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**EDWARD THOMPSON COMPANY.**



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# THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

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BY THEODOR MEGAARDEN.

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## CROSS-REFERENCES.

- For tender of payment in condemnation proceedings, see the title EMINENT DOMAIN*, vol. 10, p. 1043.
- For the necessity of a tender on the right to rescind a contract for fraud or deceit, see the title FRAUD AND DECEIT*, vol. 14, p. 162.
- For tender of rent, see the title LANDLORD AND TENANT*, vol. 18, p. 292.
- For tender as condition precedent to a suit for conversion of pledged property, see the title PLEDGE AND COLLATERAL SECURITY*, vol. 22, p. 839.
- For tender of the consideration received on rescinding contracts, see the title RESCISION, CANCELLATION, AND REFORMATION*, vol. 24, p. 604.
- For tender as a condition precedent to a decree of specific performance, see the title SPECIFIC PERFORMANCE*, vol. 26, p. 7.
- For tender of stock in connection with a contract of sale of stock, see the title STOCK AND STOCKHOLDERS*, vol. 26, p. 808.
- For tender as a condition precedent to attacking tax sales, see the title TAXATION*, vol. 27, p. 567.
- For tender in connection with contracts for the conveyance of land, see the title VENDOR AND PURCHASER.*
- For matters of PROCEDURE related to this title, see in the ENCYCLOPÆDIA OF PLEADING AND PRACTICE the titles FUNDS AND DEPOSITS IN COURT*, vol. 9, p. 727; *OFFER OF JUDGMENT*, vol. 15, p. 32; *TENDER*, vol. 21, p. 542.

**I. DEFINITION.** — Tender, in the law of contracts, is an offer or attempt to perform. It may be an offer to pay a sum of money in satisfaction of a debt or claim,<sup>1</sup> to deliver goods in performance of a contract for their delivery,<sup>2</sup> to perform services,<sup>3</sup> to make a conveyance,<sup>4</sup> or to discharge almost any other contractual obligation. Hence, tender has been defined to be "an offer to perform an act which the party offering is bound to perform."<sup>5</sup> Perhaps the most satisfactory definition which has yet been formulated is the following: A tender is an offer by a debtor or other person who is under an obligation, to pay such debt or perform such obligation, the actual payment or performance being prevented by the refusal of the creditor or person entitled to performance to accept the same.<sup>6</sup>

**II. TENDER AND PAYMENT DISTINGUISHED.** — Tender is, of course, clearly distinguishable from payment. Payment implies an acceptance and appropriation of that which is offered by one party to the other; whereas tender is an offer of performance which is not accepted.<sup>7</sup>

**III. NECESSITY OF TENDER** — **1. General Rule.** — Where a right is made dependent upon the payment of money or delivery of property, the general rule is that an action cannot be maintained to enforce such right, without proof of a tender of the money or property.<sup>8</sup> No elaboration of this general

**1. Definitions.** — A tender has been defined to be the offer of a sum of money in satisfaction of a debt or claim by producing and showing the amount to the creditor, or party claiming, and expressing verbally a willingness to pay it. *Tompkins v. Batie*, 11 Neb. 147, 38 Am. Rep. 361.

**2.** The law as to the delivery of specific articles under a contract has been treated in the title *SALES*, vol. 24, p. 1018.

**3.** See the title *MASTER AND SERVANT*, vol. 20, p. 3.

**4.** See the title *VENDOR AND PURCHASER*.

**5.** *Bouv. Inst.*, § 2437, quoted in *McClain v. Batton*, 50 W. Va. 130.

It has also been said that a tender "is an offer to perform a contract, or to pay money, coupled with a present ability to do the act." *Cockrill v. Kirkpatrick*, 9 Mo. 697.

**6.** 12 *Encyc. Laws of Eng.* 117. See also *Glos v. Goodrich*, 175 Ill. 20.

**7. Tender Distinguished from Payment.** — *Barker v. Brink*, 5 Iowa 481; *Mohn v. Stoner*, 11 Iowa 30.

**8. General Rule as to Necessity of Tender** — *Alabama*. — *Commercial Bank v. Crenshaw*, 103 Ala. 497.

*Georgia*. — *Sivell v. Hogan*, 115 Ga. 667; *Askew v. Carr*, 81 Ga. 685.

*Illinois*. — *Dulin v. Prince*, 124 Ill. 76; *Webster v. Pierce*, 35 Ill. 158.

*Maine*. — *Counce v. Studley*, 81 Me. 431.

*Massachusetts*. — *Mansfield v. Hodgdon*, 147 Mass. 304.

*Missouri*. — *McMurray v. Taylor*, 30 Mo. 263, 77 Am. Dec. 611; *O'Bryan v. Jones*, 38 Mo. App. 90; *Schepflin v. Dessar*, 20 Mo. App. 569. *New York*. — *Mendel v. Pickrell*, (Supm. Ct.

rule will be attempted here, for the reason that its specific application is treated in the appropriate titles throughout this work.<sup>1</sup>

**2. Waiver of Tender** — *a. GENERAL PRINCIPLES.* — The maxim that the law does not compel one to do vain or useless things applies to the case of tender of performance of an obligation. Hence a tender is not necessary where it appears that, if made, it would have been fruitless.<sup>2</sup> The general rule may be stated as follows: An actual tender of performance may be excused when there is a willingness and an ability to perform, and actual performance has been prevented or expressly waived by the parties to whom performance is due.<sup>3</sup> It appears, then, that to excuse a failure to make an actual tender, there must be an existing capacity to perform, coupled with a state of facts which establishes the futility of making the tender.

*b. CAPACITY TO PERFORM* — (1) *In General.* — It is a well-settled general rule that there can be no waiver of tender unless there is, on the part of the debtor, an existing capacity to perform if his offer is accepted.<sup>4</sup> Not only is this the rule of the common law, but, according to the great weight of authority, this rule is to be applied to tenders made under statutes which make an offer in writing a sufficient tender.<sup>5</sup>

(2) *Title to Thing Tendered.* — Thus, in the case of the tender of specific articles, there can be no waiver of an actual tender unless the person who is to deliver them has title free from any mortgage or other lien.<sup>6</sup> But it is not always necessary that the person making a tender shall be the absolute owner of the thing tendered. If his title is such that, upon acceptance, the thing becomes the property of the other party, the tender is sufficient. Hence it cannot be objected that the money or other thing tendered was borrowed for the occasion, if, by acceptance, the person to whom the tender is made gets payment.<sup>7</sup> And it has been held that where one of the parties to an

App. T.) 38 Misc. (N. Y.) 758; National Oleo Meter Co. v. Jackson, 56 N. Y. Super. Ct. 609, 3 N. Y. Supp. 826; Brush Electric Illuminating Co. v. Consolidated Tel., etc., Co., 60 Hun (N. Y.) 446.

*Pennsylvania.* — *Wagenblast v. McKean*, 2 Grant Cas. (Pa.) 393; *Scott v. Patterson*, 1 Pa. Dist. 603.

*Wisconsin.* — *Gehl v. Milwaukee Produce Co.*, 116 Wis. 263.

1. See the following titles: CHATTEL MORTGAGES, vol. 5, p. 1020; CONTRACTS, vol. 7, p. 146; EMINENT DOMAIN, vol. 10, p. 1137; EQUITY OF REDEMPTION, vol. 11, p. 252; FRAUD AND DECEIT, vol. 14, p. 161; INSURANCE, vol. 16, p. 875; PLEDGE AND COLLATERAL SECURITY, vol. 22, p. 874; RELEASE AND DISCHARGE, vol. 24, p. 320; RESCISSION, CANCELLATION, AND REFORMATION, vol. 24, pp. 621, 645; SALES, vol. 24, pp. 1068, 1094; SHERIFF'S SALES, vol. 25, p. 847; SPECIFIC PERFORMANCE, vol. 26, pp. 42, 113; STOCKS AND STOCKHOLDERS, vol. 26, p. 857; TROVER AND CONVERSION; USURY; VENDOR AND PURCHASER; WARRANTY.

2. *When Tender Waived.* — *Jackson v. Jacob*, 3 Bing. N. Cas. 869, 32 E. C. L. 360, 5 Scott 79, 3 Hodges 219; *Enterprise Soap Works v. Sayers*, 55 Mo. App. 15; *Graham v. Frazier*, 49 Neb. 90.

3. *Thomas v. Evans*, 10 East 101; *Cort v. Ambergate, etc., R. Co.*, 17 Q. B. 127, 79 E. C. L. 127; *Hochster v. De La Tour*, 2 El. & Bl. 678, 75 E. C. L. 678; *Ashburn v. Poulter*, 35 Conn. 553; *Soderberg v. Crockett*, 17 Nev. 416; *Levy v. Loeb*, 85 N. Y. 372; *Howard v. Daly*, 61 N. Y. 370, 19 Am. Rep. 285; *Nelson v.*

*Plimpton Fire-proof Elevating Co.*, 55 N. Y. 480; *Traver v. Halsted*, 23 Wend. (N. Y.) 66; *Franchot v. Leach*, 5 Cow. (N. Y.) 506.

In *Minnesota* it has been held that the formal tender of charges and tickets provided for by statute (Minn. Gen. Stat. 1878, c. 124, § 15) may be waived by the bailee of grain held in store. *Wallace v. Minneapolis, etc., Elevator Co.*, 37 Minn. 464.

4. *Capacity to Perform Necessary.* — *Leek Milling Co. v. Langford*, 81 Miss. 728; *Eddy v. Davis*, 116 N. Y. 251; *Bigler v. Morgan*, 77 N. Y. 312; *Champion v. Joslyn*, 44 N. Y. 653; *Nelson v. Plimpton Fire-proof Elevating Co.*, 55 N. Y. 484; *Mills v. Huggins*, 3 Dev. L. (14 N. Car.) 58; *Brown v. Binz*, (Tex. Civ. App. 1899) 50 S. W. Rep. 483. See also the title SALES, vol. 24, p. 1114, note 4.

5. *Same — Statutory Offer in Writing.* — *Lilienthal v. McCormick*, (C. C. A.) 117 Fed. Rep. 89, construing the *Oregon* statute; *McCourt v. Johns*, 33 Oregon 561; *Halladay v. Halladay*, 13 Oregon 523; *Ladd v. Mason*, 10 Oregon 308; *Hyams v. Bamberger*, 10 Utah 3.

6. *Ownership by Debtor of Thing Tendered.* — *Croninger v. Crocker*, 62 N. Y. 151; *Dunham v. Pettee*, 4 E. D. Smith (N. Y.) 500.

It has even been held that where a debtor has fraudulently obtained money, the creditor is not bound or authorized to receive it, and that a tender in such money is void. *Reed v. Newburgh Bank*, 6 Paige (N. Y.) 337.

7. *Eslow v. Mitchell*, 26 Mich. 500; *Mayo v. Knowlton*, 134 N. Y. 254; *Champion v. Joslyn*, 44 N. Y. 653; *Bell v. Ballance*, 1 Dev. L. (12 N. Car.) 391.

agreement to exchange stock offers his stock to the other party, who refuses the offer on the ground that there was no such agreement, the actual production of the stock is waived, notwithstanding that it had been pledged for a debt with the understanding that it could be exchanged for the stock to be received under the prior exchange agreement.<sup>1</sup>

(3) *Actual Possession of Money.* — There can be no waiver of tender unless the money is actually present, or within the immediate control of the person making the offer; in other words, unless the debtor has the money at command, the advantages of having made a tender cannot be claimed, even though there is a refusal to accept.<sup>2</sup> There is no tender if the debtor does not have the money with him, but says that he will get it next morning,<sup>3</sup> or in five minutes.<sup>4</sup> On the other hand, it has been held sufficient that the person making the tender has the money in a bank in the same building,<sup>5</sup> and even that he has the money in a bank elsewhere in the same town.<sup>6</sup> But these are extreme cases, upon which it is not safe to place much reliance. An offer to pay if the creditor will go to a neighboring bank has been held not to be a good common-law tender.<sup>7</sup>

**Money in Possession of Third Person Present.** — It has been held that it is not necessary that the person making the tender should have the money in his own possession; it is enough that the money is upon the spot and ready for the purpose. That the money is really in the possession of a third person, who is present, is immaterial, if it is at the command of the person making the tender.<sup>8</sup> However, it is not sufficient that a third person on the spot has the money which the debtor might borrow, unless he consents to make the loan.<sup>9</sup>

**c. ACTS CONSTITUTING WAIVER** — (1) *In General.* — While a tender may be expressly waived,<sup>10</sup> there may also, as will be shown in the following pages, be an implied waiver. It has been said that in order that one can be held to have waived a tender "he must have placed himself in such a position as would make a tender to him an idle and unnecessary ceremony."<sup>11</sup> And an

1. *Eames v. Haver*, 111 Cal. 401.

2. **Possession by Debtor of Money Necessary.** — *Searight v. Calbraith*, 4 Dall. (U. S.) 325; *Lamar v. Sheppard*, 84 Ga. 561; *Steele v. Biggs*, 22 Ill. 643; *Wynkoop v. Cowing*, 21 Ill. 570; *Chicago, etc., R. Co. v. Patterson*, 26 Ind. App. 295; *Niederhauser v. Detroit Citizens' St. R. Co.*, (Mich. 1902) 91 N. W. Rep. 1028; *Pinner v. Jorgenson*, 27 Minn. 26; *Farnsworth v. Howard*, 1 Coldw. (Tenn.) 215; *Shank v. Groff*, 45 W. Va. 543.

It is not a legal tender to say, "Here, I am ready." The party making the tender must also have the money ready. *North v. Mallett*, 2 Hayw. (3 N. Car.) 151, 2 Am. Dec. 622.

In *Kraus v. Arnold*, 7 Moo. 59, 17 E. C. L. 70, it was held that there was no tender if the debtor did not have the money with him, although he had it in his house, at the door of which the parties were standing.

3. *Blair v. Hamilton*, 48 Ind. 32.

4. *Breed v. Hurd*, 6 Pick. (Mass.) 356.

5. **Money in Bank.** — *Smith v. Old Dominion Bldg., etc., Assoc.*, 119 N. Car. 257.

6. *Steckel v. Standley*, 107 Iowa 694.

7. *Stakke v. Chapman*, 13 S. Dak. 269.

8. **Money in Possession of Third Person Present.** — *Mathis v. Thomas*, 101 Ind. 119.

Where the plaintiff stated to the defendant that he was willing to give him £10, and a witness who stood by stated that he had the money up stairs, and he would go up stairs and fetch it, but the plaintiff said he need not trouble himself, he could not take it, this was held

to be a good tender. But, said the court, by *Best, C. J.*: "It would not do if a man said, 'I have got the money, but must go a mile to fetch it.'" *Harding v. Davies*, 2 C. & P. 77, 12 E. C. L. 35.

9. *Sargent v. Graham*, 5 N. H. 440, 22 Am. Dec. 469; *Fuller v. Little*, 7 N. H. 535.

10. **Express Waiver.** — *Veazy v. Harmony*, 7 Me. 91; *Berthold v. Reyburn*, 37 Mo. 586; *Terrell v. Walker*, 65 N. Car. 91.

It has, however, been doubted whether a purchaser of land is relieved of the duty of making a tender of the purchase price by the conduct of the vendor in saying that a tender is unnecessary. *Davis v. Holbrook*, 25 Colo. 493.

11. **Futility of Making Tender Necessary.** — *Jewett v. Earle*, 53 N. Y. Super. Ct. 349.

A waiver of a tender cannot be shown by asking the defendant if he would have received it if it had been made. *Bluntzer v. Dewees*, 79 Tex. 272.

In *California* it has been provided by statute that the want of performance, or an offer of performance, of an obligation is excused "when the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made and not rescinded before that time." Cal. Civ. Code, § 1511, subd. 3. The excuse for the want of performance of an obligation, or an offer to perform, which is prescribed by this statute, consists of two elements: first, the act of the creditor; second,



act which is relied upon as a waiver of tender must, of course, have occurred previous to the time fixed for performance.<sup>1</sup>

(2) *Refusal to Accept.* — When it is clear that a tender will not be accepted it need not be made.<sup>2</sup> Thus, a tender to one who announces in advance that he will not accept it is unnecessary.<sup>3</sup> Accordingly, where the purchaser of goods, in advance of their delivery, refuses to accept them, no tender of the goods need be made.<sup>4</sup>

(3) *Demanding Excessive Amount.* — A tender is waived by the refusal of the creditor to receive anything less than an amount which is larger than that to which he is entitled.<sup>5</sup> If the person who is in possession of property upon

the effect on the debtor. The latter must have been induced by the other; the other must have been intended, or must naturally have tended, to have that effect. *Sanford v. Savings, etc., Soc.*, 80 Fed. Rep. 54. Under this statute the refusal by the purchaser of different articles of personal property, at an agreed price for the different items, of a tender of some of the items is not a renunciation of the right to receive the other items. *Herzog v. Purdy*, 119 Cal. 99.

1. **Time of Waiver.** — *Columbia Bank v. Hagner*, 1 Pet. (U. S.) 455; *Newman v. Baker*, 10 App. Cas. (D. C.) 187, 25 Wash. L. Rep. 170.

2. **Waiver When It Appears that Tender Will Not Be Accepted.** — *Blight v. Ashley*, 1 Pet. (C. C.) 15; *Keller v. Fisher*, 7 Ind. 718; *Sonia Cotton Oil Co. v. Steamer Red River*, 106 La. Ann. 42; *Girard v. St. Louis Car Wheel Co.*, 123 Mo. 358, 45 Am. St. Rep. 556; *Enterprise Soap Works v. Sayers*, 55 Mo. App. 15; *Martin v. Fayetteville Bank*, 131 N. Car. 121; *Sanford v. Royal Ins. Co.*, 11 Wash. 653; *Griesemer v. Mutual L. Ins. Co.*, 10 Wash. 202.

3. **Waiver by Refusal to Accept** — *England.* — *Read v. Goldring*, 2 M. & S. 86; *Glascott v. Day*, 5 Esp. 48; *Ex p. Danks*, 2 DeG. M. & G. 936; *Finch v. Brook*, 1 Scott 70; *Black v. Smith*, Peake N. P. (ed. 1795) 88, 3 Rev. Rep. 661; *Harding v. Davies*, 2 C. & P. 77, 12 E. C. L. 35, 31 Rev. Rep. 654; *Douglas v. Patrick*, 3 T. R. 683, 1 Rev. Rep. 793.

*United States.* — *Barker v. Parkenhorn*, 2 Wash. (U. S.) 142.

*Alabama.* — *McCalley v. Otey*, 99 Ala. 584, 42 Am. St. Rep. 87; *Root v. Johnson*, 99 Ala. 90; *Odum v. Rutledge, etc.*, R. Co., 94 Ala. 488; *Rudolph v. Wagner*, 36 Ala. 698.

*Connecticut.* — *Hall v. Norwalk F. Ins. Co.*, 57 Conn. 105; *Ashburn v. Poulter*, 35 Conn. 553.

*Delaware.* — *Wood v. Bangs*, 2 Penn. (Del.) 435.

*Illinois.* — *Hanna v. Ratekin*, 43 Ill. 462.

*Kentucky.* — *Smith v. Phillips*, (Ky. 1895) 29 S. W. Rep. 358; *Tibbs v. Timberlake*, 4 Litt. (Ky.) 12; *Dorsey v. Barbee*, Litt. Sel. Cas. (Ky.) 204, 12 Am. Dec. 296.

*Louisiana.* — *Lynch v. Postlethwaite*, 7 Mart. (La.) 69, 12 Am. Dec. 495; *Ware v. Berlin*, 43 La. Ann. 534.

*Maine.* — *Duffy v. Patten*, 74 Me. 396.

*Massachusetts.* — *Williams v. Patrick*, 177 Mass. 160; *Schayer v. Commonwealth Loan Co.*, 163 Mass. 322; *Hazard v. Loring*, 10 Cush. (Mass.) 267; *Breed v. Hurd*, 6 Pick. (Mass.) 356.

*Michigan.* — *Lacy v. Wilson*, 24 Mich. 479.

*Minnesota.* — *Pinney v. Jorgenson*, 27 Minn. 26.

*Mississippi.* — *Wesling v. Noonan*, 31 Miss. 599.

*Missouri.* — *Stephenson v. Kilpatrick*, 166 Mo. 262; *Schilb v. Pendleton*, 76 Mo. App. 454; *MacDonald v. Wolff*, 40 Mo. App. 302; *Johnson v. Garlichs*, 63 Mo. App. 578.

*Nebraska.* — *Guthman v. Kearns*, 8 Neb. 502.

*New Jersey.* — *Thorne v. Mosher*, 20 N. J. Eq. 257.

*New York.* — *Stone v. Sprague*, 20 Barb. (N. Y.) 509; *Holmes v. Holmes*, 12 Barb. (N. Y.) 137; *Bellinger v. Kitts*, 6 Barb. (N. Y.) 273; *Howe v. Moore*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 236; *Blewett v. Baker*, 37 N. Y. Super. Ct. 23, 58 N. Y. 611.

*North Carolina.* — *Smith v. Old Dominion Bldg., etc., Assoc.*, 119 N. Car. 257; *Terrell v. Walker*, 65 N. Car. 91; *Abrams v. Suttles*, Busb. L. (44 N. Car.) 99.

*Oklahoma.* — *Gray v. Stiles*, 6 Okla. 455.

*Pennsylvania.* — *Westmoreland, etc., Natural Gas Co. v. De Witt*, 130 Pa. St. 235; *Brewer v. Fleming*, 51 Pa. St. 102; *Appleton v. Donaldson*, 3 Pa. St. 381; *Hampton v. Speckenagle*, 9 S. & R. (Pa.) 212, 11 Am. Dec. 704; *Hanna v. Phillips*, 1 Grant Cas. (Pa.) 253. *Tennessee.* — *Farnsworth v. Howard*, 1 Coldw. (Tenn.) 215.

*Virginia.* — *Lohman v. Crouch*, 19 Gratt. (Va.) 331; *King v. King*, 90 Va. 177.

*West Virginia.* — *Thompson v. Lyon*, 40 W. Va. 87; *Koon v. Snodgrass*, 18 W. Va. 320.

But where the creditor, upon the offer being made, referred the debtor to his attorney, saying that his office was open and that it was but a step there, but did not in terms refuse to receive the money, nor interpose any objection to the production of the money, nor intimate that its production was not required, this would not excuse the failure to produce the money. *Strong v. Blake*, 46 Barb. (N. Y.) 227.

4. *Scribner v. Schenkel*, 128 Cal. 250, decided under Cal. Civ. Code, § 1440; *McKnight v. Watkins*, 6 Mo. App. 118; *Azema v. Levy*, (N. Y. City Ct. Gen. T.) 5 N. Y. Supp. 418. See also the title SALES, vol. 24, p. 1087.

5. **Refusal to Receive Anything Less than Excessive Amount.** — *Thomas v. Evans*, 10 East 101; *Finch v. Brook*, 1 Scott 70; *Watson v. Pearson*, 9 Jur. N. S. 501, 11 W. R. 702, 8 L. T. N. S. 395; *Schayer v. Commonwealth Loan Co.*, 163 Mass. 322; *Guthman v. Kearns*, 8 Neb. 502. *Compare Indiana Bond Co. v. Jameson*, 24 Ind. App. 8.



which he has a lien refuses to deliver the property except upon condition of the payment of a sum larger than the amount secured by the lien, an action may be brought at once, without making actual physical tender of the amount of the lien,<sup>1</sup> especially when there is a refusal to give the owner information as to the amount of the lien.<sup>2</sup> Thus, a tender may be waived where goods are retained by a carrier to enforce the payment not only of freight, but of an additional and unlawful charge.<sup>3</sup> But a mere dispute respecting the amount of the debt, without expressly dispensing with the production of the money, will not excuse the omission.<sup>4</sup> A bare refusal of the sum due with a demand of a larger sum will not, of itself, amount to a waiver of the actual production and offer of the money.<sup>5</sup> And the mere assertion, unaccompanied by any other act, of a lien greater in amount than that to which the lienor is entitled, will not obviate the necessity of a tender; for it may be that the right amount will be accepted.<sup>6</sup> It has been held that the pledgee of goods does not, by asserting that the transaction was an out-and-out sale, divest himself of the special property in the goods, or relieve the pledgor from tendering the sum advanced.<sup>7</sup>

(4) *Repudiation or Abandonment of Contract.* — Tender of performance by one party to a contract is not necessary when the other party absolutely repudiates the contract,<sup>8</sup> by denying its existence,<sup>9</sup> or by denying his liability under the contract.<sup>10</sup> Tender of performance need not be made to a party who abandons a contract on the ground that it has been broken by the other party.<sup>11</sup>

(5) *Refusal to Perform.* — Where one party to a contract, at or before the time of performance, refuses to perform, or declares his intention not to perform at all events, a tender of performance by the other party, who is ready and willing to perform, is unnecessary.<sup>12</sup> Where a purchaser of goods demands

1. Bowden v. Dugan, 91 Me. 141; Westling v. Noonan, 31 Miss. 599; Hoyt v. Sprague, 61 Barb. (N. Y.) 497; Allen v. Corby, 59 N. Y. App. Div. 1.

2. Staat v. Evans, 35 Ill. 456; Allen v. Corby, 59 N. Y. App. Div. 1; Wagenblast v. M'Kean, 2 Grant Cas. (Pa.) 393.

3. Jones v. Tarleton, 9 M. & W. 675; The Norway, Brown & L. 404, 3 Moo. P. C. C. N. S. 245, 11 Jur. N. S. 892; Peebles v. Boston, etc., R. Co., 112 Mass. 498; Adams v. Clark, 9 Cush. (Mass.) 215, 57 Am. Dec. 41.

4. Dispute as to Amount Due. — Dickinson v. Shee, 4 Esp. 68.

5. Bare Refusal of Sum Due and Demand of Larger Amount. — Dickinson v. Shee, 4 Esp. 68; Middleton v. Scott, 3 Ont. L. Rep. 26; Brown v. Gilmore, 8 Me. 107, 22 Am. Dec. 223; Dunham v. Jackson, 6 Wend. (N. Y.) 22; Wagenblast v. M'Kean, 2 Grant Cas. (Pa.) 393; Farnsworth v. Howard, 1 Coldw. (Tenn.) 215.

6. Scarfe v. Morgan, 4 M. & W. 270; Loewenberg v. Arkansas, etc., R. Co., 56 Ark. 439. See Hoyt v. Sprague, 61 Barb. (N. Y.) 497. See also the title LIENS, vol. 19, p. 33, note 7.

7. Yungmann v. Briesmann, 4 Reports 119, 67 L. T. N. S. 642, 41 W. R. 148.

8. Waiver by Repudiating Contract. — Cunningham v. Brown, 44 Wis. 72. See also the title SALES, vol. 24, p. 1114, note 3.

9. Denying Existence of Contract. — Eames v. Haver, 111 Cal. 401; Abrams v. Suttles, Busb. L. (44 N. Car.) 99; Duffy v. Patten, 74 Me. 396; Lowe v. Harwood, 139 Mass. 133; Hampton v. Speckenagle, 9 S. & R. (Pa.) 212, 11

Am. Dec. 704; Barnes v. Morrison, 97 Va. 372. But see Mowry v. Kirk, 19 Ohio St. 375.

10. Denying Liability under the Contract. — Duffy v. Patten, 74 Me. 396; Mattocks v. Young, 66 Me. 459; Davenport v. Jennings, 25 Neb. 87; Baumann v. Pinckney, 118 N. Y. 604; Eddy v. Davis, 116 N. Y. 247; Bradford v. Foster, 87 Tenn. 11; Soell v. Hadden, 85 Tex. 182; Wright v. Young, 6 Wis. 127, 70 Am. Dec. 453.

11. Waiver by Abandonment of the Contract. — Ashley v. Rocky Mountain Bell Telephone Co., 20 Mont. 286. See the title CONTRACTS, vol. 7, p. 150.

A purchaser of a bond who is told that his bond is forfeited, and that no further payment will be received from him, is not under the necessity of making any further tender of payment. Union Invest. Assoc. v. Geer, 64 Ill. App. 648.

Where an insurance company declares a policy of insurance to have been forfeited because of the nonpayment of a premium, or interest on premium loans, an action may be maintained upon the policy without a tender of the amount of the premium. See the title LIFE INSURANCE, vol. 19, p. 57, note 4. See also Supreme Lodge, etc., v. Davis, 26 Colo. 252.

12. Waiver by Refusal to Perform — California. — Gray v. Dougherty, 25 Cal. 266.

Kansas. — Chinn v. Bretches, 42 Kan. 316; Thompson v. Warner, 31 Kan. 533.

Louisiana. — Ware v. Berlin, 43 La. Ann. 534; Sonia Cotton Oil Co. v. Steamer Red River, 106 La. 42.

their delivery and offers to pay for them, but the vendor or his agent refuses to comply with the demand, no further tender is necessary.<sup>1</sup> Where the person in possession of goods upon which he has a lien positively refuses to deliver the goods over to the owner, a formal tender of the amount of the lien is unnecessary.<sup>2</sup> Where a mortgagee absolutely refuses to make an assignment of the mortgage to a devisee of the mortgagor when an offer to pay the amount due is made, there is no necessity for an actual tender.<sup>3</sup> If a principal, who has commissioned an agent to sell real estate, notifies the agent that he will not consummate a sale made by the agent by executing a deed, a tender of the purchase money is not necessary to entitle the agent to his commissions.<sup>4</sup> An unreasonable delay in performance, after performance has been requested, may be the equivalent of a refusal to perform.<sup>5</sup>

(6) *Inability to Perform.* — When one of the parties to a contract is unable to perform his part, no tender of performance by the other party, who is ready and willing to perform, is necessary.<sup>6</sup> Thus, where the vendor of goods is unable to deliver them, the buyer may maintain an action for the breach of contract without having tendered the purchase price.<sup>7</sup> And there need be no tender of a deed by the vendor when the vendee declares his inability to pay the purchase money.<sup>8</sup> Neither need the purchase money be tendered by the vendee when the vendor is unable to convey the land.<sup>9</sup>

*Maine.* — Mattocks v. Young, 66 Me. 459.

*Maryland.* — Oelrichs v. Artz, 21 Md. 524.

*Massachusetts.* — Peebles v. Boston, etc., R. Co., 112 Mass. 509; Smith v. Boston, etc., R. Co., 6 Allen (Mass.) 273; Cook v. Doggett, 2 Allen (Mass.) 440.

*Minnesota.* — Tarbell v. Farmers' Mut. Elevator Co., 44 Minn. 471; Wallace v. Minneapolis, etc., Elevator Co., 37 Minn. 464; Brown v. Eaton, 21 Minn. 409; Gill v. Newell, 13 Minn. 462.

*Missouri.* — Deichmann v. Deichmann, 49 Mo. 107.

*Nebraska.* — Graham v. Frazier, 49 Neb. 90.

*New Jersey.* — Maxwell v. Pittenger, 3 N. J. Eq. 156.

*New York.* — Stokes v. Mackay, 147 N. Y. 223; Blewett v. Baker, 58 N. Y. 611; Franchot v. Leach, 5 Cow. (N. Y.) 506; Crary v. Smith, 2 N. Y. 60; Bellinger v. Kitts, 6 Barb. (N. Y.) 273; Kerr v. Purdy, 50 Barb. (N. Y.) 24; Stone v. Sprague, 20 Barb. (N. Y.) 509.

*Ohio.* — Brock v. Hidy, 13 Ohio St. 307.

*South Dakota.* — McPherson v. Fargo, 10 S. Dak. 611, 66 Am. St. Rep. 723.

*Texas.* — Bluntzer v. Dewees, 79 Tex. 272.

*Vermont.* — Amsden v. Atwood, 68 Vt. 322.

*Virginia.* — White v. Dobson, 17 Gratt. (Va.) 262.

*Wisconsin.* — Maxon v. Gates, 112 Wis. 196.

Where goods were to be delivered in several shipments, each to be paid for on delivery, a refusal to pay for the goods first shipped releases the vendor from the necessity of making tender of the remaining goods. Azema v. Levy, (N. Y. City Ct. Gen. T.) 5 N. Y. Supp. 418.

1. Baldwin v. Central Sav. Bank, (Colo. App. 1901) 67 Pac. Rep. 179; Thompson v. Warner, 31 Kan. 533; Walker v. Cooper, 97 Mo. App. 441; Graham v. Frazier, 49 Neb. 90; Post v. Garrow, 18 Neb. 682; Anderson v. Sherwood, 56 Barb. (N. Y.) 69; Blalock v. Clark, 133 N. Car. 306. See also the title SALES, vol. 24, p. 1095, note 3.

But a subscriber to the capital stock of a corporation is not excused from making a tender by reason of a statement to him by the secretary of the company that he has no stock for him. Ohio Ins. Co. v. Nunemacher, 10 Ind. 234.

2. Jones v. Cliff, 1 Crompt. & M. 540; Zeitlin v. Arkaway, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 761.

3. Cleveland v. Rothwell, 54 N. Y. App. Div. 14.

4. Vaughan v. McCarthy, 59 Minn. 199.

5. *Delay in Performance.* — Ritchie v. Bennett, 35 N. Y. App. Div. 68; Duryea v. Bonnell, 18 N. Y. App. Div. 151.

6. *Waiver by Inability to Perform* — *Massachusetts.* — Lowe v. Harwood, 139 Mass. 133.

*Minnesota.* — Taylor v. Read, 19 Minn. 372; Bennett v. Phelps, 12 Minn. 326.

*New York.* — Hartley v. James, 50 N. Y. 38; Delavan v. Duncan, 49 N. Y. 485; Bunge v. Koop, 48 N. Y. 225, 8 Am. Rep. 546; Holmes v. Holmes, 9 N. Y. 525; Karker v. Haverly, 50 Barb. (N. Y.) 79; Wheaton v. Baker, 14 Barb. (N. Y.) 594; Lawrence v. Taylor, 5 Hill (N. Y.) 107; Voorhees v. Earl, 2 Hill (N. Y.) 288, 38 Am. Dec. 588; Baker v. Robbins, 2 Den. (N. Y.) 136; Foote v. West, 1 Den. (N. Y.) 544; Morange v. Morris, 3 Keyes (N. Y.) 48; Marshall v. Wenninger, (Supm. Ct. Tr. T.) 20 Misc. (N. Y.) 527; Beier v. Spaulding, 92 Hun (N. Y.) 388; Davis v. Van Wyck, 64 Hun (N. Y.) 186.

*Oregon.* — Bussard v. Hibler, 42 Oregon 500.

*Pennsylvania.* — Dixon v. Oliver, 5 Watts (Pa.) 509.

7. Lea v. Ennis, 6 Houst. (Del.) 433; Northwestern Iron, etc., Co. v. Hirsch, 94 Ill. App. 579; Crist v. Armour, 34 Barb. (N. Y.) 378.

8. Lawrence v. Miller, 86 N. Y. 131.

9. Auxier v. Taylor, 102 Iowa 673; Lowe v. Harwood, 139 Mass. 133; Bennett v. Phelps, 12 Minn. 326; Davis v. Van Wyck, 64 Hun (N. Y.) 186; Morange v. Morris, 3 Keyes

(7) *Evading Tender.* — A tender is waived when it appears that the tender would have been made but for the evasion of the other party.<sup>1</sup> Thus, generally speaking, if the creditor refuses to remain till the money can be counted, the tender is good.<sup>2</sup> And an actual tender is deemed to be waived if the creditor refuses to receive the money himself and to give the name of the party to whom he claims to have assigned the obligation,<sup>3</sup> or if he orders the debtor away or repulses him.<sup>4</sup>

(8) *Absence from Home or Place of Tender.* — If the creditor absents himself from home or does not attend at the place where the tender is to be made, and the debtor does all in his power to make the tender, the creditor cannot afterwards object that no tender was made.<sup>5</sup> It has been said that when it is stipulated that a debt shall be payable at a certain bank, the contract imports an agreement that the holder of the evidence of indebtedness shall lodge it with the bank for collection, and if the instrument be not there lodged, and the obligor is there at its maturity, with the necessary funds to pay, and offers to pay the debt, there is the equivalent of a tender.<sup>6</sup>

(9) *Waiver a Question of Fact.* — The question whether there has been a waiver of actual production is for the jury.<sup>7</sup>

**IV. WHEN TENDER AVAILABLE — 1. By Common Law.** — The benefits resulting from a proper tender cannot be secured in every case where there exists a liability. The common-law rule is that a tender may be made in all cases when the demand is certain or capable of being made certain by mere computation,<sup>8</sup> but is not allowed when the claim, whether growing out of a

(N. Y.) 48. See the title **VENDOR AND PURCHASER.**

**1. Waiver by Evading Tender.** — *Schayer v. Commonwealth Loan Co.*, 163 Mass. 322; *Borden v. Borden*, 5 Mass. 67, 4 Am. Dec. 32; *Tasker v. Bartlett*, 5 Cush. (Mass.) 359; *Southworth v. Smith*, 7 Cush. (Mass.) 391; *Gilmore v. Holt*, 4 Pick. (Mass.) 258; *Sharp v. Todd*, 38 N. J. Eq. 324; *Judd v. Ensign*, 6 Barb. (N. Y.) 258; *Raines v. Jones*, 4 Humph. (Tenn.) 490; *Schroeder v. Laubenheimer*, 50 Wis. 480.

**2. Creditor Leaving Presence of Debtor.** — *Raines v. Jones*, 4 Humph. (Tenn.) 490; *Knight v. Abbott*, 30 Vt. 577.

But where the production of the money was prevented by the creditor leaving the room after the debtor had offered to pay it, and whilst he was in the act of taking it from his pocket, *Lord Tenterden, C. J.*, thought there was not a sufficient tender. *Leatherdale v. Sweepstone*, 3 C. & P. 342, 14 E. C. L. 338.

Where the debtor offered bank bills which were not legal tender, and while the creditor was counting them, having made no objection on the ground of their being bank bills, the debtor made an insulting remark to him which caused him to leave the room, it was held that the tender was insufficient. *Harris v. Mulock*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 402.

**3. Creditor Refusing to Give Name of Assignee.** — *Strafford v. Welch*, 59 N. H. 46; *Fritz v. Simpson*, 34 N. J. Eq. 436; *Noyes v. Clark*, 7 Paige (N. Y.) 179, 32 Am. Dec. 620.

**4. Creditor Ordering Debtor Away or Repulsing Him.** — *Sands v. Lyon*, 18 Conn. 18; *Sharp v. Todd*, 38 N. J. Eq. 324; *Meserole v. Archer*, 3 Bosw. (N. Y.) 376; *Harris v. Mulock*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 402.

**5. Creditor Not Present** — *England.* — *Crouche v. Fastolfe*, T. Raym. 418.

*United States.* — *Stewart v. Henry County*, 66 Fed. Rep. 127.

*Alabama.* — *Trimble v. Williamson*, 49 Ala. 525.

*Connecticut.* — *Smith v. Loomis*, 7 Conn. 110.

*Indiana.* — *Thomas v. Mathis*, 92 Ind. 560; *Johnson v. Baird*, 3 Blackf. (Ind.) 182.

*Maine.* — *Bacon v. Dyer*, 12 Me. 19.

*Massachusetts.* — *Robbins v. Luce*, 4 Mass. 474; *Southworth v. Smith*, 7 Cush. (Mass.) 391; *Tasker v. Bartlett*, 5 Cush. (Mass.) 359.

*Minnesota.* — *Kling v. Childs*, 30 Minn. 366; *Gill v. Bradley*, 21 Minn. 15.

*Mississippi.* — *Watson v. Sawyers*, 54 Miss. 64.

*New Jersey.* — *Barton v. McKelway*, 22 N. J. L. 165.

*New York.* — *Houbie v. Volkening*, (Supm. Ct. Spec. T.) 49 How. Pr. (N. Y.) 169; *Smith v. Smith*, 25 Wend. (N. Y.) 405; *Howard v. Holbrook*, 9 Bosw. (N. Y.) 237; *Holmes v. Holmes*, 12 Barb. (N. Y.) 139, 9 N. Y. 525; *Rice v. Churchill*, 2 Den. (N. Y.) 145; *Judd v. Ensign*, 6 Barb. (N. Y.) 258; *Smith v. Smith*, 2 Hill (N. Y.) 351; *Schmidt v. Hoffman*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 225.

*Ohio.* — *Conn v. Gano*, 1 Ohio 483, 13 Am. Dec. 639.

*Pennsylvania.* — *Case v. Green*, 5 Watts (Pa.) 262, 30 Am. Dec. 311.

*Vermont.* — *Morton v. Wells*, 1 Tyler (Vt.) 384; *Barney v. Bliss*, 1 D. Chip. (Vt.) 399, 12 Am. Dec. 696.

**6. Ward v. Smith**, 7 Wall. (U. S.) 447. But s. *Balme v. Wambaugh*, 16 Minn. 116.

**7. Waiver a Question of Fact.** — *Finch v. Brook*, 1 Bing. N. Cas. 253, 27 E. C. L. 378; *Guthman v. Kearns*, 8 Neb. 502.

**8. Tender Available When the Amount Due Is Certain.** — *Johnson v. Lancaster*, 1 Stra. 576;



contract or a tort, is unliquidated, and so uncertain that the amount is to be determined by the exercise of discretion by a jury,<sup>1</sup> unless, of course, there is a tender of the full amount claimed,<sup>2</sup> or if only nominal damages are recoverable, and there is a tender of nominal damages and the amount of the accrued costs.<sup>3</sup>

**2. By Statute.** — But it is provided by statute in some jurisdictions that a proper tender of amends relieves the defendant from costs in an action for the recovery of unliquidated damages.<sup>4</sup> But statutes allowing a tender to be made after action brought have been considered as extending only to those cases in which a tender might have been made before suit brought, by the common law.<sup>5</sup>

**3. In Admiralty.** — The rule in admiralty is less stringent than at common law. A tender may be made in salvage cases even though the sum in controversy is indefinite and uncertain.<sup>6</sup>

**V. EFFECT OF TENDER — 1. Of Money — a. ON LIABILITY FOR DEBT.** — The tender of the amount of a debt or liability and the creditor's refusal to accept the money do not extinguish the debt; the debtor is still liable to pay whenever he is called upon to do so, and an action may be maintained against him to enforce payment.<sup>7</sup> And a judgment for the principal amount

Cox v. Brain, 3 Taunt. 95; Johnson v. Clay, 7 Taunt. 486, 2 E. C. L. 485; East Tennessee, etc., R. Co. v. Wright, 76 Ga. 532; Ferguson v. Hogan, 25 Minn. 135; Taylor v. Brooklyn El. R. Co., (Brooklyn City Ct. Gen. T.) 18 Civ. Pro. (N. Y.) 72; People v. Sternbury, 1 Den. (N. Y.) 635; Green v. Shurtliff, 19 Vt. 592.

**1. Tender Not Available When Damages Are Unliquidated — England.** — Bennett v. Smerdon, 16 L. T. N. S. 296; Dearle v. Barrett, 2 Ad. & El. 82, 29 E. C. L. 41, 4 N. & M. 200, 3 Dowl. 13; Hodges v. Litchfield, 3 Moo. & S. 201, 9 Bing. 713, 23 E. C. L. 434.

Arkansas. — Day v. Lafferty, 4 Ark. 450.

Colorado. — Denver, etc., R. Co. v. Harp, 6 Colo. 420.

Georgia. — East Tennessee, etc., R. Co. v. Wright, 76 Ga. 532.

Illinois. — Cilley v. Hawkins, 48 Ill. 312.

Kansas. — Kaw Valley Fair Assoc. v. Miller, 42 Kan. 20.

Kentucky. — Hill v. Pettit, 66 S. W. Rep. 188, 23 Ky. L. Rep. 2001.

Louisiana. — Breau v. Negrotto, 43 La. Ann. 426.

Massachusetts. — Lawrence v. Gifford, 17 Pick. (Mass.) 366.

Missouri. — Nanson v. Jacob, 93 Mo. 331, 3 Am. St. Rep. 531.

North Carolina. — Johnston v. Crawford, Phil. L. (61 N. Car.) 342.

Pennsylvania. — Roberts v. Beatty, 2 P. & W. (Pa.) 63, 21 Am. Dec. 410.

Tennessee. — McDowell v. Keller, 4 Coldw. (Tenn.) 258.

Texas. — Breen v. Texas, etc., R. Co., 50 Tex. 43.

Vermont. — McDaniels v. Rutland Bank, 29 Vt. 230, 70 Am. Dec. 406; Green v. Shurtliff, 19 Vt. 592.

**2. Tender of Whole Amount Claimed.** — Johnson v. Triggs, 4 Greene (Iowa) 97.

**3. Tender of Nominal Damages.** — Cernahan v. Chrisler, 107 Wis. 645.

**4. Statutory Tender of Amends.** — See Leis v. Hodgson, 1 Colo. 393; Beach v. Jeffery, 1 Ill. App. 283; Kaw Valley Fair Assoc. v. Miller,

42 Kan. 20. See the title TENDER, 21 ENCYC. OF PL. AND PR. 591.

**In New York** it has been provided by statute that where an action is commenced for a casual or involuntary trespass or injury the defendant before trial may tender amends, and if the sum tendered is sufficient to cover the damages and costs the plaintiff is not required to recover costs incurred after the tender, but if he proceeds he must pay costs to the defendant. See Slack v. Brown, 13 Wend. (N. Y.) 390; Clark v. Hallock, 16 Wend. (N. Y.) 607; Taylor v. Brooklyn El. R. Co., 119 N. Y. 561, affirming (Brooklyn City Ct. Gen. T.) 18 Civ. Pro. (N. Y.) 72. It has been held that this statute, since it only authorizes a tender in an action to recover "damages for a casual or involuntary injury to property," does not warrant such a tender by the defendant in an action against a carrier to recover damages for the conversion of goods. Clement v. New York Cent., etc., R. Co., (Supm. Ct. Gen. T.) 9 N. Y. Supp. 601.

**5.** Joyner v. Bentley, 21 Mo. App. 26; Green v. Shurtliff, 19 Vt. 592; Hart v. Skinner, 16 Vt. 138, 42 Am. Dec. 500. See Lawrence v. Gifford, 17 Pick. (Mass.) 366.

**6. Admiralty Rule.** — Dedekam v. Vose, 3 Blatchf. (U. S.) 44.

**7. Debt Not Discharged by Tender — England.** — Dixon v. Clark, 5 C. B. 365, 57 E. C. L. 365; Cooper v. Phillips, 1 C. M. & R. 649.

Alabama. — McCalley v. Otey, 90 Ala. 302.

California. — Rhorer v. Bila, 83 Cal. 51; Redington v. Chase, 34 Cal. 666.

Iowa. — Mohn v. Stoner, 11 Iowa 30; Johnson v. Triggs, 4 Greene (Iowa) 97.

Maryland. — Fridge v. State, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463.

Massachusetts. — Suffolk Bank v. Worcester Bank, 5 Pick. (Mass.) 106.

Michigan. — Snyder v. Quarton, 47 Mich. 211; Chase v. Welsh, 45 Mich. 345.

Mississippi. — Memphis Mach. Works v. Aberdeen, 77 Miss. 420, construing Miss. Code, 1892, § 713.

Missouri. — Ruppel v. Missouri Guarantee,



with interest thereon, if any due, up to the time of the tender, may be recovered against the debtor,<sup>1</sup> unless the money is paid into court, in which case the defendant is entitled to judgment, while the plaintiff is entitled to receive the money deposited.<sup>2</sup> The tender of amends which is allowed in some jurisdictions, even though the claim is for unliquidated damages,<sup>3</sup> is not a defense, but affects only the right to recover costs.<sup>4</sup>

*b. ON COLLATERAL BENEFITS AND SECURITIES* — (1) *In General.* — While a valid tender of the amount of a debt and a refusal of the money by the creditor do not have the effect of discharging the indebtedness, it is well settled that the tender is equivalent to payment as to all things which are incidental and accessorial to the debt. The creditor by refusing to accept does not forfeit his right to the thing tendered, but he does lose all collateral benefits and securities.<sup>5</sup>

(2) *On Interest and Costs.* — Hence while a tender does not extinguish the indebtedness, a valid tender, which is kept good, stops the running of interest after the tender,<sup>6</sup> and, if the money is brought into court,

etc., Assoc., 158 Mo. 613; Raymond v. McKinney, 58 Mo. App. 303; McGuire v. Brockman, 58 Mo. App. 307; Cockrill v. Kirkpatrick, 9 Mo. 697.

*New Hampshire.* — Haynes v. Thom, 28 N. H. 386; Stowell v. Read, 16 N. H. 20, 41 Am. Dec. 714.

*New York.* — Manny v. Harris, 2 Johns. (N. Y.) 25, 3 Am. Dec. 386; Raymond v. Bearnard, 12 Johns. (N. Y.) 274, 7 Am. Dec. 317; Hill v. Place, 7 Robt. (N. Y.) 389; Kelly v. West, 36 N. Y. Super. Ct. 304.

*Pennsylvania.* — Cornell v. Green, 10 S. & R. (Pa.) 14.

*Tennessee.* — Gracy v. Potts, 4 Baxt. (Tenn.) 395; Elliott v. Bass, 4 Baxt. (Tenn.) 354.

*Texas.* — Hoskins v. Dougherty, 29 Tex. Civ. App. 318.

*Vermont.* — Spaulding v. Warner, 57 Vt. 654; Preston v. Grant, 34 Vt. 201; Downer v. Sinclair, 15 Vt. 495.

The deposit of money, pursuant to statute, by a railway company with a county judge, during the progress of proceedings to obtain a right of way, does not, unless it is withdrawn by the property owner, discharge the obligation of the company to make just compensation for the property taken or damaged. Brown v. Chicago, etc., R. Co., 64 Neb. 62. See Baker v. 4th New Hampshire Turnpike, 8 N. H. 509.

But in *Dakota*, under section 849 of the Civil Code, providing that "an obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor with some bank of deposit within this territory, of good repute, and a notice thereof is given to the creditor," it has been held that a valid tender of the correct amount due on a mortgage operates as a discharge of the indebtedness and the mortgage. Kronebusch v. Raumin, 6 Dak. 243.

**Malicious Prosecution.** — The action of the creditor, who has refused a tender, in bringing suit upon the debt, is not actionable. Kramer v. Stock, 10 Watts (Pa.) 115. See the title MALICIOUS PROSECUTION, vol. 19, p. 647.

1. Harding v. Spicer, 1 Campb. 327; Ryerson v. Kitchell, 2 N. J. L. 154; Kelly v. West, 36 N. Y. Super. Ct. 304. And see the cases in the preceding note.

2. **Tender with Deposit of Money in Court.** — Cagliostro v. Corporale, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 818; Fallon v. Farber, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 626. See the title TENDER, 21 ENCYC. OF PL. AND PR., p. 587 et seq.

3. See *supra*, this title, *When Tender Available*.

4. **Effect of Statutory Tender of Amends.** — Spaulding v. Warner, 57 Vt. 654; Adams v. Morgan, 39 Vt. 302; Smith v. Wilbur, 35 Vt. 132.

5. **Tender Extinguishes Collateral Benefits and Securities.** — Hill v. Carter, 101 Mich. 158; Tiffany v. St. John, 65 N. Y. 314, 22 Am. Rep. 612; Kortright v. Cady, 21 N. Y. 366, 78 Am. Dec. 145; McClain v. Batton, 50 W. Va. 130.

6. **Tender Stops the Running of Interest.** — See the title INTEREST, vol. 16, p. 1067, note 1, and the following additional cases:

*England.* — Manning v. Burges, 1 Ch. Cas. 29; Sweatland v. Squire, 2 Salk. 623.

*United States.* — Wallace v. M'Connell, 13 Pet. (U. S.) 136.

*Alabama.* — Park v. Wiley, 67 Ala. 310; Rudolph v. Wagner, 36 Ala. 698.

*Arkansas.* — Hamlett v. Tallman, 30 Ark. 505; Woodruff v. Trapnall, 12 Ark. 640.

*Georgia.* — Gray v. Angier, 62 Ga. 596.

*Illinois.* — Aulger v. Clay, 109 Ill. 487; Allen v. Woodruff, 96 Ill. 11; Thayer v. Meeker, 86 Ill. 474; Stow v. Russell, 36 Ill. 18.

*Indiana.* — King v. Finch, 60 Ind. 420.

*Iowa.* — Martin v. Whisler, 62 Iowa 416.

*Kansas.* — King v. Harrison, 32 Kan. 215.

*Kentucky.* — Nantz v. Lober, 1 Duv. (Ky.) 304; Lloyd v. O'Rear, (Ky. 1900) 59 S. W. Rep. 483.

*Louisiana.* — De Goer v. Kellar, 2 La. Ann. 496. See also Thiel v. Conrad, 21 La. Ann. 214.

*Maine.* — Call v. Lothrop, 39 Me. 434.

*Massachusetts.* — Town v. Trow, 24 Pick. (Mass.) 169.

*Michigan.* — Cowles v. Marble, 37 Mich. 158.

*Minnesota.* — Balme v. Wambaugh, 16 Minn. 117.

*Missouri.* — Berthold v. Reyburn, 37 Mo. 586; Cockrill v. Kirkpatrick, 9 Mo. 697; Raymond v. McKinney, 58 Mo. App. 303.

costs are saved.<sup>1</sup>

(3) *On Liens* — (a) **General Rule.** — It is a general rule of law that where a person holds a lien upon property, a valid tender of the amount of the lien by the owner of the property, while not affecting his personal liability for the debt, discharges the lien.<sup>2</sup>

(b) **Lien of Attorney.** — Thus, a valid tender will discharge the lien of an attorney.<sup>3</sup>

(c) **Lien of Bailee.** — A valid tender of the amount for which a bailee of goods has a lien on the property, while not affecting the personal liability of the owner for the debt, discharges the lien. Thus a tender discharges the lien of a pledge,<sup>4</sup> the lien of a carrier for the amount of freight charges,<sup>5</sup> the lien of a warehouseman for storage charges,<sup>6</sup> the lien of a wharfinger for wharfage,<sup>7</sup> the lien of a workman for services rendered and material furnished,<sup>8</sup> the lien of one who has distrained trespassing animals,<sup>9</sup> the lien of a landlord on chattels distrained for rent,<sup>10</sup> and similar liens.

(d) **Mechanic's Lien.** — A valid tender of the amount secured by a statutory mechanic's lien on realty has the effect of discharging the lien.<sup>11</sup>

(e) **Lien of Mortgage.** — A valid tender of the amount of the debt secured by a mortgage extinguishes the lien of the mortgage and leaves the mortgagee only a creditor of the mortgagor. This is the effect of tender on the lien of both real property<sup>12</sup> and chattel mortgages.<sup>13</sup> The tender necessarily prevents foreclosure.<sup>14</sup>

(f) **Lien of Taxes.** — A valid tender of the amount due for taxes destroys the lien of the taxes.<sup>15</sup>

(g) **Lien of Execution.** — It seems to be fairly well settled that a valid tender of a sum sufficient to satisfy an execution discharges the lien on the property levied upon and renders invalid a subsequent sale under the execution.<sup>16</sup>

*Nebraska.* — *Clark v. Colfax County*, (Neb. 1901) 96 N. W. Rep. 607.

*New Hampshire.* — *Brown v. Simons*, 45 N. H. 213.

*New York.* — *Tuthill v. Morris*, 81 N. Y. 94; *Wheelock v. Tanner*, 39 N. Y. 481; *Hill v. Place*, 7 Robt. (N. Y.) 389; *Logue v. Gillick*, 1 E. D. Smith (N. Y.) 398; *Morgan v. Valentine*, 6 Dem. (N. Y.) 18.

*North Carolina.* — *Tate v. Smith*, 70 N. Car. 685.

*Ohio.* — *Foote v. Palmer, Wright* (Ohio) 336.

*Pennsylvania.* — *Cornell v. Green*, 10 S. & R. (Pa.) 14; *M'Dowell v. Glass*, 4 Watts (Pa.) 389.

*Tennessee.* — *Gracy v. Potts*, 4 Baxt. (Tenn.) 395.

*Texas.* — *Riley v. McNamara*, 83 Tex. 11; *Engelbach v. Simpson*, 12 Tex. Civ. App. 188.

*Vermont.* — *Curtiss v. Greenbanks*, 24 Vt. 536.

*West Virginia.* — *Thompson v. Lyon*, 40 W. Va. 87.

*Wisconsin.* — *Mankel v. Belscamper*, 84 Wis. 218.

**1. Tender Bars Recovery of Costs.** — See the title TENDER, 21 ENCYC. OF PL. AND PR., pp. 589-590.

**2. General Effect of Tender on Liens.** — *Yeager v. Groves*, 78 Ky. 278; *Tiffany v. St. John*, 65 N. Y. 314, 22 Am. Rep. 612. See the title LIENS, vol. 19, p. 33, note 6.

**3. Attorney's Lien.** — *Jones v. Tarleton*, 9 M. & W. 675; *Scarfe v. Morgan*, 4 M. & W. 280; *Jrving v. Viana*, 2 Y. & J. 71.

**4. Lien of Pledge.** — *Ryall v. Rolle*, 1 Atk. 165; *McCalla v. Clark*, 55 Ga. 53; *Matter of Price*, 69 N. Y. App. Div. 37. For additional cases and a full treatment of the subject, see the title PLEDGE AND COLLATERAL SECURITY, vol. 22, p. 879 *et seq.*

**5. Lien of Carrier for Freight Charges.** — See the title CARRIERS OF GOODS, vol. 5, p. 414, note 4.

**6. Lien of Warehouseman.** — See the title WAREHOUSE AND WAREHOUSEMAN.

**7. Lien of Wharfinger.** — *Barry v. Longmore*, 2 Ad. & El. 639, 40 E. C. L. 144; *Wooster v. Blossom*, 5 Jones L. (50 N. Car.) 244, 72 Am. Dec. 549. See the title WHARVES AND WHARFINGERS.

**8. Mechanic's Lien.** — See the title MASTER AND SERVANT, vol. 20, p. 190, note 5; *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468.

**9. Lien on Trespassing Animals.** — *McPherson v. James*, 69 Ill. App. 337. See also DISTRESS, vol. 9, p. 627, note 2.

**10. Lien on Chattels Distrained for Rent.** — See the title DISTRESS, vol. 9, p. 626.

**11. Mechanic's Lien.** — See the title MECHANIC'S LIENS, vol. 20, p. 519.

**12. Lien of Mortgage.** — See the title MORTGAGES, vol. 20, p. 1062 *et seq.*

**13.** See the title CHATTEL MORTGAGES, vol. 5, p. 1020 *et seq.*

**14.** See the title FORECLOSURE OF MORTGAGES, vol. 13, p. 818, note 5.

**15. Lien of Taxes.** — See the title TAXATION, vol. 27, p. 567.

**16. Execution Lien.** — *Tiffany v. St. John*, 65 N. Y. 314, 22 Am. Rep. 612; *Parmenter v.*

(h) **Lien of Judgment.** — But it seems that the tender of an amount necessary to satisfy a judgment cannot have the effect of taking away the lien of the judgment.<sup>1</sup> But even in the case of a judgment a tender may have such an effect as to make it inequitable to enforce the lien, and a court of equity may set aside a sale under it as irregular and void.<sup>2</sup>

(i) **Lien of Attachment.** — It is at least doubtful whether a tender can have the effect of discharging the lien of an attachment. There are stages in a proceeding in an action, where property is in the custody of the law, when a tender cannot be given the effect of destroying the lien, because that might interfere with the proper disposition of the case.<sup>3</sup> And since the statutes have provided other ways of dissolving or releasing attachments, it has been doubted whether a tender can be given that effect.<sup>4</sup>

(4) **On Right to Forfeit Contract for Purchase of Land.** — On the same principle that a tender of the amount due upon a mortgage will operate to discharge its lien, a tender of interest due by the purchaser of land has the effect of depriving the vendor of the right to declare a forfeiture of the contract on the ground of a default in the payment of interest.<sup>5</sup>

(5) **On Right to Forfeit Lease.** — A tender of rent due, if refused, is as effectual to prevent a forfeiture of the lease for nonpayment of rent as is actual payment.<sup>6</sup>

(6) **On Liability of Sureties.** — A tender properly made to the creditor by the principal discharges the surety.<sup>7</sup>

(7) **On Ownership of Money.** — The ownership of money which has been tendered but not accepted remains in the person making the tender, and may be levied upon or attached as his property;<sup>8</sup> and any depreciation in its value must, it has been held, be borne by the debtor rather than the creditor.<sup>9</sup>

**2. Of Specific Articles** — *a.* **ON DEBTS TO BE PAID IN SPECIFIC PROPERTY.** — The rules governing the effect of tender of money in discharge of a debt are not applicable to the case of tender of specific articles. Where a debt is to be paid in specific articles, a valid tender of the articles has the effect of discharging the debt and terminating the creditor's right to sue upon the contract.<sup>10</sup>

Fitzpatrick, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 748, *reversed* on a different point in 135 N. Y. 190; Perry v. Ward, 20 Vt. 92.

**1. Judgment Lien.** — In Jackson v. Law, 5 Cow. (N. Y.) 248, 9 Cow. (N. Y.) 641, it was held that a tender of money due upon a judgment by a junior judgment creditor did not discharge it nor take away the lien of the senior judgment creditor upon the lands, but that the latter might still redeem upon his judgment within the terms of the statute applicable to that subject. The ground of this decision was, that a judgment being a debt of record is not discharged by a tender, as it is in no case the effect of a tender to discharge the debt. The judgment could only be extinguished by actual satisfaction. As long as it remained in force it must, by its very nature as prescribed by statute, be a lien on the land. If its existence continued it could not be deprived of its ordinary and usual characteristics.

**2. Mason v. Sudam,** 2 Johns. Ch. (N. Y.) 172.

**3. Attachment Lien.** — See Tiffany v. St. John, 65 N. Y. 314, 22 Am. Rep. 612.

**4.** See Chase v. Welsh, 45 Mich. 345.

**5.** Hill v. Carter, 101 Mich. 158.

**6.** Chapman v. Kirby, 49 Ill. 211; North Chicago St. R. Co. v. Le Grand Co., 95 Ill. App. 435.

**7. Liability of Sureties.** — See the title SURETYSHIP, vol. 27, p. 426.

**8. Money Tendered but Not Accepted Belongs to Debtor.** — Thompson v. Kellogg, 23 Mo. 281; Stowell v. Read, 16 N. H. 20, 41 Am. Dec. 714.

**9.** Terrell v. Walker, 65 N. Car. 91.

**10. Tender Discharges Debt to Be Paid in Specific Property** — England. — Peytoe's Case, 9 Coke 78.

*United States.* — Savary v. Goe, 3 Wash. (U. S.) 140.

*Alabama.* — Garrard v. Zachariah, 1 Stew. (Ala.) 272; Thaxton v. Edwards, 1 Stew. (Ala.) 524.

*Connecticut.* — Smith v. Loomis, 7 Conn. 110.

*Indiana.* — Mitchell v. Merrill, 2 Blackf. (Ind.) 87, 18 Am. Dec. 128; Johnson v. Baird, 3 Blackf. (Ind.) 182.

*Iowa.* — Games v. Manning, 2 Greene (Iowa) 254.

*Massachusetts.* — Robbins v. Luce, 4 Mass. 474; Jewett v. Bacon, 6 Mass. 60.

*Missouri.* — McJilton v. Smizer, 18 Mo. 111.

*New Hampshire.* — Currier v. Currier, 2 N. H. 75, 9 Am. Dec. 43; Robinson v. Batchelder, 4 N. H. 40; Weld v. Hadley, 1 N. H. 295; Brown v. Berry, 14 N. H. 459; Haynes v. Thorn, 28 N. H. 400; Miles v. Roberts, 34 N. H. 254.

*New York.* — Des Arts v. Leggett, 16 N. Y.



**Title to Property.** — By the tender and refusal, or that which is its equivalent, the title to the property vests in the creditor, and the debtor becomes his bailee,<sup>1</sup> with the same right to compensation as other bailees.<sup>2</sup> As long as the bailee continues in possession of the goods, he will be bound to deliver them on demand, and if he refuses to deliver them an action may be maintained for their recovery.<sup>3</sup> If he treats the property tendered and disposes of it as his own, he will be responsible for the proceeds.<sup>4</sup>

**Care of Property.** — The debtor is bound to care for the property, and will be liable in damages if he wilfully or negligently allows it to be destroyed.<sup>5</sup>

**Effect of Sale or Destruction on Indebtedness.** — There is some authority to the effect that the indebtedness will not be discharged if the debtor, after refusal of tender, sells the property as his own,<sup>6</sup> or wilfully destroys it.<sup>7</sup> But it has, on the other hand, been said that if the debtor, after becoming bailee of the property, negligently allows it to be damaged or carried away, the payment of the debt is not affected.<sup>8</sup>

**b. ON CONTRACTS OF SALE.** — It may be laid down as a general rule that when contracts are made for the delivery of goods, or any article other than money, a tender of the thing contracted for according to the contract, though refused by the promisee, may be treated as absolutely discharging the contract.<sup>9</sup> As to this rule, and the rights of a vendor when goods tendered under a contract of sale are not accepted, reference should be made to another title.<sup>10</sup>

**3. As Admission of Liability.** — A tender admits the plaintiff's cause of action to the amount of the sum or thing tendered,<sup>11</sup> even though it may be

582; *Lamb v. Lathrop*, 13 Wend. (N. Y.) 96, 27 Am. Dec. 174; *Brooklyn Bank v. De Grauw*, 23 Wend. (N. Y.) 345, 35 Am. Dec. 569; *Slingerland v. Morse*, 8 Johns. (N. Y.) 478; *Coit v. Houston*, 3 Johns. Cas. (N. Y.) 243.

*Pennsylvania.* — *Zinn v. Rowley*, 4 Pa. St. 169; *Case v. Green*, 5 Watts (Pa.) 262, 30 Am. Dec. 311; *Fleming v. Potter*, 7 Watts (Pa.) 380.

*Texas.* — *Bradshaw v. Davis*, 12 Tex. 336. *Vermont.* — *Curtiss v. Greenbanks*, 24 Vt. 536; *Gilman v. Moore*, 14 Vt. 457; *Dewey v. Washburn*, 12 Vt. 580; *Barney v. Bliss*, 1 D. Chip. (Vt.) 399, 12 Am. Dec. 696; *M'Connel v. Hall*, *Brayt.* (Vt.) 223.

**1. Debtor Becomes Bailee of Creditor.** — *Smith v. Loomis*, 7 Conn. 110; *Rix v. Strong*, 1 Root (Conn.) 55; *Nichols v. Whiting*, 1 Root (Conn.) 443; *Leballister v. Nash*, 24 Me. 316; *Lamb v. Lathrop*, 13 Wend. (N. Y.) 96, 27 Am. Dec. 174; *Slingerland v. Morse*, 8 Johns. (N. Y.) 474; *Zinn v. Rowley*, 4 Pa. St. 169; *Bradshaw v. Davis*, 12 Tex. 336; *Gilman v. Moore*, 14 Vt. 457; *Curtiss v. Greenbanks*, 24 Vt. 536.

In an early *New Hampshire* case it was held that, while an obligation to deliver specific articles is discharged by a tender and refusal of the articles, the title does not pass to the creditor unless the tender is accepted. *Weld v. Hadley*, 1 N. H. 295. But this is not the law.

**2. See Sheldon v. Skinner**, 4 Wend. (N. Y.) 525, 21 Am. Dec. 161. As to what these rights are, see the title *BAILMENTS*, vol. 3, p. 732.

**Reason for the Rule.** — The reason for the rule stated in the text is very apparent in the case of contracts to deliver articles which have little or no value except to the promisee; as

in the case of an agreement to deliver a set of gravestones (*Matheson v. Westcott*, 13 Vt. 258), or, which would be a still stronger case, but the same in principle, an agreement to deliver a set of family portraits having no value except for the particular use and design for which they were made. See *Downer v. Sinclair*, 15 Vt. 495.

**3. Liability of Debtor as Bailee.** — See *McJilton v. Smizer*, 18 Mo. 111.

**4. Fisk v. Holden**, 17 Tex. 408.

**5. Duty of Debtor to Care for the Property.** — *Sheldon v. Skinner*, 4 Wend. (N. Y.) 525, 21 Am. Dec. 161.

It seems that the debtor may in some cases abandon the property by leaving it in the care of a third person, who thereby becomes bailee for the creditor. *Bradshaw v. Davis*, 12 Tex. 336.

**6. Sale or Destruction of the Property by the Debtor.** — *Mayfield v. Cotton*, 21 Tex. 1.

**7.** Where the holder of a note had agreed to take a satisfactory acceptance in payment, but, when an acceptance was offered, refused to take it, and the acceptance was thereupon destroyed, it was held that the holder of the note was entitled to elect whether to sue upon the note or upon the acceptance. *Gayle v. Suydam*, 24 Wend. (N. Y.) 274.

**8. Gilman v. Moore**, 14 Vt. 457.

**9. Effect of Tender on Contracts of Sale.** — See the titles *RESCISSION*, *CANCELLATION*, and *REFORMATION*, vol. 24, p. 643, note 7; *SALES*, vol. 24, p. 1104, note 5.

**10.** See the title *SALES*, vol. 24, p. 1018.

**11. Liability Admitted by Tender** — *Colorado*. — *Denver, etc., R. Co. v. Harp*, 6 Colo. 420.

*Illinois.* — *Uedelhofen v. Mason*, 201 Ill. 465, affirming 102 Ill. App. 116; *Monroe v. Chaldeck*, 78 Ill. 429; *La Salle County v.*



defective, or is made in a case in which a tender is not available.<sup>1</sup> But a tender of depreciated banknotes is in the nature of a compromise, and is not an admission of liability to the amount of the face value of the notes.<sup>2</sup> And if there is a tender of an amount which is larger than the sum shown by the evidence to be really due, the court is not bound to give judgment on the amount of the larger sum.<sup>3</sup> Neither does a tender prevent the defendant from interposing any defense there may be to a further recovery,<sup>4</sup> nor, it has been held, from urging a counterclaim.<sup>5</sup>

**VI. ACCEPTANCE OF TENDER — 1. Reasonable Time for Decision.** — The creditor is entitled to a reasonable time to determine whether he will accept or refuse the tender.<sup>6</sup> He should have a reasonable time and opportunity to examine, and determine the sufficiency of that which is tendered, and to ascertain his right in the premises.<sup>7</sup>

**2. Effect of Acceptance — a. OF UNCONDITIONAL TENDER.** — The unconditional tender of an amount due and its acceptance by the creditor constitute a payment and extinguish the obligation.<sup>8</sup> But the acceptance of a smaller sum than is legally due will not, of itself, bar a recovery for the balance; to conclude the creditor from proceeding for more the acceptance must be in full of all demands.<sup>9</sup>

**b. OF CONDITIONAL TENDER — (1) In General.** — The effect of a conditional tender and acceptance differs accordingly as the tender is made to extinguish a liquidated or an unliquidated demand.

(2) *On Liquidated Demand.* — As a general rule, if the demand is liquidated, and the dispute as to the sum due is not in good faith, the acceptance of a smaller sum, though tendered in full, being without any consideration, will not discharge the debt.<sup>10</sup>

(3) *On Unliquidated or Contingent Demand.* — But where the demand is unliquidated or contingent, and the tender is conditional, as where it is accompanied by the stipulation that the amount tendered shall be received

Hatheway, 78 Ill. App. 95; Illinois Ins. Co. v. Manchester F. Assur. Co., 77 Ill. App. 673; James T. Hair Co. v. Hichcox, 45 Ill. App. 504.

Indiana. — Abel v. Opel, 24 Ind. 250.

Iowa. — Metropolitan Nat. Bank v. Commercial State Bank, 104 Iowa 682; Martin v. Whisler, 62 Iowa 416; Wright v. Howell, 35 Iowa 288; Fisher v. Moore, 19 Iowa 84; Frink v. Coe, 4 Greene (Iowa) 555, 61 Am. Dec. 141; Johnson v. Triggs, 4 Greene (Iowa) 97; Sheriff v. Hull, 37 Iowa 174.

Kansas. — Latham v. Hartford, 27 Kan. 249.

Louisiana. — Davis v. Millaudon, 17 La. Ann. 97, 87 Am. Dec. 517.

Massachusetts. — Noble v. Fagnant, 162 Mass. 275; Bacon v. Charlton, 7 Cush. (Mass.) 581.

New York. — Eaton v. Wells, 82 N. Y. 576.

North Carolina. — Brown v. Fink, 3 Jones L. (48 N. Car.) 378.

Oregon. — Simpson v. Carson, 11 Oregon 361.

Pennsylvania. — Wagenblast v. M'Kean, 2 Grant Cas. (Pa.) 393.

Vermont. — Woodward v. Cutter, 33 Vt. 49.

Washington. — Young v. Borzone, 26 Wash. 4.

Wisconsin. — Schnur v. Hickcox, 45 Wis. 200.

See the title TENDER, 21 ENCYC. OF PL. AND PR., p. 582 *et seq.*

1. Denver, etc., R. Co. v. Harp, 6 Colo. 420, citing Monroe v. Chaldeck, 78 Ill. 429; Cilley

v. Hawkins, 48 Ill. 309; Slack v. Price, 1 Bibb (Ky.) 275; Eddy v. O'Hara, 14 Wend. (N. Y.) 221; Slack v. Brown, 13 Wend. (N. Y.) 390; Bailey v. Bucher, 6 Watts (Pa.) 75.

2. Newberry v. Trowbridge, 13 Mich. 263. See also Davis v. Millaudon, 17 La. Ann. 97, 87 Am. Dec. 517.

3. Tender of Amount Larger than Due. — Glos v. Goodrich, 175 Ill. 20; Abel v. Opel, 24 Ind. 250.

4. Effect on Defense to Recovery of Larger Amount. — Brown v. Fink, 3 Jones L. (48 N. Car.) 378; Simpson v. Carson, 11 Oregon 361.

5. Effect on Right to Urge Counterclaim. — Young v. Borzone, 26 Wash. 4.

6. Creditor's Right to Time for Deliberation. — Moore v. Norman, 43 Minn. 428, 19 Am. St. Rep. 247.

7. Newlin v. Prevo, 90 Ill. App. 529; Root v. Bradley, 49 Mich. 27; Potts v. Plaisted, 30 Mich. 149; Tuthill v. Morris, 81 N. Y. 94.

8. Acceptance of Amount Due. — See the title PAYMENT, vol. 22, p. 608, note 5.

9. Acceptance of Less than Amount Due. — Bowen v. Owen, 11 Q. B. 130, 63 E. C. L. 130; Thorpe v. Burgess, 4 Jur. 799; Higgins v. Halligan, 46 Ill. 173; Myers v. Byington, 34 Iowa 205; Benkard v. Babcock, 2 Robt. (N. Y.) 175; Preston v. Grant, 34 Vt. 201; Miller v. Holden, 18 Vt. 337.

10. Acceptance of Conditional Tender of Less than Amount of Liquidated Demand. — See the title ACCORD AND SATISFACTION, vol. 1, p. 413 *et seq.*

in full of the demand, an acceptance has the effect of extinguishing the claim.<sup>1</sup> In such a case, the person to whom the tender is made must either refuse to accept or accept on the terms made; so long as the condition is insisted upon by the debtor, an acceptance constitutes an agreement to the terms proposed,<sup>2</sup> even though the acceptance is made under protest.<sup>3</sup> There can, of course, be no question that if the creditor expressly accepts on the terms proposed, he cannot recover anything more on the same account.<sup>4</sup> But if, on the other hand, the debtor waives the condition imposed, an acceptance by the creditor does not preclude him from recovering any balance which may be due.<sup>5</sup>

**VII. SUFFICIENCY OF TENDER**—1. **Amount to Be Tendered**—*a. GENERAL RULE.*—To be valid, a tender should be of a specific amount,<sup>6</sup> and, subject to qualifications which will be stated presently, should be of the exact amount due.<sup>7</sup>

*b. INSUFFICIENCY OF AMOUNT TENDERED.*—Since a creditor is not bound to accept less than the whole amount of his demand, a tender of part only of a single entire demand is of no effect.<sup>8</sup> And it makes no difference

1. **Acceptance of Conditional Tender Where Demand Is Unliquidated.**—See the title **ACCORD AND SATISFACTION**, vol. 1, p. 419 *et seq.*

2. *Jenks v. Burr*, 56 Ill. 450; *Walston v. Denny*, 84 Ill. App. 417; *Adams v. Helm*, 55 Mo. 468; *St. Joseph School Board v. Hull*, 72 Mo. App. 403; *Haeussler v. Duros*, 14 Mo. App. 103.

3. *Springfield, etc., R. Co. v. Allen*, 46 Ark. 217; *Potter v. Douglass*, 44 Conn. 541; *Nassoiy v. Tomlinson*, 148 N. Y. 326, 51 Am. St. Rep. 695; *Fuller v. Kemp*, 138 N. Y. 231; *Turner v. Lee Gin, etc., Co.*, 98 Tenn. 604; *Towslee v. Healey*, 39 Vt. 522; *Cole v. Champlain Transp. Co.*, 26 Vt. 87.

So where the tender is refused, but the debtor leaves the money with the creditor, who afterwards refuses to give it up, this is a good tender. *Rogers v. Rutter*, 11 Gray (Mass.) 410.

4. **Acceptance on Conditions Proposed.**—*Jenks v. Burr*, 56 Ill. 450; *Miller v. Holden*, 18 Vt. 337.

5. **Acceptance After Waiver of Conditions by Debtor.**—*Gassett v. Andover*, 21 Vt. 342.

6. **Specific Amount to Be Tendered.**—*Pulsifer v. Shepard*, 36 Ill. 513; *Burgett v. Teal*, 91 Ind. 260; *Chase v. Welsh*, 45 Mich. 345.

A mortgagor, while riding with the mortgagee on the public highway, made repeated offers of money to the mortgagee by way of tender, but all were involved with other matters of dealing between them, and the settlement was interrupted by a quarrel. Before any costs were incurred, the mortgagee offered to accept the amount due. It was held that no tender had been made which would discharge the mortgage lien. *Parks v. Allen*, 42 Mich. 482.

7. **Exact Amount Due to Be Tendered.**—*McCalley v. Otey*, 99 Ala. 584, 42 Am. St. Rep. 87; *Shank v. Groff*, 45 W. Va. 543.

8. **Tender of Less than Amount Due—England.**—*Dixon v. Clark*, 5 C. B. 365, 57 E. C. L. 365; *Hardingham v. Allen*, 5 C. B. 793, 57 E. C. L. 793; *Searles v. Sadgrave*, 5 El. & Bl. 639, 85 E. C. L. 639, 25 L. J. Q. B. 15.

*United States.*—*Lilienthal v. McCormick*, (C. C. A.) 117 Fed. Rep. 89.

*Alabama.*—*McCalley v. Otey*, 103 Ala. 469.

*California.*—*San Pedro Lumber Co. v. Reynolds*, 111 Cal. 588; *Colton v. Oakland Sav. Bank*, 137 Cal. 376; *Shafer v. Willis*, 124 Cal. 36.

*Connecticut.*—*People's Sav. Bank v. Norwalk*, 56 Conn. 547.

*Georgia.*—*Lamar v. Sheppard*, 84 Ga. 561.

*Indiana.*—*Rose v. Duncan*, 49 Ind. 269; *Coulter v. Clark*, 2 Ind. App. 512.

*Iowa.*—*McLaughlin v. Royce*, 108 Iowa 254; *Brandt v. Chicago, etc., R. Co.*, 26 Iowa 114; *Helphrey v. Chicago, etc., R. Co.*, 29 Iowa 4.

*Louisiana.*—*Benton v. Roberts*, 2 La. Ann. 243.

*Maryland.*—*Fridge v. State*, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463.

*Massachusetts.*—*Chapin v. Chapin*, (Mass. 1894) 36 N. E. Rep. 746; *Welch v. Adams*, 152 Mass. 74; *Boyden v. Moore*, 5 Mass. 365.

*Michigan.*—*Emerson v. Kinne*, 110 Mich. 679. Compare *Montague v. Dougan*, 68 Mich. 98.

*Minnesota.*—*Spoon v. Frambach*, 83 Minn. 301; *Moore v. Norman*, 43 Minn. 428, 19 Am. St. Rep. 247.

*New Hampshire.*—*Fisher v. Willard*, 20 N. H. 421.

*New York.*—*Tuthill v. Morris*, 81 N. Y. 94.

*North Carolina.*—*Rand v. Harris*, 83 N. Car. 486.

*Pennsylvania.*—*Pershing v. Feinberg*, 203 Pa. St. 144.

*South Carolina.*—*Eastland v. Longshorn*, 1 Nott & M. (S. Car.) 194; *Baker v. Gasque*, 3 Strobb. L. (S. Car.) 25.

*Texas.*—*Kelly v. Collins*, (Tex. Civ. App. 1900) 56 S. W. Rep. 997; *Henry v. Sansom*, (Tex. Civ. App. 1896) 36 S. W. Rep. 122.

*Vermont.*—*Patnote v. Sanders*, 41 Vt. 66, 98 Am. Dec. 564.

Compare *McCartney v. Linsley*, 5 Montreal Q. B. 455.

See the title **INTEREST**, vol. 16, p. 1067, note 4.

It is not sufficient, in a proceeding to redeem from a tax sale, to tender the amount paid by the purchaser, where a premium is allowed by law. The tender must include the premium. *Lamar v. Sheppard*, 84 Ga. 561.

In order to discharge a mortgage which pro-

that the insufficiency in amount arises from an honest mistake on the part of the debtor; the mistake must be regarded as his misfortune.<sup>1</sup> Neither is a tender of part of an entire demand rendered valid by the subsequent accrual of a set-off which reduces the debt to the amount tendered.<sup>2</sup> The debtor cannot apply a set-off in reduction of his debt and tender the residue; a set-off, in the absence of agreement, being available only by way of plea or counterclaim in an action by the creditor.<sup>3</sup>

**Waiver of Objection.** — Where a tender is refused, not on the ground that the amount is too small, but on some other ground, the objection to the deficiency of the amount is waived.<sup>4</sup> In some of the *United States* this rule is declared by statute.<sup>5</sup> But, since a tender of money in payment of a debt does not extinguish the indebtedness,<sup>6</sup> a waiver of the objection that the amount is insufficient does not prevent the creditor from recovering the whole amount due.<sup>7</sup>

**c. TENDER OF MORE THAN AMOUNT DUE.** — A tender of a larger sum than the amount due is a good tender if the return of the balance is not required.<sup>8</sup> But if the tender is coupled with a demand for the balance, and

vides that, in case of a default in interest, the whole debt shall become due, a tender of the amount in default is not sufficient, but the whole debt must be tendered. *Cupples v. Galligan*, 6 Mo. App. 62; *Detweiler v. Breckenkamp*, 83 Mo. 45.

Under statutes authorizing the tender of amends (see *supra*, this title, *When Tender Available*), a tender by a person who has become liable to the payment of a penalty, to have effect, must be of the full amount of the penalty. *Lowrie v. Verner*, 3 Watts (Pa.) 317.

1. *Helphrey v. Chicago*, etc., R. Co., 29 Iowa 480; *Brandt v. Chicago*, etc., R. Co., 26 Iowa 114; *Baker v. Gasque*, 3 Strobb. L. (S. Car.) 25; *Patnote v. Sanders*, 41 Vt. 66, 98 Am. Dec. 564.

2. **Subsequent Accrual of Set-off.** — *Cotton v. Godwin*, 7 M. & W. 147; *Searles v. Sadgrave*, 5 El. & Bl. 639, 85 E. C. L. 639; *Dixon v. Clark*, 5 C. B. 365, 57 E. C. L. 365.

3. **Deducting Amount of Set-off.** — *Searles v. Sadgrave*, 5 El. & Bl. 639, 85 E. C. L. 639, 25 L. J. Q. B. 15; *Phillipotts v. Clifton*, 10 W. R. 135; *Rand v. Harris*, 83 N. Car. 486.

It has been held that an agreement by a creditor that a sum of money in his hands, belonging to a third person, shall be applied or accounted for as a part payment of the debt is, if without consideration, not binding; and a tender of the difference between such sum and the amount otherwise due is insufficient. *Fisher v. Willard*, 20 N. H. 421.

4. **Waiver of Insufficiency of Amount.** — *Bender v. Bean*, 52 Ark. 132; *Downing v. Plate*, 90 Ill. 268; *Thayer v. Meeker*, 86 Ill. 470; *Conway v. Case*, 22 Ill. 127; *Hayward v. Munger*, 14 Iowa 516; *Kentucky Chair Co. v. Com.*, 105 Ky. 455; *Hill v. Carter*, 101 Mich. 158; *Flanders v. Chamberlain*, 24 Mich. 305; *Connell v. Mulligan*, 13 Smed. & M. (Miss.) 388; *Lambert v. Miller*, 38 N. J. Eq. 117; *Christenson v. Nelson*, 38 Oregon 473; *Brewer v. Fleming*, 51 Pa. St. 102; *Bradshaw v. Davis*, 12 Tex. 336; *Graves v. McFarlane*, 2 Coldw. (Tenn.) 167. But compare *Pershing v. Feinberg*, 203 Pa. St. 144.

But where ten dollars was offered in pay-

ment of an indebtedness of nearly twenty thousand dollars, a failure to object to the insufficiency of the amount did not constitute a waiver of the obligation, under a statute providing that all objections to the mode of an offer of payment are waived if not stated when the offer is made. *Colton v. Oakland Sav. Bank*, 137 Cal. 376.

5. *Latimer v. Capay Valley Land Co.*, 137 Cal. 286.

6. **Effect of Waiver of Insufficiency of Amount.** — See *supra*, this title, *Effect of Tender—Of Money*.

7. *Chicago*, etc., R. Co. v. *Northwestern Union Packet Co.*, 38 Iowa 377; *Sheriff v. Hull*, 37 Iowa 174; *Guengerich v. Smith*, 36 Iowa 587. See *supra*, this title, *Acceptance of Tender—Of Unconditional Tender*.

Section 2107 of the *Iowa Code* of 1873 providing that "the person to whom a tender is made must, at the time, make any objection which he may have to the money, instrument, or property tendered, or he will be deemed to have waived it," has been construed to refer to the character or kind of money, and not to the amount. *Chicago*, etc., R. Co. v. *Northwestern Union Packet Co.*, 38 Iowa 377. And it has been held that a purchaser of land who tenders an amount less than the purchase price is not entitled to a decree for specific performance, even though the objection that the amount tendered is too small is not made at the time of the tender. *McWhirter v. Crawford*, 104 Iowa 550.

8. **Tender of More than Amount Due.** — *Wade's Case*, 5 Coke 115; *Astley v. Reynolds*, 2 Stra. 916; *Douglas v. Patrick*, 3 T. R. 683; *Dean v. James*, 4 B. & Ad. 546, 24 E. C. L. 114; *North Chicago St. R. Co. v. Le Grand Co.*, 95 Ill. App. 435; *Patterson v. Cox*, 25 Ind. 261; *Zeitlin v. Arkaway*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 761; *Hubbard v. Chenango Bank*, 8 Cow. (N. Y.) 88; *Houston*, etc., R. Co. v. *Campbell*, (Tex. Civ. App. 1897) 40 S. W. Rep. 431.

A tender of the amount of a note not due and the accrued interest is a good tender of the interest. *Saunders v. Frost*, 5 Pick. (Mass.) 259, 16 Am. Dec. 394.



the creditor refuses to give change, and objects to taking the money for that reason, the tender is not good.<sup>1</sup>

**Waiver of Objection.** — If, however, the creditor does not make any objection to the tender on the ground of his being required to give change, but refuses to receive it for some other reason, as where he claims to be entitled to a larger sum, or that the tender is too late, he will be deemed to have waived the objection.<sup>2</sup> And the objection is waived if the creditor refuses the tender merely on the ground that the debtor will not pay with the surplus another and a distinct debt, or unless the debtor will fix his own counterclaim against the creditor at a certain sum.<sup>3</sup>

**d. WHEN THERE ARE SEVERAL DISTINCT CLAIMS.** — But, while the debtor is bound to tender the whole amount of a demand, if he owes the creditor two or more separate and distinct debts, he need not tender all that he owes the debtor, but may elect to acknowledge and tender payment of any one or more of the debts.<sup>4</sup> And, on the other hand, a tender of a gross sum in payment of several distinct demands, without designating the amount tendered upon each, is sufficient.<sup>5</sup> But if one person is indebted to another upon several distinct accounts for unequal amounts, a tender of one sum for the whole, without appropriating any portion to a particular debt, is not good if the sum tendered is not sufficient to cover all.<sup>6</sup> If a person has separate demands for unequal sums against several persons, a tender of one sum for the debts of them all will not support a plea by one of those persons that a certain portion of such sum was tendered for his debt.<sup>7</sup>

**e. INTEREST AND COSTS.** — A tender, made after the day of payment, must include interest up to the date of the tender.<sup>8</sup> And if a tender is made

1. *Robinson v. Cook*, 6 Taunt. 336, 1 E. C. L. 404, 16 Rev. Rep. 624; *Betterbee v. Davis*, 3 Campb. 70, 13 Rev. Rep. 755; *Brady v. Jones*, 2 Dowl. & R. 305, 16 E. C. L. 87; *Cadman v. Lubbock*, 5 Dowl. & R. 289, 16 E. C. L. 235; *Bevans v. Rees*, 5 M. & W. 308; *Dean v. James*, 4 B. & Ad. 548, 24 E. C. L. 115; *Blow v. Russell*, 1 C. & P. 365, 11 E. C. L. 421; *Perkins v. Beck*, 4 Cranch (C. C.) 68; *Patterson v. Cox*, 25 Ind. 261.

2. **Waiver of Objection to Demand for Change.** — *Black v. Smith*, Peake N. P. (ed. 1795) 89; *Saunders v. Graham*, Gow 121, 5 E. C. L. 483; *Cadman v. Lubbock*, 5 Dowl. & R. 289, 16 E. C. L. 235; *People's Furniture, etc., Co. v. Crosby*, 57 Neb. 282, 73 Am. St. Rep. 504.

3. In *Bevans v. Rees*, 5 M. & W. 306, where the defendant, who owed the plaintiff £108, sent a person to the plaintiff's solicitor, who was authorized to receive payment of the debt, and that person told the solicitor that he had come to settle the amount due, and laid down 150 sovereigns, out of which he desired the solicitor to take what was due, and the solicitor refused to do so unless a certain account due from the plaintiff to the defendant was fixed at a certain amount, it was held that there was a good tender of £108.

4. **Tender of Less than Total of Separate Demands.** — *North Chicago St. R. Co. v. Le Grand Co.*, 95 Ill. App. 435; *Duvall v. Perkins*, 77 Md. 582; *Carleton v. Whitcher*, 5 N. H. 289.

It appears that, when a quarter's rent is tendered and refused and another quarter's rent accrues and is tendered, such second tender is sufficient without tendering the whole rent then due. *Bassett v. Prior*, etc., Year Book 2 Hen. VI., fo. 4, pl. 1, *per* Martin, J.

Where a carrier is sued for loss of a part of the goods, and for damage by water to the remainder, the defendant is not justified in refusing a tender of the value of the goods lost, because the amount of the damage to those injured was not also tendered. *East Tennessee, etc., R. Co. v. Wright*, 76 Ga. 532.

5. **Tender of Gross Sum in Payment of Separate Demands.** — *Johnson v. Cranage*, 45 Mich. 14; *Berthold v. Reyburn*, 37 Mo. 586; *Thetford v. Hubbard*, 22 Vt. 440.

6. *Hardingham v. Allen*, 5 C. B. 793, 57 E. C. L. 793.

Where a railroad company tendered a certain sum in payment of the damages to two animals, it was held not to be good as to either, if the plaintiff afterward recovered a sum for the injuries to both larger in the aggregate than the amount tendered, though the tender was larger than the amount recovered for either animal singly. *Shuck v. Chicago, etc., R. Co.*, 73 Iowa 333.

7. *Strong v. Harvey*, 3 Bing. 304, 11 E. C. L. 112. This case was distinguished in *Hall v. Norwalk F. Ins. Co.*, 57 Conn. 105, wherein it was held that where an award was made in favor of the same person against five insurance companies, a tender made by one company of the entire sum awarded was a valid tender by that company.

8. **Including Interest.** — *Francis v. Deming*, 59 Conn. 108; *Chicago, etc., R. Co. v. Woodard*, 159 Ind. 541; *Hamar v. Dimmick*, 14 Ind. 105; *Weld v. Eliot Five Cents Sav. Bank*, 158 Mass. 330; *Woodworth v. Morris*, 56 Barb. (N. Y.) 97; *Van Benthuyzen v. Central New England, etc., R. Co.*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 709.

A tender by executors, of an amount which

during the pendency of a suit, costs up to the time of tender should be included.<sup>1</sup> But it has been held that costs incurred in preparing to bring suit need not be included in a tender which is made before suit has actually been commenced.<sup>2</sup>

**Waiver of Objection.** — If, at the time of making a tender, the debtor has no knowledge of the commencement of a suit, and the creditor does not inform him thereof nor make claim of costs, but refuses to accept the amount tendered solely on account of its insufficiency to pay the debt, this may be regarded as a waiver of all claim for costs.<sup>3</sup>

**2. Time of Tender** — *a. GENERAL RULE.* — By the Common Law, a tender, to be good, must be made on the very day when performance is due. If made before that time it is, in most cases, of no effect.<sup>4</sup> And if made after that time the consequences vary, accordingly as the tender is of money or of specific articles. If an offer to pay money is made after the day for payment, the offer is not a bar to an action, but goes only in mitigation of damages.<sup>5</sup>

does not equal the legacy and accrued interest, and which the legatee refuses to accept as a partial payment, does not stop the running of interest. *Welch v. Adams*, 152 Mass. 74.

**1. Including Costs** — *United States.* — The *Enos B. Phillips*, 53 Fed. Rep. 153; *The Serapis*, 37 Fed. Rep. 436.

*Alabama.* — *Smith v. Anders*, 21 Ala. 782.

*Connecticut.* — *Francis v. Deming*, 59 Conn. 108.

*Illinois.* — *Fuller v. Brown*, 167 Ill. 293; *Smith v. Jackson*, 153 Ill. 399; *McDaniel v. Upton*, 45 Ill. App. 151.

*Indiana.* — *Chicago, etc., R. Co. v. Woodard*, 159 Ind. 541.

*Iowa.* — *Martin v. Whisler*, 62 Iowa 416; *Barnes v. Greene*, 30 Iowa 114; *Warrington v. Pollard*, 24 Iowa 281, 95 Am. Dec. 727; *Freeman v. Fleming*, 5 Iowa 460.

*Kentucky.* — *Samuels v. Simmons*, 60 S. W. Rep. 937, 22 Ky. L. Rep. 1586.

*Louisiana.* — *Louisiana Molasses Co. v. Le Sasser*, 52 La. Ann. 1768, 2071.

*Maine.* — *Marshall v. Wing*, 50 Me. 62; *Call v. Lothrop*, 39 Me. 434.

*Minnesota.* — *Seeger v. Smith*, 74 Minn. 279. *Nebraska.* — *McEldon v. Patton*, (Neb. 1903) 93 N. W. Rep. 938.

*New Hampshire.* — *Thurston v. Blaisdell*, 8 N. H. 367.

*New York.* — *Eaton v. Wells*, 22 Hun (N. Y.) 123, 82 N. Y. 576; *Hill v. Place*, 7 Robt. (N. Y.) 389; *Globe Soap Co. v. Liss*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 199.

*Ohio.* — *Burt v. Dodge*, 13 Ohio 131; *Hay v. Ousterout*, 3 Ohio 384.

*Texas.* — *Berry v. Davis*, 77 Tex. 191, 19 Am. St. Rep. 748.

See *Smith v. Curtiss*, 38 Mich. 393; *Audenreid v. Hull*, 45 Mo. App. 202; *Fishburne v. Sanders*, 1 Nott & M. (S. Car.) 242.

The party to whom the tender is made is not bound to inform the party making the tender what costs he has incurred, unless inquiry be made. *Smith v. Wilbur*, 35 Vt. 133.

**2. Whether a tender of the debt without costs is sufficient,** after an attorney has been employed and a writ issued, but not served, is answered in the affirmative in *Hull v. Peters*, 7 Barb. (N. Y.) 331, overruling the earlier decision of the Supreme Court in *Retan v. Drew*, 19 Wend. (N. Y.) 304, and in *Brown v.*

*Ferguson*, 2 Den. (N. Y.) 196; and in the negative in *Emerson v. White*, 10 Gray (Mass.) 351. See also *Thurston v. Blaisdell*, 8 N. H. 367.

**3. Waiver of Objection that Costs Are Not Included.** — *Haskell v. Brewer*, 11 Me. 258.

**4. Premature Tender.** — *Abshire v. Corey*, 113 Ind. 484; *Reed v. Rudman*, 5 Ind. 409; *Jouett v. Wagnon*, 2 Bibb (Ky.) 269, 5 Am. Dec. 602; *Saunders v. Frost*, 5 Pick. (Mass.) 267, 16 Am. Dec. 394; *Illingworth v. Miltenberger*, 11 Mo. 80; *Moore v. Kime*, 43 Neb. 517; *Tillou v. Britton*, 9 N. J. L. 120; *Wyckoff v. Anthony*, 90 N. Y. 442, affirming *Noyes v. Wyckoff*, 30 Hun (N. Y.) 466. See the titles PAYMENT, vol. 22, p. 530; SALES, vol. 24, p. 1074, notes 6 and 7. But see *Eaton v. Emerson*, 14 Me. 335; *Quynn v. Whetcroft*, 3 Har. & M. (Md.) 136, 1 Am. Dec. 375; *Sanders v. Burk*, (Va. 1895) 22 S. E. Rep. 516.

**5. Tender of Money After Day for Payment.** — *Richardson v. Harris*, 22 Q. B. D. 275; *Dixon v. Clark*, 5 C. B. 379, 57 E. C. L. 379; *Dobie v. Larkan*, 10 Exch. 776; *Hume v. Péploe*, 8 East 168; *Poole v. Tumbridge*, 2 M. & W. 223; *Day v. Lafferty*, 4 Ark. 450; *Huston v. Noble*, 4 J. J. Marsh. (Ky.) 130; *Frazier v. Cushman*, 12 Mass. 277; *Maynard v. Hunt*, 5 Pick. (Mass.) 240; *Dewey v. Humphrey*, 5 Pick. (Mass.) 187; *Suffolk Bank v. Worcester Bank*, 5 Pick. (Mass.) 106; *City Bank v. Cutter*, 3 Pick. (Mass.) 414; *Butts v. Burnett*, (N. Y. Super. Ct. Spec. T.) 6 Abb. Pr. N. S. (N. Y.) 302. See *Law v. Jackson*, 9 Cow. (N. Y.) 641. See *supra*, Effect of Tender — Of Money.

**Reason for Rule.** — The reason for the strictness of the rule that tender of a debt could not be made after the same had become due arose mainly from the fact that the averment of *tout temps prist* was material in every plea of tender, and the debtor, not having tendered the amount of the claim upon the day of its falling due, could not aver that he had been always ready. 9 Bac. Abr. 325; *Day v. Lafferty*, 4 Ark. 450; *Huston v. Noble*, 4 J. J. Marsh. (Ky.) 130. In addition to this, it may be suggested that since damages may, by the common law, be incurred by a failure to pay at the proper time, the amount due, after default, may be either wholly or partly unliquidated, so that a tender is not available. See *supra*, this title, *When Tender Available*.



If specific articles are to be delivered, they must be tendered when delivery is due, and cannot be tendered afterwards.<sup>1</sup>

**Changes in Common-law Rule.** — In *Connecticut* by usage and practice a tender is good even though made after the day for payment.<sup>2</sup> And by statute in some of the *United States* tender of money may be made after the day upon which a debt becomes due.

**b. TENDER AFTER ACTION BROUGHT.** — By the common law, a valid tender cannot be made after suit brought,<sup>3</sup> nor, it seems, after the creditor has brought and discontinued another action, in a different form, for the same money.<sup>4</sup> But it has been provided by statute in some jurisdictions that a tender may be made after suit brought and before a specified time, and that the tender will have the effect of preventing the plaintiff from recovering costs which subsequently accrue.<sup>5</sup>

**c. WHEN NO TIME FOR PERFORMANCE IS FIXED.** — When the time for performance is not fixed tender of performance may be made within a reasonable time.<sup>6</sup> What constitutes a reasonable time must be determined by a view of all the circumstances of the particular case,<sup>7</sup> and has sometimes been declared to be a question of law.<sup>8</sup>

**d. WHEN PERIOD OF TIME IS ALLOWED FOR PERFORMANCE.** — Where a certain space of time is allowed for the performance of the contract, as a day or several days, it is sufficient if the performance be completed before the end of the last day.<sup>9</sup>

**Tender of Mortgage Debt.** — The effect of a tender of the amount of a mortgage debt after breach of the condition has been treated elsewhere. See the titles *CHATTEL MORTGAGES*, vol. 5, p. 1020; *EQUITY OF REDEMPTION*, vol. 11, p. 252; *MORTGAGES*, vol. 20, p. 1062.

**1. Tender of Specific Articles After Day for Delivery.** — *Powe v. Powe*, 42 Ala. 113; *Day v. Lafferty*, 4 Ark. 450; *Hamilton v. Chicago*, etc., R. Co., 103 Iowa 325. See the title *SALES*, vol. 24, p. 1073 *et seq.*

**2. Tracy v. Strong**, 2 Conn. 659.

**3. Tender After Suit Brought.** — *Smith v. Woodleaf*, 21 Kan. 717; *Braumann v. Vanderpoel*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 786; *Murray v. Windley*, 7 Ired. L. (29 N. Car.) 201, 47 Am. Dec. 326; *Winningham v. Redding*, 6 Jones L. (51 N. Car.) 126; *Cope v. Bryson*, Winst. L. (60 N. Car.) 112; *M'Intyre v. Carver*, 2 W. & S. (Pa.) 392, 37 Am. Dec. 519.

**4. See observations of Parke, B., on the case of Johnson v. Clay**, 7 Taunt. 486, 2 E. C. L. 485, in *Poole v. Tumbridge*, 2 M. & W. 223.

**5. See Thomson v. Way**, 172 Mass. 423; *Snyder v. Quarton*, 47 Mich. 211; *Rand v. Harris*, 83 N. Car. 486; *Hay v. Ousterout*, 3 Ohio 385; *Willey v. Laraway*, 64 Vt. 566; *Green v. Shurtliff*, 19 Vt. 592; *Hart v. Skinner*, 16 Vt. 138, 42 Am. Dec. 500.

A tender of a deed, after a verdict has been rendered for a sum of money claimed as alternative relief, is made too late. *Houston v. Sledge*, 101 N. Car. 640.

Where a tender was made in an action after the defendant's liability had been determined, it was held that the tender could not affect the costs which had accrued. *The Receipts*, (1893) P. 255, 1 Reports 644.

**6. Time of Performance Not Stipulated.** — *Adams v. Adams*, 26 Ala. 272; *Fisk v. Williams*, 75 Me. 217.

It has been held that a statute providing, in effect, that when a time for performance is fixed, the offer of performance must be made at that time, and not before or after, did not apply to an agreement by one person to take certain stock at a stipulated valuation at the expiration of a prescribed period, if requested to do so by the other party, but that the holder might exercise his option of compelling payment by tendering the stock within a reasonable time after the expiration of the prescribed period. *Maurer v. King*, 127 Cal. 114.

**Where a Deed Is Placed in Escrow**, to be delivered to the grantee upon payment of the purchase money, a tender within a reasonable time is good; and if the party holding the deed refuses to deliver it upon such tender, the grantee is not bound to keep the tender good by payment of the money into court or otherwise. *Cannon v. Handley*, 72 Cal. 133; *McDanel v. Kimbrell*, 3 Greene (Iowa) 335; *Washburn v. Dewey*, 17 Vt. 92; *White v. Dobson*, 17 Gratt. (Va.) 262. See *infra*, this title, *Keeping Tender Good*.

**7. What Constitutes a Reasonable Time.** — *Cocker v. Franklin Hemp*, etc., Mfg. Co., 3 Sumn. (U. S.) 530; *Fisk v. Williams*, 75 Me. 217; *Coates v. Sangston*, 5 Md. 121.

**8. Reasonableness of Time a Question of Law.** — *Hill v. Hobart*, 16 Me. 164; *Howe v. Huntington*, 15 Me. 350; *Kingsley v. Wallis*, 14 Me. 57; *Attwood v. Clark*, 2 Me. 249; *Murry v. Smith*, 1 Hawks (8 N. Car.) 41; *Cameron v. Wells*, 30 Vt. 633. See the title *QUESTIONS OF LAW AND FACT*, vol. 23, p. 585.

**9. Allowance of Period of Time for Performance.** — *Sheppard's Touch*, 378; *Leftley v. Mills*, 4 T. R. 170; *Startup v. Macdonald*, 6 M. & G. 593, 46 E. C. L. 593.

Where there is a margin of time for performance, tender may be made and repeated, if necessary, within the limit of time; thus, where a seller tendered goods in discharge of

*c.* WHEN THERE ARE NO DEFINITE TERMS OF CREDIT. — In cases where the debt is of an indefinite credit, unless the credit has been put an end to by a demand for payment, the tender of payment may be made at any time before process has actually issued.<sup>1</sup>

*f.* TIME OF DAY. — As to the time of day when a tender is to be made, this distinction has been said to prevail in all the cases: Where an act may be done anywhere, a tender a convenient time before midnight is sufficient;<sup>2</sup> but if the act is to be done at a particular place, so that a duty rests upon the other party to attend at that place, the tender must be made by daylight, and at the utmost convenient time before sunset to count the money or examine the goods.<sup>3</sup> But the tender may, of course, be made at any hour of the day at which both of the parties meet at the appointed place.<sup>4</sup> And the rule may be varied by special agreements and usages of business.<sup>5</sup>

*g.* WAIVER OF OBJECTION. — A tender which is not made at the time when performance is due may be waived by not objecting to the irregularity, and placing the refusal to accept on some other ground.<sup>6</sup>

**3. Place of Tender** — *a.* WHEN PLACE IS FIXED. — If a contract for the payment of money or the delivery of goods fixes a place for performance, the tender must be made at that place, and the person to whom tender is to be made must be in attendance for the purpose of receiving the money or property.<sup>7</sup>

his contract, which were refused, and upon arbitration were adjudged insufficient, it was held that he might tender other sufficient goods within the time limited by the contract. *Borrowman v. Free*, 4 Q. B. D. 500, 48 L. J. Q. 65.

**1. Indefinite Terms of Credit.** — *Caine v. Coulton*, 1 H. & C. 764, 32 L. J. Exch. 97; *Smith v. Mannors*, 5 C. B. N. S. 632, 94 E. C. L. 632, 28 L. J. C. Pl. 220; *Kington v. Kington*, 11 M. & W. 233; *Norton v. Ellam*, 2 M. & W. 461; *Cotten v. Godwin*, 7 M. & W. 147; *Pigot v. Cubley*, 15 C. B. N. S. 701, 109 E. C. L. 701, 33 L. J. C. Pl. 134.

**2. When Place of Performance Is Not Fixed.** — *Parke, B.*, in *Startup v. Macdonald*, 6 M. & G. 593, 46 E. C. L. 593; *McClartey v. Gokey*, 31 Iowa 505. And see *Leftley v. Mills*, 4 T. R. 172. See also the title LANDLORD AND TENANT, vol. 18, p. 375, note 5.

But it has been held that an offer which was made not long before midnight, when the persons who were entitled to the tender, and their families, were asleep, and all the lights extinguished, was not a good tender. *Wing v. Davis*, 7 Me. 31.

**3. When Place of Performance Is Fixed** — *England*. — *Startup v. Macdonald*, 6 M. & G. 593, 46 E. C. L. 593; *Wade's Case*, 5 Coke 114; *Hill v. Grange*, 1 Plowd. 172; *Lancashire v. Killingworth*, 12 Mod. 530, 1 Ld. Raym. 686; *Hammond v. Ouden*, 12 Mod. 421; *Rutland v. Hodgson*, 2 Stra. 777; *Hill v. Grange*, 1 Plowd. 172; *Tinckler v. Prentice*, 4 Taunt. 549; *Doe v. Paul*, 3 C. & P. 613, 14 E. C. L. 483; *Acoccks v. Phillips*, 5 H. & N. 183, and note.

*United States*. — *Savary v. Goe*, 3 Wash. (U. S.) 140.

*Kentucky*. — *Duckham v. Smith*, 5 T. B. Mon. (Ky.) 372.

*Maine*. — *Aldrich v. Albee*, 1 Me. 120, 10 Am. Dec. 45.

*New York*. — *Croninger v. Crocker*, 62 N. Y. 158; *Karker v. Haverly*, 50 Barb. (N. Y.) 79.

*Rhode Island*. — *Hall v. Whittier*, 10 R. I. 530.

*Tennessee*. — *Tiernan v. Napier*, 5 Yerg. (Tenn.) 410.

*Vermont*. — *Sweet v. Harding*, 19 Vt. 587.

**4. When Parties Meet at Appointed Place.** — *Startup v. Macdonald*, 6 M. & G. 623, 46 E. C. L. 623; *Wade's Case*, 5 Coke 114; *Tinckler v. Prentice*, 4 Taunt. 549; *Sweet v. Harding*, 19 Vt. 587.

**5. Special Agreements and Usages Varying the Rule.** — *Lancashire v. Killingworth*, 12 Mod. 530, 1 Ld. Raym. 686; *Rutland v. Hodgson*, 2 Stra. 777; *Hill v. Grange*, 1 Plowd. 172.

**6. Waiver of Objection as to Time.** — *Eaton v. Emerson*, 14 Me. 335; *Adams v. Helm*, 55 Mo. 468; *Cythe v. La Fontain*, 51 Barb. (N. Y.) 190; *Gould v. Banks*, 8 Wend. (N. Y.) 562, 24 Am. Dec. 95. But compare *Friess v. Rider*, 24 N. Y. 367, 82 Am. Dec. 308.

**7. Tender Must Be at Place Appointed** — *England*. — *Startup v. Macdonald*, 6 M. & G. 623, 46 E. C. L. 623; *Sanderson v. Bowes*, 14 East 500; *Co. Litt.* 210b.

*Connecticut*. — *Smith v. Loomis*, 7 Conn. 110.

*Kentucky*. — *Price v. Cockran*, 1 Bibb (Ky.) 570.

*Maine*. — *Howard v. Miner*, 20 Me. 325; *Bean v. Simpson*, 16 Me. 49; *White v. Perley*, 15 Me. 470; *Bixby v. Whitney*, 5 Me. 192; *Aldrich v. Albee*, 1 Me. 120, 10 Am. Dec. 45.

*Mississippi*. — *Bates v. Bates*, Walk. (Miss.) 401, 12 Am. Dec. 572.

*New Hampshire*. — *Wiggin v. Wiggin*, 43 N. H. 567, 80 Am. Dec. 192.

*New York*. — *Goodwin v. Holbrook*, 4 Wend. (N. Y.) 380; *Lobdell v. Hopkins*, 5 Cow. (N. Y.) 516; *Schmidt v. Hoffman*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 225.

*Oregon*. — *Adams v. Rutherford*, 13 Oregon 78.

*Pennsylvania*. — *Roberts v. Beatty*, 2 P. & W. (Pa.) 63, 21 Am. Dec. 410.

*Texas*. — *Deel v. Berry*, 21 Tex. 463, 73 Am. Dec. 236.

See *supra*, III. 2. *Waiver of Tender* — *Acts*

*b. WHEN NO PLACE IS FIXED* — (1) *Tender of Money*. — When money is to be paid on a particular day and no place is mentioned for the payment, either expressly or by necessary implication, the debtor must seek the person to whom payment is to be made on the day appointed, and make the tender,<sup>1</sup> unless he is out of the state when the debt becomes due. The debtor is not bound to go out of the state to seek his creditor.<sup>2</sup> But he should, perhaps, make every reasonable effort to effect a tender if the creditor's address is known, or can be ascertained.<sup>3</sup>

(2) *Tender of Specific Articles* — (a) *In General*. — With regard to the tender of specific articles, when the place of delivery is not designated in the contract, or subsequently agreed upon by the parties, the place of delivery is governed by the intent of the parties, which is to be inferred from the nature of the contract, and of the articles to be delivered, from the situation of the parties, and from any other circumstances from which the intent of the parties may reasonably be inferred.<sup>4</sup> It has been said that where a commercial contract between business men requires personal property, such as certificates of stock in a corporation, to be delivered to several parties at the same time that it requires them to pay a sum certain to the holder of the stock, and no place of delivery is named in the agreement, a deposit of the property in a convenient business institution in the city in which the contract was made, in which its subject-matter was situated, and in which it was presumably to be performed, and a timely notice to the debtors that it has been so deposited, is a fair, reasonable, and sufficient tender and offer of delivery by the holder of the property.<sup>5</sup>

(b) *Portable Articles*. — Some articles, such as written obligations, certificates of stock, and the like, may, no doubt, be tendered, like money, to the creditor personally, at any suitable place where he may be found,<sup>6</sup> but, usually, specific articles are to be tendered at some particular place. The general rule is that where portable articles are to be delivered on a certain day, but the place of delivery is not stated, a tender of the property should be made at the obligee's residence or place of business.<sup>7</sup> But the obligor is not bound to

*Constituting Waiver — Absence from Home or Place of Tender*. And see the title SALES, vol. 24, pp. 1094, 1069, note 6.

1. *Place of Tendering Money*. — Shep. Touch. p. 378; Co. Litt. 210b; Haldane v. Johnson, 8 Exch. 689, 20 Eng. L. & Eq. 498; Poole v. Tumbridge, 2 M. & W. 223; Littell v. Nichols, Hard. (Ky.) 71; Galloway v. Smith, Litt. Sel. Cas. (Ky.) 133; Butts v. Burnett, (N. Y. Super. Ct. Spec. T.) 6 Abb. Pr. N. S. (N. Y.) 302; Judd v. Ensign, 6 Barb. (N. Y.) 258. But see Smith v. Smith, 25 Wend. (N. Y.) 405, 2 Hill (N. Y.) 351. See the title PAYMENT, vol. 22, p. 533, note 6.

When tender and demand are essential to the procuring of a deed, the covenantee's ignorance of the residence of the covenantor previous to the conveyance will not excuse a tender. Sage v. Ranney, 2 Wend. (N. Y.) 532.

The provision of the *Louisiana Code*, that where the obligation refers to real property, the debtor must give notice to the creditor to be present at a fixed hour, at the office of a notary, to receive the conveyance, does not apply to a case where the purchaser has been evicted from a portion of the land sold to him. Robins v. Martin, 43 La. Ann. 488.

A tender which was made at the window of a house, while the creditor, who refused admittance to the debtor, was at the window, has been held good. Wing v. Davis, 7 Me. 31.

*Rent*. — As to the rule governing the place for the tender of rent, see the title LANDLORD AND TENANT, vol. 18, p. 269 *et seq.* See also the title DISTRESS, vol. 9, p. 627.

2. *Absence of Creditor from State*. — Young v. Daniels, 2 Iowa 126, 63 Am. Dec. 477; Tasker v. Bartlett, 5 Cush. (Mass.) 359; Jones v. Perkins, 29 Miss. 139, 64 Am. Dec. 136; Hale v. Patton, 60 N. Y. 233, 19 Am. Rep. 168; Houbie v. Volkening, (Supm. Ct. Spec. T.) 49 How. Pr. (N. Y.) 169; Allshouse v. Ramsay, 6 Whart. (Pa.) 331, 37 Am. Dec. 417. See North Pennsylvania R. Co. v. Adams, 54 Pa. St. 94, 93 Am. Dec. 677. And see the title PAYMENT, vol. 22, p. 533, note 7.

3. It seems to have been held in Crawford v. Paine, 19 Iowa 172, that, although the creditor is beyond the state, if the debtor knows his residence and post-office address the tender should be made.

4. *Place of Tendering Specific Articles*. — Miles v. Roberts, 34 N. H. 253. See the title SALES, vol. 24, p. 1069 *et seq.*

5. Kauffman v. Raeder, (C. C. A.) 108 Fed. Rep. 171.

6. *Place of Tendering Portable Articles*. — See Miles v. Roberts, 34 N. H. 245.

7. *Illinois*. — Borah v. Curry, 12 Ill. 66. *Kentucky*. — Wilmouth v. Patton, 2 Bibb (Ky.) 280; Jacoby v. Schwartzwelder, 1 Bibb (Ky.) 430; Galloway v. Smith, Litt. Sel. Cas.



seek the obligee out of the state to make a tender of delivery,<sup>1</sup> though he may be under an obligation to make every reasonable effort to ascertain from the obligee where he will receive the goods.<sup>2</sup> And if the obligee has left a business agent within the state, the obligor should seek out the agent and request him to fix a place for delivery.<sup>3</sup>

(c) **Ponderous Articles.**—Where the time is specified, but the place is not designated, either expressly or by implication, and the articles are not readily portable, but cumbersome and bulky, the obligor should seek out the obligee a reasonable time before the day of delivery, and ascertain from him the place where the articles are to be delivered, and deliver the articles accordingly, if the place appointed is reasonable and within the contemplation of the parties.<sup>4</sup> If the obligee cannot be found, or if he refuses or neglects to name any place, or, what is much the same, appoints an unreasonable place, the obligor may himself appoint a suitable place, and deliver the articles there, with notice to the obligee, if he can be found.<sup>5</sup>

(Ky.) 133; *Grant v. Groshon*, Hard. (Ky.) 91.

*New Hampshire.*—*Miles v. Roberts*, 34 N. H. 254.

*New York.*—*Bronson v. Gleason*, 7 Barb. (N. Y.) 472; *La Farge v. Rickert*, 5 Wend. (N. Y.) 187, 21 Am. Dec. 209; *Goodwin v. Holbrook*, 4 Wend. (N. Y.) 377; *Lobdell v. Hopkins*, 5 Cow. (N. Y.) 516.

*Pennsylvania.*—*Barr v. Myers*, 3 W. & S. (Pa.) 295; *Roberts v. Beatty*, 2 P. & W. (Pa.) 63, 21 Am. Dec. 410.

*Rhode Island.*—*Hall v. Whittier*, 10 R. I. 535.

Where a quantity of corn was sold to a miller and no place of delivery was fixed, and a part of the corn was delivered at the mill of the purchaser, that was held to be the place of delivery. *Field v. Runk*, 22 N. J. L. 525.

**Kent's Distinctions.**—It is said by Mr. Chancellor Kent, that "the common law on the subject of the delivery of specific articles, which are portable, makes a distinction between the contract of sale and the contract to pay a debt at another time in such articles. \* \* \* In the contract of sale the delivery is to be at the place where the vendor has the article, but in the other case the weight of authority would seem to be in favor of the rule, that the property was to be delivered at the creditor's place of residence, though the cases on the subject are not easily reconcilable with each other." 2 Kent Com. 506. But in *Barr v. Myers*, 3 W. & S. (Pa.) 295, where the articles were to be delivered under a contract of sale, Sergeant, J., said: "I am not aware of any decided case which makes a distinction, when a time is stipulated for the delivery of articles, between a contract of sale and delivery and a contract to pay a debt in certain articles; nor do I perceive the ground of such distinction." See *Borah v. Curry*, 12 Ill. 66.

**1. Absence of Obligor from State.**—*Trimble v. Williamson*, 49 Ala. 525; *Howard v. Miner*, 20 Me. 330; *Gill v. Bradley*, 21 Minn. 15; *Santee v. Santee*, 64 Pa. St. 473.

**2.** *Bixby v. Whitney*, 5 Me. 192.

Where a factor, wishing to return certain books to the principal who had left the state, deposited the books in a warehouse and notified the principal where they were, and that

they were subject to his order, the tender was held to be good. *Angell v. Loomis*, 97 Mich. 5.

**3.** *Santee v. Santee*, 64 Pa. St. 473.

**4. Place of Tendering Ponderous Articles.**—*England.*—Co. Litt. 210b; Cro. Eliz. 48.

*Maine.*—*Howard v. Miner*, 20 Me. 325; *Bean v. Simpson*, 16 Me. 49; *Bixby v. Whitney*, 5 Me. 192; *Aldrich v. Albee*, 1 Me. 120, 10 Am. Dec. 45.

*Massachusetts.*—*Mason v. Briggs*, 16 Mass. 453.

*New Hampshire.*—*Miles v. Roberts*, 34 N. H. 254; *Flanders v. Lamphear*, 9 N. H. 201; *Currier v. Currier*, 2 N. H. 75, 9 Am. Dec. 43.

*New York.*—*Slingerland v. Morse*, 8 Johns. (N. Y.) 474; *La Farge v. Rickert*, 5 Wend. (N. Y.) 187, 21 Am. Dec. 209; *Sheldon v. Skinner*, 4 Wend. (N. Y.) 525, 21 Am. Dec. 161; *Goodwin v. Holbrook*, 4 Wend. (N. Y.) 377; *Barns v. Graham*, 4 Cow. (N. Y.) 452, 15 Am. Dec. 394. See *Vance v. Bloomer*, 20 Wend. (N. Y.) 197; *Coit v. Houston*, 3 Johns. Cas. (N. Y.) 243.

*North Carolina.*—*Mingus v. Pritchett*, 3 Dev. L. (14 N. Car.) 78.

*Pennsylvania.*—*Musselman v. Stoner*, 31 Pa. St. 265; *Roberts v. Beatty*, 2 P. & W. (Pa.) 7, 21 Am. Dec. 410; *Barr v. Myers*, 3 W. & S. (Pa.) 299.

*Wisconsin.*—*Mallory v. Lyman*, 4 Chand. (Wis.) 143.

See *Deel v. Berry*, 21 Tex. 463, 73 Am. Dec. 236.

**5. Appointment of Place by Obligor.**—*Howard v. Miner*, 20 Me. 325; *Aldrich v. Albee*, 1 Me. 120, 10 Am. Dec. 45; *Miles v. Roberts*, 34 N. H. 254; *Slingerland v. Morse*, 8 Johns. (N. Y.) 474; *Peck v. Hubbard*, 11 Vt. 612.

If a note is payable in personal property, to a party living out of the United States, and the place of payment is not named therein, it would seem that the debtor must ascertain from the creditor where he will receive the goods, or else must designate to the creditor where he will deliver the goods, and must make the tender accordingly. *Bixby v. Whitney*, 5 Me. 192.

Where, in an action of trover for the recovery of personalty, the property sued for consists of cumbrous articles, such as an engine and boiler and a cotton-gin, and the



*c.* WHEN NEITHER TIME NOR PLACE IS FIXED. — If neither the time nor the place for the delivery of specific articles is specified, so that they are deliverable on demand,<sup>1</sup> the general rule is that they are to be delivered at the place where they are at the time of the contract, and a tender there will be sufficient.<sup>2</sup>

*d.* WAIVER OF OBJECTION. — Where tender is made at a place other than that stipulated in the contract as the place of payment, and is refused except upon certain conditions, this constitutes a waiver of the right to have the tender at the place agreed on.<sup>3</sup>

**4. Medium of Tender** — *a.* GENERAL RULE. — In the absence of a special agreement defining the medium by which a debt is to be discharged,<sup>4</sup> a tender of payment, to be effective, whether the creditor accepts or refuses to accept, must be in money which is made legal tender in the state in which it is offered.<sup>5</sup>

*b.* BANKNOTES. — An offer of banknotes in discharge of a general indebtedness is not a good tender,<sup>6</sup> except, possibly, to the bank by which they were issued.<sup>7</sup>

*c.* POSTAL ORDERS. — A postal order is not available as a tender.<sup>8</sup>

*d.* STATE OR MUNICIPAL WARRANTS OR ORDERS. — A valid tender cannot be made in city orders<sup>9</sup> or in county orders.<sup>10</sup> And it has been held that a collector of taxes cannot tender a state auditor's warrant in payment of taxes collected.<sup>11</sup>

*e.* CHECKS. — A strictly good tender cannot be made by the offer of a check for the amount due,<sup>12</sup> even though the check may have been

plaintiff was a nonresident of the county in which the property was situate, a *bona fide* offer to deliver the property at any railroad station in the county which the plaintiff might select was held to constitute a proper tender. *Trammell v. Mallory*, 115 Ga. 748.

1. See the title DEMAND, vol. 9, p. 201.

**2. Place of Tendering Specific Articles When Neither Time nor Place Is Stated.** — *Bosworth v. Frankberger*, 15 Ill. 508; *Dunn v. Marston*, 34 Me. 379; *Miles v. Roberts*, 34 N. H. 254; *McKillip v. McKillip*, 8 Barb. (N. Y.) 552; *Bronson v. Gleason*, 7 Barb. (N. Y.) 472; *Vance v. Bloomer*, 20 Wend. (N. Y.) 196; *Goodwin v. Holbrook*, 4 Wend. (N. Y.) 380; *Lobdell v. Hopkins*, 5 Cow. (N. Y.) 518; *Rice v. Churchill*, 2 Den. (N. Y.) 145; *Barr v. Myers*, 3 W. & S. (Pa.) 295.

**3. Waiver of Objection to Place of Tender.** — *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. Rep. 286.

**4. General Rule as to Medium.** — If it is stipulated that a debt shall be paid in a particular kind of currency, tender of payment may be in that kind of currency. *Magraw v. McGlynn*, 26 Cal. 420. See the title PAYMENT, vol. 22, p. 541.

If a debt is to be paid in "currency," the tender of "stump tail" or depreciated currency is of no avail. *Webster v. Pierce*, 35 Ill. 158.

**5. Wade's Case**, 5 Coke 114; *Polgrass v. Oliver*, 2 Crompt. & J. 15; *Case of Mixed Moneys*, *Davies* 18; *Lang v. Waters*, 47 Ala. 624; *Martin v. Bott*, 17 Ind. App. 444; *Hart v. Flynn*, 8 Dana (Ky.) 190; *Hallowell, etc., Bank v. Howard*, 13 Mass. 235; *Wright v. Jacobs*, 61 Mo. 23; *Moody v. Mahurin*, 4 N. H. 296; *Shotwell v. Dennman*, 1 N. J. L. 202.

**Legal Tender Money.** — The discussion of what constitutes legal tender money will be found in other titles in this work. See the

titles MONEY, vol. 20, p. 837; PAYMENT, vol. 22, p. 538.

**Confederate Money.** — A tender in Confederate money has been held not to be a legal tender. *Phillips v. Gaston*, 37 Ga. 16; *Graves v. Hardesty*, 19 La. Ann. 186; *Love v. Johnson*, 72 N. Car. 415. As to the sufficiency of a tender of Confederate money in discharge of a contract payable in Confederate money, see the title PAYMENT, vol. 22, p. 544.

**6. Tender in Banknotes.** — *Grigby v. Oakes*, 2 B. & P. 526; *Martin v. Bott*, 17 Ind. App. 444; *Jones v. Mullinix*, 25 Iowa 198; *Hallowell, etc., Bank v. Howard*, 13 Mass. 235; *Moody v. Mahurin*, 4 N. H. 296; *Coxe v. State Bank*, 8 N. J. L. 172, 14 Am. Dec. 417; *Warren v. Mains*, 7 Johns. (N. Y.) 476; *Donaldson v. Benton*, 4 Dev. & B. L. (20 N. Car.) 435; *Cornell v. Green*, 10 S. & R. (Pa.) 14; *Lowry v. McGhee*, 8 Yerg. (Tenn.) 242. See the title BANKNOTES, vol. 3, p. 773.

**7.** See the title BANKNOTES, vol. 3, p. 779, and the following additional cases: *Keyes v. Jasper*, 5 Ill. 305; *Blount v. Windley*, 68 N. Car. 1, 12 Am. Rep. 616; *Northampton Bank v. Balliet*, 8 W. & S. (Pa.) 311, 42 Am. Dec. 297; *Ewing v. Anderson*, 3 Tenn. Ch. 364.

**8. Tender in Postal Orders.** — *Gordon v. Strange*, 1 Exch. 477.

**9. Tender in City Orders.** — *Helena v. Turner*, 36 Ark. 577; *Comstock v. Gage*, 91 Ill. 328; *Benson v. Carmel*, 8 Me. 110.

**10. Tender in County Orders.** — *Perry v. Colquitt*, 63 Ga. 311. *Contra*, *Howell v. Hogins*, 37 Ark. 110, holding them good in payment of taxes.

**11. Tender in State Warrants.** — *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 318.

**12. Tender in Checks.** — *Larsen v. Breene*, 12 Colo. 480; *Harding v. Commercial Loan Co.*, 84 Ill. 251; *Sloan v. Petrie*, 16 Ill. 262; *Collier*

certified.<sup>1</sup> And, of course, a mere offer to draw a check is of no effect as a tender.<sup>2</sup>

*f.* CERTIFICATES OF DEPOSIT. — In the absence of some special agreement, the offer of a bank certificate of deposit can have no effect as a tender.<sup>3</sup>

*g.* CREDITOR'S PROMISSORY NOTE. — A tender of the creditor's own promissory note then due is insufficient.<sup>4</sup>

*h.* WAIVER OF OBJECTION. — But while a strictly valid tender can only be made in money which has been made legal tender by law, the objection to the medium in which the tender is made may sometimes be waived by the creditor. Thus, if the debtor makes a tender of bank bills, which are current and good,<sup>5</sup> and the creditor makes no objection to receiving them on the ground that they are not legal tender, but refuses to accept them on some other ground, as that the tender is not of the right amount, the objection to the medium is deemed to be waived, and the tender is good.<sup>6</sup> If no objec-

*v. White*, 67 Miss. 133; *Te Poel v. Shutt*, 57 Neb. 592; *Grussy v. Schneider*, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 134, (Supm. Ct. Gen. T.) 55 How. Pr. (N. Y.) 188; *Martin v. Clover*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 638; *Block v. Garfil*, (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 821; *Poague v. Greenlee*, 22 Gratt. (Va.) 724; *Cady v. Case*, 11 Wash. 124; *Lewis v. Larson*, 45 Wis. 353.

But it has been held that where the maker of a note has on deposit with a company to which the note has been transferred, and which owns it at the time of tender, money nearly sufficient to pay the note, it is a good tender for the maker to tender his check for the amount on deposit, and a small sum in money sufficient, both together, to make the amount of the note. *Shipp v. Stacker*, 8 Mo. 145.

1. *People v. Hays*, 4 Cal. 127; *Larsen v. Breene*, 12 Colo. 480.

Where a certified check is tendered, and is afterwards deposited in court, the failure, pending the suit, of the bank on which it was drawn, does not relieve the party depositing it, from payment. *Larsen v. Breene*, 12 Colo. 480.

2. *Dunham v. Jackson*, 6 Wend. (N. Y.) 22. *Compare Link v. Mack*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 615.

3. **Tender in Certificates of Deposit.** — *Dougherty v. Hughes*, 3 Greene (Iowa) 92. See the titles CERTIFICATES OF DEPOSIT, vol. 5, p. 811; PAYMENT, vol. 22, p. 569.

4. **Tender of Claim Against Creditor.** — *Wilmarth v. Mountford*, 4 Wash. (U. S.) 79; *Allen v. Hartfield*, 76 Ill. 358; *Cary v. Bancroft*, 14 Pick. (Mass.) 315, 25 Am. Dec. 393; *Hughes v. Daniells*, 87 Mich. 190; *Barker v. Walbridge*, 14 Minn. 469; *Bellows v. Smith*, 9 N. H. 285. See *Searles v. Sadgrave*, 5 El. & Bl. 639, 85 E. C. L. 639; *Williams v. Dooley*, 53 Ga. 71; *Foley v. Mason*, 6 Md. 37; *Borden v. Sackett*, 113 Mass. 214; *Dehon v. Stetson*, 9 Met. (Mass.) 341; *Bell v. Ballance*, 1 Dev. L. (12 N. Car.) 391; *Thorp v. Wagefarth*, 56 Pa. St. 82, 93 Am. Dec. 789. See the title PAYMENT, vol. 22, p. 576.

5. **Waiver of Objection to Banknotes.** — *Ward v. Smith*, 7 Wall. (U. S.) 447; *Cockrill v. Kirkpatrick*, 9 Mo. 698.

6. *England.* — *Wright v. Reed*, 3 T. R. 554; *Owenson v. Morse*, 7 T. R. 60; *Grigby v. Oakes*, 2 B. & P. 526; *Poglass v. Oliver*, 2 Crompt. & J. 15; *Gillard v. Wise*, 5 B. & C.

134, 11 E. C. L. 177; *Alexander v. Brown*, 1 C. & P. 288, 11 E. C. L. 395; *Brown v. Saul*, 4 Esp. 267; *Lockyer v. Jones*, Peake 239, note; *Tiley v. Courtier*, 2 Crompt. & J. 16, note c.

*United States.* — *U. S. Bank v. Georgia Bank*, 10 Wheat. (U. S.) 333. See also *McFarland v. Gwin*, 3 How. (U. S.) 717; *Griffin v. Thompson*, 2 How. (U. S.) 244.

*Alabama.* — *Seawell v. Henry*, 6 Ala. 226.

*California.* — *People v. Mayhew*, 26 Cal. 656.

*Delaware.* — *Wood v. Bangs*, 2 Penn. (Del.) 435; *Corbit v. Smyrna Bank*, 2 Harr. (Del.) 235, 30 Am. Dec. 635.

*Florida.* — *Spann v. Baltzell*, 1 Fla. 301, 46 Am. Dec. 346.

*Illinois.* — *New Hope Delaware Bridge Co. v. Perry*, 11 Ill. 467, 52 Am. Dec. 452; *Keyes v. Jasper*, 5 Ill. 305. See *Chamblin v. Blair*, 58 Ill. 385; *People v. Riggs*, 56 Ill. 483.

*Maine.* — *Hoyt v. Byrnes*, 11 Me. 475.

*Maryland.* — *Hartsock v. Mort*, 76 Md. 281; *Towson v. Havre-de-Grace Bank*, 6 Har. & J. (Md.) 53, 14 Am. Dec. 254.

*Massachusetts.* — *Hallowell, etc., Bank v. Howard*, 13 Mass. 235; *Snow v. Perry*, 9 Pick. (Mass.) 539.

*Michigan.* — *Koehler v. Buhl*, 94 Mich. 496; *Beebe v. Knapp*, 28 Mich. 70; *Lacy v. Wilson*, 24 Mich. 479; *Fosdick v. Van Huse*, 21 Mich. 576; *Welch v. Frost*, 1 Mich. 30, 48 Am. Dec. 692.

*Missouri.* — *Cockrill v. Kirkpatrick*, 9 Mo. 697; *Williams v. Rorer*, 7 Mo. 556.

*New Hampshire.* — *Brown v. Simons*, 44 N. H. 475; *Cummings v. Putnam*, 19 N. H. 569. *Contra*, *Moody v. Mahurin*, 4 N. H. 296.

*New York.* — *Bristol v. Mente*, 79 N. Y. App. Div. 67.

*Ohio.* — *Wheeler v. Knaggs*, 8 Ohio 169; *Jennings v. Mendenhall*, 7 Ohio St. 257.

*Pennsylvania.* — *Brown v. Dysinger*, 1 Rawle (Pa.) 408.

*South Carolina.* — *Wood v. Babb*, 16 S. Car. 427.

*Tennessee.* — *Rogers v. Rogers*, (Tenn. Ch. 1895) 35 S. W. Rep. 890; *Cooley v. Weeks*, 10 Yerg. (Tenn.) 142; *Lowry v. M'Ghee*, 8 Yerg. (Tenn.) 243; *Ball v. Stanley*, 5 Yerg. (Tenn.) 199, 26 Am. Dec. 263; *Ewing v. Anderson*, 3 Tenn. Ch. 364; *McDowell v. Keller*, 4 Coldw. (Tenn.) 266; *Noe v. Hodges*, 3 Humph. (Tenn.) 162.

See *Dougherty v. Hughes*, 3 Greene (Iowa)

tion is made on the ground that it is not lawful money, a certificate of deposit is a sufficient tender.<sup>1</sup> And if a check is tendered by a debtor who has sufficient money in bank to pay it, and the creditor refuses to receive it on some other ground than that it is a check, the tender is valid.<sup>2</sup> But there is no waiver of the objection that a check is not a good tender if there is an objection to the form of the check.<sup>3</sup> And perhaps a bare refusal to receive a check, without stating any grounds for the refusal, will not constitute a waiver.<sup>4</sup>

i. **ELECTION TO PAY IN MONEY OR PROPERTY.** — Where the debtor has the election to pay either money or property, if he fails to make tender on the day fixed for payment, he thereby loses his election, and the obligee has the right to demand money.<sup>5</sup>

5. **Manner of Tender** — a. **OF MONEY** — (1) *Offer of Payment.* — In order that there may be a valid tender there must be an offer of payment.<sup>6</sup> An offer of performance, to constitute a valid tender, "should be unequivocal, and reasonably capable of being understood by the other party as a *bona fide* tender of the requisite thing, act, or service."<sup>7</sup> An offer to buy a mortgage

92. See also *Prather v. State Bank*, 3 Ind. 356; *Armstrong v. Scotten*, 29 Ind. 495.

If before the day of payment the party to whom payment is due agrees to accept bank bills, it is a waiver of a tender in gold and silver, and the bank bills having been tendered, it is competent evidence to support an allegation of tender. *Warren v. Mains*, 7 Johns. (N. Y.) 476.

1. **Waiver of Objection to Certificates of Deposit.** — *Gradle v. Warner*, 140 Ill. 123.

2. **Waiver of Objection to Checks** — *England.* — *Jones v. Arthur*, 8 Dowl. 442, 4 Jur. 859.  
*California.* — *People v. Hays*, 4 Cal. 127.  
*Colorado.* — *Larsen v. Breene*, 12 Colo. 480.  
*District of Columbia.* — *Dale v. Richards*, 21 D. C. 312, 21 Wash. L. Rep. 86.

*Illinois.* — *Sloan v. Petrie*, 16 Ill. 262.  
*Maryland.* — *McGrath v. Gegner*, 77 Md. 331, 39 Am. St. Rep. 415; *Bonaparte v. Thayer*, 95 Md. 548.

*Michigan.* — *Browning v. Crouse*, 40 Mich. 342.

*Mississippi.* — *Collier v. White*, 67 Miss. 133.  
*Missouri.* — *Henderson v. Cass County*, 107 Mo. 50; *Walsh v. St. Louis Exposition, etc.*, Assoc., 101 Mo. 534; *Beckham v. Puckett*, 88 Mo. App. 636; *Raymond v. McKinney*, 58 Mo. App. 303.

*Nebraska.* — *Ricketts v. Buckstaff*, 64 Neb. 851.

*New York.* — *Mitchell v. Vermont Copper Min. Co.*, 67 N. Y. 280; *Becker v. Boon*, 61 N. Y. 317; *Duffy v. O'Donovan*, 46 N. Y. 223; *Wright v. Robinson*, 84 Hun (N. Y.) 172.

*Ohio.* — *Jennings v. Mendenhall*, 7 Ohio St. 257.

*Pennsylvania.* — *Pershing v. Feinberg*, 203 Pa. St. 144.

It is too late, after the final decree, to object that a tender was made by check. *Bradford v. Foster*, 87 Tenn. 4.

While the debtor was in the act of drawing his check for the amount due, he was interrupted by the creditor with an inquiry as to the amount of the check, and a dispute arose as to the amount due. The creditor finally declared that he would not accept the amount offered. It was held that there was a sufficient tender. *Link v. Mack*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 615.

3. *Murphy v. Gold, etc.*, Tel. Co., (N. Y. City Ct. Tr. T.) 3 N. Y. Supp. 804, wherein it was held that there was no valid tender when a check payable to a partnership was tendered to one of the firm, who refused to take it unless made payable to his own order.

Tender was made in a check and was objected to on the ground that it was not certified. The debtor, with the creditor's consent, thereupon withdrew it to get it certified. In about two hours he returned with the check certified, when the creditor objected to receiving it on the ground that the hour for performing the contract had passed. It was held that this objection could not avail. *Duffy v. O'Donovan*, 46 N. Y. 223.

4. *Jennings v. Mendenhall*, 7 Ohio St. 257. See *Jones v. Arthur*, 8 Dowl. 442.

5. **Loss of Right to Pay in Property.** — *Reed v. Fleming*, 102 Ill. App. 668; *Farmers' L. & T. Co. v. Canada, etc.*, R. Co., 127 Ind. 250; *Tranter v. Hibbard*, 108 Ky. 265; *Crowl v. Goodenberger*, 112 Mich. 686; *Roberts v. Beatty*, 2 P. & W. (Pa.) 63, 21 Am. Dec. 410. See the title **PAYMENT**, vol. 22, p. 543, note 7.

6. **Offer to Perform.** — *Hamilton v. Finnegan*, 117 Iowa 623. Merely giving notice of an intended tender is of no avail. *Stone v. Billings*, 167 Ill. 170, affirming 63 Ill. App. 371.

A simple inquiry as to whether a party will accept the money can have no effect as a tender. *Steele v. Biggs*, 22 Ill. 643; *Ladd v. Patten*, 1 Cranch (C. C.) 263.

Bringing money into court for the creditor's use, without first offering it to him, is not a sufficient tender. *Phoenix Ins. Co. v. Overman*, 21 Ind. App. 516; *Hornby v. Cramer*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 490.

Where the debtor placed some money on a table in front of the creditor with a request for an extension of time, and on the request being granted took the money away with him, it was held that there was not a tender. *McInerney v. Lindsay*, 97 Mich. 238.

7. *Selby v. Hurd*, 51 Mich. 1.

If a debtor, with the money in his hand, goes to the creditor and asks if he has a receipt stamp, and on being answered in the negative does not offer the money to him, there is no tender. *Ryder v. Townsend*, 7 Dowl. & R. 119, 16 E. C. L. 272.



or deed of trust and notes given as security for the principal debt is not a tender of the amount due.<sup>1</sup>

(2) *Actual Production*—(a) *Necessity of.*—By the Common Law, to constitute a valid tender of money, there must, in the absence of some act or condition which amounts to a waiver,<sup>2</sup> be something more than a mere readiness and willingness to pay, even though expressed;<sup>3</sup> there must be an actual production of the money.<sup>4</sup>

1. *Magnusson v. Williams*, 111 Ill. 450; *Cochran v. Jackman*, (Ky. 1900) 56 S. W. Rep. 507; *Proctor v. Robinson*, 35 Mich. 284; *Whittaker v. Belvidere Roller Mill Co.*, 55 N. J. Eq. 674. See *Chielovich v. Krauss*, (Cal. 1886) 11 Pac. Rep. 781.

A tender of the amount of a senior mortgage by a subsequent incumbrancer on condition of receiving an assignment of the mortgage is of no effect. *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553, 26 Am. Rep. 627; *Day v. Strong*, 29 Hun (N. Y.) 505.

2. *Waiver of Actual Production.*—The question as to what constitutes a waiver of actual tender has been discussed in a former part of this article. See *supra*, this title, *Necessity of Tender*—*Waiver of Tender*.

3. *Readiness and Willingness to Pay*—*United States.*—*Sheredine v. Gaul*, 2 Dall. (U. S.) 190; *Ladd v. Patten*, 1 Cranch (C. C.) 263.

*Georgia.*—*Angier v. Equitable Bldg., etc., Assoc.*, 109 Ga. 625.

*Illinois.*—*Liebbrandt v. Myron Lodge No. One*, 61 Ill. 81.

*Indiana.*—*Schrader v. Wolflein*, 21 Ind. 238.

*Iowa.*—*Myers v. Byington*, 34 Iowa 205; *Eastman v. District Tp.*, 21 Iowa 590.

*Louisiana.*—*Adams v. Friedlander*, 37 La. Ann. 350; *McStea v. Warren*, 26 La. Ann. 455; *Hughes v. Patterson*, 23 La. Ann. 680; *Thiel v. Conrad*, 21 La. Ann. 214; *Bacon v. Smith*, 2 La. Ann. 441, 46 Am. Dec. 549.

*Maine.*—*Brown v. Gilmore*, 8 Me. 107, 22 Am. Dec. 223.

*Massachusetts.*—*Breed v. Hurd*, 6 Pick. (Mass.) 356.

*Michigan.*—*Chase v. Welsh*, 45 Mich. 345.

*Minnesota.*—*Deering Harvester Co. v. Hamilton*, 80 Minn. 162.

*New Hampshire.*—*Fuller v. Little*, 7 N. H. 535; *Sargent v. Graham*, 5 N. H. 440, 22 Am. Dec. 469.

*New York.*—*Bakeman v. Pooler*, 15 Wend. (N. Y.) 637.

*Ohio.*—*Wheeler v. Knaggs*, 8 Ohio 169.

*Oregon.*—*Smith v. Foster*, 5 Oregon 44.

*Pennsylvania.*—*M'Intyre v. Carver*, 2 W. & S. (Pa.) 392, 37 Am. Dec. 519.

*Texas.*—*Rogers v. People's Bldg., etc., Assoc.*, (Tex. Civ. App. 1900) 55 S. W. Rep. 383.

See *Bowen v. Holly*, 38 Vt. 574.

Where an antecedent tender is required, a written communication demanding the cancellation of a contract, and expressing a willingness to return what had been paid, when not answered or expressly declined, is not a substitute for a tender, and does not constitute an excuse for not making it. *Adams v. Friedlander*, 37 La. Ann. 350.

A mere offer to the plaintiff of the amount due, made by the defendant's counsel in the

progress of the argument of the case, is not a valid tender. *Keys v. Roder*, 1 Head (Tenn.) 19.

4. *Actual Production Necessary*—*England.*—*Kinnaird v. Trollope*, 42 Ch. D. 618, 58 L. J. Ch. 556; *Thomas v. Evans*, 10 East 101; *Finch v. Brook*, 1 Bing. N. Cas. 253, 27 E. C. L. 378; *Douglas v. Patrick*, 3 T. R. 683; *Ryder v. Townsend*, 7 Dowl. & R. 119, 16 E. C. L. 272; *Sucklinge v. Coney*, Noy. 74.

*Canada.*—*Middleton v. Scott*, 3 Ont. L. Rep. 26.

*United States.*—*Sheredine v. Gaul*, 2 Dall. (U. S.) 190.

*Alabama.*—*Camp v. Simon*, 34 Ala. 126.

*Colorado.*—*Winne v. Colorado Springs Co.*, 3 Colo. 155.

*Georgia.*—*Angier v. Equitable Bldg., etc., Assoc.*, 109 Ga. 625.

*Illinois.*—*Liebbrandt v. Myron Lodge No. e*, 61 Ill. 81; *Steele v. Biggs*, 22 Ill. 643.

*Indiana.*—*Storey v. Krewson*, 55 Ind. 397, 23 Am. Rep. 668; *Schrader v. Wolflein*, 21 Ind. 238.

*Iowa.*—*Holt v. Brown*, 63 Iowa 319; *Jones v. Mullinix*, 25 Iowa 198; *Eastman v. District Tp.*, 21 Iowa 590; *Casady v. Bosler*, 11 Iowa 242.

*Louisiana.*—*Walker v. Brown*, 12 La. Ann. 266; *Bacon v. Smith*, 2 La. Ann. 441, 46 Am. Dec. 549.

*Maine.*—*Brown v. Gilmore*, 8 Me. 107, 22 Am. Dec. 223.

*Maryland.*—*Fridge v. State*, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463.

*Massachusetts.*—*Irvin v. Gregory*, 13 Gray (Mass.) 218; *Breed v. Hurd*, 6 Pick. (Mass.) 356.

*Minnesota.*—*Deering Harvester Co. v. Hamilton*, 80 Minn. 162.

*Mississippi.*—*Harmon v. Magee*, 57 Miss. 410.

*Missouri.*—*Berthold v. Reyburn*, 37 Mo. 586.

*New Hampshire.*—*Fuller v. Little*, 7 N. H. 535; *Sargent v. Graham*, 5 N. H. 440, 22 Am. Dec. 469.

*New York.*—*Eddy v. Davis*, 116 N. Y. 251; *Strong v. Blake*, 46 Barb. (N. Y.) 227; *Holmes v. Holmes*, 12 Barb. (N. Y.) 137; *Bakeman v. Pooler*, 15 Wend. (N. Y.) 637.

*South Carolina.*—*Eastland v. Longshorn*, 1 Nott & M. (S. Car.) 194; *McNair v. Moore*, 55 S. Car. 435, 74 Am. St. Rep. 760.

*Texas.*—*Rogers v. People's Bldg., etc., Assoc.*, (Tex. Civ. App. 1900) 55 S. W. Rep. 383.

*Vermont.*—*Draper v. Hitt*, 43 Vt. 439, 5 Am. Rep. 292; *Bowen v. Holly*, 38 Vt. 574; *Morton v. Wells*, 1 Tyler (Vt.) 384.

*West Virginia.*—*Shank v. Groff*, 45 W. Va. 543.

*Wisconsin.*—*Hunter v. Warner*, 1 Wis. 141.



**In Admiralty.** — But it seems that the same strictness does not exist as to tenders in admiralty as at common law, and that "any real offer to pay, by one then ready and able to pay, is treated as a valid tender, without inquiring whether the money was produced or not, or in what form."<sup>1</sup>

(b) **Sufficiency of.** — To constitute a sufficient production within the rule requiring an actual production, the money should be placed within the power of the person to whom the tender is to be made, so that he may, if he wishes, reduce it to possession by merely reaching out and laying hold of the money.<sup>2</sup> Hence, it is, of course, clear that it is not enough that the debtor has the money in his pocket, and informs his creditor that he is ready to pay; there must be an actual offer and presentation of the money, so that it can be taken by the creditor.<sup>3</sup> And shaking an envelope, which contains the money, at the creditor, is not a sufficient tender.<sup>4</sup> But the fact that the money tendered is contained in bags or purses which the creditor may open if he pleases, is immaterial.<sup>5</sup> If, however, the money is in a bag which the debtor retains under his arm, there is no tender.<sup>6</sup>

(3) **Counting Money.** — If there is an actual production of the proper amount the tender is sufficient, even though the debtor does not count out the money,<sup>7</sup> especially if he tells the creditor the amount offered.<sup>8</sup> But it would seem that if the proper amount is offered, so that the money may be taken and counted, it is not necessary to state the amount.<sup>9</sup>

(4) **Dividing Money with Reference to Each of Several Claims.** — Where separate claims are held by the same person, the tender need not be divided to meet each claim.<sup>10</sup>

(5) **Deposit of Funds in Bank to Meet Obligation.** — When a negotiable instrument or other obligation is made payable at a specified bank, and funds are deposited in the bank and kept there to meet the particular demand, and set apart for that special purpose, the deposit is equivalent to a tender.<sup>11</sup>

**b. OF SPECIFIC ARTICLES** — (1) **Offer.** — As in the case of tender of money, when performance consists in the delivery of specific articles, a mere

See the titles *DISTRESS*, vol. 9, p. 627; *INTEREST*, vol. 16, p. 1067.

An offer to pay a specified sum of money, made by letter, is not a tender. *Angier v. Equitable Bldg., etc., Assoc.*, 109 Ga. 625.

1. **Same** — **In Admiralty.** — 2 Pars. Shipp. & Adm. 484. See *Boulton v. Moore*, 14 Fed. Rep. 922; *Dedekam v. Vose*, 3 Blatchf. (U. S.) 44.

2. **Generally as to Sufficiency of Production.** — *Sands v. Lyon*, 18 Conn. 18; *Hartsock v. Mort*, 76 Md. 281; *Curtiss v. Greenbanks*, 24 Vt. 536; *Lohman v. Crouch*, 19 Gratt. (Va.) 331.

3. **Retaining Money in Pocket.** — *Thomas v. Evans*, 10 East 101; *Douglas v. Patrick*, 3 T. R. 683; *Finch v. Brook*, 1 Bing. N. Cas. 253, 27 E. C. L. 378; *Thorne v. Mosher*, 20 N. J. Eq. 257; *Bakeman v. Pooler*, 15 Wend. (N. Y.) 637; *Appleton v. Donaldson*, 3 Pa. St. 381.

4. **Showing Envelope Containing Money.** — *Strong v. Blake*, 46 Barb. (N. Y.) 227.

5. **Delivery of Money in Bag or Purse.** — *Wade's Case*, 5 Coke 114; *Conway v. Case*, 22 Ill. 127; *Behaly v. Hatch*, Walk. (Miss.) 369, 12 Am. Dec. 570.

The production of a handkerchief containing the proper amount, with a statement of the amount and kind of money, is a good tender. *Davis v. Stonestreet*, 4 Ind. 101.

6. *Sucklinge v. Coney*, Noy 74.

7. *Breed v. Hurd*, 6 Pick. (Mass.) 356; *Behaly v. Hatch*, Walk. (Miss.) 369, 12 Am.

Dec. 570; *Wheeler v. Knaggs*, 8 Ohio 169; *King v. King*, 90 Va. 177. See *Southworth v. Smith*, 7 Cush. (Mass.) 393.

A tender by producing a purse, containing the necessary amount, and offering to pay if the creditor will go into a neighboring public house, has been held good. *Read v. Goldring*, 2 M. & S. 86.

8. A person who made a tender had two bank notes twisted in his hand, inclosing sovereigns and silver, and making together the precise sum intended to be paid. He told the creditor what the parcel consisted of, but did not open it before him; and Best, C. J., said: "I am of opinion this is a sufficient tender. If the witness had not mentioned the amount I think it would not have done." *Alexander v. Brown*, 1 C. & P. 288, 11 E. C. L. 395.

9. *State v. Spicer*, 4 Houst. (Del.) 100. But see *Knight v. Abbott*, 30 Vt. 577.

10. *Johnson v. Cranage*, 45 Mich. 14; *Thetford v. Hubbard*, 22 Vt. 440.

11. **Tender by Depositing Money in Bank.** — *Wallace v. McConnell*, 13 Pet. (U. S.) 136; *Myers v. Byington*, 34 Iowa 205; *Carley v. Vance*, 17 Mass. 389; *Denison v. Masons' Fraternal Acc. Assoc.*, 59 N. Y. App. Div. 294; *Riley v. Cheesman*, 75 Hun (N. Y.) 387; *Hill v. Place*, (N. Y. Super. Ct. Spec. T.) 5 Abb. Pr. N. S. (N. Y.) 18, 7 Robt. (N. Y.) 389; *Miller v. New Orleans Bank*, 5 Whart. (Pa.) 503, 34 Am. Dec. 571.

ability and readiness to perform is insufficient to constitute a tender; there must be an express offer of the thing to be delivered.<sup>1</sup>

(2) *Production* — (a) *In General*. — And, in the case of such articles as can easily be carried from place to place, the rule as to the production necessary is practically the same as in the case of the tender of money, and, to constitute a valid tender, there must, in addition to the offer, be an actual production of the articles so that the other party may obtain possession by merely reaching out and taking them.<sup>2</sup> But in the case of bulky and cumbersome articles a manual delivery, being impracticable, is not required.<sup>3</sup>

(b) *Setting Apart Goods*. — But if the chattels are intermixed with other goods of a like kind, they must usually be separated and set apart so that they may be identified.<sup>4</sup> There is, however, some authority to the effect that when the chattels, though intermixed with others of a like kind, can be ascertained by weight, measure, or number, separation is not necessary, since, there being no difference in value, it cannot matter what particular part or article is received.<sup>5</sup> Perhaps this would be a sufficient tender under a contract of sale so as to entitle the vendor to recover damages for nonacceptance, but it is doubtful if it is a sufficient tender in most cases, especially in the case of a tender under a contract to pay a debt in specific property, which has the effect of extinguishing the debt and vesting the title to the property in the creditor.

(c) *Opportunity to Inspect*. — A tender must be made in such a manner and under such circumstances that the party entitled under the contract may have

**1. Offer Necessary** — *England*. — *Haldane v. Johnson*, 8 Exch. 689; *Cranley v. Hillary*, 2 M. & S. 120.

*Alabama*. — *Camp v. Simon*, 34 Ala. 126.

*Illinois*. — *Steele v. Biggs*, 22 Ill. 643.

*Iowa*. — *Eastman v. District Tp.*, 21 Iowa 590.

*Kentucky*. — *Adam Roth Grocery Co. v. Hopkins*, (Ky. 1895) 29 S. W. Rep. 293; *Littell v. Nichols*, Hard. (Ky.) 71.

*Maine*. — *Wyman v. Winslow*, 11 Me. 398, 26 Am. Dec. 546.

*New York*. — *Newton v. Galbraith*, 5 Johns. (N. Y.) 119; *McIntire v. Clark*, 7 Wend. (N. Y.) 330.

*Pennsylvania*. — *Pennsylvania L. Ins. Co. v. Dovey*, 64 Pa. St. 260; *Williams v. Bentley*, 27 Pa. St. 294; *Sheredine v. Gaul*, 2 Dall. (Pa.) 190.

See *Smith v. Richardson*, 11 Rob. (La.) 520.

**2. Sufficiency of the Production**. — *McPherson v. Gale*, 40 Ill. 368; *Henly v. Streeter*, 5 Ind. 207; *Johnson v. Mulvy*, 51 N. Y. 634; *Barr v. Myers*, 3 W. & S. (Pa.) 299. See the title VENDOR AND PURCHASER.

The text deals only with the manner of making the tender. It is not meant that the person making the tender of goods must always, as in the case of a tender of money, seek out the person entitled to the goods. When delivery is to be made under a contract of sale the general rule is otherwise as to the place of tender. See the title SALES, vol. 24, p. 1069. The question as to the place where tender is to be made has already been discussed. See *supra*, this section, *Place of Tender*.

**3. Kauffman v. Raeder**, 108 Fed. Rep. 171, 47 C. C. A. 278. See the title SALES, vol. 24, p. 1068.

**4. Goods Must Be Separated** — *Connecticut*. — *Smith v. Loomis*, 7 Conn. 110.

*Indiana*. — *Dorman v. Elder*, 3 Blackf. (Ind.) 490.

*Iowa*. — *Hamilton v. Finnegan*, 117 Iowa 623; *Games v. Manning*, 2 Greene (Iowa) 254.

*Maine*. — *Bates v. Churchill*, 32 Me. 31; *Leballister v. Nash*, 24 Me. 316; *Wyman v. Winslow*, 11 Me. 398, 26 Am. Dec. 542; *Veazy v. Harmony*, 7 Me. 91.

*Massachusetts*. — *Clark v. Baker*, 11 Met. (Mass.) 186, 45 Am. Dec. 199.

*Mississippi*. — *Bates v. Bates*, Walk. (Miss.) 402, 12 Am. Dec. 572.

*New York*. — *Croninger v. Crocker*, 62 N. Y. 151; *Flint, etc., Co. v. Standard Rope, etc., Co.*, 52 N. Y. App. Div. 459; *Barns v. Graham*, 4 Cow. (N. Y.) 452, 15 Am. Dec. 394.

*Texas*. — *Cherry v. Newby*, 11 Tex. 457; *Deweese v. Lockhart*, 1 Tex. 535.

*Vermont*. — *Gilman v. Moore*, 14 Vt. 457; *McConnel v. Hall, Brayt. (Vt.)* 223.

**5. Separation Held Unnecessary**. — *Armstrong v. Tait*, 8 Ala. 635, 42 Am. Dec. 656, where the contract was for the delivery of a specified quantity of "corn-shucks;" *Hughes v. Prewitt*, 5 Tex. 264, where the contract was for the delivery of a given quantity of corn; *Ganson v. Madigan*, 9 Wis. 146, where the contract was for the delivery of a reaping machine of a particular style.

And where an article is uniform in bulk, and it is no burden to the purchaser of a portion, to separate such portion from the mass, a tender of too much, from which the purchaser is to take the amount of his purchase, is good. Thus, where a ship's hold contained five hundred and eighty-two hectolitres of nuts of uniform quality, and the nuts were shipped as ordered, except as to the additional quantity, and it was a part of the contract of sale that the purchaser was to furnish bags, a tender of four hundred hectolitres, to be taken from the ship's hold, is good. *Brownfield v. Johnson*, 128 Pa. St. 254. But in that case it appeared that it was common to ship small orders of nuts in common bulk, in this manner.

an opportunity of seeing that what is presented for his acceptance is really what he stipulated to have.<sup>1</sup>

*c. STATUTORY OFFER IN WRITING.* — By statute in some of the *United States*, an offer in writing to pay a particular sum of money or deliver a particular thing takes the place of, and is equivalent to, the common-law tender.<sup>2</sup> These statutes merely dispense with the actual production of the thing due. In other respects the rules of the common law prevail.<sup>3</sup> And they do not prevent the making of a common-law tender.<sup>4</sup>

*d. GOOD FAITH.* — A tender must be made in good faith, and if it is shown that the party making the tender did not intend to deliver the money or property if the tender had been accepted, the tender is invalid.<sup>5</sup>

**6. Requirement that Tender Be Unconditional** — *a. GENERAL RULE.* — It is often broadly stated that a tender must be absolute and without condition.<sup>6</sup> The rule may be more accurately stated as follows: A tender, to be good, must be unaccompanied by any condition to which the creditor has a right to object,<sup>7</sup> but it is not invalidated by being coupled with a condition upon

1. *Per Rolfe, B.*, in *Startup v. Macdonald*, 6 M. & G. 610, 46 E. C. L. 610; *Isherwood v. Whitmore*, 10 M. & W. 757, 11 M. & W. 347.

2. **Statutes Authorizing Written Tender.** — See the following cases:

*California.* — *Colton v. Oakland Sav. Bank*, 137 Cal. 376; *Green v. Barney*, (Cal. 1894) 36 Pac. Rep. 1026; *Latimer v. Capay Valley Land Co.*, 137 Cal. 286; *Herberger v. Husman*, 90 Cal. 583.

*Iowa.* — *Hamilton v. Finnegan*, 117 Iowa 623; *Loughridge v. Iowa L., etc., Assoc.*, 84 Iowa 141; *Holt v. Brown*, 63 Iowa 319.

*Oregon.* — *Halladay v. Halladay*, 13 Oregon 523; *Ladd v. Mason*, 10 Oregon 308; *McCourt v. Johns*, 33 Oregon 561.

*Utah.* — *Hyams v. Bamberger*, 10 Utah 3.

3. *Kuhns v. Chicago, etc., R. Co.*, 65 Iowa 528; *Shugart v. Pattee*, 37 Iowa 422; *Lilienthal v. McCormick*, (C. C. A.) 117 Fed. Rep. 89, construing the *Oregon* statute.

4. *Casady v. Bosler*, 11 Iowa 242.

5. *Nantz v. Lober*, 1 Duv. (Ky.) 304; *Potts v. Plaisted*, 30 Mich. 149; *McPherson v. Wiswell*, 16 Neb. 625; *Fisk v. Holden*, 17 Tex. 408.

**6. Tender Must Be Unconditional** — *England.* — *Robinson v. Cook*, 6 Taunt. 336, 1 E. C. L. 404; *Betterbee v. Davis*, 3 Campb. 70; *Hastings v. Thorley*, 8 C. & P. 573, 34 E. C. L. 530.

*United States.* — *Perkins v. Beck*, 4 Cranch (C. C.) 68; *Ladd v. Patten*, 1 Cranch (C. C.) 263; *Hepburn v. Auld*, 1 Cranch (U. S.) 321; *Lilienthal v. McCormick*, (C. C. A.) 117 Fed. Rep. 89; *Beardsley v. Beardsley*, (C. C. A.) 86 Fed. Rep. 16; *Coghlan v. South Carolina R. Co.*, 32 Fed. Rep. 316.

*Alabama.* — *Odum v. Rutledge, etc., R. Co.*, 94 Ala. 488.

*California.* — *Jones v. Shuey*, (Cal. 1895) 40 Pac. Rep. 17; *Perkins v. Maier, etc., Brewery*, 134 Cal. 372.

*Colorado.* — *Butler v. Hinckley*, 17 Colo. 523.

*Connecticut.* — *Sanford v. Bulkley*, 30 Conn. 344.

*Georgia.* — *Cuthran v. Scanlan*, 34 Ga. 555.

*Illinois.* — *Pulsifer v. Shepard*, 36 Ill. 513.

*Indiana.* — *Rose v. Duncan*, 49 Ind. 269.

*Kansas.* — *Latham v. Hartford*, 27 Kan. 249; *Shaw v. Sears*, 3 Kan. 242.

*Kentucky.* — *Nantz v. Lober*, 1 Duv. (Ky.)

304.

*Maine.* — *Brown v. Gilmore*, 8 Me. 107, 22 Am. Dec. 223.

*Massachusetts.* — *Thayer v. Brackett*, 12 Mass. 450; *Richardson v. Boston Chemical Laboratory*, 9 Met. (Mass.) 42; *Loring v. Cooke*, 3 Pick. (Mass.) 48.

*Mississippi.* — *Bacon v. Conn, Smed. & M. Ch. (Miss.)* 348.

*Missouri.* — *Henderson v. Cass County*, 107 Mo. 50; *Berthold v. Reyburn*, 37 Mo. 586; *Kitchen v. Clark*, 1 Mo. App. 430.

*Nebraska.* — *McEldon v. Patton*, (Neb. 1903) 93 N. W. Rep. 938; *Schrandt v. Young*, 62 Neb. 254.

*New Hampshire.* — *Buffum v. Buffum*, 11 N. H. 451; *Fuller v. Little*, 7 N. H. 535; *Robinson v. Batchelder*, 4 N. H. 40.

*New York.* — *Currie v. White*, 45 N. Y. 843; *Strong v. Blake*, 46 Barb. (N. Y.) 227; *Holmes v. Holmes*, 12 Barb. (N. Y.) 137; *Brooklyn Bank v. De Grauw*, 23 Wend. (N. Y.) 342, 35 Am. Dec. 569; *Wood v. Hitchcock*, 20 Wend. (N. Y.) 47; *Bakeman v. Pooler*, 15 Wend. (N. Y.) 637; *Cass v. Higenbotam*, 27 Hun (N. Y.) 406.

*Pennsylvania.* — *Wagenblast v. M'Kean*, 2 Grant Cas. (Pa.) 393.

*South Carolina.* — *Smith v. Keels*, 15 Rich. L. (S. Car.) 318; *Eastland v. Longshorn*, 1 Nott & M. (S. Car.) 194.

*South Dakota.* — *Brace v. Doble*, 3 S. Dak.

110.

*Texas.* — *Flake v. Nuse*, 51 Tex. 98.

*Vermont.* — *Holton v. Brown*, 18 Vt. 224, 46 Am. Dec. 148; *Morton v. Wells*, 1 Tyler (Vt.) 384.

*Wisconsin.* — *Elderkin v. Fellows*, 60 Wis. 339; *Hunter v. Warner*, 1 Wis. 141.

**7. Objectionable Conditions.** — *Bevans v. Rees*, 5 M. & W. 309; *In re Steam Stoker Co., L. R.* 19 Eq. 416, 44 L. J. Ch. 386; *Gammon v. Stone*, 1 Ves. 339; *Odum v. Rutledge, etc., R. Co.*, 94 Ala. 488; *Hall v. Norwalk F. Ins. Co.*, 57 Conn. 105; *Glos v. Goodrich*, 175 Ill. 20; *Rose v. Duncan*, 49 Ind. 269; *Shuck v. Chicago, etc., R. Co.*, 73 Iowa 333; *Loring v. Cooke*, 3 Pick. (Mass.) 48; *Moore v. Norman*, 52 Minn. 83, 38 Am. St. Rep. 526; *Wheelock v. Tanner*, 39 N. Y. 481; *In re Wallace*, (Surrogate Ct.) 5 N. Y. Supp. 31; *Redfern v. Ullery*, 5 Ohio Cir. Dec. 435, 12 Ohio Cir. Ct. 87.



which the debtor has a right to insist, and to which the creditor cannot reasonably object.<sup>1</sup> A tender may certainly be coupled with words explanatory of the transaction, if they impose no condition.<sup>2</sup>

*b. DEMANDING ACKNOWLEDGMENT OF PAYMENT IN FULL.*—Since a person to whom a tender of less than the amount due is made upon condition that it be in full of the liability, may prejudice his right to recover any balance due by accepting the tender,<sup>3</sup> a tender which is made subject to the condition that if the creditor takes the amount offered, it is to be in full payment of his claim against the debtor, is invalid.<sup>4</sup> Thus, a tender of money as "all that was due,"<sup>5</sup> as "balance account railing,"<sup>6</sup> as "for the claim,"<sup>7</sup> as "a settlement of the matter,"<sup>8</sup> and in payment of rent to a specified day,<sup>9</sup> have been held bad. But when one makes a tender in good faith, he supposes it is enough to close the whole business, if accepted, and he may tell the other party that it will. This differs from an offer upon condition that it shall be received only as closing the matter, for the creditor may accept without admitting that the amount tendered is all that is due him.<sup>10</sup> And a party who tenders money undoubtedly has a right to exclude any presumption against

1. **Unobjectionable Conditions.**—*Bevans v. Rees*, 5 M. & W. 309; *Saunders v. Frost*, 5 Pick. (Mass.) 259, 16 Am. Dec. 394; *Johnson v. Cranage*, 45 Mich. 14; *Lamb v. Jeffrey*, 41 Mich. 719; *Brink v. Freoff*, 40 Mich. 614; *Wheelock v. Tanner*, 39 N. Y. 481; *Brooklyn Bank v. De Grauw*, 23 Wend. (N. Y.) 342, 35 Am. Dec. 569; *Flake v. Nuse*, 51 Tex. 98.

2. **Explanatory Words.**—*Foster v. Drew*, 39 Vt. 51.

3. **Tender in Full Payment of Claim.**—See *Cheminant v. Thornton*, 2 C. & P. 50, 12 E. C. L. 23; *Peacock v. Dickerson*, 2 C. & P. 51, note, 12 E. C. L. 24; *Sutton v. Hawkins*, 8 C. & P. 259, 34 E. C. L. 380; *Sanford v. Bulkeley*, 30 Conn. 344. And see *supra*, this title, *Acceptance of Tender—Of Conditional Tender*.

4. *England.*—*Bowen v. Owen*, 11 Q. B. 131, 63 E. C. L. 131; *Sutton v. Hawkins*, 8 C. & P. 259, 34 E. C. L. 380; *Mitchell v. King*, 6 C. & P. 237, 25 E. C. L. 375; *Peacock v. Dickerson*, 2 C. & P. 51, note, 12 E. C. L. 24; *Cheminant v. Thornton*, 2 C. & P. 50, 12 E. C. L. 23; *Evans v. Judkins*, 4 Campb. 156; *Strong v. Harvey*, 3 Bing. 304, 11 E. C. L. 112; *Eckstein v. Reynolds*, 7 Ad. & El. 80, 34 E. C. L. 40; *Hough v. May*, 4 Ad. & El. 954, 31 E. C. L. 235.

*Illinois.*—*Connecticut Mut. L. Ins. Co. v. Stinson*, 86 Ill. App. 668.

*Kansas.*—*Latham v. Hartford*, 27 Kan. 249. *Massachusetts.*—*Chapin v. Chapin*, (Mass. 1894) 36 N. E. Rep. 746.

*Missouri.*—*Ruppel v. Missouri Guarantee, etc., Assoc.*, 158 Mo. 613; *Henderson v. Cass County*, 107 Mo. 50.

*New York.*—*Noyes v. Wyckoff*, 114 N. Y. 204; *Shiland v. Loeb*, 58 N. Y. App. Div. 565; *Wood v. Hitchcock*, 20 Wend. (N. Y.) 47.

*Ohio.*—*Hoppe, etc., Bottling Co. v. Sacks*, 5 Ohio Cir. Dec. 306, 11 Ohio Cir. Ct. 3; *Gincinnati v. Mt. Auburn Cable R. Co.*, 11 Ohio (Reprint) 667, 28 Cinc. L. Bul. 276.

*South Carolina.*—*Doty v. Crawford*, 39 S. Car. 1.

*Vermont.*—*Draper v. Hitt*, 43 Vt. 439, 5 Am. Rep. 292.

*Wisconsin.*—*Elderkin v. Fellows*, 60 Wis. 339.

5. *Sutton v. Hawkins*, 8 C. & P. 259, 34 E. C. L. 380.

6. *Hough v. May*, 4 Ad. & El. 954, 31 E. C. L. 235.

7. *Tompkins v. Batie*, 11 Neb. 147, 38 Am. Rep. 361.

8. *Rand v. Harris*, 83 N. Car. 486.

9. *Hastings v. Thorley*, 8 C. & P. 573, 34 E. C. L. 530; *Finch v. Miller*, 5 C. B. 428, 57 E. C. L. 428.

10. **Tender Coupled with Assertion of Sufficiency of Amount.**—*Robinson v. Ferreday*, 8 C. & P. 752, 34 E. C. L. 620; *Thorpe v. Burgess*, 8 Dowl. 603, 4 Jur. 799; *Bowen v. Owen*, 11 Q. B. 130, 63 E. C. L. 130; *Henwood v. Oliver*, 1 Q. B. 409, 41 E. C. L. 601; *Davies v. Dow*, 80 Minn. 223; *Preston v. Grant*, 34 Vt. 201; *Foster v. Drew*, 39 Vt. 54.

In *Jones v. Bridgman*, 39 L. T. N. S. 500, it was held that a tender of rent, accompanied with the words "Here is your quarter's rent," did not require the landlord to make any admission as to the amount due, as a condition of its receipt, and was therefore a good tender. In such cases the question whether the words used are such as to render the tender conditional or not is a question of fact. *Eckstein v. Reynolds*, 7 Ad. & El. 80, 34 E. C. L. 40; *Marsden v. Goode*, 2 C. & K. 133, 61 E. C. L. 133.

Where a mortgagor tenders the amount appearing to be due, according to an account made up by himself from documents furnished by the mortgagee, this is sufficient to throw the costs of the action to redeem upon the latter in case the amount tendered is all that is due, although the mortgagor when making it reserves the right to dispute the mortgagee's accounts, and to have the costs taxed. *Greenwood v. Sutcliffe*, (1892) 1 Ch. 1.

It has been held in *Iowa* that where an offer of judgment of a certain sum was made "with costs to date, said amount to be a full settlement of the above cause," the offer was good, the last clause not constituting a condition, but stating only the legal and logical consequence of its acceptance (*distinguishing* *Quinton v. Van Tuyl*, 30 Iowa 554). *De Long v. Wilson*, 80 Iowa 216.



himself that the sum tendered is in part payment of his debt.<sup>1</sup> Hence a tender under protest, but which does not impose any conditions on the creditor, is valid.<sup>2</sup>

*c. DEMANDING RECEIPT IN FULL.* — In accordance with the rule stated in the next preceding section, the tender of a certain sum, on condition that the creditor will give a receipt in full, is not good, unless the release is especially stipulated for in the contract.<sup>3</sup> A demand for a receipt in full invalidates a tender, even though it is provided by statute that a person making a tender may demand a receipt for the money tendered.<sup>4</sup>

*d. DEMANDING PERFORMANCE OF RECIPROCAL DUTY* — (1) *General Rule.* — A tender is not invalid because it is coupled with a demand for the performance of a reciprocal duty enjoined by law upon the person to whom the tender is made.<sup>5</sup>

(2) *Demanding Receipt for Amount Tendered.* — While it may not be very well settled that requiring a receipt for the amount tendered does not invalidate the tender, there is some authority to that effect.<sup>6</sup> Certainly a mere request for a receipt does not invalidate the tender.<sup>7</sup> And if the creditor refuses to accept the money because insufficient in amount, he cannot afterwards object that a receipt was required.<sup>8</sup>

(3) *Demanding Release or Reconveyance.* — It has frequently been held that a tender of the amount of a mortgage debt is not invalid because coupled with a demand for a cancellation or release,<sup>9</sup> or a reconveyance.<sup>10</sup>

(4) *Demanding Surrender of Evidence of Indebtedness.* — It has been held

1. *Tender under Protest.* — Erle, J., in *Bowen v. Owen*, 11 Q. B. 131, 63 E. C. L. 131.

2. *Greenwood v. Sutcliffe*, (1892) 1 Ch. 1, 61 L. J. Ch. 59; *Manning v. Lunn*, 2 C. & K. 13, 61 E. C. L. 13; *Scott v. Uxbridge, etc.*, R. Co., L. R. 1 C. P. 596; *Sweny v. Smith*, L. R. 7 Eq. 324.

But it has been held that an offer to pay a specified sum for the express purpose of avoiding litigation, accompanied with a denial of liability and a threat of bitter litigation if the amount offered is not accepted, is not a good tender. *Kuhns v. Chicago, etc.*, R. Co., 65 Iowa 528.

3. *Requiring Receipt in Full* — *England.* — *Laing v. Meader*, 1 C. & P. 257, 11 E. C. L. 382; *Griffith v. Hodges*, 1 C. & P. 419, 11 E. C. L. 440; *Glasscott v. Day*, 5 Esp. 48, 8 Rev. Rep. 828; *Higham v. Baddely*, Gow 213; *Food v. Noll*, 2 Dowl. N. S. 617.

*United States.* — *Perkins v. Beck*, 4 Cranch (C. C.) 68; *Hepburn v. Auld*, 1 Cranch (U. S.) 321; *Boulton v. Moore*, 14 Fed. Rep. 922. See *Coghlan v. South Carolina R. Co.*, 32 Fed. Rep. 316.

*Arkansas.* — *Jacoway v. Hall*, 67 Ark. 340; *Fields v. Danenhower*, 65 Ark. 400.

*Connecticut.* — *Sanford v. Bulkley*, 30 Conn. 344.

*Kentucky.* — *Crawford v. Thomas*, (Ky. 1899) 54 S. W. Rep. 197.

*Maine.* — *Brown v. Gilmore*, 8 Me. 107, 22 Am. Dec. 223.

*Massachusetts.* — *Thayer v. Brackett*, 12 Mass. 450; *Richardson v. Boston Chemical Laboratory*, 9 Met. (Mass.) 42; *Loring v. Cooke*, 3 Pick. (Mass.) 48.

*Missouri.* — *Kitchen v. Clark*, 1 Mo. App. 430. *New York.* — *Roosevelt v. Bull's Head Bank*, 45 Barb. (N. Y.) 583; *Wood v. Hitchcock*, 20 Wend. (N. Y.) 47.

*Pennsylvania.* — *Wagenblast v. McKean*, 2 Grant Cas. (Pa.) 399.

A tender of the balance due on an account, less certain claims for damages, accompanied with a demand for a receipt in full, is not a good tender. *L'Hommedieu v. The H. L. Dayton*, 38 Fed. Rep. 926.

4. *West v. Farmers' Mut. Ins. Co.*, 117 Iowa 147.

5. *Requiring Performance of Reciprocal Duty.* — *Johnson v. Cranage*, 45 Mich. 14; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 175.

6. *Requiring Receipt for Amount Tendered.* — *Fields v. Danenhower*, 65 Ark. 401; *Brock v. Jones*, 16 Tex. 467. But see *Storey v. Krewson*, 55 Ind. 397, 23 Am. Rep. 668.

In a number of the *United States* it is provided by statute that a person making a tender may demand a receipt in writing, duly signed, as a condition precedent to delivery. 1 Stim. Am. Stat. L., § 4175.

7. *Merely Requesting a Receipt.* — *Jones v. Arthur*, 8 Dowl. 442; *People v. Edwards*, 56 Hun (N. Y.) 377.

8. *Waiver of Objection.* — *Richardson v. Jackson*, 8 M. & W. 298; *Cole v. Blake*, Peake N. P. (ed. 1795) 179. See also *Bull v. Parker*, 2 Dowl. N. S. 345.

9. *Requiring Release.* — *Saunders v. Frost*, 5 Pick. (Mass.) 259, 16 Am. Dec. 394; *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165; *Wheelock v. Tanner*, 39 N. Y. 486; *Salinas v. Ellis*, 26 S. Car. 337. *Contra*, *Story v. Krewson*, 55 Ind. 397, 23 Am. Rep. 668.

A tender by a purchaser of land, upon condition that a release of the vendor's lien be delivered upon final payment of the purchase money, has been held to be valid. *Engelbach v. Simpson*, 12 Tex. Civ. App. 188.

10. *Requiring Reconveyance.* — *Menkel v. Belscamper*, 84 Wis. 218.

that a tender of the amount due on a note or other negotiable instrument, conditioned on the surrender of the instrument, is good.<sup>1</sup> Where by the terms of a bond a right was reserved to pay it before maturity, a tender of the face of the bond with interest to date of tender has been held effectual to stop the running of interest, though it was coupled with a condition that the bond and all the coupons then in possession of the holder be surrendered.<sup>2</sup>

(5) *Demanding Conveyance*. — A tender by the purchaser, of the balance of the purchase price of land on condition that the vendor will make title, has been held not to be good.<sup>3</sup> But where the obligation of one of the contracting parties to pay money, and the obligation of the other party to convey land, are mutual and reciprocal, and not independent, a tender of the money, accompanied by a request to convey, is good.<sup>4</sup>

(6) *Demanding Delivery of Property*. — A tender which is made upon condition that property to which the debtor is entitled shall be delivered to him, as where the delivery and payment are mutual and concurrent acts, is valid.<sup>5</sup> Thus, the tender of the amount due to redeem a pledge, made upon condition that the property be surrendered, is good.<sup>6</sup> And it has been held that a tender of money for certain logs, held under a lien, may be coupled with a demand for an order on the person in charge of the logs to make delivery.<sup>7</sup>

*e. WAIVER OF OBJECTION*. — Even though a tender is coupled with a condition which the debtor has no right to impose, if the creditor does not object to the tender for that reason, but puts his objection upon some other ground, as the sufficiency of the sum, or any similar ground, the objection is waived<sup>8</sup> unless the condition is impossible.<sup>9</sup> This rule, has, in effect, been declared by statute in some of the *United States*.<sup>10</sup>

*f. ACCEPTANCE OF CONDITION*. — It has been said that if a conditional tender be made and accepted, it becomes a matter of contract, and may be binding.<sup>11</sup>

**7. By Whom Made** — *a. GENERAL RULE*. — A valid tender can only be made by the person, or the agent of the person, who has a right to pay the

**1. Requiring Surrender of Negotiable Instrument**. — *Dent v. Dunn*, 3 Campb. 296; *Straford v. Welch*, 59 N. H. 46; *Osterman v. Goldstein*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 676, *reversing* (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 501. See also *Storey v. Krewson*, 55 Ind. 397, 23 Am. Rep. 668. But see *Balme v. Wambaugh*, 16 Minn. 116; *Holton v. Brown*, 18 Vt. 224, 46 Am. Dec. 148.

**2. Requiring Surrender of Bond**. — *Bailey v. Buchanan County*, 115 N. Y. 297. The same principle is recognized in *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165.

**3. Requiring Conveyance**. — *Cothran v. Scanlan*, 34 Ga. 555.

It has been held that a tender, by the holder of a bond for title, of the amount due upon a promissory note therein described, coupled with a condition that the maker of the note shall execute the necessary conveyance, is not a valid tender. *Morris v. Continental Ins. Co.*, 116 Ga. 53; *Elder v. Johnson*, 115 Ga. 691; *De Graffenreid v. Menard*, 103 Ga. 651.

A tender by the owner of property of the amount due the holder of a tax deed, coupled with a demand for a conveyance, is invalid. *Glos v. Goodrich*, 175 Ill. 20.

Where a tenant had the option of purchase during the term, and tendered to the landlord a deed to be executed by him, accompanied by the purchase money, but the deed embraced more than the premises, the deed so qualified the tender as wholly to invalidate it. *Plummer*

*v. Barnett*, (Pa.) 1888) 13 Atl. Rep. 953.

Where the purchaser of land tenders the purchase price, on condition that the vendor's wife will sign the deed, such tender is not good as the basis for a bill to compel specific performance. *Kelsey v. Crowther*, 7 Utah 519.

**4. Harding v. Giddings**, 73 Fed. Rep. 335, 34 U. S. App. 642; *Henry v. Raiman*, 25 Pa. St. 354, 64 Am. Dec. 703. See the titles *INTEREST*, vol. 16, p. 1067, note 4; *VENDOR AND PURCHASER*.

**5. Requiring Delivery of Property**. — *Rice v. Appel*, 111 Iowa 454; *Johnson v. Cranage*, 45 Mich. 18; *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468.

**6. Loughborough v. McNevin**, 74 Cal. 250, 5 Am. St. Rep. 435; *Cass v. Higenbotam*, 27 Hun (N. Y.) 406.

**7. Requiring Order for Delivery of Property**. — *Johnson v. Cranage*, 45 Mich. 14.

**8. Waiver of Objection to Improper Condition**. — *Richardson v. Jackson*, 8 M. & W. 298; *Bull v. Parker*, 2 Dowl. N. S. 345; *Cole v. Blake*, Peake N. P. (ed. 1795) 179; *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468; *Clark v. Colfax County*, (Neb. 1901) 96 N. W. Rep. 607; *Ricketts v. Buckstaff*, 64 Neb. 851; *Wilder v. Seelye*, 8 Barb. (N. Y.) 408.

**9. Brink v. Freoff**, 40 Mich. 610.

**10. Kofoed v. Gordon**, 122 Cal. 314.

**11. Acceptance of Condition**. — *Bickle v. Bescke*, 23 Ind. 18.

debt, as the debtor himself or his representatives, or the holder of the title to the estate or property on which the debt is a lien, or the holder of some subsequent lien having an equity of redemption; a tender by a stranger is not good.<sup>1</sup>

**Exceptions to the Rule.** — Some exceptions to this rule have, however, been recognized. Thus, it has been said by Lord Coke that any person may make a tender on behalf of an idiot; for the law, by reason of the utter inability of the idiot to act for himself, allows this to be done out of charity.<sup>2</sup> And, in *Pennsylvania*, a tender of money by an uncle on behalf of an infant, the father being dead but the mother living, has been held to be good although the uncle had not been appointed guardian.<sup>3</sup>

**b. BY AGENTS.** — A tender need not be made by the obligor personally; a lawful tender may be made by a duly authorized agent.<sup>4</sup> The tender by an agent, at his own risk, of more than the money given him by his principal, is good;<sup>5</sup> and a tender by one of a number of agents, appointed for the purpose, is good.<sup>6</sup>

**c. BY EXECUTORS AND ADMINISTRATORS.** — A valid tender may be made by an executor who has been duly appointed and qualified.<sup>7</sup>

**d. TENDER OF AMOUNT SECURED BY MORTGAGE.** — A tender of the amount of a mortgage debt is invalid if made by a stranger.<sup>8</sup> But a valid tender of the amount necessary to discharge a mortgage may be made by the mortgagor's grantee,<sup>9</sup> by his assignee for the benefit of creditors,<sup>10</sup> by a judgment creditor or subsequent incumbrancer,<sup>11</sup> or by a purchaser at an execution sale of the mortgagor's title and interest.<sup>12</sup>

**e. TENDER FOR SCHOOL DISTRICT BY INHABITANT OF DISTRICT.** — A tender by an inhabitant of a school district, who, as such, was liable to have his property seized and sold on execution, has been held good, although he was without any express authority to make the tender.<sup>13</sup>

**f. DISCLOSURE OF RIGHT TO MAKE TENDER.** — A tender which is made by a stranger, without informing the creditor on whose behalf it is made, has been held to be invalid.<sup>14</sup> And it has been said that if the tender is not expressly made on behalf of the debtor, it is not aided by the fact that the creditor supposes it to have been made on his behalf.<sup>15</sup>

**g. WAIVER OF OBJECTION.** — The objection that the person making a tender has not been authorized to make it, may be waived by a failure to interpose the objection.<sup>16</sup>

**1. Who May Make Tender.** — *Cropp v. Hambleton*, Cro. Eliz. 48; *Gibson v. Lyon*, 115 U. S. 439; *McDougald v. Dougherty*, 11 Ga. 570; *Prieur v. Depouilly*, 8 La. Ann. 399; *Whittaker v. Belvedere Roller Mill Co.*, 55 N. J. Eq. 674; *Johnson v. Smock*, 1 N. J. L. 125.

**Joint Tender.** — It has been held that where one who is entitled to make a tender, makes it jointly with one who is not entitled to make it, the tender is bad. *Bender v. Bean*, 52 Ark. 146.

But it was held, where one of two cotenants of land tendered his *pro rata* share of the amount necessary to redeem the land from a sale for taxes, that this was sufficient. *Wintner v. Atkinson*, 28 La. Ann. 650.

**2. Tender on Behalf of Idiots.** — Co. Litt. 206b.

**3. Tender on Behalf of Infants.** — *Brown v. Dysinger*, 1 Rawle (Pa.) 408.

**4. Tender by Agent.** — *Cropp v. Hambleton*, Cro. Eliz. 48; *Read v. Goldring*, 2 M. & S. 86; *Eslow v. Mitchell*, 26 Mich. 500.

**5.** *Read v. Goldring*, 2 M. & S. 86.

**6.** *St. Paul Div. No. 1, etc., v. Brown*, 11 Minn. 356.

**7. Tender by Executors or Administrators.** — *Sharp v. Garesche*, 90 Mo. App. 233.

**8. Tender of Mortgage Debt.** — *Gibson v. Lyon*, 115 U. S. 439; *Mahler v. Newbaur*, 32 Cal. 168, 91 Am. Dec. 571; *Sinclair v. Learned*, 51 Mich. 335.

**9.** *Yeager v. Groves*, 78 Ky. 278; *Brown v. Simons*, 45 N. H. 211.

**10.** *Davies v. Dow*, 80 Minn. 223.

**11.** *Lambert v. Miller*, 38 N. J. Eq. 117. See *Proctor v. Robinson*, 35 Mich. 284.

**12.** See the title CHATTEL MORTGAGES, vol. 5, p. 1021, note 2.

**13. Tender by Inhabitant of School District.** — *Kincaid v. School Dist. No. 4*, 11 Me. 188.

**14. Right to Make Tender Should Be Disclosed.** — *Mahler v. Newbaur*, 32 Cal. 168, 91 Am. Dec. 571. See *Eslow v. Mitchell*, 26 Mich. 500; *Whittaker v. Belvedere Roller Mill Co.*, 55 N. J. Eq. 674.

**15.** *Mahler v. Newbaur*, 32 Cal. 168, 91 Am. Dec. 571. But compare *Davies v. Dow*, 80 Minn. 223.

**16. Waiver of Objection that Tender Is Not Made by Proper Person.** — *Lampley v. Weed*, 27 Ala. 621.



*h.* **RATIFICATION OF TENDER BY UNAUTHORIZED PERSON.** — Upon the principle that a ratification of an act done without authority is equivalent to a previous authority, it has been said, in effect, that a tender which is made by a person who is not authorized to make the tender may subsequently be recognized and sanctioned by the obligor and, when that is done, the tender will be good.<sup>1</sup> But this is very doubtful. A tender which is made by a person who is not invested with the proper authority is invalid and need not be accepted by the obligee, and it does not seem consistent with the principles which determine the sufficiency of a tender to permit the obligor to convert an invalid into a valid tender in any such manner, to obtain the benefits of a tender he should make a valid tender or cause one to be made.

**8. To Whom Made** — *a.* **GENERAL RULE.** — A valid tender can only be made to the holder of the debt, or some person representing him, who has, at the time of the tender, power to accept it,<sup>2</sup> and who, if the circumstances call for a transfer of the debt, has also power to assign it.<sup>3</sup>

*b.* **TO AGENTS.** — A tender may be effectually made to an agent who is authorized to receive payment of the debt or delivery of the property, or who is held out as having authority to accept performance.<sup>4</sup> Thus, a tender to a clerk in the store of the creditor for goods purchased at the store is good,<sup>5</sup> even though the clerk has been instructed not to receive the money if tendered.<sup>6</sup>

**To Creditor's Attorney.** — And a valid tender may be made to an attorney at law to whom the demand has been intrusted for collection,<sup>7</sup> even though he

**1. Ratification of Unauthorized Tender.** — *Kincaid v. School Dist. No. 4*, 11 Me. 188.

**2. Persons to Whom Tender Should Be Made** — *England.* — *Bingham v. Allport*, 1 N. & M. 398, 28 E. C. L. 324; *Kirton v. Braithwaite*, 1 M. & W. 310.

*Indiana.* — *King v. Finch*, 60 Ind. 420.

*Louisiana.* — *Alexandrie v. Saloy*, 14 La. Ann. 327; *Billiot v. Robinson*, 13 La. Ann. 529.

*Maine.* — *Hoyt v. Byrnes*, 11 Me. 475.

*Massachusetts.* — *McNiffe v. Wheelock*, 1 Gray (Mass.) 600.

*Michigan.* — *Thurber v. Jewett*, 3 Mich. 295.

*Minnesota.* — *Balme v. Wambaugh*, 16 Minn. 116.

*Missouri.* — *J. H. North Furniture, etc., Co. v. Davis*, 86 Mo. App. 296.

*Nebraska.* — *Te Poel v. Shutt*, 57 Neb. 592; *Fletcher v. Daugherty*, 13 Neb. 224.

*New York.* — *Tuthill v. Morris*, 81 N. Y. 94; *Hale v. Patton*, 60 N. Y. 233, 19 Am. Rep. 168; *Strong v. Blake*, 46 Barb. (N. Y.) 227; *Grussy v. Schneider*, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 134; *Hornby v. Cramer*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 490; *Hoyt v. Hall*, 3 Bosw. (N. Y.) 42.

*Vermont.* — *Morton v. Wells*, 1 Tyler (Vt.) 384.

*Compare* *Thurston v. Blaisdell*, 8 N. H. 367.

Where the creditor sent his son to the debtor to demand a specific sum, an offer of a less sum by the debtor to the son cannot be deemed a legal tender to the father. *Chipman v. Bates*, 5 Vt. 143.

In an action for work and labor, there was a plea of tender whereon issue was joined. The defendant proved that he sent the money by his servant to the plaintiff's house. The defendant's servant swore that she carried it to the plaintiff's house; and that having seen a servant there, who informed her that her master was at home, she delivered the money

to that servant, to be delivered to her master; that the servant took it, and went into the house, as she supposed, to deliver it to the plaintiff; and that she returned with an answer that he would not receive it, but that she must go to his attorney; and Lord Kenyon is reported to have held that this was evidence to be left to the jury, from which they might infer that a tender had been made. *Anonymous*, 1 Esp. 349.

**3. Whittaker v. Belvidere Roller Mill Co.**, 55 N. J. Eq. 674.

**4. Tender to Creditor's Agent.** — *Goodland v. Blewith*, 1 Campb. 477; *Finch v. Boning*, 4 C. P. D. 143; *Smith v. Goodwin*, 4 B. & Ad. 413. 24 E. C. L. 89; *Kirton v. Braithwaite*, 1 M. & W. 310, Tyrw. & G. 945; *Moffat v. Parsons*, 5 Taunt. 307, 1 E. C. L. 114; *King v. Finch*, 60 Ind. 420; *Crawford v. Osmun*, 94 Mich. 533; *Post v. Springsted*, 49 Mich. 90; *Fletcher v. Daugherty*, 13 Neb. 224. See the title SALES, vol. 24, p. 1072.

**5. Tender to Clerks in Creditor's Store.** — *Hoyt v. Byrnes*, 11 Me. 475.

**6. Moffat v. Parsons**, 5 Taunt. 307, 1 E. C. L. 114.

**7. Tender to Creditor's Attorney.** — *Watson v. Hetherington*, 1 C. & K. 36, 47 E. C. L. 36; *Crozer v. Pilling*, 4 B. & C. 28, 10 E. C. L. 272, 6 Dowl. & R. 129; *Salter v. Shove*, 60 Minn. 483; *Jackson v. Crafts*, 18 Johns. (N. Y.) 110. See *Billiot v. Robinson*, 13 La. Ann. 529. *Compare* *Tuthill v. Morris*, 81 N. Y. 94.

If a party is required to pay an attorney's fee to the attorney of the opposite party, as a condition of opening a default, it would seem that a tender of the amount to the attorney is sufficient. *Wolff v. Canadian Pac. R. Co.*, 89 Cal. 332.

But under a *New Hampshire* statute a tender of money to an attorney, with whom a demand had been lodged for collection, made

denies his authority.<sup>1</sup>

**To Attorney's Clerk.** — When the attorney demands payment at his office, a tender to any person who is in the office carrying on the business is good,<sup>2</sup> unless he at the time disclaims any authority to receive the money.<sup>3</sup> But the fact that the attorney's clerk states that he has no instructions to receive the money does not invalidate the tender.<sup>4</sup>

**c. TO TRUSTEES.** — Money due a beneficiary is properly tendered to the trustee, or his personal representatives, after his death.<sup>5</sup>

**d. TO EXECUTORS.** — It has been said that a valid tender may be made to an executor, even before he has proved the will, if he afterwards does so,<sup>6</sup> but, on the other hand, it has been held that a tender to a person who has been appointed executor, but who has never acted or been qualified to act in that capacity, is not good.<sup>7</sup>

**e. TO ASSIGNS.** — As a general rule, after a contract has been assigned, and the obligor has notice of the assignment, tender is properly made to the assignee.<sup>8</sup>

**To Assignees of Mortgages.** — Thus a tender of the amount secured by a mortgage which has been assigned should ordinarily be made to the assignee, if the mortgagor has notice of the assignment.<sup>9</sup> But a valid tender may be made to the mortgagee, although the mortgage has been assigned, if the assignment has not been recorded, and the mortgagee refuses to divulge the name of the assignee,<sup>10</sup> especially if the inability of the mortgagor to find him is the fault of the assignee.<sup>11</sup>

**To Assignees for the Benefit of Creditors.** — A tender of the amount necessary to recover possession of goods which had been consigned to a factor, may be made to the factor's assignee for the benefit of creditors, into whose possession the goods have passed.<sup>12</sup>

**f. TO ALIENEE OF GRANTEE WITH COVENANT TO RECONVEY.** — Where a grantor reserves the right to repurchase the land "of the grantee or his heirs or assigns" within a stipulated time, for a specific amount, if a reconveyance is desired, the necessary amount should be tendered to, and the reconveyance demanded of, the person to whom the grantee has conveyed the land.<sup>13</sup>

**g. TO GRANTEE OF PURCHASER AT EXECUTION SALE.** — Where the purchaser at an execution sale has sold and conveyed the land to another person, who is in open possession under his purchase, a tender can only be made to the latter.<sup>14</sup>

**h. TO ONE OF SEVERAL JOINT CREDITORS OR OBLIGEEES.** — When a debt is due, or specific articles are to be delivered, to two or more joint creditors or obligees, a tender to one of them is sufficient.<sup>15</sup> Hence, where there is a

before suit brought, was held to be unavailing. *Thurston v. Blaisdell*, 8 N. H. 367.

1. *McNiffe v. Wheelock*, 1 Gray (Mass.) 600.

2. **Tender to Attorney's Clerk.** — *Per Parke, B.*, in *Watson v. Hetherington*, 1 C. & K. 36, 47 E. C. L. 36; *Kirton v. Braithwaite*, 1 M. & W. 310. And see *Wilmot v. Smith*, 3 C. & P. 453, 14 E. C. L. 386, M. & M. 238; *Barrett v. Deere*, M. & M. 200, 22 E. C. L. 291; *Oatman v. Walker*, 33 Me. 67.

3. *Bingham v. Allport*, 1 N. & M. 398, 28 E. C. L. 324.

4. *Finch v. Boning*, 4 C. P. D. 143.

5. **Tender to Trustees.** — *Hayward v. Munger*, 14 Iowa 516; *Chahoon v. Hollenback*, 16 S. & R. (Pa.) 425, 16 Am. Dec. 587.

6. **Tender to Executors.** — *Eq. Cas. Abr.* 319; *Bac. Abr. Tender* (E).

7. *Todd v. Parker*, 1 N. J. L. 54.

8. **Tender to Assignees.** — *Wilson v. Doran*,

110 N. Y. 101. See the title *PAYMENT*, vol. 22, p. 524.

9. **Tender to Assignee of Mortgage.** — *Wing v. Davis*, 7 Me. 31. See the title *MORTGAGES*, vol. 20, p. 1059. But compare *Smith v. Kelley*, 27 Me. 237.

10. *Fritz v. Simpson*, 34 N. J. Eq. 436.

11. *Noyes v. Clark*, 7 Paige (N. Y.) 179, 32 Am. Dec. 620.

12. **Tender to Assignee for Creditors.** — *Cook v. Kelly*, 9 Bosw. (N. Y.) 358.

13. **Tender to Obtain Reconveyance.** — *McLaughlin v. Royce*, 108 Iowa 254.

14. *Camp v. Simon*, 34 Ala. 126.

15. **Tender to One of Several Joint Creditors of Obligees.** — *Douglas v. Patrick*, 3 T. R. 683; *Flanigan v. Seelye*, 53 Minn. 23; *Dyckman v. New York*, 5 N. Y. 434; *Carman v. Pultz*, 21 N. Y. 547; *Dawson v. Ewing*, 16 S. & R. (Pa.) 371; *Prescott v. Everts*, 4 Wis. 314. See *Beebe v. Knapp*, 28 Mich. 55.

contract to convey to several persons jointly, a tender of a sufficient conveyance to one of them, by whom it is refused, is good.<sup>1</sup> And where a mortgage runs to several mortgagees, to secure a joint debt, a tender of payment to one of them only is good.<sup>2</sup>

2. **TENDER OF RENT TO BAILIFFS.** — Where a bailiff is employed to distress for rent, a tender of the rent and expenses is valid if it is made either to the bailiff or to the landlord.<sup>3</sup> But a man left in possession by the bailiff, not being the person to whom the distress warrant is addressed, has no implied authority, as such, to receive payment of the rent, and a tender to him is therefore invalid, unless it can be shown that he had in fact such authority.<sup>4</sup>

9. **Waiver of Objections to Sufficiency.** — Where objection to the sufficiency of a tender is made solely on certain specified grounds, all other objections to the sufficiency of the tender are thereby waived, and, if the objection made is not well founded, the tender is good,<sup>5</sup> especially if the ground not stated is a trivial one, and one which could easily have been remedied at the time.<sup>6</sup> Thus, there may be a waiver of the objection that the amount tendered is too small,<sup>7</sup> or that it is too large,<sup>8</sup> that the tender is not made at the time when performance is due,<sup>9</sup> that it is not made at the proper place,<sup>10</sup> that it is not made in the proper medium,<sup>11</sup> that it is not unconditional,<sup>12</sup> or that it is not made by the proper person.<sup>13</sup> But it has been said that there can be no waiver of an objection, unless it appears that the party had knowledge of the facts which would warrant the objection.<sup>14</sup>

**VIII. KEEPING TENDER GOOD — 1. Necessity of Keeping Tender Good — a. TO STOP INTEREST AND COSTS.** — Even though there has been a valid tender of money, and a refusal to accept, in order that the tender may have the effect of stopping interest and costs, it must be kept good.<sup>15</sup>

1. **Tender to One of Several Joint Purchasers.** — *Oatman v. Walker*, 33 Me. 67; *Carman v. Pultz*, 21 N. Y. 547; *Dawson v. Ewing*, 16 S. & R. (Pa.) 371; *Prescott v. Everts*, 4 Wis. 314. But compare *Dodge v. Deal*, 28 Ill. 303.

2. **Tender to One of Several Joint Mortgagees.** — *Flanigan v. Seelye*, 53 Minn. 23. See the title MORTGAGES, vol. 20, p. 1059, note 3.

3. **Tender to Bailiff.** — *Hatch v. Hale*, 15 Q. B. 10, 69 E. C. L. 10; *Smith v. Goodwin*, 4 B. & Ad. 413, 24 E. C. L. 89. See the title DISTRESS, vol. 9, p. 627, note 4.

4. **Boulton v. Reynolds, 2 El. & El. 369, 105 E. C. L. 369, 29 L. J. Q. B. 11.**

5. **Waiver of Objections — Georgia.** — *Fenn v. Ware*, 100 Ga. 563.

*Illinois.* — *Weill v. American Metal Co.*, 182 Ill. 128, affirming 80 Ill. App. 406; *Thayer v. Meeker*, 86 Ill. 470; *Conway v. Case*, 22 Ill. 127.

*Iowa.* — *Gilbert v. Mosier*, 11 Iowa 498.

*Maine.* — *Haskell v. Brewer*, 11 Me. 258.

*Michigan.* — *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468.

*Missouri.* — *Whelan v. Reilly*, 61 Mo. 565; *Adams v. Helm*, 55 Mo. 468.

*Nebraska.* — *Ricketts v. Buckstaff*, 64 Neb. 851.

*New York.* — *Gould v. Banks*, 8 Wend. (N. Y.) 562, 24 Am. Dec. 95.

*Oregon.* — *Christenson v. Nelson*, 38 Oregon 473.

*South Carolina.* — *Wood v. Babb*, 16 S. Car. 427.

*West Virginia.* — *Koon v. Snodgrass*, 18 W. Va. 320.

Compare *Perry v. Mt. Hope Iron Co.*, 16 R. I. 319.

See the title SALES, vol. 24, p. 1092.

It has been provided by statute in some of the *United States* that certain objections are waived by a failure to make them when the tender is made. See *Latimer v. Capay Valley Land Co.*, 137 Cal. 286; *Kofoed v. Gordon*, 122 Cal. 314; *Gilbert v. Mosier*, 11 Iowa 498.

6. *Lathrop v. O'Brien*, 57 Minn. 175; *Stokes v. Recknagel*, 38 N. Y. Super. Ct. 368; *Decamp v. Feay*, 5 S. & R. (Pa.) 323, 9 Am. Dec. 372.

7. See *supra*, this section, *Amount to Be Tendered — Insufficiency of Amount Tendered*.

8. See *supra*, this section, *Amount to Be Tendered — Tender of More than Amount Due*.

9. See *supra*, this section, *Time of Tender — Waiver of Objection*.

10. See *supra*, this section, *Place of Tender — Waiver of Objection*.

11. See *supra*, this section, *Medium of Tender — Waiver of Objection*.

12. See *supra*, this section, *Requirement that Tender be Unconditional — Waiver of Objection*.

13. See *supra*, this section, *By Whom Made — Waiver of Objection*.

14. **Knowledge of Grounds for Objecting.** — *Waldron v. Murphy*, 40 Mich. 668; *Dunham v. Pettie*, 4 E. D. Smith (N. Y.) 500.

15. **Keeping Tender Good Necessary to Stop Interest and Costs — England.** — *Gyles v. Hall*, 2 P. Wms. 378.

*United States.* — *Bissell v. Heyward*, 96 U. S. 587; *Beardsley v. Beardsley*, (C. C. A.) 86 Fed. Rep. 16; *Coghlan v. South Carolina R. Co.*, 32 Fed. Rep. 316.

*Alabama.* — *Frank v. Pickens*, 69 Ala. 369; *Park v. Wiley*, 67 Ala. 310.



*b.* TO DISCHARGE LIENS. — But, generally speaking, when the effect of a tender is to destroy a lien upon property, it is not necessary to keep the tender good; for the lien having once been destroyed cannot be revived.<sup>1</sup> Thus, a valid tender, although not kept good, has the effect of destroying the lien of a pledgee<sup>2</sup> or other bailee.<sup>3</sup> And a tender of the amount secured by a mortgage, made on the day of maturity, but not kept good, discharges the lien of the mortgage, whether it be a mortgage upon land<sup>4</sup> or personal property.<sup>5</sup> And in some jurisdictions the rule is the same even though the tender is made after the law-day, if made before foreclosure or before the mortgagee takes possession.<sup>6</sup> On the other hand, it has been held that when a tender is made after the debt secured by the mortgage is due, the tender must be kept good in order that it may operate to discharge the mortgage.<sup>7</sup>

**When Debtor Seeks Affirmative Relief in Equity.** — And the authorities seem to be agreed that, upon the principle that he who seeks equity must do equity, when the debtor seeks affirmative relief of an equitable nature, as where he seeks the cancellation of a mortgage or other lien securing the debt, he must have kept his tender good, or at least come before the court in an attitude of willingness to pay what is due from him.<sup>8</sup>

*Arkansas.* — Hamlett *v.* Tallman, 30 Ark. 505; Woodruff *v.* Trapnall, 12 Ark. 640.

*California.* — Wolff *v.* Canadian Pac. R. Co., 89 Cal. 332.

*Colorado.* — Burlock *v.* Cross, 16 Colo. 162.

*Connecticut.* — Rose *v.* Brown, Kirby (Conn.) 293, 1 Am. Dec. 24.

*Florida.* — Matthews *v.* Lindsay, 20 Fla. 962.

*Georgia.* — Gray *v.* Angier, 62 Ga. 596; Mason *v.* Croom, 24 Ga. 211.

*Illinois.* — Auger *v.* Clay, 109 Ill. 487;

Thayer *v.* Meeker, 86 Ill. 474; Pulsifer *v.*

Shepard, 36 Ill. 513; Webster *v.* Pierce, 35 Ill.

158; Mason *v.* Stevens, 91 Ill. App. 623; Blain

*v.* Foster, 33 Ill. App. 297.

*Indiana.* — Wilson *v.* McVey, 83 Ind. 108;

King *v.* Finch, 60 Ind. 420.

*Iowa.* — Rainwater *v.* Hummell, 79 Iowa

571; Martin *v.* Whisler, 62 Iowa 416.

*Kansas.* — King *v.* Harrison, 32 Kan. 215.

*Kentucky.* — Nantz *v.* Lober, 1 Duv. (Ky.)

304.

*Louisiana.* — De Goer *v.* Kellar, 2 La. Ann.

496.

*Maine.* — Call *v.* Lothrop, 39 Me. 434.

*Minnesota.* — Norton *v.* Baxter, 41 Minn.

146, 16 Am. St. Rep. 679.

*Mississippi.* — Miller *v.* McGehee, 60 Miss.

903.

*Missouri.* — Berthold *v.* Reyburn, 37 Mo.

586; Henderson *v.* Cass County, 107 Mo. 50.

*Nebraska.* — Lantry *v.* French, 33 Neb. 524;

Tompkins *v.* Batie, 11 Neb. 147, 38 Am. Rep.

361.

*New Hampshire.* — Stowell *v.* Read, 16 N.

H. 20, 41 Am. Rep. 714.

*New York.* — Werner *v.* Tuch, 127 N. Y.

217, 24 Am. St. Rep. 443; Tuthill *v.* Morris,

81 N. Y. 94; Roosevelt *v.* Bull's Head Bank,

45 Barb. (N. Y.) 579; Riley *v.* Cheesman, 75

Hun (N. Y.) 387; Nelson *v.* Loder, 55 Hun

(N. Y.) 173; Dodge *v.* Fearey, 19 Hun (N.

Y.) 278; Warburg *v.* Wilcox, 2 Hilt. (N. Y.)

121, 7 Abb. Pr. (N. Y.) 337; Hill *v.* Place, 7

Robt. (N. Y.) 389.

*North Carolina.* — Tate *v.* Smith, 70 N. Car.

685.

*Pennsylvania.* — Summerson *v.* Hicks, 134

Pa. St. 566, 26 W. N. C. (Pa.) 332; Cornell  
*v.* Green, 10 S. & R. (Pa.) 14; McDowell *v.*  
Glass, 4 Watts (Pa.) 389.

*South Carolina.* — Fishburne *v.* Sanders, 1  
Nott & M. (S. Car.) 243; Black *v.* Rose, 14  
S. Car. 278.

*Texas.* — Brock *v.* Jones, 16 Tex. 461;  
Deweese *v.* Lockhart, 1 Tex. 539.

*West Virginia.* — McClain *v.* Batton, 50 W.  
Va. 130.

**1. Whether Keeping Tender Good Necessary to Discharge of Lien.** — Eslow *v.* Mitchell, 26 Mich. 500; Moynahan *v.* Moore, 9 Mich. 9, 77 Am. Dec. 468; Tiffany *v.* St. John, 65 N. Y. 314, 22 Am. Rep. 612. Compare Starke *v.* Myers, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 577.

**2. Lien of Pledge.** — Norton *v.* Baxter, 41 Minn. 146, 16 Am. St. Rep. 679.

**3. Lien on Property Distrained.** — A tender of the amount of damages done by trespassing animals which have been distrained, and reasonable charges for keeping them, has been held to discharge the lien of the distrainer, even though the tender is not kept good. McPherson *v.* James, 69 Ill. App. 337. But see Dunbar *v.* De Boer, 44 Ill. App. 615.

**4. Lien of Mortgages.** — Balme *v.* Wambaugh, 16 Minn. 116; Schieck *v.* Donohue, 77 N. Y. App. Div. 321.

**5.** Eslow *v.* Mitchell, 26 Mich. 500. *Contra*, Frank *v.* Pickens, 69 Ala. 369; Noyes *v.* Wyckoff, 30 Hun (N. Y.) 466, affirmed on another point in 114 N. Y. 204.

**6.** Moore *v.* Norman, 43 Minn. 428, 19 Am. St. Rep. 247; Kortright *v.* Cady, 21 N. Y. 343, 78 Am. Dec. 145, reversing 23 Barb. (N. Y.) 490.

**7.** Crain *v.* McGoon, 86 Ill. 431, 29 Am. Rep. 37; Blain *v.* Foster, 33 Ill. App. 297; Tompkins *v.* Batie, 11 Neb. 147, 38 Am. Rep. 361. Compare Loughborough *v.* McNevin, 74 Cal. 250, 5 Am. St. Rep. 435.

**8. Keeping Tender Good Necessary to Affirmative Equitable Relief.** — Ruppel *v.* Missouri Guarantee, etc., Assoc., 158 Mo. 613; Nelson *v.* Loder, 132 N. Y. 288; Werner *v.* Tuch, 127 N. Y. 217, 24 Am. St. Rep. 443, affirming 52 Hun (N. Y.) 269; Tuthill *v.* Morris, 81 N. Y.

*c.* TO DISCHARGE SURETIES. — A valid tender made to the creditor, and a refusal by him, will release sureties, although the tender is not kept good.<sup>1</sup>

*d.* TO AUTHORIZE RECOVERY ON INSURANCE POLICY. — Since the insured is not bound to make a tender of a premium due, in order to maintain an action on an insurance policy when there has been a wrongful declaration of forfeiture,<sup>2</sup> it has been held that a valid tender which has been rejected need not be kept good, but the premium admitted to be due may be deducted in the judgment from the amount of the policy.<sup>3</sup>

*e.* WHEN TENDER HAS BEEN WAIVED. — It has been held that when one party to a contract makes a tender, but the other party declares the contract at an end and refuses to accept, it is not necessary to keep the tender good in order to maintain an action for breach of contract.<sup>4</sup>

**2. Mode of Keeping Tender Good** — *a.* IN GENERAL. — The debtor whose tender has been refused may retain the money in his own possession,<sup>5</sup> in the absence of some statute providing otherwise,<sup>6</sup> until it becomes necessary to pay it into court.

*b.* USING MONEY. — The identical money need not be kept on hand; since the money tendered does not become the property of the creditor, the debtor may use it as his own without destroying the effect of the tender, if he is ready at all times to pay the debt in current money when requested.<sup>7</sup> But if, by making use of the money, he is not ready to pay the debt at any time when he may be required to do so, the effect of the tender is destroyed.<sup>8</sup>

*c.* RETURN OF MONEY BORROWED. — If the money tendered has been borrowed by the debtor, the tender is not kept good if he returns the money to the lender as soon as it is refused.<sup>9</sup>

*d.* DEPOSITING MONEY WITH THIRD PERSON. — The duty to keep a tender good does not require the debtor to have the money about his person or in his actual possession at all times and in all places; he may deposit the money, especially if it is a large sum, in some safe and convenient place, where he can readily get it for delivery to the creditor. But he cannot, simply

94; *McNeil v. Sun, etc., Bldg, etc., Assoc.*, 75 N. Y. App. Div. 290. See *Schieck v. Donohue*, 77 N. Y. App. Div. 321.

**1. Tender Need Not Be Kept Good to Discharge Sureties.** — *Randol v. Tatum*, 98 Cal. 390; *Curriac v. Packard*, 29 Cal. 194; *Wilson v. McVey*, 83 Ind. 110; *Musgrave v. Glasgow*, 3 Ind. 31; *Johnson v. Mills*, 10 Cush. (Mass.) 503; *Sears v. Van Dusen*, 25 Mich. 351; *Dunn v. Hunt*, 63 Minn. 484; *M'Questen v. Noyes*, 6 N. H. 19; *Griswold v. Jackson*, 2 Edw. (N. Y.) 461; *Smith v. Old Dominion Bldg, etc., Assoc.*, 119 N. Car. 257; *Joslyn v. Eastman*, 46 Vt. 258. See *Clark v. Sickler*, 64 N. Y. 231, 21 Am. Rep. 606.

This is also the rule under section 2839 of the *California Civil Code*. *Randol v. Tatum*, 98 Cal. 390.

**2.** *Te Bow v. Washington L. Ins. Co.*, 59 N. Y. App. Div. 310, affirmed without opinion in 172 N. Y. 623. And see *supra*, this title, *Necessity of Tender* — *Waiver of Tender* — *Acts Constituting Waiver* — *Repudiation or Abandonment of Contract*.

**3. Keeping Tender Good Not Necessary to Recovery on Insurance Policy.** — *Denison v. Masons' Fraternal Acc. Assoc.*, 59 N. Y. App. Div. 294.

**4. When Tender Has Been Waived.** — *Ashley v. Rocky Mountain Bell Telephone Co.*, 25 Mont. 286.

**5. Manner of Keeping Tender Good.** — *Loughridge v. Iowa L., etc., Assoc.*, 84 Iowa 141.

**6.** Under the *Louisiana Code* a tender will not avail unless followed by a consignment or deposit of the money or bank notes. (Civil Code, art. 2163, 2165; Code Prac., art. 405, 407, 412); *Benton v. Roberts*, 2 La. Ann. 243; *Breen v. Schmidt*, 6 La. Ann. 13; *Walker v. Brown*, 12 La. Ann. 266.

**7. Use of Money by Debtor Holding Himself in Readiness to Pay.** — *Beatty v. Mutual Reserve Fund L. Assoc.*, 44 U. S. App. 527, 75 Fed. Rep. 72; *Cheney v. Bilby*, (C. C. A.) 74 Fed. Rep. 52; *McCalley v. Otey*, 90 Ala. 302; *Curtiss v. Greenbanks*, 24 Vt. 536; *Thompson v. Lyon*, 40 W. Va. 87. But see *Murphy v. Gold, etc., Tel. Co.*, (N. Y. City Ct. Tr. T.) 3 N. Y. Supp. 804; *Roosevelt v. Bull's Head Bank*, 45 Barb. (N. Y.) 579.

**8. Use of Money by Debtor Not Ready to Pay.** — *Gray v. Angier*, 62 Ga. 596; *Aulger v. Clay*, 109 Ill. 487; *Stow v. Russell*, 36 Ill. 18; *Nantz v. Lober*, 1 Duv. (Ky.) 304; *Shields v. Lozeau*, 22 N. J. Eq. 447.

In one *Illinois* case it was held that where a party, after making a tender, deposited the money to his own use, and a part was drawn out, in place of which no other money was shown to have been held ready, the tender was not kept good. *Crain v. McGoon*, 86 Ill. 431, 29 Am. Rep. 370. But compare *Thayer v. Meeker*, 86 Ill. 470.

**9. Returning Borrowed Money.** — *Park v. Wiley*, 67 Ala. 310.

because the money is refused, deposit it with a third person, and, when the creditor demands payment, require him to call upon the depositary for the money.<sup>1</sup>

*e.* PAYMENT INTO COURT. — The rule demanding that a tender be kept good ordinarily requires the money to be paid into court when suit is brought.<sup>2</sup>

**3. Amount to Be Kept Good.** — If too much has been tendered, there is no obligation to keep the tender good as to the whole amount or to pay the whole amount tendered.<sup>3</sup>

**4 Subsequent Demand and Refusal** — *a.* EFFECT. — Notwithstanding the refusal of a valid tender, if the creditor subsequently demands payment and the debtor fails to pay, the tender has not been kept good, and the debtor loses the benefit of the tender.<sup>4</sup>

*b.* SUFFICIENCY OF DEMAND — *By and of Whom Made.* — In order to have this destructive effect, the demand must be made by the creditor or by some person who has authority to receive the money for him.<sup>5</sup> And the demand should be made of the debtor personally,<sup>6</sup> unless he has an agent who has full authority to act in the premises, when it may, perhaps, be made upon him.<sup>7</sup> Demanding payment of one of two joint debtors is sufficient.<sup>8</sup>

**Manner of Making Demand.** — It seems that the demand should be made upon the debtor personally and cannot be made by letter.<sup>9</sup>

**Time of Making Demand.** — In order to avoid the effect of a tender the demand should be made at a seasonable hour.<sup>10</sup>

**Amount Which May Be Demanded.** — When a tender is valid, even though it was of a sum less than the amount due, as where the creditor has waived the objection that the sum tendered was too small,<sup>11</sup> it seems that a demand for more than the sum tendered does not have the effect of avoiding the tender.<sup>12</sup> And there can be no question but that a tender is not avoided by a subsequent demand and refusal of an amount greater than that tendered, if the demand is for more than is due.<sup>13</sup>

**1. Requiring Creditor to Call on Depositary for the Money.** — *Town v. Trow*, 24 Pick. (Mass.) 168.

**2.** See the title TENDER, 21 ENCYC. OF PL. AND PR., p. 571 *et seq.*

**3. Amount of Debt Only Need Be Kept Good.** — *Abel v. Opel*, 24 Ind. 250.

**4. Demand and Refusal of Payment Subsequent to Tender.** — *Hesketh v. Fawcett*, 11 M. & W. 356; *Tyler v. Bland*, 9 M. & W. 338; *Cotton v. Godwin*, 7 M. & W. 147; *Dixon v. Clark*, 5 C. B. 377, 57 E. C. L. 377; *Rose v. Brown*, Kirby (Conn.) 293, 1 Am. Dec. 22; *Carr v. Miner*, 92 Ill. 604; *Stow v. Russell*, 36 Ill. 18; *Sloan v. Petrie*, 16 Ill. 262; *Woolner v. Levy*, 48 Mo. App. 469; *Manny v. Harris*, 2 Johns. (N. Y.) 24, 3 Am. Dec. 386; *Call v. Scott*, 4 Call (Va.) 402. See *Tucker v. Buffum*, 16 Pick. (Mass.) 46.

**5. By Whom Made.** — *Coore v. Callaway*, 1 Esp. 115; *Goodland v. Blewith*, 1 Campb. 478, note. See the title DEMAND, vol. 9, p. 213.

**6. Of Whom Made.** — *Berthold v. Reyburn*, 37 Mo. 586.

**7.** See the title DEMAND, vol. 9, p. 214.

**8. Demand upon One of Two or More Joint Debtors.** — *Peirse v. Bowles*, 1 Stark. 323, 2 E. C. L. 127. See the title DEMAND, vol. 9, p. 214, note 2.

**9. Sufficiency of Demand by Letter.** — *Edwards v. Yeates*, R. & M. 360, 21 E. C. L. 456. But see *Hayward v. Hague*, 4 Esp. 93. As to the mode of making a demand generally, see the title DEMAND, vol. 9, p. 211.

**10. When Demand to Be Made.** — *Tucker v. Buffum*, 16 Pick. (Mass.) 46.

**11.** See *supra*, this title, *Sufficiency of Tender* — *Amount to Be Tendered* — *Insufficiency of Amount Tendered*.

**12. Demanding More than Amount Tendered.** — See *Thetford v. Hubbard*, 22 Vt. 440.

It appears that if the plaintiff replies, alleging a prior or subsequent demand and refusal of the precise sum stated to have been tendered to and refused by him, proof that he demanded and was refused payment of a larger sum will not support such replication. *Coore v. Callaway*, 1 Esp. 115; *Spybey v. Hide*, 1 Campb. 181. See *Fabian v. Winston*, Cro. Eliz. 209.

And accordingly where, to an action on a bill of exchange for £10 4s., accepted by the defendant, the defendant pleaded a tender of £4 7s. 6d., and the plaintiff replied a prior demand of that sum, but the only proof of such demand was that the bill was presented for payment when due and was dishonored, the court held that the proof did not support the issue, as the plaintiff proved no demand of the precise sum tendered. *Rivers v. Griffiths*, 5 B. & Ald. 630, 7 E. C. L. 215.

**13. Demanding More than Amount Due.** — *Dixon v. Clark*, 5 C. B. 378, 57 E. C. L. 378; *Brandon v. Newington*, 3 Q. B. 915, 43 E. C. L. 1035; *Rivers v. Griffiths*, 5 B. & Ald. 630, 7 E. C. L. 215; *Hesketh v. Fawcett*, 11 M. & W. 356, apparently overruling *Tyler v. Bland*, 9 M. & W. 338; *Mahan v. Waters*, 60 Mo. 167.



*c.* **DEBTOR ALLOWED REASONABLE TIME TO COMPLY WITH DEMAND.** — The principle that if the debtor fails to make delivery where the creditor or obligee requires him to do so, he loses the benefit of his tender, is to be received with reasonable limitations and qualifications. For example, since the debtor cannot be expected to have the money about his person or in his actual possession at all times and places, he is entitled to a reasonable opportunity to comply with the demand.<sup>1</sup>

**5. Specific Articles.** — In some cases it has been said, in effect, that when specific articles are tendered, and they are not accepted, or the obligee is not present at the appointed time and place to receive the goods, if the obligor, instead of abandoning the articles, elects to retain them in his own possession, he is bound to keep them safely at his own peril, and to deliver them to the obligee upon a proper demand being made.<sup>2</sup> But this is rather a loose statement of the law. The rule which requires a tender of money to be kept good is not to be applied to the tender of specific articles. Money can be kept without expense, and with comparatively little risk, which is not true of bulky or heavy articles. Besides, a tender of money which is not accepted does not extinguish the debt, while a debt which is payable in specific articles is discharged by a tender of the articles. The debtor, it is true, becomes a bailee of the goods, but ordinarily is not bound to keep the goods safely for an indefinite length of time ready for delivery to the other party on demand.<sup>3</sup>

**IX. EVIDENCE.** — The burden of proof rests upon the party pleading a tender,<sup>4</sup> but there is some conflict of authority as to whether he must also show that the tender was kept good.<sup>5</sup> In view of the serious consequences attending the refusal of a tender, the fact of a valid tender having been made must be established by clear and satisfactory proof,<sup>6</sup> but it seems that it may, in some cases, be shown by circumstances, and need not be established by direct and positive evidence.<sup>7</sup> Evidence of a waiver of tender is competent and sufficient to support an averment of tender.<sup>8</sup> Upon the question as to what reasons were given for refusing a tender, it has been held competent to require the party to whom the tender was made to state whether the tender would have been accepted under any circumstances.<sup>9</sup>

**TENEMENT.** (See also **APARTMENT**, vol. 2, p. 420; **LAND**, vol. 18, p. 140; **LODGE — LODGER — LODGING**, vol. 19, p. 519; and see the title **REAL PROPERTY**, vol. 23, p. 923.) — **Technical Meaning.** — “Tenement” is a word of wide meaning, and “though in its vulgar acceptation it is only applied to houses and other buildings, yet in its original, proper, and legal sense, it signifies everything that may be holden, provided it be of a permanent nature.”<sup>10</sup>

**1. Compliance with Demand Within Reasonable Time Sufficient.** — *Town v. Trow*, 24 Pick. (Mass.) 168; *Strafford v. Welch*, 59 N. H. 46; *Sharp v. Todd*, 38 N. J. Eq. 329. See *Gibbs v. Stead*, 8 B. & C. 528, 15 E. C. L. 288.

**2. Whether Tender of Specific Articles Shall Be Kept Good.** — *Dorman v. Elder*, 3 Blackf. (Ind.) 490; *Johnson v. Baird*, 3 Blackf. (Ind.) 182.

In *Ortmann v. Fletcher*, 117 Mich. 501, it was held that a tender of shares of stock should have been kept good by a readiness to deliver the identical shares.

A party tendering bonds must keep them where he can deliver them within a reasonable time, or the tender will not avail him. *Sanders v. Peck*, 131 Ill. 407, reversing 30 Ill. App. 238.

**3. Garrard v. Zachariah**, 1 Stew. (Ala.) 272; *Mitchell v. Merrill*, 2 Blackf. (Ind.) 87, 18 Am. Dec. 128; *Holt v. Brown*, 63 Iowa 319; *Mitchell v. Gregory*, 1 Bibb (Ky.) 449, 4 Am. Dec. 655;

*McJilton v. Smizer*, 18 Mo. 111; *McPherson v. Wiswell*, 16 Neb. 625; *Lamb v. Lathrop*, 13 Wend. (N. Y.) 96, 27 Am. Dec. 174. See *supra*, this title, *Effect of Tender — Of Specific Articles*.

**4. Burden of Proof.** — *Butler v. Hannah*, 103 Ala. 481; *Park v. Wiley*, 67 Ala. 310.

**5. See Sanders v. Bryer, 152 Mass. 141.**

**6. Sufficiency of Evidence to Establish Tender.** — *Butler v. Hannah*, 103 Ala. 481; *Potts v. Plaisted*, 30 Mich. 149; *Proctor v. Robinson*, 35 Mich. 284; *Davies v. Dow*, 80 Minn. 223; *Tuthill v. Morris*, 81 N. Y. 94; *Reynolds v. Washington Real Estate Co.*, 23 R. I. 197.

**7. Cockrill v. Kirkpatrick**, 9 Mo. 704.

**8. Holmes v. Holmes**, 9 N. Y. 525, affirming 12 Barb. (N. Y.) 137.

**9. Competency of Evidence to Show Reason Given for Refusal.** — *Kofoed v. Gordon*, 122 Cal. 314.

**10. Technical Sense — Blackstone's Definition.** — 2 Black. Com. 16; *Dashwood v. Ayles*, 16 Q.

**Popular Sense.** — But in its popular sense the term “tenement” is frequently

B. D. 301; *Beauchamp v. Winn*, L. R. 6 H. L. 241; *Mitchell v. Warner*, 5 Conn. 518; *Oskaloosa Water Co. v. Board of Equalization*, 84 Iowa 412; *Field v. Higgins*, 35 Me. 339; *McMechen v. Marman*, 8 Gill & J. (Md.) 68; *Sacket v. Wheaton*, 17 Pick. (Mass.) 105; *Com. v. Hersey*, 144 Mass. 297; *Nessler v. Neher*, 18 Neb. 650; *Thompson v. People*, 23 Wend. (N. Y.) 584; *Meason's Estate*, 4 Watts (Pa.) 346; *Keller v. Pagan*, 54 S. Car. 255.

**Coke's Definition.** — See *infra*, this note, paragraph *Freehold—Term of Years*. See also *Dodds v. Thompson*, L. R. 1 C. P. 137; *Ellis v. Burden*, 1 Ala. 465; *Gibson v. Brockway*, 8 N. H. 471; *New York v. Mabie*, 13 N. Y. 159; *Van Rensselaer v. Read*, 26 N. Y. 566.

“With respect to the word *tenements* or *tenementa*, in Co. Litt. 20a, it is stated: ‘This is the only word which the Stat. of Westm. 2, that created estates *taille*, useth; and it includeth not only all corporate inheritances which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning or annexed to, or exercisable within the same, though they lie not in tenure, therefore all these without question may be entailed.’ That is a proper legal definition of *tenement*. I think *tenement*, when used at all in connection with a house or room, must mean something of the same kind, or of the same character, and a thing absolutely immovable from the land.” *Fredericks v. Howie*, 1 H. & C. 381.

It not only includes land, but rents and other interests. *Musgrave v. Sherwood*, 23 Hun (N. Y.) 679; *Boyd v. Kerwin*, (Supm. Ct. Spec. T.) 15 N. Y. Supp. 721.

**Tenement Is Defined as “Property Held by a Tenant.”** — *Marmet Co. v. Archibald*, 37 W. Va. 781.

**Example.** — In *Rex v. Stoke*, 2 T. R. 451, it was held that the right of taking the hay-grass and aftermath of a meadow is a *tenement*.

**Adwoson.** — The word will include an adwoson. *Westfaling v. Westfaling*, 3 Atk. 460; *Gully v. Exeter*, 4 Bing. 290, 13 E. C. L. 439.

**Dam.** — A right reserved in a deed of erecting or building a dam on the bank of a creek at a place specified has been held to be a *tenement*. *Jackson v. Buel*, 9 Johns. (N. Y.) 298.

**Dignity.** — It has been held that a dignity, whether it be granted of a place or not, is a *tenement*. *In re Rivett-Carnac*, 30 Ch. D. 136; *Rex v. Knollys*, 2 Salk. 509; 1 Ld. Raym. 10; *Ferrers's Case*, 2 Eden 373.

**Equitable Interest.** — The word *tenement* has been held to embrace an equitable interest. *McMechen v. Marman*, 8 Gill & J. (Md.) 68.

**Executory Devise.** — One entitled to land by way of executory devise made a general assignment for the benefit of creditors, by which he assigned all and singular his lands and *tenements*. In construing this assignment the court said: “It is very questionable whether under the word *tenement*, as used, this interest would pass. For a *tenement* properly signifies a house, and not only com-

prehends a house, but all corporeal inheritances which are holden of another, and not only a house, but land, rent, or that which is any way held or possessed; and, we are told, is a word of large and ambiguous meaning, and not so certain as messuage; and therefore it is not fit to be used to express any thing which requires a particular description.” *Rash's Estate*, 2 Pars. Eq. Cas. (Pa.) 161.

**Fee—In Will.** (See also the title *WILLS*.) — The word *tenements* has never been construed in a will, independently of other circumstances, to pass a fee. *Canning v. Canning*, Mosely 240; *Doe v. Richards*, 3 T. R. 356; *Denn v. Mellor*, 5 T. R. 558; *Wright v. Denn*, 10 Wheat. (U. S.) 238.

**Freehold Rent Charge.** — See *infra*, this note, *Rent Charge*.

**Freehold—Interest Connected with Freehold.** — *Tenement* is a word of extensive signification. When used in a statute directing the proceedings to be taken when goods and chattels cannot be found to discharge an execution and the debtor has lands or *tenements*, it should be construed as referring to such interests in real estate as are connected with the freehold, and not included in the term “chattels.” *Barr v. Doe*, 6 Blackf. (Ind.) 335.

**Freehold—Term of Years.** — In *People v. Westervelt*, 17 Wend. (N. Y.) 676, it was said: “No doubt the notion that *tenements* comprehended chattels real was taken, in *Vredenbergh v. Morris*, 1 Johns. Cas. (N. Y.) 223, from the very general words of Blackstone (2 Black. Com. 16, 17), who says that ‘it includes everything that may be holden, provided it be of a permanent nature.’ But none of his illustrations given at the same pages go so far; and the generality of his phrases is still more plainly restricted by Co. Litt. 6a, to which he refers. Coke's words are: ‘*Tenementum, tenement*, is a large word to pass not only lands and other inheritances which are holden, but also offices, rents, commons, profits apprende out of lands, and the like, wherein a man hath any frank *tenement*, and whereof he is seized *ut de libero et tenemento*.’ The illustrations of the same writer (Co. Litt. 19 and 20a) show also that the term in its technical sense is confined to freeholds. Perkins, § 114, is to the same effect. Preston on Estates 8, 9, is very full in his examples, all of which are confined to freeholds; indeed, terms for years are expressly excluded. Wood's Inst. 114 also contain a very full enumeration to the same effect. Blackstone himself excludes terms for years, by so many words, at another place (2 Black. Com. 386; Co. Litt. 118b, S. P.).” Compare *New York v. Mabie*, 13 N. Y. 159.

**Fishery.** — A fishery has been held to be a *tenement*. *Rex v. Old Alresford*, 1 T. R. 358. But a fishery is not within the popular meaning of the term. *Redington v. Millar*, 24 L. R. Ir. 65.

**Tenements and Land Distinguished.** (See also *LAND*, vol. 18, p. 140.) — In *Canfield v. Ford*, 28 Barb. (N. Y.) 338, it was said: “*Tenements* is a word of greater meaning and extent, sometimes, than ‘land,’ and includes not

given the same meaning as "house" or "buildings."<sup>1</sup> A tenement is defined to be a dwelling house or an apartment in a building used by one family; often, in modern usage, an inferior dwelling house, rented to poor persons, or

only land, but rents, commons, and several other rights and interests issuing out of or concerning land." See also *Nessler v. Neher*, 18 Neb. 650; *Meason's Estate*, 4 Watts (Pa.) 346; *Keller v. Pagan*, 54 S. Car. 255.

**Pew.**—A right to sit in a pew to hear divine service has been held not to be a *tenement*. *Hinde v. Chorlton*, L. R. 2 C. P. 105. See the title PEWS AND PEW RIGHTS, vol. 22, p. 761.

**Real Property.**—In *Gibson v. Brockway*, 8 N. H. 471, it was said: "With us the word *tenement* is applied exclusively to land, or what is usually denominated real property. *Stearns on Real Actions* 150."

**Rabbit Warren.**—Rabbit warren held a *tenement*, see *Rex v. Piddletrentthide*, 3 T. R. 772.

**Rent Charge.**—A rent charge has been held to be a *tenement*. *Dodds v. Thompson*, L. R. 1 C. P. 133; *Druitt v. Christchurch*, Colt. Reg. Cas. 328; *Van Rensselaer v. Read*, 26 N. Y. 566.

**Shareholders in Bridge.**—In *Wadmore v. Dear*, L. R. 7 C. P. 212, it was held that holders of shares in a bridge were not owners of a *tenement* within the statute of 8 Hen. VI., c. 7, so as to be entitled to a county vote.

**Tithes.**—The term has been held to include tithes. *Powell v. Bull*, 1 Comyns 265; *Rex v. Skingle*, 1 Stra. 100; *Rex v. Barker*, 6 Ad. & El. 388, 33 E. C. L. 91.

**A Wharf Has Been Held to Be a "Tenement."**—A wharf or pier reclaimed from tidewater by an embankment, or by raising the bottom with stone, earth, or other material, was held to be a *tenement*, within the meaning of a *New York* statute authorizing summary proceedings in favor of the landlord to recover the possession of houses, lands, and *tenements*. *People v. Kelsey*, (Supm. Ct. Gen. T.) 14 Abb. Pr. (N. Y.) 372.

**1. Popular Sense.**—*Yorkshire F., etc., Ins. Co. v. Clayton*, 8 Q. B. D. 423; *Oskaloosa Water Co. v. Board of Equalization*, 84 Iowa 412; *Sacket v. Wheaton*, 17 Pick. (Mass.) 105; *Nessler v. Neher*, 18 Neb. 650; *Musgrave v. Sherwood*, 23 Hun (N. Y.) 679; *Meason's Estate*, 4 Watts (Pa.) 346.

"I think the vulgar meaning of the word which existed in Blackstone's days still remains, and that common people, not lawyers, use the word *tenement* when they mean to speak of a dwelling house or building of that character." *Dashwood v. Ayles*, 16 Q. B. D. 301, 55 L. J. Q. 8, *per* Cotton, L. J.

**Dwelling House.**—So the term has been held to be equivalent to "dwelling house." *Minifie v. Banger*, 16 Q. B. D. 302, 55 L. J. Q. B. 10; *Dashwood v. Ayles*, 16 Q. B. D. 301.

**Not Necessarily Part of Dwelling House.**—A complaint for keeping and maintaining a *tenement* for the illegal sale of liquors may be supported by proof of keeping and maintaining for such a purpose a shop consisting of one room, and not forming part of a dwelling house. *Com. v. Cogan*, 107 Mass. 212.

**"Building" Not Identical with "Tenement."**—An indictment charged the illegal letting of a certain *tenement* and building for the illegal sale of intoxicating liquors. It was held that the indictment charged the letting of a building, and that there was a variance between the indictment and the evidence, which proved the letting of a single apartment in the building, the other apartments being occupied by other tenants. The court said: "A building is a *tenement*, but a *tenement* may be something different from a building. But in this indictment, it is clear that the words 'building' and *tenement* are used as synonymous." *Com. v. Bossidy*, 112 Mass. 278.

And so in *Com. v. McCaughey*, 9 Gray (Mass.) 296, it was held that a charge of keeping and maintaining a "building" for the illegal sale of liquors could not be supported by proof that the defendant kept and maintained only a part of the building, or a *tenement* in it, the residue being occupied by other persons. But an indictment for keeping a *tenement* may be sustained by proof of keeping a "building." *Com. v. Godley*, 11 Gray (Mass.) 454.

**Cellar.**—An indictment charged that the defendant kept and maintained "a certain *tenement*", to wit, a *tenement* in a building" used for the illegal sale and keeping of intoxicating liquor. It was proved that the defendant used the cellar of his dwelling house for the illegal sale of intoxicating liquors, and it was held that this was sufficient. The court said: "The cellar was well described as a *tenement*, and as in a building. The cellar is a part of a building." *Com. v. Welch*, 2 Allen (Mass.) 510.

**Personal Property.**—Within a statute against maintaining a *tenement* for the illegal keeping and sale of intoxicating liquors, a two-story building of five rooms, in which a person had lived for ten years, which was supported by railroad sleepers and had a chimney built upon the ground, was held to be a *tenement*, although it did not appear that the defendant was the owner of the land on which the building stood. The court said: "Even if personal property, it was occupied by the defendant as a dwelling, and in the modern use of the word was properly described as a *tenement*." *Com. v. Mullen*, 166 Mass. 378. See also *Dashwood v. Ayles*, 16 Q. B. D. 301; *Com. v. McCaughey*, 9 Gray (Mass.) 296; *Com. v. McAarty*, 11 Gray (Mass.) 456; *Com. v. Clynes*, 150 Mass. 71.

**Tangible.**—In *Commercial Bank v. Lockwood*, 2 Harr. (Del.) 13, it was said: "Lands and *tenements* and goods and chattels are matters of substance—they are tangible."

**Term Imports Immovable Structure.**—In *Fredericks v. Howie*, 1 H. & C. 381, it was held that a portable booth used by strolling players was not a *tenement* within an *English* act prohibiting keeping "any house or other *tenement*" as an unlicensed theatre.

**House, Lands, and Appurtenances.**—In *Ellis v.*



a dwelling erected for the purpose of being rented, called also a "tenement house."<sup>1</sup> A tenement is a building the different rooms or parts of which are let for residence purposes by the possessor to others, as distinct tenements, so that each tenant, as to the room or rooms occupied by him, would sustain to the common landlord the same relation that the tenant occupying a whole house would to his landlord.<sup>2</sup>

**TENENDUM.** — See the title DEEDS, vol. 9, p. 142.

**TENET.** — The word "tenet" in a writ always implies a tenant of the freehold.<sup>3</sup>

**TENON — TENONED.** — See note 4.

Burden, 1 Ala. 465, it was said: "The word *tenement* was therefore sufficient to pass a house and the lot of land on which it stood, with its appurtenances as ascertained by the enclosure; and is, indeed, the appropriate word to include all this without a paraphrase."

**Whether Fishery a Tenement.** — See the preceding note.

1. *Boyd v. Kerwin*, (Supm. Ct. Spec. T.) 15 N. Y. Supp. 721, quoting *Webst. Dict.* And see *Kitchings v. Brown*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 439.

So in *Musgrave v. Sherwood*, 23 Hun (N. Y.) 679, it was held that a covenant in a deed against the use of the premises as a *tenement* house was not violated by their use for a family hotel or apartment house. See also *Boyd v. Kerwin*, (Supm. Ct. Spec. T.) 15 N. Y. Supp. 721.

2. **Apartment.** — *Linwood Park Co. v. Van Dusen*, 63 Ohio St. 200, quoting *Rose v. King*, 49 Ohio St. 213. And see *Com. v. Hersey*, 144 Mass. 297, 3 N. Eng. Rep. 911; *Com. v. Clynes*, 150 Mass. 71; *Young v. Boston*, 104 Mass. 95.

**Leased Without Land.** — The term *tenement* is applicable in popular and legal meaning to parts of a building leased without the land upon which the building stands. *Miller v. Benton*, 55 Conn. 529; *Taylor v. Hart*, 73 Miss. 22.

**Examples.** — A four-story building, occupied by three families living in separate apartments on the second floor, and by two families living in separate apartments on the third floor, numbering in all sixteen persons, all tenants of one owner, has been held to be a *tenement* house. *Rose v. King*, 49 Ohio St. 213.

A *tenement* may consist of a single room or contiguous rooms, or rooms upon different stories, if controlled by a single person and used in connection with each other. The fact that one of the rooms was occupied and used as a shop, and another for a living room or kitchen, by the same person, would not make these rooms distinct *tenements*. *Com. v. Clynes*, 150 Mass. 72; *Com. v. Buckley*, 147 Mass. 581.

**Part of Room.** — In *Com. v. Hersey*, 144 Mass. 297, 3 N. Eng. Rep. 910, it was held that where part of a room was occupied by one and a distinct portion by another, as where one occupied one side of a room and another the opposite side, or one the front and another the rear, the portion appropriated by either was properly his *tenement*.

**Distinct Subject of Lease.** — An English statute provided that every house or *tenement* which should be occupied solely for the purposes of a

trade or business should be exempted from certain duties on inhabited houses. In construing this provision the Earl of Halsbury, L. C., said: "With respect to the exemption, I do not think what has been said by the Lord President in *Russell v. Coutts*, (1881) 9 Reports 261, 265, can be made clearer, that, in his own words, 'the word *tenement* in the statute means part of a house so structurally divided and separated as to be capable of being a distinct property or a distinct subject of lease.' There is no doubt that if this is right, and I am by no means prepared to say it is wrong, the house which is here described is undoubtedly capable of being a separate property or separately leased, but I have more difficulty in seeing that it is structurally divided if I assume that the whole building is one house." *Grant v. Langston*, (1900) A. C. 392.

**Different Tenements.** — Under the inhabited-house duty act, a house let to different tenants, occupying rooms on the same floor, opening on a common hall and staircase, is held not to be "divided into and let in different *tenements*." *Yorkshire F., etc., Ins. Co. v. Clayton*, 6 Q. B. D. 557, 8 Q. B. D. 421. But if the *tenements* are complete in themselves, having each its independent hall and stairway, they are "different *tenements*," although all on the same floor, like "flats." The "difference" may be horizontal as well as vertical. *Atty.-Gen. v. Mutual Tontine Westminster Chambers Assoc.*, L. R. 10 Exch. 305.

**Tenement Block.** — A building described in an insurance policy as a "*tenement* frame block" is not "unoccupied," if two of the *tenements* are in actual use and occupation as residences. The court said: "The phrase '*tenement* block' gives but slight indication of what portions of the block the *tenements* consist, whether a single room, a floor or flat, or suite of rooms. It imports only of necessity that the building is designed for the accommodation of various families." *Harrington v. Fitchburg Mut. F. Ins. Co.*, 124 Mass. 129.

3. **Tenet.** — *M'Kee v. Straub*, 2 Binn. (Pa.) 3, quoting *Co. Litt.* 167a.

4. **Tenoned.** — In *Sarven v. Hall*, 11 Blatchf. (U. S.) 300, it was said: "But let it be assumed that in mechanics the word *tenoned* imports not merely a *tenon* to be inserted in a mortise, but, as a correlative or adjunct, a shoulder to sustain the thing *tenoned* against endwise pressure, as illustrated in *tenoned* posts inserted in the sill of a building, *tenoned* braces to strengthen an angle in a frame, and the like. There is no necessary or prescribed form either to the *tenon* or to the shoulder."

**TENOR.**—The word “tenor” imports an exact copy—that the instrument is set out in the words and figures.<sup>1</sup>

**TENT.**—A tent, in the ordinary acceptation of the word, is a pavilion, portable lodge, or canvas house, inclosed with walls of cloth and covered with the same material.<sup>2</sup>

1. **Exact Copy.**—*State v. Atkins*, 5 Blackf. (Ind.) 458; *State v. Johnson*, 26 Iowa 407, 96 Am. Dec. 160; *Com. v. Wright*, 1 Cush. (Mass.) 65; *People v. Warner*, 5 Wend. (N. Y.) 273; *Miller v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 268.

**Omission of Word “All.”**—“While the mis-use or omission of a letter which works no such change in a word as to make of it a different one will not be treated as a fatal variance, still, *tenor* imports identity, and whenever that is destroyed, either by the omission or adoption of any one word, however slightly the sense may be affected, it will be so regarded.” *State v. Townsend*, 86 N. Car. 679. And in that case the omission of the word “all” in an indictment purporting to set out the *tenor* of a card, though its effect upon the sense was of the slightest, if any, was held to be a fatal variance.

**Banknote—Margin.**—The word *tenor* binds the party to a strict recital; but the number of a bank bill and the words at the top of it expressing its amount are not parts of the bill, and need not be set out in an indictment purporting to give the *tenor* of the bill. *Com. v. Stevens*, 1 Mass. 203. And in *Griffin v. State*, 14 Ohio St. 61, the indictment alleged that one of the counterfeit banknotes unlawfully sold by the defendant “was of the *tenor* and effect following, to wit.” The court said: “The word *tenor* imports an exact copy. It was necessary, therefore, that the indictment should set forth truly and precisely all the words and figures of the bill which constitute its contract. It was not necessary to the validity of the indictment to go further and set out the number of the bill, its vignettes, mottoes, and devices, or the words and figures in its margin which constitute no part of the contract of the forged instrument. These are not properly any part of the bill. *Com. v. Bailey*, 1 Mass. 62, 2 Am. Dec. 3; *Com. v. Stevens*, 1 Mass. 204; *State v. Carr*, 5 N. H. 367; *People v. Franklin*, 3 Johns. Cas. (N. Y.) 299; *Com. v. Searle*, 2 Binn. (Pa.) 332, 4 Am. Dec. 446; *Wharton’s Am. Crim. Law* 174, 588.”

**Tenor and Purport.** (See also **PURPORT**, vol. 23, p. 527.)—The word *tenor* imports an exact copy—that it is set forth in the words and figures—whereas the word “purport” means only the substance or general import of the instrument. *State v. Atkins*, 5 Blackf. (Ind.) 458; *Myers v. State*, 101 Ind. 381; *Thomas v. State*, 103 Ind. 426; *State v. Calendine*, 8 Iowa 296; *Com. v. Wright*, 1 Cush. (Mass.) 65; *Com. v. Parmenter*, 5 Pick. (Mass.) 279; *State v. Fenly*, 18 Mo. 454; *Dana v. State*, 2 Ohio St. 93; *Fogg v. State*, 9 Yerg. (Tenn.) 394.

**Tenor Includes “Purport.”**—In *State v. Chinn*, 142 Mo. 512, it was said: “What significance then is to be attached to the word ‘purport’? In the case of *Fogg v. State*, 9 Yerg. (Tenn.) 392, the court, quoting from *Buller, J.*, in *Rex v. Gilchrist*, 2 Leach 657, said: ‘Old cases

have given rise to much learning and argument on the words ‘purport’ and *tenor*, and the books are full of distinctions as to the meaning of these words, and the necessity of using the one or the other of them in indictments where instructions are to be stated, but in the many cases upon the subject I can find no judicial determination that the purport and the *tenor* should both be stated in any case whatever. Purport means the substance of an instrument as it appears on the face of it to every eye that reads it, and *tenor* means an exact copy of it; and therefore, where the instrument is stated according to its *tenor*, the purport of it must necessarily appear.” See also *Rex v. Reading*, 2 Leach C. C. 590; *State v. Pullens*, 81 Mo. 391.

**Distinguished from “Manner and Form.”**—The law attaches a technical meaning to the word *tenor*, as signifying either an exact copy, or a statement of the libel verbatim. *Tenor* has so strict and technical a meaning as to make it necessary to recite verbatim; but the expression “manner and form” means nothing more than a substantial recital. *Wright v. Clements*, 3 B. & Ald. 503, 5 E. C. L. 358.

**In Popular Sense.**—The word *tenor*, in its technical sense, means an exact copy, but in popular use may mean the substance and effect of an instrument. Where a statute prescribing the mode of entering judgment on an instrument required the date and *tenor* to be entered, this was held to be satisfied by entering the substance of the instrument, for if an exact copy were intended this would include the date, and calling for the date in addition would be superfluous. *Beeson v. Beeson*, 1 Harr. (Del.) 466.

**Same—Legal Tenor.**—In *Lexington v. Union Nat. Bank*, 75 Miss. 10, it was said: “It is insisted that the new bonds are void because the Act of 1884 provides them to be of ‘like *tenor*’ with the old ones. This is untenable. The words ‘of like *tenor*’ are to be taken in the sense that they are popularly understood, and not in the strict technical sense, as used in reference to the crimes of counterfeiting, forgery, libel, etc. They mean of the same nature or character. The statute was dealing with a financial transaction, and intended the word *tenor* in the popular, dictionary sense, not the precise sense of the criminal law. The bonds, new and old, were a donation to the railroad company, given in lieu of cash, and to be used as cash. The new bonds did not add one cent to the liability imposed by the old, either of principal or interest. They were of the same *tenor*—that is, of the same nature and character—of the old, varying only in their denominational figures, and this to suit the convenience of the parties to the contract, as must be assumed.”

2. **Tent.**—*Killman v. State*, 2 Tex. App. 224, 28 Am. Rep. 432. And in that case it was held that a canvas *tent* might be a “disorderly house.” And see *Callahan v. State*, 41 Tex. 43.

**TENTERDEN'S (LORD) ACT**<sup>1</sup> is a supplement to the statute of frauds, and requires the following promises and engagements to be in writing: First, an acknowledgment of a debt barred by the statute of limitations. The act further provides that an acknowledgment by one joint contractor shall not affect the others.<sup>2</sup> Second, a promise to pay a debt incurred, or a ratification of a contract made, during infancy.<sup>3</sup> Third, a representation as to a person's character, ability, etc., made to enable him to obtain money or goods on credit.<sup>4</sup> Fourth, executory contracts for the sale of goods.<sup>5</sup>

**TENURE.** (See also the title REAL PROPERTY, vol. 23, p. 934.)—The word "tenure" properly denotes the specific feudal relation subsisting between the lord and the tenant;<sup>6</sup> the manner whereby lands or tenements are holden or the service that the tenant owes to his lord.<sup>7</sup> But since the decadence of the feudal system, which has deprived the true doctrine of tenures of nearly all of its practical importance, the word "tenure" has often been confused with terms referring to the *quantum* of the tenant's estate. This confusion is chiefly due to the fact that common-law tenure is found only in connection with estates having a certain conventional *quantum*.<sup>8</sup>

**TENURE OF OFFICE.** (See also the title PUBLIC OFFICERS, vol. 23, p. 314.)—The word "tenure," in this connection, includes the duration of the term of office, as well as the manner of holding.<sup>9</sup>

1. Statute of 9 Geo. IV., c. 14.

2. See the title LIMITATION OF ACTIONS, vol. 19, p. 136.

3. See the title INFANTS, vol. 16, p. 255.

4. See the titles FRAUD AND DECEIT, vol. 14, p. 32; VERBAL AGREEMENTS.

5. See the title VERBAL AGREEMENTS.

6. Atty.-Gen. v. Mercer, 8 App. Cas. 772.

7. Bard v. Grundy, Sneed (Ky.) 169.

8. Challis on Real Property 6. And see Bard v. Grundy, Sneed (Ky.) 169.

Thus in Richman v. Lippincott, 29 N. J. L. 59, it was said: "The word *tenure* is one of very extensive signification; it may import a mere possession, and may include every holding of an inheritance."

**Lease.**—In Saunders v. Hanes, 44 N. Y. 361, it was said: "The word *tenure*, in its legal signification, is applicable to a leasehold possession for a term of years, or for life, as well as to a fee simple, which the defendants' counsel assumes that it implies. It signifies the manner of holding only."

**Tenure of His Patent.**—Where a patent purports to grant the fee, and the patentee sells and undertakes to convey "according to the *tenure* of his patent," it is held that he was bound to convey in fee with covenant of general warranty. Bard v. Grundy, Sneed (Ky.) 168.

9. **Tenure of Office.**—People v. Waite, 9 Wend. (N. Y.) 58. That case was upon the term of office of a commissioner of deeds. The statute authorizing and regulating the appointment of commissioners declared that they

should hold their offices by the same *tenure* as justices of the peace.

The Constitution of Indiana, § 224, provides that "the General Assembly shall not create any office the *tenure* of which shall be longer than four years." In State v. Harrison, 113 Ind. 446, it was contended, on behalf of the relator, that the right to hold over after the expiration of a four-years' term, to an officer of legislative creation, was the practical abrogation of that part of the constitution. But the court refused to give this interpretation to the clause, saying: "This contention rests upon a critical analysis of the word *tenure*, which comes from the Latin *tenere*, to hold. The argument assumes that the meaning to be attributed to the word *tenure*, as used above, is substantially such as to render any person incapacitated or ineligible to hold an office of legislative creation for a longer period than four years by any method, in virtue of one selection or election. \* \* \* We are not impressed with the view thus urged. \* \* \* To sustain the view contended for would require us, upon the mere construction or definition of a word—and a definition which in our view does not lead to the conclusion claimed—to entirely read out of, or materially modify, all that part of section 3, article 15, of the constitution which has reference to the holding over of officers who are incumbent in offices created by the General Assembly."

"The word *tenure* in this connection means nothing more than the right to, or the manner of holding, the place." Ex p. Herrick, 78 Ky. 32.



# TERM.

- I. IN GENERAL, 48.
- II. TERM OF COURT, 48.
- III. TERM OF YEARS, 51.
- IV. TERMS OF AGREEMENT, 52.
- V. TERM OF OFFICE, 53.

## CROSS-REFERENCES.

*As to Terms of Court, see the title TERMS AND SESSIONS OF COURT*  
21 ENCYCLOPÆDIA OF PLEADING AND PRACTICE 598.

*As to Term of Office, see the title PUBLIC OFFICERS, vol. 23, p. 404.*

**I. IN GENERAL.** — The word “term,” in a general sense, signifies boundary or limit; the extremity of anything, or that which limits its extent.<sup>1</sup> As applied to time, the word signifies a fixed period, a determined or prescribed duration;<sup>2</sup> the time for which anything lasts; any limited time; the term of life.<sup>3</sup> As applied to language, it means a word, an expression, a phrase; as, a term of art, a law term, etc.<sup>4</sup>

**II. TERM OF COURT.** — Terms of court are those stated periods during which courts sit for the dispatch of business.<sup>5</sup> The frequency and duration of terms

1. Cent. Dict. See also *Hutchinson v. Lord*, 1 Wis. 314, wherein it was said that “the word ‘terms’ is susceptible of a very varied signification, dependent on the subject-matter spoken of.”

2. Time. — Abb. L. Dict.; *State v. Twichell*, 9 Wash. 530; *State v. Tallman*, 24 Wash. 426.

3. Webst. Dict., quoted in *State v. Sayre*, 118 Ala. 52 (*per Head, J.*), and *State v. Stone-street*, 99 Mo. 372. See also *Hutchinson v. Lord*, 1 Wis. 314.

**Term in Sense of Time.** — A statute provided that if any prisoner should escape he might be retaken and imprisoned again “notwithstanding the term for which he or she was sentenced to be imprisoned may have expired.” The court said that the word “term” was used in this provision as a synonym of the word “time.” *Ex p. Clifford*, 29 Ind. 106.

**Succession of Years.** — A statute required a residence for a term of seven years in order to gain a settlement. The court said: “The word ‘term,’ *ex vi termini*, imports a succession of years.” *Lincoln v. Warren*, 19 Vt. 171.

4. And. L. Dict.

**Terms de la Ley**, the name of an old lexicon of law-French and other technicalities of legal language.

**Under Terms.** — A party is said to be under terms when the court shows him some indulgence or makes some order in his favor, upon certain conditions. *Bouv. L. Dict.*

5. **Terms of Court.** — *Burr. L. Dict.*; 3 Black. Com. 275; and see the title TERMS AND SESSIONS OF COURT, 21 ENCYC. OF PL. AND PR. 598.

“The times fixed by law for the transaction

of judicial business are called ‘terms.’” *Von Schmidt v. Widber*, 99 Cal. 512.

Term is defined as “the time in which a court is held.” *Hutchinson v. Lord*, 1 Wis. 314, quoting *Webst. Dict.*

In *Horton v. Miller*, 38 Pa. St. 270, quoting *Tidd's Pr.* 105, it was said: “Terms of courts ‘are those times or seasons of the year which are set apart for the dispatch of business in the superior courts of common law.’” See also *State v. McHatton*, 10 Mont. 378.

**Bouvier's Definition.** — The word “term,” when used with reference to a court, signifies the space of time during which the court holds a session. *Conkling v. Ridgely*, 112 Ill. 36; *Lipari v. State*, 19 Tex. App. 433, both of which cases quoted *Bouv. L. Dict.*

**English Practice.** — In English practice, the courts of Westminster held four terms a year; viz., Hilary, Easter, Trinity, and Michaelmas terms. “These terms are supposed by Mr. Selden (*Jan. Angl. l. 2, § 9*) to have been instituted by William the Conqueror, but Sir Henry Spelman hath clearly and learnedly shown that they were gradually formed from the canonical institutions of the church; being, indeed, no other than those leisure seasons of the year which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business.” 3 Black. Com. 275.

Formerly, Hilary Term began on the 20th of January, and ended on the 12th of February; Easter Term began on the Wednesday fortnight after Easter day, and ended on the Monday next after Ascension day; Trinity Term began on the Friday following Trinity

depend upon the constitution of the court.<sup>1</sup>

**Whole Term Considered as One Day.** — The whole term is considered as but one day, so that the court has power to revise its own judgments and decrees at

Sunday, and ended the Wednesday fortnight thereafter; Michaelmas Term began on the 6th of November, and ended on the 28th of November. By the statutes of 11 Geo. IV. and 1 Wm. IV., c. 70, the terms were so rearranged that Hilary Term began on the 11th and ended on the 31st of January; Easter Term began on the 15th of April, and ended on the 8th of May; Trinity Term began on the 14th day after the ending of Easter Term and continued for twenty-one days; Michaelmas Term began on the 2d and ended on the 25th of November. By the Judicature Act, the division of the legal year into terms is abolished, and the terms are superseded by the sittings of the court of appeal and of the high court of justice in London and Middlesex. Abb. L. Dict.; Bouv. L. Dict.; 3 Steph. Com. (13th ed.) 570.

**Term Fee.** — In English practice, the term fee is a sum which a solicitor is entitled to charge to his client, and the client to recover, if successful, from the unsuccessful party, paid for every term in which any proceedings subsequent to the summons shall take place. Bouv. L. Dict.; Abb. L. Dict.

**Term Probatory** is the period of time during which evidence may be taken in an ecclesiastical suit. Coote's Ecc. Pr. 240.

1. Bouv. L. Dict.

**Duration.** — In *Bronson v. Schulten*, 104 U. S. 410, it was said: "In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and if there be exceptions in the state courts they are unimportant." See also *MacNaughton v. South Pac. Coast R. Co.*, 19 Fed. Rep. 881; *U. S. v. Guiteau*, 1 Mackey (D. C.) 498.

But the duration of the term, as well as the time for its commencement, is sometimes fixed by statute. *Horton v. Miller*, 38 Pa. St. 271. See also the title JURISDICTION, vol. 17, p. 1039.

**Session and Term Distinguished.** — In *Lipari v. State*, 19 Tex. App. 433, it was said: "It is provided by the statute that 'it shall be the duty of the court, at its first regular session after the filing of such petition with the clerk thereof, to order an election,' etc. \* \* \* Counsel for appellant insists that the word 'session' as used in this provision is synonymous with the word 'term,' and that said petition was filed after the term or session of the court had commenced. We think differently. The word 'term,' when used with reference to a court, signifies 'the space of time during which the court holds a session.' (Bouv. L. Dict.) A session signifies the time during the term which the court sits for the transaction of business, and the session commences when the court convenes for the term, and continues until final adjournment, either before or at the expiration of the term. The term of the court is the time prescribed by law during which it may be in session. The session of the court is

the time of its actual sitting." See also *U. S. v. Dietrich*, 126 Fed. Rep. 659; *Heim v. Brammer*, 145 Ind. 605.

And in *Bush v. Doy*, 1 Kan. 88, it was said: "The term of a court is the time prescribed for holding it, and not the time the court sits transacting business." And it was also held in that case that though the judge may not be present on the day fixed by law for the commencement of the term, yet that day is the first day of the term.

So in *Ex p. Croom*, 19 Ala. 572, where it was held that the word "term" meant the period of time prescribed by law during which the court was required to be held unless the business was sooner disposed of, and not the time during which the court might actually be in session.

**Term and Session Synonymous.** — But in *Brown v. Hume*, 16 Gratt. (Va.) 456, judgment confessed in the clerk's office on the morning of the first day of the term of court, before the order for the opening of court, was held to be a judgment confessed in vacation and valid. The court said: "For some purposes the term of a court and the time appointed by law for the holding of the court have the same legal import and meaning. Thus, the law may require process to be returned, pleadings to be filed, notices to be given, or other steps to be taken, a certain number of days before a given term of the court. \* \* \* In other instances the word 'term' is considered as meaning not the stated time when a court should be held, but the actual session of the court."

A statute provided that every person charged with treason or felony who should not be indicted before or at the second term after he should have been committed, and who should not be tried at the end of the third term after his examination before the justices, should be discharged. It was held that the word "term" meant the actual session of the court and not a stated time when the court should be held. *Ex p. Santee*, 2 Va. Cas. 363; *Com. v. Cawood*, 2 Va. Cas. 540.

And for "session" used synonymously with "term," see *Ravenscraft v. Blaine County*, 5 Idaho 178; *Stefani v. State*, 124 Ind. 8.

"Term of record" synonymous with "regular session," see *Harpwell v. Cumberland County*, 78 Me. 100.

**Sitting and Term.** — By the Constitution of *Maryland* it is provided that the party against whom a decision is made may have the point or question reserved for the consideration of the court *in banc*; but the motion for the reservation of the point must be entered of record during the sitting at which the decision was made. It was held that the word "sitting," as here used, was not synonymous with "term" of the court, but included only the time between the decision and the adjournment of the court for the day. *Costigin v. Bond*, 65 Md. 122.

But where an *Oregon* act provided for the holding of a District Court in one place in each judicial district, and for "sittings" in

any time during the term at which they are rendered.<sup>1</sup> But it may not re-examine its final judgments or decrees at a term subsequent to that at

each county for the trial of issues of fact, it was held that the word "sittings" might be regarded as signifying "term." The court said: "The district judges, in their 'sittings' in the several counties for the trial of issues of fact, attended as they were by clerks, sheriffs, juries, and all the paraphernalia of courts of record, were holding District Courts, and the duration of each of those sittings was a 'term' of court." *Gird v. State*, 1 Oregon 311.

**Competent Term.**—A statute provided that any person committed for treason or felony and not tried sometime in the next term, session of oyer and terminer, general jail delivery, or other court after such commitment, should upon the last day of the term, sessions, or court be set at liberty upon bail, and further provided that "if such prisoner shall not be indicted and tried the second term, sessions, or court after his or her commitment, unless the delay happen on the application or with the assent of the defendant, or upon trial shall be acquitted, he or she shall be discharged from imprisonment." In construing this provision the court said: "Now, the evident construction of this section is that the 'term, session, or court' intended by the act is a legally constituted and competent term, session, or court. It meant that a prosecutor should not allow two such terms or sessions of the court, at each of which the defendant might be legally indicted or tried, to elapse without bringing on the prosecution." *Clark v. Com.*, 29 Pa. St. 135.

**During Term Time.**—See DURING, vol. 10, p. 350.

**Entire Term.**—"An entire term means simply 'from one session of the court to another'—the period of time intermediate between two regular terms as fixed by law." *Carlisle v. May*, 75 Ala. 504, citing *Gamble v. Fowler*, 58 Ala. 576. These cases arose upon the construction of a statute providing that an execution should be a lien from the time when the writ came into the hands of the sheriff, and should continue only so long as it was "regularly issued and delivered to the sheriff without the lapse of an entire term."

**In Term—Confession of Judgment.**—A statute relating to warrants of attorney authorizing confession of judgment provided that judgments entered in vacation should have the same force and effect as if entered "in term." In construing this provision the court in *Kellogg v. Keith*, 4 Ill. App. 390, affirmed 97 Ill. 147, said: "What is understood by the words 'in term'? It means that the judgments confessed in vacation shall have the same force and effect as those entered in the term time of court."

**Regular Term of Court.**—See REGULAR, vol. 24, p. 242.

**Special and General Term.**—See GENERAL, vol. 14, p. 950; Rev. Stat. Mo. (1899), App., art. 17, §§ 10, 14; *State v. Eggers*, 152 Mo. 485.

**Special and Adjourned Term Distinguished.**—By special term is understood a term appointed by the presiding officer or officers, held at an unusual time, for the transaction of some particular business. By adjourned term is meant a term begun at the time appointed by

law, and continued at the discretion of the court to such time as it may appoint, consistent with law. *Wightman v. Karsner*, 20 Ala. 446. See also ADJOURN—ADJOURNMENT, vol. 1, p. 636.

**Term Held to Include Special Term.**—*McGinnis v. Ragsdale*, 116 Ga. 245.

In *Colt v. Vedder*, 19 Minn. 539, it was said: "The phrase 'the term' for which notice of trial may be given under section 200, c. 66, Gen. Stat. [Stat. Minn. 1894, § 5362], includes a special term, at which the action noticed may properly be tried under section 15, c. 64, Gen. Stat." [Stat. Minn. 1894, § 4850].

**Term Time.**—A statute allowed an appeal in certain proceedings from the county commissioners to the Superior Court "at term time." In construing this provision the court said: "The legal construction of those words, 'at the term time,' as bearing upon the proper time of docketing the appeal, is a matter for the courts, and in no sense involves the jurisdiction of the Superior Court in the proper sense of that term. And we think that the words 'term time' in the statute mean the next term of the appellate court." *Brown v. Plott*, 129 N. Car. 272, citing *Boing v. Raleigh*, etc., R. Co., 88 N. Car. 62, and *Hahn v. Guilford*, 87 N. Car. 172.

**Time and Term.**—In *Gardner v. State*, 25 Md. 146, it was said: "In the proviso of the original section, the suggestion for removal was to be made 'before or during the term in which the issue or issues may be joined.' It is obvious from the context that the word 'time' in the section as amended should be construed 'term,' as the sentence indicates duration, not a mere *punctum temporis*."

**Time to Time and Term to Term.**—A recognition bound the defendant to appear before the convicting court "from time to time," instead of "from term to term" as required by the form prescribed by statute. It was held that "from time to time" was not equivalent to "from term to term." *Forbes v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 1072.

**1. Term One Day, Fiction of Law—United States.**—*U. S. v. Harmison*, 3 Sawy. (U. S.) 556; *Doss v. Tyack*, 14 How. (U. S.) 297; *Basset v. U. S.*, 9 Wall. (U. S.) 38; *Ex p. Lange*, 18 Wall. (U. S.) 163; *Tilton v. Barrell*, 17 Fed. Rep. 59; *The Madgie*, 31 Fed. Rep. 926; *Memphis v. Brown*, 94 U. S. 715; *Godard v. Ordway*, 101 U. S. 752; *Bronson v. Schulten*, 104 U. S. 410; *Barrell v. Tilton*, 119 U. S. 637.

*Illinois.*—*Bestor v. Powell*, 7 Ill. 127; *Richardson v. Beldam*, 18 Ill. App. 527; *Jasper v. Schlesinger*, 22 Ill. App. 639.

*Kansas.*—*Union Pac. R. Co. v. Hand*, 7 Kan. 380.

*Wisconsin.*—*Barrett v. State*, 1 Wis. 175.

See also the title JUDGMENTS AND DECREES, vol. 17, p. 814.

In *Bell's Case*, 7 Gratt. (Va.) 649, it was said: "In *England* 'the term,' according to the common law, is understood as the term of a day, and that day is the first day of the term, to which all the after proceedings have reference. This interpretation is there given in



which they were rendered.<sup>1</sup> It may, however, at such subsequent term, order the correction of clerical errors so as to make the record conform to the truth.<sup>2</sup> At common law, a judgment related back to the first day of the term at which it was rendered.<sup>3</sup>

**Adjournment.** — A term may, in the discretion of the court, be adjourned to a day certain,<sup>4</sup> and the presumption is that an adjourned term of court was regularly called and held.<sup>5</sup>

**III. TERM OF YEARS.** — A term, in real-estate law, or estate for years, is one granted for a definite period of time by the owner of the freehold, called the lessor, to one called the lessee, or termor, to hold for the time stipulated and under the conditions agreed upon.<sup>6</sup> "In many cases the word has been used to designate merely the length of time for which the lease is granted, but in others, and originally, it signified not merely the time specified in the lease, but the estate and interest that passes by the lease; 'and therefore the term may expire during the continuance of the time, as by surrender, forfeiture, and the like.'"<sup>7</sup>

criminal as well as in civil proceedings. The same notion has been recognized in our own courts, where the date of a judgment rendered during the term has always had reference to the first day of the term." See also *Glover v. Com.*, 86 Va. 388.

1. See the title JUDGMENTS AND DECREES, vol. 17, p. 816.

2. See the title JUDGMENTS AND DECREES, vol. 17, p. 818.

3. 3 Black. Com. 420.

The fiction of law that a term consists of but one day cannot be invoked to antedate the judicial rejection of a claim to public lands, so as to render operative a grant otherwise of no effect. *Newhall v. Sanger*, 92 U. S. 761.

4. **Adjournment.** — *Colt v. Vedder*, 19 Minn. 539 (special term). See also the title ADJOURNMENTS, 1 ENCYC. OF PL. AND PR. 239, and see in this work ADJOURN — ADJOURNMENT, vol. 1, p. 636, and the title JURISDICTION, vol. 17, p. 1070.

5. *Dallas County v. McKenzie*, 110 U. S. 686.

6. **Term of Years.** (See also the titles ESTATES, vol. 11, p. 380; LANDLORD AND TENANT, vol. 18, p. 149; LEASES, vol. 18, p. 593.) — 1 Washburn on Real Prop. (5th ed.) 291; Tiedeman on Real Prop., § 172.

A term may be for several years, one year, or any fraction of a year, if the time is fixed. 1 Washburn on Real Prop. (5th ed.) 291; Tiedeman on Real Prop., § 172, citing *Brown v. Bragg*, 22 Ind. 122; *Gould v. Sub. Dist. No. 3*, 8 Minn. 427.

In *Williams v. Bosanquet*, 1 Brod. & B. 238, 5 E. C. L. 74, it was said: "The definition by Littleton, § 58, p. 43, b, is, 'tenant for term of years is where a man letteth lands or tenements to another, for term of certain years, after the number of years that is accorded between the lessor and the lessee; and when the lessee entereth by force of the lease, then is he tenant for term of years.'"

**Chattels Real.** — *Glenn v. Peters*, Busb. L. (44 N. Car.) 458.

**Fixed Period.** — In *Gay Mfg. Co. v. Hobbs*, 128 N. Car. 46, it was said: "An indispensable legal requirement to the creation of a lease for a term of years is that it shall have a certain beginning and a certain end. Blackstone says that such an estate is frequently called a 'term'

(*terminus*), because its duration or continuance is bounded, limited, and determined. If no time at which a lease is to commence has been mentioned, the law would fix that time as of the date of the contract. *Moring v. Ward*, 5 Jones L. (50 N. Car.) 272; 2 Black. Com."

While it is necessary that a term be for a fixed period, it is not essential that the period be fixed by the contract of the parties. It is sufficient if by the provisions of the contract the duration of the term can be rendered certain. See *Say v. Smith*, 1 Plowd. 269; *Horner v. Den*, 25 N. J. L. 106.

Thus, an agreement that a lessee may continue to keep the premises after the expiration of his term until he is reimbursed from the rents and profits for certain improvements stipulated to be made entitles him to possession against one claiming under the lessor. *Batchelder v. Dean*, 16 N. H. 265.

**Term and Terms.** — In *Hurd v. Whitsett*, 4 Colo. 89, the court said: "We conclude, therefore, that these words, 'term' and 'terms,' cannot legitimately be used synonymously; that they are not generic in their relations to each other, but have each a technical and specifically distinct meaning as applied to estates in the nature of tenancies. True, the words are both derived from the Latin *terminus*, a limit or boundary, but their application is nevertheless technically distinct, 'term' meaning, in brief, a limited estate, and 'terms,' the limitations in the use of that estate arising out of the covenants and conditions thereto annexed."

**Term in Gross.** — A "term in gross" is one which is not attached to the inheritance, but is held by some person not interested in the inheritance, for his own use and benefit. Abb. L. Dict.; Bouv. L. Dict.

**Term Attendant upon Inheritance.** — A term which is held by a trustee in trust for the owner of the inheritance is said to be attendant upon the inheritance in contradistinction to the term in gross, which is outstanding. Abb. L. Dict.; 1 Washburn on Real Prop. (5th ed.) 312. See also Stat. 8 & 9 Vict., c. 112, § 2, whereby such terms were abolished.

7. **Estate and Duration.** — *St. Joseph, etc., R. Co. v. St. Louis, etc., R. Co.*, 135 Mo. 173, quoting 2 Black. Com. 144.

"Coke Littleton 45 \* \* \* defines the

#### IV. TERMS OF AGREEMENT. — The conditions, stipulations, covenants, and obligations of a contract are frequently called the terms thereof.<sup>1</sup>

word 'term' to signify in understanding of law 'not only the limits and limitation of time but also the estate and interest which passes for that time.' " Wright v. Cartwright, 1 Burr. 284.

**In Sense of Time.** — In Finkelmeier v. Bates, 92 N. Y. 178, it was said: "This payment was to be made or the new lease given at 'the expiration of the term.' The appellants construed the word 'term' as relating not to time, but to the estate of the lessee. It is capable of use in both senses. (1 Washburn on Real Prop. 292.) And whether the one sense or the other is to be attached to the form of expression depends upon the construction of the instrument containing it. \* \* \* The seventh subdivision of the lease, after providing 'that at the expiration of the aforesaid term' the building should be appraised, further undertakes to stipulate for the ultimate surrender of the premises by the lessee in good order and condition, and in fixing the date of such surrender uses the expression 'on the last day of the said term or other sooner determination of the estate hereby granted.' The phraseology indicates that the word 'term' was used in the sense of time as distinguished from the estate granted."

In Grizzle v. Pennington, 14 Bush (Ky.) 116, it was said: "The word 'term' means the duration or extent of the interest in the premises acquired by the tenant from his landlord by the terms of his lease."

**Time Between Making of Lease and Its Commencement.** — In Young v. Dake, 5 N. Y. 467, it was said: "The time between the making of the lease and its commencement in possession is no part of the term granted by it. The term is that period which is granted for the lessee or tenant to occupy and have possession of the premises; it is the estate or interest which he has in the land itself, by virtue of the lease, from the time it vests in possession. When, therefore, our statute speaks of a lease for a term not exceeding one year, and of a contract for a lease for a period not longer than one year, it has reference to the time for the tenant to possess and occupy the premises, and does not include any previous or intermediate time." See also Taylor v. Terry, 71 Cal. 48; Whitney v. Allaire, 1 N. Y. 307; Trull v. Granger, 8 N. Y. 115; Becar v. Flues, 64 N. Y. 518. And see the title VERBAL AGREEMENTS.

**Interesse Terminii.** — "The estate of a lessee for years is called a term, *terminus*, because its duration is limited and determined; for every such estate must have a certain beginning and a certain end. It is perfected only by the entry of the lessee, for before the time fixed for entry the whole estate remains in the lessor, and the lessee has no estate in the land, but merely a right thereto which is called an *interesse terminii*." Taylor on Landlord and Tenant (8th ed.), § 15, quoted in Austin v. Huntsville Coal, etc., Co., 72 Mo. 542.

Lease used in the sense of term, see Harding v. Seeley, 148 Pa. St. 24.

**In Criminal Law.** — When a statute provides that whenever any person who shall be con-

victed of any crime, the punishment whereof shall be confinement at hard labor "for any term of years," shall have been before sentenced to a like punishment, he shall be sentenced to punishment in addition to that prescribed by law for the offense of which he shall be convicted, the words "term of years" mean a period of time not less than two years. *Ex p. Seymour*, 14 Pick. (Mass.) 40.

**1. Terms of Agreement.** (See also the titles CONDITIONS, vol. 6, p. 499; CONTRACTS, vol. 7, p. 88.) — Walsh v. Mehrback, 5 Hun (N. Y.) 449.

The terms of a contract are "conditions, propositions stated, or provisions made, which, when assented to or accepted by another, settle the contract and bind the parties." Webst. Dict., quoted in Hutchinson v. Lord, 1 Wis. 314, wherein it was also said: "Bouvier, in his Law Dictionary, has it thus: 'Terms, in contracts. This word is used in the civil law to denote the space of time granted to the debtor for discharging his obligation; these are express terms resulting from the positive stipulations of the agreement, as where one undertakes to pay a certain sum on a certain day, and also terms which tacitly result from the nature of the things which are the object of the engagement, or from the place where the act is agreed to be done. For instance, if a builder engage to construct a house for me, I must allow a reasonable time for fulfilling his engagement.'"

**Distinguished from Words.** — In Hunt v. Bratt, 23 Iowa 171, it was said that the defendant "should undertake or promise in terms to pay or perform in the particular place, to justify the bringing of the suit in the county where such place may be situated." This was substantially the same as a statutory provision upon the subject which was as follows: "When, by its terms, a contract is to be performed in any particular place, action for a breach thereof may be brought in the county in which such place is situated."

In Haugen v. McCarthey, 34 Iowa 418, it was said: "The word 'terms,' occurring in the statute above quoted, and in the opinion in Hunt v. Bratt, 23 Iowa 171, is not to be understood as synonymous with 'words' or 'expressions,' its signification when used in grammar, which appears to be the meaning applied to it by plaintiff's counsel. But it must be received in the sense attached to it when applied to contracts, namely, as expressing the idea of conditions or stipulations."

**Price.** — In People v. Waring, 5 N. Y. App. Div. 311, it was held, where a statute provided that a contract should be approved as to terms and conditions by a certain board, that this necessarily required the approval of the board to everything in the contract, including the price. The court said: "We may well rest upon the broad construction that in such a connection, and under such circumstances, the legislature gave to the word 'terms' its full and ordinary signification."

But for the fixing of terms in contradiction to the fixing of price, see *In re Wil-*

**V. TERM OF OFFICE.**—A term of office is a fixed period prescribed for holding office.<sup>1</sup> The word "term," when used with reference to the tenure of office, ordinarily refers to a fixed and definite time, and does not apply to appointive offices held at the pleasure of the appointing power.<sup>2</sup>

liams, 106 Mich. 490; *Hutchinson v. Lord*, 1 Wis. 314.

**Credit.**—An assignment for the benefit of creditors which authorizes the assignee to sell on such "terms" as he shall deem advisable invests him with a legal discretion only, and does not authorize him to sell on credit. *Cribben v. Ellis*, 69 Wis. 337, *overruling Keep v. Sanderson*, 2 Wis. 42, 60 Am. Dec. 404, and *Hutchinson v. Lord*, 1 Wis. 286, 60 Am. Dec. 381, which held that such language in the assignment authorized the assignee to sell on credit, and, therefore, rendered the assignment void. *Beus v. Shaughnessey*, 2 Utah 492, is in harmony with the early *Wisconsin* decisions.

In *Smith v. Barron County*, 44 Wis. 693, a power to authorize terms was held not to authorize a sale on credit.

But in *Carson v. Smith*, 5 Minn. 78, it was held that the word "terms" in a power authorized the attorney to sell on credit and to receive payment of such credit.

**Bonds in Payment.**—In *Paul v. Grimm*, 165 Pa. St. 148, it was said: "The learned court below was of opinion that because the letter of attorney granted authority to the attorney to sell 'on such terms as to him shall seem meet,' it was competent for him to take the bonds in payment of the purchase money instead of money. We cannot assent to that proposition. The word 'terms' in such a connection in ordinary acceptance means the times and amounts of the payments. If there are any deferred payments, it may also embrace stipulations as to how such payments shall be secured. It certainly does not import that the attorney has license to take anything he pleases as payment whether it has value or not. Nor, we apprehend, does the use of this word authorize the attorney to subvert the rule of law applicable in such cases and substitute for money, which the law implies, specific property of any kind."

**Terms Cash.**—See *CASH*, vol. 5, p. 760.

**Warranty.**—In *Le Roy v. Beard*, 8 How. (U. S.) 466, the court, in construing the word "terms" as used in a power of attorney, said that "'terms' is an expression applicable to the conveyances and covenants to be given, as much as to the amount of and the time of paying the consideration." And it was held, in that case, that the word "terms" in a power of attorney authorized a covenant of warranty in a deed made under the power.

**Terms of Attachment.**—In *Casey v. Holmes*, 10 Ala. 789, it was said: "The 'terms of attachment' is a charge which one press or warehouse pays another, for 'arranging' cotton."

**Municipal Aid—Lawful Terms.**—A statute granted the power of granting aid to a railroad by the issue of municipal bonds on such "terms, conditions, and considerations" as the municipality and the railroad might agree upon. It was held that by this must be understood lawful terms and considerations. *Bound v. Wisconsin Cent. R. Co.*, 45 Wis. 562.

**1. Term of Office.**—*People v. Brundage*, 78 N. Y. 407; *State v. Ware*, 13 Oregon 385; *State v. Twichell*, 9 Wash. 533; *State v. Tallman*, 24 Wash. 426.

The phrase "term of office" means the period or limit of time during which an incumbent is permitted to hold an office. *People v. Le Fevre*, 21 Colo. 218.

**2. Fixed and Definite Time.**—*Field v. Malster*, 88 Md. 691; *People v. Tierney*, 31 N. Y. App. Div. 309.

But of *People v. Tierney*, 31 N. Y. App. Div. 309, it was said in *McKenna v. New York*, 34 N. Y. App. Div. 154: "This declaration was unnecessary to the decision of the case, and we are not prepared to express an opinion upon the question; nor is it necessary to decide it in the present case."

When applied to an office the word "term" is invariably used to designate a fixed and definite period of time. *Crovatt v. Mason*, 101 Ga. 246; *Baker v. Kirk*, 33 Ind. 517; *Hale v. Bischoff*, 53 Kan. 304; *Speed v. Crawford*, 3 Met. (Ky.) 207; *State v. Stonestreet*, 99 Mo. 372; *People v. Brundage*, 78 N. Y. 403; *State v. Twichell*, 9 Wash. 530; *State v. Tallman*, 24 Wash. 426.

In *State v. Sayre*, 118 Ala. 1, it was said by Head, J.: "So that, whether we take the phrase 'term of office' in its ordinary or popular sense or in its technical import, it means one and the same thing—'a fixed and definite period of time.' Of course, every such period of time, in order to be 'fixed and definite,' must have a point of beginning and a point of termination equally fixed and definite." *Quoting State v. Stonestreet*, 99 Mo. 372.

**Same—Constitutional Provision.**—The Constitution of *Kentucky* provided that officers of states and towns should be elected for such terms and in such manner as might be prescribed by law. It was held that the word "terms," with reference to the tenure of office, was used in the constitution to designate a fixed and definite period of time, and it was accordingly held that a statute creating the offices of members of a police board of a city which provided that they might be removed at the pleasure of the chancellor, and that they must be removed whenever by change of political opinion on their part or on the part of the mayor they ceased to disagree, failed to comply with the requirements of the constitution. *Speed v. Crawford*, 3 Met. (Ky.) 207.

**Consecutive Years.**—A term of two years designates consecutive years. *Hale v. Bischoff*, 53 Kan. 304.

**Time in Sense of Term.**—The words "during the time for which he is elected" have been construed as equivalent to "during his term of office." *Barnum v. Gilman*, 27 Minn. 469.

**Different Incumbents.**—The phrase "term of office" refers to the tenure of office, and there may be different incumbents during a single term. *Baker v. Kirk*, 33 Ind. 517.



**TERMINAL FACILITIES.** — See note 1.

**TERMINATE.** — See note 2.

**TERMINER.** — See note 3.

**TERMINUS.** (See also the title *TERM*, *ante.*) — In modern law, a limiting point, either of time or space, and either at the beginning or end of a period. The termini of a voyage, for instance, are the two local points at which it begins and ends. The *terminus a quo* (limit from which) is the point where it begins; the *terminus ad quem* (limit to which) is the point where it ends.<sup>4</sup> A terminus is defined as the extreme point at either end of a railway, the intervals along its

**Term Applies to Office and Not to Person.** — In *Parmater v. State*, 102 Ind. 95, it was said: "Appellant certainly was elected to fill an office in which a vacancy had occurred by the resignation of Mather. The statute says that he, in such cases, shall hold such office for the unexpired term of Mather. The word 'term' applies to the office, and not to the person holding it." Compare *Weaver v. State*, 152 Ind. 479.

**Same — Term for Which He Is Elected.** — A statute provided that no alderman should be elected or appointed to any other office in the city during the term of office for which he was elected as alderman. In *Ellis v. Lennon*, 86 Mich. 473, the respondent contended that when appointed he had ceased to be an alderman or member of the council and that his term of office had therefore expired. In refusing to sustain this contention the court said: "The term for which respondent was elected is clearly defined by the charter, and the language, 'the term for which he was elected,' has a clear and well-defined meaning. He was elected to serve for two years, whether he served that time or not."

**Holding Over.** — A statute prescribed that the term of office of an assessor or collector of water rates should be for four years and until his successor should have been duly appointed and qualified. By the Constitution of *Missouri* it was provided that an officer's salary should not be increased during the term for which he was appointed. In *State v. Smith*, 87 Mo. 158, reversing 14 Mo. App. 589, it was held that "the time he holds over the designated period is as much a part of the term of his office as that which precedes the date at which the new appointment should be made." See also *State v. Tallman*, 24 Wash. 426.

**Territorial Officer Holding until Suspended by Authority of State.** — The Constitution of *Washington* provided that territorial officers should continue to hold their offices until suspended by authority of the state. Another article provided that no county officer should be eligible to hold his office more than two terms in succession. It was held that this latter provision had no reference to the time served by an officer under the former. *Smalley v. Snell*, 6 Wash. 161.

**Pro Tem. Judge.** — In *Missouri*, etc., *R. Co. v. Ft. Scott*, 15 Kan. 476, it was said: "It may be that it is, strictly speaking, hardly correct to speak of the 'term of office' of a pro tem. judge. Perhaps he may not technically have a 'term of office;' and yet such an expression does no great violence to language. It clearly comes within the spirit and purpose of this

statute that whenever the judge before whom a case is tried shall, before the expiration of the time allowed for settling and signing the case made, have ceased to be judge, he shall nevertheless settle and sign the case made."

**During Term.** — See *DURING*, vol. 10, p. 350.

**Unexpired Term.** — See *UNEXPIRED TERM*.

**1. Terminal Facilities.** — A lease between two railway companies provided for the payment of rent for the use of a part of the track of the lessor company and for *terminal facilities*. The lessor company switched cars for the lessee company over tracks leading to the shops of a car-works company, and sought to recover switching charges therefor, in addition to the amount agreed in the contract to be paid for *terminal facilities*. It was held that the car-works track was not a part of the lessor's *terminal facilities*, and that switching cars over it to and from the shops was a service separate and distinct from the services included in the contract, and that the lessor was entitled to recover the amount such separate service was reasonably worth. *Jacksonville, etc., R. Co. v. Louisville, etc., R. Co.*, 150 Ill. 480.

**2. Terminated.** — As to when suits with an agreement to pay an attorney for his services when due are finally *terminated*, see *Hubbard v. Woodbury*, 7 Allen (Mass.) 422.

**Termination of Voyage in Policy of Insurance.** — In *Gracie v. Marine Ins. Co.*, 8 Cranch (U. S.) 82, Marshall, C. J., said: "The voyage is understood to be *terminated* when the vessel arrives at her port of destination, and has been moored there in safety for twenty-four hours. But it will be conceded that the termination of the voyage as to the ship does not necessarily *terminate* the risk on the goods. This risk may continue when the voyage as to the ship has ended."

**Terminating Society.** — See *Pfeister v. Wheeling Bldg. Assoc.*, 19 W. Va. 695.

**Termination — Reference to Final Judgment.** — See *Matter of Murray Hill Bank*, 153 N. Y. 199.

**Terminated Construed "To Have Terminated."** — See *Hazen v. Massachusetts Mut. L. Ins. Co.*, 170 Mass. 254.

**3. Oyer and Terminer.** — A phrase applied in *England* to the assizes, which were so called from the commission of oyer and *terminer* directed to the judges, empowering them to inquire, bear, and determine all felonies, misdemeanors, treasons, etc. 4 Black. Com. 269. It is now used to denote a court of original jurisdiction for the trial of crimes.

**4. Terminus.** — Burr. L. Dict., citing 3 Kent's Com. 185.

course being called stations; also, as the buildings for offices, etc., at the extremity of a railroad.<sup>1</sup>

**TERRA COTTA.** — See note 2.

**TERRE-TENANT.** — Terre-tenant is defined by Bouvier as one who has the actual possession of land, but, in a more technical sense, as he who is seized of the land; and in the latter sense the owner of the land, or the person seized, is the terre-tenant, and not the lessee.<sup>3</sup> "A terre-tenant, in a general sense, is one who is seized or actually possessed of lands as the owner thereof. In a *scire facias sur mortgage* or judgment, a terre-tenant is, in a more restricted sense, one other than the debtor who becomes seized or possessed of the debtor's lands, subject to the lien thereof. Those only are terre-tenants, therefore, in a technical sense, whose title is subsequent to the incumbrance."<sup>4</sup>

**TERRIER.** — In the old English law, a register or survey of lands; a book or roll in which the several lands, either of an individual or a corporation, are described, containing the quantity of acres, boundaries, tenants' names, etc.<sup>5</sup>

**TERRITORIAL JURISDICTION.** — "The tract of land or district within which a judge or magistrate has jurisdiction is called his territory, and his power in relation to his territory is called his territorial jurisdiction. Every act of jurisdiction exercised by a judge without his territory, either by pronouncing sentence or carrying it into execution, is null."<sup>6</sup>

**TERRITORIAL MARSHAL.** — See note 7.

1. **Railroads.** — *Goyeau v. Great Western R. Co.*, 25 Grant Ch. (U. C.) 64, quoting Imp. Dict. See also *State v. Camden*, 38 N. J. L. 299.

The *termini* of a projected road are its designation and only means of identification. *Road in Lower Merion*, 58 Pa. St. 68, where the court said: "The importance of the *termini* is thus seen. They are the initials which describe the proceeding, and limit the authority delegated by the court in its orders to the viewers. To go beyond them is to exceed the authority. When once the viewers cut loose from the order and go outside of it the whole identity of the proceeding is lost. If they can go beyond one terminus they may disregard the other."

**Not Confined to Buildings.** — In *Geauyeau v. Great Western R. Co.*, 3 Ont. App. 412, it was held that the word *terminus* was not confined to buildings alone, but extended to the whole premises necessary to the conducting of the business of a railroad at its *terminus*.

**Subscription.** — In *Manheim, etc., Turnpike Road Co. v. Arndt*, 31 Pa. St. 319, it was said: "It is involved in the nature of a subscription to the stock of a company, for making a road from one place to another, that the *termini* are part of the contract." See generally the title STOCK AND STOCKHOLDERS, vol. 26, p. 808.

2. **Terra Cotta Busts.** — *Terra cotta* busts do not come within the term "statuary." See *Sutton v. Ciceri*, 15 App. Cas. 144.

3. **Bouv. L. Dict.** See also *Reynolds v. Henderson*, 7 Ill. 110.

4. **Terre-tenant.** — *Hulett v. Mutual L. Ins.*

*Co.*, 114 Pa. St. 146, citing *Chahoon v. Hollenback*, 16 S. & R. (Pa.) 425.

In *Mitchell v. Hamilton*, 8 Pa. St. 491, it was said: "Strictly speaking, only the debtor's subsequent grantee of the fee simple is a *terre-tenant*."

In *Dengler v. Kiehner*, 13 Pa. St. 41, it was said: "Who is a *terre-tenant*? Not every one who happens to be in possession of the land. There can be no *terre-tenant* who is not a purchaser of the estate, mediately or immediately, from the debtor, while it was bound by the judgment." See also *Fox v. Seal*, 79 Pa. St. 66, note, 22 Wall. (U. S.) 441.

In *Eberhart's Appeal*, 39 Pa. St. 511, it was said: "The person who is entitled to the benefit of the exemption law of 1849 is described or referred to in the act, by two words — 'defendant' and 'debtor.' The question therefore is whether a *terre-tenant* is a defendant or debtor, within the meaning of the act." It was held that a *terre-tenant* was neither a defendant nor a debtor.

In *Polk v. Pendleton*, 31 Md. 123, it was said: "Who are *terre-tenants* within the meaning of the law, whom it is necessary to make parties to the *scire facias*? All who are in possession deriving title under the judgment debtor, such as heirs, devisees, or alienees, after the judgment."

5. **Burr. L. Dict.** In ecclesiastical law, a detailed statement or inventory of the temporal possessions of a church.

6. **Territorial Jurisdiction.** — *Phillips v. Thralls*, 26 Kan. 781, quoting *Bouv. L. Dict.*

7. **Territorial Marshal.** — In *Ex p. Duncan*, 1 Utah 88, it was held that a *territorial marshal* was not a federal officer.

# TERRITORIES.

BY WILLIAM HOWARD BUCHANAN.

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## CROSS-REFERENCES.

*For matters of PROCEDURE, see the* ENCYCLOPEDIA OF PLEADING AND PRACTICE, vol. 21, p. 644.

*For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work:* EMINENT DOMAIN, vol. 10, p. 1043; POLICE POWER, vol. 22, p. 914; PUBLIC OFFICERS, vol. 23, p. 314; STATE AND PUBLIC LANDS, vol. 26, p. 197; STATES, vol. 26, p. 463; TAXATION, vol. 27, p. 567; UNITED STATES.



**I. DEFINITIONS.** — Territories are political subdivisions of the outlying dominion of the United States.<sup>1</sup> They are outlying provinces of the national government, subject to its direct control through congressional legislation, or its indirect control through congressional supervision of territorial legislation.<sup>2</sup>

**II. ACQUISITION** — **1. In General.** — The usage of the world is, where a nation is not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined by the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose.<sup>3</sup>

**2. By the United States.** — The Constitution confers absolutely on the government of the United States the powers of making war and making treaties; consequently, the government possesses the power of acquiring territory, either by conquest or treaty.<sup>4</sup>

**III. STATUS** — **1. In General.** — The territories are as much a part of the United States as are the states.<sup>5</sup>

The **Ultimate Purpose** is that they shall, as soon as practicable, be organized into states, which shall take their equal place and part in the Union. The territorial condition is but a necessary incident of immaturity. Every essential element of statehood is there, and the policy of the government has always been to employ this period as one of preparation by clothing the territories with the paraphernalia and investing them with many of the duties and privileges of statehood.<sup>6</sup> During the term of their pupilage as territories, they are mere dependencies of the United States. They are not sovereign or supreme in any department of their authority.<sup>7</sup> They are, in a sense, wards of the government,<sup>8</sup> and their relation to the general government is much the same as that which counties bear to the state.<sup>9</sup>

**Upon Acquisition of Territory It Ceases to Be Foreign** as to the country which acquires it. It comes under the complete and absolute sovereignty and dominion of that country, and so becomes territory of that country over which civil government can be established.<sup>10</sup>

**2. Status of Inhabitants of Ceded Territory.** — Where territory is acquired by cession, the relations of the inhabitants with each other undergo no change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it; and the law which may be denominated political is neces-

**1. Territory Defined.** — *National Bank v. Yankton County*, 101 U. S. 133; *Territory v. Scott*, 3 Dak. 357; *People v. Daniels*, 6 Utah 288.

**2. Territory v. O'Connor**, 5 Dak. 397.

A territory is an emanation of federal power, standing upon and subordinate to the authority of the general government. *Reynolds v. People*, 1 Colo. 179.

**Whether the Term "State" in Legislation Embraces a Territory**, see the title STATES, vol. 26, p. 465.

**3. Acquisition in General.** — *American Ins. Co. v. 356 Bales Cotton*, 1 Pet. (U. S.) 511.

**4. Acquisition by the United States.** — *Fleming v. Page*, 9 How. (U. S.) 603; *Dred Scott v. Sandford*, 19 How. (U. S.) 393; *American Ins. Co. v. 356 Bales Cotton*, 1 Pet. (U. S.) 511; *Territory v. Lee*, 2 Mont. 124; *Nelson v. U. S.*, 30 Fed. Rep. 112.

**5. Territories Part of United States.** — *Silver Bow County v. Davis*, 6 Mont. 306.

**6. Ultimate Purpose of Territorial Government.** — *Shively v. Bowlby*, 152 U. S. 1; *Territory v. Scott*, 3 Dak. 357.

**7. Territories Not Sovereign.** — *Snow v. U. S.*, 18 Wall. (U. S.) 317; 16 Op. Atty.-Gen. 114; *Reynolds v. People*, 1 Colo. 179; *Territory v. Lee*, 2 Mont. 124; *People v. Daniels*, 6 Utah 288.

**8. Territories Wards of Government.** — *U. S. v. Smith*, (Ohio 1856) 5 Am. L. Reg. 268; *Treadway v. Schnauber*, 1 Dak. 227.

**9. Relation to General Government.** — *National Bank v. Yankton County*, 101 U. S. 129; *Stevenson v. Moody*, 2 Idaho 260; *People v. Daniels*, 6 Utah 288.

**10. Territory Not "Foreign" After Acquisition.** — *Cross v. Harrison*, 16 How. (U. S.) 164; *De Lima v. Bidwell*, 182 U. S. 1; *Fourteen Diamond Rings v. U. S.*, 183 U. S. 176.

**A Territory Cannot Be Domestic for One Purpose and Foreign for Another**, and it does not remain foreign with respect to the tariff laws until

sarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the state.<sup>1</sup> The result is the same although there is no stipulation that the native inhabitants shall be incorporated into the body politic, and none securing to them the right to choose their nationality. Their allegiance becomes due to the acquiring country, and they become entitled to its protection.<sup>2</sup>

**IV. RIGHTS OF INHABITANTS — 1. In General.** — The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, state and national; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States.<sup>3</sup>

**2. Right to Sue Citizen of State.** — The uniform ruling of the courts has been that a resident of a territory is not a citizen of a state, so as to give him the right to sue a citizen of a state in the federal courts.<sup>4</sup>

**3. Right of Suffrage.** — It rests with Congress to say whether, in a given case, any of the people resident in the territory shall participate in the election of its officers, or the making of its laws; and Congress may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge such right as it may deem expedient.<sup>5</sup>

The Territorial Legislature May Impose Additional Qualifications regarding suffrage, in so far as it acts within the scope of the authority committed to it.<sup>6</sup>

**V. GOVERNMENT — 1. Control by Congress.** — It is no longer doubted that over all territory acquired by treaty or conquest Congress has exclusive and universal power, and its legislation is subject to no control, save treaty stipulations, personal rights, and rights of citizenship guaranteed by the Constitution. Such territory is not within the control of any state, and is necessarily under the jurisprudence of the United States, otherwise it would be without any government at all.<sup>7</sup> This power has been repeatedly recognized by the

Congress has acted by embracing it within the customs union. *De Lima v. Bidwell*, 182 U. S. 1.

**1. Inhabitants of Ceded Territory.** — *American Ins. Co. v. 356 Bales Cotton*, 1 Pet. (U. S.) 511.

**2. Stipulation for Incorporation Not Necessary.** — *Fourteen Diamond Rings v. U. S.*, 183 U. S. 176.

**3. Rights of Inhabitants.** — *Cross v. Harrison*, 16 How. (U. S.) 164; *American Ins. Co. v. 356 Bales Cotton*, 1 Pet. (U. S.) 511; *National Bank v. Yankton County*, 101 U. S. 129; *Murphy v. Ramsey*, 114 U. S. 15; *Boyd v. Nebraska*, 143 U. S. 135.

**4. Right to Sue Citizen of State in Federal Courts.** — *Cissel v. McDonald*, 16 Blatchf. (U. S.) 150; *Hepburn v. Ellzey*, 2 Cranch (U. S.) 445; *Picquet v. Swan*, 5 Mason (U. S.) 35; *Barney v. Baltimore*, 6 Wall. (U. S.) 280; *Vasse v. Mifflin*, 4 Wash. (U. S.) 519; *New Orleans v. Winter*, 1 Wheat. (U. S.) 91; *Darst v. Peoria*, 13 Fed. Rep. 561.

**5. Right of Suffrage.** — *Murphy v. Ramsey*, 114 U. S. 15; *Boyd v. Nebraska*, 143 U. S. 135; *Innis v. Bolton*, 2 Idaho 442.

Where the Organic Act Provides that the Right of Suffrage and holding office shall be exercised by citizens of the United States, etc., the word "citizens" refers to male citizens. *Bloomer v. Todd*, 3 Wash. Ter. 509.

**6. Legislative Qualifications.** — *Innis v. Bolton*, 2 Idaho 442.

**The Power of the Territorial Legislature to Determine Who Shall and Who Shall Not Vote** at a territorial election is subject both to constitutional and congressional restrictions. Such legislature is expressly given the power to prescribe the qualifications of voters at all elections after the first. *Wooley v. Watkins*, 2 Idaho 590.

**7. Control by Congress — United States.** — *Benner v. Porter*, 9 How. (U. S.) 235; *Dred Scott v. Sandford*, 19 How. (U. S.) 393; *Leitensdorfer v. Webb*, 20 How. (U. S.) 176; *American Ins. Co. v. 356 Bales Cotton*, 1 Pet. (U. S.) 511; *Clinton v. Englebrecht*, 13 Wall. (U. S.) 434; *Snow v. U. S.*, 18 Wall. (U. S.) 317; *Hornbuckle v. Toombs*, 18 Wall. (U. S.) 648; *National Bank v. Yankton County*, 101 U. S. 129; *Murphy v. Ramsey*, 114 U. S. 15; *U. S. v. Kagama*, 118 U. S. 375; *Church of Jesus Christ v. U. S.*, 136 U. S. 1; *McAllister v. U. S.*, 141 U. S. 174; *Boyd v. Nebraska*, 143 U. S. 135; *Shively v. Bowlby*, 152 U. S. 1; *U. S. v. Nelson*, 29 Fed. Rep. 202; *Nelson v. U. S.*, 30 Fed. Rep. 112.

*Arizona*. — *Territory v. Blomberg*, (Ariz. 1886) 11 Pac. Rep. 671.

*Colorado*. — *Deitz v. Central*, 1 Colo. 323.

*Dakota*. — *Treadway v. Schnauber*, 1 Dak. 227; *Territory v. Scott*, 3 Dak. 357.

*Idaho*. — *Stevenson v. Moody*, 2 Idaho 260; *Taylor v. Stevenson*, 2 Idaho 180.

*Montana*. — *Territory v. Burgess*, 8 Mont. 57.

Supreme Court of the United States, and has been exercised without interruption by Congress for over a century. It arises from the right to acquire the territory itself,<sup>1</sup> and from the power given to Congress by the Constitution to make all needful rules and regulations respecting the territory or other property of the United States.<sup>2</sup>

Congress May Govern the Territories Either Mediatey or Immediately; either by the creation of a territorial government, with power to legislate for the territory, subject to such limitations and restraints as Congress may impose upon it, or by the passage of laws directly operating upon the territory without the intervention of the subordinate government.<sup>3</sup>

**2. Territorial Government** — *a. ORGANIC ACT.* — The organic act (*i. e.*, the act organizing the territory) transfers from Congress to the territorial legislature the power to pass laws for the people of the territories, and takes the place of a constitution as the fundamental law of the local government. It is obligatory and binds the territorial authorities.<sup>4</sup> From the earliest history of the country the organic acts of the several territories have been of the same general character. They are framed after and founded upon the Constitution of the United States itself, and are singularly like the early state constitutions; and the division into and the separation of the three great departments, and the grants of power thereto, are much the same in character and distribution.<sup>5</sup>

**Effect on Congressional Control.** — Congress, in giving the territories an organic act, delegates none of its sovereign authority; for not only can the organic acts be altered or abolished, but all laws made under and by virtue thereof, by territorial legislatures, are subject to congressional supervision, showing that sovereignty resides with Congress alone.<sup>6</sup>

*b. LEGISLATIVE DEPARTMENT* — (1) *In General.* — The legislative department in each territory is composed of a governor and a legislative assembly.<sup>7</sup> The legislature is a creature of Congress; the number of its members, its powers, duties, and sessions, are defined and limited by the act organizing the territory and the amendments thereto, and it derives no life or power from

*Oklahoma.* — Allen *v.* Reed, 10 Okla. 105.

*Oregon.* — Edwards *v.* Steamship Panama, 1 Oregon 418.

*Utah.* — People *v.* Clayton, 4 Utah 421; People *v.* Daniels, 6 Utah 288.

*Wisconsin.* — Territory *v.* Doty, 1 Pin. (Wis.) 396.

*Wyoming.* — Wagner *v.* Harris, 1 Wyo. 194; Downes *v.* Parshall, 3 Wyo. 425.

**1. Source of Congressional Authority.** — Sere *v.* Pilot, 6 Cranch (U. S.) 332; Dred Scott *v.* Sandford, 19 How. (U. S.) 443; National Bank *v.* Yankton County, 101 U. S. 129; Church of Jesus Christ *v.* U. S., 136 U. S. 1; De Lima *v.* Bidwell, 182 U. S. 1; Nelson *v.* U. S., 30 Fed. Rep. 112. See *infra*, this title, *Acquisition*.

**2. Const. U. S., art. 4, § 3;** Scott *v.* Jones, 5 How. (U. S.) 343; Dred Scott *v.* Sandford, 19 How. (U. S.) 393; American Ins. Co. *v.* 356 Bales Cotton, 1 Pet. (U. S.) 511; Church of Jesus Christ *v.* U. S., 136 U. S. 1; Territory *v.* Blomberg, (Ariz. 1886) 11 Pac. Rep. 671; Treadway *v.* Schnauber, 1 Dak. 227; Territory *v.* Lee, 2 Mont. 124.

**3. Method of Government** — *United States.* — Dred Scott *v.* Sandford, 19 How. (U. S.) 393; Snow *v.* U. S., 18 Wall. (U. S.) 317; National Bank *v.* Yankton County, 101 U. S. 129; Murphy *v.* Ramsey, 114 U. S. 15; De Lima *v.* Bidwell, 182 U. S. 1; U. S. *v.* Nelson, 29 Fed. Rep. 202.

*Colorado.* — Reynolds *v.* People, 1 Colo. 179; Deitz *v.* Central, 1 Colo. 323.

*Oklahoma.* — Allen *v.* Reed, 10 Okla. 105.

*Oregon.* — Edwards *v.* Steamship Panama, 1 Oregon 418.

*Wyoming.* — Wagner *v.* Harris, 1 Wyo. 194; Downes *v.* Parshall, 3 Wyo. 425.

**4. Organic Act Takes Place of Constitution** — *United States.* — Ferris *v.* Higley, 20 Wall. (U. S.) 375; National Bank *v.* Yankton County, 101 U. S. 129.

*Dakota.* — Treadway *v.* Schnauber, 1 Dak. 227; Territory *v.* Scott, 3 Dak. 357; Territory *v.* O'Connor, 5 Dak. 397.

*Idaho.* — People *v.* Maxon, 1 Idaho 330; Moore *v.* Kouhly, 1 Idaho 55; Stevenson *v.* Moody, 2 Idaho 260.

*New Mexico.* — Matter of Atty.-Gen., 2 N. Mex. 49.

*Utah.* — Williams *v.* Clayton, 6 Utah 86.

*Wisconsin.* — Smith *v.* Odell, 1 Pin. (Wis.) 449.

**5. Nature of Organic Acts.** — Territory *v.* O'Connor, 5 Dak. 397; National Bank *v.* Yankton County, 101 U. S. 133; Treadway *v.* Schnauber, 1 Dak. 236; Territory *v.* Scott, 3 Dak. 357; Matter of Atty.-Gen., 2 N. Mex. 58.

**6. Effect on Congressional Control.** — Territory *v.* Lee, 2 Mont. 124.

**7. Composition of Legislative Department.** — U. S. Rev. Stat., § 1846; Wilkerson *v.* Utah, 99 U. S. 130; *Ex p.* Lothrop, 118 U. S. 113.



any other source.<sup>1</sup> The powers of government are only such as are authorized under the law creating the government of the territory, and an act obnoxious thereto cannot be sustained.<sup>2</sup>

(2) *Extent of Power.*—The power conferred on the territorial legislature by the organic act extends to "all rightful subjects of legislation" consistent with the Constitution and laws of the United States and the organic law of the territory.<sup>3</sup>

"Rightful" has here the significance of "lawful," and the clause quoted must be interpreted to mean that Congress grants to the territorial legislature all the powers necessary to be exercised by it in the establishment of a temporary sovereign government. There are certain powers it cannot grant, such as the right to coin money, to regulate commerce, and to pass bankrupt laws, for such powers can be exercised by Congress alone; but all necessary powers of municipal government must have been and were intended to be granted by the clause.<sup>4</sup> What are "rightful subjects of legislation," must be determined by an examination of the subjects upon which legislatures are in the practice of acting, with the consent and approval of the people they represent.<sup>5</sup>

1. *Status of Legislature.*—Treadway v. Schnauber, 1 Dak. 227; Stevenson v. Moody, 2 Idaho 260; People v. Clayton, 4 Utah 421.

*Legislative Officers and Attaches.*—See *infra*, this title, *Officers*.

2. *Acts in Conflict with Organic Act.*—Ferris v. Higley, 20 Wall. (U. S.) 375; Moore v. Koubly, 1 Idaho 55; Taylor v. Stevenson, 2 Idaho 180; Territory v. Burgess, 8 Mont. 57; Duncan v. McAllister, 1 Utah 89; Winters v. Hughes, 3 Utah 443; People v. Clayton, 4 Utah 421; People v. Daniels, 6 Utah 288; Smith v. Odell, 1 Pin. (Wis.) 449.

3. *Extent of Legislative Power.*—Rev. Stat. U. S., § 1851.

*United States.*—The Panama, Deady (U. S.) 31; The Ullock, 9 Sawy. (U. S.) 634; Miners' Bank v. Iowa, 12 How. (U. S.) 1; Rogers v. Burlington, 3 Wall. (U. S.) 654; Beall v. New Mexico, 16 Wall. (U. S.) 535; Snow v. U. S., 18 Wall. (U. S.) 317; Ferris v. Higley, 20 Wall. (U. S.) 375; Wilkerson v. Utah, 99 U. S. 130; *Ex p.* Lothrop, 118 U. S. 113; Maynard v. Hill, 125 U. S. 190; Guthrie Nat. Bank v. Guthrie, 173 U. S. 528; U. S. v. Smith, (Ohio 1856) 5 Am. L. Reg. 269.

*Arizona.*—Territory v. Blomberg, (Ariz. 1886) 11 Pac. Rep. 671; Oury v. Goodwin, (Ariz. 1891) 26 Pac. Rep. 376; Atlantic, etc., R. Co. v. Lesueur, (Ariz. 1888) 19 Pac. Rep. 157, 37 Am. & Eng. R. Cas. 368.

*Colorado.*—Cowell v. Colorado Springs Co., 3 Colo. 82.

*Dakota.*—St. Paul F. & M. Ins. Co. v. Coleman, 6 Dak. 458; Territory v. O'Connor, 5 S. Dak. 397.

*Idaho.*—Wooley v. Watkins, 2 Idaho 590; People v. Havird, 2 Idaho 531; Stevenson v. Moody, 2 Idaho 260.

*Kansas.*—Burnes v. Atchison, 2 Kan. 454; State v. Young, 3 Kan. 445.

*Montana.*—U. S. v. Ensign, 2 Mont. 396; People v. Butte, 4 Mont. 174, 47 Am. Rep. 346; Silver Bow County v. Davis, 6 Mont. 306; Carver Mercantile Co. v. Hulme, 7 Mont. 566; Territory v. Burgess, 8 Mont. 57; O'Donnell v. Glenn, 8 Mont. 248; Territory v. Guyott, 9 Mont. 46.

*New Mexico.*—Garcia v. Territory, 1 N. Mex. 415; Chavez v. Luna, 5 N. Mex. 183.

*Oklahoma.*—*Ex p.* Larkin, 1 Okla. 53; Braithwaite v. Cameron, 3 Okla. 630; Guthrie v. New Vienna Bank, 4 Okla. 194; Allen v. Reed, 10 Okla. 105.

*Utah.*—Godbe v. Salt Lake City, 1 Utah 75; Salt Lake City Nat. Bank v. Golding, 2 Utah 1; Ducheneau v. House, 4 Utah 367; People v. Douglass, 5 Utah 283; Williams v. Clayton, 6 Utah 86; People v. Daniels, 6 Utah 288.

*Washington.*—Dacres v. Oregon R., etc., Co., 1 Wash. 525; Bloomer v. Todd, 3 Wash. Ter. 599.

*Wisconsin.*—Smith v. Odell, 1 Pin. (Wis.) 449; Territory v. Doty, 1 Pin. (Wis.) 396.

*Wyoming.*—Wagner v. Harris, 1 Wyo. 194; Downes v. Parshall, 3 Wyo. 425; *In re* Murphy, 5 Wyo. 297.

*Extent of Legislative Powers.*—The powers exercised by a territorial legislature are nearly as extensive as those exercised by the legislature of any state. Baca v. Perez, 8 N. Mex. 187.

4. *Significance of "Rightful."*—Territory v. O'Connor, 5 Dak. 397; Baca v. Perez, 8 N. Mex. 187.

5. *Determination of Rightful Subjects.*—The Panama, Deady (U. S.) 27, 1 Oregon 418; Maynard v. Hill, 125 U. S. 190, *affirming* 2 Wash. Ter. 326.

*The Punishment of Larceny* is a rightful subject of legislation. Garcia v. Territory, 1 N. Mex. 415.

*The Allowance or Refusal of Costs* in judicial proceedings is a rightful subject of legislation. St. Paul F. & M. Ins. Co. v. Coleman, 6 Dak. 458.

*Writs and Oaths.*—The territorial legislature may prescribe all rules, requirements, forms, and ceremonies in obtaining, issuing, and serving writs, and it may, by law, declare what officers shall or may administer oaths. Smith v. Odell, 1 Pin. (Wis.) 449.

*The Creation of Municipal Corporations* is a "rightful subject of legislation." State v. Young, 3 Kan. 445; People v. Butte, 4 Mont. 174, 47 Am. Rep. 346.

*The Definition of Crimes and Misdemeanors* and a prescription of the mode of punishment are pre-eminently rightful subjects of legislative action. Bray v. U. S., 1 N. Mex. 1.

The Territorial Legislature Is Substituted for Congress and clothed with the power of that body, except that it may not pass laws interfering with the primary disposal of the soil, nor tax the property of the United States, nor tax the land or other property of nonresidents higher than the land or property of residents.<sup>1</sup>

(3) *Police Power*. — A territorial legislature may rightfully regulate the general police power of the territory.<sup>2</sup>

(4) *Taxation*. — It is just as competent for a territorial legislature to determine and to direct the manner and the place of taxing personal property as it is for a state legislature to do the same thing.<sup>3</sup>

The Only Limitations are that no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or property of residents. This is the only restriction placed upon the taxing power of the territory, and should be held to be a delegation by Congress to the territory of its admitted power to tax all else.<sup>4</sup>

(5) *Power of Incorporation*. — A territorial legislature may, by general incorporation acts, create municipal corporations and confer upon them the usual franchises.<sup>5</sup> And while it is forbidden by Congress to grant private charters or special privileges,<sup>6</sup> it may, by general incorporation laws, permit persons to associate together as bodies corporate, for the purpose of engaging in mining, manufacturing, and other industrial pursuits.<sup>7</sup>

(6) *Power over Public Domain*. — The government has a perfect title to the public land and an absolute and unqualified right of disposal; and a territory cannot in any manner modify or affect the right which the government has to the primary disposal of the public domain.<sup>8</sup>

(7) *Power of Repeal*. — When a legislative enactment requires the ratification of Congress before it becomes effective as a law, and it is ratified, then the legislature has no power to effect its repeal. But if a statute is within the legislative power, its subsequent ratification not being required to give it

The Giving of Additional Power to the Writ of Prohibition is a subject of rightful legislation. *People v. House*, 4 Utah 369.

The Continuing in Force of a Criminal Law Offended Against until the offender is convicted and the penalty of the law enforced is a "rightful subject" of legislation within the meaning of the organic act. *Ex p. Larkin*, 1 Okla. 53.

1. *Restrictions on Legislative Power*. — *Miners' Bank v. Iowa*, 12 How. (U. S.) 1; *Oury v. Goodwin*, (Ariz. 1891) 26 Pac. Rep. 376; *Wooley v. Watkins*, 2 Idaho 590; *Burnes v. Atchison*, 2 Kan. 454; *Braithwaite v. Cameron*, 3 Okla. 630; *Salt Lake City Nat. Bank v. Golding*, 2 Utah 1; *People v. Douglass*, 5 Utah 283; *In re Murphy*, 5 Wyo. 297.

2. *Police Power*. — *Territory v. O'Connor*, 5 Dak. 397.

Articles Deemed Injurious to the Health or Morals of the Community. — *Territory v. Guyott*, 9 Mont. 46.

Licensing and Regulating the Liquor Traffic. — *Territory v. O'Connor*, 5 Dak. 397; *Thornton v. Territory*, 3 Wash. Ter. 482.

Regulation of Pilots and Pilotage. — The Panama, Deady (U. S.) 31.

Regulating the Killing of Game. — *Hayes v. Territory*, 2 Wash. Ter. 286.

3. *Taxation*. — *Silver Bow County v. Davis*, 6 Mont. 306. See the title TAXATION, vol. 27, p. 567.

4. *Limitations upon Taxing Power*. — *Atlantic*,

etc., *R. Co. v. Lesueur*, (Ariz. 1888) 19 Pac. Rep. 157, 37 Am. & Eng. R. Cas. 368.

5. *May Create Municipal Corporations*. — *Vincennes University v. Indiana*, 14 How. (U. S.) 268; *Rogers v. Burlington*, 3 Wall. (U. S.) 662; *Deitz v. Central*, 1 Colo. 323; *Elk Point v. Vaughn*, 1 Dak. 108; *Burnes v. Atchison*, 2 Kan. 454; *State v. Young*, 3 Kan. 445; *People v. Butte*, 4 Mont. 174, 47 Am. Rep. 346; *Myers v. Manhattan Bank*, 20 Ohio 283; *Wagner v. Harris*, 1 Wyo. 194.

6. *Cannot Grant Special Privileges*. — *Elk Point v. Vaughn*, 1 Dak. 108; *Guthrie Daily Leader v. Cameron*, 3 Okla. 677.

A Game Law, Forbidding All Persons from Hunting at Certain Seasons within specified counties, is not inconsistent with the inhibition that "especial privileges" shall not be granted. *Hayes v. Territory*, 2 Wash. Ter. 286.

May Grant a Charter to a City. — *Alger v. Hill*, 2 Wash. 344.

7. *Incorporation for Industrial Pursuits*. — *Wells v. Northern Pac. R. Co.*, 10 Sawy. (U. S.) 441, 23 Fed. Rep. 469, 18 Am. & Eng. R. Cas. 440; *Cowell v. Colorado Springs Co.*, 3 Colo. 82; *Carver Mercantile Co. v. Hulme*, 7 Mont. 566, 22 Am. & Eng. Corp. Cas. 580.

8. *Power over Public Domain*. — *Rev. Stat. U. S.*, § 1851; *Territory v. Lee*, 2 Mont. 124, 13 Am. L. Reg. (N. S.) 487, 6 Mor. Min. Rep. 248; *King v. Thomas*, 6 Mont. 409; *Vansickle v. Haines*, 7 Nev. 249; *Newcomb v. Smith*, 1 Chand. (Wis.) 71. But see *Oury v. Goodwin*,

validity, such ratification does not prevent the legislature from changing such statute.<sup>1</sup>

(8) *Restrictions Upon*. — General restrictions upon the general government are restrictions upon the territories also.<sup>2</sup>

But a **General Law of Congress**, applicable to all territories and other places under the exclusive jurisdiction of the United States, does not restrict the legislation of the territories over kindred offenses, or over the means for their ascertainment and prevention.<sup>3</sup>

(9) *Delegation of Authority*. — A power intrusted to the territorial legislature alone belongs to it exclusively, without the right of delegation.<sup>4</sup>

(10) *Legislative Sessions*. — The sessions of the several legislative assemblies of the territories are limited by act of Congress to sixty working days exclusive of Sundays, holidays, and days of intermediate adjournment.<sup>5</sup>

An **Extraordinary or Special Session** of a territorial legislature cannot be convened "until the reasons for the same have been presented to the President of the United States, and his approval thereof has been duly given."<sup>6</sup>

(11) *Congressional Supervision of Territorial Legislation*. — While in their operation Congress and the territorial legislature are distinct, there is the relation of superior and inferior in all territorial affairs; and the superior may revise, alter, or revoke the acts of the inferior.<sup>7</sup> Until it does so the acts of the inferior are as valid within its province as the acts of the superior,<sup>8</sup> unless an act is contrary to the Constitution and laws of the United States, or to the organic act, in which case it is invalid without any disapproval of Congress.<sup>9</sup>

**c. EXECUTIVE DEPARTMENT**. — The executive power in each territory is vested in a governor, appointed by the President with the advice and consent of the senate, who holds his office for four years, unless sooner removed.<sup>10</sup> In the absence or disability of the governor, the secretary of the territory executes all powers and performs all the duties of the governor.<sup>11</sup>

The **Powers of the Executive** are prescribed in the organic act of the territory and are subject to the sovereign will of Congress and the President.<sup>12</sup>

**d. JUDICIAL DEPARTMENT** — (1) *How Vested*. — The judicial power of the

(Ariz. 1891) 26 Pac. Rep. 376; *Swan v. Williams*, 2 Mich. 427.

**Mining Regulations** do not interfere "with the primary disposal of the soil." *O'Donnell v. Glenn*, 8 Mont. 248.

1. **Power of Repeal**. — *Irwin v. Irwin*, 3 Okla. 186; *Martin v. Territory*, 8 Okla. 41.

2. **Restrictions on Legislative Powers**. — *Chumasero v. Potts*, 2 Mont. 242.

3. **General Law of Congress No Restriction**. — *In re Murphy*, 5 Wyo. 297.

4. **Power Cannot Be Delegated**. — *Winter v. Hughes*, 3 Utah 443.

5. **Legislative Sessions**. — *Cheyney v. Smith*, (Ariz. 1890) 23 Pac. Rep. 680; *People v. Clayton*, 5 Utah 598.

6. **Extraordinary or Special Session**. — 18 U. S. Stat. at L., c. 388, p. 135.

7. **Congress May Alter or Revoke Legislative Acts**. — *Territory v. O'Connor*, 5 Dak. 397; *Hornbuckle v. Toombs*, 18 Wall. (U. S.) 648; *U. S. v. Smith*, (Ohio 1856) 5 Am. L. Reg. 268; *Reynolds v. People*, 1 Colo. 179; *Territory v. Scott*, 3 Dak. 357; *Wooley v. Watkins*, 2 Idaho 590; *Territory v. Lee*, 2 Mont. 124; *O'Donnell v. Glenn*, 8 Mont. 248; *Garcia v. Territory*, 1 N. Mex. 415; *People v. Douglass*, 5 Utah 283; *Wagner v. Harris*, 1 Wyo. 197.

8. **Effect of Failure to Alter or Repeal**. — *Miners' Bank v. Iowa*, 12 How. (U. S.) 8; *Clinton v. Englebrecht*, 13 Wall. (U. S.) 445; *Atlantic, etc., R. Co. v. Lesueur*, (Ariz. 1888) 19 Pac. Rep. 157, 37 Am. & Eng. R. Cas. 368; *Wooley v. Watkins*, 2 Idaho 590; *Sperling v. Calfee*, 7 Mont. 526; *Baca v. Perez*, 8 N. Mex. 187; *Territory v. Doty*, 1 Pin. (Wis.) 396. But see *Clayton v. Utah Territory*, 132 U. S. 632; *Williams v. Clayton*, 6 Utah 86.

9. **Acts Invalid Per Se**. — *People v. Clayton*, 4 Utah 421.

If an **Act Is Merely Inconsistent with the Organic Act**, Congress may approve it, in which case it becomes paramount and part of the constitution of the territory, provided it is not in conflict with the Federal Constitution. *Godbe v. Salt Lake City*, 1 Utah 68.

10. **Executive Department**. — U. S. Rev. Stat., §§ 1841, 1877.

11. **Absence or Disability of Governor**. — U. S. Rev. Stat., § 1843. The secretary of the territory, having a fixed salary as such, is not entitled to claim in addition thereto the salary of governor during the absence of that officer. *U. S. v. Smith*, (Ohio 1856) 5 Am. L. Reg. 269.

12. **Powers of Executive**. — 13 Op. Atty.-Gen. 408; *Territory v. Lee*, 2 Mont. 124.



territories is vested in the Supreme Court, district courts, probate courts, and in justices of the peace.<sup>1</sup>

The Supreme Court consists of a chief justice and generally two associate justices.<sup>2</sup>

The District Courts are authorized to be held by one of the justices of the Supreme Court in the several judicial districts into which each territory is divided. The presiding justice is assigned to the district by order of the Supreme Court of the territory, and must reside therein.<sup>3</sup>

The Chambers of the District Judge need not be within the territorial limits of the district. While he is in attendance upon the Supreme Court his chambers may be where the court is sitting.<sup>4</sup>

The Inferior Courts of a territory are the probate courts and courts of justices of the peace.<sup>5</sup>

Where Congress Enumerates the Courts in which the judicial power shall be vested, a territorial legislature cannot create any other tribunal.<sup>6</sup>

But the Creation of Municipal Courts has been held to be within the powers of a territorial legislature.<sup>7</sup>

(2) *Appointment, Tenure, and Removal of Justices.*—The judges of the Supreme Courts of the territories are appointed by the President of the United States.<sup>8</sup>

Their Tenure of Office is generally “for four years, and until their successors are appointed and qualified.”<sup>9</sup>

They Are Subject to Removal or Suspension like other civil officers, a commission for a term of years giving no better legal right to the office than if it were at the pleasure of the appointing power.<sup>10</sup>

The Right of a Person Assuming to Exercise the Functions of a Territorial Supreme Judge should be tested by instituting a proceeding in the nature of a quo warranto in the name of the United States, and not in the name of the territory.<sup>11</sup>

(3) *Nature of Courts.*—Although the judges of the Supreme Court of a territory are appointed by the President under an act of Congress, this does not make the courts they are authorized to hold courts of the United States.<sup>12</sup>

They Are Legislative Courts, and as the distinction between federal and state

1. Judicial Power—How Vested.—Rupert v. Alturas County, 2 Idaho 19; Hedges v. Lewis County, 4 Mont. 280.

2. The Supreme Court.—U. S. Rev. Stat., § 1864; Ex p. Lothrop, 118 U. S. 113; Howard v. U. S., 22 Ct. Cl. 305.

3. District Courts.—U. S. Rev. Stat., § 1865; Ex p. Lothrop, 118 U. S. 113; Beery v. U. S., 2 Colo. 186.

Congress Has the Power to Change Districts or create new ones, but it cannot by such change divest the court of the jurisdiction which the territorial legislature has prescribed for territorial causes. Murphy v. Murphy, 4 Dak. 107.

4. Chambers of District Judge.—Parker, Petitioner, 131 U. S. 221.

5. Inferior Courts.—U. S. Rev. Stat., § 1907.

The Creation of a County Court is authorized by a provision of Congress that the inferior courts shall be such “as the legislative council may by law prescribe.” Ex p. Lothrop, 118 U. S. 113.

6. Legislature Cannot Create Tribunals.—Smith v. Odell, 1 Pin. (Wis.) 449.

Legislature Cannot Confer Judicial Functions upon County Commissioners.—Spencer v. Sully County, 4 Dak. 474; Rupert v. Alturas County, 2 Idaho 21; Hedges v. Lewis County, 4 Mont. 280.

7. Creation of Municipal Courts.—State v. Young, 3 Kan. 445.

8. Appointment of Justices.—Clinton v. Englebrecht, 13 Wall. (U. S.) 434; Territory v. Murray, 7 Mont. 251.

9. Tenure of Justices.—U. S. Rev. Stat., § 1864; McAllister v. U. S., 22 Ct. Cl. 318.

10. Removal and Suspension of Justices.—Howard v. U. S., 22 Ct. Cl. 305; McAllister v. U. S., 22 Ct. Cl. 318, 141 U. S. 174; Wingard v. U. S., 141 U. S. 201, Field, Gray, and Brown, JJ., dissenting. See the dissenting opinion written by Mr. Justice McLean in U. S. v. Guthrie, 17 How. (U. S.) 284, and his observations therein, approved in U. S. v. Avery, Deady (U. S.) 208.

11. Proceedings Against Person Assuming Functions of Judge.—Territory v. Lockwood, 3 Wall. (U. S.) 236.

12. Not Federal Courts.—United States.—Hunt v. Palao, 4 How. (U. S.) 589; Benner v. Porter, 9 How. (U. S.) 235; American Ins. Co. v. 356 Bales Cotton, 1 Pet. (U. S.) 546; Clinton v. Englebrecht, 13 Wall. (U. S.) 434; Hornbuckle v. Toombs, 18 Wall. (U. S.) 648; U. S. v. Haskins, 3 Sawy. (U. S.) 272; Good v. Martin, 95 U. S. 98; Reynolds v. U. S., 98 U. S. 154; Corbus v. Leonhardt, (C. C. A.) 114 Fed. Rep. 10; Howard v. U. S., 22 Ct. Cl. 305; McAllister v. U. S., 22 Ct. Cl. 318.

jurisdiction, under the Constitution, has no foundation in territorial governments, no such distinction exists either in respect to the jurisdiction of their courts or the subjects committed to their cognizance.<sup>1</sup>

(4) *Jurisdiction*.—The courts of the territory are in some respects *sui generis*. They have a broader and more extensive jurisdiction than state courts, since they are, with slight exceptions, endowed with the same jurisdiction as the District and Circuit Courts of the United States in all cases arising under the Constitution and laws of the United States. They have a more extensive jurisdiction than the United States District and Circuit Courts, as they are clothed with plenary municipal jurisdiction in the territory.<sup>2</sup>

**The Provisions of the Constitution**, which prescribe the limits of judicial power of the United States, restrict the jurisdiction of the states only, and do not apply to the territories.<sup>3</sup>

**The Legislature of a Territory Cannot Extend or Curtail the Jurisdiction** defined by Congress, although it may impose other duties and powers upon the courts when the same do not conflict with their powers as defined by Congress.<sup>4</sup>

**The Provisions of the Judiciary Act** giving exclusive jurisdiction to the United States courts in all offenses cognizable under the authority of the United States, are not applicable to such offenses committed within the territories.<sup>5</sup>

**The Jurisdiction of the United States over a Military Reservation** is not exclusive, and does not deprive the territorial laws and courts of the jurisdiction conferred on them by law.<sup>6</sup>

**District Courts** of the territories are, by the organic acts, invested with the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States.<sup>7</sup>

**Both Supreme and District Courts** are possessed of "chancery as well as common-law jurisdiction."<sup>8</sup>

**The Jurisdiction of the Inferior Courts** of a territory is generally prescribed by Congress, and it is beyond the power of a territorial legislature to extend or modify it.<sup>9</sup>

**In a Territory the Courts Have No Final Jurisdiction**, and the right of appeal to the

*Arizona*.—Houghtaling v. Ellis, 1 Ariz. 383.

*Dakota*.—U. S. v. Beebe, 2 Dak. 292.

*Idaho*.—U. S. v. Hailey, 2 Idaho 22.

*Montana*.—Territory v. Murray, 7 Mont. 251; U. S. v. Bisel, 8 Mont. 20.

**1. Territorial Courts Purely Legislative.**—Benner v. Porter, 9 How. (U. S.) 235; American Ins. Co. v. 356 Bales Cotton, 1 Pet. (U. S.) 545; Clinton v. Englebrecht, 13 Wall. (U. S.) 434; Howard v. U. S., 22 Ct. Cl. 305; McAllister v. U. S., 141 U. S. 174; Territory v. Murray, 7 Mont. 251; *In re* Murphy, 5 Wyo. 297; Downes v. Parshall, 3 Wyo. 425.

**2. Jurisdiction—In General.**—Hornbuckle v. Toombs, 18 Wall. (U. S.) 648; Beery v. U. S., 2 Colo. 186; U. S. v. Mays, 1 Idaho 763.

**Land Belonging to Indians.**—In the absence of a treaty stipulation land belonging to Indian tribes is a part of the territory and subject to its jurisdiction, and process may run there. Langford v. Monteith, 102 U. S. 145.

**An Indian Is Not Subject to the Criminal Laws of the United States**, but to the laws of the territory in which the offense is committed. Gon-shay-ee, Petitioner, 130 U. S. 343.

**3. Not Restricted by Constitution.**—Smith v. U. S., 1 Wash. Ter. 262.

**4. Legislature Cannot Change Jurisdiction.**—Territory v. Ortiz, 1 N. Mex. 12; Martin v. Territory, 8 Okla. 41.

**5. Judiciary Act Not Applicable.**—*In re* Murphy, 5 Wyo. 297. And see the title STATES, vol. 26, p. 465.

**6. Jurisdiction over Military Reservation.**—7 Op. Atty.-Gen. 571; Territory v. Burgess, 8 Mont. 57.

**7. District Courts.**—Hornbuckle v. Toombs, 18 Wall. (U. S.) 648; The City of Panama, 101 U. S. 461; *Ex p.* Crow Dog, 109 U. S. 556; Northern Pac. R. Co. v. Carland, 5 Mont. 146; Zimmerman v. Zimmerman, 7 Mont. 114.

**8. Chancery and Common-law Jurisdiction.**—U. S. Rev. Stat., § 1868; Ferris v. Higley, 20 Wall. (U. S.) 375; *Ex p.* Lothrop, 118 U. S. 113; Howard v. U. S., 22 Ct. Cl. 305; Moore v. Koubly, 1 Idaho 55; Zimmerman v. Zimmerman, 7 Mont. 114; Bray v. U. S., 1 N. Mex. 1; Irwin v. Irwin, 2 Okla. 180; People v. House, 4 Utah 369.

**9. Inferior Courts.**—Ferris v. Higley, 20 Wall. (U. S.) 375; Moore v. Koubly, 1 Idaho 55; People v. Maxon, 1 Idaho 330; Irwin v. Irwin, 2 Okla. 180; People v. Douglass, 5 Utah 283; McCray v. Baker, 3 Wyo. 192.

**Justices of the Peace** have no jurisdiction in a litigation involving the title to land, or the boundary thereof. U. S. Rev. Stat., § 1867. Langford v. Monteith, 102 U. S. 145.

Supreme Court of the United States is limited only by the amount involved.<sup>1</sup> But the Supreme Court of the United States has no jurisdiction for the discharge on habeas corpus of a person imprisoned under the sentence of a territorial court in criminal cases, unless the sentence of the territorial court exceeds the jurisdiction of that court, or there is no authority to hold under the sentence.<sup>2</sup>

(5) *Practice.* — The practice, pleading, forms, and mode of proceeding in the territorial courts, subject to any regulations that Congress may deem expedient, are left to the action of the territorial legislatures, and to regulations which may be adopted by the courts themselves.<sup>3</sup>

Where the District Court has the jurisdiction of the United States Circuit and District Courts, the practice and method of proceeding therein where the federal government seeks to enforce a civil right arising under the Constitution and laws of the United States, are the same as in cases arising under the laws of the territory.<sup>4</sup>

**VI. OFFICERS — 1. Appointment.** — The governor of the territory nominates, and, by and with the advice of the legislative council, appoints, all officers not otherwise provided for.<sup>5</sup> Congress having given this power to the governor, he cannot be divested of his prerogative by any act of the territorial legislature.<sup>6</sup>

All Township, District, and County Officers, except justices of the peace and general officers of the militia, are appointed or elected in such manner as may be provided by the governor and legislative assembly of each territory.<sup>7</sup>

The Number of Legislative Officers and Attachés is determined by Congress, and the legislative assembly of the territory cannot increase the number of its officers or attachés by any enactment of its own. If the number is not sufficient the relief must come from Congress.<sup>8</sup>

**Subordinate Officers.** — Territorial legislatures have persistently pursued the practice of creating, for their service, subordinates in addition to those named by Congress; and being cognizant of this action, Congress has not disapproved or condemned it, nor denied the right, or censured its exercise, even if excessive. If wrong, it has been permitted to pass current as law by competent and controlling authority, and must be accepted as affirmation tantamount to congressional decree.<sup>9</sup>

**2. Vacancies.** — If a vacancy is occasioned by death or resignation, during the recess of the legislative council, the governor may fill the vacancy by granting a commission, "which shall expire at the end of the next session of the legislative council."<sup>10</sup> The appointee, under such circumstances, continues in office until his term expires by limitation, and no longer; and if no person is

1. Right of Appeal to Federal Supreme Court. — *In re Snow*, 120 U. S. 274; *Territory v. Lee*, 2 Mont. 124.

2. Habeas Corpus. — *Ex p. Harding*, 120 U. S. 782.

3. Practice. — *Orchard v. Hughes*, 1 Wall. (U. S.) 77; *Dunphy v. Kleinsmith*, 11 Wall. (U. S.) 610; *Hornbuckle v. Toombs*, 18 Wall. (U. S.) 648; *U. S. v. Ensign*, 2 Mont. 396; *Sperling v. Calfee*, 7 Mont. 514; *Houtz v. Gisborn*, 1 Utah 173.

4. Practice of District Courts in Certain Cases. — *U. S. v. Ensign*, 2 Mont. 396; *U. S. v. Williams*, 6 Mont. 379.

5. Appointment of Officers. — U. S. Rev. Stat., §§ 1841-1857; *Clayton v. Utah Territory*, 132 U. S. 632; *Taylor v. Stevenson*, 2 Idaho 180; *Territory v. Rodgers*, 1 Mont. 252; *Smith v. Odell*, 1 Pin. (Wis.) 449.

Legislature Must Confirm Nomination. — *Territory v. Rodgers*, 1 Mont. 258.

6. Legislature Cannot Divest Appointing Power.

28 C. of L.—5

— *Clayton v. Utah Territory*, 132 U. S. 632; *Taylor v. Stevenson*, 2 Idaho 180; *People v. Clayton*, 4 Utah 421.

7. Township, District, and County Officers. — *People v. Van Gaskin*, 5 Mont. 352.

8. Legislative Officers and Attachés. — *Osborn v. Clark*, 1 Ariz. 397; *Stevenson v. Moody*, 2 Idaho 260.

9. Subordinate Officers. — *Clinton v. Englebrecht*, 13 Wall. (U. S.) 434; *Baca v. Perez*, 8 N. Mex. 187; *Braithwaite v. Cameron*, 3 Okla. 630.

Where a Territorial Office Is Created by Legislative Enactment, it is wholly under legislative control. The legislature may lengthen or abridge the term of office, or declare the office vacant and appoint another to fill the vacancy, at least in so far as to make a provisional appointment. *People v. Van Gaskin*, 5 Mont. 352; *Lee v. Uinta County*, 3 Wyo. 52.

10. Power to Fill Vacancy. — U. S. Rev. Stat., § 1858,



commissioned to succeed him by "the end of the next session of the legislative council," the incumbent does not hold over, but the office becomes vacant.<sup>1</sup> There being no inherent power in the executive to fill a vacancy, except as provided by law, the governor in such case would be powerless to act.<sup>2</sup>

**3. Compensation** — *a. OFFICERS AUTHORIZED BY CONGRESS.* — The obligation is assumed by the general government to provide for the payment of the salaries and compensation of all the officers authorized by Congress.<sup>3</sup>

*b. SUBORDINATE OFFICERS.* — The territorial legislature may provide out of the territorial fund for the payment of necessary subordinate officers and attendants.<sup>4</sup>

**TEST.** (See also the titles ELECTIONS, vol. 10, pp. 575, 610, 705; EX POST FACTO LAWS, vol. 12, p. 531.) — See note 5.

**TESTAMENT.** (See also the titles CODICILS, vol. 6, p. 174; WILLS.) — A testament is defined to be the legal declaration of a party's intentions which he wills to be performed after his death.<sup>6</sup>

**Real and Personal Property.** — It has been said that the term "testament," strictly speaking, is applicable only to a will of personal property.<sup>7</sup> But "the

**1. Appointee Does Not Hold Over.** — Matter of Atty.-Gen., 2 N. Mex. 49.

**2. No Inherent Power to Fill Vacancy.** — Territory v. Rodgers, 1 Mont. 252.

**3. Officers Authorized by Congress.** — U. S. v. Smith, (Ohio 1856) 5 Am. L. Reg. 269.

**Compensation Must Be Provided by Congress.** — No law of any legislature shall be made or enforced by which the governor or secretary of a territory or the officers or members of any territorial legislature shall be paid any compensation other than that provided by the laws of the United States. U. S. Rev. Stat., § 1855; Osborn v. Clark, 1 Ariz. 397; Stevenson v. Moody, 2 Idaho 260; Baca v. Perez, 8 N. Mex. 187.

**4. Subordinate Officers.** — Braithwaite v. Cameron, 3 Okla. 630.

**5. Contract for Digging Wells — Test — Sufficiency of.** — Bennett v. Edison Electric Illuminating Co., 26 N. Y. App. Div. 368, affirmed 164 N. Y. 131.

**Test of Electoral Qualifications.** — See the title ELECTIONS, vol. 10, p. 552, and see Clayton v. Harris, 7 Nev. 64.

**Selection of Election Judges.** — In People v. Hoffman, 116 Ill. 606, it was held that an election law which required the appointment of at least two of the three commissioners and two of the three judges of election from each of the two leading political parties did not establish such a political *test* of office as was repugnant to the constitution; the court held that the direction to select the appointees from the two political parties was only a rule for the guidance of the appointing power and imposed no act or action upon the appointees.

**Matters of Opinion.** — In Atty.-Gen. v. Detroit, 58 Mich. 217, it was said: "It was urged on the argument that if the term *test* can be held applicable to inquiries into party affiliation, it is equally applicable to those other qualifications often required for public service, such as education, scientific acquirements in surveyors and other specialists, legal knowledge in law officers, and the like. But this is not so. Not only is it evident from the other provisions in this clause that all of the exemptions referred

to are such as would be applicable in all sorts of offices, but the use of the word *test* is especially significant because its recognized legal meaning in our constitutions is derived from the English *Test* Acts, all of which related to matters of opinion, and most of them to religious opinion. Such has been the general understanding of the framers of constitutions." See also People v. Hurlbut, 24 Mich. 92; Rogers v. Buffalo, 123 N. Y. 173; State v. McAllister, 38 W. Va. 485.

**6. Cogbill v. Cogbill,** 2 Hen. & M. (Va.) 510, per Roane, J., quoting 2 Black. Com. 499. See to the same effect Pluche v. Jones, 2 U. S. App. 565.

"A *testament* is defined to be the institution of an heir or executor." Richardson v. Richardson, Dudley Eq. (S. Car.) 192.

**Swinburne's Definition.** — In Matter of Nadal, 2 Hawaii 403, it was said: "Swinburne, in his excellent treatise, says: 'This word *testamentum* is as much as *testatio mentis*, that is to say, a testifying or witnessing of the mind.' And in giving the definition of a *testament* he says: 'A *testament* is a just sentence of our will, touching that we would have done after our death.' And again: 'For without meaning or concert of mind the *testament* is altogether without life, and is no more a *testament* than a painted lion is a lion.' (Swinburne on Wills, pt. i., §§ 1, 2, 3.)" See also Hastilow v. Stobie, L. R. 1 P. & D. 68; Barney v. Hayes, 11 Mont. 575; Morrow v. Morrow, 2 Tenn. Ch. 563.

**Civil Law.** — See Seymour's Succession, 48 La. Ann. 993.

**Deed.** — The test whether a written instrument is a deed or is *testamentary* in its character is this: If the title vests *eo instanti* at the execution of the paper it is a deed; but if the same is not to take effect until the death of the maker it is a *testament*. Ward v. Campbell, 73 Ga. 97.

**7. Compton v. McMahan,** 19 Mo. App. 505; Conklin v. Egerton, 21 Wend. (N. Y.) 447; Cogbill v. Cogbill, 2 Hen. & M. (Va.) 510. See also TESTAMENTARY, *post*.

common usage the world over is to employ the words 'will,' 'testament,' and 'last will and testament' as exactly synonymous." <sup>1</sup>

**TESTAMENTARY.** — See note 2.

1. *Hill v. Hill*, 7 Wash. 410. See also *Robinson v. King*, 6 Ga. 547; *Boofter v. Rogers*, 9 Md. (Md.) 53; *Compton v. McMahan*, 19 Mo. App. 505.

"When the will operates upon personal property it is sometimes called a *testament* and when upon real estate a 'devise,' but the more general and the more popular denomination of the instrument, embracing equally real and personal estate, is that of last will and *testament*." *Jolliffe v. Fanning*, 10 Rich. L. (S. Car.) 197, quoting from "Lecture 68," by Chancellor Kent.

2. **Testamentary and of Administration — Real and Personal Property.** — In *Hanks v. Neal*, 44 Miss. 228, it was said: "The terms 'all matters *testamentary* and of administration,' as used in the constitution, embrace only matters which concern that property which is the subject of administration by executors and administrators, and which vested in the personal representative. The real estate does not vest in the personal representative, and is not the subject, therefore, of administration at common law, but descends upon the heirs of deceased, or goes to the devisee."

But the word *testamentary* has been held to apply equally to real as to personal property. *Smith v. Coffin*, 2 H. Bl. 444; *Beall v. Holmes*, 6 Har. & J. (Md.) 215. See also **TESTAMENT, ante**.

**Testamentary Estate — Real and Personal Property.** — Where a residuary clause disposed of all of the testatrix's *testamentary* effects and estate, it was held that the whole of her property passed. *Doe v. Gilbert*, 3 Brod. & B. 85, 7 E. C. L. 359.

So in *Smith v. Coffin*, 2 H. Bl. 451, it was said, *per* Heath, J.: "The residuary clause is sufficient to pass the estate in question; for the word *testamentary* is a most comprehen-

sive term, and we should interpret it in much too narrow a sense if we were to confine it to personal property."

**Testamentary Expenses — Costs of Suit to Administer.** — A testator directed by his will that his *testamentary* expenses should be paid out of a specified part of his estate. It was held that the costs of a suit to administer the estate were included under a *testamentary* expenses. *Penny v. Penny*, 11 Ch. D. 440.

**Same — Contest of Will.** — In *In re Prince*, (1898) 2 Ch. 225, it was held that the plaintiff's costs of an unsuccessful action impeaching the validity of a will, though ordered by a judge of the probate division to be paid out of the testator's estate, were not *testamentary* expenses.

**Same — Costs of Ascertaining Identity of Legatees of Pecuniary Bequest Held to Be Testamentary Expenses.** — *Re Baumgarten*, 82 L. T. N. S. 711.

**Same — Intestacy.** — In *In re Clemow*, (1900) 2 Ch. 182, it was held that a direction for the payment of *testamentary* expenses might extend to the expenses of administration under an intestacy.

**Same — Succession Tax.** — The expression "*testamentary* expenses" has been held to include the estate duty in respect of the personal property of which the testator or other person whose "*testamentary* expenses" are referred to was competent to dispose at his death. *In re Clemow*, (1900) 2 Ch. 182. See also *In re Treasure*, (1900) 2 Ch. 648.

**Testamentary Trustee.** — See the titles **EXECUTORS AND ADMINISTRATORS**, vol. 11, p. 720; **TRUSTS AND TRUSTEES, post**. And see *Matter of Valentine*, (Surrogate Ct.) 1 Misc. (N. Y.) 491; *DeLafield v. Schuchardt*, 2 Dem. (N. Y.) 435.

# TESTAMENTARY CAPACITY.

BY PHILIP TINDALL.

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## CROSS-REFERENCE.

See the title *PROBATE AND LETTERS OF ADMINISTRATION*, vol. 23, p. 109, and the references there given.

**I. ELEMENTS OF TESTAMENTARY CAPACITY — 1. Degree of Capacity Requisite**  
 — a. **VARIETY OF DOCTRINES.** — While the authorities on the subject of testamentary capacity have with some exceptions a general similarity in their statements of the degree of mental capacity requisite to the execution of a valid will, so many shadings and qualifications are to be found among the decisions which have attempted to deal with the question that it is impossible to state any universally accepted definition of testamentary capacity.<sup>1</sup>

1. "The Difficulty of Stating Standards or Tests by which to determine the degree of mental capacity of a particular person has been everywhere recognized, and grows out of the inherent impossibility of measuring mental

capacity, or its impairment by disease or other causes." *Greene v. Greene*, 145 Ill. 264. See also *Taylor v. Trich*, 165 Pa. St. 586, 44 Am. St. Rep. 679.

"It is probable that no court has ever at-

*b. SCOPE OF INQUIRY.* — It should be stated at the outset that, contrary to the very prevalent lay impression, perfect soundness of mind is not essential to testamentary capacity. A testator may be afflicted with any of a variety of mental weaknesses, disorders, or peculiarities, and still be capable in law of executing a valid will.<sup>1</sup> On the other hand, absolute insanity is not essential to testamentary incapacity. The testator's condition may fall short of that degree of mental aberration generally known as insanity or idiocy, and yet be such as to incapacitate him in law for the execution of a valid will.<sup>2</sup> It is as to the precise degree of mental capacity which will meet the requirements of the law, or the precise degree of incapacity which will fall short of those requirements, that the divergence of the decisions occurs.

*c. GENERALLY ACCEPTED TEST.* — The definition which has, perhaps, been

tempted to lay down any definite rule in respect to the exact amount of mental capacity requisite to the making of a valid will, without appreciating the difficulty of the undertaking; and we experience it in no slight degree." *Trish v. Newell*, 62 Ill. 196, 14 Am. Rep. 79.

**1. Perfect Mental Soundness Not Requisite** — *Alabama*. — *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33.

*Arkansas*. — *McCulloch v. Campbell*, 49 Ark. 367; *St. Joseph's Convent v. Garner*, 66 Ark. 623.

*Delaware*. — *Duffield v. Robeson*, 2 Harr. (Del.) 375; *Lodge v. Lodge*, 2 Houst. (Del.) 418.

*District of Columbia*. — *Barbour v. Moore*, 4 App. Cas. (D. C.) 535.

*Illinois*. — *American Bible Soc. v. Price*, 115 Ill. 623; *Graybeal v. Gardner*, 146 Ill. 337; *Nieman v. Schnitker*, 181 Ill. 400; *Ring v. Lawless*, 190 Ill. 520.

*Indiana*. — *Dyer v. Dyer*, 87 Ind. 13; *Durham v. Smith*, 120 Ind. 468; *Whiteman v. Whiteman*, 152 Ind. 263; *Bundy v. McKnight*, 48 Ind. 502.

*Iowa*. — *Perkins v. Perkins*, 116 Iowa 253.

*Maryland*. — *Jones v. Collins*, 94 Md. 403.

*Missouri*. — *Sehr v. Lindemann*, 133 Mo. 276.

*New York*. — *Matter of Dixon*, 42 N. Y. App. Div. 481.

*West Virginia*. — *Kerr v. Lunsford*, 31 W. Va. 659.

"**Mere Weakness of Mind, or Partial Imbecility** from disease of body, or from age, will not render a person incapable of making a will. A weak or feeble minded person may make a valid will, provided he has understanding and memory sufficient to enable him to know what he is about, and how, or to whom, he is disposing of his property." *Lodge v. Lodge*, 2 Houst. (Del.) 418.

To constitute a sound and disposing mind, it is not necessary that the mind should be unbroken or unimpaired, unshattered by disease or otherwise. *Sloan v. Maxwell*, 3 N. J. Eq. 563.

"It has not been understood that a testator must possess these qualities [of sound and disposing mind and memory] in the highest degree. \* \* \* Few indeed would be the wills confirmed, if this is correct. Pain, sickness, debility of body, from age or infirmity, would, according to its violence or duration, in a

greater or less degree, break in upon, weaken, or derange the mind," but the derangement must be such as deprives him of the rational faculties common to man. *Den v. Vancleve*, 5 N. J. L. 680.

"Sound mind" does not mean a perfectly balanced mind. The question of soundness is one of degree. *Boughton v. Knight*, L. R. 3 P. & D. 64, 42 L. J. P. 25.

But the expression "necessarily includes soundness in all the faculties of the mind." *Tudor v. Tudor*, 17 B. Mon. (Ky.) 383.

In *Kimberly's Appeal*, 68 Conn. 428, 57 Am. St. Rep. 101, it was said: "The rule is that when the mind is sound, when the insane or impaired condition has passed away, when the person is enjoying a lucid interval, the power to make a will exists, assuming, of course, that in other respects the testator has the degree of mental capacity which I have described to you."

**2. Absolute Insanity Not Requisite to Testamentary Incapacity.** — In *Manatt v. Scott*, 106 Iowa 203, 68 Am. St. Rep. 293, the trial court instructed the jury as follows: "Testamentary incapacity does not necessarily require that a person shall actually be insane or of an unsound mind. Weakness of intellect, whether it arises from extreme old age, from disease, or great bodily infirmities or suffering, or from all these combined, may render the testator incapable of making a valid will, providing such weakness really disqualifies her from knowing or appreciating the nature, effects, or consequences of the act she is engaged in." The appellate court, in commenting upon this charge, said: "We take it, the court intended to say that the mind need not necessarily be diseased, but weakness might incapacitate it; and that the instruction was so understood by the jury."

In *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33, the charge to the jury on the subject of testamentary capacity, which was held to be correct, contained the following statement: "On the one hand, it does not require dementia or idiocy, or a total deprivation of reason, to destroy testamentary capacity — that is, to put a man in such a mental condition that he cannot make a will. A man may not be capable mentally of making a will, and yet not be an idiot nor demented nor totally deprived of reason."

To the same effect see *Campbell v. Campbell*, 130 Ill. 466.

most frequently announced is that which in varying forms of verbiage states testamentary capacity to be the capacity to comprehend the nature of the transaction in which the testator is engaged at the time, to recollect the property to be disposed of and the persons who would naturally be supposed to have claims upon the testator, and to comprehend the manner in which the instrument will distribute his property among the objects of his bounty.<sup>1</sup> In addition

**1. The Accepted Test** — *England*. — Brown v. Bruce, 19 U. C. Q. B. 35; Harwood v. Baker, 3 Moo. P. C. 282; Boyse v. Rossborough, 6 H. L. Cas. 45; Banks v. Goodfellow, L. R. 5 Q. B. 549; Murfett v. Smith, 12 P. D. 116; Marsh v. Tyrell, 2 Hagg. Ecc. 122; Constable v. Tufnell, 4 Hagg. Ecc. 477; Greenwood v. Greenwood, 3 Curt. Ecc. 2.

*United States*. — Harrison v. Rowan, 3 Wash. (U. S.) 580.

*Alabama*. — Coleman v. Robertson, 17 Ala. 84; Taylor v. Kelly, 31 Ala. 59, 68 Am. Dec. 150; Stubbs v. Houston, 33 Ala. 555; Leeper v. Taylor, 47 Ala. 221; Kramer v. Weinert, 81 Ala. 416; Eastis v. Montgomery, 95 Ala. 486, 36 Am. St. Rep. 227; Knox v. Knox, 95 Ala. 495, 36 Am. St. Rep. 235; Schieffelin v. Schieffelin, 127 Ala. 14.

*Arkansas*. — Owachita Baptist College v. Scott, 64 Ark. 349.

*California*. — Matter of Motz, 136 Cal. 558.

*Connecticut*. — Kinne v. Kinne, 9 Conn. 102, 21 Am. Dec. 732; St. Leger's Appeal, 34 Conn. 434, 91 Am. Dec. 735; Kimberly's Appeal, 68 Conn. 428, 57 Am. St. Rep. 101; Turner's Appeal, 72 Conn. 305.

*Delaware*. — Cordrey v. Cordrey, 1 Houst. (Del.) 269; Chandler v. Ferris, 1 Harr. (Del.) 454; Sutton v. Sutton, 5 Harr. (Del.) 459.

*District of Columbia*. — Barbour v. Moore, 4 App. Cas. (D. C.) 535.

*Georgia*. — Hall v. Hall, 18 Ga. 40; Stancell v. Kenan, 33 Ga. 56.

*Illinois*. — Roe v. Taylor, 45 Ill. 485; Trish v. Newell, 62 Ill. 196, 14 Am. Rep. 79; Yoe v. McCord, 74 Ill. 33; Rutherford v. Morris, 77 Ill. 409; Brown v. Riffin, 94 Ill. 560; Schneider v. Manning, 121 Ill. 376; Campbell v. Campbell, 130 Ill. 466; Nicewander v. Nicewander, 151 Ill. 156; Daly v. Daly, 183 Ill. 269; Ring v. Lawless, 190 Ill. 520.

*Indiana*. — Kenworthy v. Williams, 5 Ind. 375; Wray v. Wray, 32 Ind. 126; Rush v. Megee, 36 Ind. 69; Bundy v. McKnight, 48 Ind. 502; Lowder v. Lowder, 58 Ind. 538; Todd v. Fenton, 66 Ind. 25; Durham v. Smith, 120 Ind. 463; Burkhart v. Gladish, 123 Ind. 337; Harrison v. Bishop, 131 Ind. 161, 31 Am. St. Rep. 422; Rarick v. Ulmer, 144 Ind. 25; Blough v. Parry, 144 Ind. 463; Young v. Miller, 145 Ind. 652; Roller v. Kling, 150 Ind. 159; Bower v. Bower, 146 Ind. 393; Whiteman v. Whiteman, 52 Ind. 263.

*Iowa*. — Matter of Convey, 52 Iowa 197; Meeker v. Meeker, 74 Iowa 352, 7 Am. St. Rep. 489; Howe v. Richards, 112 Iowa 220; Perkins v. Perkins, 116 Iowa 253.

*Kansas*. — Delaney v. Salina, 34 Kan. 532; Hudson v. Hughan, 56 Kan. 152.

*Kentucky*. — Elliott's Will, 2 J. J. Marsh. (Ky.) 340; Patton v. Patton, 5 J. J. Marsh. (Ky.) 390; Wise v. Foote, 81 Ky. 10; Johnson v. Stivers, 95 Ky. 128; Bramel v. Bramel, 101

Ky. 64; King v. King, (Ky. 1897) 42 S. W. Rep. 347; Woodford v. Buckner, 111 Ky. 241; Wilson v. Hays, 109 Ky. 321; Dunaway v. Smoot, 67 S. W. Rep. 62, 23 Ky. L. Rep. 2289.

*Maine*. — Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; Barnes v. Barnes, 66 Me. 286; Hall v. Perry, 87 Me. 569, 47 Am. St. Rep. 352; Wells, Appellant, 96 Me. 161.

*Maryland*. — Davis v. Colvert, 5 Gill & J. (Md.) 301, 25 Am. Dec. 282; Colvin v. Warford, 20 Md. 367; Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666; Tyson v. Tyson, 37 Md. 567; McElwee v. Ferguson, 43 Md. 479; Berry v. Safe Deposit, etc., Co., 96 Md. 45; Brown v. Ward, 53 Md. 382, 36 Am. Rep. 422; Davis v. Denny, 94 Md. 390.

*Massachusetts*. — Hathorn v. King, 8 Mass. 371, 5 Am. Dec. 106; Whitney v. Twombly, 136 Mass. 145.

*Michigan*. — Aikin v. Weckerly, 19 Mich. 482; Kempsey v. McGinniss, 21 Mich. 141; Hoban v. Campau, 52 Mich. 346; Spratt v. Spratt, 76 Mich. 384; Spencer v. Terry, 127 Mich. 420.

*Missouri*. — Benoist v. Murrin, 58 Mo. 307; Young v. Ridenbaugh, 67 Mo. 574; Brinkman v. Rueggessick, 71 Mo. 556; Appleby v. Brock, 76 Mo. 314; Myers v. Hauger, 98 Mo. 433; Thompson v. Ish, 99 Mo. 160, 17 Am. St. Rep. 552; Norton v. Paxton, 110 Mo. 456; Couch v. Gentry, 113 Mo. 248; Maddox v. Maddox, 114 Mo. 35, 35 Am. St. Rep. 734; McFadin v. Catron, 120 Mo. 252; Farmer v. Farmer, 129 Mo. 530; Berberet v. Berberet, 131 Mo. 399, 52 Am. St. Rep. 634; Cash v. Lust, 142 Mo. 630; Riley v. Sherwood, 144 Mo. 354; Fulbright v. Perry County, 145 Mo. 432; Gordon v. Burris, 153 Mo. 223; Sehr v. Lindemann, 153 Mo. 288; Tibbe v. Kamp, 154 Mo. 584; Kischman v. Scott, 166 Mo. 214; Riffin v. Westminster College, 160 Mo. 570; Schierbaum v. Schemme, 157 Mo. 7, 80 Am. St. Rep. 604.

*New Jersey*. — Den v. Johnson, 5 N. J. L. 522; Andress v. Weller, 3 N. J. Eq. 604; Sloan v. Maxwell, 3 N. J. Eq. 563; Lyons v. Van Riper, 26 N. J. Eq. 337; McCoon v. Allen, 45 N. J. Eq. 708; Hampton v. Westcott, 49 N. J. Eq. 522; Bennett v. Bennett, 50 N. J. Eq. 439; Claffey v. Ledwith, 56 N. J. Eq. 333; Matter of Carter, 60 N. J. Eq. 338.

*New York*. — Clark v. Fisher, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; Blanchard v. Nestle, 3 Den. (N. Y.) 37; Delafield v. Parish, 25 N. Y. 10; Van Guysling v. Van Kuran, 35 N. Y. 70; Horn v. Pullman, 72 N. Y. 269; La Bau v. Vanderbilt, 3 Redf. (N. Y.) 384; Forman v. Smith, 7 Lans. (N. Y.) 443; Crolus v. Stark, 7 Lans. (N. Y.) 311; Pilling v. Pilling, 45 Barb. (N. Y.) 86; Kinne v. Johnson, 60 Barb. (N. Y.) 69; Matter of Blair, 16 Daly (N. Y.) 540; Matter of Kiedaisch, 2 Connolly (N. Y.) 438; Matter of Stewart, 59 Hun (N. Y.) 618, 13 N. Y. Supp. 219; Matter of Johnson, (Sur-



to the foregoing definition of testamentary capacity the qualification has been stated that the testator must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in mind a sufficient length of time to perceive their obvious relations to each other, and to be able to form some rational judgment concerning them. This qualification, either in whole or in part, has been very frequently adopted.<sup>1</sup>

rogate Ct.) 7 Misc. (N. Y.) 220; Matter of Wheeler, (Surrogate Ct.) 5 Misc. (N. Y.) 279; Matter of Folts, 71 Hun (N. Y.) 492; Matter of Lewis, 81 Hun (N. Y.) 213; Matter of Pike, 83 Hun (N. Y.) 327; Matter of Murphy, 41 N. Y. App. Div. 153; Matter of Snelling, 136 N. Y. 515.

*North Carolina.*—Cornelius v. Cornelius, 7 Jones L. (52 N. Car.) 593; Horne v. Horne, 9 Ired. L. (31 N. Car.) 99; Lawrence v. Steel, 66 N. Car. 584; Mitchell v. Corpening, 124 N. Car. 472.

*Oregon.*—Hubbard v. Hubbard, 7 Oregon 42; Clark v. Ellis, 9 Oregon 129; Chrisman v. Chrisman, 16 Oregon 127; Luper v. Werts, 19 Oregon 122; Franke v. Shipley, 22 Oregon 104; *In re* Cline, 24 Oregon 175, 41 Am. St. Rep. 851; Swank v. Swank, 37 Oregon 439; Ames's Will, 40 Oregon 495.

*Pennsylvania.*—Leech v. Leech, 1 Phila. (Pa.) 244, 8 Leg. Int. (Pa.) 154; Horbach v. Denniston, 3 Pittsb. (Pa.) 49; Wood v. Wood, 4 Brews. (Pa.) 75; Daniel v. Daniel, 39 Pa. St. 192; Thompson v. Kyner, 65 Pa. St. 368; Wilson v. Mitchell, 101 Pa. St. 495; Shaver v. McCarthy, 110 Pa. St. 339; Tawney v. Long, 76 Pa. St. 106; Miller v. Oestrich, 157 Pa. St. 264.

*South Carolina.*—Tomkins v. Tomkins, 1 Bailey L. (S. Car.) 92, 19 Am. Dec. 656; Gable v. Rauch, 50 S. Car. 95.

*Tennessee.*—Ford v. Ford, 7 Humph. (Tenn.) 92; Wisener v. Maupin, 2 Baxt. (Tenn.) 342.

*Texas.*—Trezevant v. Rains, (Tex. 1892) 19 S. W. Rep. 567; Prather v. McClelland, 76 Tex. 574.

*Vermont.*—Converse v. Converse, 21 Vt. 168, 52 Am. Dec. 58.

*Virginia.*—Greer v. Greer, 9 Gratt. (Va.) 330.

*Wisconsin.*—Holden v. Meadows, 31 Wis. 284; Matter of Blakely, 48 Wis. 294; *In re* Lewis, 51 Wis. 101; Farnsworth's Will, 62 Wis. 474; Carroll's Will, 50 Wis. 437; Smith's Will, 52 Wis. 552, 38 Am. Rep. 756.

**In Maryland It Is Provided by Statute** that the inquiry as to the capacity of the testator is as to whether the testator is "of sound and disposing mind, and capable of executing a valid deed or contract." The courts of that state have defined these words to mean "that the testator must have had sufficient capacity, at the time of executing the will, to make a disposition of his estate with judgment and understanding in reference to the amount and situation of his property, and the relative claims of the different persons who should have been the objects of his bounty." *Davis v. Calvert*, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282; *Colvin v. Warford*, 20 Md. 357; *Jones v. Collins*, 94 Md. 403.

**Objects of Testator's Bounty.**—In *Petefish v. Becker*, 176 Ill. 448, the testator asserted his doubt as to the paternity of his son, though there was no evidence that he suspected his wife of infidelity. The court said: "If the testator, utterly without cause or reason, and without expressing distrust of the fidelity of his wife, doubted the paternity of his son, and from that cause alone disinherited him when he was one of the natural objects of his bounty, it might well be said that he did not then know who were the natural objects of his bounty; and if he was in such condition of mind that he did not know the actual objects of his bounty, and such condition caused him to make a will he would not have otherwise made, then he was not of sound and disposing mind." A verdict overthrowing the will was sustained.

**Extent of Property, Etc.**—In *Davis v. Denny*, 94 Md. 390, a testatrix who shortly before making her will was informed of the nature and extent of her property, but when giving directions for the will forgot all except a bank account amounting to about one-fifth of her estate, and who on the same occasion referred to a dead brother and later to a dead sister as still living, although she provided for tombstones for each in her will, was held not to have testamentary capacity.

But the fact that a wealthy testator frequently complained of being very poor is insufficient to show such a want of knowledge of his property as will invalidate his will. *Knauss's Appeal*, 114 Pa. St. 10.

**Mistaken Calculation.**—So the fact that the testator may have been mistaken in his calculations concerning the disposal of the property is no ground for setting aside his will. *Wood v. Carpenter*, 166 Mo. 465.

**1. A Qualification Sometimes Added.**—*DeLafield v. Parish*, 25 N. Y. 9; *O'Donnell v. Rodiger*, 76 Ala. 223, 52 Am. Rep. 322; *Bulger v. Ross*, 98 Ala. 267; *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33; *McHugh v. Fitzgerald*, 103 Mich. 21; *Spencer v. Terry*, 127 Mich. 420; *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828; *Lowder v. Lowder*, 58 Ind. 538; *Blough v. Parry*, 144 Ind. 463; *Whiteman v. Whiteman*, 152 Ind. 263; *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352; *Ouachita Baptist College v. Scott*, 64 Ark. 349.

**Authorities Disapproving Qualification.**—But in *Wilson v. Mitchell*, 101 Pa. St. 495, the court, after stating the general definition announced in the text, says: "It is not necessary that he collect all these in one review. If he understands in detail all that he is about, and chooses with understanding and reason between one disposition and another, it is sufficient for the making of a will."

See also as differing with the rule announced in the text: *Trish v. Newell*, 62 Ill. 196, 14

*d.* TESTS ELIMINATING ELEMENTS INCLUDED IN FOREGOING. — Decisions are numerous, however, excluding the necessity of one or more of the above-mentioned elements in the definition of testamentary capacity. Thus it has frequently been held that the test of testamentary capacity is included in the simple requirement that the testator shall have capacity to comprehend the nature of the act in which he is engaged at the time he executes his will. In other words, by this line of authorities it is required only that he shall understand what he is doing at the time.<sup>1</sup> Actual comprehension of the nature

Am. Rep. 79; *Carpenter v. Calvert*, 83 Ill. 62; *McMasters v. Blair*, 29 Pa. St. 298; *Daniel v. Daniel*, 39 Pa. St. 191; *Shaver v. McCarthy*, 110 Pa. St. 339; *Thompson v. Kynner*, 65 Pa. St. 368; *Brown v. Mitchell*, 75 Tex. 9; *Kempsey v. McGinniss*, 21 Mich. 141.

In *Dean v. Phillips*, 61 S. W. Rep. 10, 22 Ky. L. Rep. 1621, an instruction to the jury to find against the will unless they believed that it was composed, written, and signed by the testator without the aid, assistance, or intervention in any way of any other person or persons, was held erroneous.

**Calling Jury's Attention to Character of Will.** — As to the propriety of calling to the attention of the jury the question of the character of a will as being rational or not, see *infra*, this title, *Evidence — Character of Will as Evidence*.

**Other Definitions.** — It has been held that the testator should have a sufficiently active memory to retain the above-mentioned elements in mind long enough to have his will prepared. *Spratt v. Spratt*, 76 Mich. 384; *Bundy v. McKnight*, 48 Ind. 502. But see *Perera v. Perera*, (1901) A. C. 354, 70 L. J. P. C. 46, 84 L. T. N. S. 371; *Bennett v. Manchester*, 2 W. R. 644, set out *infra*, this section, *Time to Which Inquiry Relates*.

It is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions. *McClintock v. Curd*, 32 Mo. 411; *Spencer v. Terry*, 127 Mich. 420; *Campbell v. Campbell*, 130 Ill. 466; *Marsh v. Tyrrell*, 2 Hag. Ecc. 122; *Winchester's Case*, 6 Coke 23.

**"Sane," "Sound Mind and Memory," "Sound and Disposing Mind," Etc.** — These terms are held to be synonymous in *Keithley v. Stafford*, 126 Ill. 507; *Waugh v. Moan*, 200 Ill. 298; *Matter of Forman*, 54 Barb. (N. Y.) 274.

A disposing mind and memory is a mind and memory which has the capacity of recollecting, discerning, and feeling the relations, connections, and obligations of family and blood. *Den v. Johnson*, 5 N. J. L. 522.

The term "unsound mind" in a statute is to be employed with reference to the accepted definition of testamentary capacity above stated. *Blough v. Parry*, 144 Ind. 463; *Young v. Miller*, 145 Ind. 652.

"Sound and disposing mind" means a mind of natural capacity, not unduly impaired by old age, or enfeebled by illness, or tainted by morbid influence. *Smith v. Tebbitt*, L. R. 1 P. & D. 398, 36 L. J. P. 97, 16 W. R. 18.

A person may not be of "sound mind," but yet be of disposing mind and capable of making a will. *Freeman v. Easley*, 117 Ill. 317.

**State of Mind.** — The testator's mental capacity,

not state of his mind, is the subject of inquiry. *Yoe v. McCord*, 74 Ill. 33.

But a testatrix was held incapacitated for the purpose of revocation where she tore up her will when under such mental excitement as incapacitated her from forming a reasonable and intelligent intention to revoke the will. *Forman's Will, Tuck*, (N. Y.) 205.

**1. Certain Other Tests.** — *Connecticut.* — *Sturtevant's Appeal*, 71 Conn. 392.

*Delaware.* — *Chandler v. Ferris*, 1 Harr. (Del.) 454; *Sutton v. Sutton*, 5 Harr. (Del.) 459; *Lodge v. Lodge*, 2 Houst. (Del.) 418; *Jamison v. Jamison*, 3 Houst. (Del.) 108; *Ball v. Kane*, 1 Penn. (Del.) 90; *Steele v. Helm*, 2 Marv. (Del.) 237; *Smith v. Day*, 2 Penn. (Del.) 245; *Pritchard v. Roe*, 3 Penn. (Del.) 128.

*Illinois.* — *Lindsey v. Lindsey*, 50 Ill. 79, 99 Am. Dec. 489; *Wiley v. Ewalt*, 66 Ill. 26; *Titcomb v. Vantyle*, 84 Ill. 371; *Willemijn v. Dunn*, 93 Ill. 511; *English v. Porter*, 109 Ill. 285; *Perry v. Pearson*, 135 Ill. 218; *Yoe v. McCord*, 74 Ill. 33; *Trish v. Newell*, 62 Ill. 196, 14 Am. Rep. 79; *Ring v. Lawless*, 190 Ill. 520; *Schmidt v. Schmidt*, 201 Ill. 191; *Waugh v. Moan*, 200 Ill. 298.

*Indiana.* — *Dyer v. Dyer*, 87 Ind. 13.

*Missouri.* — *McClintock v. Curd*, 32 Mo. 411.

*North Carolina.* — *Horne v. Horne*, 9 Ired. L. (31 N. Car.) 99; *Paine v. Roberts*, 82 N. Car. 451; *Barnhardt v. Smith*, 86 N. Car. 473; *Bost v. Bost*, 87 N. Car. 477.

*Pennsylvania.* — *Wilson v. Mitchell*, 101 Pa. St. 495; *Miller v. Oestrich*, 157 Pa. St. 264; *Hoopes's Estate*, 174 Pa. St. 373.

*Texas.* — *Brown v. Mitchell*, 75 Tex. 9.

*Washington.* — *Matter of Gorkow*, 20 Wash. 563.

See also *Tudor v. Tudor*, 17 B. Mon. (Ky.) 383; *Best v. Best*, (Ky. 1889) 11 S. W. Rep. 810.

This test has, however, been said to be merely a more succinct statement of the generally accepted rule first stated in the text. *Wilson v. Mitchell*, 101 Pa. St. 495; *Miller v. Oestrich*, 157 Pa. St. 264; *Hoopes's Estate*, 174 Pa. St. 373.

In *Spratt v. Spratt*, 76 Mich. 395, the court said: "It is not required that a testator should know and understand the number and condition of his relatives, nor their relative claims upon his bounty, nor that he should know and understand the reason for giving or withholding his bounty as to any and every relative. \* \* \* These questions are too remote and conjectural to be applied as tests of mental capacity."

The effect of this decision is somewhat

and extent of one's property is not an essential element of testamentary capacity. The capacity to know is what the law regards.<sup>1</sup> So a testator is not required to have an exact knowledge of the scope and bearing of his will.<sup>2</sup> It has also been held that a testator is not required to ascertain the legal status of each person who apparently stands in a natural relation to him.<sup>3</sup>

*c.* TEST MEASURED BY STANDARDS REQUISITE FOR OTHER PURPOSES. — The weight of authority is to the effect that the capacity to execute a valid will does not necessarily involve so high a standard of mental power as is required for the execution of a deed, mortgage, or contract.<sup>4</sup> And it is not essential that the testator's mental capacity should be such even as to enable him to transact his ordinary business affairs.<sup>5</sup> Therefore proof of capacity

qualified in the later case of *Moriarty v. Moriarty*, 108 Mich. 249.

It would be hard to prove that a testator, of whose competency there was no question, recollected all his property, etc., that is, made no mistake. *Kerr v. Lunsford*, 31 W. Va. 659.

**Evidentiary Facts Rather than Elements of Capacity.** — It has been judicially intimated that the knowledge of the extent and character of the testator's property, and of the objects of his bounty, and an understanding of the manner in which he wished to dispose of his property, are merely evidentiary facts to be considered in passing upon the question of testamentary capacity, rather than elements of capacity. *Waugh v. Moan*, 200 Ill. 298.

**1. Actual Knowledge, and Capacity to Know, Distinguished.** — In *Brown v. Mitchell*, 75 Tex. 9, the trial court in its charge to the jury stated the test of capacity to consist of a knowledge of the elements enumerated in the generally accepted definition given in the text. The appellate court in commenting upon the charge said: "The question is one of capacity to know, and not of actual knowledge, and the want of the latter cannot be made the test of the existence of the other."

"It is not ignorance of the kind or amount of property owned by the testatrix which invalidates her will, but ignorance resulting from a mental incapacity to comprehend the kind and amount of such property." *In re Livingston*, (N. J. 1897) 37 Atl. Rep. 770. To the same effect see *Kerr v. Lunsford*, 31 W. Va. 659.

But evidence that part of the property attempted to be devised did not belong to the testator is admissible on the question of his capacity. *Goodbar v. Lidikey*, 136 Ind. 1, 43 Am. St. Rep. 296; *Re Buckman*, 64 Vt. 313; *Marks v. Bryant*, 4 Hen. & M. (Va.) 91.

**2. Knowledge of Scope and Bearing of Will.** — While it is true that a testator should reasonably have understood as to how he desired his will to take effect, it is not necessary that he should have understood the scope and bearing of the provisions of the will as prepared by his legal adviser. *Kischman v. Scott*, 166 Mo. 214; *Couch v. Gentry*, 113 Mo. 248; *Trish v. Newell*, 62 Ill. 196, 14 Am. Rep. 79.

In *Harrison v. Rowan*, 3 Wash. (U. S.) 585, Mr. Justice Washington says: "It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form."

An erroneous calculation respecting one of

the bequests will not invalidate a will. *Wood v. Carpenter*, 166 Mo. 465.

**3. Legal Status of Persons.** — *Smith v. Smith*, 48 N. J. Eq. 566.

But if the testator was in such a condition of mind that he did not know the actual objects of his bounty, and such condition caused him to make a will that he would not otherwise have made, then he was not of sound and disposing mind. *Petefish v. Becker*, 176 Ill. 448.

**4. Capacity to Make Deed, Mortgage, etc.** — *Connecticut*. — *Comstock v. Hadlyme Ecclesiastical Soc.*, 8 Conn. 254, 20 Am. Dec. 100.

*Georgia*. — *Terry v. Buffington*, 11 Ga. 345, 56 Am. Dec. 423.

*Iowa*. — *Perkins v. Perkins*, 116 Iowa 253. *Michigan*. — *O'Connor v. Madison*, 98 Mich. 183.

*Missouri*. — *Von De Vell v. Judy*, 143 Mo. 348, overruling *Armstrong v. Farrar*, 8 Mo. 627; *Maddox v. Maddox*, 114 Mo. 35, 35 Am. St. Rep. 734; *Brinkman v. Rueggessick*, 71 Mo. 553.

*New Jersey*. — *Bennett v. Bennett*, 50 N. J. Eq. 439.

*Ohio*. — *Thompson v. Thompson*, 13 Ohio St. 356.

*Pennsylvania*. — *Thompson v. Kyner*, 65 Pa. St. 368.

*South Carolina*. — *Kirkwood v. Gordon*, 7 Rich. L. (S. Car.) 474, 62 Am. Dec. 418.

*Vermont*. — *Converse v. Converse*, 21 Vt. 168, 52 Am. Dec. 58.

*West Virginia*. — *Kerr v. Lunsford*, 31 W. Va. 680; *Jarrett v. Jarrett*, 11 W. A. 584.

**Under the Statutes of Maryland**, the courts of that state have held that the testator should have capacity to execute a valid deed or contract. *Jones v. Collins*, 94 Md. 403.

**5. Transaction of Ordinary Business** — *Alabama*. — *Schieffelin v. Schieffelin*, 127 Ala. 14.

*Connecticut*. — *Turner's Appeal*, 72 Conn. 305.

*Georgia*. — *Wood v. Lane*, 102 Ga. 199.

*Illinois*. — *Campbell v. Campbell*, 130 Ill. 466; *Greene v. Greene*, 145 Ill. 264; *Sinnet v. Bowman*, 151 Ill. 146; *Ring v. Lawless*, 190 Ill. 520; *Craig v. Southard*, 148 Ill. 37; *Taylor v. Cox*, 153 Ill. 220; *Waugh v. Moan*, 200 Ill. 298.

*Indiana*. — *Harrison v. Bishop*, 131 Ind. 161, 31 Am. St. Rep. 422.

*Iowa*. — *Meeker v. Meeker*, 74 Iowa 352, 7 Am. St. Rep. 489; *Perkins v. Perkins*, 116 Iowa 253.



sufficient for the execution of a deed, mortgage, or contract, or for the transaction of the ordinary affairs of life, is strong, if not conclusive, evidence of capacity to execute a valid will.<sup>1</sup>

*Kentucky*.—*Wise v. Foote*, 81 Ky. 10; *Bramel v. Bramel*, 101 Ky. 64.

*Massachusetts*.—*Whitney v. Twombly*, 136 Mass. 145.

*Missouri*.—*Brinkman v. Rueggiesick*, 71 Mo. 556; *Crossan v. Crossan*, 169 Mo. 161; *Benoist v. Murrin*, 58 Mo. 307; *Jackson v. Hardin*, 83 Mo. 175; *Myers v. Hauger*, 98 Mo. 433.

*New York*.—*Matter of Johnson*, (Surrogate Ct.) 7 Misc. (N. Y.) 220; *Matter of Stewart*, 60 Hun (N. Y.) 586, 15 N. Y. Supp. 601; *Matter of Kiedaisch*, 2 Connolly (N. Y.) 438.

**Reasons for Distinguishing Between Capacity for Ordinary Business and for Making Will.**—“Instructions Nos. 3, 7, 11, and 13, given in behalf of the appellees, were to the effect that unless the jury believed, from the evidence, the testator had sufficient mental capacity to enable him to transact the ordinary business affairs of life, he could not make a valid will. In buying and selling property, adjusting accounts, collecting or paying out moneys, borrowing money or making loans, and in other business transactions of life, important considerations arise which are not involved in the disposition of property by will. A will does not take effect during the lifetime of the testator, and for that reason the act of making a will does not interfere with the use of the property by the testator. He may enjoy or dispose of the property as fully after as before making the will. His personal convenience and physical comfort are not to be affected by an imprudent or ill-judged provision in his will as to the enjoyment of the property by others after he shall have no further need of its use. A sale of property becomes operative during the lifetime of the seller, and on the consummation of the transaction he must surrender possession of the property to the buyer, and at once forego all further right to enjoy the use or benefit thereof. It then becomes important for him to understand and comprehend the value of that which he is to receive for that which he parts with by the sale, and to determine whether it is to his interest to retain that which he has, or to deprive himself of it, and receive some other thing or representative of value in its stead. The buyer will exercise his judgment, knowledge, experience, and shrewdness to the end that he may become the owner of the property of the seller, on terms the most favorable possible to himself. The vendor must have mental strength and understanding to compete with his business antagonist and protect his own interest, but the testator has no antagonist to meet, and no necessity to consider whether he will be benefited or injured by the act in which he is engaged. The ordinary business transactions of life involve a contest of reason, judgment, experience, and the exercise of mental powers not at all necessary to the testamentary disposition of property.” *Ring v. Lawless*, 190 Ill. 520.

**It Is Not Necessary that the Testator Should Be Capable of Trafficking** with or mortgaging his property. *Howard v. Coke*, 7 B. Mon. (Ky.) 655.

**Bad Management and Waste** of an inherited estate does not necessarily show testamentary incapacity. *Hall v. Hall*, 17 Pick. (Mass.) 373; *Brinkman v. Rueggiesick*, 71 Mo. 553.

**Contrary View.**—But in *Meeker v. Meeker*, 75 Ill. 266, the court said: “The rule is the same in the case of a sale of property, and its disposition by will, and the usual test is, that the party be capable of acting rationally in the ordinary affairs of life.” Followed in *Carpenter v. Calvert*, 83 Ill. 62; *Rutherford v. Morris*, 77 Ill. 397; *Brown v. Riggan*, 94 Ill. 560; *Keithley v. Stafford*, 126 Ill. 507. To the same effect see *Coleman v. Robertson*, 17 Ala. 84; *McElroy v. McElroy*, 5 Ala. 81; *Stewart v. Elliott*, 2 Mackey (D. C.) 307.

**Highest Degree of Mental Soundness Held to Be Requisite.**—In *Boughton v. Knight*, L. R. 3 P. & D. 64, 42 L. J. P. 25, 28 L. T. N. S. 562, it was held that the term “sound mind” involves a question of degree, requiring in its consideration allowance for individual character, but that in every case the highest degree of mental soundness is requisite to testamentary competency, as the making of a will involves a larger and wider survey of facts and things than is required in the other transactions of life.

**Capacity for Ordinary Affairs Sufficient.**—In a number of decisions the instruction that if the testator had capacity to transact his ordinary business affairs, and to know the character and extent of his estate, the objects of his bounty, and what disposition he was making of his property, he had testamentary capacity, has been held correctly to state the law. These cases, however, it will be noted, do not hold that one who has not sufficient capacity to transact his ordinary business has not testamentary capacity. *Benoist v. Murrin*, 58 Mo. 307; *McClintock v. Curd*, 32 Mo. 411; *Harvey v. Sullens*, 56 Mo. 372; *Myers v. Hauger*, 98 Mo. 433; *Farmer v. Farmer*, 129 Mo. 530; *Freeman v. Easley*, 117 Ill. 317.

1. *Wood v. Lane*, 102 Ga. 199; *Greene v. Greene*, 145 Ill. 264; *Craig v. Southard*, 148 Ill. 37; *Taylor v. Cox*, 153 Ill. 220; *Harp v. Parr*, 168 Ill. 459; *Entwistle v. Meikle*, 180 Ill. 9; *Ring v. Lawless*, 190 Ill. 520; *Waugh v. Moan*, 200 Ill. 298; *Hudson v. Hughan*, 56 Kan. 152; *Berry v. Safe Deposit, etc., Co.*, 96 Md. 45; *Gable v. Rauch*, 50 S. Car. 95; *Gass v. Gass*, 3 Humph. (Tenn.) 278. See also *Hogan v. Roche*, 179 Mass. 510; *Bonnemort v. Gill*, 165 Mass. 493.

**Proof that the Testator Was Unable to Attend to His Business Affairs** is admissible to show want of testamentary capacity. *Bower v. Bower*, 142 Ind. 194. See, as holding a contrary view, *Brackney v. Fogle*, 156 Ind. 535.

In *Delafeld v. Parish*, 25 N. Y. 9, the court refers to the fact that during the period in question the testator was not shown to have

*f.* TEST AS AFFECTED BY CHARACTER OF ESTATE. — From the foregoing it follows that the question of mental capacity in a given case is dependent in some degree upon the character and extent of the estate and the manner of its disposition, a higher degree of capacity being necessarily required where the estate is large and of complicated nature than where the amount of property is small and its character homogeneous. So, where the number of relatives or others having a claim on the testator's bounty is large, or where an involved disposition of the property is sought to be made, a higher degree of capacity is requisite than where those to be regarded in the distribution are few and the manner of disposition simple.<sup>1</sup>

*g.* CAPACITY REQUISITE FOR REVOCATION. — The same degree of mental capacity is required to a valid revocation of a will as is requisite to its valid execution.<sup>2</sup> And where it is shown that the decedent was lacking in capacity when he revoked his will, the court will admit it to probate if he was competent when the will was executed.<sup>3</sup>

ever by himself performed a single business transaction, made a purchase or sale of property, or have expended or been entrusted with a dollar, although the owner of a million, as showing that his condition was undoubtedly that of utter dementia.

**A Long and Varied Correspondence Carried On By and With the Testator for a Series of Years,** and the execution of various deeds by him, and of others to him, involving property to a large amount, are sufficient to show his general competency to dispose of his property. *Wright v. Tatham*, 9 L. J. Ch. 265.

In *Kerr v. Lunsford*, 31 W. Va. 659, it was held error, though not reversible, to refuse to admit, as indicative of want of capacity to transact business, evidence offered by the contestants to show that property sold by the testator three months before the date of the will was worth more than the price obtained.

**But the Testator May Be Incapacitated by Reason of Insane Delusions** although capable of transacting his ordinary business affairs. *Petefish v. Becker*, 176 Ill. 448; *Orchardson v. Cofield*, 171 Ill. 14, 63 Am. St. Rep. 211; *Nicewander v. Nicewander*, 151 Ill. 156; *Brace v. Black*, 125 Ill. 33; *American Bible Soc. v. Price*, 115 Ill. 623; *Huggins v. Drury*, 192 Ill. 528; *Banks v. Goodfellow*, L. R. 5 Q. B. 549.

**Senile Dementia.** — It has also been held that he may be incapacitated by reason of senile dementia, though capable of transacting his business affairs. *Bever v. Spangler*, 93 Iowa 576.

**1. Nature of Extent — Number of Relatives, Etc.** — In *Campbell v. Campbell*, 130 Ill. 466, the court said: "The inquiry is to be made in view of the circumstances of the particular case, and a determination reached by a consideration of the nature and character of the business performed, under all the attendant conditions and circumstances."

In *Trish v. Newell*, 62 Ill. 196, 14 Am. Rep. 79, the court say: "The idea here intended to be conveyed by the learned judge is, that a man might not be competent to make a will of one kind and under some circumstances in relation to the estate, the number of objects, and the character of the disposition, when under other and different circumstances, requiring less mental effort, he might be. We know, practically, that it requires a less degree of

capacity to thus dispose of a single farm and the usual personal property owned by a farmer, by distribution among a few recipients, than of a large and diversified estate, among numerous recipients, with various gradations of their bounties. So that there can be no safer practical rule than that the competency of the mind should be judged of by the nature of the act to be done, from a consideration of all of the circumstances of the case." To the same effect, see *Greene v. Greene*, 145 Ill. 264.

But in *Yoe v. McCord*, 74 Ill. 33, the court say: "One grossly ignorant, or of very limited mental capacity, if otherwise of sane mind, may make any instrument, however complex it may be, and be bound thereby. \* \* \* We agree with the rule as held in *Delafield v. Parish*, 25 N. Y. 9, that the question is, had the testator, as *compos mentis*, capacity to make a will; not, had he capacity to make the will produced."

**2. Revocation of Will — Capacity.** — Vol. 10 Bac. Abr. p. 546; *Harris v. Berrall*, 1 Sw. & Tr. 153; *Scruby v. Fordham*, 1 Add. Ecc. 74; *Benson v. Benson*, L. R. 2 P. & D. 172; *Brunt v. Brunt*, L. R. 3 P. & D. 37; In Goods of *Brand*, 3 Hag. Ecc. 754; *Matter of Johnson*, 40 Conn. 587; *Allison v. Allison*, 7 Dana (Ky.) 94; *Linkmeyer v. Brandt*, 107 Iowa 750; *Delafield v. Parish*, 25 N. Y. 9; *McIntosh v. Moore*, 22 Tex. Civ. App. 22.

**3. Batton v. Watson**, 13 Ga. 63, 58 Am. Dec. 504; *Forbing v. Weber*, 99 Ind. 588; *Allison v. Allison*, 7 Dana (Ky.) 94; *Rich v. Gilkey*, 73 Me. 595; *Semmes v. Semmes*, 7 Har. & J. (Md.) 388; *Rhodes v. Vinson*, 9 Gill (Md.) 169, 52 Am. Dec. 685; *McIntire v. Worthington*, 68 Md. 203; *Smith v. Wait*, 4 Barb. (N. Y.) 28; *Forman's Will*, Tuck. (N. Y.) 205; *Idley v. Bowen*, 11 Wend. (N. Y.) 227; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158, 49 Am. Dec. 170; *Ford v. Ford*, 7 Humph. (Tenn.) 92.

In *Delafield v. Parish*, 25 N. Y. 9, the testator by his will, executed at a time when his mental condition was above suspicion, made large provision for his brothers. Some years after he suffered a stroke of apoplexy which produced the condition upon which the claim of incapacity was based. While in this resultant condition he executed three codicils, the effect of which was to give practically all of his very large estate to his wife, who had



**2. Relation of Incompetency to Will.** — Mental unsoundness, in order to avoid a will, must have actually entered into or affected the will or caused its execution.<sup>1</sup>

**3. Time to Which Inquiry Relates — When Will Executed.** — In determining the issue of testamentary capacity, the only question is whether the testator was competent at the time of the execution of the will.<sup>2</sup>

**Prior or Subsequent Incompetency.** — If the testator was possessed of testamentary capacity when the will was executed, the fact that he may have at some previous time lacked capacity or that he may have become incompetent subsequent to the execution of the will cannot affect the validity of the will.<sup>3</sup>

been bountifully provided for in the will, and to divest the brothers of any participation in the estate. The court, after remarking that the validity of the will was beyond controversy, that no change in the circumstances of the testator's family had occurred, and that a condition of bodily and mental weakness had supervened calculated to create doubt as to his soundness of mind, during the continuance of which condition the codicils in question were executed, quotes with approval from the language of Lord Brougham in *Panton v. Williams*, 2 Curt. Ecc. 530, as follows: That when the question arises "between one will and another of a prior date, the proof being upon the party propounding any testamentary writing, the course of administration directed by the law is to prevail against him who cannot satisfy the conscience of the court of probate that he has established a will; or the prior instrument which is liable to no doubt is to be established in preference to the posterior one which cannot be so proved to speak the testator's intentions as to leave the court in no doubt that it declares those intentions." And to the same effect, see *Matter of Barbineau*, (Surrogate Ct.) 27 Misc. (N. Y.) 417 [citing *Matter of Way*, (Surrogate's Ct.) 6 Misc. (N. Y.) 484; *Forman v. Smith*, 7 Lans. (N. Y.) 443; *Matter of Clark*, (Surrogate Ct.) 5 Misc. (N. Y.) 68; *Booth v. Kitchen*, 3 Redf. (N. Y.) 52; *Tyler v. Gardiner*, 35 N. Y. 559].

**1. Relation of Mental Unsoundness to Will.** — *Blough v. Parry*, 144 Ind. 463; *Durham v. Smith*, 120 Ind. 468; *Den v. Gibbons*, 22 N. J. L. 117, 51 Am. Dec. 253; *Jackson v. King*, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354.

In *Durham v. Smith*, 120 Ind. 463, the following instruction came in question: "(6) Furthermore, I instruct you that a person who is of unsound mind is incapable of making a valid will; and, if there is unsoundness of mind, it is not necessary for the contestant to show that such unsoundness had anything to do with the manner of disposing of the property. In such a case the will is invalid, whether it is shown that the unsoundness of mind had or had not affected the character of the testament." The court said: "By adding the words, 'In such a case the will is invalid, whether it is shown that the unsoundness had or had not affected the character of the testament,' it changed the scope and meaning of the instruction, and was in effect telling the jury that, upon considering all the evidence, if they came to the conclusion there was any unsoundness of mind or defect of any character in the

mind of the testatrix, no difference to what extent such defect affected or impaired the mind, or whether it in any way affected the disposition of the property devised or the making of the will, the will would be invalid; and this, too, even though the evidence might affirmatively establish the fact that such defect in no way entered into the making of the will or disposition of the property, and that she had at the time sufficient mental capacity to make a will. In short, this charge recognizes but two conditions of the human mind, one sound and capable of doing all acts, and the other unsound and incapable of doing any act; that a person is responsible for all his acts, or not responsible for any of his acts. This is an erroneous theory of the law. \* \* \* It is evident that a person might be possessed of the requisite capacity to make a will \* \* \* and yet have some defect of the mind, some delusion in relation to some subject entirely foreign to the execution of the will, the disposition of the property, the devisees, or those who are the natural objects of his bounty. It is not necessary that we point out in this opinion what particular defects or delusions there may be in a testator's mind, and yet he possess sufficient mental capacity to make a valid will; it is sufficient if there may be any to render the instruction under consideration erroneous."

**2. Inquiry Directed to Time of Execution of Will.** — *Ayrey v. Hill*, 2 Add. Ecc. 210; *Billinghurst v. Vickers*, 1 Phill. Ecc. 191; *Handley v. Stacey*, 1 F. & F. 574; *Etter v. Armstrong*, 46 Ind. 197; *Conway v. Vizzard*, 122 Ind. 266; *Shailer v. Bumstead*, 99 Mass. 112; *Von De Veld v. Judy*, 143 Mo. 348; *Pritchard v. Roe*, 3 Penn. (Del.) 128; *Kerr v. Lunsford*, 31 W. Va. 659.

**3. O'Donnell v. Rodiger**, 76 Ala. 223, 52 Am. Rep. 322.

"The Proof of Incapacity at Any Prior or Subsequent Time, while it may furnish evidence reflecting on the condition of the testator's mind at the date of the will, will not relieve the party assailing the will from the necessity of establishing by clear proof the existence of the mental incompetency at the time of executing the paper." *Barbour v. Moore*, 4 App. Cas. (D. C.) 535; *Greene v. Greene*, 145 Ill. 264.

In *Kerr v. Lunsford*, 31 W. Va. 659, it was held that although it might appear that previous to the execution of the will, and for sixteen months thereafter, the testator was afflicted with a disease which materially affected his mind and memory, and which progressed in its



**Lucid Intervals.** — A will made during a lucid interval is therefore valid.<sup>1</sup> But evidence of the condition of the testator's mind, both prior and subsequent to the time of the execution of the will, is admissible as throwing light upon the condition of his mind at the time the will was executed.<sup>2</sup>

**Length of Period over Which Inquiry to Extend.** — It is a matter largely within the discretion of the trial court as to how long prior or subsequent to the making of the will the mental condition of the testator may be inquired into.<sup>3</sup>

effects upon his mind to the date of the will, at which time he was incapacitated from transacting business, the jury may still find for the will if they believe that the testator was competent at the time the will was executed.

**Subsequent Adjudication of Insanity.** — In *Brady v. McBride*, 39 N. J. Eq., 495, the will of a person, executed when she was eighty-two years old and blind, was admitted to probate on satisfactory evidence of capacity, though two years after the will was made an inquisition of lunacy found her to be of unsound mind, and to have been in that condition for three years.

**Intermittent Delusions.** — In *Lee v. Scudder*, 31 N. J. Eq. 633, the testatrix suffered from intermittent delusions dependent upon disease. Her will, drawn at a time when she was undoubtedly free of such delusions, was sustained.

**Where Testator of Sound Mind When His Instructions as to Will Were Given.** — It has been held recently in *England* that where a testator was of sound mind when he gave instructions for a will, but at the time of the execution thereof accepted the instrument drawn in pursuance to such instructions without being able to follow its provisions, he will be deemed to be of sound mind when it was executed. *Perera v. Perera*, (1901) A. C. 354, 70 L. J. P. C. 46, 84 L. T. N. S. 371, *approving and quoting Parker v. Felgate*, 8 P. D. 171.

So in *Bennett v. Manchester*, 2 W. R. 644, holding that where a person of clear mind gives instructions for a will of a complicated nature, such will will not be set aside, although the next day, on executing it, the testator could not have given those complicated instructions or fully understood them; but at a time when the mind is incapable of forming a new idea or intention, the mere recollection of an intention formerly expressed in a conversation two months before is not sufficient proof of capacity.

**1. Lucid Intervals.** — *Hall v. Warren*, 9 Ves. Jr. 610; *Rodd v. Lewis*, 2 Lee Ecc. 176; *Clarke v. Cartwright*, 1 Phill. Ecc. 90; *Gombault v. Public Administrator*, 4 Bradf. (N. Y.) 226; *Wright v. Lewis*, 5 Rich. L. (S. Car.) 212, 55 Am. Dec. 714.

**Proof of a Lucid Interval Is Rendered Very Difficult** by the fact that the patient often appears entirely rational when there is really no abatement of his disease. *Brogden v. Brown*, 2 Add. Ecc. 445.

**Strong Proof of Capacity Should Be Required** in a case in which a consultation of physicians was held at the instance of those in whose favor the will was to be made, to decide upon the testator's sanity. *Christy v. Clarke*, 45 Barb. (N. Y.) 529.

**2. Alabama.** — *Saxon v. Whitaker*, 30 Ala.

237; *O'Donnell v. Rodiger*, 76 Ala. 222, 52 Am. Rep. 322; *Moore v. Spier*, 80 Ala. 129; *Kramer v. Weinert*, 81 Ala. 417; *Knox v. Knox*, 95 Ala. 495, 36 Am. St. Rep. 235; *Moore v. Heineke*, 119 Ala. 627.

*Connecticut.* — *Kinne v. Kinne*, 9 Conn. 102, 21 Am. Dec. 732.

*Delaware.* — *Steele v. Helm*, 2 Marv. (Del.) 237; *Pritchard v. Roe*, 3 Penn. (Del.) 128.

*Georgia.* — *Terry v. Buffington*, 11 Ga. 337, 56 Am. Dec. 423.

*Illinois.* — *Greene v. Greene*, 145 Ill. 264; *Harp v. Parr*, 168 Ill. 459; *Petefish v. Becker*, 176 Ill. 448.

*Indiana.* — *Rush v. Megee*, 36 Ind. 69; *Dyer v. Dyer*, 87 Ind. 13; *Staser v. Hogan*, 120 Ind. 207; *Bower v. Bower*, 142 Ind. 194.

*Iowa.* — *Ashcraft v. De Armond*, 44. Iowa 232; *Ross v. McQuiston*, 45 Iowa 145; *Sim v. Russell*, 90 Iowa 656; *Bever v. Spangler*, 93 Iowa 576; *Hull v. Hull*, 117 Iowa 738.

*Maryland.* — *Brashears v. Orme*, 93 Md. 442.

*Massachusetts.* — *Peaslee v. Robbins*, 3 Met. (Mass.) 164; *Shailer v. Bumstead*, 99 Mass. 112.

*New Jersey.* — *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Turner v. Cheeseman*, 15 N. J. Eq. 243.

*New York.* — *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330.

*North Carolina.* — *Mitchell v. Corpening*, 24 N. Car. 472.

*Pennsylvania.* — *Swailes v. White*, 149 Pa. St. 261.

**Where Competency Shown to Exist Month Prior to Will.** — In *Johnson v. Johnson*, 187 Ill. 86, it is held that proof of competency a month before the execution of the will carries a presumption that the competency continued and throws the burden on the contestant to prove lack of capacity at the date of the will.

**The Fact that the Testator Had the Will a Long Time in His Possession After Its Execution**, during which time he was in full possession of his mental faculties, may be taken into account as bearing upon the question of his mental condition at the time the will was executed. *Lamb v. Lynch*, 56 Neb. 135.

**3. Judicial Discretion.** — *Shailer v. Bumstead*, 99 Mass. 112; *Howes v. Colburn*, 165 Mass. 385; *Bonnemort v. Gill*, 165 Mass. 493; *Haines v. Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566; *Rusling v. Rusling*, 36 N. J. Eq. 603; *Herster v. Herster*, 122 Pa. St. 239, 9 Am. St. Rep. 95.

**Period of Six Years After Execution of Will.** — In *Bever v. Spangler*, 93 Iowa 576, the testator's condition of senile dementia was of long standing, and its development progressive. It was held that testimony as to his actions and manner for a connected period of six years after the making of the will had been properly

**Subsequent Mental Restoration.** — But a will executed while the testator is lacking capacity is not revived or established by his subsequently acquiring capacity, without a re-execution and republication. A mere failure to destroy or cancel it is not sufficient.<sup>1</sup>

**Codicils.** — If a will is executed while the testator is of sound mind, and a codicil is added when he is insane, the codicil may be rejected and the will admitted to probate.<sup>2</sup> But if a will is executed while the testator is insane, a codicil added when of sound mind is a republication of the will which gives it validity.<sup>3</sup>

**4. Particular Instances of Mental Infirmary** — *a.* **IDIOCY.** — The terms “idiot” and “idiocy” have already been defined.<sup>4</sup> If a person is capable of transacting any business intelligently he is not an idiot.<sup>5</sup> The will of an idiot is void, notwithstanding its provisions may be wise and just.<sup>6</sup>

*b.* **LUNACY.** — A lunatic is a person who is usually insane, but who has intervals of reason.<sup>7</sup> A will executed during such an interval is valid; one not executed at such a time is invalid.<sup>8</sup>

*c.* **PARTIAL INSANITY: MONOMANIA, DELUSIONS, HALLUCINATIONS — Partial Insanity.** — Partial insanity is insanity on one or more subjects, the mind being clear and rational on all others. The term has reference, not to some general weakening of the mind short of positive insanity, nor to any intermediary stage in the development of mental derangement, but to disturbance at some particular point or upon some particular subject, not involving the mind on any other point or subject.<sup>9</sup> The particular manner

admitted on the question of his capacity at the time the will was made.

“The Limitations Which Govern the Admission of This Quality of Evidence must depend largely on the character of the unsoundness attempted to be proved. There are types of mental unsoundness which appear suddenly, and may be of short duration, and in such cases the proof, to be of any avail, must come near to the precise time when the act was performed; but the decadence of old age, and many forms of mental derangement and imbecility, are of slow advancement, and proof of their distinct development at any given period will afford pretty clear ground to infer their existence for a long period, either before or after, with a considerable degree of certainty.” *Herster v. Herster*, 122 Pa. St. 239, 9 Am. St. Rep. 95.

**On the Day Will Executed.** — Where a testator is alleged to have been incapable of executing a valid will at between ten and eleven o'clock in the forenoon, evidence as to his mental condition soon after noon of the same day is admissible where it is not shown that his condition was materially different at the two times. *Lange v. Wiegand*, 125 Mich. 647, 7 Detroit Leg. N. 673.

**1. Subsequent Mental Restoration.** — Swinb. Wills, pt. 2, § 3, p. 118, says: “And so strong is this impediment of insanity of mind that if the testator make his testament after this furor hath overtaken him, and while as yet it doth possess his mind, albeit the furor afterwards departing or ceasing, the testator recover his former understanding, yet doth not the testament made during his former fit recover any strength or force thereby.”

In *Porter v. Campbell*, 2 Baxt. (Tenn.) 81, a verdict in favor of a will was set aside for error of the judge in instructing the jury that

if the testator retained a holographic will among his papers during lucid intervals, “it would be very strong if not conclusive proof” that he intended it to remain his will.

**Statute.** — Where there is want of testamentary capacity when a will is executed, but afterwards capacity is given by statute, the will must be re-executed and republished in order to take effect as such. *Mitchell v. Kimbrough*, 98 Tenn. 535.

**2. Codicil Added While Testator Incompetent.** — *Delafield v. Parish*, 25 N. Y. 9. And see *supra*, this section, *Capacity Requisite for Revocation*.

**3. Codicil Added While Testator Competent.** — *Wood v. Wood*, 1 Phill. Ecc. 357; *Billinghurst v. Vickers*, 1 Phill. Ecc. 187; *Brouncker v. Brouncker*, 2 Phill. Ecc. 57.

**If the Testator Was Sane at the Time of Making the Last of Several Codicils,** it is not necessary to prove sanity at the time of making the other codicils, since the last is in law a republication of those prior thereto. *Brown v. Riffin*, 94 Ill. 560.

**4. Idiocy.** — See *IDIOCY*, vol. 15, p. 924, and the title *INSANITY*, vol. 16, p. 562.

**5.** See *Bannatyne v. Bannatyne*, 14 Eng. L. & Eq. 581; *Errickson v. Fields*, 30 N. J. Eq. 634.

**6.** See *Stewart v. Lisenard*, 26 Wend. (N. Y.) 255; *Harper v. Harper*, 1 Thomp. & C. (N. Y.) 354; Swinb. on Wills, pt. 2, § 4, pl. 5. **7.** See also *Townsend v. Bogart*, 5 Redf. (N. Y.) 93.

**7. Lunacy.** — See *LUNACY — LUNATIC*, vol. 19, 602, and the titles *INSANITY*, vol. 16, p. 562; *MEDICAL JURISPRUDENCE*, vol. 20, p. 545.

**8.** See the preceding parts of this article, also *infra*, the section *Evidence*.

**9. Partial Insanity.** — *Dew v. Clark*, 1 Add. Ecc. 279, 3 Add. Ecc. 79; *Greenwood's Case*,

in which the insanity manifests itself is known by the practically interchangeable names "delusion," "monomania," or "hallucination."<sup>1</sup>

**A Delusion** is a false belief, originating spontaneously in the imagination, without foundation either in fact or evidence, of the falsity of which the person affected cannot be convinced by argument or proof.<sup>2</sup>

**Where Will Product of the Disorder.** — Partial insanity will invalidate a will which is the offspring of the peculiar delusion from which the testator was suffering at the time the will was made,<sup>3</sup> though the mind be otherwise sound.

**Where Will Not Product of the Disorder.** — But where the partial insanity did not directly cause or affect the particular provisions of the will, the fact of its existence will not invalidate the will.<sup>4</sup> A mere mistake of fact which is the

cited in the preceding case; *McClintock v. Curd*, 32 Mo. 411; *Taylor v. Trich*, 165 Pa. St. 586, 44 Am. St. Rep. 679; *Chaney v. Bryan*, 16 Lea (Tenn.) 67. See also *Nichols v. Binns*, 1 Sw. & Tr. 239.

In *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329, Lumpkin, J., says: "If there be partial insanity only, and the will is the direct offspring of it, it will be invalid, although the general capacity be wholly unimpeached. And this partial insanity may be *quoad hoc* or *quoad hanc*, i. e., upon a particular subject, or as to a particular person. In either case, the sound and disposing mind is deficient or wanting in regard to this particular transaction. It is well established, both by mental and legal authorities, that a party may be both sane and insane, at different times, upon the same subject, and both sane and insane at the same time on different subjects; and it is in this last sense that the phrase 'partial insanity' is generally used."

1. See generally the title MEDICAL JURISPRUDENCE, vol. 20, p. 529.

2. **Delusions** — *England*. — *Dew v. Clark*, 3 Add. Ecc. 79; *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *Boughton v. Knight*, L. R. 3 P. & D. 68. See *Smith v. Tebbitt*, L. R. 1 P. & D. 398.

*Kansas*. — *Medill v. Snyder*, 61 Kan. 15, 78 Am. St. Rep. 307.

*Michigan*. — *Haines v. Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566.

*Mississippi*. — *Mullins v. Cottrell*, 41 Miss. 291.

*Missouri*. — *Benoist v. Murrin*, 58 Mo. 307.

*New Jersey*. — *Middleditch v. Williams*, 45 N. J. Eq. 726; *Smith v. Smith*, 48 N. J. Eq. 566.

*New York*. — *Riggs v. American Tract Soc.*, 95 N. Y. 503; *Matter of White*, 121 N. Y. 406; *Stanton v. Wetherwax*, 16 Barb. (N. Y.) 259; *Matter of Loewenstine*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 323; *Matter of Gannon*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 330; *Matter of Kahn*, 1 Connolly (N. Y.) 510; *Matter of Lockwood*, 2 Connolly (N. Y.) 118; *Matter of Lapham*, (Surrogate Ct.) 19 Misc. (N. Y.) 71; *Matter of Brush*, (Surrogate Ct.) 35 Misc. (N. Y.) 689; *Matter of Jenkins*, (Surrogate Ct.) 39 Misc. (N. Y.) 618; *Matter of Smith*, (Surrogate Ct.) 24 N. Y. Supp. 928.

*Oregon*. — *Potter v. Jones*, 20 Oregon 239.

*Pennsylvania*. — *McGovran's Estate*, 185 Pa. St. 203.

And see the title MEDICAL JURISPRUDENCE, vol. 20, p. 568.

**Where It Does Not Appear that the Testator's Belief Was So Fixed** that he could not be reasoned out of it, it will not be held to be a delusion. *Skinner's Will*, 40 Oregon 571; *Matter of Kendrick*, 130 Cal. 360.

**Aversion for Relatives** — **Where Explainable.** — Where there is nothing in the testator's conduct, as disclosed by the evidence, indicative of aversion for a relative, which cannot be explained by the temper of the testator, the acts or conduct of the contestant, or the relations existing between them, it is not necessary to resort to the theory of delusions to explain statements evidencing aversion of the testator for the contestant. *Schneider v. Manning*, 121 Ill. 376; *Huggins v. Drury*, 192 Ill. 528.

**Evidence Tending to Show that the Testator's Beliefs Had Some Foundation** in fact is therefore admissible. *Foster v. Dickerson*, 64 Vt. 233; *Stevens v. Leonard*, 154 Ind. 67, 77 Am. St. Rep. 446.

**So of Evidence Tending to Show that the Testator's Beliefs Were Not Only False, but Such that No Sane Person Would Have Held Them.** — *Titus v. Gage*, 70 Vt. 13.

**As to Character of Heir at Law.** — In *Mill's Appeal*, 44 Conn. 484, it was held that, for the purpose of showing that the testator was under the influence of an insane delusion in believing one of his heirs at law to be a lewd character, evidence of the good character of such an one was admissible. See also *Burkhart v. Gladish*, 123 Ind. 337. But see *Tudor v. Tudor*, 17 B. Mon. (Ky.) 383.

3. **Where Will Offspring of Delusion.** — *Cotton v. Ulmer*, 45 Ala. 378, 6 Am. Rep. 703; *Kimberly's Appeal*, 68 Conn. 428, 57 Am. St. Rep. 101; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Orchardson v. Cofield*, 171 Ill. 14, 63 Am. St. Rep. 211; *Layer v. Layer*, 110 Ky. 542; *Rivard v. Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566; *Thomas v. Carter*, 170 Pa. St. 272, 50 Am. St. Rep. 770; *Taylor v. Trich*, 165 Pa. St. 586, 44 Am. St. Rep. 679; *Re Segur*, 71 Vt. 224.

4. **Where Will Not Product of Delusion** — *England*. — *Banks v. Goodfellow*, L. R. 5 Q. B. 549, 39 L. J. Q. B. 237, 22 L. T. N. S. 813, followed in *Murfett v. Smith*, 12 P. D. 116, 57 L. T. N. S. 498, 51 J. P. 374, and in *Smee v. Smee*, 5 P. D. 84, 49 L. J. P. 8, 28 W. R. 703, 44 J. P. 220.

*Canada*. — *In re Maxwell*, 10 Nova Scotia 229.

*Alabama*. — *Floreay v. Florey*, 24 Ala. 241.

*California*. — *Matter of Redfield*, 116 Cal. 637; *Matter of Kendrick*, 130 Cal. 360.

*Connecticut*. — *Dunham's Appeal*, 27 Conn.



result of false evidence is not a delusion.<sup>1</sup>

**Illogical Reasoning.** — And a distinction is drawn in some of the cases between a delusion as before defined and an erroneous conclusion drawn from evidence by an illogical process of reasoning. Where there is any evidence to support the belief there is no delusion, although the mental process by which the belief was reached was irrational.<sup>2</sup>

192; *Kimberly's Appeal*, 68 Conn. 428, 57 Am. St. Rep. 101.

*Georgia.* — *Wetter v. Habersham*, 60 Ga. 193.

*Illinois.* — *Whipple v. Eddy*, 161 Ill. 114.

*Indiana.* — *Burkhart v. Gladish*, 123 Ind. 337; *Blough v. Parry*, 144 Ind. 463; *Young v. Miller*, 145 Ind. 652.

*Iowa.* — *In re Goldthorp*, 115 Iowa 430.

*Kentucky.* — *James v. Langdon*, 7 B. Mon. (Ky.) 193.

*Maryland.* — *Jones v. Collins*, 94 Md. 403.

*Massachusetts.* — *Maynard v. Tyler*, 168 Mass. 107.

*Michigan.* — *Rice v. Rice*, 50 Mich. 448; *Rice v. Rice*, 53 Mich. 432; *Peninsular Trust Co. v. Barker*, 116 Mich. 333.

*Missouri.* — *McClintock v. Curd*, 32 Mo. 411.

*Nebraska.* — *McClary v. Stull*, 44 Neb. 175.

*New Hampshire.* — *Boardman v. Woodman*, 47 N. H. 120.

*New Jersey.* — *Stackhouse v. Horton*, 15 N. J. Eq. 202; *Hollinger v. Syms*, 37 N. J. Eq. 221; *Gilman v. Ayer*, (N. J. 1901) 47 Atl. Rep. 1049, affirmed 63 N. J. Eq. 806.

*New York.* — *Matter of Jones*, (Surrogate Ct.) 5 Misc. (N. Y.) 199; *Matter of Lang*, (Surrogate Ct.) 9 Misc. (N. Y.) 521; *Matter of Henry*, (Surrogate Ct.) 18 Misc. (N. Y.) 149; *Matter of Iredale*, 53 N. Y. App. Div. 45; *Matter of White*, 121 N. Y. 406; *Matter of Vedder*, 6 Dem. (N. Y.) 92.

*Pennsylvania.* — *Pidcock v. Potter*, 68 Pa. St. 342; *Thomas v. Carter*, 170 Pa. St. 272; *Shreiner v. Shreiner*, 178 Pa. St. 57; *Hemingway's Estate*, 195 Pa. St. 291, 78 Am. St. Rep. 815; *Englert v. Englert*, 198 Pa. St. 326, 82 Am. St. Rep. 808; *Rodger's Estate*, 19 W. N. C. (Pa.) 383.

*Wisconsin.* — *Chafin's Will Case*, 32 Wis. 557; *Matter of Blakely*, 48 Wis. 294; *Cole's Will Case*, 49 Wis. 179.

**Contrary View.** — But see *Smith v. Tebbitt*, L. R. 1 P. & D. 398; 36 L. J. P. 97, 16 L. T. N. S. 841, 16 W. R. 18, in which it is held that where a testator is shown to be suffering from a delusion on some particular subject, although on all other subjects of sound mind, the result is the same whether the particular subject of delusion has any connection with the provisions of the will or not. To the same effect see *Waring v. Waring*, 6 Moo. P. C. 341, 12 Jur. 947, where it was held that the condition of mind which indicates the person's incapacity to overcome one delusion constitutes an unsound mind.

**But the Doctrine of These Two Cases Has Been Expressly Repudiated**, and that of *Dew v. Clark*, 3 Add. Ecc. 79, reaffirmed; namely, that the will of one suffering from delusions will not be set aside if it is rational in itself, and in no way attributable to such delusions. *Banks v. Goodfellow*, L. R. 5 Q. B. 549. In this case *Cockburn, C. J.*, said: "When the jury are

satisfied that the delusion has not affected the general faculties of the mind, and can have had no effect upon the will, we see no sufficient reason why the testator should be held to have lost his right to make a will, or why a will made under such circumstances should not be upheld. Such an inquiry may involve, it is true, considerable difficulty and require much nicety of discrimination, but we see no reason to think that it is beyond the power of judicial investigation and decision, or may not be disposed of by a jury directed and guided by a judge." In *Boughton v. Knight*, L. R. 3 P. & D. 64, these principles were reaffirmed, but the will was set aside because the aversion of the testator to certain of his children who were excluded by the will, was considered to amount to an insane delusion. In *Smee v. Smee*, 5 P. D. 84, the same doctrines were declared, but the will was rejected as having been the result of the testator's delusions. In *Murfett v. Smith*, 12 P. D. 116, the will was sustained, the decision having been rested upon the authority of *Banks v. Goodfellow*, L. R. 5 Q. B. 549, without an opinion. So, also, *Russell v. Lafrancois*, 8 Can. Sup. Ct. 335.

**1. Mistake of Fact.** — *Fulleck v. Allinson*, 3 Hag. Ecc. 527; *Hall v. Hall*, 38 Ala. 131; *Carpenter's Estate*, 94 Cal. 406; *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422; *Middleditch v. Williams*, 45 N. J. Eq. 726; *Matter of White*, 121 N. Y. 406; *In re Smith*, (Surrogate Ct.) 24 N. Y. Supp. 928; *Skinner's Will*, 40 Oregon 571; *Potter v. Jones*, 20 Oregon 240; *In re Cline*, 24 Oregon 175, 41 Am. St. Rep. 851; *Bennett's Estate*, 201 Pa. St. 485.

**2. It Is Never a Question of Soundness of View in Such Investigations**, but the proper inquiry always is whether the party imagined or conceived something to exist which did not in fact exist, and which no rational person, in the absence of evidence, would have believed to exist. *McGovran's Estate*, 125 Pa. St. 203.

**Delusion and Insane Delusion.** — In *Bennett's Estate*, 201 Pa. St. 485, the testator conceived a belief in the illegitimacy of his daughter, based, however, upon some evidence. The court, in sustaining the will, said: "All delusions are not insane delusions. A man may, from information given him, believe that his son is dead, when in point of fact the son is alive. The father's belief is a delusion; and if, when his son appears to him in person and explains that the information was false, the father persists in thinking him dead, his belief becomes an insane delusion. The difference between the two species is that one is the product of the reason, and the other a figment of the imagination."

The court in this case evidently means by the term "delusion," as distinguished from an "insane delusion," a false or erroneous belief.

**False Beliefs** are common to men. It is

**Estrangement, Distrust, Resentment, etc.** — Mere estrangement, distrust, unfounded jealousy, and unjust resentment of fancied wrongs will not necessarily constitute delusions. They must be shown to be due to some erroneous belief for which there is no foundation in evidence.<sup>1</sup>

The **Exclusion of Relatives** is frequently the result of insane delusions in respect to them. Where such has been shown to be the case, the will has generally been rejected.<sup>2</sup> Where, however, the testator's capacity is shown, and his discrimination against his relatives was not the offspring of a delusion respecting them, the will has generally been sustained.<sup>3</sup>

only when these false beliefs are such as a reasonable man would not under the circumstances entertain, that they become insane delusions." *Kimberly's Appeal*, 68 Conn. 428, 57 Am. St. Rep. 101.

"**Belief in Spiritualism** is not proof of insanity, but if, through that belief, one is led into the delusion that another is a god, a Christ, or gifted with powers and faculties belonging only to supernatural persons, the believer of the delusion is insane on that subject, and if he is prompted to make a will by that delusion his will cannot be sustained." *Orchardson v. Cofield*, 171 Ill. 14, 63 Am. St. Rep. 211.

This **Distinction** does not appear to have been always regarded. In *Haines v. Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566, the testator's belief in his daughter's illegitimacy was undoubtedly inspired by another daughter. The court, however, approved a charge based on the theory that the testator's belief might have been a delusion.

In *Matter of Ruffino*, 116 Cal. 304, and in *Matter of Lang*, (Surrogate Ct.) 9 Misc. (N. Y.) 521, in neither of which cases was the testator's belief shown to have been founded in fact or evidence, the courts referred to the "mistakes" of the testators as insufficient to invalidate their wills.

**Belief Based on Facts Shown to Exist.** — "One cannot be said to act under an insane delusion if his condition of mind results from a belief or inference, however irrational or unfounded, drawn from facts which are shown to exist." *Matter of Scott*, 128 Cal. 57, citing *Merrill v. Rolston*, 5 Redf. (N. Y.) 252; *Potter v. Jones*, 20 Oregon 249; *Cole's Will*, 49 Wis. 179; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *Boardman v. Woodman*, 47 N. H. 139; *American Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619; *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *Matter of White*, 121 N. Y. 406; *Smith v. Smith*, 48 N. J. Eq. 566; *Carpenter's Estate*, 94 Cal. 406.

**Belief Based on Evidence, However Slight**, is not a delusion. A delusion rests on no evidence whatever, but is based on mere surmise. *Tittel's Estate*, Myr. Prob. (Cal.) 12.

In *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681, it was held not sufficient to justify the rejection of a will, that a testator, in other respects competent, entertained the mistaken idea that one of his daughters was illegitimate, if it was not the effect of an insane delusion, but of slight and inadequate evidence, acting upon a jealous and suspicious mind. See also *Florey v. Florey*, 24 Ala. 241.

In *In re Dates*, (Supm. Ct. Gen. T.) 12 N.

Y. Supp. 205, 58 Hun (N. Y.) 608, the testator was declared competent on the evidence of the scrivener, a lawyer who was also one of the subscribing witnesses, and who testified that the testator directed changes to be made in his will as to his son because of reports of his bad conduct which he had heard.

**1. Estrangement, Distrust, Etc.** — *Matter of Journeay*, 15 N. Y. App. Div. 567, affirmed 162 N. Y. 611; *McGovran's Estate*, 185 Pa. St. 203.

An unjust belief by a testatrix that her brother, the contestant of her will, had obtained more than a fair share of the property left by their father, to her detriment, and which caused her to have an intense dislike for the brother, was a mistake in judgment, and was no ground for rejecting her will. *Matter of Lang*, (Surrogate Ct.) 9 Misc. (N. Y.) 521.

**2. Relatives Excluded** — *England*. — *Boughton v. Knight*, L. R. 3 P. & D. 64.

*California*. — *Tittel's Estate*, Myr. Prob. (Cal.) 12.

*Georgia*. — *Lucas v. Parsons*, 24 Ga. 640, 71 Am. Dec. 147; *Evans v. Arnold*, 52 Ga. 169.

*Illinois*. — *American Bible Soc. v. Price*, 115 Ill. 623.

*Indiana*. — *Staser v. Hogan*, 120 Ind. 207; *Burkhart v. Gladish*, 123 Ind. 338.

*Kentucky*. — *Harrel v. Harrel*, 1 Duv. (Ky.) 204; *Johnson v. Moore*, 1 Litt. (Ky.) 371; *Carlin v. Baird*, (Ky. 1900) 13 S. W. Rep. 434; *Sherley v. Sherley*, 81 Ky. 240.

*Massachusetts*. — *Woodbury v. Obear*, 7 Gray (Mass.) 470.

*New York*. — *Matter of Kahn*, 1 Connolly (N. Y.) 510; *Matter of Lockwood*, 2 Connolly (N. Y.) 118; *Colhoun v. Jones*, 2 Redf. (N. Y.) 34; *Crandall v. Shaw*, 2 Redf. (N. Y.) 100; *Merrill v. Rolston*, 5 Redf. (N. Y.) 221; *Matter of Dorman*, 5 Dem. (N. Y.) 112; *American Seaman's Friend Soc. v. Hopper*, 43 Barb. (N. Y.) 625, affirmed 33 N. Y. 619.

*Pennsylvania*. — *Baker v. Lewis*, 4 Rawle (Pa.) 356; *Leech v. Leech*, 1 Phila. (Pa.) 247, 8 Leg. Int. (Pa.) 154; *Matter of Mintzer*, 5 Phila. (Pa.) 206, 20 Leg. Int. (Pa.) 380; *Carter's Estate*, 11 Pa. Co. Ct. 140.

*Wisconsin*. — *Ballantine v. Proudfoot*, 62 Wis. 216.

**3. England.** — *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *Murfett v. Smith*, 12 P. D. 116; *Hoby v. Hoby*, 1 Hag. Ecc. 146; *Frere v. Peacock*, 1 Rob. Ecc. 442, 2 Taylor Med. Jur. (2d Eng. ed.) 555.

*Alabama*. — *Mosser v. Mosser*, 32 Ala. 551; *Hall v. Hall*, 38 Ala. 131; *Stoelker v. Thornton*, 88 Ala. 241.

*California*. — *Carpenter's Estate*, 94 Cal. 406.

**Feigning Beliefs.** — Where a testator really did not entertain the beliefs constituting the alleged delusions, but merely feigned to do so, he cannot be held to have been laboring under delusions.<sup>1</sup>

**d. ECCENTRICITY.** — Mere peculiarities of mind and eccentricities of character and conduct in the testator are not in themselves sufficient to render him incompetent.<sup>2</sup>

*Illinois.* — *Snow v. Benton*, 28 Ill. 306; *Schneider v. Manning*, 121 Ill. 376.

*Indiana.* — *Shorb v. Brubaker*, 94 Ind. 165; *Hite v. Sims*, 94 Ind. 333; *Conway v. Vizzard*, 122 Ind. 266.

*Iowa.* — *Bomgardner v. Andrews*, 55 Iowa 638.

*Kentucky.* — *Schildnecht v. Rompf*, (Ky. 1887) 4 S. W. Rep. 235; *Gordon v. Morrow*, (Ky. 1889) 10 S. W. Rep. 373; *Kevil v. Kevil*, 2 Bush (Ky.) 614; *Cleveland v. Lyne*, 5 Bush (Ky.) 383; *Tudor v. Tudor*, 17 B. Mon. (Ky.) 383.

*Michigan.* — *Fraser v. Jennison*, 42 Mich. 206; *Rice v. Rice*, 50 Mich. 448.

*Mississippi.* — *Mullins v. Cottrell*, 41 Miss. 291.

*Missouri.* — *Benoist v. Murrin*, 58 Mo. 307.

*New Hampshire.* — *Boardman v. Woodman*, 47 N. H. 120.

*New Jersey.* — *Den v. Gibbons*, 22 N. J. L. 117, 51 Am. Dec. 253; *Stackhouse v. Horton*, 15 N. J. Eq. 202; *Middleditch v. Williams*, 45 N. J. Eq. 726; *Smith v. Smith*, 48 N. J. Eq. 566.

*New York.* — *Phillips v. Chater*, 1 Dem. (N. Y.) 533; *Potter v. McAlpine*, 3 Dem. (N. Y.) 108; *Bull v. Wheeler*, 6 Dem. (N. Y.) 123; *Thompson v. Thompson*, 21 Barb. (N. Y.) 107; *Gamble v. Gamble*, 39 Barb. (N. Y.) 373; *Matter of Forman*, 54 Barb. (N. Y.) 274; *Thompson v. Quimby*, 2 Bradf. (N. Y.) 449; *In re Ogden*, (Surrogate Ct.) 2 N. Y. Supp. 345; *In re Comstock*, (Surrogate Ct.) 7 N. Y. Supp. 334; *In re Fricke*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 315; *In re Zeigler*, (Supm. Ct.) 19 N. Y. Supp. 947, 65 Hun (N. Y.) 621; *Matter of Gross*, (Supm. Ct. Gen. T.) 14 N. Y. St. Rep. 429; *Coit v. Patchen*, 77 N. Y. 533.

*Oregon.* — *Potter v. Jones*, 20 Oregon 239.

*Pennsylvania.* — *Cauffman v. Long*, 82 Pa. St. 77; *McKim's Estate*, 9 Pa. Co. Ct. 209; *Frowert's Estate*, 11 Phila. (Pa.) 136, 33 Leg. Int. (Pa.) 177.

*Tennessee.* — *Chaney v. Bryan*, 16 Lea (Tenn.) 63.

*Texas.* — *Denson v. Beazley*, 34 Tex. 191.

*Wisconsin.* — *Cole's Will*, 49 Wis. 179.

**Mere Bitter Prejudices or Ill Feeling**, without reasonable ground therefor, will not avail against the validity of the will. *Carter v. Dixon*, 69 Ga. 82; *Den v. Gibbons*, 22 N. J. L. 117, 51 Am. Dec. 253; *Matter of White*, 121 N. Y. 406; *Frowert's Estate*, 11 Phila. (Pa.) 136, 33 Leg. Int. (Pa.) 177; *Foster's Estate*, 9 Pa. Co. Ct. 216.

In *Lathrop v. American Board of Foreign Missions*, 67 Barb. (N. Y.) 590, the testator's will was refused probate on the ground that he was a monomaniac in respect to freemasons, and expressed fears that he would lose his life and property among them, and because he entertained delusions towards his relatives who

were freemasons, and excluded them from his will. But in *Matter of White*, 121 N. Y. 406, a dislike of freemasonry and of a son because he was a freemason was held not sufficient to establish an insane delusion.

**1. Where Delusion Feigned.** — *Smith v. Smith*, 48 N. J. Eq. 566.

**Imputations in Nature of Personal Abuse, etc.** — In *American Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619, the court said: "If he did not really believe what he alleged to be their criminal conduct and intentions — if he uttered the injurious imputations by way of personal abuse, in order to gratify a depraved and malicious disposition, or for the purpose of defaming or otherwise injuring them in the estimation of their acquaintances and the community, any or all of these dispositions and motives, though most unworthy and reprehensible, would fall short of that degree of mental perversion which would enable the courts to pronounce him *non compos mentis* and incapable of disposing of his property by will. On questions of testamentary capacity, courts should be careful not to confound perverse opinions and unreasonable prejudices with mental alienation."

**A Mere Suspicion**, not amounting to a conviction, is not a delusion. So long as doubt exists there is no delusion. *Matter of Scott*, 128 Cal. 57; *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681.

**2. Eccentricities.** — 1 Redf. on Wills 71, 72; *Schouler on Wills* (2d ed.), § 144; *Austen v. Graham*, 8 Moo. P. C. 493, 29 Eng. L. & Eq. 38; *Morgan v. Boys*, cited in *Taylor Med. Jur.* (ed. 1838) 657; *Hutchinson v. Hutchinson*, 152 Ill. 347; *Bennett v. Hibbert*, 88 Iowa 154; *Prentis v. Bates*, 88 Mich. 567; *Fulbright v. Perry County*, 145 Mo. 432; *Brick v. Brick*, 66 N. Y. 144; *Lee v. Lee*, 4 McCord L. (S. Car.) 183, 17 Am. Dec. 722; *Mercer v. Kelso*, 4 Gratt. (Va.) 106; *Chafin Will Case*, 32 Wis. 557; *Ingoldsby v. Ingoldsby*, 20 Grant Ch. (U. C.) 131; *In re Wilkie*, 17 Nova Scotia 543.

In *Matter of Lewis*, 33 N. J. Eq. 219, the testator, who was shown to have been miserly, squalid, dishonest, profane, irascible, and otherwise eccentric in character, bequeathed the bulk of his estate to his executors, to be applied to the reduction of the debt incurred by the United States in the war of 1861. He had no relatives. The will was sustained.

Evidence that decedent was erratic, eccentric, rambling, and disconnected in her conversation, flighty in her notions, and unsettled; that her manner was excitable; that she could not comprehend connected conversation; that she ran about the house screaming, with her dress open in front, is competent to be considered with other evidence on the issue of testamentary capacity. *Prentis v. Bates*, 93 Mich. 234, overruling 88 Mich. 567, the court say-



*e.* **IMPAIRMENT OF MEMORY.** — Mere forgetfulness or weakening of memory, such as usually attends upon old age, is not sufficient to render a testator incompetent where it does not amount to a serious lapse of memory with respect to those matters necessary to be considered in making a will.<sup>1</sup> But evidence of forgetfulness and failure of memory is proper to be considered upon the question of testamentary capacity.<sup>2</sup>

*f.* **DRUNKENNESS — DRUGS.** — Drunkenness or the use of drugs may render the mind incapable of executing a valid will, and a will executed by one under the influence of drugs or intoxicants to such an extent as to fall short of the standard of capacity required by law is invalid.<sup>3</sup> The mind may become diseased to such an extent, by the continued use of intoxicants or

ing that circumstances are often admissible which may coexist with a perfectly sound mind.

**In Some Instances, However, Eccentricities Have Been Held to Indicate Such Mental Impairment** as to warrant a rejection of the will. *Schouler on Wills* (2d ed.), § 145; *Ray Med. Jur.* (1839) 129, § 92; *Mudway v. Croft*, 3 *Curt. Ecc.* 678; *Frere v. Peacock*, 1 *Rob. Ecc.* 442. In *Yglesias v. Dyke* (*Prerog. Court*, May, 1852), cited *Taylor Med. Jur.* 658, it was shown that the testatrix kept fourteen dogs of both sexes, which were provided with kennels in her drawing-room. Her will was rejected on the ground of eccentricity amounting to insanity. So, the will of another woman who had a strong propensity for cats, provided them with meals at regular hours, and furnished them with plates and napkins. The author observes, however, that a "propensity for animals proves nothing in relation to the existence of insanity, unless there is at the same time good evidence of intellectual aberration."

**1. Impairment of Memory.** — *Schouler on Wills* (2d ed.), § 134; *Tufnell v. Constable*, 3 *Knapp* 1221; *Bice v. Hall*, 120 *Ill.* 597; *Yoe v. McCord*, 74 *Ill.* 33; *Lowder v. Lowder*, 58 *Ind.* 538; *Whiteman v. Whiteman*, 152 *Ind.* 263; *Bleecker v. Lynch*, 1 *Bradf. (N. Y.)* 458; *Crolius v. Stark*, 64 *Barb. (N. Y.)* 112; *Clarke v. Davis*, 1 *Redf. (N. Y.)* 249; *Bennett v. Bennett*, 50 *N. J. Eq.* 439; *Matter of Eddy*, 32 *N. J. Eq.* 701; *Ames' Will*, 40 *Oregon* 495; *Wilson v. Mitchell*, 101 *Pa. St.* 495; *Fow's Estate*, 147 *Pa. St.* 264; *Tallman's Estate*, 148 *Pa. St.* 286. Compare *Wood v. Wood*, 4 *Brews. (Pa.)* 75; *Horbach v. Denniston*, 3 *Pittsb. (Pa.)* 49; *Richmond's Appeal*, 59 *Conn.* 226, 21 *Am. St. Rep.* 85; *Horn v. Pullman*, 72 *N. Y.* 269; *Hovey v. Chase*, 52 *Me.* 304, 83 *Am. Dec.* 514; *Merrill v. Rush*, 33 *N. J. Eq.* 537; *In re Allison*, (*Supm. Ct. Gen. T.*) 12 *N. Y. Supp.* 324, 58 *Hun (N. Y.)* 608.

**Partial Loss of Memory** is insufficient. *Montague v. Allan*, 78 *Va.* 502; *Marquis v. Marquis*, 1 *Quebec* 50; *Taylor v. Pegram*, 151 *Ill.* 106.

**A Testator Who, Notwithstanding Great Age, Bodily Infirmities, and Impaired Mind, has mind and memory enough to recollect the property of which he is about to dispose, the persons to whom and the manner in which he wishes to bequeath it, and to know and understand the business in which he is engaged, has that sound and disposing memory which qualifies him to make a will.** *Ring v. Lawless*, 190 *Ill.* 520; *Watson v. Watson*, 2 *B. Mon. (Ky.)* 74; *Reed's Will*, 2 *B. Mon. (Ky.)* 79. See also, to

the same effect, *Taylor v. Kelly*, 31 *Ala.* 59, 68 *Am. Dec.* 150; *Stancell v. Kenan*, 33 *Ga.* 56; *Nailing v. Nailing*, 2 *Sneed (Tenn.)* 630; *Maverick v. Reynolds*, 2 *Bradf. (N. Y.)* 360; *Bleecker v. Lynch*, 1 *Bradf. (N. Y.)* 470; *Chrisman v. Chrisman*, 16 *Oregon* 127; *Norton v. Paxton*, 110 *Mo.* 456.

**Giving Instructions for Will and Referring to Provisions.** — An impairment of memory will not invalidate a will, when it appears that the testator gave his own directions for the will and at different times thereafter referred to its provisions. *Napfle's Estate*, 134 *Pa. St.* 492.

**A Mere Failure of Memory** which resulted in the testatrix referring to her deceased brother and sister as if still living, does not amount to a delusion where upon being reminded of the death of either of them she would recall the fact. *Davis v. Denny*, 94 *Md.* 390.

2. *Bush v. Delano*, 113 *Mich.* 321; *Ring v. Lawless*, 190 *Ill.* 520; *Daly v. Daly*, 183 *Ill.* 269.

See *Bever v. Spangler*, 93 *Iowa* 576, for a case where the court held that a verdict overthrowing the will was sustained by the evidence.

**3. Drunkenness — Drugs.** — 1 *Redf. on Wills* 160; *Ayrey v. Hill*, 2 *Add. Ecc.* 206; *Billinghurst v. Vickers*, 1 *Phill. Ecc.* 191; *Wheeler v. Alderson*, 3 *Hag. Ecc.* 602; *Stedham v. Stedham*, 32 *Ala.* 525; *Bush v. Lisle*, 89 *Ky.* 393; *Peck v. Cary*, 27 *N. Y.* 9, 84 *Am. Dec.* 220; *Edge v. Edge*, 38 *N. J. Eq.* 211; *Garrison v. Blanton*, 48 *Tex.* 299; *Chapleau v. Chapleau*, 1 *Montreal Leg. N.* 473.

In *In re D'Avignon*, 12 *Colo. App.* 489, one of the subscribing witnesses, who lived near the testator, saw him daily, and was intimately acquainted with him, testified that when he signed the will he talked incoherently; that his face was bloated; that he had been on a series of debauches for six weeks past, and was constantly under the influence of a drug, and when he signed was manifestly under its influence. A physician testified as to the drugs he had taken. The court held that a judgment against the will was warranted by the evidence.

**But the Mere Fact that the Testator Was Addicted to the Use of Morphine** at the time the will was executed, when it is not shown that he was under its influence at that time, will not affect his capacity. *Frost v. Wheeler*, 43 *N. J. Eq.* 573.

**So Also the Administration of Opium** is not sufficient to show want of testamentary capacity, when it is not shown that the drug affected the mental powers of the testatrix,

drugs, that the testator's capacity to execute a valid will is destroyed.<sup>1</sup> But, in order to invalidate a will on the ground of the testator's drunkenness, it must be shown to have been executed while the testator was under the influence of the intoxicant. The disability ceases when the state of drunkenness is past.<sup>2</sup> And where the testator is shown to have been sober and of sound mind when he executed the will, his competency will not be affected

further than to cause sleepiness, or that she was at all affected by it when she executed the will. *In re Glockner*, (Surrogate Ct.) 2 N. Y. Supp. 97.

1. U. S. v. Drew, 5 Mason (U. S.) 28; *Howe v. Richards*, 112 Iowa 220; *Matter of Ely*, (Surrogate Ct.) 16 Misc. (N. Y.) 228; *Starrett v. Douglass*, 2 Yeates (Pa.) 48; *Hannigan's Estate*, Myr. Prob. (Cal.) 135; *Burritt v. Silliman*, 16 Barb. (N. Y.) 199; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *McSorley v. McSorley*, 2 Bradf. (N. Y.) 188.

**Illustrations.** — In *Burkhart v. Gladish*, 123 Ind. 337, the testator's previous excessive indulgence in liquor had brought about alcoholic insanity, which was manifest in a causeless jealousy of his wife, which finally led him to shoot her and himself. The will was rejected on account of incapacity.

In *Duffield v. Robeson*, 2 Harr. (Del.) 375, it was held that delirium tremens produced by drunkenness, as affecting testamentary capacity, was the same as insanity produced in any other manner.

In *Cochran's Will*, 1 T. B. Mon. (Ky.) 263, where it was proved that for some time before the execution of the will, and until his death, the testator's mind was in general in a state of derangement produced by the habitual and intemperate use of ardent spirits, it was held that it was necessary for the establishment of the will that it should be shown by clear and statutory testimony to have been made in a lucid interval.

But in *Ball v. Kane*, 1 Penn. (Del.) 90, it was held that the evidence of the testator's habits with respect to drinking must be brought down to and connected with the making of the will, otherwise it will have little or no effect.

**Evidence.** — The question of the effect of intoxication upon the capacity of a person is not one to be determined by expert testimony, but is dependent upon the facts of the particular case. *Pierce v. Pierce*, 38 Mich. 418; *Ayrey v. Hill*, 2 Add. Ecc. 209. And contradictory testimony as to such circumstances should be left for the jury to decide upon. *Best v. Best*, (Ky. 1889) 11 S. W. Rep. 810. In *Matter of Gharky*, 57 Cal. 274, where the only issue presented by the contestant was the unsoundness of the testator's mind, it was held that the question whether the testator was drunk at the time the will was executed should not be submitted to the jury as a special issue.

2. **Connection Between State of Intoxication and Will.** — *England.* — *Billinghurst v. Vickers*, 1 Phill. Ecc. 187; *Ayrey v. Hill*, 2 Add. Ecc. 206; *Handley v. Stacey*, 1 F. & F. 574.

*Canada.* — *Bell v. Lee*, 28 Grant Ch. (U. C.) 150.

*California.* — *Black's Estate*, Myr. Prob. (Cal.) 24; *Matter of Johnson*, 57 Cal. 529.

*Kentucky.* — *Harper's Will*, 4 Bibb. (Ky.) 244; *Hubbard's Will*, 6 J. J. Marsh. (Ky.) 59.

*Michigan.* — *Pierce v. Pierce*, 38 Mich. 412.

*New Jersey.* — *Turner v. Cheeseman*, 15 N. J. Eq. 243; *Kahl v. Schober*, 35 N. J. Eq. 461; *Bannister v. Jackson*, 45 N. J. Eq. 702; *Matter of Lee*, 46 N. J. Eq. 193.

*New York.* — *Julke v. Adam*, 1 Redf. (N. Y.) 454; *McLaughlin's Will*, 2 Redf. (N. Y.) 504; *Matter of Reed*, 2 Connolly (N. Y.) 403; *Gardner v. Gardner*, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340; *In re Schreiber*, (Surrogate Ct.) 5 N. Y. Supp. 47; *In re Watson*, 131 N. Y. 587, affirming (Supm. Ct. Gen. T.) 14 N. Y. Supp. 465, which affirmed 12 N. Y. Supp. 115; *In re Peck*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 248, 62 Hun (N. Y.) 622; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Waters v. Cullen*, 2 Bradf. (N. Y.) 354; *O'Neil v. Murray*, 4 Bradf. (N. Y.) 311; *Matter of Johnson*, (Surrogate Ct.) 7 Misc. (N. Y.) 220.

*Pennsylvania.* — *Harmony Lodge's Appeal*, 127 Pa. St. 269; *McPherson's Appeal*, (Pa. 1887) 11 Atl. Rep. 205; *Hight v. Wilson*, 1 Dall. (Pa.) 94; *Hannum v. Spear*, 2 Dall. (Pa.) 291; *Weisman's Estate*, 45 Leg. Int. (Pa.) 274; *Starrett v. Douglass*, 2 Yeates (Pa.) 46.

*South Carolina.* — *Black v. Ellis*, 3 Hill L. (S. Car.) 68.

*Tennessee.* — *Key v. Holloway*, 7 Baxt. (Tenn.) 576.

*Virginia.* — *Temple v. Temple*, 1 Hen. & M. (Va.) 476.

**A Drunkard May Make a Valid Will**, even if at the time of the execution of the instrument he is under the influence of liquor, provided he comprehends the nature, extent, and disposition of his estate. *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Matter of Reed*, 2 Connolly (N. Y.) 403; *Gardner v. Gardner*, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340; *Key v. Holloway*, 7 Baxt. (Tenn.) 575.

**"In Order to Show Such Drunkenness**, or such condition from drinking intoxicating liquors, as would avoid the will, the contestants must show that the deceased was intoxicated, or that his understanding was clouded or reason dethroned by actual intoxication, at the exact time the will was executed." *Matter of Woolsey*, (Surrogate Ct.) 17 Misc. (N. Y.) 547.

**And Although a Person Executes His Last Will During an Attack of Delirium Tremens**, it will be maintained if shown to have been executed during a lucid interval. *Cronzeilles's Succession*, 106 La. 442.

**Mania a Potu.** — The fact that a person is addicted to habits of intoxication, even to such a degree as to suffer from *mania a potu*, cannot invalidate a will, unless the will was made during a period when the reason was actually dethroned from that cause. *Matter of Jones*, (Surrogate Ct.) 5 Misc. (N. Y.) 199.

by the fact that he had long been addicted to the excessive use of alcoholic liquors.<sup>1</sup>

*g.* DELIRIUM. — Delirium is a species of insanity due to the diseased state of the body,<sup>2</sup> and is inconsistent with testamentary capacity.<sup>3</sup> But such a state of mind is fluctuating, and a lucid interval may be proved with much greater facility than in the case of fixed mental derangement.<sup>4</sup> It is not unusual for persons who are insane from the effect of some violent disease to recover the right use of their mental faculties, therefore there is no legal presumption of the continuance of a state of delirium from the fact of its existence at any particular time.<sup>5</sup>

*h.* EPILEPTIC FITS. — Epileptic fits, though depriving one of testamentary capacity during their continuance, do not have this effect after recovery of the patient.<sup>6</sup>

*i.* PERSONS IN EXTREMIS. — The fact that the testator was in a dying condition when his will was executed does not invalidate the will if his mental condition met the requirements of the law.<sup>7</sup>

*j.* OLD AGE AND FEEBLENESS. — Old age and extreme feebleness are not

1. Where Testator Shown to Be Sober and of Sound Mind When Will Executed — *California*. — *Matter of Wilson*, 117 Cal. 262.

*Connecticut*. — *Kimberly's Appeal*, 68 Conn. 428, 57 Am. St. Rep. 101.

*Delaware*. — *Ball v. Kane*, 1 Penn. (Del.) 90; *Truitt v. Cullen*, 3 Penn. (Del.) 311.

*Louisiana*. — *Hennessey v. Woulfe*, 49 La. Ann. 1376.

*Missouri*. — *Von De Veld v. Judy*, 143 Mo. 348; *Schierbaum v. Schemme*, 157 Mo. 1, 80 Am. St. Rep. 604.

*New Jersey*. — *Matter of Lee*, 46 N. J. Eq. 193; *Fluck v. Rea*, 51 N. J. Eq. 233, *affirmed* 51 N. J. Eq. 639, 30 Atl. Rep. 430; *Elkinton v. Brick*, 44 N. J. Eq. 154; *Baninster v. Jackson*, 45 N. J. Eq. 702, *affirmed* 46 N. J. Eq. 593; *Koegel v. Egner*, 54 N. J. Eq. 623; *Matter of Gilham*, 64 N. J. Eq. 715.

*New York*. — *Cook v. White*, 43 N. Y. App. Div. 388, *affirmed* 167 N. Y. 588; *Van Wyck v. Brasher*, 81 N. Y. 260; *Gardner v. Gardner*, 22 Wend. (N. Y.) 526; 34 Am. Dec. 340; *Lewis v. Jones*, 50 Barb. (N. Y.) 669; *Matter of Halbert*, (Surrogate Ct.) 15 Misc. (N. Y.) 308; *Matter of Sutherland*, (Surrogate Ct.) 28 Misc. (N. Y.) 424; *Matter of Hewitt*, (Surrogate Ct.) 31 Misc. (N. Y.) 81; *Hagan v. Sone*, 68 N. Y. App. Div. 60; *Matter of Evan*, (Surrogate Ct.) 37 Misc. (N. Y.) 337.

*Pennsylvania*. — *In re Miller*, 179 Pa. St. 645, 39 W. N. C. (Pa.) 397; *Schusler's Estate*, 198 Pa. St. 81.

*Washington*. — *Matter of Gorkow*, 20 Wash. 563.

**Habitual Drunkard Subject to Control of Commission.** — In *Lewis v. Jones*, 50 Barb. (N. Y.) 645, it was held that an habitual drunkard, though subject to the control of a commission, was not necessarily incapacitated from making a will.

2. Delirium. — See DELIRIUM, vol. 9, p. 194, and the title INSANITY, vol. 16, p. 565.

3. *Jackson v. Moore*, 14 La. Ann. 209. And see the preceding parts of this article, also *infra*, this subdivision, and *infra*, this title, the section *Evidence*.

4. *Brogden v. Brown*, 2 Add. Ecc. 367, Sir John Nichol saying "that the apparently

rational intervals of persons merely delirious, for the most part are really such."

5. *Hix v. Whittemore*, 4 Met. (Mass.) 545; *Brown v. Riffin*, 94 Ill. 561; *Clark v. Ellis*, 9 Oregon 128; *Matter of Bush*, 1 Connolly (N. Y.) 330. See also *Trish v. Newell*, 62 Ill. 200; *Lillibridge's Estate*, 133 Pa. St. 211; *Staples v. Wellington*, 58 Me. 453 (case of contract); *Dimes v. Dimes*, 10 Moo. P. C. 422. And see *infra*, this title, *Evidence*.

6. Epilepsy. — *Foot v. Stanton*, 1 Deane Ecc. 19; *Brown v. Riffin*, 94 Ill. 560; *Wood v. Carpenter*, 166 Mo. 465; *Brown v. Torrey*, 24 Barb. (N. Y.) 583; *Matter of Rapplee*, 66 Hun (N. Y.) 558; *Matter of Johnson*, (Surrogate Ct.) 7 Misc. (N. Y.) 220; *In re Lewis*, 51 Wis. 101.

**General Ill Health.** — In *Wood v. Carpenter*, 166 Mo. 465, the testator was eighty-one years old when the will was made. He was subject to bowel troubles, rheumatism, kidney trouble, retention of urine, irritation of the bladder, enlargement of the prostate gland, and fainting spells or epileptic fits which rendered him rigid and unconscious for fifteen or twenty minutes, gradually passing off and leaving him pale and limp but with his mental faculties returned. It was held that his case did not evidence want of testamentary capacity.

7. **Persons in Extremis.** — *Jackson v. Jackson*, 39 N. Y. 153; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577.

**Wills Sustained.** — *Martin v. Wotton*, 1 Lee Ecc. 130; *Hall v. Hall*, 18 Ga. 40; *Sloan v. Maxwell*, 3 N. J. Eq. 563; *Andress v. Weller*, 3 N. J. Eq. 604; *Ayres v. Ayres*, 43 N. J. Eq. 565; *Stoutenburgh v. Hopkins*, 43 N. J. Eq. 577; *O'Brien v. Dwyer*, 45 N. J. Eq. 689; *Matter of Bush*, 1 Connolly (N. Y.) 330; *In re Walther*, (Surrogate Ct.) 7 N. Y. Supp. 417; *Matter of Connor*, 5 Silv. Sup. (N. Y.) 261, 55 Hun (N. Y.) 606; *In re Patterson*, (Supm. Ct. Gen. T.) 26 Abb. N. Cas. (N. Y.) 395, 59 Hun (N. Y.) 624; *Matter of McGraw*, 9 N. Y. App. Div. 372; *Horne v. Horne*, 9 Ired. L. (31 N. Car.) 99; *Converse v. Converse*, 21 Vt. 168. See also *Duggan v. McBren*, 78 Iowa 591; *Rankin v. Rankin*, 6 T. B. Mon. (Ky.) 531, 17 Am. Dec. 161 (in this case the testator was under



sufficient to destroy testamentary capacity where the testator's mind meets the test of competency. The law aims to protect the aged and infirm in their testamentary dispositions equally with those in the prime of life.<sup>1</sup> But extreme old age and its accompanying feebleness of mind and body are elements which a jury may consider on the question of testamentary capacity.<sup>2</sup>

sentence of death for murder when the will was made); *Leech v. Leech*, 1 Phila. (Pa.) 244, 8 Leg. Int. (Pa.) 154.

**Where Testatrix Died Two Hours After Execution of Will.**—A testatrix, being ill, gave instructions for her will at eleven o'clock in the morning; she executed the will at six in the evening, and died in two hours. The court instructed the jury that if the testatrix, at the time of giving the instructions, had sufficient discretion for that purpose, and was able afterwards at the time of execution to remember the instructions, she was competent. *Hathorn v. King*, 8 Mass. 371, 5 Am. Dec. 106. See also *Tomkins v. Tomkins*, 1 Bailey L. (S. Car.) 92, 19 Am. Dec. 656; *Billinghurst v. Vickers*, 1 Phill. Ecc. 187.

**The Occasional Flightiness or Wandering of Intellect of a Dying Man** is of slight weight as bearing upon the question of his testamentary capacity. *McMasters v. Blair*, 29 Pa. St. 298; *Leech v. Leech*, 1 Phila. (Pa.) 244, 8 Leg. Int. (Pa.) 154.

**Ability to Answer Simple and Familiar Questions.**—A person to be competent to execute a will must be able to do more than answer simple and familiar questions by an affirmative or negative. *Winchester's Case*, 6 Coke 23.

**Will Executed by Testator When Roused from Stupor.**—In *Menzies v. White*, 9 Grant Ch. (U. C.) 574, a will executed by a person when roused from a stupor into which he was thrown by an accident which resulted fatally, was sustained.

**Wills Rejected.**—In *re Coop*, (Surrogate Ct.) 6 N. Y. Supp. 664; *Copeland v. Copeland*, 32 Ala. 512; *Knapp v. Reilly*, 3 Dem. (N. Y.) 427.

**1. Extreme Old Age—England.**—*Bird v. Bird*, 2 Hag. Ecc. 142; *Lewis v. Pead*, 1 Ves. Jr. 19; *Kinleside v. Harrison*, 2 Phill. Ecc. 461; *Griffiths v. Robins*, 3 Madd. 192; *Mackenzie v. Handasyde*, 2 Hag. Ecc. 211; *Ex p. Cranmer*, 12 Ves. Jr. 452; *Sherwood v. Sanderson*, 19 Ves. Jr. 283; *Ridgeway v. Darwin*, 8 Ves. Jr. 65.

*Alabama.*—*Leeper v. Taylor*, 47 Ala. 221; *Bulger v. Ross*, 98 Ala. 267.

*Arkansas.*—*Campbell v. Carnahan*, (Ark. 1890) 13 S. W. Rep. 1098.

*Connecticut.*—*Turner's Appeal*, 72 Conn. 305.

*Illinois.*—*Pooler v. Cristman*, 145 Ill. 405, affirming 45 Ill. App. 314.

*Iowa.*—*Manatt v. Scott*, 106 Iowa 203, 68 Am. St. Rep. 293.

*Kentucky.*—*Denton v. Franklin*, 9 B. Mon. (Ky.) 28; *Watts v. Bullock*, 1 Litt. (Ky.) 252; *Hoskins v. Hoskins*, (Ky. 1888) 7 S. W. Rep. 546.

*Maine.*—*Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352.

*Michigan.*—*O'Connor v. Madison*, 98 Mich. 183.

*Missouri.*—*Riley v. Sherwood*, 144 Mo. 354. *New Jersey.*—*Collins v. Townley*, 21 N. J. Eq. 353; *Matter of Wintermute*, 27 N. J. Eq. 447; *Harris v. Betson*, 28 N. J. Eq. 211; *Sutton v. Morgan*, 30 N. J. Eq. 629; *Kise v. Heath*, 33 N. J. Eq. 239; *Rusling v. Rusling*, 36 N. J. Eq. 607; *Brady v. McBride*, 39 N. J. Eq. 495; *Waddington v. Buzby*, 45 N. J. Eq. 173, 14 Am. St. Rep. 706; *Clifton v. Clifton*, 47 N. J. Eq. 227.

*New York.*—*Bleecker v. Lynch*, 1 Bradf. (N. Y.) 458; *Maverick v. Reynolds*, 2 Bradf. (N. Y.) 360; *Cornwall v. Riker*, 2 Dem. (N. Y.) 354; *Stebbins v. Hart*, 4 Dem. (N. Y.) 501; *Matter of Gray*, 1 Silv. Sup. (N. Y.) 338; *Matter of Springstead*, 5 Silv. Sup. (N. Y.) 362; *Van Alst v. Hunter*, 5 Johns. Ch. (N. Y.) 148; *In re Clearwater* (Surrogate Ct.) 2 N. Y. Supp. 99; *Matter of Stewart*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 219; *Matter of Williams*, 2 Connolly (N. Y.) 579; *Matter of Berrien*, (Surrogate Ct.) 24 N. Y. St. Rep. 332; *Matter of Metcalf*, (Surrogate Ct.) 16 Misc. (N. Y.) 180; *Matter of McGraw*, 9 N. Y. App. Div. 372; *Matter of Dixon*, 42 N. Y. App. Div. 481.

*Pennsylvania.*—*Re Woodfall*, 1 Leg. Gaz. (Pa.) 66; *Wood's Estate*, 13 Phila. (Pa.) 236, 36 Leg. Int. (Pa.) 202; *Napflie's Estate*, 134 Pa. St. 492.

*South Carolina.*—*McKnight v. Wright*, 12 Rich. L. (S. Car.) 232.

*Virginia.*—*Spencer v. Moore*, 4 Call (Va.) 423.

**"Though Old Age Often Has Its Weakness, Physical and Mental,** it is not necessarily associated with such unsoundness of mind as renders its possessor incapable of making a valid will." *Leeper v. Taylor*, 47 Ala. 221.

**"The Test Is** integrity of the mind, not the body." *McIntosh v. Moore*, 22 Tex. Civ. App. 22.

**2. Turner's Appeal**, 72 Conn. 305; *Manatt v. Scott*, 106 Iowa 203, 68 Am. St. Rep. 293; *Matter of Dixon*, 42 N. Y. App. Div. 481.

**Great Age May Raise Doubt of Capacity** so as to excite the vigilance of the court, but it does not alone constitute testamentary disqualification. *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352. See to like effect *Whitney v. Twombly*, 136 Mass. 145.

**Leading Case.**—*Delafield v. Parish*, 25 N. Y. 9, is a leading case in *New York* on the degree of capacity requisite for the execution of a will in cases of imbecility. While this case does not in terms overrule the decision in *Stewart v. Lisenard*, 26 Wend. (N. Y.) 255, it is considered practically to have done so. See also *Blanchard v. Nestle*, 3 Den. (N. Y.) 37; *Newhouse v. Godwin*, 17 Barb. (N. Y.) 236; *Alston v. Jones*, 10 Paige (N. Y.) 98; *Person v. Warren*, 14 Barb. (N. Y.) 488; *Osterhout v. Shoemaker*, 3 Den. (N. Y.) 37, note; *Petrie v. Shoemaker*, 24 Wend. (N. Y.) 85; *Burger v. Hill*, 1 Bradf. (N. Y.) 360.

There may be such deterioration due to the advance of years, amounting to senile dementia, as will deprive one of testamentary capacity.<sup>1</sup>

*k.* **BLINDNESS.** — Blindness does not, *per se*, constitute testamentary disqualification, but a will made by one laboring under such disability may be admitted to probate on proof that it was read to, or, if not read, that its contents were known to, him.<sup>2</sup> Persons deaf and dumb, who are also blind, are not incompetent; the fact of the additional affliction merely requires a more careful scrutiny of the question of the testator's capacity.<sup>3</sup> Persons who have become deaf, dumb, and blind from supervening causes are presumed competent to execute a will.<sup>4</sup> Wherever such disability is not congenital, it is to be regarded simply as one circumstance, to be considered along with others, in passing upon the question of testamentary capacity.<sup>5</sup>

*l.* **INABILITY TO HEAR AND SPEAK.** — This subject has already been discussed.<sup>6</sup>

*m.* **INABILITY TO EXPRESS IDEAS.** — Where a testator is shown to have been deaf and dumb, unable to read or write or to speak the language of those about him or in which the will is written, or otherwise incapacitated from communicating his ideas, strict proof is required to show that the will, as prepared, really evidences the testator's intentions.<sup>7</sup>

**1. Senile Dementia.** — Schouler on Wills (2d ed.), § 130; Swinb. on Wills, p. 2, § 5; Harvey v. Sullens, 46 Mo. 147, 2 Am. Rep. 491; Minor v. Thomas, 12 B. Mon. (Ky.) 106.

**Illustrations.** — In *Dumond v. Kiff*, 7 Lans. (N. Y.) 465, the testator made his will in June, at the age of eighty. Neither of the subscribing witnesses testified that he was of sound mind; one of them thought the contrary. In the following autumn he did not know his children, inquired how many he had, could only name some of them, and died soon thereafter. The will was rejected.

In *In re Liddington*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 646, 51 Hun (N. Y.) 638, the testator was ninety-two years old, feeble, deaf, nearly blind, and subject to periodical attacks of sickness, in which his mind wandered. The will, which gave a large part of his estate to the wife of the scrivener, was rejected.

Where the testatrix was suffering from senile dementia or weakness of the understanding resulting from old age and repeated apoplectic attacks followed by paralysis, there being no delusions or derangements of the mind, but rather a wearing out or failure of the mental faculties to work with sufficient force, a judgment setting aside the will was held to be justified. *Hudson v. Hughan*, 56 Kan. 152; *Bever v. Spangler*, 93 Iowa 576.

But in *Kerr v. Lunsford*, 31 W. Va. 659, the court held that even if the jury had found by special verdict that the testator had senile dementia, that the disease is incurable, and that one suffering from it has no lucid intervals, such a verdict would not have warranted a finding against the will where the jury were of opinion that the testator was competent when he executed his will. This case also holds that there may be a lucid interval in a case of senile dementia, during which the person will be competent to execute a will.

**2. Blindness.** — 1 Redf. on Wills, p. 56; 1 Jarm. on Wills (6th Am. ed.) 35; Wharton & Stille's Med. Jur., § 14; *Mitchell v. Thomas*, 6 Moo. P. C. 137; *In re Arford*, 1 Sw. & Tr.

540; *Edwards v. Finchen*, 4 Moo. P. C. 198; *Barton v. Robins*, 3 Phill. Ecc. 455*n*; *King v. Berry*, Ir. R. 5 Eq. 309; *Clifton v. Murray*, 7 Ga. 564; *Ray v. Hill*, 3 Strobb. L. (S. Car.) 297; *Reynolds v. Reynolds*, 1 Spears L. (S. Car. 256. See also *Longchamp v. Fish*, 2 B. & P. N. R. 415; *Martin v. Mitchell*, 28 Ga. 382; *Lewis v. Lewis*, 6 S. & R. (Pa.) 496; *Hess's Appeal*, 43 Pa. St. 73; *Neil v. Neil*, 1 Leigh (Va.) 6; *Boyd v. Cook*, 3 Leigh (Va.) 32.

**If Reasonable Ground Is Laid for Believing that the Will Was Not Read, or that There Was Fraud or Imposition** of any kind practiced upon the testator, it is incumbent upon those who would support the will to meet such proof by evidence, and to satisfy the jury either that the will was read or that the contents were known by the testator. *Harrison v. Rowan*, 3 Wash. (U. S.) 580. See also *Harden v. Hays*, 9 Pa. St. 163; *Harding v. Harding*, 18 Pa. St. 342; *Hoshauer v. Hoshauer*, 26 Pa. St. 406; *Harleston v. Corbett*, 12 Rich. L. (S. Car.) 604.

**3.** 1 Redf. on Wills, p. 55; *Weir v. Fitzgerald*, 2 Bradf. (N. Y.) 42; *Reynolds v. Reynolds*, 1 Spears L. (S. Car.) 256.

**4.** 1 Redf. on Wills, 52; *Schouler on Wills* (ed. 1892), § 96; *Yong v. Sant*, *Dyer* 56*a*, note 13.

**5.** *Schouler on Wills* (ed. 1892), § 96; *Wilson v. Mitchell*, 101 Pa. St. 495, where the testator was over a hundred years old, blind, and deaf; *Lowe v. Williamson*, 2 N. J. Eq. 82; *Gombault v. Public Admr.*, 4 Bradf. (N. Y.) 226, where the testator, totally deaf, communicated his instructions on a slate.

**6.** See the title **DEAF AND DUMB PERSONS**, vol. 8, p. 843, and the preceding subdivision.

**7. Inability to Express Ideas.** — *Dufour v. Croft*, 3 Moo. P. C. 136; *Delafield v. Parish*, 25 N. Y. 9; *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Matter of Barbineau*, (Surrogate Ct.) 27 Misc. (N. Y.) 417; *Matter of Ehminne*, (Surrogate Ct.) 30 Misc. (N. Y.) 21; *Matter of De Castro*, (Surrogate Ct.) 32 Misc. (N. Y.) 193.

In *Rollwagen v. Rollwagen*, 63 N. Y. 504.

**n. RELIGIOUS BELIEFS.** — Religious beliefs entertained by a testator, however unusual or extreme, cannot invalidate his will so long as his reason is not affected by them.<sup>1</sup>

**o. SUPERSTITION.** — The circumstance that the mind of the testator was generally disturbed with a strange belief in witches, devils, and evil spirits, or other forms of superstition, is not sufficient to establish incompetency.<sup>2</sup>

the court, in affirming a judgment refusing probate of the will, said: "Ordinarily, when a testator subscribes and executes a will in the mode required by law, the fact of such subscription and execution are sufficient proof that the instrument speaks his language and expresses his will; but when a testator is deaf and dumb, or unable to read or write and speak, something more is demanded. There must then not only be proof of the *factum* of the will, but also that the mind of the testator accompanied the act, and that the instrument executed speaks his language and really expresses his will."

**1. Religious Beliefs.** — Schouler on Wills (2d ed.), § 166; Austen v. Graham, 8 Moo. P. C. 493, 29 Eng. L. & Eq. 38; Whipple v. Eddy, 161 Ill. 114; Weir's Will, 9 Dana (Ky.) 434; Williams v. Williams, 90 Ky. 28; Denson v. Beazley, 34 Tex. 191; American Bible Soc. v. Stover, 12 N. Y. Wkly. Dig. 213; Bonard's Will, 16 Abb. Pr. N. S. (N. Y.) 128; Taylor v. Trich, 165 Pa. St. 586, 44 Am. St. Rep. 679; Gass v. Gass, 3 Humph. (Tenn.) 278.

**The Inquiry with Respect to Religious Belief Is,** Did it unseat the testator's judgment? If by reason of the effect of this belief on the testator's mind he became the victim of insane delusions from which the will resulted, the will must fail. Matter of Brush, (Surrogate Ct.) 35 Misc. (N. Y.) 689.

**The Truth or Falsity of a Religious Belief** is beyond the scope of a judicial inquiry. Matter of Brush, (Surrogate Ct.) 35 Misc. (N. Y.) 689; *In re Keeler*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 629.

A court has no jurisdiction to decide whether a doctrine held by any particular religious sect be true or false. A delusion common to all the members of a religious sect cannot invalidate a will. *Newton v. Carbery*, 5 Cranch (C. C.) 626.

**Christian Science.** — The teachings of Christian Science being founded on the religious convictions of those professing to believe in them, the court cannot say that those persons are mentally unsound. Matter of Brush, (Surrogate Ct.) 35 Misc. (N. Y.) 689.

**Faith Cure.** — Taylor v. Trich, 165 Pa. St. 586, 44 Am. St. Rep. 679.

**Mormonism.** — In Ames's Will, 40 Oregon 495, the testator, a Mormon, in his later years occasionally muttered and talked to a picture of Joseph Smith, believing that Smith, though dead, possessed "the keys of the kingdom," and could hear and understand what was said to him; and when anything worried him he would go about "cracking his fists together like a crazy man." He was held to have been competent to execute his will.

**Spiritualism.** — A belief in spiritualism will not, *per se*, invalidate a will.

*England.* — Lyon v. Home, L. R. 6 Eq. 655.

*California.* — Matter of Spencer, 96 Cal. 448.

*Illinois.* — Matter of Storey, 20 Ill. App. 183; Whipple v. Eddy, 161 Ill. 114; Orchardson v. Cofield, 171 Ill. 14.

*Iowa.* — Otto v. Doty, 61 Iowa 23.

*Maine.* — Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473.

*Maryland.* — Brown v. Ward, 53 Md. 393, 36 Am. Rep. 422.

*Nebraska.* — McClary v. Stull, 44 Neb. 175.

*New Jersey.* — Middleditch v. Williams, 45 N. J. Eq. 726.

*New York.* — *In re Keeler*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 629; Bau v. Vanverdilt, 3 Redf. (N. Y.) 384; Matter of Halbert, (Surrogate Ct.) 15 Misc. (N. Y.) 308; Matter of Brush, (Surrogate Ct.) 35 Misc. (N. Y.) 689.

*Wisconsin.* — Chafin Will Case, 32 Wis. 557; Smith's Will, 52 Wis. 543, 38 Am. Rep. 756.

It has been held that a belief in spiritualism may justify the setting aside of a will, when it is shown that the testator, through fear, dread, or reverence of the spirit with which he believed himself to be in communication, allowed his will and judgment to be overpowered, and in disposing of his property followed implicitly the direction which the spirit gave him. But in such case the will is set aside, not on the ground of insanity, but of undue influence. *Thompson v. Hawks*, 14 Fed. Rep. 902.

In *Greenwood v. Cline*, 7 Oregon 18, where the testatrix, prior to the execution of the will, accompanied the legatee to a spiritual seance where a pretended letter was produced, purporting to be from the deceased husband of the testatrix, warning her against her son and advising her to dispose of her property in a particular way, the will was set aside on the ground of undue influence. See also the title **UNDUE INFLUENCE**.

In *Orchardson v. Cofield*, 171 Ill. 14, 63 Am. St. Rep. 211, the will was clearly the result of directions which the testatrix was fraudulently induced to suppose herself to have received from her deceased husband. It was rejected on the ground that she was suffering from delusions on the subject of spiritualism. See to the same effect *Matter of Beach*, 23 N. Y. App. Div. 411.

**2. Superstition.** — *Addington v. Wilson*, 5 Ind. 137; *Schildnecht v. Rompf*, (Ky. 1887) 4 S. W. Rep. 235; *Woodbury v. Obeart*, 7 Gray (Mass.) 467; *Kelly v. Miller*, 39 Miss. 17; *Thompson v. Thompson*, 21 Barb. (N. Y.) 107; *Thompson v. Quimby*, 2 Bradf. (N. Y.) 449; *Matter of Vedder*, 6 Dem. (N. Y.) 92; *Van Guysling v. Van Kuren*, 35 N. Y. 70; *Leech v. Leech*, 1 Phila. (Pa.) 244, 8 Leg. Int. (Pa.) 154; *Lee v. Lee*, 4 McCord L. (S. Car. 183).

**Credulity, Superstition, and Absurd Belief in the Supernatural** are not, *per se*, indications of insanity. *Thompson v. Quimby*, 21 Barb. (N. Y.) 107.



*p.* MORAL DEPRAVITY. — Moral depravity or moral insanity in a testator, when it does not affect the making of a will, and when the testator is otherwise competent, will not invalidate the will.<sup>1</sup>

*q.* PAIN. — The circumstance that the decedent was, at the time of the execution of the will, suffering from acute pain will not render him incompetent.<sup>2</sup>

## II. EVIDENCE — 1. Presumptions, Burden of Proof, and Weight of Evidence —

*a.* CONFLICT OF AUTHORITY. — An utterly irreconcilable divergence of authority exists on the subjects of presumptions, burden of proof, and weight of evidence, so far as these subjects relate to will contests. The conflict is due in some measure to a confusion of the three terms, in part to an attempt to apply to will trials the doctrines ordinarily applied to other cases at law, and in part to the early adoption in different jurisdictions of conflicting doctrines which have been adhered to in the respective jurisdictions asserting them.

(1) *Burden on Contestants* — (a) *Statement of Rule.* — The great weight of authority is to the effect that when the formal execution of a will is shown and the subscribing witnesses testify to the sanity of the testator, a *prima facie* case in favor of the will is made out and the burden is thrown upon the contestants to overcome this *prima facie* case.<sup>3</sup>

In *Middleton v. Shuburne*, 4 Y. & C. Exch. 358, it was held that a bill in equity will lie to avoid a will made under the influence of superstitious terrors.

1. "Eccentricities of Habits or Perversion of Feelings and Conduct, forming what is termed 'moral insanity,' do not constitute legal incapacity. The law, recognizing the fact that proof of moral depravity does not necessarily establish a lack of intellectual ability, does not require any particular grade of moral rectitude as an element of testamentary capacity." *Matter of Jones*, (Surrogate Ct.) 5 Misc. (N. Y.) 199; *Matter of Gorkow*, 20 Wash. 563. To like effect are *McClintock v. Curd*, 32 Mo. 411; *Boardman v. Woodman*, 47 N. H. 120.

2. *Stevens v. Leonard*, 154 Ind. 67, 77 Am. St. Rep. 446; *Matter of Wilson*, 117 Cal. 262; *Blake v. Rourke*, 74 Iowa 522; *Torrey v. Blair*, 75 Me. 548.

3. *Burden of Proof — Prevailing View — England.* — *Groom v. Thomas*, 2 Hag. Ecc. 434; *Harris v. Ingledew*, 3 P. Wms. 91; *Tucker v. Phipps*, 3 Atk. 359; *Atty.-Gen. v. Parnter*, 3 Bro. C. C. 443; *White v. Wilson*, 13 Ves. Jr. 89; *Evanturel v. Evanturel*, 16 L. C. Rep. 353.

*United States.* — *Harrison v. Rowan*, 3 Wash. (U. S.) 580; *Hoge v. Fisher, Pet.* (C. C.) 163; *Stevens v. Vancleve*, 4 Wash. (U. S.) 262; *Hall v. Unger*, 2 Abb. (U. S.) 507; *Leach v. Burr*, 188 U. S. 510, applying the rule to the *District of Columbia*.

*Alabama.* — *O'Donnell v. Rodiger*, 76 Ala. 222, 52 Am. Rep. 322; *Saxon v. Whitaker*, 30 Ala. 237; *Copeland v. Copeland*, 32 Ala. 512; *Fastis v. Montgomery*, 95 Ala. 486, 36 Am. St. Rep. 227; *Knox v. Knox*, 95 Ala. 495, 36 Am. St. Rep. 235; *Daniel v. Hill*, 52 Ala. 430; *Stubbs v. Houston*, 33 Ala. 555, *overruling* *Dunlap v. Robinson*, 28 Ala. 100; *Barnewall v. Murrell*, 108 Ala. 366.

*Arkansas.* — *McDaniel v. Crosby*, 19 Ark. 533; *Guthrie v. Price*, 23 Ark. 396; *McCulloch v. Campbell*, 49 Ark. 367; *Rogers v. Diamond*, 13 Ark. 479; *Tobin v. Jenkins*, 29 Ark. 151; *Jenkins v. Tobin*, 31 Ark. 309.

*California.* — *Panaud v. Jones*, 1 Cal. 488; *Clements v. McGinn*, (Cal. 1893) 33 Pac. Rep. 920; *Matter of Wilson*, 117 Cal. 262; *Matter of Nelson*, 132 Cal. 182; *Matter of Motz*, 136 Cal. 558.

*Delaware.* — *Chandler v. Ferris*, 1 Harr. (Del.) 454; *Pritchard v. Roe*, 3 Penn. (Del.) 128; *Steele v. Helm*, 2 Marv. (Del.) 237.

*District of Columbia.* — *Leach v. Burr*, 188 U. S. 510, *affirming* 17 App. Cas. (D. C.) 128.

*Illinois.* — *Carpenter v. Calvert*, 83 Ill. 62; *Purdy v. Hall*, 134 Ill. 298; *Graybeal v. Gardner*, 146 Ill. 337; *Taylor v. Pegram*, 151 Ill. 106; *Taylor v. Cox*, 153 Ill. 220; *Bevelot v. Lestrade*, 153 Ill. 625; *Hesterberg v. Clark*, 166 Ill. 241, 57 Am. St. Rep. 135; *Egbers v. Lgbers*, 177 Ill. 82; *Entwistle v. Meikle*, 180 Ill. 9; *Hollenbeck v. Cook*, 180 Ill. 65; *Johnson v. Johnson*, 187 Ill. 86; *Huggins v. Drury*, 192 Ill. 528; *Craig v. Southard*, 162 Ill. 209; *Wilbur v. Wilbur*, 129 Ill. 397.

*Indiana.* — *Moore v. Allen*, 5 Ind. 521; *Wallis v. Luhring*, 134 Ind. 447; *Blough v. Parry*, 144 Ind. 463; *Young v. Miller*, 145 Ind. 652.

*Iowa.* — *Stephenson v. Stephenson*, 62 Iowa 163; *Blake v. Rourke*, 74 Iowa 519; *In re Goldthorp*, 115 Iowa 430; *Hull v. Hull*, 117 Iowa 738.

*Kentucky.* — *Milton v. Hunter*, 13 Bush (Ky.) 170; *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257; *Porschett v. Porschett*, 82 Ky. 93, 56 Am. Rep. 880; *Fee v. Taylor*, 83 Ky. 259; *Bush v. Lisle*, 89 Ky. 401; *Flood v. Prago*, 70 Ky. 607; *Johnson v. Stivers*, 95 Ky. 128; *Bramel v. Bramel*, 101 Ky. 64; *Howat v. Howat*, (Ky. 1897) 41 S. W. Rep. 771; *King v. King*, (Ky. 1897) 42 S. W. Rep. 347; *Boone v. Ritchie*, (Ky. 1899) 53 S. W. Rep. 512; *Woodford v. Buckner*, 111 Ky. 241.

*Maine.* — *Halley v. Webster*, 21 Me. 461; *Barnes v. Barnes*, 66 Me. 300.

*Maryland.* — *Tyson v. Tyson*, 37 Md. 567; *Davis v. Calvert*, 5 Gill & J. (Md.) 300, 25 Am. Dec. 282; *Higgins v. Carlton*, 28 Md. 115, 92

(b) **Necessity of Prima Facie Showing by Proponents.** — This rule is premised upon a *prima facie* showing by proof, consisting of the testimony of the subscribing witnesses, of the due execution of the will, and of the testator's competency.<sup>1</sup>

Am. Dec. 666; *Townshend v. Townshend*, 7 Gill (Md.) 24.

*Missouri.* — *Harris v. Hays*, 53 Mo. 90; *Jackson v. Hardin*, 83 Mo. 178; *Maddox v. Maddox*, 114 Mo. 35, 35 Am. St. Rep. 734; *McFadin v. Catron*, 120 Mo. 252, 138 Mo. 197; *Carl v. Gabel*, 120 Mo. 283; *Fulbright v. Perry County*, 145 Mo. 432; *Riggin v. Westminster College*, 160 Mo. 570.

*New Hampshire.* — *Perkins v. Perkins*, 39 N. H. 163; *Pettes v. Bingham*, 10 N. H. 514.

*New Jersey.* — *Turnure v. Turnure*, 35 N. J. Eq. 437; *Den v. Gibbons*, 22 N. J. L. 117, 51 Am. Dec. 253; *Sloan v. Maxwell*, 3 N. J. Eq. 581; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Elkinton v. Brick*, 44 N. J. Eq. 154; *McCoon v. Allen*, 45 N. J. Eq. 708; *Harris v. Vanderveer*, 21 N. J. Eq. 561.

*North Carolina.* — *In re Burns*, 121 N. Car. 336.

*Pennsylvania.* — *Werstler v. Custer*, 46 Pa. St. 502; *Grubbs v. McDonald*, 91 Pa. St. 236; *Landis v. Landis*, 1 Grant Cas. (Pa.) 248; *Linton's Appeal*, 104 Pa. St. 228; *Grabill v. Barr*, 5 Pa. St. 441, 47 Am. Dec. 418; *Heenan's Estate*, 39 Leg. Int. (Pa.) 179; *Egbert v. Egbert*, 78 Pa. St. 326; *Thompson v. Kyner*, 65 Pa. St. 377; *Titlow v. Titlow*, 54 Pa. St. 222, 93 Am. Dec. 691; *Hoopes's Estate*, 174 Pa. St. 373.

*South Carolina.* — *Kaufman v. Coughman*, 49 S. Car. 159, 61 Am. St. Rep. 808; *Kinloch v. Palmer*, 1 Mill (S. Car.) 216; *Hobby v. Bobo*, 12 Rich. L. (S. Car.) 247, note.

*Tennessee.* — *Smith v. Smith*, 4 Baxt. (Tenn.) 293; *Frear v. Williams*, 7 Baxt. (Tenn.) 550; *Key v. Holloway*, 7 Baxt. (Tenn.) 575; *Purvey v. Reese*, 6 Coldw. (Tenn.) 21; *Bartee v. Thompson*, 8 Baxt. (Tenn.) 508.

*Virginia.* — *Burton v. Scott*, 3 Rand. (Va.) 399.

*Washington.* — *Matter of Baldwin*, 13 Wash. 666; *Higgins v. Nethery*, 30 Wash. 239.

*Wisconsin.* — *Allen v. Griffin*, 69 Wis. 529.

**Leading Case — Rules Laid Down.** — In *Delafield v. Parish*, 25 N. Y. 9, the opinion of Davies, J., lays down the following propositions: "1. That in all cases the party propounding the will is bound to prove to the satisfaction of the court that the paper in question does declare the will of the deceased, and that the supposed testator was, at the time of making and publishing the document propounded as his will, of sound and disposing mind and memory.

"2. That this burden is not shifted during the progress of the trial, and is not removed by proof of the *factum* of the will and the testamentary competency by the attesting witnesses, but remains with the party setting up the will.

"3. That if, upon a careful and accurate consideration of all the evidence on both sides, the conscience of the court is not judicially satisfied that the paper in question does contain the last will of the deceased, the court is bound to pronounce its opinion that the instrument is not entitled to probate. \* \* \*

"5. That it is not the duty of the court to

strain after probate, nor in any case to grant it where grave doubts remain unremoved, and great difficulties oppose themselves to so doing.

"6. That the heirs of a deceased person can rest securely upon the statutes of descents and distributions, and that the rights thus secured to them can only be divested by those claiming under a will and in hostility to them, by showing that the will was executed with the formalities required by law, and by a testator possessing a sound and disposing mind and memory."

Four other judges in this case, while concurring with Davies, J., in the conclusion reached, concurred in the following propositions of Gould, J., who dissented from the prevailing general conclusion: "At common law, and under our statutes, the legal presumption is, that every man is *compos mentis*; and the burden of proof that he is *non compos mentis* rests on the party who alleges that an unnatural condition of mind existed in the testator. He who sets up the fact that the testator was *non compos mentis* must prove it."

**Revocation.** — Where a testator destroyed his will the burden is upon those offering such will for probate to prove that the decedent did not possess testamentary capacity when he destroyed the will. *McIntosh v. Moore*, 22 Tex. Civ. App. 22.

1. *Barber's Appeal*, 63 Conn. 393; *Livingston's Appeal*, 63 Conn. 68; *Carpenter v. Calvert*, 83 Ill. 62; *Purdy v. Hall*, 134 Ill. 298; *Pendlay v. Eaton*, 130 Ill. 69; *Blough v. Parry*, 144 Ind. 463; *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257; *Brooks v. Barrett*, 7 Pick. (Mass.) 94; *Matter of Baldwin*, 13 Wash. 666.

The *Illinois* doctrine requiring *prima facie* proof by the attesting witnesses is based upon the statute in that state. See *Carpenter v. Calvert*, 83 Ill. 62.

The reason for this doctrine as accepted in *Connecticut* is set forth in *Barber's Appeal*, 63 Conn. 393.

The reason for the rule applying in *Illinois* seems also to apply in *Ohio* and *New York*. *Wagner v. Ziegler*, 44 Ohio St. 59. For the rule before this statute see *Green v. Green*, 5 Ohio 278; *Ramsdell v. Viele*, 6 Dem. (N. Y.) 244, citing *Kingsley v. Blanchard*, 66 Barb. (N. Y.) 317; *Miller v. White*, 5 Redf. (N. Y.) 321; *Matter of Cottrell*, 95 N. Y. 336; *Redf. Surr. Prac.* (3d ed.) 216. See also *Crispell v. Dubois*, 4 Barb. (N. Y.) 397; *Lake v. Ranney*, 33 Barb. (N. Y.) 49; *In re Lissauer*, (Surrogate Ct.) 5 N. Y. Supp. 260. And see *Matter of Kiedaisch*, 2 Connolly (N. Y.) 438.

**There Would Seem to Be an Inconsistency** in holding, first, that the executor or proponent must offer evidence of the testator's capacity, and, second, that the testator is presumed to have been sane, and that the contestant must prove his insanity. Upon this point Judge Redfield says: "We cannot but feel that all the apparent confusion in the matter has arisen

(c) **Doctrine Eliminating Necessity for Prima Facie Showing.** — In some jurisdictions authority is found for the proposition that upon proof of the due execution of a will, not irrational in its provisions nor inconsistent in its structure, language, or details, with the sanity of the testator, the presumption of law makes out a *prima facie* case, and the burden of showing that the testator was not in fact of sound mind is shifted upon the contestants. This line of authorities makes no reference to the need of proving more than the due execution of the will.<sup>1</sup>

(2) **Burden on Proponents Throughout.** — In some jurisdictions the doctrine is adhered to that the burden of proof is throughout upon the proponent and does not at any time shift to the contestant.<sup>2</sup>

from the modern gloss which has been incorporated with the old rule, that the party propounding the will must adduce some proof of the testator's sanity at the time of executing the will, which, with all due submission, we venture to affirm, is either a fallacy, or else it is the expression of a principle too refined for our comprehension. But no man's comprehension can be so far blunted that he will not be able to perceive the incongruity of requiring a party to give positive proof of the existence of a fact which the law presumes in the absence of all proof." 1 Redf. on Wills (1876) 46, note.

1. *Bims v. Collier*, 69 Ark. 245; *McCulloch v. Campbell*, 49 Ark. 373; *Fee v. Taylor*, 83 Ky. 259; *Milton v. Hunter*, 13 Bush (Ky.) 163; *Boone v. Ritchie*, (Ky. 1899) 53 S. W. Rep. 518; *Bramel v. Bramel*, 101 Ky. 64; *King v. King*, (Ky. 1897) 42 S. W. Rep. 347; *Chandler v. Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701; *Kingsbury v. Whitaker*, 32 La. Ann. 1057, 36 Am. Rep. 278; *Bey's Succession*, 46 La. Ann. 773.

In *Norton v. Paxton*, 110 Mo. 456, the court said: "It may be that the production of a will, reasonable on its face, with proof of due execution and attestation, and that the testator was of full age, will make out a *prima facie* case on the part of the proponents, thus giving full force to the presumption, though the usual course is to offer some evidence of mental capacity."

In *Alabama* the proponent is not required to make any proof in the first instance of the testator's sanity. *Stubbs v. Houston*, 33 Ala. 555; *Daniel v. Hill*, 52 Ala. 430; *O'Donnell v. Rodiger*, 76 Ala. 223, 52 Am. Rep. 322.

2. **View that Burden on Proponents Throughout** — *England*. — *Harris v. Ingledew*, 3 P. Wms. 93; *Fulton v. Andrew*, L. R. 7 H. L. 448; *Smee v. Smee*, 5 P. D. 84; *Paske v. Ollat*, 2 Phill. Ecc. 323; *Barry v. Buttin*, 2 Moo. P. C. 480; *Browning v. Budd*, 66 Moo. P. C. 430; *Sutton v. Sadler*, 3 C. B. N. S. 87, 91 E. C. L. 87; *Baker v. Batt*, 2 Moo. P. C. 317; *Symes v. Green*, 1 Sw. & Tr. 401; *Panton v. Williams*, 2 Curt. Ecc. 530; *Wallis v. Hodgson*, 2 Atk. 56.

*Connecticut*. — *Comstock v. Hadlyme Ecclesiastical Soc.*, 8 Conn. 261, 20 Am. Dec. 100.

*Georgia*. — *Evans v. Arnold*, 52 Ga. 160.

*Maine*. — *Robinson v. Adams*, 62 Me. 369.

*Massachusetts*. — *Crowninshield v. Crowninshield*, 2 Gray (Mass.) 526.

*Michigan*. — *Beaubien v. Cicotte*, 8 Mich. 9; *Taff v. Hosmer*, 14 Mich. 309 (see this case for full statement of the Michigan practice);

*Aikin v. Weekerly*, 19 Mich. 482; *McCinnis v. Kempsey*, 27 Mich. 363; *Prentiss v. Bates*, 93 Mich. 234, *overruling* 88 Mich. 567 (see strong dissenting opinion of Grant, J., in 93 Mich. 245); *Moriarty v. Moriarty*, 108 Mich. 249.

*Minnesota*. — *Matter of Layman*, 40 Minn. 371.

*Mississippi*. — *Brown v. Walker*, (Miss. 1892) 11 So. Rep. 724.

*Missouri*. — *Elliott v. Welby*, 13 Mo. App. 19; *Jones v. Roberts*, 37 Mo. App. 163; *Craven v. Faulconer*, 28 Mo. 19; *Tingley v. Cowgill*, 48 Mo. 291; *Harvey v. Sullers*, 56 Mo. 372; *Benoist v. Murrin*, 58 Mo. 322; *Norton v. Paxton*, 110 Mo. 456.

*Nebraska*. — *Seebrook v. Fedawa*, 30 Neb. 424; *Murry v. Hennessey*, 48 Neb. 608.

*New Hampshire*. — *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441.

*New York*. — *Matter of Flansburgh*, 82 Hun (N. Y.) 49.

*Oregon*. — *Hubbard v. Hubbard*, 7 Oregon 44; *Chrisman v. Chrisman*, 16 Oregon 127.

*Texas*. — *Trezevant v. Rains*, (Tex. Civ. App. 1894) 25 S. W. Rep. 1092; *Prather v. McClelland* (Tex. Civ. App. 1894) 26 S. W. Rep. 657; *Beazley v. Denson*, 40 Tex. 416.

*Vermont*. — *Williams v. Robinson*, 42 Vt. 658, 1 Am. Rep. 359.

*Virginia*. — *Ticker v. Sandidge*, 85 Va. 546.

**Competency of Testator — Validity of Will.** — The competency of a testator is to be assumed until it is impeached by evidence, but it is not to be assumed, as matter of law, that a will is valid as made by a competent testator unless the court or jury who is to decide upon it is convinced that he was competent. *Sutton v. Sadler*, 3 C. B. N. S. 87, 91 E. C. L. 87, 26 L. J. C. Pl. 284, 3 Jur. N. S. 1150, 5 W. R. 880.

**Where Contestants Offered No Evidence — Cross-examination of Proponent's Witnesses.** — In *Keays v. McDonnell*, Ir. R. 6 Eq. 611, it was held that the evidence must satisfy the court without reasonable doubt of the testator's capacity. In this case the contestants introduced no evidence, but by cross-examination of the proponent's witnesses left the evidence of capacity in an unsatisfactory condition, and the will was rejected.

**Evidence Conflicting.** — In *Steed v. Calley*, 1 Keen 620, it was held, in rejecting a will, that on an issue of sanity where the proof is conflicting the question is not whether the facts in support of it are not in general indications of sanity, but whether they are inconsistent with or sufficiently explanatory of the indications of insanity produced by the contestants.

In *Brown v. Walker*, (Miss. 1892) 11 So.



(3) *Compromise Doctrine*.—These conflicting rules are to some extent reconciled by the doctrine that while the burden remains throughout with the party claiming under the will, nevertheless the presumption of sanity will avail him as positive evidence and thus aid him in sustaining the burden.<sup>1</sup>

b. PRESUMPTIONS WHERE PROOF OF PRIOR INSANITY.—(1) *Permanent Insanity*—(a) *General Rule*.—Where it is proven that the testator, prior to the making of the will, was suffering from incompetency of a permanent or habitual nature, it will be presumed that the condition continued and that the testator was incompetent at the time the will was executed.<sup>2</sup> The pre-

Rep. 724, the court say: "If all the evidence in the case left it doubtful whether the instrument propounded was the true last will of the deceased, the jury should find against its validity, for it was incumbent upon the proponents, by a preponderance of the evidence, to reasonably satisfy the mind of the jury that the instrument was, in truth, the last will of the deceased."

In West Virginia, the Reason Given for Placing the Burden on the Proponent Is, that at common law a person could not make a will, and that the statute enabling persons of sound mind to make a will changed the common-law presumption of sanity, and required the proponent to show sanity when the will was executed. *McMechen v. McMechen*, 17 W. Va. 685, 41 Am. Rep. 682. And see *Nicholas v. Kershner*, 20 W. Va. 261.

1. *A Compromise Doctrine*.—See the following cases: *Bims v. Collins*, 69 Ark. 245; *Sturdevant's Appeal*, 71 Conn. 393; *Richardson v. Bly*, 181 Mass. 97; *Fulton v. Umbehnd*, 182 Mass. 487; *Sheehan v. Kearney*, (Miss. 1896) 21 So. Rep. 41; *Matter of Barbineaus*, (Surrogate Ct.) 27 Misc. (N. Y.) 417.

The Following Rules, drawn from the decision in *Sutton v. Sadler*, 3 C. B. N. S. 87, 91 E. C. L. 87, represent the English practice, and are given in 1 Wms. on Exrs. 15 (7th Am. ed.): "If a party impeach the validity of a will on account of a supposed incapacity of mind in the testator, it will be incumbent on such party to establish such incapacity by the clearest and most satisfactory proofs. The burthen of proof rests upon the person attempting to invalidate what on its face purports to be a legal act. Sanity must be presumed till the contrary is shown. \* \* \* But it must be borne in mind that the presumption of sanity is not to be treated as a legal presumption, but, at the utmost, as a mixed presumption of law and fact (if not as a mere presumption of fact); that is, an inference to be made by a jury from the absence of evidence to show that the testator did not enjoy that soundness which experience shows to be the general condition of the human mind. If, therefore, a will is produced before a jury and its execution proved, and no other evidence is offered, the jury would be properly told that they ought to find for the will. And if the party opposing the will gives some evidence of incompetency, the jury may nevertheless, if it does not disturb their belief in the competency of the testator, find in favor of the will. And in each case the presumption of competency would prevail. Still the *onus probandi* lies in every case on the party relying on a will, and

he must satisfy the jury that it is the will of a capable testator; and when the whole matter is before them on evidence given on both sides, if the evidence does not satisfy them that the will is the will of a competent testator, they ought not to affirm by their verdict that it is so."

*Burden of Proof and Weight of Evidence*.—The case of *Barbor's Appeal*, 63 Conn. 393, points out the distinction between the burden of proof and the weight of evidence as applied to will cases, and shows the effect of the presumption of sanity on each. See also, as making such distinction, *Barry v. Butlin*, 2 Moo. P. C. 480, 1 Curt. Ecc. 638; *Keays v. McDonnell*, Ir. R. 6 Eq. 611; *Scott v. Wood*, 81 Cal. 400.

2. *Permanent Insanity—Presumption—England*.—*Clarke v. Cartwright*, 1 Phill. Ecc. 100; *White v. Driver*, 1 Phill. Ecc. 88; *Atty.-Gen. v. Parnter*, 3 Bro. C. C. 443; *Hall v. Warren*, 9 Ves. Jr. 611; *Groom v. Thomas*, 2 Hagg. Ecc. 434; *Waring v. Waring*, 6 Moo. P. C. 341; *Chambers v. Proctor*, 2 Curt. Ecc. 415; *Germani v. Draper*, 6 Notes of Cas. 418; *Johnson v. Blane*, 6 Notes of Cas. 422; *Fowles v. Davidson*, 6 Notes of Cas. 461.

*United States*.—*Hoge v. Fisher*, Pet. (C. C.) 163.

*Alabama*.—*O'Donnell v. Rodiger*, 76 Ala. 222, 52 Am. Rep. 322; *Eastis v. Montgomery*, 95 Ala. 486, 36 Am. St. Rep. 227.

*Delaware*.—*Pritchard v. Roe*, 3 Penn. (Del.) 128.

*Georgia*.—*Griffin v. Griffin*, R. M. Charlt. (Ga.) 217.

*Indiana*.—*Rush v. Megee*, 36 Ind. 69; *Physio-Medical College v. Wilkinson*, 108 Ind. 314; *Stevens v. Stevens*, 127 Ind. 560; *Harrison v. Bishop*, 131 Ind. 161, 31 Am. St. Rep. 422; *Wallis v. Lohring*, 134 Ind. 447; *Roller v. Kling*, 150 Ind. 159.

*Iowa*.—*Bever v. Spangler*, 93 Iowa 576.

*Louisiana*.—*Chandler v. Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701.

*Maryland*.—*Jones v. Collins*, 94 Md. 403.

*Missouri*.—*McClintock v. Curd*, 32 Mo. 411; *Von De Veld v. Judy*, 143 Mo. 348.

*New York*.—*Clark v. Fisher*, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; *Bogardus v. Clark*, 4 Paige (N. Y.) 623; *Clarke v. Sawyer*, 3 Sandf. Ch. (N. Y.) 351; *Gombault v. Public Administrator*, 4 Bradf. (N. Y.) 226; *Matter of Lapham*, (Surrogate Ct.) 19 Misc. (N. Y.) 71.

*Pennsylvania*.—*Titlow v. Titlow*, 54 Pa. St. 216, 93 Am. Dec. 691; *Hoopes's Estate*, 174 Pa. St. 373.

*Adjudication of Insanity*.—In *Stone v. Damon*, Volume XXVIII.

sumption arising from prior insanity of a general or habitual character, that it continued to the time of making the will, is one of fact varying with the circumstances of the case.<sup>1</sup>

(b) **Senile Dementia.** — Incapacity resulting from old age or senile dementia has been held presumed to continue.<sup>2</sup>

(c) **Prior Adjudication.** — It has been generally held that a prior adjudication of insanity raises a presumption of its continuance, thus making a *prima facie* case in favor of the contestant.<sup>3</sup> But the fact that the testator is under guardianship, although it makes a *prima facie* case of incapacity, does not necessarily invalidate his will.<sup>4</sup> And it has been generally held that proof of prior permanent incompetency shifts the burden upon the proponent to prove

12 Mass. 488, it was decided that the rule that a decree adjudging a person *non compos mentis* was conclusive evidence of his insanity, did not apply where the testamentary capacity of such person was in dispute. In *Bogardus v. Clark*, 4 Paige (N. Y.) 623, it was held that such a decree was not conclusive on the parties to the proceeding, as to a devise of real estate by the alleged lunatic.

**If Repulsion of a Parent for His Child, Amounting to a Delusion as to the Latter's Character,** is shown to have existed previously to the execution of his will, it will be for the party setting up that document to establish that it was inoperative when the will was made. *Boughton v. Knight*, L. R. 3 P. & D. 64, 42 L. J. P. 25, 28 L. T. N. S. 562.

**Where a Testator Formerly Suffered Delusions and Was Shown to Have Been Instructed to Conceal their Continued Existence,** his will, though rational, was rejected, the evidence being weak as to his recovery from the delusions. *Dyce Sombre v. Troup*, Deane Ecc. 22. See also *East India Co. v. Dyce Sombre*, 4 W. R. 714.

**Prior and Subsequent Delusions Will Be Presumed to Have Existed** at the time the will was made, whether they appear in the provisions of the will or not, and the burden of proof of a lucid interval is on the proponent. *Waring v. Waring*, 6 Moo. P. C. 341, 12 Jur. 947.

1. *Manley v. Staples*, 65 Vt. 370.

2. **Senile Dementia — Presumption.** — In *Bever v. Spangler*, 93 Iowa 576, the testator was shown to have been afflicted with senile dementia. It was held that, the disease being of a continuous and permanent nature, it was not incumbent on the contestants to show that it was not executed in a lucid interval.

**Rule Applied to Deed.** — See *Raymond v. Wathen*, 142 Ind. 367, *Physio-Medical College v. Wilkinson*, 108 Ind. 314.

3. **Prior Adjudication of Insanity — England.** — *East India Co. v. Dyce Sombre*, 4 W. R. 714. *California.* — *Matter of Johnson*, 57 Cal. 529. *Georgia.* — *Lucas v. Parsons*, 23 Ga. 267.

*Indiana.* — *Stevens v. Stevens*, 127 Ind. 560; *Harrison v. Bishop*, 131 Ind. 161, 31 Am. St. Rep. 422.

*Iowa.* — *Matter of Fenton*, 97 Iowa 192.

*Massachusetts.* — *Leonard v. Leonard*, 14 Pick. (Mass.) 280; *Breed v. Pratt*, 18 Pick. (Mass.) 115; *Little v. Little*, 13 Gray (Mass.) 264; *Stone v. Damon*, 12 Mass. 488.

*Michigan.* — *Rice v. Rice*, 50 Mich. 448.

*New Jersey.* — *Brady v. McBride*, 39 N. J. Eq. 495.

*New York.* — *Wadsworth v. Sharpsteen*, 8

N. Y. 388, 59 Am. Dec. 499; *Matter of Pendleton*, 1 Connolly (N. Y.) 480; *Matter of Coe*, 47 N. Y. App. Div. 177; *Matter of Clark*, 57 N. Y. App. Div. 5; *Matter of Widmayer*, 74 N. Y. App. Div. 336.

*Oregon.* — *Ames's Will*, 40 Oregon 495.

*Pennsylvania.* — *In re Gangwere*, 14 Pa. St. 417, 53 Am. Dec. 554; *Hoopes's Estate*, 174 Pa. St. 373.

*Wisconsin.* — *Slinger's Will*, 72 Wis. 22.

4. **Guardianship.** — Wms. on Exrs. (Perkins's ed.) 38n; *Shouler on Wills* (1892), § 81.

*England.* — *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 244; *Cook v. Cholmondeley*, 2 Macn. & G. 22; *Bannatyne v. Bannatyne*, 16 Jur. 864.

*Georgia.* — *Lucas v. Parsons*, 27 Ga. 593.

*Indiana.* — *Harrison v. Bishop*, 131 Ind. 161, 31 Am. St. Rep. 422.

*Iowa.* — *Matter of Fenton*, 97 Iowa 192.

*Michigan.* — *Rice v. Rice*, 50 Mich. 448.

*New York.* — *Matter of Pendleton*, 1 Connolly (N. Y.) 480.

*Oregon.* — *Ames's Will*, 40 Oregon 495.

*Pennsylvania.* — *Dyre's Estate*, 12 Phila. (Pa.) 156, 35 Leg. Int. (Pa.) 446; *Titlow v. Titlow*, 54 Pa. St. 216, 93 Am. Dec. 691; *Lickey v. Cunningham*, 56 Pa. St. 370; *In re Miller*, 179 Pa. St. 645.

*Vermont.* — *Williams v. Robinson*, 39 Vt. 267.

*Wisconsin.* — *Slinger's Will*, 72 Wis. 22.

**Illustrations.** — In *Ames's Will*, 40 Oregon 495, the fact that the guardian was appointed to prevent a relative from taking advantage of the testator by extorting money from him under threat of criminal prosecution, was held sufficient to overcome any presumption of incapacity arising from the appointment.

In *Miller's Estate*, 179 Pa. St. 645, it was held that a judicial decree that the testator was a habitual drunkard, and the appointment of a committee, although conclusive as to contractual incapacity, would have been only *prima facie* evidence of testamentary incapacity.

**Instructions.** — In *Stevens v. Stevens*, 127 Ind. 560, it was held that an instruction that the proof to overcome the presumption of insanity arising from an adjudication of lunacy must be "clear, explicit, and satisfactory," was not made erroneous by italicizing those adjectives.

**Suspension of Lunacy Proceedings.** — *Matter of Burr*, 2 Barb. Ch. (N. Y.) 208. The chancellor, having become satisfied that the lunatic had so far recovered as to be capable of disposing of his property by will, partially suspended proceeding in lunacy, so as to enable the alleged

either that the will was executed in a lucid interval or that the testator's capacity was restored at the time of execution.<sup>1</sup>

(2) *Temporary Insanity*. — Proof of prior incompetency of a temporary character or due to a temporary cause does not raise a presumption of the continuance of the condition nor shift the burden of proof to those claiming under the will.<sup>2</sup>

lunatic to make a will under the superintendence of some officer of the court, to guard against improper influences.

**Inmate of Asylum.** — In *Martin v. Johnston*, 1 F. & F. 122, and *Bootle v. Blundell*, 19 Ves. Jr. 508, 15 Rev. Rep. 93, although the testators were inmates of lunatic asylums at the time of the execution of their wills, the wills were sustained.

**1. Lucid Interval.** — This rule was stated by Lord Thurlow in *Atty.-Gen. v. Parnter*, 3 Bro. C. C. 441, and approved by Lord Erskine in *White v. Wilson*, 13 Ves. Jr. 89; *Prinsep v. Dyce Sombre*, 10 Moo. P. C. 278. See also to the same effect:

*England.* — *White v. Driver*, 1 Phill. Ecc. 88; *Wood v. Wood*, 1 Phill. Ecc. 363; *Kinleside v. Harrison*, 2 Phill. Ecc. 459; *Evans v. Knight*, 1 Add. Ecc. 239; *Symes v. Green*, 1 Sw. & Tr. 401; *Ayrey v. Hill*, 2 Add. Ecc. 210; *Brogden v. Brown*, 2 Add. Ecc. 445; *Wheeler v. Anderson*, 3 Hagg. 605; *Tatham v. Wright*, 2 Russ. & M. 22; *Steed v. Calley*, 1 Keen 620.

*United States.* — *Hoge v. Fisher*, Pet. (C. C.) 163.

*Alabama.* — *Saxon v. Whitaker*, 30 Ala. 237.

*Delaware.* — *Duffield v. Robeson*, 2 Harr. (Del.) 375.

*Indiana.* — *Rush v. Megee*, 36 Ind. 69.

*Iowa.* — *Bever v. Spangler*, 3 Iowa 576.

*Kentucky.* — *Carpenter v. Carpenter*, 8 Bush (Ky.) 283.

*Maryland.* — *Jones v. Collins*, 94 Md. 403.

*Missouri.* — *McClintock v. Curd*, 32 Mo. 411; *Von De Veld v. Judy*, 143 Mo. 348.

*New Jersey.* — *Whitenack v. Stryker*, 2 N. J. Eq. 8.

*New York.* — *Matter of Lapham*, (Surrogate Ct.) 19 Misc. (N. Y.) 71; *Matter of Taylor*, 1 Edm. Sel. Cas. (N. Y.) 171, 19 Am. Dec. 402; *Clark v. Fisher*, 1 Paige (N. Y.) 171; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, 19 Am. Dec. 402.

*Pennsylvania.* — *Titlow v. Titlow*, 54 Pa. St. 216, 4 Am. Dec. 330; *Harden v. Hays*, 9 Pa. St. 151; *Boyd v. Eby*, 8 Watts (Pa.) 66; *In re Gangwere*, 14 Pa. St. 417, 53 Am. Dec. 554.

*Tennessee.* — *Puryear v. Reese*, 6 Coldw. (Tenn.) 21.

See *Clarke v. Cartwright*, 1 Phill. Ecc. 90, in which a rational will written by the testatrix in a lucid interval was upheld. And see, applying the above doctrine in the case of a contract, *Sheets v. Bray*, 125 Ind. 33; and in case of a deed, *Raymond v. Wathen*, 142 Ind. 367.

**But See, Contra,** *Roller v. Kling*, 150 Ind. 159, in which the trial court instructed the jury according to the substance of the text. The court said, in reversing the case: "The appellees, by bringing this action to set aside said will and the probate thereof, assumed the burden of showing by a preponderance of the evidence that the testator did not, at the time

the will was executed, have testamentary capacity. It is true that, if unsoundness of mind of a permanent nature has been established by the party having the burden of proof, the presumption is that the same continues until the contrary is shown. But it is equally true that, in order to remove such presumption, the party not having the burden of proof as to such fact or allegation is not required to prove the contrary by a preponderance of the evidence, but it is sufficient if the scales are evenly balanced, so that there is no preponderance either way. In such case, the party having the burden of proof cannot recover." Followed in *Merriman v. Merriman*, 153 Ind. 631.

**2. Temporary Insanity — Presumption.** — *Clarke v. Cartwright*, 1 Phill. Ecc. 100; *Saxon v. Whitaker*, 30 Ala. 237; *O'Donnell v. Rodiger*, 76 Ala. 222, 52 Am. Rep. 322; *Johnson v. Armstrong*, 97 Ala. 731; *Murphree v. Senn*, 107 Ala. 424; *Brown v. Riffin*, 94 Ill. 560; *Trish v. Newell*, 62 Ill. 201, 14 Am. Rep. 79; *Taylor v. Pegram*, 151 Ill. 106; *Blake v. Rourke*, 74 Iowa 522; *Hix v. Whittemore*, 4 Met. (Mass.) 547; *Halley v. Webster*, 21 Me. 461; *Staples v. Wellington*, 58 Me. 453; *Taylor v. Creswell*, 45 Md. 422; *Grabill v. Barr*, 5 Pa. St. 411, 47 Am. Dec. 418; *Harden v. Hays*, 9 Pa. St. 151; *Grubbs v. McDonald*, 91 Pa. St. 236; *Barbey v. Boardman*, 202 Pa. St. 185; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Clarke v. Sawyer*, 3 Sandf. Ch. (N. Y.) 351; *Matter of Johnson*, (Surrogate Ct.) 7 Misc. (N. Y.) 220; *In re Lyddy*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 636; *Matter of Snelling*, 78 Hun (N. Y.) 211; *Matter of Davis*, 91 Hun (N. Y.) 209; *Manley v. Staples*, 65 Vt. 370; *Clark v. Ellis*, 9 Oregon 128.

**And Especially Where It Is Shown that the Testator Was Cured** and no symptoms of a return of the malady were ever manifested, there can be no presumption that insanity was present at the time of the publication of his will. *Snow v. Benton*, 28 Ill. 306.

**During Period of Temporary Derangement.** — But a temporary derangement of intellect, from disease or other cause, will create, while it lasts, an incapacity to make a will, if the party's situation is apparent. *Aubert v. Aubert*, 6 La. Ann. 104.

**Proof of Periodical Epileptic Attacks, Attended with Convulsions, Loss of Consciousness,** and the usual sequences of such attacks, or proof of pneumonia with temporary delirium supervening such an attack, is not such proof of insanity as will create a presumption of continuance. *Brown v. Riffin*, 94 Ill. 560.

**Inebriety, Though Long Continued and Resulting Occasionally in Temporary Insanity,** does not require proof of lucid intervals to give validity to the acts of the drunkard as is required when general insanity is proved. Consequently, where habitual intoxication is shown, there



*c.* PRESUMPTION WHERE PROOF OF DELUSIONS. — Proof that the deceased was a monomaniac does not throw the burden upon the proponent to show that the monomania did not enter into the making of the will. Where the testator is alleged to have suffered from a delusion, the burden of proof is upon the contestant to show that the will resulted from such delusion.<sup>1</sup>

**2. Opinion Evidence** — *a.* NONEXPERT WITNESSES — (1) *Generally Accepted Doctrine.* — A nonexpert witness who is shown to have had opportunity to observe the condition of a testator's mind may state his opinion as to the mental condition of the testator after having first stated the facts and circumstances upon which that opinion is based.<sup>2</sup>

will be no presumption that incapacitating drunkenness existed at the time of making the will. Such a condition at that time must affirmatively appear, or the presumption of capacity will prevail. *Koegel v. Egner*, 54 N. J. Eq. 623; *Matter of Lee*, 46 N. J. Eq. 193; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Andress v. Weller*, 3 N. J. Eq. 604; *Elkinton v. Brick*, 44 N. J. Eq. 154; *Matter of Lee*, 46 N. J. Eq. 193; *Crittenden's Estate*, Myr. Prob. (Cal.) 50; *Black v. Ellis*, 3 Hill L. (S. Car.) 68.

**Where No Fixed Mental Disease Had Supervened.** — *Fluck v. Rea*, 51 N. J. Eq. 233, *affirmed* 51 N. J. Eq. 639, 30 Atl. Rep. 430.

**1. Delusion — Presumption.** — *Young v. Miller*, 145 Ind. 652; *Jones v. Collins*, 94 Md. 403.

**2. Nonexpert Evidence** — *United States*. — *Hoge v. Fisher*, Pet. (C. C.) 163; *Harrison v. Rowan*, 3 Wash. (U. S.) 580.

*Alabama.* — *Roberts v. Trawick*, 13 Ala. 68; *Florey v. Florey*, 24 Ala. 241; *Stubbs v. Houston*, 33 Ala. 555; *In re Carmichael*, 36 Ala. 514; *Fountain v. Brown*, 38 Ala. 72; *Watson v. Anderson*, 13 Ala. 202; *Norris v. State*, 16 Ala. 776; *Powell v. State*, 25 Ala. 21; *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33.

*Arkansas.* — *Kelly v. McGuire*, 15 Ark. 555; *Abraham v. Wilkins*, 17 Ark. 292.

*California.* — *Brooks's Estate*, 54 Cal. 471; *Matter of Carpenter*, 79 Cal. 382; *Matter of Keithley*, 134 Cal. 9.

*Connecticut.* — *Grant v. Thompson*, 4 Conn. 203, 10 Am. Dec. 119; *Dunham's Appeal*, 27 Conn. 192; *Shanley's Appeal*, 62 Conn. 325; *Kinne v. Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Sydleman v. Beckwith*, 43 Conn. 9.

*Delaware.* — *Duffield v. Robeson*, 2 Harr. (Del.) 375; *Steele v. Helm*, 2 Marv. (Del.) 237; *Pritchard v. Roe*, 3 Penn. (Del.) 128.

*Georgia.* — *Griffin v. Griffin*, R. M. Charl. (Ga.) 217; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Walker v. Walker*, 14 Ga. 242; *Dennis v. Weekes*, 51 Ga. 24; *Berry v. State*, 10 Ga. 529.

*Illinois.* — *Roe v. Taylor*, 45 Ill. 485; *Schneider v. Manning*, 121 Ill. 376; *Carpenter v. Calvert*, 83 Ill. 62; *Burley v. McGough*, 115 Ill. 11; *Keithley v. Stafford*, 126 Ill. 507; *American Bible Soc. v. Price*, 115 Ill. 623; *Upstone v. People*, 109 Ill. 175; *Rutherford v. Morris*, 77 Ill. 397; *Taylor v. Pegrarn*, 151 Ill. 106.

*Indiana.* — *Doe v. Reagan*, 5 Blackf. (Ind.) 217, 33 Am. Dec. 466; *Ryman v. Crawford*, 86 Ind. 262; *Kenworthy v. Williams*, 5 Ind. 375; *Leach v. Prebster*, 39 Ind. 492.

*Iowa.* — *Pelamourges v. Clark*, 9 Iowa 1; *Severin v. Zack*, 55 Iowa 28; *Meeker v.*

*Meeker*, 74 Iowa 352, 7 Am. St. Rep. 489; *In re Norman*, 72 Iowa 84; *Smith v. Hickenbottom*, 57 Iowa 733; *McIntire v. McConn*, 28 Iowa 483; *Parsons v. Parsons*, 66 Iowa 757, 760; *Denning v. Butcher*, 91 Iowa 425; *Kosteletzky v. Scherhart*, 99 Iowa 120; *Matter of Goldthorp*, 94 Iowa 336, 58 Am. St. Rep. 400; *Hertrich v. Hertrich*, 114 Iowa 643, 89 Am. St. Rep. 389.

*Kansas.* — *Baughman v. Baughman*, 32 Kan. 538.

*Kentucky.* — *Overall v. Bland*, (Ky. 1889) 12 S. W. Rep. 273.

*Maryland.* — *Weems v. Weems*, 19 Md. 334; *Dorsey v. Warfield*, 7 Md. 65; *Williams v. Lee*, 47 Md. 321; *Stewart v. Redditt*, 3 Md. 67; *Stewart v. Spedden*, 5 Md. 446; *Waters v. Waters*, 35 Md. 541; *Townshend v. Townshend*, 7 Gill (Md.) 28; *Jones v. Collins*, 94 Md. 403; *Brashears v. Orme*, 93 Md. 442.

*Michigan.* — *White v. Bailey*, 10 Mich. 155; *Beaubien v. Cicotte*, 12 Mich. 459; *Rice v. Rice*, 50 Mich. 448; *Sullivan v. Foley*, 112 Mich. 1; *Rivard v. Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566; *McHugh v. Fitzgerald*, 103 Mich. 21.

*Minnesota.* — *Matter of Pinney*, 27 Minn. 280; *Woodcock v. Johnson*, 36 Minn. 217.

*Missouri.* — *Farrell v. Brennan*, 32 Mo. 328, 82 Am. Dec. 137; *Appleby v. Brock*, 76 Mo. 314; *Rankin v. Rankin*, 61 Mo. 295; *Baldwin v. State*, 12 Mo. 223; *State v. Bryant*, 93 Mo. 273.

*New Hampshire.* — *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 441; *Carpenter v. Hatch*, 64 N. H. 573; *Patten v. Cilley*, 67 N. H. 526.

*New Jersey.* — *Garrison v. Garrison*, 15 N. J. Eq. 266; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Sloan v. Maxwell*, 3 N. J. Eq. 563; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Matter of Vanauken*, 10 N. J. Eq. 192; *Den v. Gibbons*, 22 N. J. L. 117, 51 Am. Dec. 253.

*North Carolina.* — *Clary v. Clary*, 2 Ired. L. (24 N. Car.) 78; *State v. Potts*, 100 N. Car. 457.

*Ohio.* — *Clark v. State*, 12 Ohio 483, 40 Am. Dec. 481; *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459; *Brockmeier v. Buck*, 9 Ohio Dec. (Reprint) 353, 12 Cinc. L. Bul. 213.

*Pennsylvania.* — *Grabill v. Barr*, 5 Pa. St. 441, 47 Am. Dec. 418; *Rambler v. Tryon*, 7 S. & R. (Pa.) 90, 10 Am. Dec. 444; *Irish v. Smith*, 8 S. & R. (Pa.) 573, 11 Am. Dec. 648; *Wogan v. Small*, 11 S. & R. (Pa.) 141; *Wilkinson v. Pearson*, 23 Pa. St. 117; *Bricker v. Lightner*, 40 Pa. St. 199; *Pidcock v. Potter*, 68 Pa. St. 342, 8 Am. Rep. 181; *Blocher v. Hostetter*, 2 Grant Cas. (Pa.) 288, a case of opinion as to

(2) *Exceptional Doctrine*. — A qualification of the doctrine permitting an opinion as to the mental condition of the testator is found in the decisions of some states which hold that the witness cannot state his opinion as to the mental condition of the person whose sanity is in question, but that he may, after stating the facts from which the condition of mind may be gathered,

the physical capacity of the testator to sign the will; *Dickinson v. Dickinson*, 61 Pa. St. 404; *Boyd v. Boyd*, 66 Pa. St. 290; *Titlow v. Titlow*, 54 Pa. St. 223, 93 Am. Dec. 691; *Taylor v. Trich*, 165 Pa. St. 586, 44 Am. St. Rep. 679; *Shaver v. McCarthy*, 110 Pa. St. 339; *Elcessor v. Elcessor*, 146 Pa. St. 359; *Swails v. White*, 149 Pa. St. 261; *Commonwealth Title Ins., etc., Co. v. Gray*, 150 Pa. St. 255; *Douglass's Estate*, 162 Pa. St. 567.

*South Carolina*. — *Heyward v. Hazard*, 1 Bay (S. Car.) 335.

*Tennessee*. — *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329.

*Vermont*. — *Lester v. Pittsford*, 7 Vt. 158; *Morse v. Crawford*, 17 Vt. 499, 44 Am. Dec. 349; *Clifford v. Richardson*, 18 Vt. 620; *Cram v. Cram*, 33 Vt. 15; *Cavendish v. Troy*, 41 Vt. 99; *Chickering v. Brooks*, 61 Vt. 554; *In re Blood*, 62 Vt. 364.

*Virginia*. — *Temple v. Temple*, 1 Hen. & M. (Va.) 476; *Burton v. Scott*, 3 Rand. (Va.) 399; *Mercer v. Kelso*, 4 Gratt. (Va.) 106; *Fishburne v. Ferguson*, 84 Va. 87.

*West Virginia*. — *Dower v. Church*, 21 W. Va. 23.

As to the propriety of admitting the opinions of nonexpert witnesses on the question of mental condition, see *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 612, in which Mr. Justice Harlan discusses the question very fully, both on reason and authority.

*Doe, J.*, in a dissenting opinion in *State v. Pike*, 49 N. H. 408, said: "In *England*, no express decision of the point can be found, for the reason that such evidence has always been admitted without objection. It has been universally regarded as so clearly competent that it seems no English lawyer has ever presented to any court, any objection, question, or doubt in regard to it. But in *Wright v. Tatham*, 5 Cl. & F. 670, 4 Bing. N. Cas. 489, 33 E. C. L. 426, the question was involved in such a manner, and the number and strength of the judicial opinions were such, as to make that case an authority of the greatest weight in favor of the competency of the evidence." And see *Lowe v. Jolliffe*, 1 W. Bl. 365; *Atty.-Gen. v. Parnter*, 3 Bro. C. C. 442; *Arnold's Trial*, 16 How. St. Tr. 695; *Reg. v. Oxford*, 9 C. & P. 525, 38 E. C. L. 208; *Reg. v. Higginson*, 1 C. & K. 129, 47 E. C. L. 129; *Dew v. Clark*, 3 Add. Ecc. 79; *Wheeler v. Alderson*, 3 Hag. Ecc. 602; *Kinleside v. Harrison*, 2 Phill. Ecc. 449; *White v. Driver*, 1 Phill. Ecc. 88; *Clarke v. Cartwright*, 1 Phill. Ecc. 122.

**Reason for the Rule.** — "A witness may be able to judge, in most cases, whether the reason is overthrown, without being an expert in mental disease; but such judgment is necessarily founded, in a large measure, upon conduct, appearances, and other individual peculiarities which are extremely difficult, if not altogether impossible, of description. His

opinion is regarded as more reliable than his ability to portray the facts upon which it is based, and because of his inability to place the jury in the position from which he judged, his opinion is received in evidence." *Mull v. Carr*, 5 Ind. App. 491. In this case the rule is referred to as an exception to the general rule excluding the opinions of nonexperts.

**Facts upon Which Nonexpert Opinion May Be Based.** — "It would, perhaps, be impossible to fix any exact rule which would be an inflexible guide in all cases; but in giving the facts upon which the witness bases his opinion it cannot be doubted that he should be permitted to state every fact which could reasonably be made the foundation of an opinion as to the mental condition of the testator. If not permitted to state all the facts, it is evident that the rule which permits parties to testify as to the mental condition of a testator would be of little value, as the court or jury would be without the means of weighing such opinions." *Burkhardt v. Gladish*, 123 Ind. 337.

It has been held that in addition to giving his opinion as to the testator's sanity based upon facts observed, the witness may state that there was nothing about the testator indicating that he was mentally unbalanced or incompetent. *Kimberly's Appeal*, 68 Conn. 428, 57 Am. St. Rep. 101; *Shanley's Appeal*, 62 Conn. 325.

**A Conversation Between the Testator and the Witness Occurring About Four Years Prior to the Date of the Will** is admissible as part of the basis for a nonexpert opinion. *Bower v. Bower*, 142 Ind. 194.

**Not Imperative to Ask Witness's Opinion.** — The rule which allows a party to obtain the opinion of a witness as to the testator's sanity after the witness has detailed the facts upon which he bases his opinion does not make it imperative upon the party calling him to ask his opinion. He may rest with examining the witness merely as to the facts coming under his observation. *Bower v. Bower*, 142 Ind. 194; *Cline v. Lindsey*, 110 Ind. 337.

**Second Opinion Based on Hypothetical Question.** — After a nonexpert has given his opinion, based upon the facts recited, as to the testator's mental condition, it is improper, for the purpose either of attacking or sustaining such opinion, to obtain a further opinion from him based upon a hypothetical question. *In re Hogmire*, 108 Mich. 410.

**Opinion on Hypothetical Statement of Fact.** — A nonexpert witness cannot, even upon cross-examination, be permitted to give his opinion upon the question whether a hypothetical statement of facts would, or would not, if true, be evidence of insanity. *Dunham's Appeal*, 27 Conn. 192; *Pittard v. Foster*, 12 Ill. App. 132.

**For a General Discussion of Expert and Opinion Evidence**, see that title, vol. 12, p. 414.

state the general impression or effect of those facts upon his own mind.<sup>1</sup>

(3) *Statement of Facts on Which Opinion Based*—(a) **General Rule.**—By the practically unanimous concurrence of authority a nonexpert cannot give his opinion on the question of the testator's mental condition without first stating the facts and circumstances upon which the opinion is based.<sup>2</sup>

**1. Limiting Examination to Witnesses' Conclusions from Specific Acts**—*Maine*.—Halley v. Webster, 21 Me. 461; Wyman v. Gould, 47 Me. 159.

*Massachusetts*.—Needham v. Ide, 5 Pick. (Mass.) 510; Poole v. Richardson, 3 Mass. 330; Buckminster v. Perry, 4 Mass. 593; Dickinson v. Barber, 9 Mass. 225, 6 Am. Dec. 58; Hastings v. Rider, 99 Mass. 624; Barker v. Comins, 110 Mass. 477; Nash v. Hunt, 116 Mass. 237, 251; May v. Bradlee, 127 Mass. 414; Ellis v. Ellis, 133 Mass. 469; Cowles v. Merchants, 140 Mass. 377; Williams v. Spencer, 150 Mass. 346, 15 Am. St. Rep. 206; Smith v. Smith, 157 Mass. 389; Clark v. Clark, 168 Mass. 523; Hogan v. Roche, 179 Mass. 510; Ratigan v. Judge, 181 Mass. 572. See also McConnell v. Wildes, 153 Mass. 487.

*Mississippi*.—Martin v. Perkins, 56 Miss. 204.

*New York*.—Clarke v. Sawyer, 3 Sandf. Ch. (N. Y.) 351; Culver v. Haslam, 7 Barb. (N. Y.) 314; Petrie v. Petrie, (Supm. Ct. Gen. T.) 25 N. Y. St. Rep. 309; Bell v. McMaster, 29 Hun (N. Y.) 272; In re Ramsdell, 51 Hun (N. Y.) 636, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 499; Petrie v. Petrie, 53 Hun (N. Y.) 638, 2 Silv. Sup. (N. Y.) 438; Matter of McCarthy, 55 Hun (N. Y.) 7; Johnson v. Cochrane, 91 Hun (N. Y.) 165, affirmed without opinion 159 N. Y. 555; Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Hewlett v. Wood, 55 N. Y. 634; Matter of Ross, 87 N. Y. 514; Paine v. Aldrich, 133 N. Y. 544; Wyse v. Wyse, 155 N. Y. 367.

*Tennessee*.—Gibson v. Gibson, 9 Yerg. (Tenn.) 320.

**Illustrations.**—A witness may testify that he did not observe any failure of mind in the testator. Robinson v. Adams, 62 Me. 410, 16 Am. Rep. 473. See further Fayette v. Chester-ville, 77 Me. 28, 52 Am. Rep. 741; Bridgham, Appellant, 82 Me. 323.

In Hogan v. Roche, 179 Mass. 510, the question whether nonexpert witnesses during the time mentioned observed in the testatrix any peculiarity in manner, speech, or conduct, was held proper as not calling for an opinion.

In Com. v. Brayman, 136 Mass. 438, the court said: "We think that any witness of ordinary intelligence, who is familiarly acquainted with a person, may testify whether within a given time he has failed mentally or physically." See also Leistriz v. American Zylonite Co., 154 Mass. 382; Connors v. Grilley, 155 Mass. 575; Laplante v. Warren Cotton Mills, 165 Mass. 487.

In Ratigan v. Judge, 181 Mass. 572, the question asked of a nonexpert, who was shown to have known the testator a number of years, was: "Was he subject to delusions or hallucinations?" This was held properly excluded as it called for an opinion on the testator's mental condition.

**2. Facts and Circumstances Must Be First Stated**—*Alabama*.—Durney v. Torrey, 100 Ala. 157, 46 Am. St. Rep. 33.

*Connecticut*.—Turner's Appeal, 72 Conn. 305.

*District of Columbia*.—Raub v. Carpenter, 17 App. Cas. (D. C.) 505, affirmed 187 U. S. 159.

*Georgia*.—Welch v. Stipe, 95 Ga. 762.

*Indiana*.—Burkhart v. Gladish, 123 Ind. 337; Rarick v. Ulmer, 144 Ind. 25; Staser v. Hogan, 120 Ind. 207; Carthage Turnpike Co. v. Andrews, 102 Ind. 138, 52 Am. Rep. 653; Mills v. Winter, 94 Ind. 329; Cline v. Lindsey, 110 Ind. 337.

*Iowa*.—Furlong v. Carraher, 108 Iowa 492, applying the doctrine to subscribing witnesses; Matter of Goldthorp, 94 Iowa 336, 58 Am. St. Rep. 400; Hull v. Hull, 117 Iowa 738.

*Kansas*.—Zirkle v. Leonard, 61 Kan. 636.

*Maryland*.—Brashears v. Orme, 93 Md. 442.

*Michigan*.—O'Connor v. Madison, 98 Mich. 183; Beaubien v. Cicotte, 12 Mich. 459; Prentis v. Bates, 88 Mich. 567, 93 Mich. 234; Lamb v. Lippincott, 115 Mich. 611.

*Mississippi*.—Sheehan v. Kearney, (Miss. 1896) 21 So. Rep. 41, 35 L. R. A. 102.

*Nebraska*.—Lamb v. Lynch, 56 Neb. 135.

*New York*.—Holcomb v. Holcomb, 95 N. Y.

316.

*Pennsylvania*.—Hoopes's Estate, 174 Pa. St. 373.

*Rhode Island*.—Hopkins v. Wheeler, 21 R. I. 533, 79 Am. St. Rep. 819.

*Wisconsin*.—Crawford v. Christian, 102 Wis. 51.

**The Opinions of Nonexpert Witnesses Are Allowable as an Aid and not as an infallible guide to the jury.** It frequently happens that the most satisfactory evidence of a person's real state of mind is to be gathered from the mind's own action as shown by his conversation, claims, declarations, and acts. Proven facts of this class carry greater weight than the opinions of witnesses. Wells, Appellant, 96 Me. 161, citing Cilley v. Cilley, 34 Me. 162.

**Exceptions to Rule.**—See, as holding that one who has known the testator a long time and often observed him may give his opinion as to the testator's mental condition though he enumerates no facts upon which the opinion is based, Shanley's Appeal, 62 Conn. 325; Higgins v. Nethery, 30 Wash. 239; Ring v. Lawless, 190 Ill. 520; Ryman v. Crawford, 86 Ind. 262. And in Newcomb v. Newcomb, 96 Ky. 120, it is held that it is not necessary that the witness detail the facts and circumstances upon which he bases his opinion. If he satisfy the court that he has had opportunity by association and observation to form an opinion he may state it, although he cannot give any specific facts upon which his opinion is based.

In Prentis v. Bates, 93 Mich. 234, the court intimates that in some cases a witness might be allowed to state his opinion after showing that



(b) *Distinction Between Witnesses For and Witnesses Against Sanity.* — A distinction, however, has been drawn between witnesses who give opinions against the testator's capacity and those who testify to a belief in his mental soundness. In the case of the latter class of witnesses it would seem that one who shows an acquaintance with the person whose mental capacity is in question, and a familiarity with his general conduct, may testify that in his opinion such person is of sound mind. He need not specify the facts upon which he bases his belief. It is sufficient if he knows of nothing tending to indicate insanity.<sup>1</sup>

(c) *Province of Court.* — It is the province of the court, before permitting a nonexpert witness to state an opinion, to determine whether the facts and circumstances enumerated by the witness as the basis of his opinion are such as to entitle him to express an opinion.<sup>2</sup> The court, however, has no authority to pass upon the weight of the opinion given by the witness. Its duty is merely to decide whether such knowledge is shown and such facts stated as to entitle the witness to express any opinion at all.<sup>3</sup> When the whole testimony of a nonexpert witness fails to show any facts justifying an opinion, he should not be allowed to express an opinion.<sup>4</sup>

(4) *Weight of Nonexpert Evidence.* — The weight to be given to the opinion of a nonexpert witness must depend upon the facts which he narrates to sustain it, his opportunities for observation, and his intelligence and freedom from bias.<sup>5</sup>

b. EXPERT WITNESSES — (1) *General Rule.* — Persons shown to be especially fitted by study, experience, and observation to speak upon questions of sanity or insanity may state their opinions as to the mental condition of a testator. Such opinions are admissible, whether formed from actual observance of the person whose sanity is in question or based upon a hypothetical statement of facts.<sup>6</sup>

(2) *Statement of Facts on Which Opinion Based.* — And it has been held that a physician who was in attendance upon or well acquainted with the testator may give his opinion without stating the facts upon which the opinion is founded.<sup>7</sup>

there were acts and appearances of the party which he is unable to describe to the jury, but which left an impression on his mind.

1. *Hull v. Hull*, 117 Iowa 738; *Lamb v. Lippincott*, 115 Mich. 611; *Jones v. Collins*, 94 Md. 403; *Nash v. Hunt*, 116 Mass. 237; *Higgins v. Nethery*, 30 Wash. 239; *Kimberly's Appeal*, 68 Conn. 428, 57 Am. St. Rep. 101; *Shanley's Appeal*, 62 Conn. 325.

2. *Province of Court.* — *Denning v. Butcher*, 91 Iowa 425; *Hall v. Hall*, 117 Iowa 738; *O'Connor v. Madison*, 98 Mich. 183; *Prentiss v. Bates*, 93 Mich. 234; *Beaubien v. Cicotte*, 12 Mich. 459.

The nonprofessional witness may be first examined as to his actual observations relating to the testator's state of mind, so as to lay a foundation for discrediting or rejecting his opinions. *Pidcock v. Potter*, 68 Pa. St. 342, 8 Am. Rep. 181; *Roberts v. Trawick*, 13 Ala. 68. See *Berry Will Case*, 93 Md. 560, where the qualifications of several nonexpert witnesses to testify are discussed.

The matter is within the discretion of the trial court, and as a rule its decision upon the preliminary question will not be disturbed unless it clearly appears that it has not properly exercised its discretion. *Denning v. Butcher*, 91 Iowa 425; *O'Connor v. Madison*, 98 Mich. 183; *Beaubien v. Cicotte*, 12 Mich. 459.

3. *Colee v. State*, 75 Ind. 511, quoted with approval in *Denning v. Butcher*, 91 Iowa 425.

4. *Berry v. Safe Deposit, etc., Co.*, 96 Md. 45; *Brashears v. Orme*, 93 Md. 442; *Prentiss v. Bates*, 93 Mich. 234; *Buyss v. Buyss*, 99 Mich. 354; *Rarick v. Ulmer*, 144 Ind. 25; *Sanders v. Blakeley*, (Ky. 1900) 55 S. W. Rep. 10; *Loughney v. Loughney*, 87 Wis. 92; *Shaver v. McCarthy*, 110 Pa. St. 339.

5. *Weight of Nonexpert Evidence.* — *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33; *Turner's Appeal*, 72 Conn. 305; *Pritchard v. Roe*, 3 Penn. (Del.) 128; *Roe v. Taylor*, 45 Ill. 485; *Bower v. Bower*, 142 Ind. 194; *Howe v. Richards*, 112 Iowa 220; *Wells, Appellant*, 96 Me. 161; *Prentiss v. Bates*, 93 Mich. 234; *In re Merriman*, 108 Mich. 454; *Claffey v. Ledwith*, 56 N. J. Eq. 333; *Foster v. Dickerson*, 64 Vt. 233.

Where a nonprofessional witness has had a long and intimate acquaintance with the person concerning whom he is called upon to testify, and is a person of intelligence, the testimony is often extremely useful. But where the mental disorder is a delusion upon one or a few particular subjects, the testimony of persons with whom the decedent has not had occasion to speak on those subjects is of no weight. *American Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619.

6. See generally the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 414.

7. *Statement of Facts.* — *Jones v. Collins*, 94 Md. 403; *Crockett v. Davis*, 81 Md. 134.

(3) *Weight of Expert Evidence* — (a) **General Rule.** — The weight to be attached to the testimony of expert witnesses must depend upon their character, standing, experience, bias or lack of bias, conduct and appearance on the stand, and the materiality and correctness of the facts assumed as the grounds of their beliefs.<sup>1</sup>

(b) **Where Opinion Overcome by Facts.** — Where the opinions of medical witnesses are overcome by direct, positive proof of facts inconsistent with those opinions, they must yield to the facts.<sup>2</sup>

(4) *Hypothetical Questions.* — In propounding a hypothetical question counsel may assume the facts in accordance with his theory of them. It is not essential that he state the facts as they exist, but the hypothesis should be based on a state of facts which the evidence tends to prove.<sup>3</sup> And the hypothesis must be clearly stated, so that the jury may know with certainty upon precisely what state of assumed facts the expert bases his opinion.<sup>4</sup> And while such a question may not be improper because it includes only a part of the facts in evidence, it will be so if by reason of omission it manifestly fails to present the facts which it does include in their just and true relation, and causes them to appear in one that is untrue and unjust.<sup>5</sup>

**But See, Contra,** strong *dissenting* opinion in *Jones v. Collins*, 94 Md. 403. Also *White v. Bailey*, 10 Mich. 155; *Hastings v. Rider*, 99 Mass. 622; *Chandler v. Barrett*, 21 La. Ann. 58, 99 Am. Dec. 701.

**1. Weight of Such Evidence.** — *Smith v. Day*, 2 Penn. (Del.) 245; *Taylor v. Cox*, 153 Ill. 220; *Blough v. Parry*, 144 Ind. 463; *Bever v. Spangler*, 93 Iowa 603; *Dobie v. Armstrong*, 27 N. Y. App. Div. 520; *Hawke v. Hawke*, 82 Hun (N. Y.) 439, *affirmed* 146 N. Y. 366; *Foster v. Dickerson*, 64 Vt. 233; *Jones v. Roberts*, 96 Wis. 427.

In *Blake v. Rourke*, 74 Iowa 519, the jury was instructed that the opinions of experts might, under some circumstances, be given more value than those of nonexperts; but in *Meeker v. Meeker*, 74 Iowa 352, 7 Am. St. Rep. 489, decided at the same term of court, a similar instruction approved was qualified by the statement that the question of weight was for the jury, the court remarking that the fact that the expert witnesses testified from actual observation gave them added weight.

**Physicians** as experts are no better prepared to judge of the mental capacity of a person to execute a will than other men of sound judgment and good common sense. *Carpenter v. Calvert*, 83 Ill. 62.

**As Against Testimony of Persons Intimately Associated with Testator** — In *Matter of Kiedaisch*, 2 Connoly (N. Y.) 450, Ransom, Surrogate, said: "The testimony of experts, although admissible always and a great aid to a court and jury in discovering where the truth lies in a question of this kind [sanity of testator], cannot ever be held to be conclusive and controlling against the testimony of those persons of intelligence who saw the man daily, and who had transactions with him of a social character and in business." And see *Kelly v. Perreault*, 5 Idaho 221. See 1 Redf. on Wills (1876) 155n, for a general criticism of expert testimony.

**See a Very Forceful Opinion Against Expert Witnesses in Will Cases,** *Berry v. Safe Deposit, etc., Co.*, 96 Md. 45. Also *Berry Will Case*, 93 Md. 560.

**Expert Evidence May Be Given Controlling Weight** if from the whole case a conclusion is reached that it is entitled to that weight; and it may be rejected altogether if the conclusion is reached that it is not of sufficient weight to influence the result. *Jones v. Roberts*, 96 Wis. 427.

**2. Where Opinion Must Yield to Facts** — *United States*. — *Leach v. Burr*, 188 U. S. 510, *affirming* 17 App. Cas. (D. C.) 128.

*Maryland*. — *Berry Will Case*, 93 Md. 560; *Berry v. Safe Deposit Co.*, 96 Md. 45.

*Missouri*. — *Rankin v. Rankin*, 61 Mo. 295.

*New York*. — *Matter of Henry*, (Surrogate Ct.) 18 Misc. (N. Y.) 149; *Matter of Conaty*, (Surrogate Ct.) 26 Misc. (N. Y.) 104; *Matter of Lawrence*, (Surrogate Ct.) 27 Misc. (N. Y.) 473; *Matter of Hewitt*, (Surrogate Ct.) 31 Misc. (N. Y.) 81; *Matter of McKean*, (Surrogate Ct.) 31 Misc. (N. Y.) 703; *Matter of Seagrist*, 1 N. Y. App. Div. 615; *Dobie v. Armstrong*, 27 N. Y. App. Div. 520; *Philips v. Philips*, 77 N. Y. App. Div. 113.

*Wisconsin*. — *Jones v. Roberts*, 96 Wis. 427.

**3. Hypothetical Questions by Counsel.** — *Barber's Appeal*, 63 Conn. 393; *Meeker v. Meeker*, 74 Iowa 357; *Bever v. Spangler*, 93 Iowa 603; *Kerr v. Lunsford*, 31 W. Va. 659.

**But a Hypothetical Question Calling for the Opinion of the Witness Must State Fairly Such Facts in Evidence** as are relied on by the party asking the question. *Prather v. McClelland*, (Tex. Civ. App. 1894) 26 S. W. Rep. 657; also *Prather v. McClelland*, 76 Tex. 583.

**4.** *McMechen v. McMechen*, 17 W. Va. 682, 41 Am. Rep. 682. See also *Kempsey v. McGinnis*, 21 Mich. 123.

**5.** *Barber's Appeal*, 63 Conn. 393.

**Questions by Proponent in Rebuttal.** — Where contestants have asked hypothetical questions of expert witnesses the proponent in rebuttal is not limited to the same questions but may include any omitted facts which it is thought the evidence tends to prove, or omit any facts included in contestants' questions which it is thought the evidence fails to prove. *Foster v. Dickerson*, 64 Vt. 233.

**Evidence of Declarations by Testator.** — It is

*c. SUBSCRIBING WITNESSES* — (1) *Necessity for Calling.* — As to the necessity of calling the subscribing witnesses or of accounting for their absence, reference is made to another part of this title.<sup>1</sup>

(2) *Admissibility in General.* — A subscribing witness may be asked his opinion as to the testator's mental condition at the time the will was executed, and it is unnecessary to lay a foundation for such opinion by any statement of the facts upon which it rests.<sup>2</sup>

(3) *Weight of Such Evidence* — (a) *In General.* — The weight to be attached to the testimony of subscribing witnesses is for the determination of the jury, as in the case of any other witness, according to the tests applicable to all classes of witnesses.<sup>3</sup>

(b) *Where Witness Discredits Competency.* — The courts have generally recognized the doctrine that where a subscribing witness discredits the capacity of the testator, his testimony should be received with great caution.<sup>4</sup>

proper to include in the statement of fact, upon which a hypothetical question is based, evidence of any declarations of the testator which tend to throw light upon his mental condition. "If they were properly admitted to establish the mental condition of the testator, then they might well be considered by an expert in arriving at his opinion as to decedent's condition of mind." *Bever v. Spangler*, 93 Iowa 576.

1. See *supra*, this section, *Necessity of Prima Facie Showing by Proponents*.

**A Contestant Is Not Limited to the Testimony of the Subscribing Witnesses** to show the mental condition of the testator at the time the will was executed. *Ashworth v. McNamee*, (Colo. App. 1902) 70 Pac. Rep. 156; *In re D'Avignon*, 12 Colo. App. 489.

**Subscribing Witness Not Proponent's Witness.** — The proponent is not required to accept the testimony of the subscribing witness. He is not his witness but that of the law. Therefore he may contradict him. *Lowe v. Jolliffe*, 1 W. Bl. 366, Bull. N. P. 254b; *Crowell v. Kirk*, 3 Dev. L. (14 N. C.) 355.

2. **Admissibility.** — *Pritchard v. Roe*, 3 Penn. (Del.) 128; *Steele v. Helm*, 2 Marv. (Del.) 237; *Smith v. Day*, 2 Penn. (Del.) 245; *Scott v. McKee*, 105 Ga. 256; *Hertrich v. Hertrich*, 114 Iowa 643, 89 Am. St. Rep. 389; *Furlong v. Carraher*, 108 Iowa 492; *Jones v. Collins*, 94 Md. 403; *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *Kaufman v. Coughman*, 49 S. Car. 159, 61 Am. St. Rep. 808.

**Under the Wording of the Illinois Statute** it has been held that if the attesting witnesses, at the time the will was signed and attested, believed the testator or testatrix was of sound mind and memory, that is sufficient to admit the will to probate. The right to probate the will is not dependent upon the belief of the attesting witnesses subsequently formed. *Waugh v. Moan*, 200 Ill. 298; *Matter of Ingalls*, 148 Ill. 287; *Dickie v. Carter*, 42 Ill. 376.

3. **Weight of Evidence.** — *Pritchard v. Roe*, 3 Penn. (Del.) 128; *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33; *Barber's Appeal*, 63 Conn. 393; *Foster v. Dickerson*, 64 Vt. 233. And see generally the title **WITNESSES**.

**Relative Weight of Testimony of Subscribing Witnesses and Other Nonexpert Witnesses.** — *In Beaubien v. Cicotte*, 12 Mich. 459, the court said: "It is little short of absurdity to hold

that persons having equal or greater facilities, derived from personal acquaintance or long intercourse, are not as competent to form opinions as those who are required to have no opportunity beyond one brief interview."

In *Berry Will Case*, 93 Md. 560, the court told the jury that the opinions of subscribing witnesses were of no more weight than the opinions of other witnesses of equal intelligence and equal knowledge of the matters as to which the subscribing and the nonsubscribing witnesses testified. This was held error, on the grounds, first, that it eliminates all question of the credibility of the witnesses, and, second, that it loses sight of the distinction which the law makes between the subscribing and the nonsubscribing witnesses, by reason of the fact that the former are placed around the testator to inform themselves of and judge of his capacity.

But in *Crandall's Appeal*, 63 Conn. 365, 38 Am. St. Rep. 375, it was held that the evidence of attesting witnesses is not entitled to any more weight than that of any other witness with equal opportunities of observation.

4. **Where Subscribing Witness Discredits Testator's Competency.** — See *Matter of Tyler*, 121 Cal. 405; *Matter of Nelson*, 132 Cal. 182; *Matter of Motz*, 136 Cal. 558; *McMeekin v. McMeekin*, 2 Bush (Ky.) 79; *Howard's Will*, 5 T. B. Mon. (Ky.) 203, 17 Am. Dec. 60; *Snyder v. Cunningham*, (Ky. 1891) 16 S. W. Rep. 30; *Hoerth v. Zable*, 92 Ky. 202; *Cook's Estate*, 41 Leg. Int. (Pa.) 6; *Lamberts v. Cooper*, 29 Gratt. (Va.) 61; *Cheatham v. Hatcher*, 30 Gratt. (Va.) 56, 32 Am. Rep. 650; *Young v. Barner*, 27 Gratt. (Va.) 103; *Tucker v. Sandige*, 85 Va. 546; *Loughney v. Loughney*, 87 Wis. 92.

In *Stevens v. Leonard*, 154 Ind. 67, 77 Am. St. Rep. 446, the court, after reviewing and quoting from many authorities, says: "Such an attitude is not merely inconsistent with the position he has voluntarily taken, but is suggestive of fraud and double dealing. It involves a betrayal of confidence, and, if the witness is believed, in some instances it may be attended with the most distressing consequences. The credibility of the witness becomes at once a matter of serious inquiry, and his desertion of his position as a sustaining witness is an important fact for the consideration of the jury. In such a case it is entirely proper for the court to inform the jury that they may



*d. POINTS AS TO WHICH OPINION OF WITNESS MAY BE GIVEN.*—A witness, whether he be an expert, a nonexpert, or an attesting witness, may state his opinion only as to the condition of the testator's mind generally. He cannot state his opinion as to the testator's capacity to make a will, as this is the precise issue which it is the duty of the jury to determine.<sup>1</sup>

**3. Declarations** — *a. OF TESTATOR.* — In an issue of testamentary capacity statements of a testator made either before, at the time of, or after the making of a will, where they tend to throw light on his mental condition, are admissible for that purpose.<sup>2</sup> They are not admissible, however, for the purpose

consider the fact of such implied contradiction, if they find that it exists, in weighing his testimony."

But see *contra*, *In re D'Avignon*, 12 Colo. App. 489; also *Davis v. Denny*, 94 Md. 390; *American Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619, where the testimony of an attesting witness attacking the capacity of testatrix was given great weight. See also *Tucker v. Sandidge*, 85 Va. 546.

**1. Scope of Inquiry.** — See for a very full discussion of this question, the case of *Brown v. Mitchell*, 88 Tex. 350.

**Nonexpert Witnesses.** — *Jameson v. Drinkald*, 12 Moo. 148, 22 E. C. L. 442; *Matter of Taylor*, 92 Cal. 564; *Schneider v. Manning*, 121 Ill. 376; *Pelamoures v. Clark*, 9 Iowa 1; *Farrell v. Brennan*, 32 Mo. 328, 82 Am. Dec. 137; *De Wit v. Barly*, 17 N. Y. 340; *Hewlett v. Wood*, 55 N. Y. 634; *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459; *Wilkinson v. Pearson*, 23 Pa. St. 117; *Gibson v. Gibson*, 9 Yerg. (Tenn.) 329; *In re Blood*, 62 Vt. 359.

**Contra.** — See *Porter v. Throop*, 47 Mich. 313.

**Expert Witnesses.** — *Walker v. Walker*, 34 Ala. 469; *Pyle v. Pyle*, 158 Ill. 289; *Marshall v. Hanby*, 115 Iowa 318; *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352; *May v. Bradley*, 127 Mass. 414; *White v. Bailey*, 10 Mich. 155 (in this case the question was: "What was his mental capacity?" but the opinion of the court applied the doctrine of the text); *Kempsey v. McGinniss*, 21 Mich. 123; *In re Buckley*, (Surrogate Ct.) 2 N. Y. Supp. 27; *Wyse v. Wyse*, 155 N. Y. 367; *Palmer's Estate*, 5 W. N. C. (Pa.) 138; *Fairchild v. Bascom*, 35 Vt. 398; *Frary v. Gusha*, 59 Vt. 257. See also *Burdon's Estate*, 11 W. N. C. (Pa.) 138.

**Attesting Witnesses.** — *Furlong v. Carraher*, 108 Iowa 492. See also *Runyan v. Price*, 15 Ohio St. 1, 86 Am. Dec. 459.

**Form of Question.** — In *Woodbury v. Obea*, 7 Gray (Mass.) 467, it was held that in a case of conflicting evidence the expert witness should not be asked, "Suppose all the facts stated by the several witnesses to be true, was the testator laboring under an insane delusion, or was he of an unsound mind?" The question should include the facts stated hypothetically. The reason given for the objection to the above form of interrogatory is that, the evidence being conflicting, the answer of the witness might tend to mislead. "since it might, unknown to the jury, be founded upon some proposition or statement of facts differing in material particulars from that which appeared to them to be satisfactorily established." And see the title **EXPERT WITNESSES**, 8 ENCYC. OF PL. AND PR. 752.

A hypothetical question should not be so

drawn as to call for an interpretation of fact, which the jury are as competent to make as an expert. *Prentiss v. Bates*, 88 Mich. 567.

In *Crowell v. Kirk*, 3 Dev. L. (14 N. Car.) 355, approved in *Fairchild v. Bascom*, 35 Vt. 398, it was held that questions propounded to experts and to others calling for an opinion should be so framed as to require them to state the degree of the testator's capacity in their own language, in other words, "in the best way they can."

**For Further Illustrations** in this connection see the following cases:

*Alabama.* — *Bowling v. Bowling*, 8 Ala. 538; *Stubbs v. Houston*, 33 Ala. 555.

*Connecticut.* — *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. Rep. 85; *Shanley's Appeal*, 62 Conn. 325.

*Illinois.* — *Schneider v. Manning*, 121 Ill. 376.

*Indiana.* — *Staser v. Hogan*, 170 Ind. 207.

*Iowa.* — *Severin v. Zack*, 55 Iowa 28; *Parsons v. Parsons*, 66 Iowa 754; *In re Norman*, 72 Iowa 84.

*Maryland.* — *Chase v. Winans*, 59 Md. 475.

*Michigan.* — *Beaubien v. Cicotte*, 12 Mich. 459; *Porter v. Throop*, 47 Mich. 313.

*Minnesota.* — *Matter of Pinney*, 27 Minn. 280.

*North Carolina.* — *Clary v. Clary*, 2 Ired. L. (24 N. Car.) 78.

*Ohio.* — *Brockmeier v. Buck*, 9 Ohio Dec. (Reprint) 353, 12 Cinc. L. Bul. 213.

*Pennsylvania.* — *Titlow v. Titlow*, 54 Pa. St. 216, 93 Am. Dec. 691.

*Vermont.* — *Hathaway v. National L. Ins. Co.*, 48 Vt. 335.

*Wisconsin.* — *Bridge v. Oshkosh*, 71 Wis. 363.

**In Apparent Conflict** with the doctrine stated in the text, see *McHugh v. Fitzgerald*, 103 Mich. 21, in which a physician was allowed to state, under objection, that he thought the testatrix was competent to make a will, and the ruling was affirmed.

**2. Declarations of Testator** — *United States.* — *Stevens v. Vancleve*, 4 Wash. (U. S.) 262.

*Alabama.* — *Coghill v. Kennedy*, 119 Ala. 641.

*Connecticut.* — *Constock v. Hadlyme Ecclesiastical Soc.*, 8 Conn. 254, 20 Am. Dec. 100; *Barber's Appeal*, 63 Conn. 393.

*Delaware.* — *Ball v. Kane*, 1 Penn. (Del.) 90.

*District of Columbia.* — *Barbour v. Moore*, 4 App. Cas. (D. C.) 535.

*Georgia.* — *Dennis v. Weekes*, 51 Ga. 24.

*Illinois.* — *Reynolds v. Adams*, 90 Ill. 134, 32 Am. Rep. 15; *American Bible Soc. v. Price*, 115 Ill. 623; *Massey v. Huntington*, 118 Ill. 80; *Nieman v. Schnitker*, 181 Ill. 400; *Waugh v. Moan*, 200 Ill. 298; *Cockeram v. Cockeram*, 17 Ill. App. 604.

*Indiana*. — Runkle v. Gates, 11 Ind. 95; Hayes v. West, 37 Ind. 21; Bundy v. McKnight, 48 Ind. 502; Todd v. Fenton, 66 Ind. 25; Vance v. Vance, 74 Ind. 370; Vanvalkenberg v. Vanvalkenberg, 90 Ind. 433; Lamb v. Lamb, 105 Ind. 456; Stazer v. Hogan, 120 Ind. 207; Bower v. Bower, 142 Ind. 194.

*Iowa*. — Bates v. Bates, 27 Iowa 110, 1 Am. Rep. 260; Ross v. McQuiston, 45 Iowa 145; Stephenson v. Stephenson, 62 Iowa 163; Denning v. Butcher, 91 Iowa 425; Beaver v. Spangler, 93 Iowa 603; Matter of Goldthorpe, 94 Iowa 336, 58 Am. St. Rep. 400; Matter of Fenton, 97 Iowa 192; Manatt v. Scott, 106 Iowa 203 68 Am. St. Rep. 293.

*Maryland*. — Colvin v. Warford, 20 Md. 357; Griffith v. Diffenderffer, 50 Md. 466.

*Massachusetts*. — Shailer v. Bumstead, 99 Mass. 112; May v. Bradlee, 127 Mass. 414.

*Michigan*. — Harring v. Allen, 25 Mich. 505; Haines v. Hayden, 95 Mich. 332, 35 Am. St. Rep. 566.

*Mississippi*. — Sheehan v. Kearney, (Miss. 1896) 21 So. Rep. 41, 35 L. R. A. 102.

*Missouri*. — Cawthorn v. Haines, 24 Mo. 237; Tingley v. Gowgill, 48 Mo. 291; Thomas v. Stump, 62 Mo. 275; Spoonemore v. Cables, 66 Mo. 579; Muller v. St. Louis Hospital Assoc., 73 Mo. 243; Bush v. Bush, 87 Mo. 480; Rule v. Maupin, 84 Mo. 587; Thompson v. Ish, 99 Mo. 160, 17 Am. St. Rep. 552.

*New Hampshire*. — Whitman v. Morey, 63 N. H. 448.

*New Jersey*. — Boylan v. Meeker, 28 N. J. L. 274.

*New York*. — Tunison v. Tunison, 4 Bradf. (N. Y.) 138; Marx v. McGlynn, 4 Redf. (N. Y.) 455, 88 N. Y. 357; Matter of Soden, (Surrogate Ct.) 38 Misc. (N. Y.) 25; Matter of Clark, 40 Hun (N. Y.) 233; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71; Cudney v. Cudney, 68 N. Y. 148; Matter of Potter, 161 N. Y. 84; Matter of Woodward, 167 N. Y. 28.

*Pennsylvania*. — Rambler v. Tryon, 7 S. & R. (Pa.) 89, 90, 10 Am. Dec. 444; McTaggart v. Thompson, 14 Pa. St. 149.

*Tennessee*. — Kirkpatrick v. Jenkins, 96 Tenn. 85.

*Vermont*. — Foster v. Dickerson, 64 Vt. 233; Re Barney, 71 Vt. 217.

*Wisconsin*. — Bryant v. Pierce, 95 Wis. 331.

**"In Such Cases the Evidence Is Admissible Simply as External Manifestations of the Testator's Mental Capacity, and not as evidence of the truth or falsity of the facts he states. Mental disturbance may be detected by declarations as surely as by conduct, and hence the declarations of persons charged with insanity are admissible in a chain of logical connection to show the mental condition existing when the will was executed."** Bever v. Spangler, 93 Iowa 603.

**The Testator's Declarations Tending to Show Knowledge of Any Fact otherwise proven to have existed are admissible for the purpose of proving such knowledge.** Foster v. Dickerson, 64 Vt. 233.

**Declarations of the Testator on the Subject of Making Wills are competent on question of mental incapacity.** Bower v. Bower, 142 Ind. 194; Staser v. Hogan, 120 Ind. 207.

**So the Testator's Declarations Indicative of His Feelings towards those interested in the controversy are admissible to prove such feelings.** Foster v. Dickerson, 64 Vt. 233; Matter of Goldthorpe, 94 Iowa 336, 58 Am. St. Rep. 400; Bryant v. Pierce, 95 Wis. 331; Barbour v. Moore, 4 App. Cas. (D. C.) 535.

**It Is Competent for the Contestant to Produce Evidence of Entire Conversations Between Witnesses and the Testatrix** tending to prove testamentary incapacity, and it is error for the court to restrict the contestant solely to what the witness stated. Matter of Potter, 161 N. Y. 84.

**Question of Revocation of Will.** — So the testator's acts and declarations during and prior to the period of time within which his will is supposed to have been destroyed are admissible in evidence on the question of his capacity to revoke his will. McIntosh v. Moore, 22 Tex. Civ. App. 22; Matter of Soden, (Surrogate Ct.) 38 Misc. (N. Y.) 25.

**Evidence as to the Effect upon the Testator of the Contestant's Presence, and What the Testator Said in His Presence,** is competent as part of the *res gestæ*. Foster v. Dickerson, 64 Vt. 233.

**Proof of a Reference to the Testator's Mental Weakness, Made in Her Hearing and Not Responded to,** is admissible on the question of her testamentary capacity. Matter of Fenton, 97 Iowa 192.

**Letters Written by the Testator** both before and after the date of the will are admissible to prove the state of his mind. Bulger v. Ross, 98 Ala. 267; Johnson v. Stivers, 95 Ky. 128; Fuller v. Fuller, 83 Ky. 345; Marx v. McGlynn, 88 N. Y. 357, 4 Redf. (N. Y.) 455; Matter of Blakely, 48 Wis. 294; McNinch v. Charles, 2 Rich. L. (S. Car.) 229; Foster v. Dickerson, 64 Vt. 233; Vance v. Upson, 66 Tex. 476.

But in Doe v. Samuel, 12 N. Bruns. 265, letters written by a testator to his relatives before making his will, which excluded them, stating that he intended to leave his property to them, were inadmissible in a contest of the will on the ground of mental incapacity of the testator.

**Letter Written by Lawyer at Instance of Testatrix.** — In Woodward v. Sullivan, 152 Mass. 470, a letter written by an attorney, at the instance of the testatrix, repudiating a bond which she had made to convey her estate to a certain party, was admitted in a controversy as to her mental capacity to make a will which she executed two and one-half years after giving the bond.

**A Paper Written by the Testator Two Years After Making His Will,** explaining his reasons for its provisions, is admissible in evidence to show mental capacity on his part. Wood v. Sawyer, Phil. L. (61 N. Car.) 251.

**So a Diary Kept by the Testator** has been held admissible. Marx v. McGlynn, 88 N. Y. 357.

**Letters Addressed to the Testator** are inadmissible as evidence of his capacity. Wright v. Doe, 7 Ad. & El. 313, 34 E. C. L. 95; unless it be shown that they came to him, and that he exercised some act of judgment or understanding upon them, Waters v. Waters, 35 Md. 531.

of proving the facts stated.<sup>1</sup> Declarations of a testator made after the execution of the will derogatory to the validity of the will have been held admissible on the issue of testamentary capacity, on the theory that the fact of such declarations, without reference to their contents, in itself tends to prove a want of mental capacity.<sup>2</sup>

**Declarations of a Decedent as to His Intended Disposition of His Property,** made before the execution of the will, are admissible to show a fixed purpose on the part of the deceased.<sup>3</sup>

*b. OF BENEFICIARIES* — (1) *Sole Beneficiary.* — The declarations of a sole beneficiary under a will, indicative of a belief in the testator's incompetency, are proper evidence as admissions against interest.<sup>4</sup>

(2) *One of Several Beneficiaries.* — By the weight of authority, the declarations and admissions of one of several beneficiaries, made in the absence of the others, to the effect that the testator was of unsound mind, are not

**1. Inadmissible to Prove Facts Stated** — *California.* — Lang's Estate, 65 Cal. 19.

*Connecticut.* — Comstock v. Hadlyme Ecclesiastical Soc., 8 Conn. 254, 20 Am. Dec. 100; Canada's Appeal, 47 Conn. 450.

*Illinois.* — Dickie v. Carter, 42 Ill. 376.

*Iowa.* — Bates v. Bates, 27 Iowa 110, 1 Am. Rep. 260.

*Maine.* — Jones v. McLellan, 76 Me. 49.

*Missouri.* — Gibson v. Gibson, 24 Mo. 228; Rule v. Maupin, 84 Mo. 587.

*New Jersey.* — Rusling v. Rusling, 36 N. J. Eq. 603.

*Pennsylvania.* — Moritz v. Brough, 16 S. & R. (Pa.) 405.

*Vermont.* — Robinson v. Hutchinson, 26 Vt. 38, 60 Am. Dec. 298.

*West Virginia.* — Thompson v. Updegraff, 3 W. Va. 629; Dinges v. Branson, 14 W. Va. 100.

But see Reel v. Reel, 1 Hawks (N. Car.) 250, 9 Am. Dec. 632; Howell v. Barden, 3 Dev. L. 8 (14 N. Car.) 442, and dissenting opinion in Jackson v. Kniffen, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390.

**Undue Influence.** — Such declarations are not admissible as evidence of undue influence. Comstock v. Hadlyme Ecclesiastical Soc., 8 Conn. 254, 20 Am. Dec. 71; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71.

**Declarations Conflicting with Will.** — Statements of a testator, made either before or after the date of the will, in conflict with the provisions of the will, are, generally speaking, not admissible for the purpose of invalidating or modifying it. Taylor v. Pegram, 151 Ill. 106; Dickie v. Carter, 42 Ill. 376; Bevelot v. Lestrade, 153 Ill. 625; Manogue v. Herrell, 13 App. Cas. (D. C.) 455.

**2.** Ball v. Kane, 1 Penn. (Del.) 97; Waterman v. Whitney, 11 N. Y. 160, 62 Am. Dec. 71; Reynolds v. Adams, 90 Ill. 146, 32 Am. Rep. 15; McTaggart v. Thompson, 14 Pa. St. 149; Haines v. Hayden, 95 Mich. 332, 35 Am. St. Rep. 566.

**3.** Roberts v. Trawick, 17 Ala. 58; Seale v. Chambliss, 35 Ala. 19; Davis v. Rogers, 1 Houst. (Del.) 93; Sutton v. Sutton, 5 Harr. (Del.) 459; Conway v. Vizzard, 122 Ind. 266; Goodbar v. Lidikey, 136 Ind. 1, 43 Am. St. Rep. 296; Matter of Lefevre, 102 Mich. 568; Hammond v. Dike, 42 Minn. 273, 18 Am. St. Rep. 503; Pancoast v. Graham, 15 N. J. Eq. 294; Brown v. Mitchell, 88 Tex. 350.

**Where the Testator Executed a Codicil to His Will During a Sudden and Fatal Illness,** it was competent to show that he had declared his intention to make the changes contained in the codicil a short time before his illness. Hammond v. Dike, 42 Minn. 273, 18 Am. St. Rep. 503. See also Couch v. Couch, 7 Ala. 519, 42 Am. Dec. 602; Bundy v. McKnight, 48 Ind. 502; Prather v. McClelland, 76 Tex. 574.

Letters showing such previous intention are also admissible. Dobie v. Armstrong, 27 N. Y. App. Div. 520.

But in Wurzell v. Beckman, 52 Mich. 478, declarations of a testatrix that she wanted the first will to stand were held inadmissible on an issue as to her mental capacity to make a second will.

**The Mere Fact that a Will Is in the Direction of a Preconceived Purpose** of the testator is not sufficient to establish the same unless he was of sound mind when the will was made. In re Hoover, 19 D. C. 495.

**Will Not in Accordance with Prior Declarations.** — Nor can the will be regarded as invalid because not made in conformity to previous declarations of the testator. Quisenberry v. Quisenberry, 14 B. Mon. (Ky.) 386.

In Harwood v. Baker, 3 Moo. P. C. 282, the fact that the testator's will was entirely different from his previously expressed directions received great weight in overthrowing the will.

But it has been held that evidence of declarations of the testator, prior to the making of the will, indicative of a purpose to dispose of his property differently from the disposition made in the will, is inadmissible. Hill v. Bahrns, 158 Ill. 314.

**4. Declarations of Sole Beneficiary.** — Blattner v. Weis, 19 Ill. 246; McMillan v. McDill, 110 Ill. 47; Campbell v. Campbell, 138 Ill. 612; Egbers v. Egbers, 177 Ill. 82; Wallis v. Luhring, 134 Ind. 447; Lundy v. Lundy, 118 Iowa 445. See also Phelps v. Hartwell, 1 Mass. 71, per Sedgwick, J.; Davis v. Calvert, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282 (certain declarations of executor who was also contingent devisee); Fairchild v. Bascomb, 35 Vt. 398; Horn v. Pullman, 10 Hun (N. Y.) 471; Brick v. Brick, 66 N. Y. 144; Julke v. Adam, 1 Redf. (N. Y.) 454; Brush v. Holland, 3 Bradf. (N. Y.) 240.



admissible in evidence against the other beneficiaries.<sup>1</sup>

c. OF PARTIES WITHOUT INTEREST. — Evidence of statements of others than contestees against the mental capacity of the testator, even though made in reference to some matters connected with the testator, are inadmissible as purely hearsay.<sup>2</sup>

4. Character of Will as Evidence — a. GENERAL RULE. — Every person possessed of testamentary capacity may dispose of his property by will as he sees fit. The only question open to investigation, assuming the absence of fraud, coercion, or undue influence, is that of the testator's competency, measured by the accepted legal standards. That being shown, the wisdom or folly, justness or unjustness, of the will, can play no part in the question of its validity.<sup>3</sup>

1. Declarations of One of Several Beneficiaries — *United States*. — Ormsby v. Webb, 134 U. S. 47.

*Alabama*. — Blakey v. Blakey, 33 Ala. 611; Seale v. Chambliss, 35 Ala. 19.

*Connecticut*. — Dale's Appeal, 57 Conn. 127.

*Georgia*. — Morris v. Stokes, 21 Ga. 252.

*Illinois*. — Campbell v. Campbell, 138 Ill. 612.

*Indiana*. — Hayes v. Burkam, 67 Ind. 359; Shorb v. Brubaker, 94 Ind. 165; Roller v. Kling, 150 Ind. 159.

*Massachusetts*. — Phelps v. Hartwell, 1 Mass. 71; Shailer v. Bumstead, 99 Mass. 112.

*Michigan*. — O'Connor v. Madison, 98 Mich. 183; Matter of Lefevre, 102 Mich. 568.

*Missouri*. — Von De Veld v. Judy, 143 Mo. 348. In Schierbaum v. Schemme, 157 Mo. 12, 80 Am. St. Rep. 604, the earlier Missouri cases of Armstrong v. Farrar, 8 Mo. 627; Hurst v. Robinson, 13 Mo. 82, 53 Am. Dec. 134; Allen v. Allen, 26 Mo. 327, and Jackson v. Hardin, 83 Mo. 175, holding a contrary doctrine, are discussed and overruled. Wood v. Carpenter, 166 Mo. 465.

*New York*. — La Bau v. Vanderbilt, 3 Redf. (N. Y.) 384 (containing a review of the authorities); Matter of Kennedy, 167 N. Y. 163, affirming 53 N. Y. App. Div. 105; Naul v. Naul, 75 N. Y. App. Div. 292; Osgood v. Manhattan Co., 3 Cow. (N. Y.) 612, 15 Am. Dec. 304; Dan v. Brown, 4 Cow. (N. Y.) 483; Matter of Baird, 47 Hun (N. Y.) 77.

*Ohio*. — Thompson v. Thompson, 13 Ohio St. 356.

*Pennsylvania*. — Bovard v. Wallace, 4 S. & R. (Pa.) 499; Nussle v. Arnold, 13 S. & R. (Pa.) 323; Dotts v. Fetzner, 9 Pa. St. 88; Clark v. Morrison, 25 Pa. St. 453; Titlow v. Titlow, 54 Pa. St. 216, 93 Am. Dec. 6; Hauberger v. Root, 6 W. & S. (Pa.) 431; Dietrich v. Dietrich, 4 Watts (Pa.) 167; Boyd v. Eby, 8 Watts (Pa.) 66.

*Virginia*. — Whitelaw v. Whitelaw, 96 Va. 712.

*West Virginia*. — Forney v. Ferrell, 4 W. Va. 729.

But see Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681.

For Other Declarations, see Atkins v. Sanger, 18 Mass. 192; Dan v. Brown, 4 Cow. (N. Y.) 483. But compare Harvey v. Anderson, 12 Ga. 69; Williamson v. Nabers, 14 Ga. 286; Lewis v. Mason, 109 Mass. 169; Peebles v. Stevens, 8 Rich. L. (S. Car.) 198, 64 Am. Dec. 750; Durant v. Ashmore, 2 Rich. L. (S. Car.) 184; Brown v. Moore, 6 Yerg. (Tenn.) 272.

An Obituary Notice Published with the Sanction of One of Several Testaments, reciting the intelligence and remarkable memory of the testatrix during the latter part of her life, is not admissible against the other contestants as an admission, nor is it admissible to impeach the testimony of the contestant with whose knowledge it was published. Hull v. Hull, 117 Iowa 738.

But in Kentucky a Rule Directly Contrary to this has been established; the courts of that state, although recognizing the weight of authority to be with the rule as stated in the text, maintaining that the declaration of one devisee tending to show a belief in the incapacity of the testator is admissible against all. Gibson v. Sutton, 70 S. W. Rep. 188, 24 Ky. L. Rep. 868, citing Beall v. Cunningham, 1 B. Mon. (Ky.) 399; Rogers v. Rogers, 2 B. Mon. (Ky.) 324, and Milton v. Hunter, 13 Bush (Ky.) 163.

2. Matter of Lefevre, 102 Mich. 568.

The Declarations of Subscribing Witnesses since deceased, or out of the jurisdiction, are not admissible to invalidate the will. Boardman v. Woodman, 47 N. H. 120; Sellars v. Sellars, 2 Heisk. (Tenn.) 430; Weatherhead v. Sewell, 9 Humph. (Tenn.) 272; Sewall v. Robbins, 139 Mass. 164; Fox v. Evans, 3 Yeates (Pa.) 506. Contra, Harden v. Hays, 9 Pa. St. 151. They may be used only to impeach the testimony of the witness, Stirling v. Stirling, 64 Md. 138.

3. General Rule as to Character of Will — *Alabama*. — Burney v. Torrey, 100 Ala. 157, 46 Am. St. Rep. 33.

*California*. — Matter of Spencer, 96 Cal. 448; Matter of Wilson, 117 Cal. 262; Matter of Motz, 136 Cal. 558.

*Connecticut*. — Sturdevant's Appeal, 71 Conn. 392.

*Delaware*. — Smith v. Day, 2 Penn. (Del.) 245.

*District of Columbia*. — Barbour v. Moore, 4 App. Cas. (D. C.) 535.

*Illinois*. — Carpenter v. Calvert, 83 Ill. 62; Salisbury v. Aldrich, 118 Ill. 199; Schneider v. Manning, 121 Ill. 376; Taylor v. Pegram, 151 Ill. 106; Nicewander v. Nicewander, 151 Ill. 156; McCommon v. McCommon, 151 Ill. 428; Kaenders v. Montague, 180 Ill. 300; Hollenbeck v. Cook, 180 Ill. 65; Entwistle v. Meikle, 180 Ill. 9; Nieman v. Schnitker, 181 Ill. 400.

*Indiana*. — Dyer v. Dyer, 87 Ind. 13; Rarick v. Ulmer, 144 Ind. 25.

*Iowa*. — Collins v. Brazill, 63 Iowa 434; Trotter v. Trotter, 117 Iowa 417; Denning v.

*b. FOR WHAT PURPOSE TO BE CONSIDERED.* — The character of the provisions, however, as being just or unjust, reasonable or unreasonable, may be considered by the jury as tending to throw light on the capacity of the testator.<sup>1</sup> Evidence is therefore admissible tending to throw light on the ques-

Butcher, 91 Iowa 425; Perkins *v.* Perkins, 116 Iowa 253.

*Kentucky.* — Herbert *v.* Long, (Ky. 1893) 23 S. W. Rep. 658; Newcomb *v.* Newcomb, 96 Ky. 120; Hoerth *v.* Zable, 92 Ky. 202.

*Michigan.* — Rivard *v.* Rivard, 109 Mich. 98, 63 Am. St. Rep. 566. See also Pierce *v.* Pierce, 38 Mich. 420; Latham *v.* Udell, 38 Mich. 238; Spratt *v.* Spratt, 76 Mich. 384.

*Missouri.* — Moore *v.* Moore, 67 Mo. 192; Jackson *v.* Hardin, 83 Mo. 185; Maddox *v.* Maddox, 114 Mo. 35, 35 Am. St. Rep. 734; McFadin *v.* Catron, 120 Mo. 252; Farmer *v.* Farmer, 129 Mo. 530; Martin *v.* Bowdern, 158 Mo. 379; Wood *v.* Carpenter, 166 Mo. 465.

*Nebraska.* — Matter of Bissell, 63 Neb. 585.

*New Jersey.* — Boylan *v.* Meeker, 15 N. J. Eq. 310; Den *v.* Gibbons, 22 N. J. L. 117, 51 Am. Dec. 253; Middleditch *v.* Williams, 45 N. J. Eq. 726; Smith *v.* Smith, 48 N. J. Eq. 591; Turnure *v.* Turnure, 35 N. J. Eq. 437.

*New York.* — Clapp *v.* Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Dobie *v.* Armstrong, 160 N. Y. 584; Matter of Skaats, 74 Hun (N. Y.) 462; Buchanan *v.* Belsey, 65 N. Y. App. Div. 58. See also Matter of Murphy, 41 N. Y. App. Div. 153.

*South Carolina.* — Kaufman *v.* Coughman, 49 S. Car. 159, 61 Am. St. Rep. 808.

*Texas.* — Trezevant *v.* Rains, (Tex. Civ. App. 1894) 25 S. W. Rep. 1092.

*Wisconsin.* — Cutler *v.* Cutler, 103 Wis. 258.

**Illegality of Will.** — The court cannot interfere with the testator's purpose, provided the object of his bounty is neither illegal, immoral, nor contrary to public policy. Matter of Bissell, 63 Neb. 585.

On an issue of *devisavit vel non* the question of the legality or illegality of the provisions of the will is not to be considered. Cox *v.* Cox, 101 Mo. 168, *overruling* Kenrick *v.* Cole, 61 Mo. 572; Lilly *v.* Tobbein, 103 Mo. 477, 23 Am. St. Rep. 887.

**Instructions to Jury Involving Question of Reasonableness, etc.** — In this connection charges using the phrases "intelligent knowledge," "intelligent perception and understanding," and "intelligent comprehension," have been held improper on account of the use of the word "intelligent." Burney *v.* Torrey, 100 Ala. 157, 46 Am. St. Rep. 33. So of a charge to the effect that the testator must think and act soundly. Kramer *v.* Weinert, 81 Ala. 414. So instructions making it a test of competency that the testator be able to dispose of his property in a rational manner, have been criticised as improperly calling to the attention of the jury the question of the character of the will. Murphy *v.* Murphy, (Ky. 1901) 65 S. W. Rep. 165; Warren *v.* O'Connell, (Ky. 1901) 62 S. W. Rep. 890, drawing distinction between the question whether the estate was disposed of in a rational manner and the question whether the testatrix was able to take a rational survey of her estate; Wilson *v.* Hays, 109 Ky. 321; Bramel *v.* Bramel, 101 Ky. 64;

Dunaway *v.* Smoot, 67 S. W. Rep. 62, 23 Ky. L. Rep. 2289.

The jury have no right to consider the character of will an insane man would have made had he possessed testamentary capacity. Cotton *v.* Ulmer, 45 Ala. 378, 6 Am. Rep. 703; Burney *v.* Torrey, 100 Ala. 157, 46 Am. St. Rep. 33; Commonwealth Title Ins., etc., Co. *v.* Gray, 150 Pa. St. 255.

**Disposition of Property as Evidence on Question of Testamentary Capacity.** — The exclusion of some or all of the legal heirs from the benefits of a will is not sufficient evidence of testamentary incapacity. Perkins *v.* Perkins, 116 Iowa 253; Collins *v.* Brazill, 63 Iowa 434; Denning *v.* Butcher, 91 Iowa 425; Middleditch *v.* Williams, 45 N. J. Eq. 726.

**1. As Evidence of Testamentary Capacity — United States.** — Leach *v.* Burr, 188 U. S. 510, affirming 17 App. Cas. (D. C.) 128.

*Alabama.* — Coleman *v.* Robertson, 17 Ala. 85; Couch *v.* Couch, 7 Ala. 519, 42 Am. Dec. 602; Eastis *v.* Montgomery, 95 Ala. 486, 36 Am. St. Rep. 227; Knox *v.* Knox, 95 Ala. 495, 36 Am. St. Rep. 235.

*Arkansas.* — Tobin *v.* Jenkins, 29 Ark. 151.

*Connecticut.* — Crandall's Appeal, 63 Conn. 365, 38 Am. St. Rep. 375; Sturdevant Appeal, 71 Conn. 392.

*Delaware.* — Duffield *v.* Robeson, 2 Harr. (Del.) 375.

*Georgia.* — Pergason *v.* Etcherson, 91 Ga. 785.

*Illinois.* — Salisbury *v.* Aldrich, 118 Ill. 199; Schneider *v.* Manning, 121 Ill. 376; Pooler *v.* Cristman, 145 Ill. 405; Nicewander *v.* Nicewander, 151 Ill. 156; Taylor *v.* Pegram, 151 Ill. 106; McCommon *v.* McCommon, 151 Ill. 428; Slingloff *v.* Brunner, 174 Ill. 561; Kaenders *v.* Montague, 180 Ill. 300.

*Indiana.* — Gurley *v.* Park, 135 Ind. 440; Lamb *v.* Lamb, 105 Ind. 456; Bundy *v.* McKnight, 48 Ind. 502; Addington *v.* Wilson, 5 Ind. 137, 61 Am. Dec. 81.

*Iowa.* — Sim *v.* Russell, 90 Iowa 656; Manatt *v.* Scott, 106 Iowa 203, 68 Am. St. Rep. 293; Howe *v.* Richards, 112 Iowa 220.

*Kentucky.* — Kevil *v.* Kevil, 2 Bush (Ky.) 614; Munday *v.* Taylor, 7 Bush (Ky.) 491; Weir's Will, 9 Dana (Ky.) 441; Newcomb *v.* Newcomb, 96 Ky. 120.

*Maryland.* — Davis *v.* Calvert, 5 Gill & J. (1d.) 269, 25 Am. Dec. 282.

*Michigan.* — Kempsey *v.* McGinniss, 21 Mich. 123; Rivard *v.* Rivard, 109 Mich. 98, 63 Am. St. Rep. 566; Henrich *v.* Saier, 124 Mich. 86.

*Minnesota.* — Hammond *v.* Dike, 42 Minn. 273, 18 Am. St. Rep. 503.

*New Jersey.* — Goble *v.* Grant, 3 N. J. Eq. 629.

*New York.* — Peck *v.* Cary, 27 N. Y. 9, 84 Am. Dec. 220; Matter of Budlong, 126 N. Y. 423; Clark *v.* Fisher, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; Gombault *v.* Public Administrator, 4 Bradf. (N. Y.) 226; Harper *v.* Harper,

tion of the justice or reasonableness of the will. Such evidence usually relates to the relative situations and needs of those having a claim on the testator's bounty, and to the relations between the testator and those receiving or claiming to have been unfairly deprived of his bounty.<sup>1</sup>

1 *Thomp. & C.* (N. Y.) 351; *Stewart v. Lisenard*, 26 Wend. (N. Y.) 313.

*North Carolina.*—*Ross v. Christman*, 1 Ired. L. (23 N. Car.) 209; *In re Burns*, 121 N. Car. 336.

*Pennsylvania.*—*Baker v. Lewis*, 4 Rawle (Pa.) 356; *Patterson v. Patterson*, 6 S. & R. (Pa.) 55.

*Texas.*—*Prather v. McClelland*, (Tex. Civ. App. 1894) 26 S. W. Rep. 657.

*Virginia.*—*Young v. Barner*, 27 Gratt. (Va.) 96.

*Compare Barbour v. Moore*, 4 App. Cas. (D. C.) 535.

A jury, in determining whether or not a testator's delusion concerning the character of his child affected the provisions of his will, may look to the contents of the will and the circumstances surrounding its execution. *Boughton v. Knight*, L. R. 3 P. & D. 64, 42 L. J. P. 25, 28 L. T. N. S. 562.

**What Constitutes Unreasonableness.**—“The question is not whether the gifts are such as, upon the whole, we would have advised under the same circumstances, but whether there is such a violent departure from what we would consider natural, that they cannot fairly be referred to any cause other than a disordered intellect.” *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

By unjust, unreasonable, or unnatural provisions of a will are meant provisions such as a person in a similar situation and relationship would not ordinarily and usually make. *Manatt v. Scott*, 106 Iowa 203, 68 Am. St. Rep. 293.

The provisions of a will may be considered, in connection with the other testimony, in determining the issue of soundness or unsoundness of mind; but to defeat a will on the ground alone of the character of the disposition of the property made therein, they must not only be in some degree extravagant and apparently unreasonable, but they must depart so far from what would be regarded as natural, and apparently reasonable, as to appear fairly attributable to no other cause than that of a disordered intellect or unsound mind. See remarks upon an instruction to this effect in *Howe v. Richards*, 112 Iowa 220.

**If a Testamentary Paper, Rational on Its Face,** is shown to have been properly executed, it will be presumed *prima facie* that it was made by a person of competent understanding. But if there are circumstances in evidence which counterbalance that presumption, the court will pronounce against it, unless on the whole the evidence is sufficient to establish affirmatively that the testator was of sound mind when he executed it. *Symes v. Green*, 1 Sw. & Tr. 401, 28 L. J. P. 83, 5 Jur. N. S. 742.

The rational character of a will is strong evidence that the testator, who was suffering from habitual insanity, made it during a lucid interval. *Nichols v. Binns*, 1 Sw. & Tr. 239.

**When the Only Question Is Not as to Unsoundness, but as to Absence of Mind** in the testator,

the court should disregard the contents and dispositions of the will and be governed solely by the evidence of capacity. *Swinfen v. Swinfen*, 27 Beav. 148, 28 L. J. Ch. 849, 5 Jur. N. S. 1276.

**Undue Influence.**—In *Beyer v. Le Fevre*, 186 U. S. 114, the question of naturalness of the will is discussed with reference to the issue of undue influence. See generally the title **UNDUE INFLUENCE**.

**A Juror May Properly Be Asked**, for the purpose of peremptory challenge, whether the fact that the testatrix gives nothing to some of her children would influence his mind in arriving at a verdict. *In re Goldthorp*, 115 Iowa 430. And a challenge for cause based upon an affirmative reply to such a question is properly sustained. *In re Goldthorp*, 115 Iowa 430, citing *Sprague v. Atlee*, 81 Iowa 11; *Geiger v. Payne*, 102 Iowa 587, 594.

**In Some Jurisdictions the Rule Is Announced** that while the unreasonableness or unjust character of a will may be considered by the jury in connection with other facts and circumstances upon the question of testamentary capacity, it is only when there is other evidence tending to show mental incapacity that the character of the testamentary disposition becomes a fact to be considered. Standing alone it does not amount to legal evidence tending to show testamentary incapacity. *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33; *Knox v. Knox*, 95 Ala. 495, 36 Am. St. Rep. 235; *Manatt v. Scott*, 106 Iowa 203, 68 Am. St. Rep. 293; *Prather v. McClelland*, (Tex. Civ. App. 1894) 26 S. W. Rep. 657; *Munday v. Taylor*, 7 Bush (Ky.) 491. See, as applying the same doctrine to the issue of undue influence, *In re Hess*, 48 Minn. 504, 31 Am. St. Rep. 665; *Maddox v. Maddox*, 114 Mo. 35, 35 Am. St. Rep. 734.

**The Will Itself as Evidence on the Question of Testator's Capacity.**—*Spratt v. Spratt*, 76 Mich. 395; *Spencer v. Terry*, 127 Mich. 420; *Bey's Succession*, 46 La. Ann. 773; *Crandall's Appeal*, 63 Conn. 365, 32 Am. St. Rep. 375.

1. *England.*—*Austen v. Graham*, 8 Moo. P. C. 493.

*Alabama.*—*Eastis v. Montgomery*, 95 Ala. 486, 36 Am. St. Rep. 227; *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33.

*California.*—*Matter of Wilson*, 117 Cal. 262. *District of Columbia.*—*Barbour v. Moore*, 4 App. Cas. (D. C.) 535.

*Illinois.*—*Stinglaff v. Bruner*, 174 Ill. 561.

*Indiana.*—*Staser v. Hogan*, 120 Ind. 207; *Stevens v. Leonard*, 154 Ind. 67, 77 Am. St. Rep. 446.

*Iowa.*—*Bennett v. Hibbert*, 88 Iowa 154; *Sim v. Russell*, 90 Iowa 656; *Manatt v. Scott*, 106 Iowa 203, 68 Am. St. Rep. 293; *Howe v. Richards*, 112 Iowa 220.

*Maryland.*—*Davis v. Calvert*, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282.

*Massachusetts.*—*Shailer v. Bumstead*, 99 Mass. 119.



**5. Prior Wills as Evidence.** — On the same theory that prior declarations of a testator are admissible where they tend to show a fixed purpose respecting the disposition of his property, any prior will of the testator is admissible in evidence to show that the disposition finally made was or was not in accordance with his past wishes.<sup>1</sup>

**6. Reputation and Rumor.** — Evidence of rumor or of the decedent's reputation for insanity, or of current expressions applied to him, are inadmissible to prove want of capacity.<sup>2</sup>

*Michigan.* — *McHugh v. Fitzgerald*, 103 Mich. 21.

*Missouri.* — *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552.

*New York.* — *Matter of Woodward*, 167 N. Y. 28.

*Tennessee.* — *Peery v. Peery*, 94 Tenn. 343; *Kirkpatrick v. Jenkins*, 96 Tenn. 85; *Earp v. Edgington*, 107 Tenn. 23.

*Texas.* — *Prather v. McClelland*, (Tex. Civ. App. 1894) 26 S. W. Rep. 657.

*Vermont.* — *Re Barney*, 71 Vt. 217.

*Wisconsin.* — *Bryant v. Pierce*, 95 Wis. 331.

**Repulsion Amounting to Mental Defect.** — A man moved by capricious, frivolous, mean, or even bad motives, may disinherit wholly or partly his children and leave his property to strangers. He may take an unduly harsh view of the character and conduct of his children. But there is a limit beyond which it will cease to be a question of harsh, unreasonable judgment, and then the repulsion which a parent exhibits to his child must be held to proceed from some mental defect. *Boughton v. Knight*, L. R. 3 P. & D. 64, 42 L. J. P. 25, 28 L. T. N. S. 562.

**Financial Condition of Persons.** — But it is not competent to show that one not related to the testator, and not shown to have any claim to his bounty, was more in need than those named in the will. *In re Merriman*, 108 Mich. 454.

Evidence of the financial condition of the parties to the contest is admissible. *Barbour v. Moore*, 10 App. Cas. (D. C.) 30.

**Evidence of the Manner in Which the Deceased Acquired the Property** is admissible where it bears on the question of capacity. *Matter of Wilson*, 117 Cal. 262.

But see *Ormsby v. Webb*, 134 U. S. 47, where the trial court refused to allow a witness to state that the testator had declared that he had received the bulk of his estate by breaking the will of his grandfather, who was also the ancestor of the caveators. The ruling was held correct on the ground that the manner in which decedent acquired his estate was immaterial on the issue of the validity of the will.

**Evidence of the Feelings of the Testator Towards the Respective Parties to a Contest** is admissible. *Bryant v. Pierce*, 95 Wis. 331.

**Also Evidence of Acts of a Beneficiary in Behalf of the Testator** coming to the latter's knowledge is competent to enable the jury to determine whether the disposition of the property was natural and probable. *Foster v. Dickerson*, 64 Vt. 233.

**The Decedent's Account Books** are admissible in evidence for the purpose of showing what advancements he had made to the contestants. *Matter of Perkins*, 109 Iowa 217.

**In Kentucky the Courts Have Shown Some Jealousy in Allowing Considerations of This Character** to go to the jury, holding that while they were proper to be regarded with the other evidence on the question of capacity, the fact should not be so presented in the charge to the jury as to single out or give especial emphasis to the evidence tending to show that the will was unreasonable or unjust. *Herbert v. Long*, (Ky. 1893) 23 S. W. Rep. 658; *Zimlich v. Zimlich*, 90 Ky. 657; *Stokes v. Shippen*, 13 Bush (Ky.) 180; *Broaddus v. Broaddus*, 10 Bush (Ky.) 299.

**1. Prior Wills Admissible.** — *Tobin v. Jenkins*, 29 Ark. 151; *Roe v. Taylor*, 45 Ill. 485; *Taylor v. Pegram*, 151 Ill. 106; *Nieman v. Schnitker*, 181 Ill. 400; *Hill v. Bahrns*, 158 Ill. 314; *Powers v. Powers*, (Ky. 1899) 52 S. W. Rep. 845; *In re Livingston*, (N. J. 1897) 37 Atl. Rep. 770; *Beaubien v. Cicotte*, 12 Mich. 459; *Titlow v. Titlow*, 54 Pa. St. 216, 93 Am. Dec. 691; *Brown v. Mitchell*, 87 Tex. 140.

**And Proof that the Testator's Sanity Was Unquestioned at the Time the Former Will Was Executed** is admissible as tending to indicate that the will in question, of similar import, was executed by him when of sound mind. *Nieman v. Schnitker*, 181 Ill. 400.

**Where Prior Wills Are Shown to Have Been Lost or Destroyed**, the testator's statements as to the contents of such wills are admissible for the same purpose that the wills themselves would be. *Taylor v. Pegram*, 151 Ill. 106.

**A Prior Memorandum of a Will Not Executed** is admissible on the same theory that the will itself would be admissible if duly executed. *Matter of Wilde*, (Surrogate Ct.) 38 Misc. (N. Y.) 149.

**2. Evidence of Decedent's Reputation for Insanity.** — *Townsend v. Pepperell*, 99 Mass. 40; *Vance v. Upson*, 66 Tex. 476; *Foster v. Brooks*, 6 Ga. 292; *Ashcraft v. De Armond*, 44 Iowa 229; *Brinkman v. Rueggessick*, 71 Mo. 553; *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552; *Rinkard v. State*, 157 Ind. 534; *Wright v. Tatham*, 5 Cl. & F. 670.

**Evidence that Boys on the Street Used to Make Fun of Testatrix Inadmissible.** — *Hine's Appeal*, 68 Conn. 551.

**Reason for the Rule.** — "Where the subject of inquiry is the concurrence of many voices to the same fact, and not the truth or falsity of the fact itself, evidence of general reputation, reputed ownership, public rumor, general notoriety, and the like, though composed of the speech of third persons not under oath, Mr. Greenleaf says, is admissible, not as hearsay, but as original evidence. \* \* \* But the essential fact here is not the belief of others who are not witnesses, but the fact of sanity or insanity, which must be established, as any

7. **Testator's Part in Drafting or Dictating Will.** — Where it is shown that the testator wrote or dictated the will, and it appears rational and consistent in its provisions, this fact will be strong evidence in favor of competency.<sup>1</sup>

8. **Insanity of Relatives.** — Evidence of insanity of relatives of the decedent is admissible to show a hereditary taint.<sup>2</sup>

9. **Suicide.** — The fact that a testator committed suicide, or attempted to do so, is not in itself sufficient evidence of mental incompetency to defeat his will.<sup>3</sup> But this is proper to be considered upon the question of his mental condition.<sup>4</sup>

10. **Admissibility of Evidence in General.** — A wide latitude is generally

other fact, by competent evidence." Brinkman v. Rueggessick, 71 Mo. 553.

1. Crandall's Appeal, 63 Conn. 365, 38 Am. St. Rep. 375; Bever v. Spangler, 93 Iowa 576; Bey's Succession, 46 La. Ann. 773; Spratt v. Spratt, 76 Mich. 391; Spencer v. Terry, 8 Detroit Leg. N. 392, 127 Mich. 420.

**Certain Questions Allowed.** — In Meeker v. Meeker, 74 Iowa 352, 7 Am. St. Rep. 489, the following questions were held to have been properly allowed, the witnesses being neighbors of the decedent: "How was his appearance? What makes you think he did not know you on this day? Do you mean that his mind was simply weakened, or that it was impaired in some of its faculties? Did he get worse or better up to the last time you saw him? You may state whether he could or could not hold a conversation."

**Where the Testator Wrote or Dictated His Will, Without Being Prompted,** and the will itself is intelligible and consistent in its provisions and disposes of all of the testator's property, and there is nothing upon the face of it to indicate mental unsoundness, the testimony as to mental incompetency would have to be very strong to defeat the will. Kempsey v. McGinniss, 21 Mich. 141, cited in Spencer v. Terry, 127 Mich. 420, 8 Detroit Leg. N. 392.

2. **Hereditary Insanity.** — Prentis v. Bates, 93 Mich. 234, citing Baxter v. Abbott, 7 Gray (Mass.) 71; Berry v. Safe Deposit, etc., Co., 96 Md. 45; Matter of Ely, (Surrogate Ct.) 16 Misc. (N. Y.) 228. See also People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; State v. Simms, 68 Mo. 305. So the evidence that the father and mother and remote ancestors of the testator were insane is admissible, but the witness must speak from his personal knowledge. Coughlin v. Poulson, 2 McArthur (D. C.) 308. Evidence of insanity of the sister and niece of the testatrix was introduced in Prentis v. Bates, 93 Mich. 234, reversing 88 Mich. 567.

But it should appear that the insanity is transmissible by inheritance. So, the record of a hospital that the testator's father was admitted to the hospital because of intemperance resulting in melancholia, is inadmissible. Reichenbach v. Ruddach, 127 Pa. St. 564.

And evidence that the father of the testatrix was intemperate, without evidence to show the connection between such intemperance and the insanity of the child, is inadmissible. Titus v. Gage, 70 Vt. 13.

3. **The Fact that the Testator Committed Suicide or Attempted to Do So** does not raise a presumption of fixed or lasting mental aberration, and the burden is upon the contestants to establish

incapacitating temporary insanity at the very time the will was made.

England. — Chambers v. Proctor, 2 Curt. Ecc. 415; Burrows v. Burrows, 1 Hag. Ecc. 109.

Delaware. — Duffield v. Robeson, 2 Harr. (Del.) 375.

Indiana. — Burkhart v. Gladish, 123 Ind. 338.

Louisiana. — Bey's Succession, 46 La. Ann. 773; Godden v. Burke, 35 La. Ann. 160.

Maryland. — McElwee v. Ferguson, 43 Md. 479.

Massachusetts. — Brooks v. Barrett, 7 Pick. (Mass.) 94.

New Jersey. — Koegel v. Egner, 54 N. J. Eq. 623, citing Elkinton v. Brick, 44 N. J. Eq. 154; Matter of Lee, 46 N. J. Eq. 194; Fluck v. Rea, 51 N. J. Eq. 233; Sanderson v. Sanderson, 52 N. J. Eq. 243.

New York. — Matter of Kahn, 1 Connolly (N. Y.) 510; Matter of Card, 5 Silv. Sup. (N. Y.) 337, 55 Hun (N. Y.) 607 (in this case it is said that the law of New York presumes sanity in a suicide, from the fact that the attempt is made a felony by the Penal Code, § 178); Matter of Frickie, N. Y. Daily Reg. Feb. 6th, 1886.

Tennessee. — Pettitt v. Pettitt, 4 Humph. (Tenn.) 191.

Vermont. — Frary v. Gusha, 59 Vt. 257.

"The act of self-destruction cannot be judicially regarded as proof *per se* of insanity. After all, it is but a fact, together with all other facts in the case, from which the court or jury are to determine the testamentary capacity of the testator, not at the time of committing suicide, but at the time of the execution of the will in question." McElwee v. Ferguson, 43 Md. 479, quoted in Brashears v. Orme, 93 Md. 442.

In Bey's Succession, 46 La. Ann. 773, it was held that no presumption of insanity at the time of the execution of the will follows from the fact of the testator's suicide shortly after, even when the suicidal act is unquestionably the result of insanity.

4. Brashears v. Orme, 93 Md. 442. See also cases in preceding note.

**It Is Not Error to Admit in Evidence the Verdict of the Coroner's Jury** to show *prima facie* that the decedent committed suicide. Pyle v. Pyle, 158 Ill. 289.

**Will Rejected.** — In Burkhart v. Gladish, 123 Ind. 337, the decedent, who was suffering from alcoholic insanity, shot his wife and himself, leaving a written statement showing that the act was prompted by an unfounded jealousy to which the provisions of the will were clearly attributable. The will was rejected.

allowed in the admission of evidence on the question of testamentary capacity.<sup>1</sup>

**11. Witnesses — Competency** — *a.* EFFECT OF STATUTORY PROVISIONS. — A devisee under a will is not prohibited from testifying by a statute rendering incompetent parties to the issues, where one of the original parties to the contract or cause in issue is dead.<sup>2</sup>

*b.* PRIVILEGED INFORMATION — (1) *Attesting Witnesses.* — The competency of a subscribing witness to testify as to the mental condition of the testator, and to the facts, conversations, and circumstances attending the execution of the will, is not affected by the fact that such witness obtained his information on the subject under such circumstances as would ordinarily prevent him from testifying on the ground of privilege. The fact that the witness was requested by the testator to witness the will raises a presumption that the latter expected the witness to give any testimony necessary to establish the will, and is regarded as a waiver of privilege.<sup>3</sup>

(2) *Scriveners and Consulting Attorneys.* — The same rule has been applied to the attorney or scrivener consulted for the purpose of drawing up the will.<sup>4</sup>

(3) *Other Privileged Witnesses.* — And others than scriveners and attesting witnesses may be called upon by the personal representative of the decedent propounding the will to give testimony to which objection might otherwise be taken on the ground of privilege. This doctrine has application principally with respect to physicians who attended upon the decedent.<sup>5</sup> But others

**1. Admissibility in General.** — *Ring v. Lawless*, 190 Ill. 531; *Whitney v. Twombly*, 136 Mass. 147.

In proving mental incompetency any fact which is more consistent with that theory than with the theory of mental soundness, is admissible. *Prentiss v. Bates*, 93 Mich. 234.

**The Peculiar Nature of the Issues** on the question of testamentary capacity and undue influence necessitates a wider range of evidence than is usual in ordinary trials. *Olmstead v. Webb*, 5 App. Cas. (D. C.) 38; *Barbour v. Moore*, 10 App. Cas. (D. C.) 30.

**2. Witnesses — Competency.** — *Foster v. Dickerson*, 64 Vt. 233; *Wallis v. Luhring*, 134 Ind. 447; *Lamb v. Lamb*, 105 Ind. 456; *Burkhart v. Gladish*, 123 Ind. 345.

The statute prohibiting persons interested from testifying in their own behalf against the survivor of a deceased person, concerning a personal transaction or communication between the witness and the deceased, does not render testimony of legatees as to conversations with the deceased inadmissible when such witnesses are called by the contestants. *Matter of Potter*, 161 N. Y. 84, reversing 17 N. Y. App. Div. 267; *Foster v. Dickerson*, 64 Vt. 233.

**Statutes Prohibiting Parties from Testifying to Matters Equally Within Knowledge of Deceased.**

— It has been held that the testimony of one of the proponents that the deceased had stated an intention to dispose of the property as it actually was disposed of is not within the prohibition of a statute providing that in a proceeding prosecuted or defended by the heirs or devisees of a deceased person, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify to matters, which, if true, must have been equally within the knowledge of such deceased. *McHugh v. Fitzgerald*, 103 Mich. 21, citing *Brown v. Bell*, 58 Mich. 58; *Schofield v. Walker*, 58 Mich. 96; *Matter of Lautenschlager*, 80 Mich. 290,

**3. Privileged Communications.** — *Matter of Coleman*, 111 N. Y. 220; *Denning v. Butcher*, 91 Iowa 425; *Matter of Wax*, 106 Cal. 343; *Matter of Mullin*, 110 Cal. 252; *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828.

**4. Scriveners and Attorneys** — *District of Columbia.* — *Olmstead v. Webb*, 5 App. Cas. (D. C.) 38.

*California.* — *Matter of Nelson*, 132 Cal. 182. *Illinois.* — *Fossler v. Schriber* 38 Ill. 172; *Scott v. Harris*, 113 Ill. 447.

*Massachusetts.* — *Worthington v. Klemm*, 144 Mass. 167. See reference to this case in *Davis v. Davis*, 123 Mass. 590; *Dougherty v. O'Callaghan*, 157 Mass. 90, 34 Am. St. Rep. 258.

*Minnesota.* — *Matter of Layman*, 40 Minn. 371.

*Missouri.* — *Graham v. O'Fallon*, 4 Mo. 338. *Nebraska.* — *Elliott v. Elliott*, (Neb. 1902) 92 N. W. Rep. 1006.

*New York.* — *Sheridan v. Houghton*, 16 Hun (N. Y.) 628, affirmed 84 N. Y. 643; *Matter of Chapman*, 27 Hun (N. Y.) 573; *Matter of Chase*, 41 Hun (N. Y.) 203; *Hebbard v. Haughian*, 70 N. Y. 54.

See also the title PRIVILEGED COMMUNICATIONS, vol. 23, p. 76.

**On a Question of Marriage and Legitimacy** an attorney who drew a will for the alleged husband, deceased at the time of trial, may, without violating professional confidence, testify to what was said by the testator on the subject in interviews between the testator and the witness connected with the preparation of the will. *Blackburn v. Crawford*, 3 Wall. (U. S.) 175.

*5. Groll v. Tower*, 85 Mo. 249, 55 Am. Rep. 358; *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552; *Fraser v. Jennison*, 42 Mich. 209; *Morris v. Morris*, 119 Ind. 341. And see the title PRIVILEGED COMMUNICATIONS, vol. 23, p. 91.

In *Russell v. Jackson*, 9 Hare 387, Vice-Chancellor Turner considered the question at



than the personal representative of the decedent have no authority to waive the privilege.<sup>1</sup>

**TESTATOR.**—See note 2.

**TESTE.** (See also the title SUMMONS AND PROCESS, 20 ENCYC. OF PL. AND PR. 1125.)—In old English practice the initial and emphatic word of the clause at the conclusion of writs, containing the attestation of the sovereign, or chief justice out of whose court it was issued, and the day on which it was issued or granted. It corresponded to the date of other instruments. In modern practice the word “teste” has been retained as the name of the corresponding clause in modern writs, being particularly applied to the day on which the writ is witnessed, that is, issued or supposed to be issued, though it is expressive also of the place where the court is or was sitting at such time.<sup>3</sup>

**TESTIFY.** (See also the titles EVIDENCE, vol. 11, p. 484; WITNESSES.)—“To make a statement or declaration in confirmation of some fact; to bear witness. To give evidence or testimony in regard to a case depending before a court or tribunal. To make a solemn declaration under oath or affirmation, before a tribunal, court, judge, or magistrate, for the purpose of proving some fact.”<sup>4</sup>

**TESTIMONY.** (See also the titles EVIDENCE, vol. 11, p. 484; WITNESSES.)—Testimony is oral evidence.<sup>5</sup>

length, and held that the reason of the rule of privilege did not apply to testamentary dispositions unless the testator entertained an illegal purpose; and that the existence of such a purpose would not attach any privilege to the communication.

**Contra.**—In *Loder v. Whelpley*, 111 N. Y. 239, the court did not regard the admission of the testimony of a physician, although improper, as error sufficiently prejudicial to warrant a reversal of the ruling in *Whelpley v. Loder*, 1 Dem. (N. Y.) 368. And the case is *discussed and discredited* in *Doherty v. O'Callaghan*, 157 Mass. 90, 34 Am. St. Rep. 258.

So in the case of *Matter of Coleman*, 111 N. Y. 220, the admission of evidence of physicians was held error, but the case was not reversed.

1. *Matter of Nelson*, 132 Cal. 182; *Gurley v. Park*, 135 Ind. 440; *Heuston v. Simpson*, 115 Ind. 62, 7 Am. St. Rep. 409; *Renihan v. Denmin*, 103 N. Y. 573, 57 Am. Rep. 770; *Groll v. Tower*, 85 Mo. 249, 55 Am. Rep. 358.

2. **Testator.** (See also the titles TESTAMENTARY CAPACITY, *ante*, p. 68; UNDUE INFLUENCE; WILLS.)—*Testator* held to include a testatrix, *Ellis v. Darden*, 86 Pa. 370.

3. **Teste.**—*Burr. L. Dict.* See also *Bryan v. Hubbs*, 69 N. Car. 427.

In *Gwin v. Latimer*, 4 Yerg. (Tenn.) 27, it was said by counsel for the defendant that “the *teste* of a writ means the date or time at which it is witnessed or issued.”

4. **Testify.**—*O'Brien v. State*, 125 Ind. 44, *quoting* *Worcester. Dict.*

To *testify* is to make a solemn declaration on oath or affirmation for the purpose of establishing or making proof of some fact. *Nash v. Hoxie*, 59 Wis. 388, *quoting* *Webst. Dict.* See to the same effect *Case v. James*, 90 Wis. 320.

**Writing.**—“The word *testify* signifies the giving of testimony, whether orally or in writing.” *Case v. James*, 90 Wis. 320.

**Witness and Testify.**—In *State v. Robertson*,

26 S. Car. 120, it was said: “It is true, the act does not use the word ‘witness,’ but there is the equivalent word *testify*, of which the definition is ‘to bear witness to,’ ‘to give evidence or testimony of,’ etc.”

**Testifying.**—“*Testifying* is the giving of evidence.” *Nash v. Hoxie*, 59 Wis. 388, *quoting* *Burr. L. Dict.*

5. **Testimony.**—“A species of evidence by means of witness.” *Carroll v. Bancker*, 43 La. Ann. 1085, 1194. In the old books, *testimony* means witness. *Co. Litt.* 326.

*Testimony* is evidence, the statement made by a witness under oath or affirmation. *Bouv. L. Dict.*, *quoted* in *Woods v. State*, 134 Ind. 43; *People v. White*, 24 Wend. (N. Y.) 551, *per* *Edwards, Sen.*; and *Peters v. U. S.*, 2 Okla. 121. See also *Baker v. Woodward*, 12 Oregon 17; *Lyts v. Keevey*, 5 Wash. 612.

*Testimony* is the declaration of a witness under oath or affirmation. *Nash v. Hoxie*, 59 Wis. 388, *quoting* *Burr. L. Dict.*

**Judicial Tribunal.**—In *Woods v. State*, 134 Ind. 42, it was held that *testimony* is the statement of a witness under oath, but it need not be made to a judicial tribunal; and that a deposition may contain *testimony* although never used in the pending cause.

**Oath.**—In *Peters v. U. S.*, 2 Okla. 121, it was said: “*Testimony* cannot be taken without administering an oath to the witness.”

In *Gannon v. Stevens*, 13 Kan. 459, it was held that where it was amply shown that a certain deceased person had testified as a witness on a former trial of the same cause, that she had been examined in chief and cross-examined, and that her *testimony* was received by the court, it was not necessary to show more specifically that the *testimony* of said deceased witness was given under oath or affirmation. The court said: “Now to testify, under such circumstances, certainly means to be examined as a witness under oath or affirmation.”

**Admissions.**—In *Nash v. Hoxie*, 59 Wis. 387,

**Evidence and Testimony.** — Evidence includes all testimony; but testimony is only a species of evidence distinguished from documentary or written evidence.<sup>1</sup>

**TEST OATH.** — See the titles ATTORNEY AND CLIENT, vol. 3, p. 289; ELECTIONS, vol. 10, pp. 575, 610, 705; EX POST FACTO LAWS, vol. 12, p. 531; and see TEST, *ante*.

the lower court instructed the jury, at the request of the respondents' counsel, that "admissions are regarded as weak *testimony*." It was held that such an instruction was not error. The court said: "There was *testimony* tending to show that both of the plaintiffs, Nash and Weatherby, had admitted to witnesses that no such contract had been consummated, and these admissions were denied by them. The jury must have understood that this instruction referred to this *testimony* to prove the admissions. The use of the word *testimony* in the instruction signifies this and nothing else. The admissions as such are not called weak when sufficiently established by *testimony*, but are called weak *testimony*. The expression is awkward and ungrammatical, but no other reasonable construction can be placed upon it in view of the *testimony* on the subject of the admission."

**Rulings and Exceptions.** — A statute provided that the stenographic notes of the *testimony* of any proceedings in any trial of the facts, together with the charge of the judge, should be deemed and held to be official and the best authority in any matters of dispute. The word *testimony* as thus used has been held to include the ruling of the court below upon an exception to the interrogatories. *Taylor v. Preston*, 79 Pa. St. 436. And in *Cummings v. Armstrong*, 34 W. Va. 9, it was held that a stenographer's notes of the *testimony* included the exceptions to the evidence and the rulings thereon.

**Affidavit.** — See AFFIDAVIT, vol. 1, p. 911.

**Preponderance of Testimony.** — See PREPONDERANCE OF EVIDENCE, vol. 22, p. 1177.

1. **Distinguished from Evidence.** — *Lindley v. Dakin*, 13 Ind. 388; *McConaha v. Carr*, 18 Ind. 443; *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803.

**Testimony** and "evidence" are not synonymous terms. The latter is the generic term, and the former applicable to a species or kind of evidence. *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803; *Woolworth v. Parker*, 57 Neb. 417.

In *Cooper v. Holmes*, 71 Md. 28, it was said: "But competent and satisfactory evidence is not necessarily 'positive *testimony*;' because a fact may be fully established by circumstantial evidence, or by presumption, or by other evidence not designated *testimony*."

So a statement in a bill of exceptions purporting to contain all the evidence given on a trial, that it contained all the *testimony* given, was held to be insufficient where it appeared that written or documentary evidence was introduced on the trial. *Gazette Printing Co. v. Morss*, 60 Ind. 153; *McDonald v. Elfes*, 61 Ind. 279; *Beineke v. Wurgler*, 77 Ind. 471; *Kleyla v. State*, 112 Ind. 146; *Miller v. Fuller*, 21 Ind. App. 256; *Kochler v. Hughes*, 73 Hun (N. Y.) 167, *affirmed* 148 N. Y. 507. See also *Hyman v. Friedman*, (C. Pl. Gen. T.) 45 N. Y. St. Rep.

636; *Upington v. Pooler*, (Supm. Ct. Gen. T.) 47 N. Y. St. Rep. 30; *Zimmerman v. Union R. Co.*, 3 N. Y. App. Div. 219.

But in *Miller v. Wolf*, 63 Iowa 236, where the appellant stated in the abstract of evidence, certified on appeal, that it contained all the *testimony*, although the use of the word *testimony* was acknowledged to be inaccurate, it was said: "If we can fairly infer, however informal the language, that the appellant claims that he had presented an abstract of all the evidence, we will presume that he has, unless the appellee sets out additional evidence."

And where a bill of exceptions recited in its introductory clause that in order to maintain the issues on his part, the plaintiff introduced the following *testimony*, but from the context it was clear that the word *testimony* referred to documentary evidence, the misuse of the word was not allowed to defeat the operation of the instrument. *Harris v. Tomlinson*, 130 Ind. 427.

So in *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 804, it was held that the use of the word *testimony* for "evidence" in the certificate of the trial judge in the allowance of a bill of exceptions, if the meaning was obvious, or it was clear that the latter was intended, would not render the document inoperative. See also *Harris v. Tomlinson*, 130 Ind. 426; *Woolworth v. Parker*, 57 Neb. 417; *Lilly v. Russell*, 4 Okla. 98.

In *Jones v. Gregory*, 48 Ill. App. 230, it was said: "Of course there is a technical difference between the terms *testimony* and 'evidence.' Strictly speaking the former relates only to the statement made by a witness under oath or affirmation, while the latter includes all that may be submitted to the jury, whether it be the statement of witnesses or the contents of papers, documents, or records, or the inspection of whatever the jury may be permitted to examine and consider during the trial." See also *Mann v. Higgins*, 83 Cal. 69; *Welch v. Miller*, 32 Ill. App. 112; *People v. Armour*, 18 N. Y. App. Div. 586.

**Same — Instructions.** — In *Noyes v. Pugin*, 2 Wash. 661, it was said: "While there is, perhaps, a technical legal distinction between the two words, we have no doubt the same meaning was conveyed to the minds of the jury by the word *testimony* that would have been conveyed by the word 'evidence,' and that appellant was in no wise injured by the charge of the court as given. Indeed, the words, according to *Bouvier*, are synonymous in meaning, though 'evidence' includes *testimony*, as well as all other kinds of proof."

**Same — Certificate in Chancery Suit.** — A certificate of evidence in a chancery suit started out by stating that "the plaintiffs, to maintain the issues on their part, gave the following evidence," and concluded with the words "and the foregoing was all the *testimony* adduced by either party on said trial." It was held that

**TEST PAPER.**—A document allowed to be used in a court of justice as a standard of comparison for determining a question of handwriting.<sup>1</sup>

**TEXAS FEVER.**—See note 2.

**TEXAS MONEY.**—See note 3.

**TEXTBOOK.**—A textbook is defined as “a book or manual used in teaching; a book for students, containing the principles of a science or any branch of learning.”<sup>4</sup>

**TEXTILE FABRICS.**—See note 5.

**“TH.”**—See note 6.

**THAT.**—See note 7.

**THE.**—The definite article particularizing the subject spoken of. “‘The’ is the word used before nouns, with a specifying or particularizing effect, opposed to the indefinite or generalizing force of ‘a’ or ‘an.’”<sup>8</sup>

the word *testimony*, as used, was synonymous with the word “evidence.” *People v. Henckler*, 137 Ill. 582.

1. See the title *HANDWRITING*, vol. 15, p. 252.

2. *Texas Fever.*—See *Kimmish v. Ball*, 129 U. S. 217, and see the titles *ANIMALS*, vol. 2, p. 380; *INTERSTATE COMMERCE*, vol. 17, p. 84.

3. *Texas Money—Parol Evidence.*—See *Roberts v. Short*, 1 Tex. 373.

4. *Textbook.*—*People v. Board of Education*, 175 Ill. 18, quoting *Webst. Dict.*

In *Affholder v. State*, 51 Neb. 91, it was said: “We do not think the term *textbooks* should be given a technical meaning, but that it is comprehensive enough to and does include globes, maps, charts, pens, ink, paper, etc., and all other apparatus and appliances which are proper to be used in the schools in instructing the youth; and we conclude, therefore, that the act under consideration is not broader than its title, and that the term ‘school supplies,’ found in the tenth section of the act, is not foreign to the term *textbooks* found in the title of the act, but is germane to, and comprehended and included within, the term *textbooks*.”

**Textbook Board.**—The title of a statute was as follows: “An act to establish a *textbook* board for the public schools of C. county, and to define its duties and powers.” In construing this provision the court said: “The term ‘*textbook* board’ has not, by either technical or ordinary usage, acquired a meaning which could of itself indicate that the creation of a board bearing that name would be attended by the selection and exclusive use of *textbooks* of uniform series in the public schools referred to; and even less does the title imply such use would be unchangeable for long periods of time, and would be compelled under forfeitures and penalties or otherwise.” *State v. Griffin*, 132 Ala. 47.

5. *Textile Fabrics.*—See *Wood v. Allen*, 111 Iowa 97, and see the title *EXEMPTIONS (FROM TAXATION)*, vol. 12, p. 350.

6. *Th. as Abbreviation of Thomas.*—See *Ogden v. Gibbons*, 5 N. J. L. 598. See generally the title *ABBREVIATIONS*, vol. 1, p. 97.

7. *“That” in Sense of “in Order that.”*—In *Fackler v. Berry*, 93 Va. 568, it was said: “He gives to his wife the absolute property, *that* ‘she may have a permanent home for life, and his children by her a pittance after her death.’ The word *that*, in the sense here

used, is equivalent to ‘in order *that*,’ ‘to the end *that*,’ and was never designed to vest any interest or estate in his children by her.”

8. *U. S. v. Hudson*, 65 Fed. Rep. 71.

**One.** (See also *A*, vol. 1, p. 1.)—A statute read as follows: “The statement may be filed with *the* clerk of *the* Court of Common Pleas, or with a trial justice.” The court said: “The definite article *the* in the first case, and the indefinite ‘a’ in the second, plainly point to the fact that there is only one clerk of *the* Court of Common Pleas with whom the statement may be filed, namely, *the* clerk of the debtor’s county of residence; but that there are several trial justices in the county, any one of whom would have jurisdiction. If it had read ‘may be filed with “a” clerk of “a” Court of Common Pleas,’ the opposite view might have been tenable.” *Ex p. Ware Furniture Co.*, 49 S. Car. 22. See also *Brownfield v. Brownfield*, 12 Pa. St. 144.

**The Treasury.**—In *Straub v. Gordon*, 27 Ark. 628, it was said: “Money raised under this provision of the constitution is to be paid into ‘*the* treasury.’ What treasury, within the meaning of the language here employed, is ‘*the* treasury’? Surely the framers of the constitution did not intend to embrace in the words ‘*the* treasury’ the numerous county treasuries of the state. They manifestly meant *the* treasury of the state.”

**“The” Distinguished from “A.”** (See also *A*, vol. 1, p. 1.)—The verdict of a jury finding a party guilty of a bill of scandal is uncertain and cannot be construed as meaning guilty of *the* bill of scandal charged in the indictment. A bill of scandal is very different from *the* bill of scandal. *Sharff v. Com.*, 2 Binn. (Pa.) 514. To the same effect, see *Dart v. McKinney*, 9 Blatchf. (U. S.) 360; *Fisk v. Henarie*, 32 Fed. Rep. 425.

**Omission.**—Where, in an election to decide whether or not a school district should issue bonds, the ballot simply read “for bonds” and “against bonds,” instead of “for *the* bonds,” etc., as provided by the order for the election, this was held not to invalidate the election. *State v. Metzger*, 26 Kan. 395.

The omission of the word *the* in signing the name of a corporation to a deed of assignment is not fatal to the subscription. *De Riesthal v. Walton*, 66 Md. 470.

**“The” and “This.”**—A statute provided that recognizances should be conditioned that the



cognizor would "not depart without leave of this court." A recognizance not to depart "without leave of *the* court" was held defective. *Howard v. State*, 30 Tex. App. 680; *Harris v. State*, (Tex. Crim. 1893) 24 S. W. Rep. 290.

**The Association.**—In holding that the name of a proposed corporation should indicate the purpose of the charter, the court in *Nether Providence Association's Charter*, 2 Pa. Dist. 702, said: "The name is too comprehensive, vague, and uncertain. Like the title to an Act of Assembly, it should, at least, indicate the purpose of the charter. There may be many associations in *Nether Providence*, and there is nothing in this name to distinguish it from any other, unless we are to put stress of the voice on the definite article and call it *The Association of Nether Providence*."

**The Books.**—Where a complaint for selling adulterated milk in violation of a *Massachusetts* statute, after alleging the official character of the inspector and that he kept an office and books as required by the statute, charged that the defendant, being a dealer in milk, and so recorded "in *the* books of said inspector," did sell, etc., instead of alleging that he was recorded in "the books aforesaid," or in "the said books," this did not sufficiently show that he was recorded in any such books as the statute requires an inspector to keep. "In the statute, doubtless, '*the* books' mean the books before mentioned, to wit, *the* books kept for the purpose of recording the names of persons engaged in the sale of milk. But it does not necessarily follow that these words are to be taken to have the same meaning in the complaint which they have in the statute." *Com. v. McCarron*, 2 Allen (Mass.) 157.

**The Church—Parol Evidence to Explain.**—See *Ayres v. Weed*, 16 Conn. 291.

**The Court.**—Where the condition of a bond was that the parties would perform the decree of *the* court, it was held that the term "*the* court" meant *the* court which would ultimately decide the cause. *U. S. v. The Schooner Little Charles*, 1 Brock. (U. S.) 381.

A statute provided that "*the* court may on motion change the place of trial." In construing this provision, the court said: "This, of course, means *the* court where the action is pending. It is not possible for one court to reach out and draw to itself jurisdiction of an action pending in another court, even when done with the consent of parties." *Ex p. Gardner*, 22 Nev. 284. And see *Ellis v. Karl*, 7 Neb. 387.

**The Credit.**—"The credit," in a guarantee, points to a definite credit—"something ascertained and known." *Broom v. Batchelor*, 1 H. & N. 250, 25 L. J. Exch. 299, *per* Bramwell, B., but the majority of the court was against him in the conclusion.

**"The Evidence in the Case," in Sense of "All the Evidence."**—Guice *v. State*, 60 Miss. 726.

**The Grant of Letters Testamentary.**—Under a *Massachusetts* statute, providing that an action may be begun against an administrator within two years after "*the* grant of letters testamentary," the word *the* cannot be construed as referring only to the original grant, but upon the death or resignation of an administrator, an action may be begun at any time within two years from the grant of letters

testamentary to his successor. *Eddy v. Adams*, 145 Mass. 489.

**The Heirs.**—In *Abel v. Abel*, 201 Pa. St. 545, it was said: "When the testator directed that at the death of his son William the property should be sold for the benefit of '*the* heirs,' he meant his own heirs. This view seems to be in harmony with that taken in *Baskin's Appeal*, 3 Pa. St. 304, 45 Am. Dec. 641, where the expression used was 'all *the* heirs.'"

**"The Heirs" in Sense of "All the Heirs."**—*Bentley v. Cowman*, 6 Gill & J. (Md.) 154.

**The House.**—The English statute providing that where the annual value of "*the* house occupied by" a brewer does not exceed ten pounds, the beer brewed by him shall not be chargeable with duty, was held to mean the house occupied by him, in which he lives. *Tippett v. Hart*, 10 Q. B. D. 483, 52 L. J. M. C. 41.

**The Party Aggrieved.**—A statute allowing "*the* party aggrieved" to prosecute an action to set aside a judgment obtained by fraud of the prevailing party cannot be construed as giving the right to any person aggrieved, not a party to the action, though he be directly interested in the result. *Stewart v. Duncan*, 40 Minn. 410.

**The People.**—See *PEOPLE*, vol. 22, p. 675.

**The Property.**—A testator made the following provision: "It is my wish that my lands in South Carolina, after *the* two hundred acres are laid out before mentioned, be equally divided among my children when my first child becomes of age or marries, and their part appointed to them of said lands;" and added: "And if any of my children should die without issue, *the* property shall return to my surviving children." In construing this provision the court said: "Whatever doubt there might be upon grammatical rules as to the meaning of the words '*the* property,' we think there is none as to the plain sense in which they are to be understood. They are employed in immediate connection with the South Carolina lands, after the personal property had been disposed of and dismissed, and when both then and immediately afterwards the testator's mind was directed to the disposition of his lands. He uses terms of limited import, '*the* property,' alluding to what was immediately in his mind; and not general terms, 'my property,' which he employs elsewhere in the will, where it is clear that he refers to his property generally. In this sense the language is natural, and such as a plain man, expressing his thoughts in direct terms, would be likely to use; while under the other construction it is different from the phraseology employed in other parts of the will, and irreconcilable with the disposition of his property generally, as indicated in the will." *Funchess v. Seibe*, 27 Miss. 39.

**The Stock.**—Where a legacy was of "ten shares of *the* stock of the W. & N. R. Co.," the word *the* preceding the word "stock" is ambiguous, and may as well refer to the stock of the company in general as to the stock owned by the testatrix; but where a subsequent clause of the will bequeathed "the balance of my stock as per my stock book," the legacy was thereby made specific. *Unitarian Soc. v. Tufts*, 151 Mass. 76.

**The Term.**—See *TERM*.

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**I. DEFINITION.** — The term "theatre" has an extended signification, and comprehends a variety of performances, yet it is conceived that all which it legitimately comprehends partake more or less of the character of the drama.<sup>1</sup>

**Edifice and Stage.** — But the term does not necessarily import anything more than the stage on which the actors play and the room in which the acting is done and seen.<sup>2</sup>

**II. THEATRE FIXTURES.** — In constructing a theatre, the whole building, considered in reference to its uses, makes up the house contracted for, and the fixtures include all fittings necessary to make the building suitable as a theatre.<sup>3</sup>

**III. STATUTORY REGULATION — 1. In General.** — Each state, being supreme within its own sphere as an independent sovereignty, as such has power to regulate by statutory provisions all classes of public exhibitions such as are usually conducted for the observation and amusement of the public.<sup>4</sup>

**2. License or Tax — a. IN GENERAL.** — The state has the power to impose a license or tax upon all theatres and places of amusement,<sup>5</sup> upon all perform-

1. **Definition.** — *Jacko v. State*, 22 Ala. 73.

**Within the Pennsylvania License Act of 1845** the term "theatre" means, not the place, but the troupe or exhibition itself. *Com. v. Keeler*, 3 Pa. Dist. 158.

**Drama Defined.** — *Bell v. Mahn*, 121 Pa. St. 225, 6 Am. St. Rep. 786; *Jacko v. State*, 22 Ala. 73.

**"Place of Amusement" or "Theatre" — Question of Fact.** — *Gartenstein, etc.*, License, 15 Pa. Co. Ct. 612, 4 Pa. Dist. 37.

**2. Edifice and Stage.** — *Lee v. State*, 56 Ga. 477.

**House for Exhibition of Dramatic Performances.** — *Bell v. Mahn*, 121 Pa. St. 225, 6 Am. St. Rep. 786.

**Circus Not Theatre under License Statute.** — *Jacko v. State*, 22 Ala. 73.

**3. Fixtures.** — *Forbes v. Howard*, 4 R. I. 364; *Halley v. Alloway*, 10 Lea (Tenn.) 523.

**Stage and Stage Fittings.** — *Waycross Opera House Co. v. Sossman*, 94 Ga. 100; *Sosman v. Conlon*, 57 Mo. App. 25; *Bender v. King*, 111

Fed. Rep. 60; *Grewar v. Alloway*, 3 Tenn. Ch. 584.

**Seats.** — *Grosz v. Jackson*, 6 Daly (N. Y.) 463; *Forbes v. Howard*, 4 R. I. 364.

**Upholstery on Seats.** — *Forbes v. Howard*, 4 R. I. 364.

**Painting of Walls Not a Fixture.** — *Forbes v. Howard*, 4 R. I. 364.

**4. Power to Regulate Exhibitions.** — *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581; *New York v. Eden Musee American Co.*, 102 N. Y. 593.

**5. Power to Impose License on Places of Amusement.** — *State v. Schonhausen*, 37 La. Ann. 42; *State v. O'Hara*, 36 La. Ann. 94; *Com. v. Twitchell*, 4 Cush. (Mass.) 74; *Wallack v. New York*, 3 Hun (N. Y.) 84, 5 Thomp. & C. (N. Y.) 310; *Nurdlinger v. Irvine*, 18 W. N. C. (Pa.) 65; *Mabry v. Tarver*, 1 Humph. (Tenn.) 94.

**Public Building.** — *Camden v. Camden*, 77 Me. 530.

**Fixed or Transient.** — *Trapp v. White*, 35



ances of the stage<sup>1</sup> or upon public amusements of any description.<sup>2</sup> But it has been held that merely offering for rent a room fitted up as a theatre, without having given any dramatic performance therein, is not a carrying on of the business of keeping a theatre within the license law.<sup>3</sup>

**Sufficiency of License.** — The license need not be in writing.<sup>4</sup>

**b. IMPOSITION BY COUNTY OR MUNICIPALITY** — **Additional License by County.** — Where a license is fixed by express statute, the county where the performance takes place cannot exact an additional license.<sup>5</sup>

**Exemption in Prescribed Towns.** — So where the statute expressly exempts theatrical exhibitions from license in a certain town such town cannot collect a tax or license by virtue of its own ordinance.<sup>6</sup>

**Power May Be Conferred.** — It is competent for a legislature to grant to a city or town the power to assess a tax or require a license upon all theatres or places of amusement,<sup>7</sup> and the municipal authorities, in the valid exercise of a police regulation, may license and regulate theatres and amusements.<sup>8</sup>

**Power Discretionary.** — Where a mayor and board of aldermen are empowered

Tex. 387; Com. v. Keeler, 3 Pa. Dist. 158; Green v. Kousins, 3 Pa. Dist. 302; Davys v. Douglas, 4 H. & N. 180; Fredericks v. Howie, 1 H. & C. 381; Fredericks v. Payne, 1 H. & C. 584.

**Place Subject to License But Once.** — Garrett v. Messenger, L. R. 2 C. P. 583.

**Presumption as to License.** — Fry v. Bennett, 28 N. Y. 324.

**Extent of License.** — Gandy v. Oellers, 39 W. N. C. (Pa.) 438.

**Owner and Lessee May Fix Liability by Contract.** — Gandy v. Oellers, 39 W. N. C. (Pa.) 438.

**1. All Performances of the Stage.** — Day v. Simpson, 18 C. B. N. S. 680, 114 E. C. L. 680; Wigan v. Strange, L. R. 1 C. P. 175; People v. Campbell, 51 N. Y. App. Div. 565; Downing v. Blanchard, 12 Wend. (N. Y.) 383.

**Equestrian Performances.** — Batty v. Melillo, 10 C. B. 282, 70 E. C. L. 282.

**Negro Minstrel.** — Rowland v. Kleber, 1 Pittsb. (Pa.) 68; Shelby County Taxing Dist. v. Emerson, 4 Lea (Tenn.) 312.

**Opera.** — Bell v. Mahn, 121 Pa. St. 225, 6 Am. St. Rep. 786.

**Trick Performance by Venders of Goods Not Within Statute.** — People v. Royal, 23 N. Y. App. Div. 258; Thurber v. Sharp, 13 Barb. (N. Y.) 627.

**Tumbling.** — Rex v. Handy, 6 T. R. 286.

**2. Any Public Amusement — In General.** — Pearson v. Seattle, 14 Wash. 438; Bellis v. Beal, 2 Esp. 592.

**Public Dance or Dance Hall.** — Com. v. Quinn, 164 Mass. 11; Pearson v. Seattle, 14 Wash. 438; Gartenstein, etc., License, 15 Pa. Co. Ct. 612, 4 Pa. Dist. 37; Gregory v. Tufts, 6 C. & P. 271, 25 E. C. L. 393; Bellis v. Beal, 2 Esp. 592.

It is not necessary that the party accused of keeping a public house of dancing and music, should charge an admission in order to be guilty of the offense. Archer v. Willingrice, 4 Esp. 186.

**Running a "Flying Jennie."** — Mosby v. State, 98 Ala. 50.

**Merry-go-round.** — Com. v. Bow, 177 Mass. 347.

**Skating Rink.** — Reg. v. Tucker, 2 Q. B. D. 417. But see Harris v. Com., 81 Va. 240, 59 Am. Rep. 666.

**Impromptu Song and Dialogue in Costume Performed in Public Garden — Admission Fee Charged — Unless License Obtained, May Be Enjoined.** — Society, etc., v. Diers, 10 Abb. Pr. N. S. (N. Y.) 216.

**Dancing School or Private Dance Not Within Statute.** — Com. v. Gee, 6 Cush. (Mass.) 174; Shutt v. Lewis, 5 Esp. 129; Bellis v. Burghall, 2 Esp. 722. But see Clarke v. Searle, 1 Esp. 25.

**Question of Fact for Jury.** — Marks v. Benjamin, 5 M. & W. 565.

**Where the Statute Designates Particular Shows or Amusements for which a license is required, others not designated need not be licensed.** State v. Bowers, 14 Ind. 195; State v. Tilley, 9 Oregon 125.

**3. Carrying On Business.** — Gillman v. State, 55 Ala. 248. See also Hayes v. Coatesville Opera House Co., 139 Pa. St. 636.

But where the owner of a building constructed, fitted, and equipped for the purposes of a theatre, allowed stage plays to be occasionally given, or even allowed one public performance therein, without having obtained a license, he violated the statute and was subject to the penalty provided for such violation. Shelley v. Bethell, 12 Q. B. D. 11.

**4. License Need Not Be in Writing.** — Boston v. Schaffer, 9 Pick. (Mass.) 415. See also the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 820.

**Oral Promise Not a License.** — Simpson v. Wood, 105 Mass. 263.

**5. County Cannot Impose Additional License.** — Orton v. Brown, 35 Miss. 426.

**6. Exemption in Prescribed Towns.** — Negrotto v. Monett, 49 Mo. App. 286.

**7. Power May Be Conferred.** — Boston v. Schaffer, 9 Pick. (Mass.) 415; Baker v. Cincinnati, 11 Ohio St. 543; Robertson v. Heneger, 5 Sneed (Tenn.) 257; Hodges v. Nashville, 2 Humph. (Tenn.) 61; Ex p. Bell, 32 Tex. Crim. 308, 40 Am. St. Rep. 778.

**May Exact Money for License.** — Boston v. Schaffer, 9 Pick. (Mass.) 415.

**8. Police Regulation.** — Duluth v. Marsh, 71 Minn. 248, holding that the exercise of the power must be reasonable.

**Ordinance Repugnant to Charter Not Proper.** — Waters v. Leech, 3 Ark. 110.

to license public entertainments the power is discretionary,<sup>1</sup> and will not be controlled by mandamus,<sup>2</sup> but a fair legal discretion must be exercised.<sup>3</sup> The entertainment must be above question as to morals or decency.<sup>4</sup>

*c. FREE SHOWS.* — Where the statutes provide for the payment of a tax or license for public exhibitions and places of amusement, free shows and entertainments are not contemplated, but only places where an entrance or admission fee is charged,<sup>5</sup> and the license is intended to be imposed upon professional players, who play for compensation, so amateur performances are not liable to the tax.<sup>6</sup>

*d. PLAYERS PROTECTED BY THEATRE LICENSE.* — Where a statute provides for the licensing of theatres or places of amusement, where entertainments or performances are given, the performers or persons employed by the owner of the building licensed are all included in and protected by the license.<sup>7</sup>

**3. Hours and Modes of Occupying Places of Amusement.** — It is within the power of the legislature to make police regulations as to the hours and modes of occupying places of amusement.<sup>8</sup>

**4. Regulations as to Children — Employment of Children.** — The legislature has power to pass statutes prohibiting the employment of children of immature years in theatrical exhibitions,<sup>9</sup> and the mayor of a city cannot consent to a participation in such exhibitions by children under the age prescribed.<sup>10</sup>

**Presence of Children.** — The state has power to require a forfeit from the owner of a public place of amusement for allowing a minor to play therein.<sup>11</sup>

**5. Exits and Aisles.** — Under the valid exercise of its police powers, the state may pass a statute requiring the exits and aisles of all public places of amusement to be kept open and clear, and such statute is mandatory.<sup>12</sup>

**6. Renting Out Public Buildings.** — Under the power to regulate and manage municipal buildings, the mayor and aldermen may rent out part of such buildings for concerts, theatrical exhibitions, or other entertainments, for profit.<sup>13</sup>

**7. Sunday Laws.** — The state has the right to pass statutes prohibiting any sort of public exhibition or amusement on Sunday, in order to preserve peace and order.<sup>14</sup>

**1. Power Discretionary.** — *People v. Wurster*, 14 N. Y. App. Div. 556.

**2. Not Controlled by Mandamus.** — *Armstrong v. Murphy*, 65 N. Y. App. Div. 123; *People v. Grant*, 58 Hun (N. Y.) 455; *People v. Board of Police*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 89. But see *Com. v. Stokley*, 12 Phila. (Pa.) 316, 35 Leg. Int. (Pa.) 180.

**3. Legal Discretion.** — *Duluth v. Marsh*, 71 Minn. 248; *In re Stedman*, 14 Phila. (Pa.) 376, 37 Leg. Int. (Pa.) 444.

**4. Decency of Entertainment.** — *Duluth v. Marsh*, 71 Minn. 248; *People v. Wurster*, 14 N. Y. App. Div. 556.

**5. Free Shows.** — *State v. Lundie*, 47 La. Ann. 1596.

**Admissions of the actor that he was performing feats free of charge, while the audience had come to hear a musical entertainment regularly licensed, are admissible as part of the *res geste*.** *Pike v. State*, 35 Ala. 419.

**6. Amateur Performances.** — *Treasurer v. Horn*, 3 Pa. Super. Ct. 537.

**7. Players Protected by Theatre License.** — *Rowland v. Kleber*, 1 Pittsb. (Pa.) 68; *Com. v. Reifsnnyder*, 14 Pa. Co. Ct. 353, 3 Pa. Dist. 193; *Shelby County Taxing Dist. v. Emerson*, 4 Lea (Tenn.) 312; *Reg. v. Strugnell*, L. R. 1 Q. B. 93.

**8. Hours and Modes of Occupying Places.** — *Com. v. Colton*, 8 Gray (Mass.) 488.

**9. Employment of Children.** — *People v. Ewer*, 141 N. Y. 129, 38 Am. St. Rep. 788.

**What Constitutes Violation of Statute.** — *People v. Meade*, (N. Y. Gen. Sess.) 24 Abb. N. Cas. (N. Y.) 357.

**10. Mayor Cannot Consent.** — *People v. Grant*, 70 Hun (N. Y.) 233; *Matter of Stevens*, 70 Hun (N. Y.) 243.

**11. Presence of Children.** — *State v. Mackin*, 51 Mo. App. 129.

**12. Open Exits and Aisles.** — *Fire Dept. v. Stetson*, 14 Daly (N. Y.) 125; *Sturgis v. Grau*, (Supm. Ct. App. T.) 39 Misc. (N. Y.) 330.

**13. Renting Out Public Buildings.** — *French v. Quincy*, 3 Allen (Mass.) 9; *Bell v. Platteville*, 71 Wis. 139; *Stone v. Oconomowoc*, 71 Wis. 155.

**14. Exhibitions, etc., on Sunday May Be Prohibited.** — *Quarles v. State*, 55 Ark. 10; *Stewart v. Thayer*, 168 Mass. 519, 60 Am. St. Rep. 407; *Lindenmuller v. People*, 33 Barb. (N. Y.) 548; *People v. Hoym*, (N. Y. Super. Ct. Spec. T.) 20 How. Pr. (N. Y.) 76; *Neuendorff v. Duryea*, 69 N. Y. 557, 25 Am. Rep. 235.

**Athletic Games and Sports.** — *St. Louis Agricultural, etc., Assoc. v. Delano*, 108 Mo. 217.

**Playing Baseball.** — *State v. Hogeiver*, 152 Ind. 652; *State v. Williams*, 35 Mo. App. 541,

**IV. CONTRACT BETWEEN MANAGER AND ACTOR — 1. In General.** — Contracts between manager and actor and the mutual rights and duties growing out of such contracts are governed by the same general principles of law as other contracts.<sup>1</sup>

**2. Breach** — *a. IN GENERAL.* — Contracts for the services of actors are personal in their nature, and a breach of the obligations will render liable the party who breaks the contract.<sup>2</sup>

*b. RELIEF BY INJUNCTION — Ancient Doctrine.* — The earlier cases hold, both in *England* and the *United States*, that as the courts could not enforce the positive part of the contract, they would not enjoin a breach of the negative part.<sup>3</sup>

*Modern Doctrine.* — But it is now settled that a definite contract by an actor not to perform at any other theatre than that of his employer may be enforced by injunction.<sup>4</sup> But some courts hold that an injunction will not be granted unless there is a restricting clause in the contract,<sup>5</sup> while in other cases it is held that to obtain an injunction it must appear that the actor's artistic ability is extraordinary and of special merit,<sup>6</sup> or that there is no adequate remedy at law,<sup>7</sup> or that irreparable damages will result to the manager holding the contract.<sup>8</sup>

under statute against playing games of any kind; *State v. O'Rourke*, 35 Neb. 614, holding that playing baseball is "sporting" within the meaning of the statute; *Matter of Rupp*, 33 N. Y. App. Div. 468, under a statute prohibiting public sport and all noise disturbing the peace on Sunday; *State v. Powell*, 58 Ohio St. 324; *State v. Goode*, 5 Ohio Dec. 281, 5 Ohio N. P. 179.

**Game on Private Grounds.** — *People v. Dennin*, 35 Hun (N. Y.) 327.

**Playing Cards or Dice Not Within Statutes.** — *Rucker v. State*, 67 Miss. 328. But see *Com. v. Hallahan*, 143 Mass. 167.

**Private Dance.** — Where persons dance on Sunday for their own amusement and not for exhibition, they are not guilty of violating the statute against theatrical and other performances on Sunday. *Matter of Allen*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 698.

**Theatrical Performance Within Ordinance** against games of amusement, keeping open places of business, etc. *St. Joseph v. Elliott*, 47 Mo. App. 418.

**For Other Illustrations** see also the title *SUNDAY*, vol. 27, p. 398.

**1. Married Woman.** — A contract by an actress who is a married woman, to perform at a certain theatre, is not binding upon her. *Burton v. Marshall*, 4 Gill (Md.) 487, 45 Am. Dec. 171.

**Corporation.** — The contract obligation to employ an actor, entered into by a corporation, is binding upon the latter the same as it would be upon an individual. *Brandt v. Godwin*, (N. Y. City Ct. Tr. T.) 3 N. Y. Supp. 807.

**2. Services of Actor in General.** — *McCaull v. Braham*, 16 Fed. Rep. 37; *Watson v. Russell*, 149 N. Y. 388; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Duff v. Russell*, 60 N. Y. Super. Ct. 80.

**Forfeiture Clause — Liquidated Damages.** — A provision that in case of violation of the contract by the actor he should forfeit a week's salary, is construed as a penalty and not as liquidated damages, where its plain object is to secure the performance of the contract and not

to provide the price or equivalent to be paid for a nonperformance of the contract. *McCaull v. Braham*, 16 Fed. Rep. 37. But see *Corsi v. Maretzek*, 4 E. D. Smith (N. Y.) 1, where such a provision was enforced; *Graddon v. Price*, 2 C. & P. 610, 12 E. C. L. 286, as to the right of theatre proprietors to enforce regulations by imposing fines.

**3. Injunction — Ancient Doctrine.** — *Kemble v. Kean*, 6 Sim. 334; *Burton v. Marshall*, 4 Gill (Md.) 487, 45 Am. Dec. 171; *De Rivafrinol v. Corsetti*, 4 Paige (N. Y.) 264, 25 Am. Dec. 532; *Sanquirico v. Benedetti*, 1 Barb. (N. Y.) 315; *Hamblin v. Dinneford*, 2 Edw. (N. Y.) 529; *Dietrichsen v. Cabburn*, 2 Phil. 52.

**4. Modern Doctrine.** — *Webster v. Dillon*, 3 Jur. N. S. 432; *Lumley v. Wagner*, 1 De G. M. & G. 604; *Shubert v. Angeles*, 80 N. Y. App. Div. 625; *Daly v. Smith*, 38 N. Y. Super. Ct. 158; *Fredricks v. Mayer*, (Super. Ct. Spec. T.) 13 How. Pr. (N. Y.) 566; *Hayes v. Willio*, (C. Pl. Spec. T.) 11 Abb. Pr. N. S. (N. Y.) 167.

**Not After Salary Period Expires.** — *Mapleson v. Bentham*, 20 W. R. 176.

**Contract Must Be Fair and Reasonable.** — *Mapleson v. Del Puente*, (N. Y. Super. Ct. Spec. T.) 13 Abb. N. Cas. (N. Y.) 144.

**Contract Must Be Definite.** — *Metropolitan Exhibition Co. v. Ward*, (Supm. Ct.) 24 Abb. N. Cas. (N. Y.) 393.

**5. Restricting Clause in Contract.** — *Caldwell v. Cline*, 8 Mart. N. S. (La.) 684; *Butler v. Galletti*, (N. Y. Super. Ct.) 21 How. Pr. (N. Y.) 465. But see *Montague v. Flockton*, L. R. 16 Eq. 189.

**6. Extraordinary Ability.** — *McCaull v. Braham*, 16 Fed. Rep. 37; *Metropolitan Exhibition Co. v. Ewing*, (U. S. Cir. Ct.) 24 Abb. N. Cas. (N. Y.) 419; *Bronk v. Riley*, 50 Hun (N. Y.) 489; *Carter v. Ferguson*, 58 Hun (N. Y.) 569; *Cort v. Lassard*, 18 Oregon 221, 17 Am. St. Rep. 726.

**7. Inadequacy of Legal Remedy.** — *Hahn v. Concordia Soc.*, 42 Md. 460; *Metropolitan Exhibition Co. v. Ewing*, (U. S. Cir. Ct.) 24 Abb. N. Cas. (N. Y.) 419.

**8. Irreparable Damage.** — *McCaull v. Braham*,



**After Breach by Manager.** — Where the manager has himself broken some of the conditions of the contract, an injunction will not be granted to restrain the actor from contracting with a third person.<sup>1</sup>

**c. DEFENSE OF OR EXCUSE FOR NONPERFORMANCE — Illness of Actor.** — Where the illness of an actor is such that it incapacitates him from acting, such inability to perform is a good defense for the nonperformance of the contract,<sup>2</sup> though the actor must give notice to the manager of his inability.<sup>3</sup> But it has been held that serious illness of an actor went to the root of the contract and justified the manager in breaking it and employing another actor in the place of the one unable to perform.<sup>4</sup>

**That Theatre Was Not Licensed.** — It is no defense to the action that the theatre was not licensed, it being presumed from the fact that performance takes place therein that it is regularly licensed;<sup>5</sup> but it has been held otherwise where the actor knew there was no license,<sup>6</sup> or was a party to the illegal contract.<sup>7</sup>

**d. MEASURE OF DAMAGES.** — Besides the actual expenses incurred in preparing for a performance, prospective profits may be recovered for breach of the actor's contract to perform.<sup>8</sup>

**3. Procurement of Breach by Third Person.** — A person who wrongfully interrupts the relation subsisting between employer and employee by procuring a breach by the latter of his contract to perform exclusively for the employer, whereby the employer is injured, commits a wrongful act for which he is responsible at law.<sup>9</sup>

**Assault on Actor.** — But an action was held not to lie against a third person who assaulted an actor in the employ of a theatrical manager, so that the actor was unable to perform.<sup>10</sup>

**4. Termination by Discharge of Actor — a. IN GENERAL.** — The manager of a theatre cannot arbitrarily or capriciously discharge the actor, but must act in good faith.<sup>11</sup>

**Incompetency.** — If an actor shows that he is incompetent to take his part, he may be dismissed.<sup>12</sup>

**Immoral Conduct.** — If an actress conducts herself immorally or indecently, she may be discharged.<sup>13</sup>

16 Fed. Rep. 37; *De Pol v. Sohlke*, 7 Robt. (N. Y.) 280.

**1. After Breach by Manager.** — *Hill v. Haberkorn*, 3 Silv. Sup. (N. Y.) 87. See also *Fechter v. Montgomery*, 33 Beav. 22.

**2. Illness.** — *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Robinson v. Davison*, L. R. 6 Exch. 269.

**Temporary Illness.** — Temporary illness of the plaintiff, an actress, is not a sufficient excuse to justify the defendants in breaking their contract of employment, but where the plaintiff fails to appear at a rehearsal sufficient cause for nonattendance must be shown. *Fisher v. Monroe*, 16 Daly (N. Y.) 461.

**3. Notice of Inability.** — *Robinson v. Davison*, L. R. 6 Exch. 269.

**Theatrical Custom** may be shown. *Corsi v. Maretzek*, 4 E. D. Smith (N. Y.) 1.

**Agreement to Obtain Certain Physician's Certificate.** — *Corsi v. Maretzek*, 4 E. D. Smith (N. Y.) 1.

**4. Serious Illness.** — *Poussard v. Spiers*, 1 Q. B. D. 410.

**5. Theatre Not Licensed.** — *Rodwell v. Redge*, 1 C. & P. 220, 11 E. C. L. 374. But see *Gallini v. Labori*, 5 T. R. 242.

**6. Knowledge on Part of Actor.** — *Roys v. Johnson*, 7 Gray (Mass.) 163.

**7. Actor Party to Illegal Contract.** — *De Begnis v. Armistead*, 10 Bing. 107, 25 E. C. L. 47.

**8. Prospective Profits.** — *Alfaro v. Davidson*, 40 N. Y. Super. Ct. 87; *Savery v. Ingersoll*, 46 Hun (N. Y.) 176.

**9. Procurement of Breach by Third Person.** — *Lumley v. Gye*, 2 El. & Bl. 216, 75 E. C. L. 216. And see the title INTERFERENCE WITH CONTRACT RELATIONS, vol. 16, p. 1109.

**10. Assault on Actor.** — *Taylor v. Neri*, 1 Esp. 386.

**11. Termination by Discharge.** — *Grinnell v. Kiralfy*, 55 Hun (N. Y.) 422; note "On Stipulations to Satisfy," 18 Abb. N. Cas. (N. Y.) 48; *Montague v. Flockton*, L. R. 16 Eq. 189.

**12. Incompetency.** — *White v. Henderson*, 5 Gibson's Law Notes 5. And see the title MASTER AND SERVANT, vol. 20, p. 29.

**Physical Disability**, it has been held, is meant by "incompetency" in a contract for theatrical services. *Brandt v. Godwin*, (N. Y. City Ct. Tr. T.) 3 N. Y. Supp. 807, holding that a discharge because the plaintiff was "not musically satisfactory to the board" was not a discharge for "incompetency."

**13. Immoral Conduct.** — *Drayton v. Reid*, 5 Daly (N. Y.) 442.

**b. NOTICE.** — Personal notice of the discharge of an actor must be given in order to be effective.<sup>1</sup>

**c. MEASURE OF DAMAGES.** — For the arbitrary dismissal of an actor by the manager the actor is entitled, as the measure of damages, to the full amount of the contract price, less the amount he has earned, during the contract period, in the same line of employment,<sup>2</sup> and the burden of proof is upon the manager to show that the actor obtained or could have obtained like employment;<sup>3</sup> but the latter can have but one recovery.<sup>4</sup>

**Liquidated Damages.** — Where a specific sum as liquidated damages is agreed upon as the amount either party who breaks the contract should pay, the measure of damages is the sum thus agreed upon.<sup>5</sup>

**5. Right of Manager to Publish Lithograph, etc.** — The manager of an actress has a right to print and circulate lithographs, photographs, pictures, or other representation of the actress, and she cannot prevent it by injunction.<sup>6</sup>

**6. Requirement as to Rehearsals.** — It is a right of the manager to require the actor to appear and take part at rehearsals,<sup>7</sup> and a failure on the part of the actor to comply with the requirement would justify the manager in terminating the contract.<sup>8</sup>

**7. Theatrical Season.** — Where an actor is engaged for a season, the manager or proprietor of the theatre is the proper person to determine when the theatre season is at a close,<sup>9</sup> but the usages and customs pertaining to the theatrical profession are admissible to explain the contract in this particular.<sup>10</sup>

**8. Right to Assign Parts.** — It is within the discretion of the manager to assign the parts and characters of a play to the different actors, yet he cannot force them to take any part or cast below their character<sup>11</sup> and they are entitled to reasonable notice to prepare themselves for the parts assigned to them.<sup>12</sup>

**9. Duty to Allow Actor to Perform.** — Where an actor contracts with a theatrical manager to perform at the latter's theatre for a certain time, the manager has no right to compel the actor to remain idle for a long space of time, but he must allow the actor to play.<sup>13</sup>

**10. Tender of Services.** — Where the manager repudiates the contract before

**1. Notice.** — *Watson v. Russell*, 149 N. Y. 388; *De Gellert v. Poole*, (N. Y. City Ct. Gen. T.) 2 N. Y. Supp. 651.

**A Theatrical Custom** as to notice has been held not effective as against specific provision of contract. *Hall v. Aronson*, 4 N. Y. L. J. 1499.

**2. Contract Price.** — *Sterling v. Bock*, 37 Minn. 29; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285.

**Where a Definite Period of Notice Is Stipulated**, the measure of damages for discharge without notice is the amount of salary for the stipulated period. *Peverly v. Poole*, (N. Y. City Ct. Gen. T.) 19 Abb. N. Cas. (N. Y.) 271, note.

**Purchase of Costumes — Damage Must Be Shown.** — *Ellsler v. Brooks*, 54 N. Y. Super. Ct. 73.

**3. Burden to Show Other Employment.** — *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285.

**4. One Recovery Only.** — *Everson v. Powers*, 89 N. Y. 527, 42 Am. Rep. 319; *Parry v. American Opera Co.*, (N. Y. City Ct. Gen. T.) 19 Abb. N. Cas. (N. Y.) 269.

**5. Liquidated Damages.** — *Watson v. Russell*, 149 N. Y. 388.

**6. Right to Publish Lithographs.** — *Dis Debar v. Hoeffe*, 4 N. Y. L. J. 1475.

**7. Right to Require Rehearsals.** — *Fisher v. Monroe*, 16 Daly (N. Y.) 461; *Batty v. Melillo*, 10 C. B. 282, 70 E. C. L. 282.

**8. Failure of Actor to Comply.** — *Batty v. Melillo*, 10 C. B. 282, 70 E. C. L. 282; *Fisher v.*

*Monroe*, 16 Daly (N. Y.) 461. But see *Bettini v. Gye*, 1 Q. B. D. 183, where it was held that a provision in the contract for attendance at rehearsals was not a material part of the contract; but the failure to attend was occasioned by illness.

**9. Manager Determines What Is Season.** — *Montague v. Flockton*, L. R. 16 Eq. 189; *Strakosch v. Strakosch*, 3 N. Y. L. J. 645.

**10. Usage and Custom Admissible to Explain.** — *Leavitt v. Kennicott*, 157 Ill. 235; *Grant v. Maddox*, 15 M. & W. 737.

**11. Right to Assign Parts.** — *Kelly v. Caldwell*, 4 La. 38; *Warner v. Holy Church*, (Marine Ct. Tr. T.) 1 City Ct. (N. Y.) 419 (singer in church choir); *Roserie v. Kiralfy*, 12 Phila. (Pa.) 209, 34 Leg. Int. (Pa.) 185; *Graddon v. Price*, 2 C. & P. 610, 12 E. C. L. 286.

**Voluntary Dancing of Other Parts.** — *Baron v. Placide*, 7 La. Ann. 229.

**12. Notice to Prepare.** — *Graddon v. Price*, 2 C. & P. 610, 12 E. C. L. 286.

**Custom or Usage Not Admissible.** — The custom or usage of a theatre that dancers employed there to dance any part may be assigned to any other dance or part as the manager sees fit, is inadmissible to prove or determine a specific contract of employment. *Baron v. Placide*, 7 La. Ann. 229.

**13. Duty to Allow Actor to Perform.** — *Coghlan v. Stetson*, 22 Blatchf. (U. S.) 88.

the time to begin service arrives, the actor is not bound to tender his services to the manager on the day the contract commences to run.<sup>1</sup>

**11. Construction of Contract** — *a. CONTINUOUS CONTRACT.* — The contract to employ an actor for a specified time is continuous, and it is not necessary, in order to constitute a performance, that he play any particular week, when not called upon to do so.<sup>2</sup>

*b. USAGE OR CUSTOM TO EXPLAIN CONTRACT.* — The usages and customs pertaining to the theatrical profession or the class of contracts are admissible to determine the meaning of the contract.<sup>3</sup>

*c. CONTRACT COMPLETE WHEN MAILED.* — Where an actor, accepting a theatrical position, duly mails a duplicate copy of the agreement, the contract is complete from the time of such mailing.<sup>4</sup>

**12. Immoral Performances.** — Although the performance of the contract may be immoral or indecent, if the law tolerates such performances the actor can recover for such services.<sup>5</sup>

**13. Illegal Contract.** — A contract to give a concert for a week of seven days is entire and indivisible, and of no validity.<sup>6</sup>

**V. CONTRACT BETWEEN OWNER AND MANAGER** — **1. Contract of Letting** — *a. IN GENERAL.* — Where there is a specific contract to let a theatre, the lessor is bound by the agreement, and a failure or refusal to carry out the contract will subject the lessor to an action for damages.<sup>7</sup>

**Unlawful Use of Premises.** — If the purpose of the letting is the unlawful use of the premises, such unlawful use may be pleaded in defense to an action for a breach of the contract.<sup>8</sup>

**Time to Sue.** — And when the lessor has repudiated the contract, the lessee may treat the contract as broken and sue immediately for the breach, although the time for performance has not arrived.<sup>9</sup> On the other hand, where the lessee has refused to take the theatre, he is liable to the lessor for damages, and the lessor may treat the contract as broken and sue immediately for the breach although the time for occupancy is not at hand.<sup>10</sup>

*b. DESTRUCTION OF PREMISES.* — In the absence of any warranty that the thing shall exist, the contract for the renting of a theatre is not to be construed as a positive contract, but is subject to the implied condition that the parties shall be excused in case, before breach, the building is destroyed.<sup>11</sup>

*c. AGREEMENT TO USE THEATRE FOR NO OTHER PURPOSE.* — An agreement by the manager that he would use the theatre for no other purpose than that of a theatre is not broken by the manager closing the theatre through inability to keep it open.<sup>12</sup>

*d. CUSTOM AND USAGE.* — Any custom or usage pertaining to theatres, known to the parties at the time the contract was entered into, is binding when the contract was entered into with reference to such usage.<sup>13</sup>

*e. SPECIFIC PERFORMANCE.* — The courts will not compel the owner or

**1. Tender of Services.** — *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285.

**2. Continuous Contract.** — *Sterling v. Bock*, 37 Minn. 29.

**3. Usage and Custom.** — *Kelly v. Caldwell*, 4 La. 38; *Baron v. Placide*, 7 La. Ann. 229.

**4. Complete When Mailed.** — *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285.

**5. Immoral Performance.** — *Baumeister v. Markham*, 101 Ky. 122, 72 Am. St. Rep. 397.

**6. For Performance on Seven Days of Week.** — *Stewart v. Thayer*, 168 Mass. 519, 60 Am. St. Rep. 407; *Fountain Square Theater Co. v. Evans*, 4 Ohio Dec. 151.

**7. Lease — In General.** — *Welty v. Jacobs*, 171 Ill. 624; *Grau v. McVicker*, 8 Biss. (U. S.) 13.

**8. Unlawful Use of Premises.** — *Levy v. Yates*, 8 Ad. & El. 129, 35 E. C. L. 352; *Pringle v. Napanee*, 43 U. C. Q. B. 285.

**9. Time to Sue.** — *Grau v. McVicker*, 8 Biss. (U. S.) 13.

**10. Where Lessee Refuses to Perform.** — *Grau v. McVicker*, 8 Biss. (U. S.) 13.

**11. Destruction of Premises.** — *Taylor v. Caldwell*, 3 B. & S. 826, 113 E. C. L. 826, 32 L. J. Q. B. 164.

**12. Agreement to Use for No Other Purpose.** — *Croft v. Lumley*, 5 El. & Bl. 648, 85 E. C. L. 648; *Leader v. Moody*, L. R. 20 Eq. 145.

**13. Custom and Usage.** — *American Academy of Music v. Birt*, 26 W. N. C. (Pa.) 351.



lessor of a theatre to furnish it to the lessee or manager for the uses of a theatre.<sup>1</sup>

*f.* MEASURE OF DAMAGES. — In an action against the owner of a theatre for breach of the contract of letting, the damages are only such as can be fixed with reasonable certainty.<sup>2</sup> Where the manager of a theatre has refused to comply with his contract, the measure of damages is the loss sustained by the nonperformance of the contract, that is, the amount of rent agreed upon, less the amount brought by the theatre upon being leased to another.<sup>3</sup>

*2. Employment of Manager by Owner* — *a.* IN GENERAL. — Where a contract between an owner of a theatre building and a theatrical manager is in effect a partnership agreement for the conduct of the theatrical business, it is not necessary that the manager should devote his entire services to the business, and he may employ others in the management of the theatre.<sup>4</sup>

*b.* PRIVILEGES OF MANAGER — *Private Box.* — Under a contract by a manager with the owner of a theatre whereby the manager is entitled to all the privileges of his situation, he is not entitled as a matter of right to the use of a private box.<sup>5</sup>

*Free Admissions.* — The manager has no right to give orders for free admissions, but these privileges are only matters of kindness and courtesy usually extended to the manager.<sup>6</sup>

*c.* RIGHT TO DISCHARGE MANAGER. — Where the manager of a theatre is guilty of such immoral or indecent conduct as would tend to damage the interests of the theatre, the owner has a right to dismiss him.<sup>7</sup>

*d.* PERSONAL LIABILITY OF MANAGER — *Performance Without License.* — Where a party is the acting manager of a theatre, he is liable personally for performances given without a license, it not being material whether he acted as agent of others or not.<sup>8</sup>

*On Covenants of Lease.* — Where the manager enters into a contract for the lease of a theatre, not disclosing the agency, he is liable personally for a breach of any of the covenants in the lease.<sup>9</sup>

**VI. CONTRACT BETWEEN AUTHOR AND MANAGER.** — An action lies against a theatre manager for failure to produce a certain play as agreed upon.<sup>10</sup>

**VII. CONTRACT FOR LITHOGRAPHS AND ADVERTISING** — *Must Correspond with Sketches.* — A contract for a certain number of lithographs "as per sketches" must be performed by making the lithographs in accordance with such sketches.<sup>11</sup>

*Contract for Work and Labor.* — An agreement to manufacture lithographs for theatrical purposes, to be taken and paid for during the theatrical season, is a

1. *Specific Performance Will Not Be Compelled.* — *Welty v. Jacobs*, 171 Ill. 624; *Lacy v. Heuck*, 9 Ohio Dec. (Reprint) 347, 12 Cinc. L. Bul. 209.

2. *Measure of Damages — Breach by Owner.* — *New York Academy of Music v. Hackett*, 2 Hilt. (N. Y.) 217. See also *Behrens v. Miller*, (City Ct. Tr. T.) 2 City Ct. (N. Y.) 427.

*Expenses of Advertising, Printing, etc.* — *New York Academy of Music v. Hackett*, 2 Hilt. (N. Y.) 217.

3. *Breach by Manager.* — *Grau v. McVicker*, 8 Biss. (U. S.) 13.

4. *Personal Services of Manager — Partnership Contract.* — *Leavitt v. Windsor Land, etc., Co.*, (C. C. A.) 54 Fed. Rep. 439.

*Contract of Employment — Time It Begins Is Question of Fact.* — *Leavitt v. Kennicott*, 157 Ill. 235.

5. *Right of Manager to Private Box.* — *Lacy v. Osbaldiston*, 8 C. & P. 80, 34 E. C. L. 300.

6. *Free Admissions.* — *Lacy v. Osbaldiston*, 8 C. & P. 80, 34 E. C. L. 300.

7. *Right to Discharge Manager* — *Lacy v. Osbaldiston*, 8 C. & P. 80, 34 E. C. L. 300; *Walsh v. Wiggins*, 19 Chicago Leg. N. 169.

*Where the Manager Has Control of the Selection of Shows* under the terms of the contract the owner cannot re-enter on the ground that the manager engaged shows of questionable character. *Leavitt v. Windsor Land, etc., Co.*, (C. C. A.) 54 Fed. Rep. 439.

8. *Personal Liability of Manager — Performances Without License.* — *Parsons v. Chapman*, 5 C. & P. 33, 24 E. C. L. 201.

9. *Liability of Manager on Covenants of Lease.* — *Grau v. McVicker*, 8 Biss. (U. S.) 13.

10. *Contract Between Author and Manager.* — *Schonberg v. Cheney*, 3 Hun (N. Y.) 677; *Thorne v. French*, (N. Y. Super. Ct. Gen. T.) 4 Misc. (N. Y.) 436.

11. *Must Correspond with Sketches.* — *Bien v. Abbey*, (C. Pl. Gen. T.) 13 N. Y. Supp. 286.

contract for work and labor, not a sale.<sup>1</sup>

**Amount Recoverable.** — Where a contract was made to furnish lithographs but the manager failed to take them within the time stipulated, the furnisher may, upon their destruction by fire, recover the contract price less the amount of insurance which he, as nominal owner, had procured on them.<sup>2</sup>

**Contract for Premises for Posting Lithographs.** — A contract for the use of a fence, building, or space for the purpose of posting theatrical advertisements, includes the right of entry upon the premises for the purpose.<sup>3</sup>

**Contract for Advertisement in Program.** — A contract to insert an advertisement in the programs of three different theatres during "the theatre season," each ending at a different date, is entire and becomes terminated when the season of the first theatre ends.<sup>4</sup>

**VIII. TICKETS OF ADMISSION — 1. Revocable License.** — The courts generally hold that a ticket of admission to a public performance is merely a revocable license to witness the performance.<sup>5</sup>

**2. Right of Holder to Seat.** — On the other hand it seems to have been considered that the holder of a ticket of admission to a theatre has more than a revocable license; his right is more in the nature of a lease, entitling him to peaceable ingress and egress, and exclusive possession of the designated seat during the performance on the particular evening for which it is purchased.<sup>6</sup>

**Coupon — Reserved Seat.** — When a ticket is sold reserving to the purchaser a particular seat, the holder of the coupon has a right to the designated seat.<sup>7</sup>

**3. Wrongful Expulsion.** — Where the holder of a ticket of admission to a place of public amusement is wrongfully ejected, the wrongdoer is liable for all consequential damages resulting from the unlawful ejection.<sup>8</sup>

**4. Forgery.** — Forgery may be committed by printing bogus theatre tickets.<sup>9</sup>

**1. Contract for Work and Labor.** — *Central Lithographing, etc., Co. v. Moore*, 75 Wis. 170, 17 Am. St. Rep. 186.

**2. Amount Recoverable.** — *Central Lithographing, etc., Co. v. Moore*, 75 Wis. 170, 17 Am. St. Rep. 186.

**3. Right of Entry in Posting.** — *Willoughby v. Lawrence*, 18 Chicago Leg. N. 180.

**4. Advertising in Program.** — *Hazard v. Hoxsie*, 53 Hun (N. Y.) 417.

**5. Revocable License.** — *Taylor v. Waters*, 7 Taunt. 374, 2 E. C. L. 373; *Coleman v. Foster*, 1 H. & N. 37; *Flight v. Glossop*, 2 Scott 220, 2 Bing. N. Cas. 125, 29 E. C. L. 279; *Wood v. Leadbitter*, 13 M. & W. 838; *McCrea v. Marsh*, 12 Gray (Mass.) 211, 71 Am. Dec. 745; *Burton v. Scherpf*, 1 Allen (Mass.) 133, 79 Am. Dec. 717; *Purcell v. Daly*, (N. Y. City Dist. Ct.) 19 Abb. N. Cas. (N. Y.) 301 (citing *Mendenhall v. Klinck*, 51 N. Y. 246).

**License for Twenty-one Years Irrevocable.** — *Taylor v. Waters*, 2 Marsh. 551, 7 Taunt. 374, 2 E. C. L. 373.

**Assignment of Lease Revokes License of Holder of Free Ticket.** — *Coleman v. Foster*, 1 H. & N. 37; *Taylor v. Waters*, 7 Taunt. 374, 2 E. C. L. 373.

**Ejection — Remedy by Action in Contract.** — *McCrea v. Marsh*, 12 Gray (Mass.) 211, 71 Am. Dec. 745; *Burton v. Scherpf*, 1 Allen (Mass.) 133, 79 Am. Dec. 717; *Coleman v. Foster*, 1 H. & N. 37; *Wood v. Leadbitter*, 13 M. & W. 838.

**6. Right to Seat.** — *Drew v. Peer*, 93 Pa. St. 234.

**Where There Is No Seat.** — Where one purchased a ticket to a theatre upon being told

there was room, but when inside found there was no room, his proper course was to go out of the theatre and demand the return of his money, but he has no right to go into a box, and if he does go into the box the manager has the right to remove him, using such force as is necessary. *Lewis v. Arnold*, 4 C. & P. 354, 19 E. C. L. 417.

**General Admission.** — A person paying for a general admission to a place of amusement, not knowing that an extra price is charged for certain seats, may rightfully occupy one of them without pay until notified by the management that a fee is charged therefor and the same demanded of him; and in the absence of improper conduct upon the part of such ticket holder, he should be allowed to remain within the auditorium, although it is necessary to remove him from the seat in question, he declining to leave the same. *McGovern v. Staples*, (N. Y.) 7 Alb. L. J. 219.

**7. Reserved Seat.** — *Com. v. Powell*, 10 Phila. (Pa.) 180, 30 Leg. Int. (Pa.) 100; 1 Harvard L. Rev. 24.

**8. Wrongful Ejection.** — *Smith v. Leo*, 92 Hun (N. Y.) 242; *Drew v. Peer*, 93 Pa. St. 234.

**Evidence of Insults of Patrons Admissible.** — In an action by a colored man who was forcibly beaten and ejected from a public place of amusement, evidence of the insults of patrons of the entertainment, which took place before the defendants' servants interfered and participated in the assault, are admissible as part of the *res gesta*. *Cremore v. Huber*, 18 N. Y. App. Div. 231.

**9. Forgery.** — *Benson v. McMahon*, 127 U. S. 457; *Com. v. Ray*, 3 Gray (Mass.) 441.

**IX. RIGHTS, DUTIES, AND LIABILITIES OF MANAGER TOWARD PUBLIC—**

**1. Discrimination** — *a.* **IN GENERAL.** — Various statutory and constitutional provisions have been enacted, to the effect that all persons shall be entitled to full and equal privileges in all places of amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens.<sup>1</sup>

*b.* **EXCLUSION OF COLORED PEOPLE.** — It is generally provided in the various states that it is unlawful to exclude persons of color from the equal enjoyment of all rights and privileges in places of public amusement.<sup>2</sup>

**2. Right to Assign Particular Seat.** — The manager of a place of public amusement has the right to assign particular seats to different races or classes of men as he sees fit.<sup>3</sup>

**3. Liability for Acts of Agents and Employees.** — The manager of a theatre is liable for such acts and defaults of his agents and employees as fall within the scope of their employment.<sup>4</sup>

**X. RIGHTS, DUTIES, AND LIABILITIES OF OWNER OF PLACE TOWARD PUBLIC**

**— Duty to Provide Safe Place.** — It is the duty of the proprietor of a place of public amusement to keep such place in a reasonably safe condition for persons who enter at his invitation, and the failure or neglect to keep the place in proper condition will render him liable to one hurt by reason of the defect,<sup>5</sup> and the leasing of the premises to another will not relieve the owner of liability for defects known to him.<sup>6</sup> But if the lessee changes the building and makes it defective without the owner's knowledge, the latter is not liable.<sup>7</sup>

**Safe Appliances.** — And the owner will be liable for negligence in not providing safe appliances for the prevention of accidents peculiar to the character of the performance.<sup>8</sup>

**1. Discrimination — In General.** — Baylies *v.* Curry, 128 Ill. 287; Joseph *v.* Bidwell, 28 La. Ann. 382, 26 Am. Rep. 102; Grannan *v.* Westchester Racing Assoc., 16 N. Y. App. Div. 8; Smith *v.* Leo, 92 Hun (N. Y.) 242.

**Violation of Rule No Cause for Permanent Exclusion.** — Grannan *v.* Westchester Racing Assoc., 16 N. Y. App. Div. 8.

**2. Exclusion of Colored People.** — Baylies *v.* Curry, 128 Ill. 287; Joseph *v.* Bidwell, 28 La. Ann. 382, 26 Am. Rep. 102; Donnell *v.* State, 48 Miss. 661, 12 Am. Rep. 375; People *v.* King, 110 N. Y. 418, 6 Am. St. Rep. 389; Cremore *v.* Huber, 18 N. Y. App. Div. 231. See also Anderson *v.* Rawlings, 10 Ohio Cir. Dec. 112, 18 Ohio Cir. Ct. 381.

**Regulations of Theatre Inadmissible.** — Baylies *v.* Curry, 128 Ill. 287.

Unless there is a regulation in the theatre assigning particular seats for white people and for colored people, the defendants have no right to eject colored people who have purchased tickets of general admission. Drew *v.* Peer, 93 Pa. St. 234.

**Saloon Not a Place of Amusement.** — Kellar *v.* Koerber, 61 Ohio St. 388.

**3. Right to Assign Seats.** — Civil Rights Cases, 109 U. S. 3; District of Columbia *v.* Saviile, 1 MacArthur (D. C.) 581, 29 Am. Rep. 616; Bowlin *v.* Lyon, 67 Iowa 536, 56 Am. Rep. 355; Burton *v.* Scherpf, 1 Allen (Mass.) 133, 79 Am. Dec. 717; Younger *v.* Judah, 111 Mo. 303; 33 Am. St. Rep. 527; Pearce *v.* Spalding, 12 Mo. App. 141. See generally the title **CIVIL RIGHTS**, vol. 6, p. 68.

**Right to Set Apart Private Box** — Clifford *v.* Brandon, 2 Camb. 358.

**4. For Acts of Agents and Employees.** — Joseph

*v.* Bidwell, 28 La. Ann. 382, 26 Am. Rep. 102; Fowler *v.* Holmes, (Brooklyn City Ct. Gen. T.) 3 N. Y. Supp. 816; Anderson *v.* Rawlings, 10 Ohio Cir. Dec. 112, 18 Ohio Cir. Ct. 381; Drew *v.* Peer, 93 Pa. St. 234.

**Assault and Battery by Servant.** — Dickson *v.* Waldron, 135 Ind. 507, 41 Am. St. Rep. 440, affirmed in 135 Ind. 524, 1 Am. Law. Reg. 448.

**Mistake of Ticket Seller.** — The mistake of the ticket seller in selling a ticket of admission with reserved seat for a day other than the day of performance, and the consequent ejection of the purchaser from the seat, no undue force or violence being used, is not a cause for exemplary or punitive damages. MacGowan *v.* Duff, 14 Daly (N. Y.) 315.

**5. Duty to Provide Safe Place.** — Schofield *v.* Wood, 170 Mass. 415; Oxford *v.* Leathe, 165 Mass. 254; Currier *v.* Boston Music Hall Assoc., 135 Mass. 414; Fox *v.* Buffalo Park, 21 N. Y. App. Div. 321; Francis *v.* Cockrell, L. R. 5 Q. B. 501; Scott *v.* London Docks, 11 L. T. N. S. 383.

**Twenty-four Hours' Notice of Defect — Proprietor Liable.** — Butcher *v.* Hyde, (Brooklyn City Ct. Gen. T.) 10 Misc. (N. Y.) 275.

**Negligence Question of Fact.** — Schofield *v.* Wood, 170 Mass. 415; Dunning *v.* Jacobs, (C. Pl. Gen. T.) 15 Misc. (N. Y.) 85.

**6. Lease Does Not Relieve for Known Defects.** — Fire Dept. *v.* Hill, (C. Pl. Gen. T.) 14 N. Y. Supp. 158.

**7. Change by Lessee.** — Bard *v.* New York, etc., R. Co., 10 Daly (N. Y.) 520.

**8. Safe Appliances.** — Thompson *v.* Lowell, etc., St. R. Co., 170 Mass. 577, 64 Am. St. Rep. 323.



**Not Bailee.** — The proprietor of a theatre is not a bailee of property of a patron while he is witnessing a performance.<sup>1</sup>

**XI. LITERARY PROPERTY IN DRAMATIC PRODUCTION.** — This subject has already been fully discussed.<sup>2</sup>

**XII. RIGHT TO CRITICISE PLAY** — **Right of Public.** — The public who go to a theatre have the right to express their free and unbiased opinions of the merits of the performers who appear upon the stage, but parties have no right by preconcerted plan to make such a disturbance as would break the peace or excite terror.<sup>3</sup>

**Right of Press.** — All places of public amusement and any species of public entertainment may be fairly and candidly criticised, provided the comments or criticism be not malevolent or flagrantly unjust.<sup>4</sup>

**XIII. NUISANCES.** — Erections or buildings adapted to the use of sports and amusements which collect or have a tendency to draw disorderly crowds or indecent exhibitions, may be prohibited as nuisances.<sup>5</sup> But a theatre or variety show is not *co nomine* illegal; and a city council has no right to call acts, innocent in themselves, variety shows, and punish persons engaged therein.<sup>6</sup>

**XIV. RIGHTS OF OWNER OF ADJOINING PROPERTY.** — One has a right to build a stand upon his own land from which he allows other persons to witness a baseball game within the enclosure of an adjoining baseball park, and such action will not be enjoined.<sup>7</sup>

**XV. OWNERSHIP OF ACTOR'S PHOTOGRAPH.** — Where one photographs an actress, with her consent, and agrees to furnish her with as many copies as she desires, such photographer is the absolute owner of the negative, and she has no right to make copies or allow others to do so from the photograph without the consent of the photographer.<sup>8</sup>

**THEFT.** (See also **STEAL**, vol. 26, p. 769; and see the titles **LARCENY**, vol. 18, p. 456; **MARINE INSURANCE**, vol. 19, p. 1028.) — Theft is synonymous with larceny.<sup>9</sup> It is a popular name for larceny.<sup>10</sup>

**Fire-alarm System Installed in Theatre at Request of Former Lessee** — **Subsequent Lessee Not Liable by Merely Permitting It to Remain** — **Legal Obligation Discharged by Another.** — *Manhattan Fire Alarm Co. v. Weber*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 729. And see the title **IMPLED OR QUASI CONTRACTS**, vol. 15, p. 1076.

1. **Not Bailee.** — *Pattison v. Hammerstein*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 375.

2. See the title **COPYRIGHT**, vol. 7, p. 508.

3. **Right of Public to Criticise.** — *Gregory v. Brunswick*, 1 C. & K. 24, 47 E. C. L. 24; *Clifford v. Brandon*, 2 Campb. 358; *Rex v. Forbes*, 1 Cr. & Dix. 157.

4. **Right of Press to Criticise.** — *Dibdin v. Swan*, 1 Esp. 28, 5 Rev. Rep. 717.

5. **Nuisances.** — *Reg. v. Saunders*, 1 Q. B. D. 15; *Walsh v. Wiggins*, 19 Chicago Leg. N. 169.

**Rope Dancing.** — *Hall's Case*, 1 Mod. 76.

**Circus.** — *Inchbald v. Robinson*, L. R. 4 Ch. 388, 20 L. T. N. S. 259, 17 W. R. 459.

**Shooting Ground.** — *Rex v. Moore*, 3 B. & Ad. 184, 23 E. C. L. 52.

**Bowling Alley.** — *Tanner v. Albion*, 5 Hill (N. Y.) 121, 40 Am. Dec. 337. See also *Hall's Case*, 1 Mod. 76.

**Sparring Exhibition.** — A sparring exhibition is a legitimate pastime, and unless there is a breach of the peace to be committed the officers have no right to interfere with it as being a nuisance. *Behrens v. Miller*, (City Ct. Tr. T.) 2 City Ct. (N. Y.) 427.

**Billiard Room** not a nuisance when no betting

is allowed and where there is no disturbance, *People v. Sergeant*, 8 Cow. (N. Y.) 139.

**Theatre Crowd Obstructing Private Property.** — The owner, manager, or lessee of a theatre is liable civilly for a nuisance caused by the obstruction of access to the plaintiff's property resulting from the assembling of crowds previous to the opening of the doors of the theatre. *Barber v. Penley*, (1893) 2 Ch. 447.

6. *Ex p. Bell*, 32 Tex. Crim. 308, 40 Am. St. Rep. 778.

7. **Right of Adjoining Owner.** — *Detroit Base Ball Club v. Deppert*, 61 Mich. 63, 1 Am. St. Rep. 566.

8. **Photographer's Ownership of Photograph.** — *Press Pub. Co. v. Falk*, 59 Fed. Rep. 324, 49 Alb. L. J. 317. See also the title **PHOTOGRAPHS**, vol. 22, p. 777.

9. **Theft and Larceny.** — *Bouv. L. Dict.* Blackstone uses the words *theft* and "larceny" as descriptive of one and the same offense. 4 Black. Com. 229. See also *People v. Donohue*, 84 N. Y. 441.

In *American Ins. Co. v. Bryan*, 26 Wend. (N. Y.) 587, 37 Am. Dec. 278, where the discussion of the meaning of the word *theft* as used in an insurance policy arose, it was said that its "primary meaning, which is now the ordinary one, is that of secret stealing or simple larceny." *Per Verplanck, Sen.* See also *Thief, post*.

10. **Theft.** — *State v. Boyce*, 65 Ark. 82; *People v. Donohue*, 84 N. Y. 442. See also *Reg.*

**THEIR.** — See note 1.

**THEM.** — See HE, vol. 15, p. 304.

*v. Hollingsworth*, 2 Can. Crim. Cas. (N. W. Ter.) 291; *State v. Kaplan*, 72 Conn. 635.

**Texas.** — “*Theft* is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with the intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking.” *Billard v. State*, 30 Tex. 374.

In *Hall v. State*, 41 Tex. 287, it was held that the carrying away and asportation necessary to constitute the common-law crime of larceny was not necessary to the statutory crime of *theft*.

In *Chance v. State*, 27 Tex. App. 441, it was held that an indictment for *theft* was fatally defective if it failed to charge directly that the taking of the property was fraudulent.

In *Crowell v. State*, 24 Tex. App. 404, it was held that the *factum probandum* of *theft*, as that offense is defined by the Texas statute, is the taking of property. See also *Minter v. State*, 26 Tex. App. 219.

It has been held that killing an animal constituted a taking. *Hall v. State*, 41 Tex. 287; *Coombes v. State*, 17 Tex. App. 258.

And for definitions and illustrations of the statutory crime, see *Counts v. State*, 37 Tex. 593; *Bawcom v. State*, 41 Tex. 189; *Campbell v. State*, 42 Tex. 591; *Berg v. State*, 2 Tex. App. 149; *Stapp v. State*, 3 Tex. App. 145; *Sansbury v. State*, 4 Tex. App. 100; *Williams v. State*, 4 Tex. App. 5; *Marshall v. State*, 4 Tex. App. 549; *Powell v. State*, 7 Tex. App. 467; *Turner v. State*, 7 Tex. App. 596; *Foster v. State*, 21 Tex. App. 80; *Smith v. State*, 21 Tex. App. 133; *Harris v. State*, 29 Tex. App. 103; *Frank v. State*, 30 Tex. App. 381; *Hurley v. State*, 30 Tex. App. 333; *Lawless v. State*, (Tex. App. 1892) 19 S. W. Rep. 676; *Dismuke v. State*, (Tex. Crim. 1892) 20 S. W. Rep. 562; *Beckham v. State*, (Tex. Crim. 1893) 22 S. W. Rep. 411; *Brown v. State*, (Tex. Crim. 1893) 22 S. W. Rep. 24; *Massey v. State*, 31 Tex. Crim. 91; *Stegall v. State*, 32 Tex. Crim. 100; *Dale v. State*, 32 Tex. Crim. 78; *Taylor v. State*, 32 Tex. Crim. 110.

**Embezzlement and Theft Distinguished.** — See *Simco v. State*, 8 Tex. App. 406, and see the title EMBEZZLEMENT, vol. 10, p. 976.

**Theft Bote.** — Theft bote is defined as “where the party robbed not only knows the felon, but also takes his goods again or other amends upon agreement not to prosecute.” 4 Black. Com. 133, cited in *People v. Munroe*, 100 Cal. 669; *Com. v. Pease*, 16 Mass. 91; and *Forshner v. Whitcomb*, 44 N. H. 14. See also the title COMPOUNDING OFFENSES, vol. 6, p. 399.

**Theft by Night.** — In *Laws v. State*, 26 Tex. App. 655, it was said: “A ‘*theft* by night’ is a *theft* committed at any time between thirty minutes after sunset and thirty minutes before sunrise.” See also NIGHT, vol. 21, p. 540.

1. **Read Distributively.** — In a covenant by two or more for “themselves, *their* executors, administrators, and assigns,” the word *their* is necessarily read distributively, because the

parties do not anticipate that they will have the same executors, etc.; but the word will not convert a covenant otherwise joint into a separate covenant. *White v. Tyndall*, 13 App. Cas. 276.

**Joint Obligation.** — In *Cottrell v. Hatheway*, 108 Mich. 622, it was said: “The use of the word *their* has several times been construed by this court to import a joint obligation. *Edwards v. Hughes*, 20 Mich. 289; *Miller v. Judge*, 41 Mich. 326; *Geiges v. Greiner*, 68 Mich. 155; *Sword v. Lane*, 71 Mich. 285.”

**Homestead.** — A homestead act provided that a homestead might be selected by the husband and wife or either of them, declaring *their* intention in writing to claim the same as a homestead. It was held that the statute did not require the joint intention of the husband and wife to claim the premises as a homestead, but allowed either the husband or wife to make and file the declaration. *Quackenbush v. Reed*, 102 Cal. 493.

**Ownership.** — The words “*their* two-story brick and gravelled roof building,” used in a policy of insurance to describe the property insured, “do not necessarily import an absolute legal title in the building itself. The words ‘his’ or *their* used in a policy as descriptive of the property of the assured do not render the policy void if the insured has an insurable interest, although the interest may be qualified or defeasible, or even an equitable interest.” *Fowle v. Springfield F. & M. Ins. Co.*, 122 Mass. 194.

**Their or Any of Their.** — A deed was “to them or any of them, *their* or any of *their* heirs.” In construing this provision the court said: “That is, them and each of them, *their* and each of *their* heirs; any heir which either of them might have; because if either of them had an heir which took nothing, the word ‘any’ would not be satisfied in its full extent.” *Galbraith v. Galbraith*, 3 S. & R. (Pa.) 392.

**Their Children.** — In *Boreham v. Bignall*, 8 Hare 131, a substitutional gift to “*their* children” was held conclusively to show that one wife only of the first beneficiary was in the contemplation of the testator, and that that wife must have been the one living at the date of the will.

**At Their Decease.** — In *Dole v. Keyes*, 143 Mass. 239, it was said: “Perhaps this court has gone further than the English courts would in reading ‘at *their* decease’ as meaning ‘when all the life tenants shall have died,’ rather than ‘as they respectively die,’ *Loring v. Coolidge*, 99 Mass. 192, although in that case the limitation over was not to children of the life tenants.”

**Their Heirs Forever.** — A testator after devising a life estate to his wife added: “At the death of my said wife Agnes, I desire that one-half of my estate, both real and personal, may be divided amongst my brothers and sisters, and *their* heirs forever.” It was held that the words “*their* heirs forever” should be construed to designate with whom the division should be made in case of the death of any of his brothers and sisters, and were words of purchase

**THEN.**—The word “then” means at that time, in that event, or in that case.<sup>1</sup> As an adverb of time, “then” means “at that time,” referring to a time specified, either past or future. It has no power in itself to fix a time, but simply refers to a time already fixed.<sup>2</sup> The word “then,” although in a strictly grammatical sense an adverb of time, is nevertheless often used for the purpose of denoting an event or contingency, and is equivalent to the words “in that event,” or “in that case.”<sup>3</sup>

and not of descent or limitation. *Flournoy v. Flournoy*, 1 Bush (Ky.) 515.

**“Their Roads” — Lease by Railroad.**—An Illinois statute empowered all railroad companies incorporated under the laws of that state to make “contracts and arrangements with each other and with railroad corporations of other states for leasing or running *their* roads or any part thereof.” In construing this provision the court said: “By the grammatical and the natural construction, the words ‘*their* roads’ include roads of Illinois corporations, as well as roads of corporations of other states, and the power conferred on corporations of Illinois to make contracts ‘for leasing’ such roads includes making, as well as taking, leases thereof.” *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 402. See also *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 309.

1. **Then.**—*Abbott v. Middleton*, 7 H. L. Cas. 119; *Harris v. Smith*, 16 Ga. 557.

In *Shaffer's Succession*, 50 La. Ann. 615, it was said: “The word has more meanings than one. We sought to make the different meanings clear by the following: *Tunc* [English *then*] expresses ‘the meaning ‘time,’ at the time; *ibi*; *eodem tempore*. Says Ainsworth in his dictionary: ‘It may also express time subsequent; after that; *unde*; *postea*, *deinde*.’ It has also another meaning, without application here. The corresponding French word is *alors* and *ensuite*, observing about the same difference in meaning as in Latin. We here made use of the foregoing definition for the reason that it is concise, and is the basis of the modern definition of the word *then*. In the Century Dictionary the definition is the same as just stated. If the word be taken in its ordinary or popular signification, the same difference in meaning arises.”

**Then Personally Appeared.**—An affidavit was objected to because the notary public subscribing it did not insert the words “before me;” the affidavit contained the words “*then* personally appeared.” The court said: “We are of the opinion that the words ‘*then* personally appeared,’ which did not occur in any of the foregoing cases, mean personally appeared before the signer, by their only fair interpretation.” *Clement v. Bullens*, 159 Mass. 193.

**Then in Sense of Thereupon or Thereafter.**—*Smith v. Callander*, (1901) A. C. 306, 307.

**Then in Sense of Further.**—*Then* may be used as equivalent to “further,” *e. g.*, where there is a testamentary direction for payment of debts, and *then* a demise of lands. *Willan v. Lancaster*, 3 Russ. 108.

**Then Due.**—A statute provided that suit must be brought within three months after the date of the rejection of the claim against the intestate by the personal representative “if it be *then* due.” In construing this provision

the court said: “If a claim is one which would become due upon presentation, it is a claim *then* due within the meaning of this statute.” *Maurer v. King*, 127 Cal. 116.

**Reasonable Time.**—A statute provided: “The case and amendments shall be submitted to the judge, who shall settle and sign the same and cause it to be attested by the clerk, and the seal of the court to be thereto attached. It shall *then* be filed with the papers in the case.” In construing this provision the court said: “But *then* does not mean the same day, for the judge may be several days’ journey away from the clerk’s office. It does not mean at the same term, for the term may long since have adjourned. The most that can be claimed is that it means that the case must be filed within a reasonable time.” *Lownsberry v. Rakestraw*, 14 Kan. 154.

**Future Time.**—In *Oullahan v. Baldwin*, 100 Cal. 654, it was said: “Again, conceding the letter to have a binding force upon the writers of it, it in substance says: ‘We cannot now release you from the contract, but if we do not convince you by Thursday morning at eight o’clock that we will make a sale, we will *then* waive all claims under the contract.’ This statement amounts simply to a conditional promise to waive something at a specified time *in futuro*. It is not a waiver, but an agreement to waive at a particular future time.”

**Boundaries.**—In *Hammond v. Ridgely*, 5 Har. & J. (Md.) 260, it was said: “It [*then*] means ‘afterwards,’ ‘immediately afterwards,’ or ‘at that time,’ and such is its meaning in all surveys; that is, as soon as the surveyor came to the termination of one line he commenced running the next.”

2. **Adverb of Time.**—*Heasman v. Pearse*, L. R. 7 Ch. 660; *Bell v. Hogan*, 1 Stew. (Ala.) 541; *Newberry v. Hinman*, 49 Conn. 130; *Farnam v. Farnam*, 53 Conn. 279; *Gibson v. Hardaway*, 68 Ga. 378; *Furnace v. State*, 153 Ind. 93; *Wood v. Bullard*, 151 Mass. 324; *Dove v. Torr*, 128 Mass. 38; *Benson v. Corbin*, 145 N. Y. 351; *Cressons's Appeal*, 76 Pa. St. 19; *Laird's Appeal*, 85 Pa. St. 343; *Mangum v. Piester*, 16 S. Car. 329.

“The natural meaning of the word [*then*] is to refer to a time.” *Widdicombe v. Muller*, 1 Drew. 445.

*Then* construed as an adverb of time, not of contingency, *Baker v. Lucas*, 1 Molloy 481.

And see *Harris v. Smith*, 16 Ga. 557, construing the following clause of a will: “Provided, nevertheless, if my said grandson should die leaving no lawful heirs, *then*, in that case, it is my will” that the property be divided between the children of J.

3. **Event or Contingency.**—*Hall v. Priest*, 6 Gray (Mass.) 24; *Pintard v. Irwin*, 20 N. J. L. 505. And see *Travis v. Taylor*, 12 Jur. N. S. 791; *Wheeler v. Addams*, 17 Beav. 417; *Hol-*



**THEN AND THERE.** (See also the title INDICTMENTS, INFORMATIONS, AND COMPLAINTS, 10 ENCYC. OF PL. AND PR. 519.)—The words “then and

loway *v.* Holloway, 5 Ves. Jr. 399; Bunting *v.* Speck, 41 Kan. 424; Thomson *v.* Ludington, 104 Mass. 193; Ash *v.* Coleman, 24 Barb. (N. Y.) 647; Barker *v.* Southerland, 6 Dem. (N. Y.) 220; Corse *v.* Chapman, 153 N. Y. 466; Buzby's Appeal, 61 Pa. St. 116. See also, generally, Hinson *v.* Pickett, 1 Hill Eq. (S. Car.) 35; Wightman *v.* Carlisle, 14 Vt. 296.

**Both Meanings.**—The word *then*, used twice in the same sentence, was construed in the first instance as pointing to the event, and in the second as an adverb of time, in Gill *v.* Barrett, 29 Beav. 372.

**Where Property Is Given to Such Persons as May Then Be Next of Kin or Relations of Testator, Etc.**—Thesiger, L. J., in Mortimer *v.* Slater, 7 Ch. D. 329, affirmed *sub nom.* Mortimore *v.* Mortimore, 4 App. Cas. 448, 48 L. J. Ch. 470, in discussing the meaning of the word *then*, where property is given upon certain events to such persons as shall *then* be next of kin or relations of the testator, said: “The cases which have been cited seem to me to divide themselves into three classes. The first of these classes is the one where the word *then*, as an adverb of time, is attached to the description of the class; and in that case, as in Wharton *v.* Barker, 4 Kay & J. 483, and Long *v.* Blackall, 3 Ves. Jr. 486, it was decided that the word *then* imported that the class was to be ascertained at the time so pointed out, *i. e.*, at the period of distribution. Wheeler *v.* Addams, 17 Beav. 417, is to a certain extent an exception from that rule; but I think that may be explained, because we find in that case there is in the limitation an exception of the tenant for life on whose death the limitation was to come into force. \* \* \* The second class of cases is where words of futurity, but without the adverb of time, are attached to the description of the class, and in that class of cases we find no distinction drawn, but in every one of them it was held that there the words must speak from the time of the testator's death. The cases cited on that point were Holloway *v.* Holloway, 5 Ves. Jr. 399, and Doe *v.* Lawson, 3 East 292. The third class of cases is that where the word *then*, the adverb of time, is used, but where we find it used not in connection with the description of the class, but in connection with the time at which the estate is to come into being. In that class of cases also, without any exception, we find that it has been decided that the class is to be ascertained at the time of the testator's death. That is to be found in Cable *v.* Cable, 16 Beav. 507; Bullock *v.* Downes, 9 H. L. Cas. 1; and in Day *v.* Day, 4 Ir. R. Eq. 385; and it is to be observed that in all these cases we do not find that any distinction is drawn from the fact of the use of the words ‘if he had died intestate,’ \* \* \* but we find in all of them that the learned judges who decided them considered the question to be whether the word *then* was attached to the description of the class, or to the time when the estate is to come into being.”

Of course these rules are merely rules for determining the intention of the testator, and in Rewalt *v.* Ulrich, 23 Pa. St. 390, it was

said: “And we cannot use the word *then* as leading to a different construction of this qualification; for *then*, or ‘in that case,’ or similar expressions are always used in these substitutionary clauses, and they all involve the idea of the time *then*; yet it is not from them, but from other parts of the will, that we learn what time is meant for the vesting. It is not the *then* that gives us the when.” And for cases illustrating these classes, see the following paragraphs.

**Distribution of Estate — Death of First Taker.**—“The adverbs of time, therefore, such as ‘when,’ *then*, ‘after,’ ‘from and after,’ etc., in a devise of a remainder limited upon a life estate, are construed to relate merely to the time of the enjoyment of the estate, and not to the time of its vesting in interest. The law favors such a construction of a will as will avoid the disinheritance of remaindermen who may happen to die before the determination of the precedent estate.” Connelly *v.* O'Brien, 166 N. Y. 408. See also Hetherington *v.* Oakman, 2 Y. & C. Ch. 299; Moore *v.* Lyons, 25 Wend. (N. Y.) 119; Sage *v.* Wheeler, 3 N. Y. App. Div. 38; Matter of Brown, 93 N. Y. 295; Delafield *v.* Shipman, 103 N. Y. 463; Stokes *v.* Weston, 142 N. Y. 433; Schwenake *v.* Haffner, 18 N. Y. App. Div. 184; Patchen *v.* Patchen, 121 N. Y. 432; Hobson *v.* Hale, 95 N. Y. 613; Livingston *v.* Greene, 52 N. Y. 118; Ackerman *v.* Gorton, 67 N. Y. 63; Bisson *v.* West Shore R. Co., 143 N. Y. 125; Corse *v.* Chapman, 153 N. Y. 466; Hersee *v.* Simpson, 154 N. Y. 496; Goodwin *v.* Coddington, 154 N. Y. 283; Matter of Brown, 154 N. Y. 313; Nelson *v.* Russell, 135 N. Y. 137; Evans *v.* Henderson, (Ky. 1902) 68 S. W. Rep. 640; Williamson *v.* Williamson, 18 B. Mon. (Ky.) 375.

The following language was used in a will: “And upon the decease of either one of my said children, and successively of each of them, *then* as respects one equal fourth part of the corpus or principal of my residuary estate, to and for the only proper use of his or her child, or of all of his or her children.” In construing this provision the court said: “The word *then* in this connection is evidently not used as an adverb of time; it merely means ‘in that case.’ But if we treat it as an adverb of time, it evidently refers to the death of the life tenant.” Coggins's Appeal, 124 Pa. St. 31. See also Abbott *v.* Middleton, 7 H. L. Cas. 118.

A deed granted certain property to M. and to the heirs of his body lawfully begotten or to be begotten, and in default of such issue *then* to the surviving sons and daughters of A. In construing this provision the court said: “The words of the deed direct that the estate shall go to the surviving sons and daughters, on the death of M. without issue; the word *then* denotes the time when the interest vests in them to be at his death, as well as the persons to take, that is, those who shall *then* be the survivors of M.” Westbrooke *v.* Romeyn, Baldw. (U. S.) 201.

**Death of Testator.**—A testator devised certain property in trust for the benefit of B., and

there" mean "at the time and place aforesaid."<sup>1</sup> When used in an indictment, they refer to the time when and the place where the thing is alleged to have been done.<sup>2</sup> The words are held to refer to the time and place last

further provided that in case B. should die "leaving no lawful issue him surviving, *then* and in that case" the property should descend and vest in his heirs at law in the same manner as it would descend and vest in them if the will had not been made and the said B. had died without issue before the testator. It was held that on the death of B. without issue the estate vested in the heirs at law of the testator who were such at the time of his death. The court said: "Nor do the words '*then* and in that case,' even using the word *then* as an adverb of time taken in connection with the whole paragraph, tend to postpone the period of ascertaining the parties entitled to the remainder." *Wadsworth v. Murray*, 29 N. Y. App. Div. 198, *affirmed* 161 N. Y. 274. See also *Gaskell v. Holmes*, 3 Hare 438.

"**The Then Valuation of the Legacy or Devise.**"—A collateral inheritance tax upon remainders provided that if the legatees or devisees elected to anticipate payment of the tax it should "be received at the *then* valuation of the legacy or devise, deducting the value of the life estate or term of years." In construing this provision the court in *Mellon's Appeal*, 114 Pa. St. 572, said: "What is meant by 'the *then* valuation of the legacy or devise' is its value as of the date it vested—the death of the decedent—with six per cent. added thereto."

**Then Living.**—"Where \* \* \* life interests are bequeathed to several persons in succession, terminating with a gift to children or any other class of objects '*then* living,' the word *then* is held to point to the period of the death of the person last named (whether he is or is not the survivor of the several legatees for life), and is not considered as referring to the period of the determination of the several prior interests." 1 Jarman on Wills (6th ed.) 809, note 1, citing *Archer v. Jegon*, 8 Sim. 446, and *In re Wollaston*, 27 Beav. 642. See also *Britnell v. Walton*, W. N. (69) 238; *Cooper v. Macdonald*, L. R. 16 Eq. 258, 42 L. J. Ch. 539; *Cobden v. Bagwell*, 19 L. R. Ir. 168; *Coulthurst v. Carter*, 15 Beav. 421; *Cormack v. Copous*, 17 Beav. 397; *Olney v. Bates*, 3 Drew, 319; *Harvey v. Harvey*, 3 Jur. 949; *Cain v. Teare*, 7 Jur. 567.

A testator gave long annuities to A for life, and if she died without leaving issue her surviving, *then* to B and C, to be paid to them at twenty-one, if both were *then* living; but if either should be *then* dead, *then* to the survivor. B and C both attained twenty-one, but died in the lifetime of A, who died without issue. It was held that the word *then* had reference to the death of A without issue; and that the residuary legatee, and not the representatives of B and C, took. *Widdicombe v. Muller*, 1 Drew. 443.

**Then in Being.**—Where, by a settlement made on his marriage, a settlor granted freehold lands to trustees upon trust for himself for life, and after his death to convey the lands and pay the rents and profits "unto or for the

benefit of all and every or any one or more child or children, or any grandchild or grandchildren, or other issue *then* in being of the said intended marriage," it was held that the words "*then* in being" governed only the words "grandchild or grandchildren or other issue," and not the words "child or children." *Leader v. Duffey*, 13 App. Cas. 294.

1. **Then and There.**—*U. S. v. Dow*, Taney (U. S.) 44.

2. **In Indictment.**—*Com. v. Butterick*, 100 Mass. 16; *Baker v. State*, 25 Tex. App. 25.

**Relative Terms.**—"The words *then* and *there* are relative and refer to some foregone averment, and their effect must be determined by that allegation to which they refer. If that is a single act done, and it then avers that *then* and *there* another fact occurred, it necessarily imports that the two were precisely coexistent and the word *then* refers to a precise time. \* \* \* But where the antecedent averment fixes no precise time and alleges no precise, single, definite act, the word *then*, used afterwards, fixes no one definite time." *Edwards v. Com.*, 19 Pick. (Mass.) 126. See also *Jeffries v. Com.*, 12 Allen (Mass.) 152.

"The words *then* and *there*, as used in an indictment, are words of reference, and when time and place have once been named with certainty, it is sufficient to refer to them afterwards by these words." *State v. Cotton*, 24 N. H. 146. See also *State v. Steeley*, 65 Mo. 221.

**Coexistent Time and Place.**—The rule is that when one fact is alleged in an indictment with time and place, the words *then* and *there*, subsequently used as to the occurrence of another fact, refer to the same point of time, and necessarily import that the two were co-existent. *State v. Hurley*, 71 Me. 354; *Com. v. Butterick*, 100 Mass. 12.

**Modifying All Allegations of Sentence.**—An indictment charged that the defendant on a certain day and in a certain county "did keep, and cause to be kept, a bucket-shop, namely, an office, in which said bucket-shop, namely, said office, the said Frank Corcoran did *then* and *there* conduct and permit the pretended buying and selling of stocks, bonds of certain corporations, petroleum, cotton, grain, provisions, pork, and other produce, on margins and otherwise without any intention of receiving and paying for the property so bought, or of delivering the property so sold, contrary," etc. In sustaining this indictment the court said: "Nor is the indictment defective because of the failure to repeat the words *then* and *there* in alleging the absence of intention. The construction is such that the effect of the phrase as used extends throughout the sentence. This is apparent when the verb and modifying clause are brought more nearly together by the omission of intervening words. The charge is that the respondent did *then* and *there* conduct and permit the pretended buying and selling of stocks without any intention, etc." *State v. Corcoran*, 73 Vt. 406.



specified, unless there is some phrase connected therewith which shows that a different reference was intended.<sup>1</sup> When more times and places than one have been mentioned, it is not sufficient to use the words "then and there," because it is uncertain to which time or place previously named the words refer.<sup>2</sup>

Where an information stated that the defendant defiled a girl placed under his care, by criminally knowing her, she "being *then and there* a female under the age of eighteen years, confided to the care and protection of said" defendant, the words *then and there* were held to refer to the female as being under the age of eighteen at her defilement; and also that she was at that time under the care and protection of the defendant. *State v. Sipe*, 38 Kan. 201.

**Whole Day or Part of Day.**—It was contended that an indictment for violating the national banking law was defective because the words "*then and there*, as used in various places, are inconsistent, uncertain, and repugnant, in some cases referring to the whole of a particular day, and in others to a part of the same day; as in '*there and then*, on said sixth day of March.'" In refusing to sustain this contention the court said: "In innumerable instances known to every practitioner of experience, where there are set out many connected or related facts, though some may cover the whole of a day and others only an instant, or a small part of a day, the words *then and there* are used interchangeably, and without further specification, unless there is some presumption of law or necessity of pleading which does not exist in this case." *U. S. v. Potter*, 56 Fed. Rep. 95.

**Same Court.**—In *State v. Bruce*, 26 W. Va. 156, it was said: "The words *then and there* generally refer to a time and place set forth in a preceding part of the same count or sentence, and when it is intended to incorporate something from a distinct count or sentence the words 'aforesaid' or 'before mentioned' are used."

**Omission Not Fatal.**—A caption stating that "at a court, etc., held before, etc., at, etc., on, etc., by the oaths and affirmation of A B, etc., good and lawful men, sworn, affirmed, and charged to inquire, it is presented," omitting *then and there*, was held to be sufficient. The court said: "There might have been, with the words *then and there*, a greater deference to tautology, but not thereby a more explicit or intelligible averment, especially when it is known that the law requires the grand jurors to be sworn at and before the court in which their presentments are made. The course of precedents has not been uniform; some, perhaps the greater number, introduce the words in question, but by others, of respected and approved authority, they are omitted." *State v. Price*, 11 N. J. L. 210. See also *State v. Ratcliffe*, 61 Ark. 65.

"The words *then and there* need not be repeated to an averment which merely declares a legal conclusion." *State v. Willis*, 78 Me. 74.

**Omission Held to Be Fatal.**—An indictment alleged that the defendant "at the county of Cole, and state aforesaid, on the first day of January, A. D. 1886, did unlawfully, feloniously,

and with culpable negligence, kill and slay William Singer by *then and there* unlawfully, recklessly, feloniously, and with culpable negligence, discharging a gun loaded with powder and paper wads in and upon the face and head of him, the said William Singer, whereby he, the said William Singer, received such injuries as to cause his death." This was held defective in failing to state that the injuries received by the deceased caused his death at the county of Cole, in the state of Missouri, on the first day of January, 1886. The court said: "The words *then and there*, as used in said last-mentioned allegation in the indictment, refer to the time and place of discharging the gun and inflicting the injuries which caused the death, but this last allegation fails and omits to expressly say that the death, so caused by said injuries, *then and there* ensued, and this is required." *State v. Sundheimer*, 93 Mo. 313.

**Same—Bribery.** It was claimed that an indictment for bribery was fatally defective because it said that "'on the 29th day of January, 1876, the defendant in said county did offer this bribe with the intent to bias,' etc., yet it should have been distinctly alleged that this intent was contemporaneous and identical in place with the offer; that is, the allegation should have been 'with intent *then and there* to bias.'" The court held that the words *then and there* were unnecessary, citing *State v. Hurst*, 11 W. Va. 55, and *State v. Betsall*, 11 W. Va. 705, where the words *then and there* were not inserted after the word "intent" in the indictments. *State v. Lusk*, 16 W. Va. 775. In the case of *State v. Newsom*, 13 W. Va. 859, the words *then and there* were inserted after the word "intent."

**Meaning of Words "Then and There" Not Material.**—*Shaffer v. State*, 1 How. (Miss.) 242.

**Indictment of Accessory—Then and There Present, Aiding, Etc.**—See *Woodside v. State*, 2 How. (Miss.) 662.

**1. Last Time and Place.**—*State v. Slocum*, 8 Blackf. (Ind.) 315; *State v. Reid*, 20 Iowa 413; *State v. Cotton*, 24 N. H. 143; *State v. Bell*, 3 Ired. L. (25 N. Car.) 506; *State v. Tolever*, 5 Ired. L. (27 N. Car.) 452; *Strickland v. State*, 7 Tex. App. 34; *State v. S. A. L.*, 77 Wis. 469.

The words *then and there* in an indictment for perjury, setting forth, "County of Lackawanna, ss," that defendant "at the county aforesaid, and within the jurisdiction of this court," did unlawfully and falsely swear before a certain person, judge of the courts of Susquehanna county, *then and there* presiding, etc., do not refer to the county of Susquehanna, but to Lackawanna county, and sufficiently show the offense to have been committed in that county. *Com. v. Williams*, 149 Pa. St. 54. And see *State v. Brown*, 12 Minn. 490.

**2. More than One Time or Place Mentioned.**—*U. S. v. Penschel*, 116 Fed. Rep. 648; *State v.*



**THENCE.** — See note 1.

**THEORY.** (See also MANNER, vol. 19, p. 918.) — See note 2.

**THEREABOUTS.** — See note 3.

**THEREAFTER.** (See also AFTERWARD — AFTERWARDS, vol. 1, p. 925; HEREAFTER — HERETOFORE, vol. 15, p. 336.) — The word "thereafter" is synonymous with "subsequent." 4

Hill, 55 Me. 365; State v. Hurley, 71 Me. 355; Jane v. State, 3 Mo. 61. See also Denison v. Richardson, 14 East 291.

An indictment which, after stating several different times, charged that the defendant *then and there* committed the offense was held bad for uncertainty. State v. Hayes, 24 Mo. 360.

1. **Thence — Boundaries.** — In Flagg v. Mason, 141 Mass. 66, it was held that in a description of the boundaries of land, "the word *thence*, preceding each course given, imports that the following course is continuous with the one before it."

The expression in a deed, "*thence* by lands" of a party, by no means indicates that the whole of the line is along those lands. If it runs partially so only, the line would answer the description. Rieglesville Delaware Bridge Co. v. Bloom, 48 N. J. L. 369.

In Hartsfield v. Westbrook, 1 Hayw. (2 N. Car.) 258, one line of a boundary was from a poplar in a swamp, "*thence* down the swamp to the beginning." It was held that the swamp, and not a straight line from the poplar to the beginning, was the boundary.

**Thence Up the Same.** — See Camden v. Creel, 4 W. Va. 367.

**Thence Next.** — See NEXT, vol. 21, p. 535.

**Marine Insurance — Term of Exclusion.** — In Bradley v. Nashville Ins. Co., 3 La. Ann. 709, 48 Am. Dec. 467, it was said: "We find the word *thence* frequently used in reference to the intermediate ports of a voyage and never recognized by courts as a term of exclusion; and we are satisfied that insurance to a port, *thence* to another, and *thence* to a third, is the same as from the first to the last with liberty to stop at the intermediate ports. We have not met with any case in which, when applied to an intermediate port, the words *thence* or 'from' have been held to have the same exclusive sense as when used with regard to the commencement of a voyage."

2. **Theory.** — In Johnson v. State, 102 Ala. 18, it was said: "Charges 9, 11, and 12 employ severally the words 'suppositions,' 'hypotheses,' and *theories*, and assert if two of them 'may be drawn' or 'may arise' out of the testimony, one consistent with the defendant's innocence and the other tending to establish his guilt, the defendant should be acquitted. These charges are faulty in several respects. Supposition has no legitimate sphere or habitation in judicial administration. So, in the connection in which they were invoked, the words 'hypotheses' and *theories* have very doubtful and indefinite significations."

3. **Quantity of Land.** — In Davis v. Shepherd, L. R. 1 Ch. 416, Cranworth, L. C., said: "The exact quantity cut off to the east of the line is said to be 'supposed to be ninety-eight acres or *thereabouts*.' \* \* \* It is impossible, on such a subject, to lay down any general ab-

stract rule, and if the deviation had been such as to include one hundred and eight acres, or even one hundred and eighteen acres, instead of ninety-eight acres to the east of the line, it would have been open to fair argument that the excess might be covered by the vague words 'or *thereabouts*.'"

**Quantity of Minerals.** — See Davis v. Shepherd, L. R. 1 Ch. 410.

**Quantity of Money.** — A testator directed his trustee to invest his residuary estate and to suffer the interest to accumulate until the principal together with the accumulations of interest should amount to "three thousand pounds or *thereabouts*," then to dispose of the fund so accumulated in a certain manner. It was held that the gift was not void for uncertainty on account of the words "or *thereabouts*." The court said: "The additional words were inserted merely to meet the difficulty which would necessarily arise in accumulating up to the exact limit, and to render any little excess subject to the same disposition as the specified sum." Oddie v. Brown, 4 De G. & J. 185.

**Tonnage.** — Where the tonnage of a ship was described as so many tons or *thereabouts*, this was held to be mere matter of description and not a warranty. Barker v. Windle, 6 El. & Bl. 675, 88 E. C. L. 675.

**Boundaries.** — See Jackson v. Zimmerman, 2 Cal. (N. Y.) 146.

4. **Thereafter.** — Davidson v. Carson, 1 Wash. Ter. 313.

**Thereafter** means "afterwards," or "after that." State v. Ryan, 120 Mo. 108, *per* Sherwood, J.

"**Thereafter**" Used in Sense of "**Hereafter**." — Chapman v. Price, 83 Va. 393.

**Reference to First Antecedent.** — Where an act of the legislature creating the office of president of the board of public works provided that "the governor, as soon as may be after the passage of this act, and every two years *thereafter*, shall nominate and appoint \* \* \* a president of the board of public works," it was held that the word *thereafter* referred to its first antecedent, to wit, the passage of the act, and that the duration of the office was to be reckoned every second year from the date of the act, and a new appointment made accordingly. Bry v. Woodrooff, 13 La. 556.

**Every Year Thereafter.** — A policy of insurance recited that it was made in consideration of a written application therefor, which was made part thereof, and of the payment in advance of an annual premium of twenty-one dollars, "and of the payment of a like sum on the twelfth day of December in every year *thereafter* during the continuance of this policy." In construing this the court said: "May not the words 'in every year *thereafter*' mean in every year after the year the premiums for which have been paid; or, in

**THEREAT.** — See note 1.

**THEREBY.** (See also THEREUPON, *post.*) — By that means, or in consequence of that.<sup>2</sup>

**THEREFORE.** — See note 3.

**THEREFORE HE BRINGS SUIT.** — An averment; usually the concluding words of a declaration.<sup>4</sup>

**THEREIN.** — See note 5.

every year after the current year from the date of the policy?" *McMaster v. New York L. Ins. Co.*, 183 U. S. 40.

**Thereafter Execute Office.** — An act provided that if the sheriff of a county should, within a prescribed time, fail to give bond with sureties, as required, his office should immediately expire and be deemed and taken to be vacant, and "if such sheriff shall *thereafter* presume to execute the office of sheriff, then all such his acts and proceedings done under color of office" should be absolutely void. It was held that his failure to give the bond within the prescribed time did not *per se* vacate the office, but that he was an officer with a defeasible title until judgment of forfeiture was pronounced in due form; and that the word *thereafter* should be interpreted to mean that all acts done under color of office after the office was adjudged forfeited by reason of the alleged default in giving the bond should be void. *Clark v. Ennis*, 45 N. J. L. 69.

**Term App al.** — A statute required an appeal to be taken during the term at which the decision complained of was made, or within ten days *thereafter*. It was held that *thereafter* referred to the end of the term. *Stephens v. Bernays*, 119 Mo. 149.

An agreement was as follows: "Plaintiff may have thirty days to file his case on appeal from the adjournment of court, and the defendant thirty days *thereafter*." The question arose whether *thereafter* meant thirty days after the service of the appellant's case or thirty days after the expiration of the thirty days. It was held that it meant thirty days after the service of the appellant's case. *Mitchell v. Haggard*, 105 N. Car. 173.

**Same — Filing Exceptions.** — A statute provided: "Such exceptions may be written and filed at the time or during the term of the court at which it is taken, or within such time *thereafter* as the court may by an order entered of record allow, which may be extended by the court or judge in vacation for good cause shown, or within the time the parties to the suit in which such bill of exceptions is proposed to be filed, or their attorneys, may *thereafter* in writing agree upon, which said agreement shall be filed by the clerk in said suit and copied into the transcript of record when sent to the Supreme Court or courts of appeals." In construing this provision the court said: "The word *thereafter*, as last used, covers at least any time during the vacation immediately succeeding the term when the exceptions are taken." *Scarritt Furniture Co. v. Moser*, 48 Mo. App. 544.

**1. Thereat.** — Upon Arrival of Vessel Thereat. — A ticket provided as follows: "If the purchaser of this ticket cannot for any reason be safely landed at the port of destination upon

arrival of the vessel *thereat*, he may be landed at the next port reached by the vessel upon the then voyage at which such landing can be safely made." In construing this provision the court said: "The phrase 'upon arrival of the vessel *thereat*' does not necessarily mean that the vessel must actually arrive and land at the point of destination, but means that if the vessel or the passengers cannot be safely landed the vessel may proceed to the next port where landing can be made." *Bullock v. White Star Steamship Co.*, 30 Wash. 456.

**2. Thereby.** — *Lieullen v. Mosgrove*, 33 Oregon 288. See also the title FIRES, vol. 13, p. 404.

**Term Held Meaningless in Connection in Which Used.** — See *Brook v. Blue Mound*, 61 Kan. 185, construing an act entitled as follows: "An act providing for the vacation of streets, alleys, public reservations, and the changing of corporate boundaries of cities *thereby*."

**"Thereby" in Sense of "In That Way."** — See *Breed v. Providence Washington Ins. Co.*, 17 Blatchf. (U. S.) 289.

**3. "Therefore" Equivalent to "So."** — *Clem v. State*, 33 Ind. 431.

**4. Therefore He Brings His Suit.** — Originally, no plaintiff was permitted to state his complaint to the court, until he could produce responsible persons to vouch for him, that his character was such as to render it probable that his complaint was well founded, or at least not frivolous or vexatious. 4 Minor's Inst., p. 654. Such persons were usually denominated his *secta*, or following, or suite. The use of the word "suit" is, therefore, a corruption of the original phrase, and does not mean that the plaintiff *therefore* brings his action. *Bract. 214b*; *Com. v. Joliffe*, 7 Watts (Pa.) 585; 3 Black. Com. 295.

The actual production of the suit has long been antiquated, though the form continues. 1 Chitty on Pleading (16th Am. ed.) 436; and *Steph. Pl.*, § 220.

**5. Therein — Orders Therein.** — *Rex v. Soper*, 3 B. & C. 857, 10 E. C. L. 253.

**Proceedings Therein.** — In *Cummings v. Tabor*, 61 Wis. 185, notice of a motion "for an order vacating and setting aside the judgment entered in said action and all proceedings *therein*," was construed to refer to all proceedings in the action, not merely to proceedings in or subsequent to the judgment.

**In Lieu of Dower or Rights of Inheritance Therein.** — *Mahaffy v. Mahaffy*, 63 Iowa 55. Compare *Mahaffy v. Mahaffy*, 61 Iowa 670.

**Streets and Alleys Therein.** — A statute provided that "whenever the burgesses and town council of any borough shall open or be about to open any streets or alleys *therein* or to widen and extend the same," they should apply by petition to the Court of Quarter Sessions.

**THEREOF.** — The word “thereof” means of that; of it.<sup>1</sup>

**THEREON.** — See note 2.

**THEREUNTO.** — See note 3.

**THEREUPON.** — As an adverb of time “thereupon” signifies without delay or lapse of time.<sup>4</sup>

It was held that by “streets and alleys *therein*” were meant such as began and ended in a borough and were within its limits, and not public roads. Somerset, etc., Road, 74 Pa. St. 63.

**Acknowledgments.** — “Herein” equivalent to *therein*, Davis v. Bogle, 11 Heisk. (Tenn.) 317.

**Section 4 of English Prisons Act of 1887.** — See Mullins v. Treasurer, 6 Q. B. D. 156.

**1. Thereof.** — U. S. v. Hudson, 65 Fed. Rep. 71. In this case it was further said: “The rule, when it speaks of a justice *thereof*, evidently must mean a justice of the Circuit Court; for, as I have said, the word *thereof* means ‘of that court’ or ‘of that Circuit Court’ in which the case was tried.” The rule in question was U. S. Supreme Court Rule 36, which limited the courts and judges who were to admit to bail.

**2. Thereon.** — Under an act providing that for failure to fence its tracks a railroad should be liable for all damage done to any cattle “and other stock *thereon*,” it was held that the animal must be injured on the track. Jeffersonville, etc., R. Co. v. Dunlap, 112 Ind. 102.

In a policy insuring a ship “to a port on the north side of Cuba, with the liberty of a second port *thereon*,” it was held that if a second port was used, it must be used on the same side of the island; *thereon*, in that connection, having the same meaning as “on the same.” Nicholson v. Mercantile Marine Ins. Co., 106 Mass. 400.

For the construction of the word *thereon* in an act regulating the rates to be charged on a railroad, and whether it means the whole line of communication between the cities, water as well as rail, or whether it applies to the railroad alone, see Camden, etc., R., etc., Co. v. Briggs, 22 N. J. L. 641 and 661, opinions of Halsted, C., and Schenck, J.

Where a bequest of six thousand dollars of the money due on a bond from a legatee directed that on payment of the balance of said bond, and whatever interest might be due *thereon*, the bond should be assigned to the legatee, the word *thereon* was held to refer to the balance of the principal due, and upon payment of such balance and interest *thereon*, the bond was ordered assigned. Leddel v. Starr, 20 N. J. Eq. 285.

**3 Thereunto.** — A statute provided that no estate of inheritance or freehold or for a term of more than one year in lands and tenements should be conveyed unless the conveyance be declared by an instrument in writing “subscribed and delivered by the party disposing of the same or by his agent *thereunto* authorized by writing.” In construing this provision the court said: “We understand the word *thereunto*, used in the statute quoted, to mean unto this or that—that is, the particular thing done.” Rue v. Missouri Pac. R. Co., 74 Tex. 479.

**4. Thereupon.** — Hallam v. Huffman, 5 Kan. App. 303; Hill v. Wand, 47 Kan. 340; Putnam v. Langley, 133 Mass. 204; Kaufmann v. Drexel, 56 Neb. 234. And see Krumeick v. Krumeick, 14 N. J. L. 44.

**Immediately.** — In Vaughan v. Watt, 6 M. & W. 498, 9 L. J. Exch. 272, *per* Rolfe, B., it was held that where a statute directs that a thing shall *thereupon* be done, it is meant that the thing shall be done forthwith or immediately.

In Hallam v. Huffman, 5 Kan. App. 303, it was held that the phrase “*thereupon* the defendant filed his motion for a new trial” meant immediately after and upon the same day of the occurrence last before cited. And that *thereupon* means “immediately,” see Mansur v. Aroostook County, 83 Me. 520.

But it has been said that *thereupon* may mean “immediately,” or it may mean “by reason of” or “in consequence of.” Demske v. Hunter, 23 Mo. App. 466, *quoted* in State v. Mason, 31 Mo. App. 211.

Again, “*thereupon* signifies sometimes ‘upon this or that,’ and sometimes ‘immediately; at once; without delay.’” Dewey v. Linscott, 20 Kan. 687, *quoting* Webst. Dict.

So when a statute provided that after the filing of a stipulation of submission the clerk must *thereupon* enter a note of submission in the register of actions, it was held that this did not require that it should be entered immediately. California Academy of Sciences v. Fletcher, 99 Cal. 207.

**Same — Ten Days.** — In State v. Van Wyck, 20 Wash. 47, it was said: “The statute, as we have seen, provides that he shall *thereupon* draw a warrant on the county treasurer, which means, not within ten days, but, according to Webster, ‘immediately; at once; without delay.’”

**In Consideration Thereof.** — In Bean v. Ayers, 67 Me. 487, the word *thereupon* was held to be equivalent to “in consideration thereof,” where the connection seemed to require such an interpretation.

**Excluding Existence of Other Facts.** — In an action for malicious prosecution, the declaration alleged, in one count, that the defendant had made a false and malicious complaint against the plaintiff to a trial justice and testified falsely at the trial thereof before the justice, “and *thereupon*” the justice found the plaintiff guilty. It was held that the count was bad as failing to allege want of probable cause. The court said: “And *thereupon*” marks the succession of events in order of time. In pleading we cannot hold that it excludes the existence of other facts than those previously recited.” Dennehey v. Woodsum, 100 Mass. 197.

**“Thereupon” in Sense of “Thereby.”** — A declaration after stating certain facts alleged that it *thereupon* became the duty of the defendant to do a certain act. It was held that the word *thereupon* was to be understood not



**THERMOSTAT.** — “ ‘Thermostat’ is a word with a definite and certain meaning, both in ordinary parlance and as used by heating engineers. It means a self-acting apparatus for the regulation of temperature. This is what a thermostat is now, and what it always has been, however simple or however complicated it may be. It includes the whole apparatus — as well the expanding strip or strips of metal or other substance upon which the heat first acts, as the intermediate wires, magnets, or other apparatus, if any, by which the dampers of the furnace are opened or closed as the strips expand or contract.”<sup>1</sup>

**THESE.** — See note 2.

**THEY.** — See note 3.

**THIEF.** (See also **STEAL**, vol. 26, p. 769; **THEFT**, *ante*; and see the titles **LARCENY**, vol. 18, p. 456; **MARINE INSURANCE**, vol. 19, p. 1028.) — One who has been guilty of larceny or theft.<sup>4</sup>

**THIEVING.** — See note 5.

merely as “afterwards,” but as equivalent to “thereby.” *Brown v. Mallett*, 5 C. B. 599, 57 E. C. L. 599. But see *Atkinson v. Raleigh*, 3 Q. B. 79, 43 E. C. L. 640.

“**Therefrom**” in Sense of “**Thereafter**.” — In consideration that the plaintiff would deliver to the defendant two thousand bushels of wheat, the defendant promised to deliver to him, “within a reasonable time *therefrom*,” five hundred barrels of flour. It was held that the word *therefrom* must be construed to mean “thereafter,” and not that the flour was to be made from the identical wheat delivered. *Tilt v. Silverthorne*, 11 U. C. Q. B. 619.

**Reference to Premises.** — A statute provided substantially that in all actions of trespass brought against any person entitled to rent, relating to any entry by virtue of that act upon the premises chargeable with such rent, or relating to any distress or seizure, or relating to any sale or disposal of any goods, *thereupon* it should be lawful, etc. In construing this statute the court said: “What can the word *thereupon*, standing in this connection, refer to if not to the premises chargeable with rent?” *Oliver v. Phelps*, 20 N. J. L. 193.

1. *Murphy v. Weil*, 92 Wis. 473.

2. **These.** — Where an advertisement recited the destruction of sundry buildings by fire, and offered a reward for information resulting in the conviction of “any perpetrator of *these* outrages,” the offer was held to apply only to offenses previously committed. *Freeman v. Boston*, 5 Met. (Mass.) 56.

**These Presents.** — In *Field v. Hopkins*, 44 Ch. D. 529, where a solicitor was empowered by a clause in a mortgage to recover his charges “in or about *these* presents,” it was held that “*these* presents” meant “this deed” and not the property in question.

3. **They.** — In *Masters v. Dunn*, 30 Miss. 271, it was said: “When several persons, collectively or jointly, have a right of action, it cannot be said that *they* are infants if one of them be over the age of twenty years.”

A statute provided: “Or if any person, being within the degrees of consanguinity or affinity in which marriages are prohibited by this section, carnally know each other, *they* shall be deemed guilty of incest.” In construing this provision the court said: “Importance is attached to the words of the section, ‘*they*

shall be deemed guilty of incest,’ being plural in form. In some cases, from other states, where the rule of appellant’s contention is sustained, the same or similar words are thought to be quite indicative. It will be seen that harmony as to number is not preserved as to the pronoun *they* and its antecedent ‘person;’ and if either is to yield, in the interest of a proper construction of the section, it may certainly as well be the pronoun as its antecedent term, and we think, grammatically speaking, better. We do not criticise the language of the section, but think the word *they* should be understood as equivalent to ‘both’ or ‘each,’ which was evidently the intent.” *State v. Hurd*, 101 Iowa 395.

4. **Bills of Lading — Marine Insurance.** — In *Taylor v. Liverpool, etc., Steam Co.*, L. R. 9 Q. B. 546, it was held that the word “thieves,” as used in an insurance policy, must be applied to thieves external to the ship. See also *The Glendarroch*, (1894) P. D. 237; *American Ins. Co. v. Bryan*, 26 Wend. (N. Y.) 574.

But in *Spinetti v. Atlas Steamship Co.*, 80 N. Y. 71, 36 Am. Rep. 579, *Taylor v. Liverpool, etc., Steam Co.*, L. R. 9 Q. B. 546, is *disapproved*, and the difference in the views of the courts of England from those of the state of New York, as to the meaning of the words “theft” and *thieves* in policies of insurance, is pointed out. See also *Atlantic Ins. Co. v. Storrow*, 5 Paige (N. Y.) 285.

In *American Ins. Co. v. Bryan*, 1 Hill (N. Y.) 25, *affirmed* 26 Wend. (N. Y.) 563, where a policy upon the cargo of a vessel insured it by express terms against “*thieves*, \* \* \* bar-  
ratty of the master and mariners,” etc., it was held that the term *thieves* was not limited in its application to external or assailing *thieves* merely, but extended to thefts from within by mariners, passengers, etc. And see *Steinman v. Angier Line*, (1891) 1 Q. B. 619.

5. **Thieving — Libel and Slander.** — In holding that a charge that one was a *thieving* person was actionable, the court said: “The adjective *thieving* imports an act committed, and not merely an inclination to commit it. To charge one with being a *thieving* person is charging him with being guilty of stealing.” *Alley v. Neely*, 5 Blackf. (Ind.) 201, *citing* *Bittridge’s Case*, 4 Coke 19; *Osborn v. Poole*, 1 Ld. Raym. 236. See also *Reynolds v. Ross*, 42 Ind. 387.

**THING.** — See note 1.

**THINGS IN ACTION.** (See also *CHoses IN ACTION*, vol. 6, p. 2.) — See note 2.

**THINK.** — To believe; to consider; to esteem.<sup>3</sup>

**THIRD OPPOSITION.** — See note 4.

**THIRD OR THIRDS.** (See also the titles *DOWER*, vol. 10, p. 122; *SUCCESSION*, vol. 27, p. 290; and see *STRANGER*, vol. 26, p. 1127.) — See note 5.

1. **Confined to Personal or Movable Property.** — See *Brown v. Chambers*, 12 Ala. 709, construing a statute that provided that all bonds, etc., and all other writings for the payment of money or any other *thing* might be assigned.

**Ejusdem Generis.** — See *Mousseau v. Sioux City*, 113 Iowa 248. See also *OTHER*, vol. 21, p. 1012, and the title *STATUTES*, vol. 26, p. 609.

**Bequest.** — A testator gave all his wagon ways, rails, staiths, and all implements, utensils, and *things* at his death used or employed together with or in or for the working, management, or employment of his collieries, and which might be deemed as of the nature of personal estate, in trust, to be held or enjoyed with the collieries. It was held that under the bequest and upon the circumstances money due from the fitters and others, and in the Tyne Bank, coals at the pits and staiths, corn, hay, horses timber, oil, candles, fire engines, and other articles of stock in trade passed. *Stuart v. Bute*, 11 Ves. Jr. 657, *affirming* 3 Ves. Jr. 212.

**Thing of Value — Bribery.** — See *GRATUITY*, vol. 14, p. 1116.

2. **Things in Action.** — “A *thing in action* is a right to recover money or other personal property by a judicial proceeding.” Civ. Code Cal., § 953, *quoted in* *Henderson v. Henshall*, 7 U. S. App. 586.

“**Things in Action**” Held to Include Shares of Stock. — See *Colonial Bank v. Whinney*, 11 App. Cas. 426.

**Held to Include Book Accounts and All Debts.** — *Kirk v. Roberts*, (Cal. 1892) 31 Pac. Rep. 620.

“**Things in Action**” Synonymous with “*Choses in Action*.” — *Kirk v. Roberts*, (Cal. 1892) 31 Pac. Rep. 620. And see *Webb v. Edwards*, 46 Ala. 29, *per* Peck, C. J.

**Rights of Action Ex Delicto.** — *Things in action*, in the statutory definition of personal property in *Wisconsin*, comprise only such rights of action as may be the subject of sale and transfer, and not mere rights of action *ex delicto*, for personal wrongs; and the latter are not included in the personal property owned by a woman at the time of her marriage, which, by statute, continues to be her sole and separate property after marriage. *Gibson v. Gibson*, 43 Wis. 23, 28 Am. Rep. 527.

3. **Thing.** — In *Martin v. Central Iowa R. Co.*, 59 Iowa 414, the jury, in a special finding, said: “We *think*” that certain horses were not struck, and the verdict was held to express sufficiently the findings of fact sought.

An affidavit made by an appellant, setting forth that “he *thinks* he has a sufficient cause for an appeal, and that the same is not intended for delay or vexation,” has been held to be insufficient in *New Jersey*. *Schenck v. Ayers*, 14 N. J. L. 311.

**Think Fit.** — A power authorized the donee

“to make leases with fine or without fine, and rendering such rents and services as he shall *think* fit.” This was held to authorize the grant of a lease without any reservation of rent. *Talbot v. Tipper*, Skin. 427.

**Think Advisable.** — Where executors were directed to sell the testator's real estate “at such times and in such manner as they shall *think* most advisable,” it was held that this did not vest a personal discretion in them, and that, therefore, an executor *de bonis non* might exercise the power. *Giberson v. Giberson*, 43 N. J. Eq. 116.

**Think Best.** — See *BEST*, vol. 4, p. 5.

4. **Third Opposition.** — “By the Code of Practice of *Louisiana*, art. 401 [Code 1894, art. 395], a *third opposition* is defined as ‘a demand brought by a third person not originally a party in the suit, for the purpose of arresting the execution of an order of seizure or judgment rendered in such suit, or to regulate the effect of such seizure in what relates to him.’ It is a suit at law, a short summary proceeding, and not a formal one in chancery.” *Lacassagne v. Chapuis*, 144 U. S. 125, *citing* *Van Norden v. Morton*, 99 U. S. 381.

5. **Third or Thirds.** — The word *thirds* is a general expression which may signify, according to the intent and scope of the instrument in which it is used, the interest of a widow in any property, personal or real, of her deceased husband in case of his intestacy. *Sam-bourne v. Barry*, Ir. R. 6 Eq. 28.

“The word *thirds* is never used accurately. It is a sort of expression in common parlance descriptive of the interest upon an intestacy.” *Druce v. Denison*, 6 Ves. Jr. 385.

**Dower and Third.** — In *Hoy v. Varner*, 100 Va. 609, it was said: “The word ‘dower,’ in its ordinary acceptation, since its first introduction into this country, has been used synonymously with the word *third*. \* \* \* So, by ‘dower out of all lands of which the husband is seized during coverture’ is meant ‘one-third of such lands;’ by ‘dower in the equity of redemption’ is meant dower in the land subject to incumbrances paramount to dower—*i. e.*, one-third for life of what remains of the land after satisfying the incumbrances; and by ‘dower in said surplus’ (as is the language of the statute) is meant ‘one-third of such surplus for life.’”

**Realty and Personalty.** — A testator, by his will, devised and bequeathed the rest of his property, after his just debts and funeral expenses were paid and his wife's *thirds* were taken out, to his two children. It was held that the wife was entitled to a *third* of the personalty as well as a *third* of the real estate. *Horsley v. Horsley*, 1 Houst. (Del.) 438. See also *Druce v. Denison*, 6 Ves. Jr. 385.

In *Yeomans v. Stevens*, 2 Allen (Mass.)



**THIRD PARTY — THIRD PERSON.** (See also PRIVY — PRIVIES — PRIVITY, vol. 23, p. 101; STRANGER, vol. 26, p. 1127.) — A third party is a stranger to a proceeding or transaction.<sup>1</sup>

**THIS.** — “This” is a simple word of relation, and it cannot be construed to include something else than that to which it relates.<sup>2</sup>

349, the term *thirds* was held to extend to the wife's dower interest in land as well as to her *third* of the personality.

But in *O'Hara v. Dever*, (Ct. App.) 2 Abb. Pr. N. S. (N. Y.) 418, 2 *Keyes* (N. Y.) 558, affirming 46 Barb. (N. Y.) 609, the testator gave, bequeathed, and devised all the rest, residue, and remainder of his estate, both real and personal, to a son and daughter, to be divided between them share and share alike, subject, nevertheless, to the dower and *thirds* of his wife. It was held that the dower estate of the wife in his lands only was referred to. The court said: “If, therefore, in the present instance the testator had given to his wife her dower and *thirds*, we should have been authorized in holding that she was entitled to one-third part of his personal estate, in addition to her dower, after the payment of his debts and legacies. But here there is an absolute and unqualified disposition of all the rest and residue of the testator's personal estate to his two children, to be divided between them, share and share alike. \* \* \* The word *thirds*, as used in this will and in this connection, obviously meant the same thing as dower, and the word ‘and’ should be used as ‘or,’ making therefore the gift to the children of the testator's real and personal estate, subject to the dower or *thirds* of his wife.”

“**Thirded.**” — Where a will directed that the widow, in case of a second marriage, should be *thirded*, it was held that upon her second marriage she was entitled to one-third of the estate as if there had been no will, and that the remainder should go to the heirs and distributees. *Baker v. Red*, 4 *Dana* (Ky.) 158.

“**In Lieu of Dower or Thirds.**” — By a settlement, a provision out of real and personal estate was made for the wife “in lieu of dower or *thirds*.” In was held, the husband having died intestate, that the provision was in satisfaction of dower out of realty and of *thirds* of personality, and that the wife could claim nothing under the statute of distributions. *Thompson v. Watts*, 31 L. J. Ch. 445.

**1. Third Persons.** — In *Balfour v. Burnett*, 28 Oregon 74, it was said: “Bouvier, in his law dictionary, in defining the term, says: ‘But it is difficult to give a very definite idea of *third persons*, for sometimes those who are not parties to the contract, but who represent the rights of the original parties, as executors, are not to be considered *third persons*;’ while Anderson, in his more recent work, referring to the term, says: ‘Strangers are *third persons* generally, — all persons in the world except parties and privies. For example, those who are in no way parties to a covenant, nor bound by it, are said to be strangers to the covenant.’”

**Public Lands.** (See also the title STATE AND PUBLIC LANDS, vol. 26, p. 387 *et seq.*) — Act Cong. March 3, 1851 (9 U. S. Stat. at L. 634, c. 41, § 15), provided: “And be it further en-

acted, that the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of *third persons*.” In construing this statute in *Beard v. Federy*, 3 Wall. (U. S.) 493, the court said: “The term *third persons*, as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property.” See also *More v. Steinbach*, 127 U. S. 70; *Waterman v. Smith*, 13 Cal. 420; *Teschemacher v. Thompson*, 18 Cal. 27; *Leese v. Clark*, 18 Cal. 572, 20 Cal. 425; *Minturn v. Brower*, 24 Cal. 669; *De Arguello v. Greer*, 26 Cal. 627; *Miller v. Dale*, 44 Cal. 576; *Colorado Fuel Co. v. Maxwell Land Grant Co.*, 22 Colo. 71; *Balfour v. Burnett*, 28 Oregon 72.

**Same — State.** — The state of California is not a *third person* within the above statute. *People v. San Francisco*, 75 Cal. 388.

**Assignee for Benefit of Creditors.** (See also the title ASSIGNMENT FOR BENEFIT OF CREDITORS, 2 ENCYC. OF PL. AND PR. 879.) — An assignee for the benefit of creditors has been held to be a *third person* within a statute requiring the recording of chattel mortgages. *Clark v. Bright*, 30 Colo. 199.

**Party to Decree of Foreclosure.** — In *Balfour v. Burnett*, 28 Oregon 72, it was held that parties to a decree for the foreclosure of a mortgage were not *third persons* as to a sale under the decree within the meaning of a statute providing that real property consisting of several lots or parcels should be sold separately when a portion was claimed by a *third person* who requested that it should be so sold.

**The Constitution of Louisiana** (art. 176) provides that no mortgage or privilege on immovable property shall affect *third persons* unless recorded, etc. In construing this provision the court said: “*Third persons* are understood to be ‘all persons who are not parties to the act or to the judgment on which the mortgage is founded.’ Art. 3343, Civil Code.” *Lovell v. Cragin*, 136 U. S. 149. See also *Trudeau v. Smith*, 12 Mart. (La.) 543; *Cucullu v. Hernandez*, 103 U. S. 113.

**Third Persons**, with regard to a contract or judgment, are all who were not parties to it. *Williams v. Hagan*, 2 La. 125.

**2. This.** — *Bryson v. Russell*, 14 Q. B. D. 720, 54 L. J. Q. B. 144.

**This and That.** — “When *this* and ‘that’ refer to different things before expressed, *this* refers to that last mentioned, and ‘that’ to the thing first mentioned.” *Russell v. Kennedy*, 66 Pa. St. 251, citing *Webst. Dict.*

**This Act.** — A statute which was a mere consolidation and revision of the various acts then in force defining the corporate powers of a



**THOROUGHbred.** — See note 1.

**THOROUGHfare.** (See also *CUL-DE-SAC*, vol. 8, p. 458; and see the titles *HIGHWAYS*, vol. 15, p. 343; *PRIVATE WAYS*, vol. 23, p. 2; *STREETS AND SIDEWALKS*, vol. 27, p. 99.) — A thoroughfare is defined as “a passage through; a street or way open at both ends and free from any obstruction.”<sup>2</sup>

**THOROUGHLY.** — See note 3.

**THOUGHT.** — See note 4.

**THOUSAND.** — The number of ten hundred.<sup>5</sup>

**THREAD.** (See also the titles *ACCRETION*, vol. 1, p. 467; *BOUNDARIES*, vol. 4, p. 756; and see *FILUM AQUÆ*, vol. 13, p. 19; *FILUM VIÆ*, vol. 13, p. 19; *MAIN*, vol. 19, p. 609.) — A middle line; a line running through the

city, including a former charter of the city and subsequent amendments, re-enacted in the same words certain sections of the charter in respect to a conveyance by tax deed of “land sold in pursuance of *this* act.” It was held that the words “*this* act” in said section should be construed as equivalent to the words “the charter of the city of M.” *Scheffels v. Tabert*, 46 Wis. 439.

**This Cause.** — See *CAUSE*, vol. 5, p. 774.

**This Court.** — See *THE*.

**This Spring.** — See *Gilbert v. Moline Plough Co.*, 119 U. S. 491.

1. **Thoroughbred Heifer.** — See *Hamilton v. Wabash, etc., R. Co.*, 21 Mo. App. 153.

2. **Thoroughfare.** — *Mankato v. Warren*, 20 Minn. 144.

**A Navigable Arm of the Sea** was held to be a public *thoroughfare* in *Coulbert v. Troke*, 1 Q. B. D. 1. In this case the appellant was convicted of supplying refreshment at prohibited hours to persons who were not *bona fide* travelers, the statute providing that a person shall not be deemed a *bona fide* traveler unless the place where he lodged the preceding night is at least three miles from the place where he demands to be supplied with liquor, such distance to be calculated by the nearest public *thoroughfare*. The appellant's licensed house was on the opposite shore of the Southampton Water from the town, and distant from it by water over a mile, and by the nearest road eight miles. The persons supplied with refreshment had lodged the night before in the town and crossed the water in their own boats.

3. **Thoroughly Dried.** — The words “*thoroughly* dried,” in a statute providing that “if any side or sides of sole leather shall vary, when *thoroughly* dried, so as to weigh five per cent. more or less than the weight marked thereon by an inspector, the inspector who inspected the same shall be subject to the payment of the whole variation at a fair valuation, to be recovered by the party injured thereby,” mean that the leather is to be suitably or sufficiently dried, so as to be in a proper state for sale and use. *Tenney v. How*, 24 Pick. (Mass.) 335.

**Thoroughly Educated.** — In an action for malpractice the trial court instructed that the defendant should have exercised such reasonable skill and diligence as are ordinarily exercised in the profession “by *thoroughly* educated surgeons.” In holding this instruction to be erroneous the court said: “We do not stop to discuss critically the meaning of the term

‘*thoroughly* educated;’ nor is it necessary to prove that it means ‘fully, completely, and perfectly educated,’ or that it necessarily implies an entire and perfect knowledge. It is enough that it must mean that the standard of the skill and diligence was not the average of the whole body of the profession, or, in other words, ordinary skill, but was that exercised by some defined or undefined portion of the profession, or, in other words, more than mere ordinary skill.” *Smothers v. Hanks*, 34 Iowa 289.

4. **Thought.** — A witness testified that he “*thought* he glimpsed Sheppard as he fell from the boat.” This was objected to as involving inference or opinion. The appellate court said: “Our construction of the expression is that it embodies no inference, but a direct reference to an immediate perception of the senses. Such perceptions may be more or less dim or indistinct, and by the use of the word *thought*, Boykin meant to signify that his ocular perception of something falling from the boat was indistinct, but nevertheless that he had such a perception and considered it reliable.” *Travelers Ins. Co. v. Sheppard*, 85 Ga. 778. See also the title *EXPERT AND OPINION EVIDENCE*, vol. 12, p. 414.

**Thought and Believed.** — See *BELIEF — BELIEVE*, vol. 3, p. 913.

5. **Thousand.** — *Webst. Dict.*

The meaning of this word, when used in its ordinary sense, is a matter of common knowledge. It may by custom or usage of trade, however, acquire a peculiar meaning. Thus in *Smith v. Wilson*, 3 B. & Ad. 728, 23 E. C. L. 169, where a lessee covenanted that at the expiration of the lease he would leave on the warren “ten *thousand* rabbits,” parol evidence was admitted to show that by custom of the country where the lease was made, the word *thousand*, as applied to rabbits, denoted one hundred dozen. In the same case, evidence was admitted to show that “hundred-weight” meant one hundred and twelve pounds. See also *Harper v. Pound*, 10 Ind. 36.

In *Soutier v. Kellerman*, 18 Mo. 509, it was held that where there was a contract for the delivery of shingles by the *thousand* it might be shown that by the general, well-established, and known custom of the trade, two packs of a certain size were counted as a *thousand*, and when such custom was shown, the parties would be understood to have contracted with reference to it. See also the title *USAGES AND CUSTOMS*.

middle of a stream or road.<sup>1</sup> A small line or twist of any fibrous or filamentous substance, as flax, silk, cotton, or wool, particularly such as is used for weaving or sewing; a filament; a small string. There is nothing to indicate that a measure of self-sustaining strength is necessarily imported in the strict idea of a thread.<sup>2</sup>

1. Rap. & L. Law Dict. See also Knight *v.* Wilder, 2 Cush. (Mass.) 207, 48 Am. Dec. 660.

**Thread of Stream.** — The *thread* of a stream is "the line midway between the banks at the ordinary state of the water, without regard

to the channel or the lowest and deepest part of the stream." State *v.* Burton, 106 Ia. 735, *quoting* Gould on Waters (2d ed.), § 198.

2. **Thread.** — Luckemeyer *v.* Magone, 38 Fed. Rep. 33, *quoting* Worcester's Dict.

# THREATS AND THREATENING LETTERS.

BY HAROLD N. ELDRIDGE.

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## CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 21, p. 670.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ARSON*, vol. 2, p. 940; *ASSAULT AND BATTERY*, vol. 2, pp. 956, 957, 997; *BAIL AND RECOGNIZANCE*,



vol. 3, p. 729; *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 322; *BLACKMAIL*, vol. 4, p. 577; *BONDS*, vol. 4, p. 628; *BREACH OF THE PEACE*, vol. 4, p. 902; *BURGLARY*, vol. 5, p. 44; *CARRYING WEAPONS*, vol. 5, p. 740; *CONFESSIONS*, vol. 6, p. 528; *DIVORCE*, vol. 9, p. 791; *DURESS*, vol. 10, p. 324 *et seq.*; *DYING DECLARATIONS*, vol. 10, p. 383; *ELECTIONS*, vol. 10, p. 779; *EVIDENCE*, vol. 11, p. 505; *FALSE IMPRISONMENT*, vol. 12, p. 719; *FORCIBLE ENTRY AND DETAINER*, vol. 13, p. 761; *INJUNCTIONS*, vol. 16, p. 360 *et seq.*; *LABOR COMBINATIONS*, vol. 18, p. 91 *et seq.*; *LANDLORD AND TENANT*, vol. 18, p. 452; *MALICIOUS PROSECUTION*, vol. 19, p. 696; *MURDER AND MANSLAUGHTER*, vol. 21, p. 83; *PATENTS*, vol. 22, p. 475; *PAYMENT*, vol. 22, p. 612 *et seq.*; *POSTAL LAWS*, vol. 22, p. 1075; *PROOF OF OTHER CRIMES*, vol. 23, p. 251; *RAPE*, vol. 23, p. 881; *ROBBERY*, vol. 24, p. 1000; *SELF-DEFENSE*, vol. 25, p. 264 *et seq.*

**I. DEFINITION.** — A threat is defined to be any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free, voluntary action which alone constitutes consent.<sup>1</sup>

**II. AS A CRIME — 1. At Common Law.** — It is well settled that at common law a mere threat in words not written is not an indictable offense.<sup>2</sup> But the person threatened can swear the peace against the offender, and obtain redress in that way, by obtaining security against the commission of the offense threatened.<sup>3</sup>

**Extorting Money by Threats.** — It is, however, an indictable offense at common law to make threats of a character calculated to overcome a firm and prudent man, where the purpose is to extort money; and it is immaterial that the purpose be not accomplished.<sup>4</sup> It is also an indictable offense to threaten to charge another with an unnatural crime for the purpose of extorting money, provided money be actually extorted.<sup>5</sup>

**2. Under Statutes.** — Numerous English Statutes exist directed against oral threats and threats contained in letters or writings, and providing punishment for a breach of them. The earliest statutes, beginning with that of 9 Geo. I., c. 22, were directed against the sending of threatening letters and writings. But later statutes include oral threats.<sup>6</sup>

1. **Definition.** — Abbott's Law Dict.; *State v. Brownlee*, 84 Iowa 473.

A Threat Is a Menace. — *Moore v. People*, 69 Ill. App. 398.

2. **Mere Threats at Common Law.** — *State v. Benedict*, 11 Vt. 236, 34 Am. Dec. 688. And see *Sively v. State*, 44 Tex. 274.

3. *State v. Benedict*, 11 Vt. 236, 34 Am. Dec. 688. And see the title *BREACH OF THE PEACE*, vol. 4, p. 902.

4. **Threats of Character Calculated to Overcome Firm Man.** — *Rex v. Southerton*, 6 East 127; *State v. Evans*, Houst. Crim. Cas. (Del.) 97. And see *Reg. v. Woodward*, 11 Mod. 137; *Grimes v. Gates*, 47 Vt. 594, 19 Am. Rep. 129.

In *Rex v. Southerton*, 6 East 127, it was held that threatening by letter or otherwise to put in motion a prosecution by a public officer to recover penalties for selling Frayar's Balsam without a stamp (which by the 42 Geo. III., c. 56, is prohibited to be vended without a stamped label), for the purpose of obtaining money to stay the prosecution, was not such a threat as a firm and prudent man might not be

expected to resist, and, therefore, was not in itself an indictable offense at common law.

5. **Threat to Charge One with an Unnatural Crime.** — *Rex v. Cannon*, R. & R. C. C. 146; *Rex v. Donnally*, 1 Leach C. C. 193; *Rex v. Jones*, 1 Leach C. C. 139; *People v. Barondess*, 61 Hun (N. Y.) 575. And see the title *ROBBERY*, vol. 24, p. 1000.

6. **English Statutes.** — See 1 Hawk. P. of C. 225; 2 East P. of C. 1104; 3 Russ. on Crimes 177; Stephen's Dig. of Crim. Law 250.

The Statute 9 Geo. I. c. 22, provided that if "any person or persons shall knowingly send any letter without any name subscribed thereto, or signed with a fictitious name or names, demanding money, venison, or other valuable thing, such offender shall suffer death without benefit of clergy." A letter to be within the meaning of the statute must be a threatening letter; that is, the demand it contains must be a clear and peremptory demand accompanied with a threat or intimidation of bodily harm or personal violence in case such demand is not complied with. *Rex v. Robinson*, 2 Leach C. C. 749.

United States. — Criminal statutes exist in all of the states of the United States on the subject of threats whether oral, written, or printed.<sup>1</sup>

**Crime of Threatening Another Is Blackmail.** — The statutory crime of threatening another is sometimes called blackmail.<sup>2</sup>

**III. CONSTITUTIONALITY OF STATUTES.** — Statutes making it a crime for one person to threaten another are not invalid as violating constitutional provisions guaranteeing freedom of speech.<sup>3</sup>

**IV. ELEMENTS OF STATUTORY CRIME — 1. In General.** — Statutes directed against threats do not usually prohibit the mere making of a threat, of any kind whatever, and without anything more.<sup>4</sup> There are usually several elements which go to make up the complete statutory offense. Thus it may be material that the threat be of a particular kind specified in the statute; that it inspire fear; that it be malicious; that it be communicated in a certain manner; that it be made with some particular intent specified in the statute; or that something be obtained by means of the threat. These different elements will now be considered.

**2. Threat — a. KINDS OF THREATS CONSIDERED — (1) To Accuse of Crime.** — Almost if not all of the statutes expressly comprehend a threat to accuse another of a crime or offense.<sup>5</sup>

**Whether "Accuse" Has Reference to Judicial Proceedings Only.** — The word "accuse" as used in the statutes does not refer necessarily to the institution of judicial proceedings,<sup>6</sup> but includes a threat to accuse before any third person.<sup>7</sup>

**Threat to Use Preliminary Means to Institute Criminal Proceedings.** — A threat to accuse a person of a crime in the sense of the statute comprehends a threat to use any of the preliminary means necessary to cause a person to be proceeded against for a criminal offense.<sup>8</sup>

1. See the statutes of the different states.

2. **Blackmail.** — *Peachee v. State*, 63 Ind. 399; *Utterback v. State*, 153 Ind. 545; *Green v. State*, 157 Ind. 101. And see generally *BLACKMAIL*, vol. 4, p. 577.

In *New York* only the crime of threatening by letter writing or printing is called blackmail. *Cook's Crim. & Pen. Code* (1901), § 558; *People v. Eichler*, 75 Hun (N. Y.) 26; *People v. Wightman*, 104 N. Y. 598.

3. **Statutes Constitutional.** — *State v. Goodwin*, 37 La. Ann. 713; *State v. McCabe*, 135 Mo. 450, 58 Am. St. Rep. 589.

In *State v. McCabe*, 135 Mo. 450, 58 Am. St. Rep. 589, it was held that a statute prohibiting as a misdemeanor any person from publishing any written or printed threat to injure the credit or reputation of another was not unconstitutional as restricting freedom of speech guaranteed by the state constitution.

4. **Statutes Do Not Extend to All Threats.** — *People v. Choynski*, 95 Cal. 640.

5. **Threat to Accuse of Crime.** — *Reg. v. Miard*, 1 Cox C. C. 22; *People v. Hoffman*, 126 Cal. 366; *People v. Sexton*, 132 Cal. 37; *State v. Pierce*, 76 Iowa 189; *State v. Brownlee*, 84 Iowa 473; *State v. McGlasson*, 88 Iowa 667; *State v. Bruce*, 24 Me. 71; *Robinson v. Com.*, 101 Mass. 27; *Com. v. Goodwin*, 122 Mass. 33; *Com. v. Philpot*, 130 Mass. 59; *People v. Whittemore*, 102 Mich. 523.

**Threat to Accuse of Keeping House of Prostitution.** — *People v. Gardner*, 144 N. Y. 119, 43 Am. St. Rep. 741.

**Threat to Accuse of Fornication or Adultery.** — *People v. Williams*, 127 Cal. 212; *Com. v. Dorus*, 108 Mass. 488.

**Threat to Accuse of Assault with Intent to Murder.** — *People v. Braman*, 30 Mich. 460.

**Threat to Accuse of Larceny.** — *Moore v. People*, 69 Ill. App. 398.

**Threat to Accuse of Perjury.** — *People v. Whittemore*, 102 Mich. 519.

**Threat to Accuse of Arson.** — *Com. v. Goodwin*, 122 Mass. 33; *Com. v. Buckley*, 145 Mass. 181.

**Threat to Accuse of Attempting to Obtain Money by False Pretenses.** — *Com. v. Philpot*, 130 Mass. 59.

**Threat to Accuse of Selling Intoxicating Liquors without a license.** *State v. Linthicum*, 68 Mo. 66.

**An Infamous Crime**, within the meaning of a statute prohibiting threats to accuse another of an infamous crime, has been held to be such a crime as subjects a man to infamous punishment or incapacitates him from being a witness. Threatening to accuse another of having made overtures to commit sodomy is evil threatening to accuse of an infamous crime. *Rex v. Hickman*, 1 Moody 34.

6. **Judicial Proceedings.** — *Rex v. Robinson*, 2 M. & Rob. 14, 2 Lewin C. C. 273; *State v. Debolt*, 104 Iowa 105. And see *People v. Braman*, 30 Mich. 460, where the court was divided on the question.

7. **Before Any Third Person.** — *Rex v. Robinson*, 2 M. & Rob. 14, 2 Lewin C. C. 273.

**A Threat to Accuse by Newspaper Publication** is within the statute. *State v. Lewis*, 96 Iowa 286; *State v. Debolt*, 104 Iowa 105.

8. **Threat to Use Preliminary Means.** — *Com. v. Murphy*, 12 Allen (Mass.) 449.

**Threat that Warrant Will Be Served.** — A

"Crime" Includes Misdemeanor. — Within the meaning of the statute a threat to accuse of a misdemeanor is a threat to accuse of a "crime."<sup>1</sup>

(2) *To Expose to Disgrace.* — Statutes exist making it an offense under certain circumstances to threaten to expose a person to, or to impute to him, any disgrace,<sup>2</sup> or to accuse a person of immoral conduct which, if the charge were true, would tend to degrade and disgrace him or in any way to subject him to the ridicule and contempt of society.<sup>3</sup>

(3) *To Injure Person or Property of Another.* — A threat to injure the person or property of another is often one of the threats enumerated in legislation of the kind under consideration.<sup>4</sup>

**A Threat to Injure the Person of Another Naturally Means** a threat to use actual physical force upon the person of another. This may be done under pretense of fictitious legal process or a process known to be void. But it does not mean a threat to arrest a person on a charge of crime or to arrest a person in civil proceedings.<sup>5</sup>

**A Threat to Injure the Credit or Reputation of Another** is not a threat to injure his property within the meaning of the statute.<sup>6</sup>

**Threat to Injure One's Business.** — Threats to injure the property of another have been held to include threats to injure his business either by preventing people from assisting him to prosecute it,<sup>7</sup> or by preventing them from buying his goods.<sup>8</sup> But there is good authority which seems to be opposed to this view of the interpretation of the statute.<sup>9</sup>

(4) *To Injure Credit or Reputation of Another.* — By one statute at least the sending of a letter or writing containing a threat to injure the credit or reputation of another is made an offense without anything more appearing.<sup>10</sup>

**Threat to Publish Name of Debtor.** — A threat by a creditor to publish the name

false statement that a warrant is issued to arrest a person for a crime, which will be served unless money is paid to stay the process, is a threat to accuse of a crime within the meaning of the statute. *Com. v. Murphy*, 12 Allen (Mass.) 449.

**Threat to Complain to a Police Officer** against a man committing a crime is a threat to accuse him of it. The person threatening must be understood to mean that he will take the first step for the commencement of a criminal prosecution with its ordinary incidents. *Com. v. Carpenter*, 108 Mass. 15.

1. **Crime Includes Misdemeanor.** — *State v. Linthicum*, 68 Mo. 66.

2. **Expose to Disgrace.** — *People v. Tonielli*, 81 Cal. 275; *People v. Wightman*, 104 N. Y. 598.

3. **Threat to Charge Person with Soliciting Sexual Intercourse with Wife of Person Threatening.** — *Motsinger v. State*, 123 Ind. 498.

**Threat to Accuse Person of Having Had Illicit Sexual Intercourse** with certain female and of being the father of her bastard child. *Green v. State*, 157 Ind. 101.

4. **Threat to Injure Person or Property of Another.** — *State v. Hollyway*, 41 Iowa 200, 20 Am. Rep. 586; *State v. McGlasson*, 88 Iowa 667; *State v. Bruce*, 24 Me. 71; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Com. v. Mosby*, 163 Mass. 291.

In *Ohio* there is a statute directed against threats "of injury of any kind whatever." *Brabham v. State*, 18 Ohio St. 485.

**Threat to Shoot and Kill.** — *State v. Brownlee*, 84 Iowa 473.

**Threat to Kick, Strike, and Otherwise Injure Person.** — *State v. Todd*, 110 Iowa 631.

5. **Meaning of Threat to Injure Person of Another.** — *Com. v. Mosby*, 163 Mass. 291.

6. **Credit and Reputation Not Property.** — *State v. McCabe*, 135 Mo. 456, 58 Am. St. Rep. 589; *State v. Barr*, 28 Mo. App. 84. In this latter case it was held that the sending of a letter threatening to publish a person's name in a "dead-beat" book, whereby his credit would be ruined, was not a threat to do any injury to the property of another.

7. **Threats to Prevent People from Assisting One to Prosecute Business.** — *People v. Baroness*, 133 N. Y. 649, 45 N. Y. St. Rep. 248, reversing *People v. Baroness*, 61 Hun (N. Y.) 571.

8. **Threats to Prevent People from Buying One's Goods.** — *People v. Hughes*, 137 N. Y. 29, affirming 64 Hun (N. Y.) 638, 19 N. Y. Supp. 550.

9. **Contrary Authority.** — In *Carew v. Rutherford*, 106 Mass. 9, 8 Am. Rep. 287, the court, referring to the statute directed against threats made to injure the property of another, says: "As this is a penal statute, perhaps it does not extend to a threat to injure one's business by preventing people from assisting him to prosecute it, whereby he loses his profits and is compelled to pay a large sum of money to those who make the threat, though the threat is quite analogous to those specified in the statute, and may be not less injurious. We shall therefore consider, not whether the acts alleged and proved against the defendants were unlawful within the statute, but whether they were so at common law."

10. **Threat to Injure Credit or Reputation.** — *State v. McCabe*, 135 Mo. 450, 58 Am. St. Rep. 589.



of a debtor of his as a bad debtor unless the debt is paid is a threat to injure the credit or reputation of another within the meaning of the statute.<sup>1</sup>

*b. TRUTH OR FALSITY OF CHARGE THREATENED.* — It is as much a crime within the meaning of the statutes to threaten to accuse a man of what is true or is believed to be true as it is to accuse him of what is known to be false.<sup>2</sup>

*c. WHETHER THREAT MUST INDUCE FEAR.* — Under statutes directed against threats of certain kinds therein enumerated, if the threat be of a kind enumerated it is within the prohibition of the statute though it does not induce any fear or terror on the part of the person threatened,<sup>3</sup> unless, of course, the statute provides that it must.<sup>4</sup>

**3. Malice.** — Statutes usually provide that the threat must be a malicious one.<sup>5</sup> The malice meant is not, however, a feeling of ill-will toward the person threatened, but merely the wilful doing of an unlawful act without excuse.<sup>6</sup>

**4. Communication of Threat** — *a. HOW COMMUNICATED* — (1) *In General.* — Usually it is immaterial how the threat is communicated, whether orally, in writing, or in printing. If communicated in any of these ways it is prohibited by statute.<sup>7</sup> But under some statutes the offense consists in communicating the threat in a certain way. Thus, it may consist in sending or delivering a letter, writing, printing, circular, or card containing the threat.<sup>8</sup>

(2) *Sending Threatening Letter.* — Under statutes prohibiting the sending or delivering of any letter, writing, or print containing certain kinds of threats, the offense consists in the sending or delivering.<sup>9</sup> And it may be committed by one who sends a threat made by another.<sup>10</sup>

**1. Threat to Publish Name of Debtor.** — *State v. McCabe*, 135 Mo. 450, 58 Am. St. Rep. 589.

**2. Truth or Falsity of Charge Immaterial.** — *People v. Choynski*, 95 Cal. 640.

**Truth or Falsity of Threat to Accuse of Crime Immaterial.** — *Reg. v. Menage*, 3 F. & F. 310; *Kessler v. State*, 50 Ind. 229; *State v. Debolt*, 104 Iowa 105; *State v. Goodwin*, 37 La. Ann. 713; *State v. Bruce*, 24 Me. 71; *People v. Whittemore*, 102 Mich. 519; *People v. Eichler*, 75 Hun (N. Y.) 26; *Elliott v. State*, 36 Ohio St. 318.

**Truth or Falsity of Threat to Accuse of Immoral Conduct Immaterial.** — *Motsinger v. State*, 123 Ind. 498.

**3. Need Produce No Fear.** — *State v. Bruce*, 24 Me. 71; *People v. Thompson*, 97 N. Y. 313.

**4. Must Induce Fear by Some Statutes.** — Several statutes directed against the obtaining of money by certain oral threats therein enumerated provide that such threats must induce fear. *People v. Hoffman*, 126 Cal. 366; *People v. Williams*, 127 Cal. 212; *People v. Sexton*, 132 Cal. 37; *People v. Gardner*, 144 N. Y. 119, 43 Am. St. Rep. 741.

**5. Malicious Threat.** — *State v. Brownlee*, 84 Iowa 473; *State v. Goodwin*, 37 La. Ann. 713; *Com. v. Goodwin*, 122 Mass. 19; *Com. v. Buckley*, 148 Mass. 27; *People v. Braman*, 30 Mich. 460; *People v. Whittemore*, 102 Mich. 525; *Mann v. State*, 47 Ohio St. 556.

**6. Malice Meant by Statutes.** — *State v. Debolt*, 104 Iowa 105; *Com. v. Goodwin*, 122 Mass. 19; *Com. v. Buckley*, 148 Mass. 27. And see the title *MALICE*, vol. 19, p. 623.

**7. Verbal, Written, or Printed Communications Prohibited.** — *Moore v. People*, 69 Ill. App.

398; *State v. Brownlee*, 84 Iowa 473; *Robinson v. Com.*, 101 Mass. 27; *Carew v. Rutherford*, 106 Mass. 9, 8 Am. Rep. 287; *Com. v. Coolidge*, 128 Mass. 55; *People v. Braman*, 30 Mich. 460; *State v. Morgan*, 3 Heisk. (Tenn.) 262.

In *Massachusetts* the statute provides that "whoever verbally, or by a written or printed communication, maliciously threatens," etc. Pub. Stat. Mass. c. 207, § 25. This statute is similar to those in many other states. See the statutes of the different states.

**8. Communicated in a Certain Way.** — In *Missouri* it is provided by statute that "every person who shall knowingly send or deliver any letter, writing, printing, circular or card, with or without a name subscribed thereto, or signed with a fictitious name, or any letter, mark, or device, threatening to," etc. Mo. Rev. Stat. 1899, § 2154.

**9. Offense Consists in the Sending or Delivering.** — *People v. Cadman*, 57 Cal. 562; *People v. Choynski*, 95 Cal. 640.

**10. Sending Threat Made by Another.** — *People v. Thompson*, 97 N. Y. 313.

**Sufficient Sending.** — In *Rex v. Wagstaff*, R. & R. C. C. 398, Wagstaff directed a threatening letter to one Dennis and dropped it in the yard of the residence of Dennis, whose wife picked it up and read it to her husband. The jury were instructed that if Wagstaff carried the letter and dropped it "meaning that it should be conveyed to Dennis, and that he should be made acquainted with its contents," the letter was sent within the meaning of the statute. Wagstaff was convicted. And see *SEND — SENT*, vol. 25, p. 287.

**Whether Letter Must Be Subscribed.** — Sometimes statutes provide that the threatening letter or writing need not be subscribed.<sup>1</sup>

*b.* **TO WHOM COMMUNICATED.** — As a rule the communication, whether oral, written, or printed, must be intended for the person threatened and must actually come to his knowledge, even though the statute does not in terms say so.<sup>2</sup>

**Sending Threatening Letter.** — But it is sufficient that a threatening letter be sent or delivered to some other person than the one threatened, provided it is so sent or delivered with the intent that it shall reach the person threatened, and it does in fact reach him.<sup>3</sup>

*c.* **LANGUAGE OF COMMUNICATION.** — No particular words are necessary to convey a threat.<sup>4</sup> Any language which shows this, either on its face or in connection with the circumstances under which it was spoken or written and with the relations of the parties, is sufficient though it consist merely of innuendoes and suggestions.<sup>5</sup>

**Threat to Accuse of Criminal Offense.** — A threat to accuse of a criminal offense need not contain all the statutory elements of the offense.<sup>6</sup>

**5. Intent** — *a.* **IN GENERAL.** — Under a few statutes the question of intent is not material. Merely communicating a threat of a particular kind mentioned in the statute is an offense.<sup>7</sup> But most statutes provide that the offense shall consist in communicating the threat with the intent to accomplish thereby the doing of some act by the person threatened.<sup>8</sup>

*b.* **KINDS OF INTENT CONSIDERED** — (1) *To Extort Money, Etc.* — Generally it is made an offense by statute to communicate the threat with intent to extort money or any pecuniary advantage,<sup>9</sup> or to extort any money or other property,<sup>10</sup> or to extort or gain any chattel, money, or valuable security, or any pecuniary advantage whatsoever.<sup>11</sup>

**Intent to Obtain Property to Satisfy Claim or Debt.** — An intent to extort property within the meaning of the statute has been held not to include an intent to obtain property to satisfy a claim or debt which justly exists in favor of the

**1. Letter Need Not Be Subscribed.** — *People v. Cadman*, 57 Cal. 562.

**Without Any Name Subscribed Thereto.** — Under the early *English* statute of 9 Geo. I., c. 22, directed against threatening letters "without any name subscribed thereto," it was held that a letter signed by two initials, as R. R., was a letter without a name subscribed thereto, within the meaning of the statute. *Rex v. Robinson*, 2 Leach C. C. 749.

**2. Communication to Person Threatened.** — *State v. Brownlee*, 84 Iowa 473. In this case threatening words were spoken to a third person with no intention that they should be communicated to the person threatened, and it was held that no offense had been committed.

**3. Rex v. Paddle, R. & R. C. C. 484; Reg. v. Grimwade, 1 Den. C. C. 30; *Larison v. State*, 49 N. J. L. 256, 60 Am. Rep. 606. And see *People v. Thompson*, 97 N. Y. 313.**

**4. No Particular Words Necessary.** — *People v. Thompson*, 97 N. Y. 313; *People v. Wightman*, 104 N. Y. 598; *Wynne v. State*, 41 Tex. Crim. 504.

**5. Threat May Appear on Face or in Connection with Extraneous Facts.** — *People v. Choynski*, 95 Cal. 640; *Moore v. People*, 69 Ill. App. 398; *People v. Thompson*, 97 N. Y. 313; *People v. Gillian*, 50 Hun (N. Y.) 35, affirmed 115 N. Y. 643; *People v. Eichler*, 75 Hun (N. Y.) 26. And see *Brabham v. State*, 18 Ohio St. 485.

**6. Need Not Contain All Statutory Elements.** — *Wynne v. State*, 41 Tex. Crim. 504.

**7. Intent Not Material.** — *State v. McCabe*, 135 Mo. 455, 58 Am. St. Rep. 589. And see the statutes of the various states.

By 27 Geo. II., c. 15, it was made an offense knowingly to send any letter without any name subscribed thereto, or signed with a fictitious name, threatening to kill or murder any of his majesty's subjects, or to burn their houses, out-houses, barns, stacks of corn or grain, hay or straw, though no money or pension or other valuable thing was demanded. *Rex v. Wagstaff*, R. & R. C. C. 398.

**8. Intent Material under Most Statutes.** — *People v. Choynski*, 95 Cal. 640; *Com. v. Goodwin*, 122 Mass. 33; *People v. Whittemore*, 102 Mich. 525; *Mann v. State*, 47 Ohio St. 563.

**9. Money.** — *Reg. v. Miard*, 1 Cox C. C. 22.

**10. Money or Other Property.** — *People v. Cadman*, 57 Cal. 562.

**Threat Made with Intent to Extort Property Includes** a threat made for the purpose of inducing the person threatened to dismiss an appeal, the right to take and prosecute an appeal being "property." *People v. Cadman*, 57 Cal. 562.

**11. To Extort or Gain Chattel, Etc.** — *Mann v. State*, 47 Ohio St. 560.

**A Valuable Thing** within the meaning of 9 Geo. I., c. 22, prohibiting the sending of certain kinds of threatening letters demanding money, venison, or other valuable thing, was held to include a banknote. *Rex v. Robinson*, 2 Leach C. C. 749.

person threatening, and which is connected with or arises out of the charge threatened,<sup>1</sup> or which is not even connected in any way with the charge threatened;<sup>2</sup> but there is considerable authority to the contrary.<sup>3</sup>

(2) *To Compel Doing of Act Against Will.* — The statutory offense often consists in communicating the threat with the intent to compel the person threatened to do any act against his will.<sup>4</sup>

**Intent to Compel Doing of Minor Act.** — An intent to compel the person threatened to do a minor act, of no great injury or serious importance, is not an intent to compel him to do any act against his will within the meaning of the statute.<sup>5</sup>

**Act Need Not Be a Crime.** — It is not necessary that the act sought to be compelled would be, if consummated, a crime.<sup>6</sup>

**c. ACCOMPLISHMENT OF PURPOSE.** — Under statutes making it an offense to threaten a person with the intent thereby to compel the person threatened to do some particular act, it is not necessary that the purpose should be accomplished and the act done.<sup>7</sup>

**6. Property Obtained by Means of Threat.** — Under a few statutes the offense consists in obtaining property by means of threats.<sup>8</sup> Here the completed offense consists in obtaining property.<sup>9</sup> But a person may be guilty of an attempt to commit the crime who does not succeed in getting the property.<sup>10</sup>

**Extortion.** — The crime of obtaining property by means of threats is called extortion by the statutes.<sup>11</sup> At common law, however, extortion technically means an entirely different thing.<sup>12</sup>

**V. EVIDENCE — 1. Threat — a. EXTRANEOUS EVIDENCE TO EXPLAIN LANGUAGE OF THREAT.** — When the threat does not appear from the language used, evidence is admissible, whether the language be written or oral, of the circumstances surrounding the making of it and the relation of the parties, for the purpose of showing that the language used was meant to convey a threat and was so understood by the party threatened.<sup>13</sup>

**b. WHETHER QUESTION OF FACT OR LAW.** — Where the threat is contained in a writing, and the writing can be understood by its own words, its interpretation is a question of law for the court. Where, however, extrinsic

**1. Property Sought Connected with Charge Threatened.** — *McMillen v. State*, 60 Ind. 216; *State v. Hammond*, 80 Ind. 80, 41 Am. Rep. 791; *Mann v. State*, 47 Ohio St. 556.

**2. Property Sought Not Connected with Charge Threatened.** — *People v. Griffin*, 2 Barb. (N. Y.) 427. In this case the defendant was indicted for having written letters to one Heath threatening to burn and destroy his property unless he would, within a certain time, send the defendant a given sum of money claimed by the defendant to be due from Heath. The court said: "The intent must be to extort or gain. Can it be truly said that a person extorts money which is justly his due?"

**3. Authority to the Contrary.** — *State v. Logan*, 104 La. 760; *State v. Bruce*, 24 Me. 71; *Com. v. Coolidge*, 128 Mass. 55.

**4. To Compel Doing of Act Against Will.** — *State v. Brownlee*, 84 Iowa 477; *State v. Todd*, 110 Iowa 631; *State v. Bruce*, 24 Me. 71; *Com. v. Coolidge*, 128 Mass. 57; *People v. Whittemore*, 102 Mich. 519; *State v. Ullman*, 5 Minn. 13.

**To Compel Signature to Deed.** — *People v. Whittemore*, 102 Mich. 519.

**To Compel Signature to Promissory Notes.** — *State v. Brownlee*, 84 Iowa 473.

**5. Minor Acts Not Included.** — *State v. Morgan*, 3 Heisk. (Tenn.) 262. In this case it was held that a threat intended to compel a

person to leave the place of his residence, on pain of death or great bodily harm, was an attempt by threats to compel a man to do such an act against his will within the meaning of the statute.

**6. Act Need Not Be a Crime.** — *State v. Todd*, 110 Iowa 631.

**7. Purpose Need Not Be Accomplished.** — *Com. v. Coolidge*, 128 Mass. 55.

**8. Obtaining Property of Another by Means of Threats.** — See the statutes of the different states.

**9. Property Must Be Obtained.** — *People v. Hoffman*, 126 Cal. 366; *People v. Williams*, 127 Cal. 212; *People v. Gardner*, 144 N. Y. 119, 43 Am. St. Rep. 741.

**10. Attempt to Commit Crime.** — *People v. Gardner*, 144 N. Y. 119, 43 Am. St. Rep. 741.

**11. Extortion.** — *Cook's Crim. and Pen. Code*, (1901) § 552. And see the statutes of the different states.

**12. Technical Extortion.** — See the title EXTORTION, vol. 12, p. 576.

**13. Threats Shown from Extraneous Evidence.** — *People v. Choyinski*, 95 Cal. 640; *Moore v. People*, 69 Ill. App. 398; *Motsinger v. State*, 123 Ind. 498; *State v. Patterson*, 68 Me. 473; *State v. Linthicum*, 68 Mo. 66; *People v. Gillian*, 50 Hun (N. Y.) 35; *People v. Eichler*, 75 Hun (N. Y.) 26; *People v. Thompson*, 97 N. Y. 313.



## THREATS AND THREATENING LETTERS—THREE STORY.

evidence is necessary to an understanding of the writing, the jury find what the oral testimony shows, but the court declares what the writing means in the light of the facts found by the jury.<sup>1</sup>

**2. Truth of Charge Threatened as Evidence of Malice.**—Evidence that the charge threatened was true is not generally admissible on the question of malice,<sup>2</sup> though it might be under some circumstances.<sup>3</sup>

**3. Intent**—*a.* **QUESTION OF FACT.**—Whether a threat was made with a particular intent is a question of fact to be submitted to the determination of the jury under proper instructions from the court,<sup>4</sup> unless the intent is perfectly clear, in which case it need not be submitted to the jury.<sup>5</sup>

*b.* **CIRCUMSTANTIAL EVIDENCE.**—Circumstantial evidence is admissible to prove intent where direct proof is not to be had.<sup>6</sup>

*c.* **PRIOR CONVERSATIONS.**—Conversations had between the parties prior to the sending of a threatening letter, in which statements were made similar to those contained in the letter and money was requested to stop threatened proceedings, have been held material and proper evidence as bearing upon the criminal intent of the defendant in writing the letter.<sup>7</sup>

**4. Sending of Threatening Letter a Question of Fact.**—It is a question of fact for the jury under proper instructions from the court whether in a particular instance there was a sending of the threatening letter within the meaning of the statute.<sup>8</sup>

**VI. PUNISHMENT.**—The offense of threatening another, whether orally or in writing, is usually made a misdemeanor, punishable by imprisonment for a short term, or by a fine, or both.<sup>9</sup> But it is sometimes made a felony.<sup>10</sup>

**VII. As A CIVIL INJURY.**—At common law, threats and menaces of bodily hurt through fear of which a man's business is so interrupted as to result in pecuniary damage give rise to an action of trespass *vi et armis*. But mere threats alone are not actionable.<sup>11</sup>

**THREE-EIGHTHS.**—See note 12.

**THREE-STORY.**—See note 13.

1. Whether Question of Fact or Law.—State v. Patterson, 68 Me. 473. But see State v. Linthicum, 68 Mo. 66.

2. Truth as Showing Malice.—Com. v. Buckley, 148 Mass. 27.

3. Might Be Admissible under Some Circumstances.—In State v. Goodwin, 37 La. Ann. 713, the court said: "We are not prepared to say that in connection with, and as an element of, evidence going to show proper motives for the communication, and to rebut malice, the truth, or even an honest belief in the truth, of the charges might not, under some circumstances, be receivable in evidence. For instance, suppose the motive of the party sending a letter threatening to accuse another of a crime of which he believed him to be guilty had been to give the latter an opportunity of explaining his conduct and showing his innocence, if possible, before taking action, such facts would obviously rebut the imputation of malice, which is an essential element of the offense. But where, as in this case, the truth was offered as, of itself and by itself, a justification, it was properly rejected."

4. Intent Question of Fact.—Com. v. Coolidge, 128 Mass. 55; People v. Braman, 30 Mich. 460.

5. Where Intent Perfectly Clear.—People v. Braman, 30 Mich. 460.

6. Circumstantial Evidence to Prove Intent.—State v. Debolt, 104 Iowa 105.

7. Prior Conversations.—People v. Thompson, 97 N. Y. 313.

8. Sending of Letter a Question of Fact.—Reg. v. Grimwade, 1 Den. C. C. 30, 1 C. & K. 592, 47 E. C. L. 592.

9. Misdemeanor.—State v. Young, 26 Iowa 122; State v. Brownlee, 84 Iowa 473; State v. Ullman, 5 Minn. 13; State v. McCabe, 135 Mo. 450, 58 Am. St. Rep. 589.

10. Felony.—People v. Tonielli, 81 Cal. 275; Peachee v. State, 63 Ind. 399; Green v. State, 157 Ind. 101; People v. Eichler, 75 Hun (N. Y.) 26; People v. Hughes, 137 N. Y. 29.

11. As a Civil Injury at Common Law.—3 Black. Com. 120; Grimes v. Gates, 47 Vt. 594, 19 Am. Rep. 129; Taft v. Taft, 40 Vt. 229, 94 Am. Dec. 389; 1 Swift's Rev. Dig. 477.

Threats Amounting to False Imprisonment.—See the title FALSE IMPRISONMENT, vol. 22, p. 719.

Threats Amounting to Duress.—see the title DURESS, vol. 10, p. 320.

12. "Three-eighths of My Estate."—Fisk v. M'Niel, 1 How. (Miss.) 543.

13. Three-story.—Where property insured was described in the policy as "contained in three-story granite building," it was held that the phrase might designate a building with a granite front only, and three stories high in front and rear, though only one story high in the middle. Medina v. Builders' Mut. F. Ins. Co., 120 Mass. 226.

**THRESHING MACHINE.** — See note 1.

**THROAT.** — See note 2.

**THROUGH.** — See note 3.

**THROWN INTO BANKRUPTCY.** — See note 4.

**THRUST.** — To push or drive with force, as to thrust anything with the hand or foot, or with an instrument; to drive, to force, to impel.<sup>5</sup>

1. A Threshing Machine has been held to include the horse-power by means of which the separator is propelled. *Osborne v. McAllister*, 15 Neb. 428.

2. Indictment. — In *Rex v. Edwards*, 6 C. & P. 401, 25 E. C. L. 458, where an indictment for murder charged that the offense had been committed by cutting the *throat* of the victim, it was held that the word *throat* was not to be confined to that portion of the neck scientifically so called.

"Throat Disease." — See DISEASE, vol. 9, p. 475.

3. Through. — *Through* means from one side to the opposite side or another side, or from one surface or limit to the other surface or limit. *Mercer County v. Provident L., etc., Co.*, 72 Fed. Rep. 627, affirmed 170 U. S. 593.

**Through in Sense of Over.** — The word *through*, in an act providing that no road, street, etc., should be laid out *through* certain grounds, was held to mean "over." *Hyde Park v. Oakwoods Cemetery Assoc.*, 119 Ill. 147. See also *Roderick v. Aston Local Board*, 5 Ch. D. 328.

**Underground—Sewers.** — A statute authorizing the carrying of sewers "into, *through*, or under" any land within certain districts was held not to render it necessary that the sewers should be carried underground. *Roderick v. Aston Local Board*, 5 Ch. D. 328.

**Through and Across.** — Where a right of way is granted "in, *through*, over, and along" a particular way, the grantee is not justified in making a transverse road across such way. *Senhouse v. Christian*, 1 T. R. 560. Compare *Wimbledon, etc., Commons Conservators v. Dixon*, 1 Ch. D. 362.

**Through County — Through in Sense of Within.** — Certain railroad-aid bonds provided that they should not be binding "until the railway of the said company shall have been so completed *through* such county that a train of cars shall have passed over the same." It was contended that the word *through* meant clear *through* the county from one end to the other. In refusing to sustain this contention the court said: "It is true the primary meaning of the word *through* is from end to end, or from side to side, but it is used in a narrower and different sense. Its meaning is often qualified by the context. \* \* \* Many similar illustrations might be cited. They show that *through* does not always mean from end to end, or from side to side, but frequently means simply 'within.'" *Provident L., etc., Co. v. Mercer County*, 170 U. S. 602.

**Through Contract.** — See the title CONNECTING CARRIERS (OF GOODS), vol. 6, p. 603, and see *Lamb v. Camden, etc., R., etc., Co.*, 46 N. Y. 271, 7 Am. Rep. 327.

**Through Elevators.** — In *Gill v. Cacy*, 49 Md. 243, it was held that when grain had been re-

moved from vessels and taken up into elevators, and thence let down into the hoppers, and, after being weighed, put into the bins of the purchasers, it had been carried *through* the elevators in the contemplation of an act exempting grain carried to the city *through* elevators from being weighed by the grain weighers of the state.

**Through Grain.** — The words "*through* grain," in a contract between a railroad and an elevator company, providing that the elevator company should receive and discharge for the railroad "all *through* grain" at one cent a bushel, and that the elevator should have the handling of "all *through* grain" at that price per bushel, were held to mean all grain consigned *through* the place of terminus of the road to some point beyond by the terms of shipment, and not to be confined to grain shipped *through* to the end of the line of the said company. *Richmond v. Dubuque, etc., R. Co.*, 26 Iowa 191.

**Through Traffic.** — The words "*through* traffic," in an agreement by which one railway company undertakes to "maintain, manage, man, stock, work, and use the railway" of another company, so as "properly to develop and accommodate not merely the *through* traffic but also the local traffic of the district to be served by the railway," were held to mean such traffic as that for which the said railway provided the shortest and most convenient route, and not that which might be more conveniently or economically carried by any other route. *Eastern, etc., R. Co. v. Midland R. Co.*, 5 R. & Can. T. Cas. 235.

**Through His Intervention.** — In *Mansell v. Clements*, L. R. 9 C. P. 139, the plaintiffs, house agents, were instructed by the defendant to offer a leasehold house for sale, for which they were to receive a certain commission if they found a purchaser, but one guinea only for their trouble if the house were sold "without their intervention." A purchaser called at the plaintiff's office and obtained a card to view the house, but thinking the price too high, declined to purchase. He afterwards resumed negotiations through a friend of the defendant and purchased for a much less sum. It was held, however, that the premises had been sold "*through* the intervention" of the agent, and that he was entitled to the commission.

**Through State — Texas Fever.** — See the title ANIMALS, vol. 2, p. 341, and see *Grimes v. Eddy*, (Mo. 1894) 27 S. W. Rep. 479.

**Words "Through" and "To" Distinguished.** — *Mercer County v. Provident L., etc., Co.*, 72 Fed. Rep. 627, affirmed 170 U. S. 593.

4. **Thrown into Bankruptcy.** — This term has been held to imply an adjudication in bankruptcy. *Wilcox v. Toledo, etc., R. Co.*, 45 Mich. 280.

5. **Thrust.** — *State v. Lowry*, 33 La. Ann. 1224. In this case it was held that under the

**TICKET.** (See the titles ELECTIONS, vol. 10, p. 552; LOTTERIES, vol. 19, p. 588; TICKETS AND FARES, *post.*) — See note 1.

**TICKET AGENT.** (See also the title TICKETS AND FARES, *post.*) — See note 2.

**TICKET BROKER.** — See the title TICKETS AND FARES, *post.*

*Louisiana* statute, *thrusting* a person may well include *thrusting* with an iron bolt, rod, or pin, whether the point be sharp or not.

**Thrust, Cut, or Stab.** — A person striking another with a wooden club is not guilty of cutting, *thrusting*, or stabbing with a knife, dirk, sword, or other deadly weapon. *Erwin v. Com.*, 96 Ky. 422.

1. **Ticket.** — In *Allaire v. Howell Works Co.*, 14 N. J. L. 23, it was held that the word *ticket* has no legal or other fixed and determinate meaning, and that where the legislature passed an act to prohibit the circulation or passing of *tickets*, the meaning of the word, or what kind of *tickets* was meant, must be gathered from the terms employed in the act.

**Elections.** — An election law prescribed that "a *ticket* different from that herein prescribed shall not be received or counted." In construing the provision the court said: "The language is unmistakable and imperative. The preceding section indicates plainly the meaning of the word *ticket*. It is 'a scroll of paper, on which shall be written or printed the names of the persons for whom he intends to vote.' 'Ballot' is sometimes used by the statute to signify *ticket*, but the latter is never used as

synonymous with the former. The *ticket* describes the paper, and names of persons, and the offices for which they are voted for. It includes all. The statute says: 'A *ticket* different from that herein prescribed shall not be received or counted.' This applies to the entire 'scroll of paper,' and excludes it as a whole. The language cannot be satisfied by limiting the exclusion from the count to the ballot for the office in which the vice exists, and we must give effect to the language of the law." *Perkins v. Carraway*, 59 Miss. 230.

**Lottery.** — In *Salomon v. State*, 27 Ala. 30, it was said: "The legislature certainly knew that there could not be a 'carrying on' a lottery without the sale of *tickets*, which means the sale of chances."

2. **Ticket Agent.** — Process was served upon one G. as *ticket* agent of the defendant railroad company. G. made affidavit that he was not an officer or an agent of the railroad company, but was agent of the Union Depot Company and as such agent sold such *tickets* as said Union Depot Company furnished to him. It was held that this did not show that he was not a *ticket* agent. *Union Pac. R. Co. v. Novak*, (C. C. A.) 61 Fed. Rep. 579.



# TICKETS AND FARES.

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## CROSS-REFERENCES.

See also the titles *BAGGAGE*, vol. 3, p. 528; *CARRIERS OF PASSENGERS*, vol. 5, pp. 536-621; *CIVIL RIGHTS*, vol. 6, p. 86; *INTERSTATE COMMERCE*, vol. 17, especially at pp. 64, 96-97, 100-103, 128-163, 171; *RAILROAD COMMISSIONERS*, vol. 23, p. 650; *RAILROAD POOLS*, vol. 23, p. 664; *SLEEPING CAR COMPANIES*, vol. 25, p. 1109.

**I. INTRODUCTORY AND EXPLANATORY.** — There is an extraordinary lack of harmony of judicial opinion upon very many of the topics embraced within this title. This inharmony confronts one at the very threshold — the definition and nature of a passage ticket — and, indeed, this fact is responsible for no little of the difficulty at other points.

Oftentimes both court and counsel have cited and relied on, indifferently, cases of carriers of goods and carriers of passengers; even, it would seem, as to matters wherein the former bear a relation to the subject of the service somewhat different from that of the latter.

Not all of the cases presented in this discussion sustain directly the propositions of text to which they are cited (the statements in some being mere *dicta*), yet it has been thought advisable thus to group them as favoring more or less directly one of several divergent rules.

Some of the cases are distinguishable, and where possible the attempt has been made to set forth the grounds of distinction. But to reconcile them all would be a hopeless task. The object of this introduction is rather to call attention to the serious conflict among the authorities and to explain the plan upon which the article has been prepared. The endeavor has been to divide the subject along lines best adapted to facilitate reference. Inevitably, matters, though related in principle, must at times fall in different and widely separated divisions of the treatment. The frequent references should prevent these matters from escaping the attention of the reader. It is especially important that the divisions discussing particular limitations and rules be read in connection with the division dealing with general principles.<sup>1</sup>

**II. DEFINITIONS.** — A *Ticket*, in this connection, is at least a voucher or receipt for the payment of fare between two points. Thus much is certain, but what, if any, further legal effect should be given to it, is not settled. The different views, with the cases in support, are stated in the section immediately following.<sup>2</sup>

*Fare* is the price of passage, or the sum paid or to be paid the carrier for transporting a passenger.<sup>3</sup>

**III. NATURE AND EFFECT OF TICKET** — 1. *Whether Voucher or Contract.* — There is a marked lack of harmony of judicial opinion as to the precise legal nature and effect of an ordinary passage ticket. Some of the cases take a rather narrow view, holding a ticket to be simply a voucher that the purchaser has paid the fare demanded, and a token of his right to be carried a certain distance. Other cases give to a ticket a more extensive significance, and consider it, besides being such a voucher, as evidence, though not conclusive, of the contract for transportation. It is a matter of common knowledge that a ticket rarely embodies all the elements of the contract. The running of the trains, as well as all reasonable rules prescribing the manner and facilitating

1. See the statement contained *infra*, this title, *Rules and Stipulations — Scope of Section*.

2. See *infra*, this title, *Nature and Effect of Ticket*.

3. *Chase v. N. Y. Cent. R. Co.*, 26 N. Y. 526.



the business of carrying passengers, certainly so far as known, become a part of the contract, and may be proved by either party, though not indorsed upon the ticket.<sup>1</sup> So, too, it has been held that either party may prove the rejection or waiver of any terms therein indorsed.<sup>2</sup> But where a ticket purports to be a complete agreement and sets out the terms of a special contract, it is to be looked to as the evidence of the contract, and is conclusive as to its terms.<sup>3</sup>

**2. As Evidence to Conductor.**—According to Some Authorities the face of the ticket is, as between the conductor and the passenger, conclusive evidence of the latter's right to transportation; and where the ticket is defective or invalid, even through the fault of an agent of the carrier, the conductor cannot be expected to listen to the passenger's account of the transaction, but the passenger should either pay his fare or walk quietly off the train, and then resort to an action against the company for breach of contract; but should he attempt to retain his place without paying fare, and be expelled by the conductor, he can recover no damages for the expulsion.<sup>4</sup>

**1. Whether Voucher or Contract.**—See the following cases, which discuss the nature of a ticket in this connection:

*England.*—*Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470; *Great Western R. Co. v. Pocock*, 28 W. R. 49; *Burke v. South Eastern R. Co.*, 5 C. P. D. 1.

*United States.*—*Mauritz v. New York, etc., R. Co.*, 23 Fed. Rep. 765, 21 Am. & Eng. R. Cas. 286.

*Illinois.*—*Chicago, etc., R. Co. v. Dumser*, 161 Ill. 190.

*Indiana.*—*Callaway v. Mellett*, 15 Ind. App. 366, 57 Am. St. Rep. 238.

*Maine.*—*Burnham v. Grand Trunk R. Co.*, 63 Me. 298, 18 Am. Rep. 220.

*Maryland.*—*Western Maryland R. Co. v. Stocksedale*, 83 Md. 245.

*Massachusetts.*—*Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *Sears v. Eastern R. Co.*, 14 Allen (Mass.) 433, 92 Am. Dec. 780; *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267, 58 Am. Rep. 135, 28 Am. & Eng. R. Cas. 148.

*Missouri.*—*Logan v. Hannibal, etc., R. Co.*, 77 Mo. 663, 12 Am. & Eng. R. Cas. 141.

*New Hampshire.*—*Johnson v. Concord R. Corp.*, 46 N. H. 213, 88 Am. Dec. 199; *Gordon v. Manchester, etc., R. Co.*, 52 N. H. 596, 13 Am. Rep. 97.

*New York.*—*Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 225; *Hibbard v. New York, etc., R. Co.*, 15 N. Y. 455; *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333; *Van Buskirk v. Roberts*, 31 N. Y. 661; *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, 8 Am. Rep. 543; *Elmore v. Sands*, 54 N. Y. 512, 13 Am. Rep. 617.

*Ohio.*—*Cleveland, etc., R. Co. v. Bartram*, 11 Ohio St. 457; *Baltimore, etc., R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617; *Frank v. Ingalls*, 41 Ohio St. 560, 21 Am. & Eng. R. Cas. 277.

*Pennsylvania.*—*Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432, 10 Am. Rep. 711.

**Both Receipt and Contract.**—In *Richmond, etc., R. Co. v. Ashby*, 79 Va. 130, 52 Am. Rep. 620, a passenger ticket is held to be both a receipt and a contract—the acknowledgment of the receipt of the passenger's fare, and of the

obligation to carry him for the purpose and upon the terms specified.

**Evidence of Contract Which Law Creates.**—In *Tennessee* it is held that a ticket purchased at full or regular fare is not intended as a contract in itself, but is a mere token or the evidence of a contract which the law creates, and which lies behind the ticket. *Watson v. Louisville, etc., R. Co.*, 104 Tenn. 194; *Louisville, etc., R. Co. v. Turner*, 100 Tenn. 214; *O'Rourke v. Citizens' St. R. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639.

**Passenger Ticket and Bill of Lading Distinguished.**—*Mauritz v. New York, etc., R. Co.*, 23 Fed. Rep. 765, 21 Am. & Eng. R. Cas. 286. See also the title *BILLS OF LADING*, vol. 4, p. 507.

**2. Rejection or Waiver of Terms.**—*Burnham v. Grand Trunk R. Co.*, 63 Me. 298, 18 Am. Rep. 220. But see *Rolfs v. Atchison, etc., R. Co.*, 66 Kan. 272, where it was held that parol evidence of statements made by the agent at the time of sale of the ticket, contradictory of the positive terms and stipulations contained in the ticket, is inadmissible; but where what passes between the ticket agent and the passenger at the time of purchase is independent of and additional to the ticket provisions, it is provable by evidence independent of and additional to the ticket. *New York, etc., R. Co. v. Winter*, 143 U. S. 60, and *Murdock v. Boston, etc., R. Co.*, 137 Mass. 293, 50 Am. Rep. 307, explained and distinguished. See also *Walker v. Price*, 62 Kan. 327, 84 Am. St. Rep. 392.

**Parol Evidence Held Admissible to Show Contract Actually Entered Into.**—*Chicago, etc., R. Co. v. Dumser*, 161 Ill. 190; *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469; *Van Buskirk v. Roberts*, 31 N. Y. 661. And see generally the cases cited in the principal list, *supra*; and *infra*, this title. *Representations, Promises, Waiver, and Modification.*

**3.** *Howard v. Chicago, etc., R. Co.*, 61 Miss. 194, 18 Am. & Eng. R. Cas. 313, holding that advertisements were inadmissible to vary the terms of such a ticket.

**4. Defective or Invalid Ticket.**—*United States.*—*Hall v. Memphis, etc., R. Co.*, 15 Fed. Rep. 57, 9 Am. & Eng. R. Cas. 348; *New York, etc., R. Co. v. Bennett*, (C. C. A.) 50 Fed. Rep. 496;

**Other Authorities, However, Declare** that in proper cases the conductor must heed the statement and explanation of the passenger as to his rights, and that one who has requested and paid for a ticket to a certain place, and who boards the train, without fault, believing he has obtained that which he sought, is entitled to ride thereon, even though the agent has not furnished him with the proper evidence of his right to be carried.<sup>1</sup>

*Poulin v. Canadian Pac. R. Co.*, 52 Fed. Rep. 197, 32 Am. L. Reg. 153.

*Alabama*.—*McGhee v. Reynolds*, 117 Ala. 413.

*Illinois*.—*Terre Haute, etc., R. Co. v. Vanatta*, 21 Ill. 188, 74 Am. Dec. 96; *Kiley v. Chicago City R. Co.*, 189 Ill. 384, 82 Am. St. Rep. 460, *affirming* 90 Ill. App. 275; *Chicago, etc., R. Co. v. Griffin*, 68 Ill. 499; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238, 18 Am. & Eng. R. Cas. 339; *Chicago, etc., R. Co. v. Bannerman*, 15 Ill. App. 100.

*Iowa*.—*Ellsworth v. Chicago, etc., R. Co.*, 95 Iowa 98.

*Maryland*.—*Western Maryland R. Co. v. Stocksdales*, 83 Md. 245, *distinguishing Philadelphia, etc., R. Co. v. Rice*, 64 Md. 63.

*Michigan*.—*Mahoney v. Detroit St. R. Co.*, 93 Mich. 612, 32 Am. St. Rep. 528, 36 Cent. L. J. 90; *Van Dusan v. Grand Trunk R. Co.*, 97 Mich. 439, 37 Am. St. Rep. 354. See the cases from this jurisdiction in the next note.

*Missouri*.—*Woods v. Metropolitan St. R. Co.*, 48 Mo. App. 125.

*New Jersey*.—*Petrie v. Pennsylvania R. Co.*, 42 N. J. L. 449, 1 Am. & Eng. R. Cas. 258.

*New York*.—*Weaver v. Rome, etc., R. Co.*, 3 Thomp. & C. (N. Y.) 270; *Beebe v. Ayres*, 28 Barb. (N. Y.) 275; *Pease v. Delaware, etc., R. Co.*, 101 N. Y. 367, 54 Am. Rep. 699, 26 Am. & Eng. R. Cas. 185.

*North Carolina*.—*Rose v. Wilmington, etc., R. Co.*, 106 N. Car. 168.

*Ohio*.—*Shelton v. Lake Shore, etc., R. Co.*, 29 Ohio St. 214; *Wilt v. Wabash R. Co.*, 11 Ohio Cir. Dec. 589, 21 Ohio Cir. Ct. 579.

*Oregon*.—*Peabody v. Oregon R., etc., Co.*, 21 Oregon 121.

*Pennsylvania*.—*Anderson v. Union Traction Co.*, 7 Pa. Dist. 41.

*West Virginia*.—*McKay v. Ohio River R. Co.*, 34 W. Va. 65, 26 Am. St. Rep. 913, 44 Am. & Eng. R. Cas. 395.

*Wisconsin*.—*Yorton v. Milwaukee, etc., R. Co.*, 54 Wis. 234, 41 Am. Rep. 23, 6 Am. & Eng. R. Cas. 322.

See also the title CARRIERS OF PASSENGERS, vol. 5, p. 602.

**The Reasons of the Rule** are well stated in the opinion of the court in *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342, 26 Am. Rep. 531. See cases from this jurisdiction in the next note.

**A Ticket Containing a Full and Unambiguous Printed Contract, Signed in Ink by the Purchaser**, that it shall expire on a date shown by punch marks on its margin, is conclusive evidence to the conductor of the contract between the passenger and the carrier as to the time the ticket continues in force. *Rolfs v. Atchison, etc., R. Co.*, 66 Kan. 272.

**Where Ticket Shows on Its Face that It Is Invald and Worthless**—*Baggett v. Baltimore, etc., R. Co.*, 3 App. Cas. (D. C.) 522.

**Passenger's Duty to Have Mistake Corrected.**—*Poulin v. Canadian Pac. R. Co.*, 52 Fed. Rep. 197.

**1. District of Columbia.**—*Carpenter v. Washington, etc., R. Co.*, 3 Mackey (D. C.) 225, 18 Am. & Eng. R. Cas. 370.

*Georgia*.—*Savannah City, etc., R. Co. v. Brauss*, 70 Ga. 368, 18 Am. & Eng. R. Cas. 324; *Head v. Georgia Pac. R. Co.*, 79 Ga. 358, 11 Am. St. Rep. 434; *Georgia R., etc., Co. v. Dougherty*, 86 Ga. 744, 22 Am. St. Rep. 499.

*Indiana*.—*Chicago, etc., R. Co. v. Conley*, 6 Ind. App. 9; *Callaway v. Mellett*, 15 Ind. App. 366, 57 Am. St. Rep. 238; *Evansville, etc., R. Co. v. Cates*, 14 Ind. App. 178.

*Tennessee*.—*O'Rourke v. Citizens St. R. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639.

*Texas*.—*Gulf, etc., R. Co. v. Copeland*, 17 Tex. Civ. App. 55; *Missouri Pac. R. Co. v. Martino*, 2 Tex. Civ. App. 634; *Houston, etc., R. Co. v. Crone*, (Tex. Civ. App. 1896) 37 S. W. Rep. 1074; *Gulf, etc., R. Co. v. Halbrook*, 12 Tex. Civ. App. 475; *Texas, etc., R. Co. v. Armstrong*, (Tex. Civ. App. 1897) 41 S. W. Rep. 833.

See also the title CARRIERS OF PASSENGERS, vol. 5, p. 603.

**Statement of Rule.**—Where under the regulations of the railroad company, the passenger is placed in a situation needing explanation as between himself and the conductor, it is the duty of the passenger to give the needed explanation, and if he does so truthfully it will be at the risk of the carrier if the explanation is not accepted. *Cleveland, etc., R. Co. v. Kinsley*, 27 Ind. App. 135, 87 Am. St. Rep. 245.

"While a passenger's ticket is not in all cases conclusive evidence of his contract with the carrier, yet it is sufficient evidence of the contract to justify a conductor—an agent of a railway company other than that one with whom the contract was made—in acting upon it, as showing the actual contract, in the absence of any reasonable statements made to him by the passenger that, through fraud, mistake, or inadvertence, it does not show the real contract." *Woods, J.*, in *Alabama, etc., R. Co. v. Drummond*, 73 Miss. 813. To the same effect is *Alabama, etc., R. Co. v. Holmes*, 75 Miss. 371, where the passenger's explanation of the mistake in the ticket was borne out by her baggage check and the company's waybill, but the conductor refused to examine them or to accept an explanation.

The passenger has the right to believe and presume that the ticket faithfully expresses the contract as made. *O'Rourke v. Citizens St. R. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639.

**Where Ticket Indicates Probability of Mistake by the Company—Ejection Unwarranted.**—*Krueger v. Chicago, etc., R. Co.*, 68 Minn. 445.

**Illustration.**—By mistake, the agent selling a mileage ticket, good for one year from issuance, stamped upon it, as the date of issuance,

Where, However, the Holder Knew His Ticket to Be Worthless, he has no cause of action for his expulsion, but his recovery must be limited to the cost of another ticket, and the damages occasioned by the delay.<sup>1</sup>

**IV. RATES OF FARE — 1. Power of Legislature to Regulate.** — The legislature of a state may regulate and control railroad rates within its own jurisdiction.<sup>2</sup> This power is, however, subject to certain qualifications and limitations to be considered in later portions of this section.

**2. Delegation of Power by Legislature — To Commissions.** — What the legislature may do directly in the matter of regulating passenger rates may be lawfully effected through the medium of a commission.<sup>3</sup>

**To Municipalities.** — Not infrequently cities, towns, and villages are invested with power to regulate the rates of fare of street railway companies within their own jurisdiction.<sup>4</sup>

**3. Limitations upon Power of Legislature — a. CHARTER PROVISION.** — The state's power to regulate rates is a power of government, continuing in its nature, and if it can be bargained away at all, this can only be by words of positive grant or something which is in law equivalent.<sup>5</sup> A charter provision that the "directors shall have power to establish such rates \* \* \* as they shall from time to time by their by-laws direct and determine," does not confer unlimited power, but merely the right to charge reasonable rates, and what is a reasonable maximum rate may be fixed by statute.<sup>6</sup> A grant in the charter of "the exclusive right" of transportation of passengers, provided the charges shall not exceed a certain specified rate, is not a contract between the state and company that the latter may charge such rates as it pleases, within the limits named, and the company is subject to the provisions of subsequent acts establishing a commission to regulate railroad rates.<sup>7</sup>

March 4, 1892, instead of 1893, and after the figures 189 wrote the figure 3, making the date of expiration March 4, 1893, and then corrected the latter mistake by writing over the 3 the figure 4, making it read 1894, not correcting the 1892. On April 23, 1893, the holder tendered the ticket for passage, but it was rejected and he was put off the train, the conductor refusing to accept the plaintiff's explanation of the circumstances of the mistake, and to wait until the train reached the station at which the ticket was bought, and make inquiry there. It was held that the passenger was entitled to recover damages of the company. *Trice v. Chesapeake, etc., R. Co.*, 40 W. Va. 271.

In *Michigan*, in *Hufford v. Grand Rapids, etc.*, R. Co., 53 Mich. 121, the court followed *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342, 26 Am. Rep. 531, wherein the rule first stated above was laid down. But upon a subsequent trial of the case (64 Mich. 631), this rule was abandoned and the court approaches very close to the second rule stated above. See also *Rouser v. North Park St. R. Co.*, 97 Mich. 565. See the Michigan cases in the note preceding.

**1. Knowledge of Passenger.** — *Russell v. Missouri, etc., R. Co.*, 12 Tex. Civ. App. 627; *Moore v. Ohio River R. Co.*, 41 W. Va. 160. See also *Baggett v. Baltimore, etc., R. Co.*, 3 App. Cas. (D. C.) 522; *Callaway v. Mellett*, 15 Ind. App. 366, 57 Am. St. Rep. 238.

**2. Regulation of Rates — United States.** — *Peik v. Chicago, etc., R. Co.*, 94 U. S. 176; *Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155; *Stone v. Wisconsin*, 94 U. S. 181; *Chicago, etc., R. Co. v.*

*Ackley*, 94 U. S. 179; *Winona, etc., R. Co. v. Blake*, 94 U. S. 180; *Shields v. Ohio*, 95 U. S. 319; *Railroad Commission Cases*, 116 U. S. 307, 23 Am. & Eng. R. Cas. 577; *Dow v. Beidelman*, 125 U. S. 680, 34 Am. & Eng. R. Cas. 322; *Chicago, etc., R. Co. v. Wellman*, 143 U. S. 339.

*Massachusetts.* — *Parker v. Metropolitan R. Co.*, 109 Mass. 506; *Atty.-Gen. v. Old Colony R. Co.*, 160 Mass. 62.

*Michigan.* — *Chamberlain v. Lake Shore, etc., R. Co.*, 122 Mich. 477.

*Ohio.* — *Cleveland, etc., R. Co. v. Wells*, 61 Ohio St. 268.

As applied to fares for transportation not extending beyond the limits of the state by which the railroad is incorporated, the authority of the legislature is not affected by the decision in *Wabash, etc., R. Co. v. Illinois*, 118 U. S. 557, 26 Am. & Eng. R. Cas. 1.

**Union Pacific Railroad Act — Extent of Reservation of Power by Congress to Control Rates.** — *Ames v. Union Pac. R. Co.*, 64 Fed. Rep. 165.

**3.** See the title RAILROAD COMMISSIONERS, vol. 23, p. 650, where this subject is exhaustively treated.

**4.** See *infra*, this section, *Municipal Regulation of Street Railway Fares*.

**5.** *Railroad Commission Cases*, 116 U. S. 307; *Indianapolis v. Navin*, 151 Ind. 139. See also the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1030.

**Power to Regulate Surrendered by Charter.** — *Pingree v. Michigan Cent. R. Co.*, 118 Mich. 314.

**6.** *Ruggles v. People*, 91 Ill. 256; *Illinois Cent. R. Co. v. People*, 95 Ill. 313, 1 Am. & Eng. R. Cas. 188.

**7.** *Georgia R. etc., Co. v. Smith*, 128 U. S. 174, 35 Am. & Eng. R. Cas. 511.



*b.* REGULATION OF COMMERCE. — If what is done in regard to the fixing of rates amounts to a regulation of foreign or interstate commerce, such action is null and void.<sup>1</sup>

*c.* RATES AND CONDITIONS MUST BE FAIR AND JUST — (1) *Generally.* — But this power of regulation is not without bounds; the power to regulate is not a power to destroy; a limitation is not the equivalent of confiscation. Accordingly, under pretense of regulating fares, the state may not require a railroad to carry persons without reward; nor can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law.<sup>2</sup> A statute which in effect authorizes one company to determine the conditions on which another road must carry passengers, and compels one road to carry passengers on the credit of another, is unconstitutional.<sup>3</sup>

(2) *Test as to Fairness.* — Whether or not a rate of fare per mile prescribed by the legislature is fair and just must be determined by the effect on the net earnings throughout the whole line within the jurisdiction, and not on any particular division, notwithstanding such latter was formerly an independent line.<sup>4</sup> And evidence of the earnings or expenses of a single mile or division of a system of railways is inadmissible to prove that a rate fixed by the legislature is unreasonable.<sup>5</sup> A railroad company, like other public service corporations, is entitled, at the very most, only to a profit on the actual investment,<sup>6</sup> and is not entitled to exact such charges for transportation as will enable it at all times not only to pay operating expenses but to meet the interest regularly accruing upon all of its outstanding obligations and justify a dividend upon all of its stock.<sup>7</sup>

*d.* WHERE INCOME PLEDGED. — This power is not restricted by the fact that the income of the company has been pledged to the payment of obligations incurred on the faith of its charter.<sup>8</sup>

*e.* CONTRACT FOR INTERCHANGE OF TRAFFIC. — A statute reducing rates is not invalid because of the fact that a contract existed between two companies for the interchange of traffic at the rates of fare which existed prior to its enactment.<sup>9</sup>

*f.* EXTENT OF JUDICIAL INTERFERENCE. — The extent of judicial interference with the legislative power to fix rates is protection against unreasonable rates.<sup>10</sup> The state may fix a maximum rate beyond which any charge would be unreasonable, and such maximum, when fixed, would be binding on the courts in their adjudications, as well as on the parties in their dealings.<sup>11</sup> And such power is not surrendered so as to leave it to be determined by the courts, free of all legislative control, by statutory authority to the company "from time to time to fix, regulate," etc., charges.<sup>12</sup>

1. See the title INTERSTATE COMMERCE, vol. 17, p. 101. And see Railroad Commission Cases, 116 U. S. 307; Georgia R., etc., Co. v. Smith, 128 U. S. 174.

2. *Bates Must Be Fair and Just.* — Wallace v. Arkansas Cent. R. Co., (C. C. A.) 118 Fed. Rep. 422; Railroad Commission Cases, 116 U. S. 307, 23 Am. & Eng. R. Cas. 577; Georgia R., etc., Co. v. Smith, 128 U. S. 174, 35 Am. & Eng. R. Cas. 511. See also Atchison, etc., R. Co. v. Campbell, 61 Kan. 439, 78 Am. St. Rep. 328; Indianapolis v. Navin, 151 Ind. 139.

3. *Atty.-Gen. v. Old Colony R. Co.*, 160 Mass. 62. In this case the court did not determine what are the limitations of the power, for the reason that there was no contention that the rates established by the statute in question were unreasonable.

4. *St. Louis, etc., R. Co. v. Gill*, 156 U. S.

649. And see *Missouri Pac. R. Co. v. Smith*, 60 Ark. 221.

5. *Chicago Union Traction Co. v. Chicago*, 199 Ill. 579.

6. *Chicago Union Traction Co. v. Chicago*, 199 Ill. 579.

7. *Snyth v. Ames*, 169 U. S. 524; *Chicago Union Traction Co. v. Chicago*, 199 Ill. 579.

8. *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155.

9. *Buffalo East Side R. Co. v. Buffalo St. R. Co.*, 111 N. Y. 132, 37 Am. & Eng. R. Cas. 200.

10. *Judicial Interference.* — *Chicago, etc., R. Co. v. Wellman*, 143 U. S. 339; *Chicago Union Traction Co. v. Chicago*, 199 Ill. 579.

11. *Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155.

12. *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307; *Stone v. Illinois Cent. R. Co.*, 116 U. S.

**4. Classification of Roads.** — A statute dividing railroad companies into classes according to the length of the roads operated or the amount of business done, and fixing a limit for passenger fares for each class, does not deny a corporation the equal protection of the laws within the meaning of the prohibition in the Federal Constitution.<sup>1</sup> The legislature may, if it sees fit, establish rates for each railroad separately, and as different roads may reasonably require different rates, certain roads may be exempted or excluded from a statute fixing rates.<sup>2</sup>

**5. Statutory Penalty for Overcharge.** — In some of the states there are statutes subjecting carriers to a penalty for charging more than the legal rate of fare.<sup>3</sup> In *Arkansas* the carrier is not relieved from liability for the penalty by the fact that the overcharge was due to mistake as to the distance for which transportation was charged.<sup>4</sup> But by the express terms of the *New York* act there is no liability where the "overcharge was made through inadvertence or mistake, not amounting to gross negligence."<sup>5</sup> A person who goes upon a train for the sole purpose of paying an overcharge if demanded, and suing for the penalty, is not on that account precluded from recovering.<sup>6</sup> Nor is the right to recover affected by the fact of a champertous agreement between the plaintiff and his attorney, made for the purpose of inducing the overcharge.<sup>7</sup>

**6. Lessees and Successors.** — A company by leasing and operating a road in another state subjects itself to such local legislation as to rates as would have been applicable to the lessor if no lease had been made.<sup>8</sup>

**7. In Absence of Statute.** — In the absence of statutory regulation upon the subject, it is necessarily implied from the character of the employment that the rates shall be just and reasonable, and without unjust discrimination, and the courts must decide, as they do in the case of private persons, when controversies arise, what is just and reasonable.<sup>9</sup>

**8. Municipal Regulation of Street Railway Fares** — *a.* **HOW POWER CONFERRED.** — It is entirely competent for the legislature to delegate to a municipi-

347; *Stone v. New Orleans, etc., R. Co.*, 116 U. S. 352. (These are known as the Railroad Commission Cases.)

**1. Roads Classified.** — *Dow v. Beidelman*, 125 U. S. 680, 34 Am. & Eng. R. Cas. 322; *Rugles v. Illinois*, 108 U. S. 526, 11 Am. & Eng. R. Cas. 49; *Illinois Cent. R. Co. v. Illinois*, 108 U. S. 541, 11 Am. & Eng. R. Cas. 55; *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155.

**2. Atty.-Gen. v. Old Colony R. Co., 160 Mass. 62.**

**3. See the local statutes.**

**The New York Act of 1857** providing a penalty for charging a greater fare than that allowed by law does not apply to city railroads. *Money Penny v. Sixth Ave. R. Co.*, (N. Y. Super. Ct. Spec. T.) 35 How. Pr. (N. Y.) 452; *Chase v. New York Cent. R. Co.*, 26 N. Y. 526.

**Penalty for Charging Illegal Rates — Identity of Roads — Evidence Held Insufficient to Prove.** — *Missouri Pac. R. Co. v. Bolling*, 66 Ark. 646, 48 S. W. Rep. 806.

**4. Missouri Pac. R. Co. v. Smith, 60 Ark. 221.**

**5. Gross Negligence.** — *Tullis v. Brooklyn Heights R. Co.*, 71 N. Y. App. Div. 494, holding that the fact that the conductor, before the plaintiff left the car, offered to accept his transfer check or to restore to him the fare he had paid warrants and requires the inference that the overcharge was mistakenly made, and under circumstances which did not amount to gross negligence.

**6. Motive of Passenger.** — *Missouri Pac. R. Co. v. Smith*, 60 Ark. 221; *St. Louis, etc., R. Co. v. Gill*, 54 Ark. 101.

**7. Champerty.** — *Missouri Pac. R. Co. v. Smith*, 60 Ark. 221.

**8. Stone v. Illinois Cent. R. Co., 116 U. S. 347.**

**Company Succeeding to Rights of Another Subject to General Law Concerning Charges.** — *Norfolk, etc., R. Co. v. Pendleton*, 156 U. S. 667.

**9. Munn v. Illinois, 94 U. S. 113; *Dow v. Beidelman*, 125 U. S. 680, 34 Am. & Eng. R. Cas. 322; *People v. Suburban R. Co.*, 178 Ill. 594; *Smith v. Pittsburg, etc., R. Co.*, 23 Ohio St. 10. See also *Cincinnati, etc., R. Co. v. Skillman*, 39 Ohio St. 444, 13 Am. & Eng. R. Cas. 31.**

**Commutation Rates.** — A railroad company is under no obligation to establish commutation rates for a particular locality, yet when it has done so, and commutation tickets are sold thereat to the public, the refusal of such a ticket to a particular individual under the same circumstances and on the same conditions as such tickets are sold to the rest of the public is an unjust discrimination against him, and a violation of the principle of equality which the company is bound to observe in the conduct of its business. *State v. Delaware, etc., R. Co.*, 48 N. J. L. 55, 57 Am. Rep. 543, 23 Am. & Eng. R. Cas. 470.

**Right to Revoke Special Rates — Evidence of Intention to Revoke.** — *Johnson v. Georgia R., etc., Co.*, 108 Ga. 496.

pality the power to regulate the rates of passenger fares to be charged by street railway companies within its jurisdiction.<sup>1</sup> The important question in this connection is whether in a given case such power has in fact been granted.<sup>2</sup> The authority must be contained in express terms or must arise by necessary implication from the language used in the legislative act, or it does not exist.<sup>3</sup>

**b. LIMITATIONS UPON POWER.**—This power of regulation has been declared to be subject to these limitations: first, that there is reasonable need on the part of the public, considering the nature and extent of the service, of lower rates and better terms than those existing; second, that the rates and terms fixed by the ordinance are not clearly unreasonable, in view of all the conditions. Neither of these considerations is independent of the other, and, although the public interest is of the first importance, the test is not what is desirable upon the part of either, but what is reasonable in respect to both.<sup>4</sup> And to these must be added this limitation: a municipality may not fix rates so as to prevent, at all events, legislative action. Accordingly, a statute fixing a lower rate than that permitted or authorized by an ordinance, does not impair the obligation of any contract, although rendering the ordinance null and of no effect.<sup>5</sup>

**c. PRESUMPTION.**—Rates of fare prescribed by municipal ordinances will be presumed to be reasonable until their unreasonableness is shown, and the burden to show that is upon the party asserting it.<sup>6</sup>

1. *People v. Suburban R. Co.*, 178 Ill. 594; *Forman v. New Orleans, etc., R. Co.*, 40 La. Ann. 446.

The Common Council of Chicago may fix a reasonable maximum rate of fare to be charged by a street car company for carrying passengers from one point to another within the city limits. *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484.

The City of Lincoln may fix the rates of fare to be charged by the street car company therein, and may require six tickets to be sold for twenty-five cents, to be kept for sale by the conductor of each car. *Sternberg v. State*, 36 Neb. 307. And see *infra*, this title, *Sale of Tickets—On Street Cars*.

The Common Council of the City of Buffalo may require as a condition precedent that the purchaser of a street railway franchise shall transport passengers for one fare to and from points beyond one of the termini of the proposed route over the line of other companies. *People v. Barnard*, 110 N. Y. 548, reversing 48 Hun (N. Y.) 57.

A Reservation in an Ordinance authorizing the use of the city streets, that the company shall be "subject to all the laws and ordinances now in force and such as may be hereafter made," is *ultra vires* unless express or implied authority therefor is to be found in some legislative enactment. *Old Colony Trust Co. v. Atlanta*, 83 Fed. Rep. 39, affirmed (C. C. A.) 88 Fed. Rep. 859.

Provision as to Through Rate for Villages, Townships, and Cities, Construed.—*Coy v. Detroit, etc., R. Co.*, 125 Mich. 616.

Franchise from Village—Construction of Provision as to Rate.—*Kissane v. Detroit, etc., R. Co.*, 121 Mich. 175.

Nonresident Entitled to Rate Fixed by Ordinance.—*Coy v. Detroit, etc., R. Co.*, 125 Mich. 616.

Option to City to Purchase Road—Right to Restrain Increasing of Rates.—See *Cambridge v. Cambridge R. Co.*, 10 Allen (Mass.) 50,

**Change of Motive Power Consideration of Contract for Higher Rates.**—An agreement to change the motive power from horses to electricity is a sufficient consideration to sustain a contract by ordinance for a higher rate of fare. *Cincinnati v. Cincinnati St. R. Co.*, 2 Ohio Dec. 468, 2 Ohio N. P. 298.

**Waiver by Street Car Company of Right in Respect to Charges.**—*Adams v. Union R. Co.*, 21 R. I. 134.

**Connecting Lines Afterward Constructed.**—The ordinance of the city of Milwaukee of October, 1871, fixing a maximum fare for street railway companies, has no application to connecting lines afterwards constructed by such roads. *Ellis v. Milwaukee City R. Co.*, 67 Wis. 135, 58 Am. Rep. 858.

2. See *infra*, this section, *d. Certain Provisions Construed*.

3. *Old Colony Trust Co. v. Atlanta*, 83 Fed. Rep. 39, affirmed (C. C. A.) 88 Fed. Rep. 859. See also *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368.

4. **Limitations upon Municipal Power.**—*Milwaukee Electric R., etc., Co. v. Milwaukee*, 87 Fed. Rep. 577, declaring the ordinance in question void as violating the Fourteenth Amendment to the Federal Constitution.

In *Ellis v. Milwaukee City R. Co.*, 67 Wis. 135, 58 Am. Rep. 858, it was said that the rates should be such as to give the company reasonable compensation for its service in view of the location and length of its road.

**The Discretion of the City of New Orleans** in the matter of the regulation of the rates of fare to be charged by street railways within its limits is not subject to judicial control unless arbitrarily or unlawfully exercised. *Forman v. New Orleans, etc., R. Co.*, 40 La. Ann. 446.

5. *Indianapolis v. Navin*, 151 Ind. 130.

6. **Presumed Reasonable.**—*Milwaukee Electric R., etc., Co. v. Milwaukee*, 87 Fed. Rep. 577; *Chicago Union Traction Co. v. Chicago*,



*d. CERTAIN PROVISIONS CONSTRUED* — (1) *Company Subject to Municipal "Regulations."* — The power of "regulation" on the part of a city does not necessarily embrace the power to change, at its pleasure, from time to time, a right so vital to the success and continued existence of the company as that in regard to passenger rates.<sup>1</sup>

(2) *Rates Subject to "Approval" of Municipality.* — A provision in the act incorporating a street railroad company that makes the rates of fare "subject to the approval of the mayor and city council" confers no power upon the city to fix rates originally.<sup>2</sup>

(3) *Power Concerning Public Order and Enumerated Vehicles.* — A grant of authority in a municipal charter to pass ordinances for the order and good government of the city, and concerning "carriages, wagons, carts, drays," etc., neither by the general terms employed; nor by the special reference to vehicles, authorizes an enactment fixing rates of fare to be charged by a street railway company.<sup>3</sup>

(4) *Power to Fix Rates in Grant of Franchise.* — The statutes of *Ohio* confer power upon municipalities to determine the conditions of the grant of a street railway franchise at the time it is made, including fixing the rates of fare to be charged, but no power thereafter to prescribe rates of fare. Accordingly, when the grant itself fixes the rate, a reserved right of regulation does not authorize a subsequent modification or change during the life of the grant.<sup>4</sup>

(5) *Where Fixing of Rates Matter of Contract by Legislative Command.* — Where the fixing of rates of fare is made a matter of agreement between the city and the company by the express command of the legislature, and is not an exercise of a governmental function of a legislative character by the city under a delegated power, a positive agreement as to rates suspends the power of the city during the time that may be specified, notwithstanding the right to prescribe from time to time the rules and regulations for the operation of the road.<sup>5</sup>

(6) *Provision Fixing Maximum Charge.* — A provision in a statute that the rate of fare agreed upon between the company and the city shall not be increased without the consent of the city authorities cannot properly or fairly be regarded as an implied permission to such authorities to reduce the rates agreed upon without the consent of the company.<sup>6</sup> An ordinance that pro-

199 Ill. 579; *Ellis v. Milwaukee City R. Co.*, 67 Wis. 135, 58 Am. Rep. 858.

1. **Power to "Regulate."** — Where, under a statute, a street railroad could not be constructed without the consent of the municipal authorities "and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe," power is not given to the city to change at its pleasure, from time to time, the rates of fare. *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368.

A validating act, providing that the companies whose charters were thus legalized should be subject to such municipal regulations "as are other railroads and street railroad companies incorporated by separate act or acts by the law of this state," does not, because the charter of one of such street railway companies contained a provision authorizing the city within which it was located to fix rates, itself confer authority to fix rates. *Old Colony Trust Co. v. Atlanta*, 83 Fed. Rep. 39, *affirmed* (C. C. A.) 88 Fed. Rep. 859.

2. **Power of "Approval."** — *Old Colony Trust Co. v. Atlanta*, 83 Fed. Rep. 39, *affirmed* (C. C. A.) 88 Fed. Rep. 859, holding further that even

if power to fix rates could be thus conferred, it is exhausted by the passage of an ordinance under which the road is constructed and maximum rates prescribed.

3. *Old Colony Trust Co. v. Atlanta*, 83 Fed. Rep. 39, *affirmed* (C. C. A.) 88 Fed. Rep. 859.

4. *Cleveland City R. Co. v. Cleveland*, 94 Fed. Rep. 385.

**But a Statutory Provision that After a Grant or Renewal Is Made**, the municipality shall not, during the term of such grant or renewal, relieve the grantee from any obligation or liability imposed thereby, does not prohibit the modification of a grant or renewal, containing such a reservation, upon sufficient consideration. *Cleveland City R. Co. v. Cleveland*, 94 Fed. Rep. 385, *citing* *Clement v. Cincinnati*, 19 Cinc. L. Bul. 74, *affirming* 9 Ohio Dec. (Reprint) 688, 16 Cinc. L. Bul. 355.

5. *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368.

6. *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, holding further that a provision in an ordinance that the rate shall not be more than five cents does not give a right to the city to reduce it below the rate of five cents established by the company.

vides that the rate of fare "shall not exceed the present fare," shows no intention to diminish the amount of fare collectible, but only to prevent a subsequent increase.<sup>1</sup>

*e.* DISCRIMINATION IN FAVOR OF CERTAIN LOCALITY. — Where all the residents of a city receive a reasonable service, at a reasonable price, a discrimination in favor of the residents of a certain locality, resting on a sense of justice and fair play, is not reprehensible.<sup>2</sup>

*f.* ESTOPPEL TO ASSERT INVALIDITY OF ORDINANCE. — Where the company accepts and enjoys the benefit of an ordinance authorizing the use of the city streets and fixing the rates of fare, it may not escape the performance of its duty concerning rates on the ground that the ordinance and the duties imposed are *ultra vires* both as to the city and the company.<sup>3</sup>

*g.* BONDHOLDERS' RIGHT TO RESTRAIN. — Bondholders may sue to restrain the enforcement of an ordinance regulating rates of fare upon showing a reasonable and fairly well-grounded anticipation of loss of interest on the bonds; it is not necessary for them to submit to loss as a demonstration of the injuries effected by legislation, before invoking the assistance of the court.<sup>4</sup>

*h.* CONTRACT AS TO RATES FOR BENEFIT OF PUBLIC. — Where, in granting a street railway franchise, a contract is made between the town and the company, limiting the rate of fare, such contract is for the benefit of the public, upon which passengers may rely and for breach of which they may seek redress.<sup>5</sup>

**V. SALE OF TICKETS — 1. On Street Cars.** — The rights and franchises of a street railway company are not destroyed or unreasonably impaired by the requirement that it shall keep tickets for sale upon its cars.<sup>6</sup>

**2. Delivery to Purchaser.** — It is the duty of a ticket agent to exercise reasonable care in delivering the ticket so that the purchaser may get it, and if the purchaser is called away after applying for a ticket and putting down his money, it would be no delivery for the agent to put the ticket on the counter in his absence, if it did not come into his possession.<sup>7</sup>

**3. Sale on Credit — Authority of Agent.** — An agent only authorized to sell tickets and to stamp and deliver the same, upon receiving pay therefor, cannot bind his principal by turning over tickets to a third person (a ticket broker) to be in turn sold by him and to be paid for when so sold.<sup>8</sup>

**As Passenger.** — Where a person obtains a ticket on his promise to pay for it upon his return, there not being sufficient time before the starting of the train to settle for it, he is, in an action for ejection, to be considered a purchaser of the ticket, where nonpayment was not the reason for the conductor's refusal to accept the ticket.<sup>9</sup>

**VI. TRANSFERABILITY OF TICKETS — 1. In Absence of Restriction — a. GENERAL RULE.** — Unless the use of a passage ticket is in some manner limited

1. *Wimmer v. Union Traction Co.*, 12 Pa. Super. Ct. 467.

2. *Forman v. New Orleans, etc., R. Co.*, 40 La. Ann. 446.

3. *People v. Suburban R. Co.*, 178 Ill. 594. And see the title *ULTRA VIRES*.

4. *Old Colony Trust Co. v. Atlanta*, 83 Fed. Rep. 39, affirmed (C. C. A.) 88 Fed. Rep. 859.

5. *Adams v. Union R. Co.*, 21 R. I. 134.

6. **Ordinance Requiring Tickets to Be Kept for Sale on Street Cars.** — *Detroit v. Ft. Wayne, etc.*, R. Co., 95 Mich. 456, 35 Am. St. Rep. 580. And in this case the reservation in the ordinance, under which the company was operating, of the right "to make such further rules," etc., "as may from time to time be deemed necessary to protect the interest, safety, welfare, or accommodation of the public," was held to

carry the right to enact an ordinance providing that the company should keep tickets for sale upon its cars, and to provide for its enforcement. So in *Sternberg v. State*, 36 Neb. 307, a similar ordinance was sustained under general provisions subjecting the company "to all reasonable regulations in the construction and use of said railway which may be imposed by ordinances," and empowering the city "to fix and determine the fare charged."

**Territorial Operation of Franchise Provision for Sale of Tickets on Cars.** — *Rice v. Detroit, etc.*, R. Co., 122 Mich. 677.

7. *Quigley v. Central Pac. R. Co.*, 5 Sawy. (U. S.) 107.

8. *Frank v. Ingalls*, 41 Ohio St. 560.

9. *Ellsworth v. Chicago, etc., R. Co.*, 95 Iowa 98.

— by constitution, statute, or contract — it possesses the quality of property generally, and may be transferred so as to confer upon the transferee the rights of the first purchaser.<sup>1</sup>

*b. ANTECEDENT EQUITIES.* — A railroad ticket is not negotiable so as to be freed of antecedent equities. Hence, when a ticket has been fraudulently obtained from a company, a person purchasing from the holder thereof, although for value and without notice of equities, acquires no title thereto.<sup>2</sup>

**2. Ticket in Coupon Form.** — A ticket in coupon form, calling for transportation over connecting lines, with stop-over privileges under certain conditions, is transferable at the terminus of each division.<sup>3</sup>

**3. Restriction of Use to Original Purchaser** — *a. POWER TO RESTRICT.* — It is entirely competent for a carrier of passengers to restrict the use of its tickets to the original purchaser, and the custom so to do obtains very generally.<sup>4</sup> The regular fare may be required of another person who attempts to travel on a ticket containing such a restriction, notwithstanding he bought it on the assurance of a pretended but unauthorized agent of the company that it would be accepted.<sup>5</sup>

*b. SUFFICIENCY OF TERMS.* — The words “not transferable,” or words of like import, printed on the ticket, will have the effect of so restricting the use of the ticket, and a third party can acquire no rights by virtue of such a ticket.<sup>6</sup>

*c. FAILURE TO AFFIX SIGNATURE.* — Where the conditions of a nontransferable ticket contemplate that it shall bear the signature of the original purchaser, the fact that it is unsigned will not confer upon a third person who purchased it of a broker the right to ride on the ticket.<sup>7</sup>

*d. GOOD FAITH OF TRANSFEREE.* — It has been held that if one, without attempting to conceal his identity, presents for his passage a nontransferable ticket issued to another, and his claim is recognized by the conductor, he is entitled to the rights of a passenger.<sup>8</sup>

*e. TICKET ISSUED IN NAME OF WRONG PERSON.* — If a ticket, on its face not transferable, is issued in the name of the wrong party, the conductor may refuse to receive it when tendered by the person for whom it was in fact purchased.<sup>9</sup>

**1. Where Ticket Contains No Limitation.** — *People v. Caldwell*, 64 N. Y. App. Div. 46; *International, etc., R. Co. v. Ing.*, 29 Tex. Civ. App. 398; *Spencer v. Lovejoy*, 96 Ga. 657, 51 Am. St. Rep. 152. See also *infra*, this title, *Ticket Brokerage*.

If no restriction is put upon a ticket by the carrier, before or at the time of the original purchase, it is transferable, being regarded as evidencing a contract to carry bearer. *Hudson v. Kansas Pac. R. Co.*, 3 McCrary (U. S.) 249.

A ticket not restricted to the original holder is good in the hands of a third party, although purchased of a scalper. *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53; *Carsten v. Northern Pac. R. Co.*, 44 Minn. 454, 20 Am. St. Rep. 589.

**2.** *Frank v. Ingalls*, 41 Ohio St. 560, 21 Am. & Eng. R. Cas. 277; *Levinson v. Texas, etc., R. Co.*, 17 Tex. Civ. App. 617.

**3. Coupon Tickets.** — *Nichols v. Southern Pac. R. Co.*, 23 Oregon 123, 37 Am. St. Rep. 664.

**4. May Impose Restrictions.** — *Delaware, etc., R. Co. v. Frank*, 110 Fed. Rep. 689; *Coyle v. Southern R. Co.*, 112 Ga. 121; *Gregory v. Burlington, etc., R. Co.*, 10 Neb. 250, 1 Am. & Eng. R. Cas. 270. And see the cases throughout this section.

**5.** *Drummond v. Southern Pac. R. Co.*, 7 Utah 118,

**6. The Words “Not Transferable” Sufficient** — *England.* — *Langdon v. Howells*, 4 Q. B. D. 337.

*United States.* — *Cody v. Central Pac. R. Co.*, 4 Sawy. (U. S.) 114.

*Illinois.* — *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613.

*Iowa.* — *Way v. Chicago, etc., R. Co.*, 64 Iowa 48, 52 Am. Rep. 431.

*Maine.* — *Crosby v. Maine Cent. R. Co.*, 69 Me. 418.

*Nebraska.* — *Post v. Chicago, etc., R. Co.*, 14 Neb. 110, 45 Am. Rep. 100, 9 Am. & Eng. R. Cas. 345.

**7.** *Rahilly v. St. Paul, etc., R. Co.*, 66 Minn. 153; *Drummond v. Southern Pac. Co.*, 7 Utah 118.

**8.** *Robostelli v. New York, etc., R. Co.*, 33 Fed. Rep. 796, 34 Am. & Eng. R. Cas. 515.

**9. Ticket in Wrong Name.** — Where the appellee's husband bought a nontransferable thousand-mile ticket, and told the agent to issue it to E. Bannerman, and the agent, thinking it was intended for a man, inserted “Mr.” before the name, and the ticket was presented by the husband to pay his wife's fare, he stating at the time to the conductor that it was bought for his wife, Elsa Bannerman, and the conductor refused to receive such ticket in payment of the wife's fare, and upon a refusal to



*f.* **TICKET ISSUED TO PURCHASER IN ASSUMED NAME.** — Where the ticket is limited to the original purchaser, and purports to contain his name and a description of his personal appearance, and is issued to another purchaser under an assumed name with the knowledge and assent of the agent, the conductor may not take up the ticket when presented by the purchaser for transportation.<sup>1</sup>

*g.* **SPECIAL AUTHORITY TO TRANSFER.** — Where a company delivers a ticket to a person, with power in the latter to sell and transfer the same, but its validity has on its face been expressly limited to the first purchaser, the effect of the transaction is to constitute such person a special agent to dispose of the ticket on the terms named. And no authority being given such agent to vary the terms, it results that after a sale by the agent and the insertion of the purchaser's name, it becomes valueless in the hands of any other person.<sup>2</sup>

*h.* **FORFEITURE OF TICKET.** — A stipulation between the carrier and purchaser, giving the former the right to forfeit the latter's ticket if presented by another person, is valid and binding.<sup>3</sup>

Where the Contract Recites that if the ticket "be found in the hands of any other person than the lawful holder" it shall be forfeited, following the general principle of strict construction of forfeiture clauses, there is no forfeiture if the ticket is so found provided the owner is without fault.<sup>4</sup> But in another case, under a similar provision, it was held that the ticket would be liable to forfeiture, even in the hands of the original purchaser, if he had, either intentionally or through negligence, permitted it to be used by another person.<sup>5</sup>

**Right to Take Up Ticket.** — Where a ticket, by its terms nontransferable, is presented by one other than the original purchaser, the conductor may, agreeably to one of the provisions of the ticket, take up the ticket and demand full fare, and the holder is not entitled to demand the return of the dishonored ticket as a condition precedent to payment of fare.<sup>6</sup> But where the condition is that if the purchaser fails to comply with the terms of the ticket the company may "refuse to accept" it, this does not give the conductor the right to take it up when found in the hands of a third party, but merely to refuse to honor it.<sup>7</sup>

*i.* **INTERFERENCE WITH CONTRACT — ACTIONABLE WRONG.** — Where a subsequent purchaser of a ticket from a broker, who purchased from the original holder, the ticket being sold by the company to the latter at a reduced rate and on condition that it should not be transferred, uses it, he becomes liable to the company in an action at law for any damage sustained, and the interference of the broker in inducing the party to violate his contract is likewise actionable.<sup>8</sup>

*j.* **INJUNCTION.** — In a very recent case it was held that persons may be enjoined from buying and selling tickets issued at reduced rates to persons who contract and bind themselves not to transfer them, the nontransferability

pay her fare put her off at the next station, using no unnecessary force, it was held that the appellee could not recover damages from the railroad company for such expulsion. *Chicago, etc., R. Co. v. Bannerman*, 15 Ill. App. 100.

1. *Chicago, etc., R. Co. v. Pendergast*, 75 Ill. App. 133.

2. *Davis v. South Carolina, etc., R. Co.*, 107 Ga. 420.

3. **Provision for Forfeiture.** — *Eastman v. Maine Cent. R. Co.*, 70 N. H. 240; *Levinson v. Texas, etc., R. Co.*, (Tex. Civ. App. 1898) 43 S. W. Rep. 1032.

4. *Mueller v. Chicago, etc., R. Co.*, 75 Minn. 109. In this case the questions of the ownership of the ticket, and whether, if a certain

person was the owner, he had authorized a third person to permit others to use the ticket, were left to the jury.

5. *Freidenrich v. Baltimore, etc., R. Co.*, 53 Md. 201.

6. *Rahilly v. St. Paul, etc., R. Co.*, 66 Minn. 153. It was here held further that the plaintiff having no right to ride on the ticket it was his duty to pay his fare or leave the train, and then pursue his remedy against the company for wrongfully withholding his ticket.

7. *Post v. Chicago, etc., R. Co.*, 14 Neb. 110, 45 Am. Rep. 100, 9 Am. & Eng. R. Cas. 345.

8. **Actionable Interference** — *Delaware, etc., R. Co. v. Frank*, 110 Fed. Rep. 689. And see *Nashville, etc., R. Co. v. McConnell*, 82 Fed.

being clearly apparent on the face of the tickets.<sup>1</sup>

*k.* **TICKET INTENDED FOR SEVERAL PERSONS.** — **A Family Commutation Ticket**, which on its face purports to be for the exclusive use of a man and family, authorizes a son, who is residing with the father as a member of his family, to travel thereon, notwithstanding he may have attained his majority. If, however, at the time of purchase, the purchaser was informed that a son over twenty-one years of age would not, under the regulations of the company, be allowed to ride on it, such regulations would constitute a part of the contract of purchase, and would be obligatory upon the holder of the ticket and any person attempting to travel on it.<sup>2</sup>

Where a Commutation Ticket Was Issued to a Newspaper for certain reporters, and not transferable, and a reporter on the same paper, not of those named, was permitted to ride on it, the question whether he was a passenger or a trespasser was left to the jury.<sup>3</sup>

**VII. PAYMENT OF FARE** — **1. Right to Require Compensation.** — Authority conferred upon a corporation to carry persons implies authority to charge a reasonable sum for the service rendered.<sup>4</sup>

**2. Time, Place, and Manner of Payment.** — **A Carrier May Make and Enforce Reasonable Regulations** not only as to the amount of fare, but also as to the time, place, and mode of payment.<sup>5</sup>

**Depositing Fare upon Entering Car.** — Thus, a rule of a street railway company requiring passengers to deposit their fare upon entering the car is a reasonable one. And although a passenger does not expressly refuse to comply therewith, yet if his language or conduct amount to a refusal he may be removed.<sup>6</sup>

**Depositing Fare Within One Block.** — Or the company may require passengers to deposit their fares in the box within one block.<sup>7</sup>

**Correction of Mistake.** — And where the plaintiff by mistake deposited in the box an amount greater than the fare, he was held entitled to restitution of the excess, and as the driver was not authorized to return it and in that manner correct the mistake, it was an entirely reasonable course to adopt for the plaintiff to receive the fare of another passenger, and in that way reimburse himself.<sup>8</sup> Under such a rule an employee authorized to make change may not retain a nickel, by mistake, belonging to a passenger, and then compel him to put another fare in the box.<sup>9</sup> A regulation of a horse car company requiring a passenger who may be deprived of his money by inadvertently depositing in the box more than the amount of the fare, to go to the office for his reimbursement and the correction of the mistake, is unreasonable.<sup>10</sup>

**Private Directions to Employees.** — On the other hand, where a passenger, in accordance with the posted rules of the company, drops his fare into the box, he may not be removed for nonpayment because of private directions to the

Rep. 65. See also the title **INTERFERENCE WITH CONTRACT RELATIONS**, vol. 16, p. 1109.

1. Louisville, etc., R. Co. v. Bitterman, 128 Fed. Rep. 176.

2. Chicago, etc., R. Co. v. Chisholm, 79 Ill. 584. And see *infra*, this title, *Passes—Pass Issued to Firm*.

3. Great Northern R. Co. v. Harrison, 10 Exch. 376.

4. **Right to Reward Implied.** — Railroad Commission Cases, 116 U. S. 307. But in an early New York case it was said that the power of a railroad company to demand fare of a passenger is not an implied or incidental power, but one derived solely from statute. Johnson v. Hudson River R. Co., 2 Sweeny (N. Y.) 298.

5. Reese v. Pennsylvania R. Co., 131 Pa. St. 422, 17 Am. St. Rep. 818.

**May Demand Prepayment of Fare.** — See Hurt v. Southern R. Co., 40 Miss. 391.

6. Nye v. Marysville, etc., St. R. Co., 97 Cal. 461.

7. Curtis v. Louisville City R. Co., 94 Ky. 573.

8. Corbett v. Twenty-third St. R. Co., 42 Hun (N. Y.) 587.

9. Curtis v. Louisville City R. Co., 94 Ky. 573. The court considered the retention of the five cents a payment of the fare, which the employee could have put in the box had he so desired.

10. Corbett v. Twenty-third St. R. Co., 42 Hun (N. Y.) 587.

servants of the company to go through the cars when crowded and collect the fares, of which he had no knowledge.<sup>1</sup>

**Round Trip on Steamboat.** — Where it does not appear by the custom of the boat or otherwise that prepayment of fare is necessary to bind the boat to carry passengers for the round trip, it is immaterial at what time the fare was paid, provided it was paid when demanded by the officer, and it is likewise immaterial whether part was paid on the up trip and part on the down trip, or all at one time.<sup>2</sup>

**3. Medium of Payment** — *a. COIN OR LEGAL TENDER NOTES.* — Where a person has been received as a passenger and transported several miles upon his journey, the company must be held to have consented to receive in payment of fare any good and lawful money which he might tender when called upon for payment, and is not entitled to insist upon a particular kind of money, as, for instance, coin, instead of legal tender notes.<sup>3</sup> And it must accept legal tender notes at their face value, in payment of fare when demanded in advance of transportation, and if it exacts payment in gold or silver coin, or the market value thereof in such notes, it is liable to the statutory penalty for charging a rate greater than allowed by law.<sup>4</sup>

*b. COIN WORN SMOOTH BUT NOT MUTILATED.* — A silver coin, worn smooth by constant and long-continued handling while being circulated as a part of the national currency, but distinguishable and not appreciably diminished in weight, is a good tender for car fare.<sup>5</sup>

*c. AMOUNT IN EXCESS OF FARE — MAKING CHANGE.* — A passenger on a street car is not bound to tender the exact fare, but must tender a reasonable sum, and the carrier must accept such tender and furnish change to a reasonable amount.<sup>6</sup> The reasonableness of a tender in excess of the fare is a question of law to be determined by the court.<sup>7</sup> In a *California* case<sup>8</sup> the tender of five dollars for a fare of five cents was held not unreasonable, but the contrary has been held in both *New York*<sup>9</sup> and *Pennsylvania*.<sup>10</sup>

*d. INSUFFICIENT AMOUNT.* — Where a passenger tenders an insufficient amount, stating that he will not pay more, and the conductor takes out the fare to an intermediate station and returns the balance, the passenger is entitled upon reaching such station to pay the fare demanded from that point to his destination, and to continue his journey.<sup>11</sup>

**4. By and to Whom Tender Made.** — It has been held that if an actual tender of fare is made before the train is stopped, the conductor cannot refuse it, no matter by whom the tender is made.<sup>12</sup> Where a stranger offers to pay the

1. *Perry v. Pittsburgh Union Pass. R. Co.*, 153 Pa. St. 336.

2. *Russ v. Steamboat War Eagle*, 14 Ohio 365.

3. *Tarbell v. Central Pac. R. Co.*, 34 Cal. 616.

4. *Lewis v. New York Cent. R. Co.*, 49 Barb. (N. Y.) 330.

**Increase of Fare When Paid in Paper Currency.** — In *Moneypenny v. Sixth Ave. R. Co.*, (N. Y. Super. Ct. Spec. T.) 35 How. Pr. (N. Y.) 452, it was held that where at the time the charter was granted the company had the right to demand a fare of five cents in specie, it was warranted, upon the issue of paper currency by the general government which enhanced the value of the original fare, in advancing the fare one cent, and a law of Congress allowing the company to do so was constitutional.

5. *Jersey City, etc., R. Co. v. Morgan*, 52 N. J. L. 60.

6. See the cases *infra*, this subdivision.

7. *Muldowney v. Pittsburg, etc., Traction Co.*, 8 Pa. Super. Ct. 335.

8. *Barrett v. Market St. R. Co.*, 81 Cal. 296, 15 Am. St. Rep. 61.

**California Case Explained.** — In the *New York* case cited in the next note Judge Bartlett said: "It is quite possible that there existed local reasons for the decision in California, as the judge writing the opinion suggested that the five-dollar gold piece [offered as fare] was practically the lowest gold coin in use in that section of the country."

9. *Barker v. Central Park, etc., R. Co.*, 151 N. Y. 238, 56 Am. St. Rep. 626, holding that a rule of a street car company requiring conductors to furnish change to a passenger to the amount of two dollars is reasonable, and in a large city about all that could be expected.

10. *Muldowney v. Pittsburg, etc., Traction Co.*, 8 Pa. Super. Ct. 335.

11. *Chicago, etc., R. Co. v. Bryan*, 90 Ill. 126.

12. *Ham v. Delaware, etc., R. Co.*, 142 Pa.



passenger's fare, the offer being addressed to the passenger and not to the conductor, the latter is not bound to accept it in the face of the former's unqualified dissent.<sup>1</sup> An offer to pay an employee, who informs the passenger not only that he is unauthorized to receive it but that he is prohibited from doing so, is not an offer to the company.<sup>2</sup>

**5. Refusal to Pay**—*a. OPPORTUNITY TO BE ALLOWED PASSENGER.*—A passenger is entitled to a reasonable time in which to produce a ticket or to pay cash fare.<sup>3</sup> And it has been held that he should be permitted to go to another part of the train to obtain funds from a friend who is willing to supply them.<sup>4</sup> Where the passenger gives the conductor to understand that he would resist expulsion, the conductor is justified in using force in putting him off, especially after again telling him, and for the third time, that he must pay his fare or get off.<sup>5</sup>

*b. RETRACTION OF REFUSAL.*—The Cases Are Not in Accord as to the circumstances in which a passenger's withdrawal of his refusal to comply with the conductor's demand for fare, and a subsequent offer to pay, will reimpose upon the carrier the duty to accept the offer and permit him to continue his journey.<sup>6</sup>

The Various Rules that have been declared are here set forth. If the passenger changes his mind and tenders the fare before anything is done towards stopping the train in order to eject him, his refusal will be retracted in time and his right to remain and be carried will stand unaffected.<sup>7</sup> But it is too late, it has been held, after repeated refusals, and the conductor's signal to the engineer to stop for the purpose of expelling him;<sup>8</sup> or after force has been required and applied, and during the process of expulsion.<sup>9</sup> In some cases a different rule is applied, according to whether the train was stopped at a regular station or between stations, while in others no such distinction is made, and, indeed, sometimes it does not appear from the reported cases which was the fact. Thus, it has been decided that no tender whatsoever will avail after steps have been rightfully taken to stop the train between stations in consequence of the passenger's refusal to pay.<sup>10</sup> But where the train stops at a regular stopping place, and before the passenger is ejected, he, or some one in his behalf, offers to pay the fare demanded, the conductor should accept it, and if the conductor refuses and expels the passenger the company is liable.<sup>11</sup> It is otherwise, however, after expulsion, it being held that if the passenger attempts to re-enter the train the conductor may exclude him.<sup>12</sup>

St. 617. And see *infra*, this section, *Refusal to Pay—Retraction of Refusal*.

1. *Muldowney v. Pittsburg, etc., Traction Co.*, 8 Pa. Super. Ct. 335. Here, whether the conductor should accept it without affirmative evidence, express or implied, of the passenger's assent, *quære*.

2. *Cleveland, etc., R. Co. v. Bartram*, 11 Ohio St. 457.

3. **Reasonable Opportunity to Pay.**—*Guy v. Pittsburgh, etc., R. Co.*, 9 Ohio Dec. 23, 6 Ohio N. P. 3. See also *Baltimore, etc., R. Co. v. Norris*, 17 Ind. App. 189, 60 Am. St. Rep. 166, where the ejection was held to be unwarranted. And see the title CARRIERS OF PASSENGERS, vol. 5, p. 596.

4. *Guy v. Pittsburgh, etc., R. Co.*, 9 Ohio Dec. 23, 6 Ohio N. P. 3.

5. *McGarry v. Holyoke St. R. Co.*, 182 Mass. 123.

6. See the title CARRIERS OF PASSENGERS, vol. 5, p. 598 *et seq.* And see *supra*, this section, *By and to Whom Tender Made*.

7. *Georgia Southern, etc., R. Co. v. Asmore*, 88 Ga. 529; *Gould v. Chicago, etc., R. Co.*, 18 Fed. Rep. 155.

8. *Guy v. Pittsburgh, etc., R. Co.*, 9 Ohio Dec. 23, 6 Ohio N. P. 3.

9. *Pease v. Delaware, etc., R. Co.*, 101 N. Y. 367, 54 Am. Rep. 699.

In a *Texas* case it was held that where the conductor has begun to remove an intruder for refusal to pay his fare, an offer to pay may be accepted or not, at the discretion of the conductor. *Galveston, etc., R. Co. v. Turner*, (Tex. Civ. App. 1893) 23 S. W. Rep. 83.

10. *Harrison v. Fink*, 42 Fed. Rep. 787; *Atchison, etc., R. Co. v. Dwelle*, 44 Kan. 394; *People v. Jillson*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 234; *Georgia Southern, etc., R. Co. v. Asmore*, 88 Ga. 529, *overruling* *South Carolina R. Co. v. Nix*, 68 Ga. 572, "in so far as it lays down in universal and unqualified terms the proposition or its equivalent that a passenger by making a tender at any time before his expulsion may acquire the right to remain on board and be carried."

11. *O'Brien v. New York Cent., etc., R. Co.*, 80 N. Y. 236; *Guy v. New York, etc., R. Co.*, 30 Hun (N. Y.) 399.

12. *State v. Campbell*, 32 N. J. L. 309.

*c. GROUNDS AND INSTANCES OF REFUSAL—(1) Demand of Illegal Fare.*—Where the carrier is attempting to exact illegal fare, and the passenger is willing to pay the legal fare but no more, and is put off the train, he may recover damages; he is under no duty to pay the full amount claimed and sue for the recovery of the overcharge.<sup>1</sup> In *Georgia*, by statute, a carrier is bound, under like conditions, to accept all as passengers upon the same terms, and it cannot lawfully expel one from the train because he refused to pay more fare than, under similar circumstances, it was in the habit of charging others.<sup>2</sup> A passenger's cause of action for the company's exaction of an excessive and unlawful fare is not affected by the circumstance that he assigned an erroneous reason for his objection to paying it.<sup>3</sup>

(2) *Claim of Prior Payment.*—Where a passenger's refusal to pay fare was placed upon the ground that he had already paid it, and the conductor reflected upon his integrity and declined to investigate his claim, it was not, it has been held, incumbent upon the passenger, in order to avoid ejection, to deliver up another ticket which he happened to have.<sup>4</sup> And if, owing to his inability to procure a ticket before starting, a passenger pays cash fare to the conductor, who fails to give him a receipt, he may not be ejected by the conductor of another train to which it was necessary for him to transfer, for refusing to pay a second time, when the second conductor has actual knowledge of the payment to the first conductor.<sup>5</sup>

(3) *Fare of Child.*—Where a passenger refuses to pay the fare of a child, for which he is responsible, both may be expelled from the train.<sup>6</sup>

(4) *Where Train Does Not Stop at Station.*—Where the train does not, under the rules of the company, stop at the station for which the passenger is bound, he may be required to pay fare to the first station beyond where the train does stop, and upon his refusal to do so may be put off the train short of his destination.<sup>7</sup>

(5) *Where Passenger Carried by Station.*—If the passenger's own neglect led to his being carried beyond his destination, he is not entitled to free passage to the next station, and may be put off in default of payment.<sup>8</sup>

*d. DEMAND BY CONDUCTOR DISPENSED WITH.*—In *Maryland* it has been held that where the passenger has forfeited his right to remain on the car by attempting to use a previously detached coupon and refusing to show the conductor his book, the duty is upon him, if he would avoid expulsion, to tender fare to the conductor, in the absence of any rule requiring a demand by the conductor.<sup>9</sup>

**6. Inability to Pay.**—In a *Tennessee* case it was held that where there is no captious objection or refusal on the part of the passenger, but "only an inability to meet the demand for the fare, arising out of innocent mistake or ignorance," if, before expulsion, another person offers the proper amount in

1. *Chamberlain v. Lake Shore, etc., R. Co.*, 110 Mich. 614.

2. *Phillips v. Southern R. Co.*, 114 Ga. 284.

3. *Galveston, etc., R. Co. v. Patterson*, (Tex. Civ. App. 1898) 46 S. W. Rep. 848.

4. *Sprenger v. Tacoma Traction Co.*, 15 Wash. 660.

5. *Homiston v. Long Island R. Co.*, (N. Y. Super. Ct. Gen. T.) 3 Misc. (N. Y.) 342.

6. *Lake Shore, etc., R. Co. v. Orndorff*, 55 Ohio St. 589, 60 Am. St. Rep. 716. See also the title CARRIERS OF PASSENGERS, vol. 5, p. 595.

7. *Noble v. Atchison, etc., R. Co.*, 4 Okla. 534.

8. *Place of Ejection.*—See the title CARRIERS OF PASSENGERS, vol. 5, p. 607. And see *Baltimore, etc., R. Co. v. Norris*, 17 Ind. App. 189, 60 Am. St. Rep. 166.

9. *Texas Pac. R. Co. v. James*, 82 Tex. 306.

9. *United R., etc., Co. v. Hardesty*, 94 Md. 661. See *infra*, this title, *Exhibition and Surrender of Tickets—Detachment of Coupons.*

**Mere Willingness to Pay.**—In *Texas Pac. R. Co. v. James*, 82 Tex. 306, it was held that while a formal tender is not necessary, nor even perhaps a specific offer to pay, yet a mere willingness to pay, unaccompanied by word or act calculated to suggest to the conductor the passenger's desire to do so, is not sufficient to place the conductor in the wrong in ejecting him. Here there was no evidence that the passenger, who had been carried by his station, offered to pay fare to the next stopping place; and it nowhere appears in the report of the case that the conductor demanded fare to the next station. See also *Nye v. Marysville, etc., St. R. Co.*, 97 Cal. 461.

his behalf, the conductor must receive it and convey the passenger.<sup>1</sup>

**7. Back Fare.** — If a passenger has failed to pay for the carriage already received on the train, he cannot insist upon being allowed to continue his trip without payment of back fare.<sup>2</sup>

**8. Holder of Ticket Voluntarily Paying Cash.** — The holder of a ticket has no cause of action against the company for failing to carry him on his ticket, when he did not demand to be so carried, but from some cause voluntarily paid cash fare to the conductor.<sup>3</sup>

**9. Public Messenger — California Statute.** — A county treasurer with state funds to be paid into the treasury of the state is not a "public messenger" within the meaning of a statute requiring the company to transport such messengers free of charge.<sup>4</sup>

**10. Passenger on Wrong Train.** — In a *Massachusetts* case it was held that the doctrine that a passenger who by mistake takes a wrong train is not obliged to pay for his ride to the first station at which he has opportunity to alight, cannot be invoked by the holder of a season ticket who boards a train supposing that a coupon from such ticket will be received as fare.<sup>5</sup>

**VIII. DISCRIMINATION BETWEEN CAR AND TICKET RATES — 1. Extra Fare When Paid on Train.** — A railroad company may establish a rate of fare for passengers failing to provide themselves with tickets before entering the train, higher than the ticket rate, the extra charge being regarded as a compensation to the company for the inconvenience to which it is subjected by being compelled to receive the fare by the hands of the conductor.<sup>6</sup> And with stronger reason, a regulation according to which the excess is to be refunded on the presentation by the passenger of a check at the ticket office is unobjectionable.<sup>7</sup> Nor is the regulation unreasonable because it provides that as to passengers getting on the train at stations where there is no ticket office, or on trains where, on account of the excessive rush of business, it is impossible to issue the refunding check, the collection of the excess shall be omitted.<sup>8</sup> Or the company may make a deduction from the regular or advertised fare in case of those buying tickets at the station.<sup>9</sup>

**2. Statutory Authorization.** — In some states such extra charge is expressly authorized by statute.<sup>10</sup>

1. Louisville, etc., R. Co. v. Garrett, 8 Lea (Tenn.) 438, 41 Am. Rep. 640.

2. Back Fare. — Coyle v. Southern R. Co., 112 Ga. 121. See also to like effect Illinois Cent. R. Co. v. Billington, (Ky. 1895) 30 S. W. Rep. 885; Chicago, etc., R. Co. v. Adams, 60 Ill. App. 571. And see the title CARRIERS OF PASSENGERS, vol. 5, p. 598.

A person hailed a street car and asked the conductor if it was a Mountain Park car, and upon being told it was such car, got on and rode to the terminus. The car was not going to the park but was returning therefrom. It was held that the plaintiff could not remain on the car for the return trip without paying a second fare. McGarry v. Holyoke St. R. Co., 182 Mass. 123.

3. Bethea v. Northeastern R. Co., 26 S. Car. 91.

4. Pfister v. Central Pac. R. Co., 70 Cal. 169, 59 Am. Rep. 404.

5. New York, etc., R. Co. v. Feely, 163 Mass. 205.

6. Fare Paid on Train. — See the title CARRIERS OF PASSENGERS, vol. 5, p. 595. And see the following cases:

Georgia. — Coyle v. Southern R. Co., 112 Ga. 121.

Illinois. — Chicago, etc., R. Co. v. Parks, 18 Ill. 469, 68 Am. Dec. 562.

Indiana. — Indianapolis, etc., R. Co. v. Kennedy, 77 Ind. 507; Sage v. Evansville, etc., R. Co., 134 Ind. 100.

Kentucky. — Wilsey v. Louisville, etc., R. Co., 83 Ky. 511.

New York. — Nellis v. New York Cent. R. Co., 30 N. Y. 505.

Oregon. — Poole v. Northern Pac. R. Co., 16 Oregon 261, 8 Am. St. Rep. 289.

Tennessee. — Lane v. East Tennessee, etc., R. Co., 5 Lea (Tenn.) 124, 2 Am. & Eng. R. Cas. 278.

Passenger's Belief and Good Faith as to Amount Offered Conductor Being Correct, Immaterial — Breach of Contract. — Sage v. Evansville, etc., R. Co., 134 Ind. 100.

Duty of Passenger to Inform Himself about Rule as to Extra Fare When Paid on Train. — Sage v. Evansville, etc., R. Co., 134 Ind. 100.

7. Reese v. Pennsylvania R. Co., 131 Pa. St. 422, 17 Am. St. Rep. 818; McGowen v. Morgan's Louisiana, etc., R., etc., Co., 41 La. Ann. 732, 17 Am. St. Rep. 415.

8. Reese v. Pennsylvania R. Co., 131 Pa. St. 422, 17 Am. St. Rep. 818.

9. Swan v. Manchester, etc., R. Co., 132 Mass. 116, 42 Am. Rep. 432, 6 Am. & Eng. R. Cas. 327; State v. Goold, 53 Me. 279.

10. Statutes. — Atchison, etc., R. Co. v. Dwelle, 44 Kan. 394; Atchison, etc., R. Co. v. Hogue,



**3. Payment of Fare at Each Station.** — It is held that if a passenger pays only from one station to another, without a ticket, he may be compelled to pay an extra charge at each station, as a new contract between him and the company is thus made at each station.<sup>1</sup>

**4. Limitation on Amount of Extra Charge.** — But the car rate can in no case exceed the maximum allowed the company by law,<sup>2</sup> and in the absence of such limitation the rate must be reasonable.<sup>3</sup> Where under certain circumstances persons without tickets were required to pay a small sum in addition to the ticket rate, the excess to be refunded under reasonable conditions, the fact that the two sums might exceed the maximum rate authorized by the charter does not constitute an illegal charge, as such additional sum is in no sense a charge for transportation.<sup>4</sup>

**5. Opportunity to Obtain Ticket** — *a.* **RULE AS TO CARRIER'S DUTY STATED.** — To justify this discrimination, every reasonable and proper facility and accommodation must be afforded the passenger to procure a ticket. The duty of the company in this respect may be stated thus: it must furnish a convenient and accessible place for the sale of tickets, with a competent person in attendance ready to sell them, which place should be open and accessible to all passengers for a reasonable time before the departure of each train, so that the passenger's failure to obtain a ticket shall really be a case of neglect on his part and not the fault of the company.<sup>5</sup>

*b.* **WHAT IS REASONABLE TIME FOR KEEPING OFFICE OPEN.** — Reasonable time for keeping open the office for the sale of tickets is held to mean up

50 Kan. 40; Union Pac. R. Co. *v.* Wolf, 54 Kan. 592; Moore *v.* Columbia, etc., R. Co., 38 S. Car. 1. And see the cases throughout this section.

**1. Paying from Station to Station.** — Chicago, etc., R. Co. *v.* Parks, 18 Ill. 464, 68 Am. Dec. 562.

But where a passenger buys a ticket from A to B, and on arriving at the latter station decides to go to C, the next station beyond, and there is no ticket office at B, he may not be compelled to pay an additional charge; it is sufficient that he tender the amount of the regular fare. In such a case, the fact that he is without a ticket is not due to any fault of his own, but the company has not afforded him an opportunity to purchase one. Phettipiece *v.* Northern Pac. R. Co., 84 Wis. 412.

**2. May Not Exceed Legal Rate.** — Atchison, etc., R. Co. *v.* Dickerson, 4 Kan. App. 345; Zagelmeyer *v.* Cincinnati, etc., R. Co., 102 Mich. 214, 47 Am. St. Rep. 514; Lane *v.* East Tennessee, etc., R. Co., 5 Lea (Tenn.) 124, 2 Am. & Eng. R. Cas. 278; Louisville, etc., R. Co. *v.* Guinan, 11 Lea (Tenn.) 98, 47 Am. Rep. 279, 13 Am. & Eng. R. Cas. 37; Cincinnati, etc., R. Co. *v.* Skillman, 39 Ohio St. 444, 13 Am. & Eng. R. Cas. 31.

If a railroad company fixes two rates of passenger fare, namely, a ticket rate and a car rate, the former within and the latter beyond the limits of its authority, and the conductor of a train, under the direction of the company, refuses to accept from the passenger less than the illegal and unauthorized rate, it is not necessary, to entitle the passenger to remain on the train, to tender more than the ticket rate, although the company might have fixed such ticket rate at a higher sum. Smith *v.* Pittsburg, etc., R. Co., 23 Ohio St. 10.

**3.** White *v.* Chesapeake, etc., R. Co., 26 W. Va. 800.

**4.** Reese *v.* Pennsylvania R. Co., 131 Pa. St. 422, 17 Am. St. Rep. 818. But see Baltimore, etc., Turnpike Road *v.* Boone, 45 Md. 344.

**5. Opportunity to Obtain Ticket** — *Georgia.* — Georgia Southern, etc., R. Co. *v.* Asmore, 88 Ga. 529; Coyle *v.* Southern R. Co., 112 Ga. 121; Phillips *v.* Southern R. Co., 114 Ga. 284. *Illinois.* — Illinois Cent. R. Co. *v.* Sutton, 42 Ill. 438, 92 Am. Dec. 81; Illinois Cent. R. Co. *v.* Johnson, 67 Ill. 312.

*Indiana.* — Sage *v.* Evansville, etc., R. Co., 134 Ind. 100.

*Kentucky.* — Wilsey *v.* Louisville, etc., R. Co., 83 Ky. 511, 26 Am. & Eng. R. Cas. 258.

*Oregon.* — Poole *v.* Northern Pac. R. Co., 16 Oregon 261, 8 Am. St. Rep. 289.

See the title CARRIERS OF PASSENGERS, vol. 5, p. 474.

**Rule Stated.** — In Central R., etc., Co. *v.* Strickland, 90 Ga. 562, it was held that the company need not keep a ticket office open each and every minute up to the time it may lawfully close the same, provided a reasonable opportunity to purchase tickets is given to all persons desiring to do so; nor, on the other hand, is a passenger bound to wait at the office an unreasonable time for the appearance of the ticket agent, or to call again and again at the office to obtain a ticket, provided in the exercise of good faith and due diligence he endeavors to do so before the time for closing the office; and in each case it is a question for the jury whether the parties have respectively performed the corresponding duties devolving upon them.

**A Contrary View — Comments Thereon.** — In Crocker *v.* New London, etc., R. Co., 24 Conn. 249, it was held that a regulation making a discrimination in fares was a mere proposal, and could be withdrawn by the company at any time before being actually accepted by the passenger, and that the closing of the ticket

to the time fixed by the published rules of the company for the departure of the train and not up to the time of actual departure.<sup>1</sup>

c. **STATUTORY PROVISIONS.** — But under a statutory provision that the ticket office shall be kept open “at least one hour prior to the departure” of each passenger train, it has been held that the actual departure of the train is meant.<sup>2</sup> And it has been held that if the company failed to observe the statute, it could not demand a higher rate, even though the passenger did not apply at the office for a ticket within the time specified; the court regarding the provision of the statute as an absolute rule, the operation of which was in no wise dependent upon the attempt or intent of the purchaser to buy a ticket.<sup>3</sup> So the language “immediately prior to the starting of the train,” in a statute, means the actual departure and not the advertised time of departure.<sup>4</sup> If there is no one in attendance to sell tickets, the office is not “open” within the meaning of the statute.<sup>5</sup>

office for the night, before the passenger applies for a ticket, is a withdrawal of the offer to discriminate in favor of those purchasing tickets. But upon this point the court were divided in opinion. This view was sanctioned in a case before the Supreme Court of *New York*. *Bordeaux v. Erie R. Co.*, 8 Hun (N. Y.) 579. But to the contrary is the language of the Court of Appeals, in an earlier case, where the train left at an hour in the night at which the company was not required to keep its ticket office open. *Nellis v. New York Cent. R. Co.*, 30 N. Y. 505. And the *Connecticut* case has also been considered by other tribunals, but failed to receive their approval. *DuLaurans v. St. Paul, etc., R. Co.*, 15 Minn. 49, 2 Am. Rep. 102; *St. Louis, etc., R. Co. v. Dalby*, 19 Ill. 353; *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1, 92 Am. Dec. 276; *Swan v. Manchester, etc., R. Co.*, 132 Mass. 116, 42 Am. Rep. 432, 6 Am. & Eng. R. Cas. 327.

**Negligence.** — In *Gulf, etc., R. Co. v. Fox*, (Tex. 1887) 6 S. W. Rep. 569, 33 Am. & Eng. R. Cas. 543, it was held that the failure of the company to give a reasonable time after the opening of the office, for a passenger to purchase a ticket and board the train in safety, is negligence.

If a Railroad Company Advertises to Run an Excursion Train on a certain day, giving the rate of fare for the round trip, etc., and a person duly presents himself at the ticket office to purchase a ticket therefor, but is unable to do so through the fault of the company, he may take passage on such train and will be entitled to the special excursion rate of fare. *Chicago, etc., R. Co. v. Graham*, 3 Ind. App. 28, 50 Am. St. Rep. 256.

**Agent's Refusal to Sell Ticket under Belief that Train Would Not Stop at Station — Measure of Damages for Requiring Extra Charge.** — *Courts v. Louisville, etc., R. Co.*, 99 Ky. 574.

1. **Reasonable Time for Keeping Office Open.** — *Swan v. Manchester, etc., R. Co.*, 132 Mass. 116, 42 Am. Rep. 432, 6 Am. & Eng. R. Cas. 327; *Illinois Cent. R. Co. v. Bauer*, 66 Ill. App. 124.

In *Chicago, etc., R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562, and *St. Louis, etc., R. Co. v. Dalby*, 19 Ill. 353, it was held to be the duty of the company to keep the ticket office open “for a reasonable time before the departure of each train, and up to the time of its actual

departure.” But in *St. Louis, etc., R. Co. v. South*, 43 Ill. 176, 92 Am. Dec. 103, Mr. Justice Breese, in commenting upon these cases, said that in speaking of the time of the actual departure of a train, up to which the ticket office must be kept open, the court, unquestionably, meant to be understood as referring to the published fixed time, which everybody knew.

In *Everett v. Chicago, etc., R. Co.*, 69 Iowa 15, 58 Am. Rep. 207, 27 Am. & Eng. R. Cas. 98, it was held that the requirement of a reasonable time before the departure of the train does not mean that the office shall remain open up to the very instant the train moves off; and it was held that what is a reasonable time depends principally upon the requirements, convenience, and demands of the public at each particular station.

Nor does it mean that the office shall be kept open within such time, before the departure of a train, that a person cannot procure a ticket and get upon the train before it begins to move. Indeed, a railroad company should not sell tickets within that time. As a matter of public policy, no one except those operating a railroad train ought to be permitted to get upon it while in motion. *State v. Hungerford*, 39 Minn. 6, 34 Am. & Eng. R. Cas. 265.

**Reasonable Time Question for Jury.** — *DuLaurans v. St. Paul, etc., R. Co.*, 15 Minn. 49, 2 Am. Rep. 102; *Central R., etc., Co. v. Strickland*, 90 Ga. 562.

2. **Statutes.** — *Porter v. New York Cent. R. Co.*, 34 Barb. (N. Y.) 353; *Chase v. New York Cent. R. Co.*, 26 N. Y. 523; *Nellis v. New York Cent. R. Co.*, 30 N. Y. 505.

3. *Missouri Pac. R. Co. v. McClanahan*, 66 Tex. 530, 27 Am. & Eng. R. Cas. 82.

4. *Atchison, etc., R. Co. v. Dwelle*, 44 Kan. 394, 41 Am. & Eng. R. Cas. 402.

5. **Ticket Office Open, but No One in Attendance, Not Sufficient.** — *Atchison, etc., R. Co. v. Hogue*, 50 Kan. 40, following *Atchison, etc., R. Co. v. Dwelle*, 44 Kan. 394; *Porter v. New York Cent. R. Co.*, 34 Barb. (N. Y.) 353; *Fordyce v. Manuel*, 82 Tex. 527.

**Indictment of Agent for Failure to Keep Office Open.** — It is a good defense to an indictment of a ticket agent, under the new Code of *Tennessee*, section 2359, for failing to keep open his office for one hour before the departure of a particular passenger train, that the company,

*d. SUFFICIENCY OF EFFORT TO PROCURE TICKET.* — Where the passenger makes no effort to procure a ticket,<sup>1</sup> or where he merely goes to the window of the ticket office, and not finding the agent there, immediately enters the cars without making any effort to see if the agent was within the office, or to attract his notice,<sup>2</sup> he may be required to pay the train rate of fare. So also where he reaches the station too late to buy a ticket before taking the train.<sup>3</sup>

**6. Waiver of Right to Demand Extra Fare.** — Circumstances may arise under which the tender by the passenger of the ticket fare, as full fare to his place of destination, and the receipt and retention of the same by the conductor, will amount to a waiver by the latter (assuming that he has the right to waive) of the right to require the passenger still to pay the difference between the ticket rate and the car rate. Thus, if the conductor should receive and retain it without demanding more, till the train had passed the place at which he must exercise or abandon the right to eject the passenger for nonpayment, the latter would have the right to assume that the amount paid was satisfactory.<sup>4</sup> But if the sum is received through mistake, the conductor has a reasonable time in which to demand the proper fare, and a refusal to pay the same will justify the passenger's expulsion from the train.<sup>5</sup>

**7. Improper Retention of Passenger's Money.** — While the conductor may retain out of the money in his hands the proper fare for the distance traveled,<sup>6</sup> yet he must return the residue to the passenger before expelling him; he cannot retain a greater sum than the proper fare for the distance traveled and still eject the passenger.<sup>7</sup>

**IX. RULES AND STIPULATIONS — GENERAL PRINCIPLES — 1. Scope of Section.** — In other parts of this article, under appropriate designations, will be found a treatment of the particular company rules and ticket stipulations that have been passed upon by the courts. The cases disclose many principles of seemingly general application, and it has been deemed advisable to bring them together in one place. As indicated by the heading above, such is the scope and purpose of this section. In view of the serious lack of harmony in the cases concerning the validity and binding force of many of these regulations and conditions, the reader is cautioned not to content himself with an examination of this presentation of general principles, but to consult as well the subdivisions embracing the particular matter in hand.

**2. Rules — a. POWER TO ESTABLISH.** — Subject to the qualifications noted below, a carrier of passengers has full power to make and enforce all rules and regulations necessary for the conduct of its business. These regulations extend over a wide range of details. Such as have been passed upon by the courts will be found discussed throughout the article in their appropriate places, as indicated by the several division headings.

*b. VALIDITY — (1) Must Be Reasonable and Legal.* — A regulation which is

with notice to the public, had, by its rules, dispensed with the sale and purchase of tickets for that train, and required passengers to pay the regular ticket fare on that train. *Brady v. State*, 15 Lea (Tenn.) 628.

1. *Union Pac. R. Co. v. Wolf*, 54 Kan. 592.

2. *Indianapolis, etc., R. Co. v. Kennedy*, 77 Ind. 507, 3 Am. & Eng. R. Cas. 467.

3. *Lake Erie, etc., R. Co. v. Mays*, 4 Ind. App. 413.

4. **Waiver.** — *Wardwell v. Chicago, etc., R. Co.*, 46 Minn. 514, 24 Am. St. Rep. 246, 47 Am. & Eng. R. Cas. 482.

5. *Wardwell v. Chicago, etc., R. Co.*, 46 Minn. 514, 24 Am. St. Rep. 246, 47 Am. & Eng. R. Cas. 482, *qualifying DuLaurans v. St.*

*Paul, etc., R. Co.*, 15 Minn. 49, 2 Am. Rep. 102; *Lake Erie, etc., R. Co. v. Mays*, 4 Ind. App. 413.

**Fact that Company Had in Other Cases Required Only Regular Fare Immaterial.** — *Sage v. Evansville, etc., R. Co.*, 134 Ind. 100.

6. *Wardwell v. Chicago, etc., R. Co.*, 46 Minn. 514, 24 Am. St. Rep. 246, 47 Am. & Eng. R. Cas. 482, *overruling DuLaurens v. St. Paul, etc., R. Co.*, 15 Minn. 49, 2 Am. Rep. 102.

7. *Wardwell v. Chicago, etc., R. Co.*, 46 Minn. 514, 24 Am. St. Rep. 246, 47 Am. & Eng. R. Cas. 482; *Bland v. Southern Pac. R. Co.*, 55 Cal. 570, 36 Am. Rep. 50, 3 Am. & Eng. R. Cas. 285.



unreasonable<sup>1</sup> or violative of a statute<sup>2</sup> is of no effect and may be disregarded by the passenger. A company is under no general obligation to carry any one for less than the regular rates, and if it does so for special accommodation, any reasonable condition imposed upon passengers should be performed, and in default of performance they may be required to pay the regular fare.<sup>3</sup>

(2) *Reasonableness Question of Law.* — The prevailing opinion is that the reasonableness of regulations prescribed by a carrier of passengers for the safety, comfort, and conduct of its passengers and for the proper management of its trains is a question for the courts to decide. The necessity for holding this to be a question of law and not of fact is apparent from the consideration that not otherwise could there be a uniformity in construction.<sup>4</sup>

(3) *Test of Reasonableness.* — All regulations will be deemed reasonable which are suitable to enable the company to perform the duties it undertakes and to secure its own just rights in such employment, and also such as are necessary and proper to insure the safety and promote the comfort of passengers.<sup>5</sup>

(4) *Personal Knowledge.* — It is not necessary that the carrier should bring home to each passenger a personal knowledge of any reasonable and just rule which it is seeking to enforce; so to hold would render the enforcement of the rule impracticable.<sup>6</sup>

**3. Stipulations** — *a. RULES AND STIPULATIONS DISTINGUISHED.* — Some of the regulations adopted by the carrier are generally printed upon the ticket, and may then be said to constitute a part of the contract rather than a rule governing the rights of the parties.<sup>7</sup>

*b. LANGUAGE DOUBTFUL OR AMBIGUOUS.* — If the language of the ticket is ambiguous or admits of doubt as to its meaning, it must be given the construction of which it is capable most favorable to the passenger.<sup>8</sup>

*c. KNOWLEDGE OR ASSENT OF PASSENGER* — (1) *Conflict of Authorities.* — As in regard to other matters embraced by this title, here likewise, the authorities are hopelessly at variance. The different rules that have been

**1. Rule Must Be Reasonable.** — Central R., etc., Co. v. Strickland, 90 Ga. 562.

In *Mississippi* it has been held that a regulation of a company making as between passenger and conductor a ticket the only evidence of the passenger's right to transportation, and authorizing the conductor to disregard a reasonable and probable showing by the passenger as to how the mistake occurred by which the ticket read in a wrong direction, is unreasonable and need not be submitted to by the passenger. Kansas City, etc., R. Co. v. Reiley, 68 Miss. 765, 24 Am. St. Rep. 309. But see *supra*, this title, *Nature and Effect of Ticket — As Evidence to Conductor*; and *infra*, *Exhibition and Surrender of Tickets*.

**Regulation that Passenger Shall Get Receiver's Indorsement of His Ticket, When Genuineness Questioned by Gateman, Unreasonable.** — Northern Cent. R. Co. v. O'Conner, 76 Md. 207, 35 Am. St. Rep. 422.

**Proper to Maintain Gates and Gatekeepers — Should Instruct Such Employees as to Rights of Persons.** — Watkins v. Pennsylvania R. Co., 21 D. C. 1.

**2. Must Be Legal.** — Robinson v. Southern Pac. R. Co., 105 Cal. 526.

**3. Goetz v. Hannibal, etc., R. Co., 50 Mo. 472.** Here the rule required passengers traveling on half-fare tickets to have a permit from the proper official to travel thus, and it was held to be reasonable.

**4. Question for Court.** — Gregory v. Chicago, etc., R. Co., 100 Iowa 345; Louisville, etc., R. Co. v. Fleming, 14 Lea (Tenn.) 145; Vedder v. Fellows, 20 N. Y. 126; Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420, 92 Am. Dec. 138; Chilton v. St. Louis, etc., R. Co., 114 Mo. 89; Norfolk, etc., R. Co. v. Wysor, 82 Va. 250. But see as *contra* State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671; State v. Chovin, 7 Iowa 204.

Where the facts are undisputed, the reasonableness of a regulation is one of law. Barker v. Central Park, etc., R. Co., 151 N. Y. 237, 56 Am. St. Rep. 626.

**5. State v. Chovin, 7 Iowa 204.**

**6. Personal Knowledge of Rules.** — Barker v. Central Park, etc., R. Co., 151 N. Y. 237, 56 Am. St. Rep. 626.

Reasonable regulations are, in the absence of express contract to the contrary, binding upon those who patronize and contract with the carrier, although their existence may not be known to them. Gulf, etc., R. Co. v. Moody, (Tex. Civ. App. 1895) 30 S. W. Rep. 574.

It has been said that it is the duty of a passenger to inform himself of such matters. Johnson v. Concord R. Corp., 46 N. H. 213, 88 Am. Dec. 199.

**7. State v. Campbell, 32 N. J. L. 309.**

**8. Construction Favorable to Passenger.** — Auerbach v. New York Cent., etc., R. Co., 89 N. Y. 281, 6 Am. & Eng. R. Cas. 334; Cleveland, etc.,

announced appear in the succeeding subdivisions. The points of difficulty here are whether actual knowledge by the passenger of the ticket limitations is necessary, or whether knowledge will ever be implied; if the latter, then what circumstances are necessary to give rise to such implication. Provided, always, that the conditions in the ticket are within the legal competency of the company to impose and are not unreasonable, the passenger will be bound by them if he has actual knowledge of them.<sup>1</sup>

(2) *Rule of Actual Knowledge or Assent.* — There are cases that hold that a ticket bought at the usual full fare and not for a special occasion entitles the purchaser to a full and unlimited right of passage, and that conditions printed upon the ticket attempting to limit this right are of no effect unless his attention is called to them or they are known and assented to by him.<sup>2</sup> And in *Texas* it is held that where the words expressing the limitation are contained on the back of the contract, in order to bind the holder it must appear that he read them or knew them when he accepted the contract.<sup>3</sup>

(3) *Rule of Implied Knowledge or Assent* — (a) **Acceptance and Retention Without Objection.** — In a *New York* case it was adjudged that the holder's assent to the terms of a ticket would be implied when he accepted the ticket, and retained it a sufficient length of time to acquaint himself with its contents, although in fact he neglected to examine it.<sup>4</sup> But a different view is taken by the courts

*R. Co. v. Kinsley*, 27 Ind. App. 135, 87 Am. St. Rep. 245; *Georgia R., etc., Co. v. Clarke*, 97 Ga. 706.

1. See *Great Northern R. Co. v. Palmer*, (1895) 1 Q. B. 862.

2. **Actual Knowledge Held Necessary.** — *Watson v. Louisville, etc., R. Co.*, 104 Tenn. 194; *Louisville, etc., R. Co. v. Turner*, 100 Tenn. 214; *O'Rourke v. Citizens' St. R. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639; *Lake Shore, etc., R. Co. v. Mortal*, 8 Ohio Cir. Dec. 134; *Boyd v. Spencer*, 103 Ga. 828, 68 Am. St. Rep. 146.

In *Georgia* where a person buys a ticket bearing on its face a time limit, and in consideration of the reduced rate assents thereto, he is bound thereby. *Central of Georgia R. Co. v. Ricks*, 109 Ga. 339.

In *Mauritz v. New York, etc., R. Co.*, 23 Fed. Rep. 765, 21 Am. & Eng. R. Cas. 286, it was said: "And where, from the undisputed circumstances of the transaction, it is apparent that the passenger rightfully took the ticket as a mere receipt or voucher, evidencing his right to be carried and enabling him to follow and identify his property, and without any notice that it embodied the terms of a special contract, or was intended to subserve any other purpose than that of a voucher, it would seem that his omission to read the paper ought not to be held negligence, and that, as a matter of law, he should not be held bound by limitations of which he had no knowledge, and to which, therefore, he did not assent, especially where, as in this case, the purchaser was unable to read the English language, and was ignorant not only of the printed matter on the ticket, but of the ways of business in this country."

3. *San Antonio, etc., R. Co. v. Newman*, 17 Tex. Civ. App. 606.

4. *Wheeler v. Oceanic Steam Nav. Co.*, 72 Hun (N. Y.) 5. Here the ticket was in such form that a person looking at it would see at once that a contract was set forth therein.

**Insufficient Reason for Failure to Object to Conditions.** — In this case it was also held that the

fact that the passenger's baggage had been put on board the ship when he received his ticket was not a good excuse for failing to object to its provisions.

"Looking to the Course of Business the Court May Take Notice that an engagement for a voyage across the ocean is a matter of more deliberation and attention than buying a railroad ticket or taking an express company's receipt for baggage or freight. There is, therefore, no room in such a case for the suggestion that the party is surprised into a contract when he supposes himself only to be taking a token indicative of his right." *Steers v. Liverpool, etc., Steamship Co.*, 57 N. Y. 1, 15 Am. Rep. 453. Quoted approvingly in *The Kensington*, 88 Fed. Rep. 331 (the judgment in which was affirmed in 94 Fed. Rep. 885), the court adding: "I find nothing later diminishing the force of these observations."

The fact that the ticket is not signed by the passenger is immaterial. *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 25 Am. St. Rep. 660; *O'Regan v. Cunard Steamship Co.*, 160 Mass. 356, 39 Am. St. Rep. 484. In these cases the court distinguished the ticket in question from the ordinary ticket, in the first case saying that it was "entirely unlike the pasteboard tickets which are commonly sold to passengers on railroads," and in the second, "it was not a mere check."

**Where Passenger Powerless to Repudiate Stipulation.** — But where the stipulation limiting the company's liability was not communicated to the passenger until he was by the act of the carrier "powerless to repudiate the pretended contract, an inference of his assent would be simply preposterous. His proceeding on the voyage and suffering his baggage to remain with the carriers were compulsory, and can therefore imply no assent to terms of transportation then, for the first time, communicated to him." *Lechowitzer v. Hamburg American Packet Co.*, (C. Pl. Gen. T.) 8 Misc. (N. Y.) 213.

**Wrong Ticket — Ratification.** — In *Godfrey v.*

of *Ohio*.<sup>1</sup> In *Iowa* the purchaser is, by the acceptance of a ticket containing a time limit, considered bound thereby, and it is immaterial that he does not sign the ticket.<sup>2</sup> And the same has been held in *Mississippi* in regard to an express limitation of liability to the carrier's own line.<sup>3</sup> The fact that the passenger's ticket was purchased for him by his agent in a wrong name, and that he could not read, does not affect the validity of the condition contained in the ticket which the passenger accepted and used, there being no fraud on the part of any one in the sale of the ticket.<sup>4</sup>

(b) **Where Holder Signs Ticket.** — Where the purchaser signs the ticket it must be presumed, in the absence of fraud, misrepresentation, or mistake, that he read the conditions and assented to them, and he will be bound although he did not in fact read them.<sup>5</sup>

(c) **Ticket Sold at Reduced Rate.** — Some cases lay stress upon the circumstance that the ticket was sold at a special or reduced rate. Thus in *Tennessee* it has been twice held that where a ticket is sold at a reduced rate upon a special occasion, this is sufficient to put the purchaser upon inquiry and affect him with notice to expect some special terms or conditions, though he may be unable to read, and that it is immaterial that he does not sign the contract or have its contents explained to him.<sup>6</sup> And in *Texas* where such a ticket contained in the body thereof a requirement as to identification and signing by the passenger, his assent was conclusively presumed notwithstanding he did not sign the ticket.<sup>7</sup> A contrary view obtains in *Ohio*.<sup>8</sup>

(d) **Knowledge that Ticket Contains Writing — Position of Writing.** — In *England* the following principles have been announced: The holder is not bound by the conditions on the back of the ticket if he does not know there is writing on the ticket; but if he knows there is writing containing conditions, he is bound; if he knows there is writing but does not know it contains conditions, he is bound nevertheless, if, in the opinion of the jury, reasonable notice is given that it contains conditions.<sup>9</sup> The *Federal* courts have held that where the clause limiting the carrier's liability appears on the face of the ticket, above

*Ohio*, etc., R. Co., 116 Ind. 30, 37 Am. & Eng. R. Cas. 8, it was held that if an intending traveler receives a ticket other than that for which he asks, and retains the same for a period of four months without complaint, he will be deemed to have ratified the contract contained in the ticket according to its terms, and to have waived any claim which he might have had in consequence of the mistake.

1. *Kent v. Baltimore*, etc., R. Co., 45 Ohio St. 284, 4 Am. St. Rep. 539, where it is said: "It is well settled that the purchaser of a railroad ticket does not, by its mere acceptance, acquiesce in and bind himself to all the terms and conditions printed thereon, in the absence of actual knowledge of them." *Quoted approvingly* in *Lake Shore*, etc., R. Co. v. *Mortal*, 8 Ohio Cir. Dec. 134.

2. *Hanlon v. Illinois Cent. R. Co.*, 109 Iowa 136.

3. *St. Clair v. Kansas City*, etc., R. Co., 77 Miss. 780.

4. *Southern R. Co. v. White*, 108 Ga. 201.

5. **Signing Ticket.** — *Bethea v. Northeastern R. Co.*, 26 S. Car. 91; *Daniels v. Florida Cent.*, etc., R. Co., 62 S. Car. 1; *Rawitzky v. Louisville*, etc., R. Co., 40 La. Ann. 47, 31 Am. & Eng. R. Cas. 129.

6. **Reduced Rates.** — *Watson v. Louisville*, etc., R. Co., 104 Tenn. 194; *Louisville*, etc., R. Co. v. *Turner*, 100 Tenn. 214.

7. *Abram v. Gulf*, etc., R. Co., 83 Tex. 61;

*Ketcheson v. Southern Pac. R. Co.*, 19 Tex. Civ. App. 288. And see to like effect *Drummond v. Southern Pac. Co.*, 7 Utah 118.

8. *Lake Shore*, etc., R. Co. v. *Mortal*, 8 Ohio Cir. Dec. 134. See also *Kent v. Baltimore*, etc., R. Co., 4 Ohio St. 284, 4 Am. St. Rep. 539.

9. **Knowledge that Ticket Contains Writing.** — *Parker v. South Eastern R. Co.*, 2 C. P. D. 416, 36 L. T. N. S. 540, *followed* in *Richardson v. Rowntree*, 6 Reports 95, (1894) A. C. 217.

If the person receiving the ticket does not know there is any writing upon the back of his ticket, he is not bound by a condition printed on the back. *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470, 32 L. T. N. S. 709.

In *Harris v. Great Western R. Co.*, 1 Q. B. D. 515, 34 L. T. N. S. 647, the party was held bound because his agent who procured the ticket admitted that he believed there were some conditions on the ticket.

In *Acton v. Castle Mail Packets Co.*, 73 L. T. N. S. 158, Lord Russell, C. J., held that the terms and conditions in the ticket constituted the contract between the passenger and the ship; that he should have known that there were conditions and that he had, under the circumstances, reasonable notice of the conditions and was bound by them, although he did not read them. Here the passenger admitted that he saw the ticket contained printed and written matter,



the signature of the ship's agent, it becomes a part of the contract,<sup>1</sup> but that if it is not included in the contract proper, either in terms or by reference, it does not amount to a contract.<sup>2</sup> In other cases contained in this section the place where the stipulations appeared on the ticket was considered of importance, but more weight was attached to other considerations, such as the reduced rate of fare, acceptance and use of the ticket, etc.; and such cases are distributed, accordingly, throughout other subdivisions of this section.

(4) *Assent Subsequent to Purchase of Ticket.* — It has been held that the contract for carriage is consummated upon the payment and acceptance of fare, and if the terms of conveyance are not then agreed upon, the law prescribes the conditions, and the passenger's subsequent assent, even though express, to a limitation of liability, is nugatory as being without consideration.<sup>3</sup>

**X. RESTRICTIONS AS TO TIME AND TRAINS** — 1. **Restrictions as to Time** — *a. IN ABSENCE OF RESTRICTION.* — A ticket purchased at the regular rate, unless there is an agreement otherwise, entitles the purchaser to carriage unlimited in the matter of time;<sup>4</sup> or, at least, at any time before his rights would be lost under the law by lapse of time.<sup>5</sup> A round-trip ticket, not limited by its terms, is, it has been held, after being used one way, good for the return trip at such time as the holder is disposed to present it, unless he was personally notified to the contrary at the time of purchase.<sup>6</sup>

*b. SPECIAL STATUTORY LIMIT.* — A statute making all railway tickets available for a specified time from date has no force beyond the territorial limits of the state; hence it would not apply to the case of a ticket calling for passage from a point within to a point without the state while being used beyond the limits of the state.<sup>7</sup>

*c. RIGHT OF CARRIER TO IMPOSE RESTRICTIONS.* — In the absence of statutory regulations, a passenger carrier has the right to impose limitations as to the time within which its tickets may be used; and after the expiration of the time specified the holders of such tickets will not be entitled to transportation by virtue of them. The reasonableness of a regulation of this character is obvious; it enables the carrier to provide requisite car room for all holders of tickets who are entitled to ride within a particular period.<sup>8</sup>

*d. TIME FIXED MUST BE REASONABLE.* — The rule just stated is subject to the qualification that the period of time specified must be reasonable. If the time limit is less than is sufficient to accomplish the trip, it would, of course, be unreasonable and therefore of no effect.<sup>9</sup>

*e. MILEAGE TICKETS.* — A ticket limited as to time and good for a specified number of miles ceases to be valid at the expiration of that time, although the number of miles has not been traveled out.<sup>10</sup>

1. The Kensington, 94 Fed. Rep. 885, 88 Fed. Rep. 331.

2. The Majestic, 166 U. S. 375, reversing 60 Fed. Rep. 624. Here the limitation was printed on the back of the ticket and there was no reference in the contract to it.

3. Lechowitzer v. Hamburg American Packet Co., (C. Pl. Gen. T.) 8 Misc. (N. Y.) 213.

4. Where Ticket Unlimited. — Louisville, etc., R. Co. v. Klyman, 108 Tenn. 304, 91 Am. St. Rep. 755.

5. Boyd v. Spencer, 103 Ga. 828, 68 Am. St. Rep. 146.

6. Round-trip Ticket. — Pennsylvania R. Co. v. Spicker, 105 Pa. St. 142, 23 Am. & Eng. R. Cas. 672. And in this case it was held that evidence was not admissible to show that by the regulations of the company such tickets were not good after a certain date, and that public notice thereof was given by posters, circulars, etc., in the absence of an offer to show

actual notice of the regulation on the part of the passenger.

7. Statutes. — Carpenter v. Grand Trunk R. Co., 72 Me. 388, 39 Am. Rep. 340, 3 Am. & Eng. R. Cas. 432; Boston, etc., R. Co. v. Traf- ton, 151 Mass. 229.

8. Tickets with Time Limit. — See the title CARRIERS OF PASSENGERS, vol. 15, p. 505. And see the recent cases cited throughout this section.

After Identification. — A stipulation contained in a ticket by which the use of the same is restricted to fifteen days after the identification of the original purchaser at the terminus of his journey, is valid. Rawitzky v. Louisville, etc., R. Co., 40 La. Ann. 47, 31 Am. & Eng. R. Cas. 129.

9. See the title CARRIERS OF PASSENGERS, vol. 5, p. 505. And see Hanlon v. Illinois Cent. R. Co., 109 Iowa 136; Gulf, etc., R. Co. v. Wright, 2 Tex. Civ. App. 463.

10. Mileage Tickets. — Lillis v. St. Louis, etc.,

*f.* TICKETS OVER CONNECTING LINES. — If a railroad company sells a limited ticket over its own and connecting roads, and such ticket is the joint contract of the several carriers, a passenger who is delayed by the fault of one of the roads is entitled to complete his journey upon such ticket, although the time expires before he reaches the last of the connecting lines; but if the ticket is in coupon form, and expressly provides that the carrier selling it is merely the agent of the connecting roads, and is not responsible beyond its own line, the passenger is not entitled to be carried over the last road after the time has expired, although he is delayed by the fault of one of the other companies.<sup>1</sup> When, however, the last day of the limitation falls on Sunday, and the last line runs no train on that day, the passenger will be entitled to transportation if he presents himself for the first train of the next day.<sup>2</sup>

*g.* CERTAIN STIPULATIONS CONSTRUED — Requiring Ticket to Be "Used," etc. — A ticket containing a condition that it will not be good unless "used" on or before a certain day, requires the holder to enter upon the journey before midnight of the last day, yet having done so, he will be entitled to passage to his destination, though the time expires while *en route*.<sup>3</sup>

"Good Only Three Days After," etc. — But where the ticket recited that it would be "good only three days after" a certain date, it was held that the journey was to be completed and not merely commenced within the three days.<sup>4</sup>

"Good This Trip Only." — It has been held that the words "good this trip only," upon a ticket, will not have the effect of limiting the undertaking of the company to any particular day, as they do not relate to time but to a journey, and if the ticket has not been previously used, it entitles the holder to a passage on a subsequent day, as well as on the day it bears date.<sup>5</sup>

"Good for This Day Only." — A ticket that bears upon its face the words "good for this day only," with the date indorsed, is not good upon a subsequent day,<sup>6</sup> especially where the price has been lawfully increased.<sup>7</sup>

*h.* EXTENSION OF TIME. — The carrier may not eject a passenger after the original period of limitation of his ticket where the time has been extended by a duly authorized agent.<sup>8</sup>

*i.* DESTRUCTION OF TICKET — PRESUMPTION. — Where, although the evidence was conflicting, the weight of testimony was that the ticket offered the conductor had not expired but was still in force, the act of the conductor in destroying, contrary to his duty, the ticket, raises a presumption that if preserved it would have supported the plaintiff's claim, as it was the conductor's duty in any event to turn it in to the auditor of the road.<sup>9</sup>

**2. Restrictions as to Trains.** — A regulation that holders of excursion tickets shall travel upon the trains provided for that special purpose, and not upon a regular train, is reasonable and valid.<sup>10</sup> And it has been held that if the ticket calls for a "continuous trip only," between two points, it is not valid for

R. Co., 64 Mo. 464, 27 Am. Rep. 255; *Sherman v. Chicago*, etc., R. Co., 40 Iowa 45; *Powell v. Pittsburg*, etc., R. Co., 25 Ohio St. 70.

**1. Connecting Lines.** — *Gulf*, etc., R. Co. v. *Looney*, 85 Tex. 158, 34 Am. St. Rep. 787, 52 Am. & Eng. R. Cas. 197; *Pennsylvania Co. v. Hine*, 41 Ohio St. 276.

**2. Sunday.** — *Little Rock*, etc., R. Co. v. *Dean*, 43 Ark. 529, 51 Am. Rep. 584, 21 Am. & Eng. R. Cas. 279.

**3. Evans v. St. Louis, etc., R. Co., 11 Mo. App. 463; *Auerbach v. New York Cent.*, etc., R. Co., 89 N. Y. 281, 42 Am. Rep. 290, 6 Am. & Eng. R. Cas. 334; *Lundy v. Central Pac. R. Co.*, 66 Cal. 191, 56 Am. Rep. 100, 18 Am. & Eng. R. Cas. 309; *Georgia Southern R. Co. v. Bigelow*, 68 Ga. 219. See also *Cleveland*, etc., R. Co. v. *Kinsley*, 27 Ind. App. 135, 87 Am. St. Rep. 245.**

**4. Gulf, etc., R. Co. v. *Wright*, 2 Tex. Civ. App. 463.**

**5. Pier v. Finch, 24 Barb. (N. Y.) 514. But this case seems to be doubted by Judge Redfield. 1 Redf. on Railways (6th ed.), p. 93, note 5.**

**6. Burnham v. Grand Trunk R. Co.**, 63 Me. 298, 18 Am. Rep. 220; *Boice v. Hudson River R. Co.*, 61 Barb. (N. Y.) 611.

**7. Boice v. Hudson River R. Co.**, 61 Barb. (N. Y.) 611.

**8. Randall v. New Orleans, etc., R. Co., 45 La. Ann. 778. See also *Spellman v. Richmond*, etc., R. Co., 35 S. Car. 475, 28 Am. St. Rep. 858. And see *infra*, this title, *Representations, Promises, Waiver, and Modification*.**

**9. Louisville, etc., R. Co. v. *Donaldson*, (Ky. 1897) 43 S. W. Rep. 439.**

**10. Limitation as to Trains.** — *McRae v. Wil-*

passage to an intermediate point on a train which does not make the whole trip.<sup>1</sup> If the ticket provides that it is exchangeable for another, good for the day and train designated in the latter, the holder of the exchange ticket cannot travel on a later train and day.<sup>2</sup> Where the company sues to recover fare, a schedule of trains, in force when the defendant enjoyed the transportation, is admissible to show that the train which he took was one on which he did not have the right to go, under the contract in his season ticket.<sup>3</sup>

**XI. IDENTIFICATION, SIGNING, AND STAMPING — 1. In General — Reasonableness of Regulation.** — It is not unusual for tickets to contain a provision requiring them to be signed by the persons for whom they are intended, and it is a very general custom for return-trip tickets to contain stipulations to the effect that the ticket shall not be good for the return trip unless the holder identifies himself as the original purchaser before some designated agent, or has the agent sign or stamp the return coupon, or himself signs such coupon in the presence of the agent who shall witness the signature. Such requirements have been very generally upheld as reasonable.<sup>4</sup> And a stipulation that the purchaser shall identify himself "to the satisfaction" of a designated agent, is not unreasonable.<sup>5</sup>

**2. Statute Against Limiting Liability by Notice in Ticket.** — Where, by virtue of a statute, a carrier may not limit its liability by a notice in the ticket, it cannot, after the sale of a ticket, require the holder to affix his signature thereto as a condition precedent to his right to make the return trip, notwithstanding the ticket bore on its face such a condition and was sold at a reduced rate.<sup>6</sup>

**3. Obvious Error as to Place of Identification.** — Where there is an obvious mistake in the body of the contract indorsed on the ticket as to the place of identification, which is furthermore inconsistent with the whole tenor of the contract, and did not mislead the holder, the requirement is not invalidated.<sup>7</sup>

**4. Sufficiency of Identification.** — Where the ticket provides that the holder shall identify himself "to the satisfaction" of a designated agent, such agent, it has been held, is the party to determine the sufficiency of the identification, and it may not be referred to the jury to determine whether he was or was not "satisfied" with the proof of identity.<sup>8</sup> But in another case it was held that the purchaser should offer to the agent such proof as would satisfy a reasonable man, and that simply writing his name, without more, might not suffice.<sup>9</sup>

**5. Reasons for and Effect of Noncompliance — a. FAILURE OR REFUSAL OF AGENT TO ACT.** — The passenger's right to transportation is unaffected by the arbitrary refusal of the agent to stamp and sign the ticket when requested

mington, etc., R. Co., 88 N. Car. 526, 43 Am. Rep. 745, 18 Am. & Eng. R. Cas. 316.

In *Nolan v. New York, etc., R. Co.*, 41 N. Y. Super. Ct. 541, the plaintiff's ticket stipulated that it was "good this day only on all trains except the Boston express trains," and the plaintiff, attempting to ride with it on the Boston express, was ejected for nonpayment of fare, after the refusal of the conductor to honor the ticket. It was held that the expulsion was justifiable.

1. *Johnson v. Philadelphia, etc., R. Co.*, 63 Md. 106, 18 Am. & Eng. R. Cas. 304.

2. *Howard v. Chicago, etc., R. Co.*, 61 Miss. 194, 18 Am. & Eng. R. Cas. 313.

3. *New York, etc., R. Co. v. Feely*, 163 Mass. 205.

4. See the cases throughout this section.

5. **Requirement as to Identification.** — *Bethea v. Northeastern R. Co.*, 26 S. Car. 91.

As to what is a compliance with such a re-

quirement, see *infra*, this section, *Sufficiency of Identification*.

6. **Statute.** — *Phillips v. Georgia R., etc., Co.*, 93 Ga. 356.

7. *Bethea v. Northeastern R. Co.*, 26 S. Car. 91.

8. *Bethea v. Northeastern R. Co.*, 26 S. Car. 91.

**Provision Construed as Requiring Passenger to Identify Himself to Agent Otherwise than by Signing His Name.** — *Southern R. Co. v. Barlow*, 104 Ga. 213, 69 Am. St. Rep. 166.

9. *Central of Georgia R. Co. v. Cannon*, 106 Ga. 828.

In *Southern R. Co. v. Barlow*, 104 Ga. 213, 69 Am. St. Rep. 166, it was held that the stipulation therein "necessarily implied that it was incumbent upon the purchaser to use reasonable means of identifying himself as such to this agent."



to do so.<sup>1</sup> Where, although the passenger presented his ticket to the agent to be stamped, etc., the agent neglected to do so, but returned it, folded up with a sleeping-car ticket for which the passenger had applied at the time, and the passenger did not find this out until he had boarded the train, the company was held liable for refusing to honor the ticket.<sup>2</sup> If the agent in good faith refuses to validate a return ticket for the reason that, in his opinion, the signature is not genuine, and the passenger readily obtains funds to buy a ticket, exemplary damages are not recoverable.<sup>3</sup>

*b. ERRONEOUS INSTRUCTIONS BY AGENT.* — It has been held that the passenger may be expelled from the train when the stipulation calling for the counter-signature of the agent has not been complied with, notwithstanding noncompliance was due to the assurance by the agent that such counter-signature was unnecessary.<sup>4</sup> And a like ruling was made where the passenger refused to sign the ticket, relying upon the agent's statement that his signature was not essential.<sup>5</sup>

*c. AGENT OF CONNECTING LINE.* — It has been held that where the ticket is for carriage over several lines and contemplates that it shall be validated by the agent at the point of destination, for the return trip, the company issuing the ticket is liable for the fault of such agent in consequence of which the ticket is rendered defective,<sup>6</sup> and this, even though the ticket recites that such company acts only as agent in selling the ticket and will not be responsible beyond its own line.<sup>7</sup>

*d. WHERE PASSENGER IN FAULT.* — If the passenger, after ample opportunity for complying with such stipulation has been afforded to him, fails to do so, the conductor may decline to honor the ticket and expel him upon refusing to pay fare.<sup>8</sup>

**1. Refusal of Agent.**—*Missouri Pac. R. Co. v. Martino*, 2 Tex. Civ. App. 634.

In *McGhee v. Reynolds*, 117 Ala. 413, it was held that where the agent refuses to validate the ticket, and the passenger is expelled by the conductor, his cause of action is for the breach of duty by the agent and not for the act of the conductor.

**Whether Refusal or Neglect of Agent to Furnish to Holder of Mileage Ticket Exchange Ticket Unreasonable — Question of Fact.**—*Pittsburgh, etc., R. Co. v. Daniels*, 90 Ill. App. 154.

**2. Neglect of Agent.**—*Northern Pac. R. Co. v. Pauson*, (C. C. A.) 70 Fed. Rep. 585.

**3. New York, etc., R. Co. v. Leander, (Tex. Civ. App. 1898) 46 S. W. Rep. 843.**

**4. Mistake of Agent.**—*New York Cent. Trust Co. v. East Tennessee R. Co.*, 65 Fed. Rep. 332. See also *Houston, etc., R. Co. v. Arey*, 18 Tex. Civ. App. 457.

**5. Ketcheson v. Southern Pac. R. Co.**, 19 Tex. Civ. App. 288. Here, however, the ticket expressly provided that the agent was without authority to waive or modify any of the stipulations.

But it has been held that if a husband, in reliance upon the agent's statement that it is permissible for him to do so, signs his own name to a ticket intended for his wife's use, the company may not refuse to honor the ticket when presented by the wife, although the ticket states that it must be signed by the person using it. *Mexican Cent. R. Co. v. Goodman*, (Tex. Civ. App. 1897) 43 S. W. Rep. 580.

**6. Gulf, etc., R. Co. v. St. John**, 13 Tex. Civ. App. 257. Here the agent returned the ticket to the passenger without stamping it, telling him this was unnecessary.

**7. Russell v. Missouri, etc., R. Co.**, 12 Tex. Civ. App. 627. In this case the agent refused to stamp the ticket because it did not bear the stamp of the office by which it was issued.

But in *Bethea v. Northeastern R. Co.*, 26 S. Car. 91, it was held that where a company issues a through ticket for itself, and as agent for the other lines, and the ticket is to be stamped by the agent of the terminal line, such agent is thereby made the agent of all the companies, and the initial road is liable only for its own breaches of contract.

**8. Defect Due to Passenger's Fault.**—*United States.*—*Boylan v. Hot Springs R. Co.*, 132 U. S. 146; *Mosher v. St. Louis, etc., R. Co.*, 127 U. S. 390.

*Georgia.*—*Wenz v. Savannah, etc., R. Co.*, 108 Ga. 290.

*Kansas.*—*Dangerfield v. Atchison, etc., R. Co.*, 62 Kan. 85.

*Louisiana.*—*Rawitzky v. Louisville, etc., R. Co.*, 40 La. Ann. 47.

*Pennsylvania.*—*Bowers v. Pittsburgh, etc., R. Co.*, 158 Pa. St. 302.

*Tennessee.*—*Watson v. Louisville, etc., R. Co.*, 104 Tenn. 194.

*Texas.*—*Reed v. Texas, etc., R. Co.*, (Tex. Civ. App. 1899) 50 S. W. Rep. 432.

**Where the Plaintiff Claims the Right as a Member of a Firm to which had been issued a commutation ticket, to ride on such ticket, he must show the conductor that his name appears indorsed on the ticket in accordance with a condition of the ticket, and in an action for damages for his expulsion, he must show, if desired, the existence of such firm at the time and that he was a member.** *Granier v. Louisiana Western R. Co.*, 42 La. Ann. 880.

*e.* NO ONE PRESENT AUTHORIZED TO ACT. — In *Georgia* it has been held that where there was no one present at the station authorized to validate the ticket, and the passenger has done everything that ordinary prudence and diligence would require to obtain a validation of the ticket, he is entitled to ride on the unvalidated ticket upon explaining the circumstances to the conductor.<sup>1</sup> But in a *Maryland* case where the condition required the return coupon to be stamped by a designated officer of a camp-meeting association, and the holder was unable to comply for the reason that the camp had closed and there was no one present authorized to act, it was held that he might be ejected from the train.<sup>2</sup>

## XII. LIMITATION OF OR EXEMPTION FROM LIABILITY — 1. In Ordinary Passes

— *a.* VIEW THAT EXEMPTION MAY BE FULL AND COMPLETE. — There is a great contrariety of opinion in the *United States* as to the validity of a stipulation in a free pass exempting the carrier from liability for injury occasioned by the negligence of himself or servants, the question having been much confused and embarrassed by imperfect and unsuccessful attempts to maintain the theory of degrees of negligence, and to distinguish between the different grades of officers and servants of the corporation.<sup>3</sup> In *England*, it is well established that the carrier has full power thus to provide against liability, and a condition in the pass that the passenger travels “at his own risk” will exclude everything for which the company would otherwise have been responsible;<sup>4</sup> and this view is sanctioned by the courts of some of the states.<sup>5</sup> And it has been held that such a stipulation is not abrogated by the purchase of a ticket for a drawing-room car.<sup>6</sup>

*b.* VIEW THAT EXEMPTION MAY NOT COVER GROSS NEGLIGENCE. — Others, while conceding the right to make such exemption in cases of ordinary negligence, refuse to apply the principle in cases of gross negligence.<sup>7</sup>

*c.* VIEW THAT EXEMPTION MAY NOT COVER MANAGING OFFICERS. — Still other authorities hold that such a stipulation will protect the carrier against the negligence of any of its servants and agents other than its managing officers or directors, the latter being regarded as identical with the corporation itself.<sup>8</sup>

**Land Exploring Ticket — Passenger Not Requested to Sign.** — In *Gregory v. Burlington*, etc., R. Co., 10 Neb. 250, 1 Am. & Eng. R. Cas. 270 (a case of land exploring ticket), it was held that possession of the ticket was *prima facie* evidence of ownership, and that the failure of the holder to sign his name to the contract on the ticket, there being no evidence that he had been requested to do so, did not invalidate the ticket, as the signature was merely a mode of identifying the purchaser.

1. *Southern R. Co. v. Wood*, 114 Ga. 140. And it was further held that the fact that the passenger, after being expelled, returns and has his ticket validated and uses it for returning on another train, does not affect his right of action for the expulsion.

2. *Western Maryland R. Co. v. Stocksedale*, 83 Md. 245.

3. See the title CARRIERS OF PASSENGERS, vol. 5, p. 608 *et seq.*

4. **Full Exemption Upheld.** — *McCawley v. Furness R. Co.*, L. R. 8 Q. B. 57; *Gallin v. London*, etc., R. Co., L. R. 10 Q. B. 212; *Hall v. North Eastern R. Co.*, L. R. 10 Q. B. 437. See also the title CARRIERS OF PASSENGERS, vol. 5, pp. 615, 621.

5. See the title CARRIERS OF PASSENGERS, vol. 5, p. 621. And it has been held to be immaterial whether the holder reads the condi-

tion or not. *Rogers v. Kennebec Steamboat Co.*, 86 Me. 261.

**Mental Anguish.** — Such a stipulation precludes recovery for mental anguish occasioned by the expulsion of the plaintiff from a train on a line other than the carrier's own line. *International*, etc., R. Co. *v. Campbell*, 1 Tex. Civ. App. 509.

6. *Ulrich v. New York Cent.*, etc., R. Co., 108 N. Y. 80, 2 Am. St. Rep. 369, 34 Am. & Eng. R. Cas. 350.

7. **Gross Negligence.** — *Illinois Cent. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260; *Toledo*, etc., R. Co. *v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Jacobus v. St. Paul*, etc., R. Co., 20 Minn. 125, 18 Am. Rep. 360; *Pennsylvania R. Co. v. McCloskey*, 23 Pa. St. 532.

**Where Want of Ordinary Care Declared Criminal.** — In *Annas v. Milwaukee*, etc., R. Co., 67 Wis. 46, 58 Am. Rep. 848, 27 Am. & Eng. R. Cas. 102, it was held that the carrier may stipulate for exemption from liability for injury arising from want of ordinary care, unless the same is expressly made a crime.

8. **Managing Officers and Directors.** — *Welles v. New York Cent. R. Co.*, 26 Barb. (N. Y.) 641, 24 N. Y. 181; *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196, 82 Am. Dec. 282; *Kinney v. Central R. Co.*, 32 N. J. L. 407, 90 Am. Dec. 675, 34 N. J. L. 513, 3 Am. Rep. 265.

*d. VIEW DENYING VALIDITY OF EXEMPTION IN TOTO.* — But according to still another view, all fine discriminations in regard to the degrees of negligence<sup>1</sup> and grades of agents<sup>2</sup> are discarded, and such stipulations held to be contrary to public policy and therefore void.<sup>3</sup>

**2. In Drovers' Passes** — *a. THE SEVERAL VIEWS STATED.* — When stock is transported upon a railroad it is usual for the company to give the shipper a ticket termed a "drover's pass," entitling him to accompany the stock to its destination and return. The pass ordinarily stipulates that the drover assumes all risk of accident, and releases the carrier from liability for all injuries, whether occasioned by the negligence of the company or its servants or otherwise. There is some conflict of authority as to the status of such a passenger and consequently the effect of such a stipulation. The *English* courts,<sup>4</sup> and those of *New York*,<sup>5</sup> regard the drover as a gratuitous passenger, and bound by the release. In *South Dakota* such a stipulation will protect the company except in cases of gross negligence, wilful wrong, or fraud.<sup>6</sup> According to the doctrine in other jurisdictions, the contract of shipment and the pass are to be construed as a single contract, the consideration of which is the charge made for the transportation of the stock, or the service rendered in caring for the stock, and the drover is deemed a passenger for hire, and the exemption void.<sup>7</sup>

1. The *Steamboat New World v. King*, 16 How. (U. S.) 474. See the title NEGLIGENCE, vol. 21, p. 455.

2. The Distinction Attempted to Be Drawn in the *New York and New Jersey Cases* between the negligence of the corporation acting through its managing officers and the negligence of other servants of the company is repudiated in *Gulf, etc., R. Co. v. McGown*, 65 Tex. 640, 26 Am. & Eng. R. Cas. 274, and *Illinois Cent. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260. And see the observations of Mr. Justice Bradley in *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.

In *Welsh v. Pittsburg, etc., R. Co.*, 10 Ohio St. 75, 75 Am. Dec. 490, the court says: "This doctrine, when applied to a corporation, which can only act through agents and servants, would secure complete immunity for the neglect of every duty."

3. **Majority View** — *United States*. — *Philadelphia, etc., R. Co. v. Derby*, 14 How. (U. S.) 469; *The Steamboat New World v. King*, 16 How. (U. S.) 469.

*Indiana*. — *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Louisville, etc., R. Co. v. Faylor*, 126 Ind. 126.

*Iowa*. — *Rose v. Des Moines Valley R. Co.*, 39 Iowa 246.

*Missouri*. — *Bryan v. Missouri Pac. R. Co.*, 32 Mo. App. 228.

*Ohio*. — *Knowlton v. Erie R. Co.*, 19 Ohio St. 260, 2 Am. Rep. 395.

*Pennsylvania*. — *Buffalo, etc., R. Co. v. O'Hara*, (Pa. 1882) 9 Am. & Eng. R. Cas. 317.

*Texas*. — *Gulf, etc., R. Co. v. McGown*, 65 Tex. 640, 26 Am. & Eng. R. Cas. 274.

In *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, it was held that the carrier could not lawfully stipulate against liability for negligence where the transportation, although not paid for in money, was not a mere matter of gratuity, and the court strongly intimated that it would not have come to a different conclu-

sion had the passage been a mere gratuity. See also *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357 (a case of a drover's pass, but supporting the principle contended for); *Indiana Cent. R. Co. v. Mundy*, 21 Ind. 48, 83 Am. Dec. 339, wherein the court, while intimating that the weight of American authority is opposed to allowing the carrier to exempt himself from liability for the consequences of his negligence, refrained from expressing any opinion on the question either way. And see the observations of Davis, J., in *Stinson v. New York Cent. R. Co.*, 32 N. Y. 337, 88 Am. Dec. 332.

4. **Drovers' Passes**. — *McCawley v. Furness R. Co.*, L. R. 8 Q. B. 57; *Gallin v. London, etc., R. Co.*, L. R. 10 Q. B. 212; *Duff v. Great Northern R. Co.*, L. R. 4 Ir. 178.

5. *Boswell v. Hudson River R. Co.*, 5 Bosw. (N. Y.) 699; *Bissell v. New York Cent. R. Co.*, 25 N. Y. 442, 82 Am. Dec. 369, reversing 29 Barb. (N. Y.) 602, and following *Wells v. New York Cent. R. Co.*, 26 Barb. (N. Y.) 641, 24 N. Y. 181; *Poucher v. New York Cent. R. Co.*, 49 N. Y. 263, 10 Am. Rep. 364. See also the title CARRIERS OF PASSENGERS, vol. 5, p. 622.

6. *Meuer v. Chicago, etc., R. Co.*, 5 S. Dak. 568, 49 Am. St. Rep. 898.

7. *Arkansas*. — *Little Rock, etc., R. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10, 13 Am. & Eng. R. Cas. 10.

*Delaware*. — *Flinn v. Philadelphia, etc., R. Co.*, 1 Houst. (Del.) 469.

*Illinois*. — *Pennsylvania R. Co. v. Gresco*, 79 Ill. App. 127.

*Indiana*. — *Indianapolis, etc., R. Co. v. Beaver*, 41 Ind. 493; *Ohio, etc., R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Ohio, etc., R. Co. v. Nickless*, 71 Ind. 271.

*Missouri*. — *Graham v. Pacific R. Co.*, 66 Mo. 536; *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239, 57 Am. Rep. 382, 26 Am. & Eng. R. Cas. 268.

*Ohio*. — *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362.



*b. DURATION OF EXEMPTION.* — Where, in the contract between a shipper of stock and the company, he assumes the "risk of personal injury from whatever cause," he is, while unloading such stock under such contract, within the exemption clause, although the car has arrived at its destination and the shipper has left the car for a short time, prior to the injury, to obtain assistance in unloading.<sup>1</sup>

**3. In Ordinary Tickets.** — It has been held that a stipulation in a ticket fixing the amount of fare demanded by the conductor as the measure of recovery for violation of the contract of carriage is unreasonable. Nor will such a stipulation preclude the recovery of damages for a tort committed by ejecting the passenger.<sup>2</sup> And a stipulation in substance that the damages for any possible personal injury shall not exceed one hundred dollars has been set aside as unreasonable.<sup>3</sup> In *Georgia* carriers are forbidden by law to limit their liability by notice or entry on a ticket.<sup>4</sup>

**4. Statutory Right of "Common Carrier" to "Limit" Liability.** — It has been said that a right given by statute to the carrier to "limit" its liability by express contract could not be made to extend to exemption from all liability.<sup>5</sup> And a statute empowering a "common carrier" so to limit its "legal liability" has been held to have no application to carriers of passengers.<sup>6</sup>

**5. Harter Act.** — The only object of the Harter Act<sup>7</sup> is "to modify the relations previously existing between the vessel and her cargo,"<sup>8</sup> and injuries to passengers are not within the exemptions of such act.<sup>9</sup>

**6. Statutory Penalty for Death by Negligence.** — A provision in the ticket exempting the company from liability for injuries resulting from the negligence of its agents and servants is of no effect as against a statute by which, in substance, a penalty is given to the widow and children and next of kin of a passenger whose death results from the negligence of the company or its servants.<sup>10</sup>

**7. What Law Governs.** — In *Massachusetts* it is held that although stipulations against liability are opposed to the policy of the *lex fori*, they are not immoral or illegal, and if valid where made will be enforced on principles of comity.<sup>11</sup> But, according to a *Federal* case, they are unenforceable where the

*Pennsylvania.* — *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315.

*Virginia.* — *Virginia, etc., R. Co. v. Sayers*, 26 Gratt. (Va.) 328.

*West Virginia.* — *Maslin v. Baltimore, etc., R. Co.*, 14 W. Va. 180, 35 Am. Rep. 748.

**The Leading Case upon This Subject in the United States** is *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357, in which it was held, first, that a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law; second, that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; third, that these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter; fourth, that a drover traveling on a pass such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

**1.** *Meuer v. Chicago, etc., R. Co.*, 5 S. Dak. 568, 49 Am. St. Rep. 898.

**2.** *Galveston, etc., R. Co. v. Kinnebrew*, 7 Tex. Civ. App. 549.

**3.** *Moses v. Hamburg-American Packet Co.*, 88 Fed. Rep. 329.

**4.** *Boyd v. Spencer*, 103 Ga. 828, 68 Am. St.

Rep. 146; *Phillips v. Georgia R., etc., Co.*, 93 Ga. 356.

**5. Statute.** — *Central of Georgia R. Co. v. Lippman*, 110 Ga. 665. Here it was also held that the duty of a carrier to exercise extraordinary diligence cannot be waived or released even by express contract. And see *Central of Georgia R. Co. v. Almand*, 116 Ga. 780.

**6.** *Central of Georgia R. Co. v. Lippman*, 110 Ga. 665, *construing* Code Ga., § 2276.

**7.** Act Cong. Feb. 13, 1893, 2 Supp. Rev. Stat. 81.

**8.** *The Delaware*, 161 U. S. 459, by Mr. Justice Brown.

**9.** *The Rosedale*, 88 Fed. Rep. 324; *Moses v. Hamburg-American Packet Co.*, 88 Fed. Rep. 329; *The Kensington*, 88 Fed. Rep. 331, 94 Fed. Rep. 885.

**10.** *Doyle v. Fitchburg R. Co.*, 162 Mass. 66, 44 Am. St. Rep. 335.

**11. Conflict of Laws.** — *O'Regan v. Cunard Steamship Co.*, 160 Mass. 356, 39 Am. St. Rep. 484; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 25 Am. St. Rep. 660. See this latter case for an instance of a contract made in *Massachusetts* which was held to have been canceled by another contract made in Ireland.

And in a *South Dakota* case it was held that a special contract containing an exemption from liability, made in one state for transpor-

contracting parties are all citizens of, and the place of completion of the contract is within, the United States.<sup>1</sup>

**XIII. ROUTE AND ACCOMMODATIONS — 1. Route to Be Pursued — a. DIRECT OR CIRCUITOUS ROUTE.** — It is a reasonable regulation for a company operating direct and indirect or circuitous lines of road between two points to require that through passengers traveling upon a simple contract to carry from one point to another should go by the most direct route.<sup>2</sup> Neither the failure of the company to notify a passenger of such regulation, nor of its conductor as to the necessity of changing cars at a certain point *en route*, will affect the contractual rights of the parties.<sup>3</sup> Where a stock contract provided for the free passage, both ways, of the shipper, but did not name the route to be taken in returning, a general usage known to the shipper, permitting persons holding such contracts to take either of two routes, became a part of the contract.<sup>4</sup>

*b. STARTING FROM INTERMEDIATE POINT.* — Where the conditions of the ticket require a continuous journey, the passenger may, nevertheless, commence his journey at an intermediate point.<sup>5</sup>

*c. REVERSE TRIP.* — A ticket calling for passage in one direction is not good for a reverse trip;<sup>6</sup> and the fact that the holder has been permitted upon former occasions to make such reverse trip upon such tickets, and that a conductor on another train at another time gave his opinion to the holder that the ticket would be good for passage either way, does not alter the rule.<sup>7</sup>

*d. CONTINUOUS TRIP "OVER THE ENTIRE LINE."* — Under an ordinance providing that the rate of fare to be charged for a single continuous ride "over the entire line" should not exceed the rate then existing, a passenger is not entitled for one fare to make a complete trip, going and coming, but he must, after passing the usual terminus where the round trip begins, pay another fare, when, at the time of the passage of the ordinance, such was the custom.<sup>8</sup>

**2. Accommodations — a. SEPARATE COACHES.** — This subject will be found treated elsewhere in this work.<sup>9</sup>

*b. SEATS.* — It has been said that a carrier is under more than ordinary care to furnish passengers with seats.<sup>10</sup> More than this, it should, unless a sudden or unusual influx of passengers makes it impracticable, furnish each passenger with a seat in the car in which his ticket entitles him to ride, and to do this must, if necessary, limit passengers to single seats.<sup>11</sup> A rule restricting passengers to the use of one seat each if cars are not crowded, and to one-half

tation therein to a point in another state, is to be interpreted according to the law of the former state, but in the absence of evidence as to what the law of such former state is it will be presumed to be the same as that of the latter state. *Meuer v. Chicago, etc., R. Co., 5 S. Dak. 568, 49 Am. St. Rep. 898.*

1. *The Kensington, 94 Fed. Rep. 885.* And see generally the title *PRIVATE INTERNATIONAL LAW*, vol. 22, p. 1314.

2. *Direct Route.* — *Church v. Chicago, etc., R. Co., 6 S. Dak. 235; Bennett v. New York Cent., etc., R. Co., 69 N. Y. 594, 25 Am. Rep. 250, affirming 5 Hun (N. Y.) 599.*

3. *Church v. Chicago, etc., R. Co., 6 S. Dak. 235.*

4. *Milroy v. Chicago, etc., R. Co., 98 Iowa 188.*

5. *Auerbach v. New York Cent., etc., R. Co., 89 N. Y. 281, 42 Am. Rep. 290, 6 Am. & Eng. R. Cas. 334.*

6. *Reverse Trip.* — *Godfrey v. Ohio, etc., R. Co., 116 Ind. 30, 37 Am. & Eng. R. Cas. 8;*

*Keeley v. Boston, etc., R. Co., 67 Me. 163, 24 Am. Rep. 19.* See also *Poulin v. Canadian Pac. R. Co., 52 Fed. Rep. 197.*

7. *Keeley v. Boston, etc., R. Co., 67 Me. 163, 24 Am. Rep. 19.*

8. *Wimmer v. Union Traction Co., 12 Pa. Super. Ct. 467.*

9. See the titles *CIVIL RIGHTS*, vol. 6, p. 68; *INTERSTATE COMMERCE*, vol. 17, p. 34.

*White Officer with Negro Prisoner — Officer but Not Negro Entitled to Ride in White Coach.* — *Louisville etc., R. Co. v. Catron, 102 Ky. 323.*

*Requiring White Woman to Occupy Negro Coach — Mental Anguish and Mortification Elements of Recovery.* — *Missouri, etc., R. Co. v. Ball, 25 Tex. Civ. App. 500.*

10. *Seats for Passengers.* — *Galveston, etc., R. Co. v. Morris, (Tex. Civ. App. 1901) 60 S. W. Rep. 813, affirmed 94 Tex. 505.* And see the title *CARRIERS OF PASSENGERS*, vol. 5, p. 590.

11. *Louisville, etc., R. Co. v. Patterson, 69 Miss. 421.*

a seat if they are crowded, and prohibiting backs of seats from being turned so as to make the seats face each other, and not allowing passengers to place baggage on seats in front of them, is a reasonable one.<sup>1</sup>

c. **FOOD.** — A Carrier by Water on a long voyage performs its full duty in regard to the quality and quantity of the food furnished to its passengers when the food is such as is customarily provided, and is cooked properly, and there is no lack of it, and no suffering on the part of passengers. It is immaterial that the food might have been better or was not so good as that to be had on ships making shorter trips.<sup>2</sup> Where a written contract for the transportation of certain troops and officers neither expressly nor impliedly provided for their subsistence, parol evidence was held admissible to show a later agreement fixing a price therefor.<sup>3</sup>

d. **WATERCLOSETS.** — In *Texas*, where the law requires carriers to provide separate coaches for white and negro passengers, but "equal in all points of comfort and convenience," a negro may recover for physical pain resulting from his inability to obey a call of nature because of the lack of a watercloset. And it is no defense that he did not go, or seek to go, in the car provided for white passengers and use the closet there, as, under the statute, he had no right to do this.<sup>4</sup> In such an action evidence is admissible to show that the plaintiff suffered no discomfort or injury on account of the insufficient accommodations.<sup>5</sup> Notwithstanding the carrier is under a statutory duty to "afford all reasonable facilities for the receiving, forwarding, and delivery" of passengers, it is not precluded from charging passengers for the use of station toilet rooms.<sup>6</sup>

e. **PASSENGERS' EFFECTS.** — Where by the terms of his ticket the passenger is entitled to "personal passage" only, he has no right to carry with him bundles of groceries for family use. Nevertheless, if he should insist on the right to do so, the conductor may not take by force such parcels from him, but should remove the passenger, together with such effects, using no more force than is necessary for this purpose.<sup>7</sup>

f. **RULE AS TO DOGS.** — A regulation prohibiting persons from taking dogs with them to be carried in cars used for the carriage of passengers, and requiring pay for carrying them in baggage cars, is reasonable.<sup>8</sup>

g. **SECOND-CLASS TICKETS.** — Where the plaintiff, a woman, and her children, holders of second-class tickets, were compelled by the conductor to ride in a smoking car, which was occupied by men smoking, and they were made ill by the smoke and fumes of the tobacco, and it appeared that this car was not the kind in which second-class passengers were ordinarily required to ride, it was held that the plaintiff was entitled to recover.<sup>9</sup>

h. **MISTAKE AS TO TICKET.** — A rule requiring conductors to permit a passenger who has failed to get the ticket really desired, upon complaint made of the true condition, to ride in the coach in which he would have been entitled to ride if no mistake had been made, upon payment of the difference in price of tickets, is reasonable and just.<sup>10</sup>

**XIV. STOP-OVER PRIVILEGES — 1. General Rule — Continuous Trip.** — It may be stated as a general rule that the obligation created by the sale of an ordi-

1. See *Gulf, etc., R. Co. v. Moody*, (Tex. Civ. App. 1895) 30 S. W. Rep. 574.

2. *The President*, 92 Fed. Rep. 673.

For evidence held to show that the food supplied was unsuitable, see *The D. C. Murray*, 89 Fed. Rep. 508.

3. *Van Studdiford v. Hazlett*, 56 Mo. 322.

4. *Henderson v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1896) 38 S. W. Rep. 1136.

5. *Henderson v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1030.

6. *West Ham Corp. v. Great Eastern R. Co.*, 64 L. J. Q. B. 340.

7. *Bullock v. Delaware, etc., R. Co.*, 60 N. J. L. 24. See the title *BAGGAGE*, vol. 3, p. 528. And see *Runyan v. Central R. Co.*, 61 N. J. L. 537.

8. *Gregory v. Chicago, etc., R. Co.*, 100 Iowa 345; it being further held that if the passenger refuses to remove his dog, the conductor may remove both passenger and dog.

9. *Southern R. Co. v. Wood*, 114 Ga. 159.

10. *Alabama, etc., R. Co. v. Drummond*, 73 Miss. 813.



nary passage ticket is for one continuous trip, neither the passenger nor the carrier having the right to compel the other to split it up in parts and perform it piecemeal; and if the passenger voluntarily leaves the train at an intermediate station, while the company is engaged in performing its part of the contract in a reasonable manner, he thereby releases it from further performance by another train or at another time.<sup>1</sup>

**Time in These Contracts Is Usually an Important Element**, because, inasmuch as the carrier is required to furnish accommodation for all persons who apply for passage on any day, it is of importance how many are to be carried, and this cannot be known if there are persons holding tickets who have a right to apply for passage along the route in numbers entirely unknown.<sup>2</sup>

**But a Passenger on a Steamboat may go ashore at points where the boat stops, and resume travel on the same boat and trip without forfeiting his right to use his ticket.**<sup>3</sup>

**Should the Passenger Attempt to Resume His Journey by virtue of the same ticket, the conductor may demand the regular fare, but before doing this, or expelling him for refusing to pay the same, must return to him the ticket which he has declined to honor.**<sup>4</sup>

**Substituting Another Person.**—And with greater reason the passenger cannot, instead of himself resuming his journey on a subsequent train, introduce some one else in his stead, and compel the carrier to complete the contract by carrying such other person on a subsequent train.<sup>5</sup>

**2. Tickets in Coupon Form—Exception.**—Tickets in coupon form, calling for transportation over connecting lines, are not within the operation of the foregoing principles. Each coupon is held to constitute a separate contract on the part of the company named therein, and entitles the holder to stop over at terminal points between the connecting lines, but he has no right to stop over at stations intermediate such terminal points.<sup>6</sup>

**1. Stop-over Privileges—California.**—Drew v. Central Pac. R. Co., 51 Cal. 425.

**Illinois.**—Churchill v. Chicago, etc., R. Co., 67 Ill. 390.

**Iowa.**—Stone v. Chicago, etc., R. Co., 47 Iowa 82, 29 Am. Rep. 458.

**Maryland.**—McClure v. Philadelphia, etc., R. Co., 34 Md. 532, 6 Am. Rep. 345.

**Massachusetts.**—Cheney v. Boston, etc., R. Co., 11 Met. (Mass.) 121, 45 Am. Dec. 190.

**Minnesota.**—Wyman v. Northern Pac. R. Co., 34 Minn. 210, 22 Am. & Eng. R. Cas. 402.

**New Hampshire.**—Johnson v. Concord R. Corp., 46 N. H. 213, 88 Am. Dec. 199.

**New Jersey.**—State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671.

**New York.**—Hamilton v. New York Cent. R. Co., 51 N. Y. 100; Barker v. Coffin, 31 Barb. (N. Y.) 556; Gale v. Delaware, etc., R. Co., 7 Hun (N. Y.) 670; Terry v. Flushing, etc., R. Co., 13 Hun (N. Y.) 359; Dunphy v. Erie R. Co., 42 N. Y. Super. Ct. 128; Beebe v. Ayres, 28 Barb. (N. Y.) 275.

**Ohio.**—Cleveland, etc., R. Co. v. Bartram, 11 Ohio St. 457; Hatten v. Straitsville Branch, etc., R. Co., 39 Ohio St. 375.

**Pennsylvania.**—Dietrich v. Pennsylvania R. Co., 71 Pa. St. 432, 10 Am. Rep. 711; Vankrik v. Pennsylvania R. Co., 76 Pa. St. 66, 18 Am. Rep. 404; Oil Creek, etc., R. Co. v. Clark, 72 Pa. St. 231.

**Tennessee.**—Louisville, etc., R. Co. v. Klyman, 108 Tenn. 304, 91 Am. St. Rep. 755.

**Texas.**—International, etc., R. Co. v. Ing, 29 Tex. Civ. App. 398; Gulf, etc., R. Co. v. Henry, 84 Tex. 678.

**Canada.**—Briggs v. Grand Trunk R. Co., 24 U. C. Q. B. 510; Craig v. Great Western R. Co., 24 U. C. Q. B. 504.

**"A Contrary Doctrine,"** says the court in Cleveland, etc., R. Co. v. Bartram, 11 Ohio St. 457, "would necessarily impose upon the carrier additional duties, the removal of baggage, as well as the passenger, from one train to another, and the consequent additional attention on the part of the company; also an increased risk of accidents, and a hindrance and delay not contemplated by a reasonable interpretation of their undertaking."

**If the Ticket Expressly Provides that the Trip Shall Be Continuous,** the stipulation is, of course, binding; it simply expresses the general rule of law on this subject. Barker v. Coffin, 31 Barb. (N. Y.) 556; Coombs v. Reg., 26 Can. Sup. Ct. 13.

**2. Terry v. Flushing, etc., R. Co., 13 Hun (N. Y.) 359.**

**3. Dice v. Willamette Transp., etc., Co., 8 Oregon 60, 34 Am. Rep. 575.**

**4. Vankirk v. Pennsylvania R. Co., 76 Pa. St. 66, 18 Am. Rep. 404.**

**5. Walker v. Wabash, etc., R. Co., 15 Mo. App. 333.**

**6. Coupon Tickets.**—Little Rock, etc., R. Co. v. Dean, 43 Ark. 529, 51 Am. Rep. 584, 21 Am. & Eng. R. Cas. 279; Brooke v. Grand Trunk R. Co., 15 Mich. 332; Auerbach v. New York Cent., etc., R. Co., 89 N. Y. 281, 42 Am. Rep. 290, 6 Am. & Eng. R. Cas. 334; Hamilton v. New York Cent. R. Co., 51 N. Y. 100; Nichols v. Southern Pac. R. Co., 23 Oregon 123, 37 Am. St. Rep. 664.

**Divisions of One System.** — And this is true with reference to the several divisions of a system owned or operated by one management.<sup>1</sup>

**Presumption.** — It has been said that the law having "attached to this class of tickets a peculiar significance, a company issuing them will be presumed to have intended that they should bear the construction which the law places upon them."<sup>2</sup>

**An Express Provision in Such a Ticket,** that passage must be continuous to the point of destination, would be binding on the passenger, and would take away his right to stop over.<sup>3</sup> But provisions on this subject must be clear, and when they are of doubtful import will be construed against the company, and the passenger will be held to have the right to stop over at terminal points.<sup>4</sup>

**3. Journey Interrupted by Accident.** — When the continuity of the journey is interrupted by misfortune or accident, without fault on the part of the passenger, he is entitled to continue his journey by another train.<sup>5</sup>

**4. Certain Provisions in Tickets Construed** — *a.* "CONTINUOUS PASSAGE." — The words "continuous passage" have been held to mean the continuous passage of the person to whom the ticket was issued, and not that of the train.<sup>6</sup>

*b.* "GOOD FOR ONE SEAT." — A ticket marked "good for one seat from A. to B." has been construed to mean "one seat" in the same train on which the holder takes passage, and that he is to be carried by that train only, and not by train after train, and by broken stages, day after day.<sup>7</sup>

**5. Right Given by Statute.** — In *Maine* there is a statute prohibiting railroad companies from denying to passengers stop-over privileges. But the statute has no extra-territorial operation,<sup>8</sup> though it applies to a foreign corporation while acting as a carrier in that state.<sup>9</sup> By statute in *California*, a passenger is entitled to stop over at any intermediate station and then resume his journey at any time within six months; and such right is unaffected by the circumstance that he selects the longer of the two routes open to him by the terms of his ticket.<sup>10</sup>

**6. Where Company Permits Stop-over** — *a.* **AUTHORITY OF AGENTS.** — The carrier may, of course, by special agreement, bind itself by the grant of the privilege of stopping over at an intermediate station. But in order to have this effect, the agreement must have been made by competent authority.<sup>11</sup>

1. *Spencer v. Lovejoy*, 96 Ga. 657, 51 Am. St. Rep. 152.

2. *Lumpkin, J.*, in *Spencer v. Lovejoy*, 96 Ga. 657, 51 Am. St. Rep. 152.

3. *Hutchinson on Carriers*, § 578.

4. *Auerbach v. New York Cent., etc.*, R. Co., 89 N. Y. 281, 42 Am. Rep. 290, 6 Am. & Eng. R. Cas. 334.

5. *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432, 10 Am. Rep. 711.

6. *Walker v. Wabash, etc.*, R. Co., 15 Mo. App. 341, 16 Am. & Eng. R. Cas. 380.

7. *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432, 10 Am. Rep. 711.

8. *Carpenter v. Grand Trunk R. Co.*, 72 Me. 388, 39 Am. Rep. 340, 3 Am. & Eng. R. Cas. 432; *Boston, etc., R. Co. v. Trafton*, 151 Mass. 229.

9. *Dryden v. Grand Trunk R. Co.*, 60 Me. 512.

10. *Robinson v. Southern Pac. R. Co.*, 105 Cal. 526. As to what is an "intermediate station" within the meaning of the statute (Civ. Code, § 490) see this case.

11. **Agency.** — *Petrie v. Pennsylvania R. Co.*, 42 N. J. L. 449, 1 Am. & Eng. R. Cas. 258;

*Tarbell v. Northern Cent. R. Co.*, 24 Hun (N. Y.) 51, the company in this latter case being held bound by the grant of the privilege by the conductor. And see *infra*, this title, *Representations, Promises, Waiver, and Modification*.

**Illustrations.** — It will not avail the passenger that he stopped over on the faith of representations made by an agent at a way station, the presumption being that such an agent has no authority to vary the regulations of the company; and the onus of rebutting this presumption is on the passenger. *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532, 6 Am. Rep. 345.

Nor has a freight agent authority to bind the company by assurances that one traveling on a drover's ticket may stop over at an intermediate station, he having nothing to do with the selling of the tickets. *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432, 10 Am. Rep. 711.

**Where the Passenger's Contract Included the Right to Stop Over** the fact that an intermediate conductor denied the right and, over the passenger's objection, took up his coupon and left him without any evidence of his right to resume his journey after stopping over, did not

*b. WHERE CONDITIONS ATTACHED.* — Some companies grant stop-over privileges, but annex thereto certain conditions precedent; for instance, requiring the passenger to obtain from the conductor, or other train officer, his indorsement of the ticket,<sup>1</sup> or a check,<sup>2</sup> evidencing the right; and if such condition is not observed, the company may refuse to honor the ticket for the remainder of the trip.

*c. WHEN PRIVILEGE EXHAUSTED.* — The privilege is, of course, exhausted by the expiration of the time for which it was granted,<sup>3</sup> or by one exercise thereof.<sup>4</sup>

*d. MAY REVOKE PRIVILEGE.* — Although it has been customary for the company to permit passengers to stop over at intermediate stations without forfeiting their right to resume travel on the same ticket, yet it may, at any time, make a regulation to the contrary, and it is held that passengers will be bound thereby, whether they have actual notice of it or not.<sup>5</sup>

**XV. TRANSFERS — 1. Power to Require of Company.** — The power to fix a maximum rate of fare carries as an incident the power to require tickets transferring passengers from one line to another of the same company.<sup>6</sup>

**2. Rule of Company Requiring Transfer Checks.** — The regulation of a street railroad company requiring passengers to obtain from conductors transfer checks is not unreasonable, and passengers must comply therewith in order to

give the conductor of another train the right to expel him. And the fact of such unwarranted action did not put an end to the plaintiff's rights so as to prevent him from suing for his ejection. *Scofield v. Pennsylvania R. Co.*, (C. C. A.) 112 Fed. Rep. 855.

**Where a Conductor, Acting Within the Scope of His Apparent Authority,** issues a stop-over ticket, the company is, it has been held, liable for the refusal of the second conductor to honor it, notwithstanding the first conductor acted contrary to the rules of the company, the passenger, however, having no knowledge of any such want of authority. *Ray v. Cortland, etc., Traction Co.*, 19 N. Y. App. Div. 530.

1. *Beebe v. Ayres*, 28 Barb. (N. Y.) 275.

**2. Conductor's Check.** — *Dixon v. New England R. Co.*, 179 Mass. 242; *Breen v. Texas, etc., R. Co.*, 50 Tex. 43; *Dunphy v. Erie R. Co.*, 42 N. Y. Super. Ct. 128; *Yorton v. Milwaukee, etc., R. Co.*, 54 Wis. 234, 41 Am. Rep. 23, 6 Am. & Eng. R. Cas. 322. In this last case the passenger requested of the conductor a lay-over check, but was given by mistake a trip check; upon presentation of this to the conductor of a subsequent train, it was refused, and the passenger ejected. The ejection was held lawful, but the company liable for the error of the first conductor.

But in *Palmer v. Charlotte, etc., R. Co.*, 3 S. Car. 580, 16 Am. Rep. 750, under somewhat similar circumstances, the railroad was held liable for the expulsion.

The conductor's check will not avail the passenger, unless it contains a clause expressly authorizing the privilege, such check, in the ordinary form, being regarded as a mere certificate of the fact of payment of fare or surrender of the regular ticket. *McClure v. Philadelphia, etc., R. Co.*, 34 Md. 532, 6 Am. Rep. 345; *State v. Overton*, 24 N. J. L. 435, 61 Am. Dec. 671; *Stone v. Chicago, etc., R. Co.*, 47 Iowa 82, 29 Am. Rep. 458; *Cheney v. Boston, etc., R. Co.*, 11 Met. (Mass.) 121, 45 Am. Dec. 190; *Breen v. Texas, etc., R. Co.*, 50

Tex. 43; *Wyman v. Northern Pac. R. Co.*, 34 Minn. 210, 22 Am. & Eng. R. Cas. 402.

3. Thus, a conductor's check authorizing a lay-over for thirty days must be presented within that time, in order to be available. *Churchill v. Chicago, etc., R. Co.*, 67 Ill. 390. See also *Wentz v. Erie R. Co.*, 3 Hun (N. Y.) 241.

4. *Denny v. New York Cent., etc., R. Co.*, 5 Daly (N. Y.) 50.

5. **Withdrawal of Privilege.** — *Johnson v. Concord R. Corp.*, 46 N. H. 213, 88 Am. Dec. 199.

At the time and on account of the ticket agent's statement that the passenger would be allowed to stop over, and that the conductor would give him the proper check, he purchased a ticket, paying full fare therefor. The conductor refused to give the check, saying that his orders were not to give any more stop-over checks. Still the passenger was permitted to retain his ticket, and after stopping over he presented it but it was refused. It was held that the conductor, having been informed of the representations of the ticket agent, could not repudiate the contract so made, without at least paying back the surplus money or deducting it from the fare claimed. *Burnham v. Grand Trunk R. Co.*, 63 Me. 298, 18 Am. Rep. 220.

**6. System of Transfers.** — *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484.

But in *Old Colony Trust Co. v. Atlanta*, 83 Fed. Rep. 39, affirmed (C. C. A.) 88 Fed. Rep. 859, it was questioned (though not decided), that power given to a city to regulate or fix rates of fare for street railroads, or for a particular company, would carry the power to provide a compulsory system of transfers.

**Mandamus to Compel Issuance of Transfer.** — *Richmond R., etc., Co. v. Brown*, 97 Va. 26.

**Where One Corporation Legal Owner of One Line and Beneficial Owner of Another Line — Ordinance as to Transfers Applicable.** — *Chicago Union Traction Co. v. Chicago*, 199 Ill. 579.



be entitled to passage, and this is so where the charter provides for passage over two lines for one fare.<sup>1</sup> Where it has been the custom of a street car company to permit passengers to transfer without a token of any kind, it may not, because it has changed the practice, expel a passenger who is without the required transfer check, when it has failed to give notice of the change.<sup>2</sup>

**3. Right to Impose Time Limit.** — Where a street car company is not obligated by contract, charter, or ordinance to give transfers, it may make and enforce a regulation that a transfer shall not be honored unless presented within fifteen minutes after being given to the passenger. Should no car pass within that time, and the passenger be ejected from the first one to pass, for refusal to pay another fare, the company will be liable.<sup>3</sup> And if, under the law, passengers on street car lines are entitled to transfers for "one continuous trip," it is not competent for the company to limit the time in which the transfer must be used regardless of the accommodations offered, but the passenger may wait until such time as he shall be provided with a seat, before continuing his journey without additional charge.<sup>4</sup>

**4. Inspection of Transfer Checks.** — It has been held to be the duty of a passenger to read his transfer ticket, and his failure to do so will not give him any rights against the company which he would not have had, had he read it and thus been informed of the time limit which it bore.<sup>5</sup> But a condition on a transfer check that the passenger "shall examine date, time, and direction," as indicated by the conductor's punch marks, and see "that the same are correct," is unreasonable where the time at his command is brief and the system complicated.<sup>6</sup> Where the conductor of a street car delays complying with the request of a passenger for a transfer check until the latter is on the point of leaving the car, a stipulation on the check requiring the passenger to examine the latter and see that it is all right is, under the circumstances, unreasonable and not binding upon him.<sup>7</sup>

**5. Delay on Account of Accident.** — The fact that the car upon which the plaintiff was being carried becomes disabled, and the company refuses to transfer him to another car for the original fare, does not entitle the plaintiff to transfer himself to another car and continue his journey without paying a second fare, and if he is expelled therefor he can recover only for the breach of contract to carry within a reasonable time.<sup>8</sup>

**The New York Statute** providing for a continuous trip for one fare does not apply to routes or roads leased from steam railroad companies. *McNulty v. Brooklyn Heights R. Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 402, following *Barnett v. Brooklyn Heights R. Co.*, 53 N. Y. App. Div. 432; *Roosa v. Brooklyn Heights R. Co.*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 387.

**The Language of the Statute**, "Embraced in Such Contract," *Construed.* — *Mendoza v. Metropolitan St. R. Co.*, 48 N. Y. App. Div. 62, affirmed 51 N. Y. App. Div. 430.

**Provision that Passengers on County Extension After Being Transferred to Main Line Should Have All Privileges of Passengers on Main Line, Construed.** — *Richmond R., etc., Co. v. Brown*, 97 Va. 26.

**Ordinance Regulating Issuance and Use of Transfer Checks.** — An ordinance having for its primary purpose the advancement of the convenience and welfare of the public by correcting and preventing abuses in the transfer system, which requires transfers to be issued and delivered upon the car from which the passenger is transferred, and received only upon the car to which he is transferred, and for

bidding him, under penalty, from giving away or selling the transfer check issued to him, is unobjectionable. *Ex p. Lorenzen*, 128 Cal. 431, 79 Am. St. Rep. 47.

1. *Percy v. Metropolitan St. R. Co.*, 58 Mo. App. 75.

2. *Consolidated Traction Co. v. Taborn*, 58 N. J. L. 1.

3. *Heffron v. Detroit City R. Co.*, 92 Mich. 406, 31 Am. St. Rep. 601.

4. *Jenkins v. Brooklyn Heights R. Co.*, 29 N. Y. App. Div. 8.

5. *Heffron v. Detroit City R. Co.*, 92 Mich. 406, 31 Am. St. Rep. 601.

6. *O'Rourke v. Citizens' St. R. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639.

7. *Laird v. Pittsburg Traction Co.*, 166 Pa. St. 4.

8. **Delay Through Accident.** — *Taylor v. Nassau Electric R. Co.*, 32 N. Y. App. Div. 486. Compare *Wilsey v. Louisville, etc., R. Co.*, 83 Ky. 511, 12 S. W. Rep. 275, 39 Am. & Eng. R. Cas. 418.

**Connecting Lines of Steam Railroads.** — In *Watkins v. Pennsylvania R. Co.*, 21 D. C. 1, it was held that where a ticket is purchased for a continuous passage over different roads from

**6. Provision for Second Fare in Case of Dispute.** — A condition on a street car transfer check which requires the passenger, in case of controversy with the conductor about the check and its refusal, to pay the conductor the regular fare and apply at the company's office for a refund within three days, is unreasonable, in that it "places the entire burden of the company's negligence upon the innocent passenger."<sup>1</sup>

**7. Wrong Transfer Check — Amount of Recovery.** — Where a street car conductor made a mistake in the giving of a transfer, and in consequence the passenger was compelled to pay additional fare, the amount of his recovery is what he had to pay over and above the customary rate, in the absence of circumstances of aggravation.<sup>2</sup>

**8. Duty to Awaken Passenger.** — It is the duty of the railroad company to awaken seasonably a passenger who has a sleeping-car ticket to an intermediate point on its line, so that he may safely and comfortably prepare to make the change and continue his journey to the point on the line called for by his passenger ticket.<sup>3</sup>

**XVI. TICKETS OVER CONNECTING LINES — 1. Obligation to Honor Tickets of Another Company.** — In the Absence of a Special Arrangement between companies operating connecting lines, there is no obligation on the part of one company to honor tickets or coupons issued by another.<sup>4</sup>

Where by Agreement Between Two Companies each is constituted the agent of the other in the sale of mileage tickets good over both lines, neither may repudiate a ticket over its line sold by the other, on account of the subsequent abrogation of the agreement.<sup>5</sup>

**2. Nature and Extent of Liability** — *a. OF INITIAL LINE* — (1) *Rule of Liability Throughout.* — The conclusions as to the liability of a carrier selling a through ticket over several connecting roads to a point beyond its own line are by no means harmonious. The *English* doctrine,<sup>6</sup> and that of some of the courts in the *United States*,<sup>7</sup> is, that the carrier is liable for the performance of the contract of transportation through to the point of destination.

(2) *Rule of No Extra-terminal Liability* — (a) *Statement of Rule.* — But the doctrine founded in reason and perhaps favored by the weight of authority

one point to another, if by reason of any accident, or from any cause whatever not by the default or wrong of the passenger, a company is prevented from making connections and keeping to the letter of its contract in carrying him to his destination, and he is left over, the law is that he has a right to go upon the first train of that company to his point of destination. See also *Tyler v. Pennsylvania R. Co.*, 18 App. Cas. (D. C.) 31.

1. *O'Rourke v. Citizens' St. R. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639.

2. *Carr v. Toledo Traction Co.*, 10 Ohio Cir. Dec. 296, 19 Ohio Cir. Ct. 281.

3. *McKeon v. Chicago, etc., R. Co.*, 94 Wis. 477, 59 Am. St. Rep. 909. And see the title *SLEEPING-CAR COMPANIES*, vol. 25, p. 1115.

4. *Oregon Short Line, etc., R. Co. v. North-pac. R. Co.*, 51 Fed. Rep. 465.

5. *Cowen v. Winters, (C. C. A.)* 96 Fed. Rep. 929.

Where one company was authorized by another to issue tickets for use on the latter's line, a person who, with knowledge of the fact and in reliance upon the agent's authority, purchases a ticket may hold the principal, even after the withdrawal of the agent's authority, no notice of such revocation having been given. *Pittsburgh, etc., R. Co. v. Berryman*, 11 Ind. App. 640.

**Thousand-mile Ticket over Two Divisions — Specified Number of Miles on One Division Exhausted — No Right Thereafter on Such Division by Virtue of Ticket.** — *Terre Haute, etc., R. Co. v. Fitzgerald*, 47 Ind. 79.

**Railroad in Receiver's Hands — Agency of Initial Company for Receiver in Selling Through Coupon Tickets.** — *Spencer v. Lovejoy*, 96 Ga. 657, 51 Am. St. Rep. 152.

**6. View that Carrier Liable for Entire Trip.** — *Mytton v. Midland R. Co.*, 4 H. & N. 615; *Great Western R. Co. v. Blake*, 7 H. & N. 987; *Bristol, etc., R. Co. v. Collins*, 7 H. L. Cas. 194; *Buxton v. North Eastern R. Co.*, L. R. 3 Q. B. 549; *Kent v. Midland R. Co.*, L. R. 10 Q. B. 1.

**7. District of Columbia.** — *Croft v. Baltimore, etc., R. Co.*, 1 MacArthur (D. C.) 492.

*Georgia.* — *Wolff v. Central R. Co.*, 68 Ga. 653, 45 Am. Rep. 501, 6 Am. & Eng. R. Cas. 44; *Central R. Co. v. Combs*, 70 Ga. 533, 48 Am. Rep. 582, 18 Am. & Eng. R. Cas. 298.

*Illinois.* — *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 337, 76 Am. Dec. 749.

*New York.* — *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333, affirming 29 Barb. (N. Y.) 491; *Weed v. Saratoga, etc., R. Co.*, 10 Wend. (N. Y.) 534; *Ward v. Vanderbilt*, 4 Abb. App. Dec. (N. Y.) 521; *Burnell v. New*

is, that, in the absence of contract making it responsible, the carrier in selling the ticket acts merely as the agent of the other lines, and there is no extra-terminal liability, the rights of the passenger, and the duty and responsibility of the several companies over whose roads he is entitled to passage, being the same as if he had purchased a ticket at the office of each of the companies constituting the through line.<sup>1</sup> The ticket may, of course, contain a provision negating that the company contracts for the entire journey, in which case its liability would be confined to its own line,<sup>2</sup> unless the act complained of was committed by one of its own officers or employees acting within the general scope of his authority at the time.<sup>3</sup> But, according to the view last

York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61; Cary v. Cleveland, etc., R. Co., 29 Barb. (N. Y.) 35; Van Buskirk v. Roberts, 31 N. Y. 661.

Tennessee. — Carter v. Peck, 4 Sneed (Tenn.) 203, 67 Am. Dec. 604.

Virginia. — Wilson v. Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654.

Wisconsin. — Candee v. Pennsylvania R. Co., 21 Wis. 582, 94 Am. Dec. 566.

A carrier "may define the terms and limit the extent of its undertaking over other lines, inasmuch as may be required to leave upon them the responsibilities of their own negligence." Harris v. Howe, 74 Tex. 534.

In Gulf, etc., R. Co. v. Cole, 8 Tex. Civ. App. 635, distinguishing Gulf, etc., R. Co. v. Ions, 3 Tex. Civ. App. 619, it was held that where the shipment is over several lines but the initial carrier's liability for the stock is by contract limited to its own line, nevertheless its liability to the drover for personal injuries extends over the entire journey, unless its contract expressly restricts its liability to its own line.

**1. View of No Extra-terminal Liability —**  
*United States.* — Pennsylvania R. Co. v. Jones, 155 U. S. 333.

California. — Lundy v. Central Pac. R. Co., 66 Cal. 191, 56 Am. Rep. 100, 18 Am. & Eng. R. Cas. 309.

Connecticut. — Hood v. New York, etc., R. Co., 22 Conn. 1.

District of Columbia. — Tyler v. Pennsylvania R. Co., 18 App. Cas. (D. C.) 31; Howard v. Chesapeake, etc., R. Co., 11 App. Cas. (D. C.) 300.

Illinois. — Pennsylvania R. Co. v. Connell, 112 Ill. 295, 54 Am. Rep. 238; Chicago, etc., R. Co. v. Mulford, 162 Ill. 522, reversing 59 Ill. App. 479; Chicago, etc., R. Co. v. Fahey, 52 Ill. 81, 4 Am. Rep. 587; Chicago, etc., R. Co. v. Dumser, 161 Ill. 190.

Maine. — Knight v. Portland, etc., R. Co., 56 Me. 235, 96 Am. Dec. 449.

Massachusetts. — Hartan v. Eastern R. Co., 114 Mass. 44.

New York. — Poole v. Delaware, etc., R. Co., 35 Hun (N. Y.) 29; Milnor v. New York, etc., R. Co., 53 N. Y. 365; Kessler v. New York Cent., etc., R. Co., 61 N. Y. 538.

Pennsylvania. — Young v. Pennsylvania R. Co., 115 Pa. St. 112, 28 Am. & Eng. R. Cas. 114; Pennsylvania Cent. R. Co. v. Schwarzenberger, 45 Pa. St. 208, 84 Am. Dec. 490.

Tennessee. — Furstenheim v. Memphis, etc., R. Co., 9 Heisk. (Tenn.) 238; Nashville, etc., R. Co. v. Sprayberry, 9 Heisk. (Tenn.) 852.

Vermont. — Sprague v. Smith, 29 Vt. 421, 70 Am. Dec. 424.

**Statements of Rule — Illustrations.** — In Hartan v. Eastern R. Co., 114 Mass. 44, it was said: "The obvious import of such a transaction is that the tickets for passage upon roads beyond its own line are sold by the first road as agent for the others. The obligations and responsibilities of a carrier of persons over other roads than its own are not thereby assumed, unless its relation to those roads, by contract or otherwise, is such as to confer, or at least to consist with, that character."

In the absence of a special contract, the law does not imply anything more than an undertaking coextensive with the carrier's ownership and control. Talcott v. Wabash R. Co., 159 N. Y. 461.

The sale of a ticket to a point on a connecting line is not in itself an assurance that the train will stop at such place or that the holder will be carried through to his destination without change of cars. Atchison, etc., R. Co. v. Cameron, (C. C. A.) 66 Fed. Rep. 709.

Nor is there an undertaking that the ticket will be honored by the roads, respectively, over whose lines it purports to give a right to transportation, so as to make the issuing company liable, when one of the other companies is subsequently put in the hands of a federal receiver, who is directed by the court not to honor the ticket. Chicago, etc., R. Co. v. Mulford, 162 Ill. 522, reversing 59 Ill. App. 479, and distinguishing Illinois Cent. R. Co. v. Copeland, 24 Ill. 332, 76 Am. Dec. 749.

But in Mexican Cent. R. Co. v. Goodman, (Tex. Civ. App. 1897) 43 S. W. Rep. 580, it was held that if one company has the authority or apparent authority to issue tickets for transportation over its own and connecting lines, and the purchaser does not know of a want of authority for their issuance, and is not chargeable by the facts and circumstances therewith, he acquires the right to be carried on the ticket.

**2. St. Clair v. Kansas City, etc., R. Co., 77 Miss. 789,** wherein the ticket recited: "In selling this ticket this company acts only as agent, and is not responsible beyond its own line."

In Alabama, etc., R. Co. v. Holmes, 75 Miss. 371, it was held that where the initial carrier's liability is expressly limited to its own line, it is not liable for a wrongful ejection by the conductor of a connecting line, because of a mistake in the ticket issued by the former over the route of the two lines.

**3. Pennsylvania R. Co. v. Spicker, 105 Pa. St. 142.**



stated, this is unnecessary, as it is never necessary to insert in a contract that which the law implies.<sup>1</sup>

(b) **Power to Assume Liability Throughout.** — It has been sometimes urged that a contract by a carrier for the transportation of passengers beyond its own line is *ultra vires*. But this view has not been favorably received; the established doctrine being that a carrier may lawfully make such a contract,<sup>2</sup> and thus become liable for the acts and neglects of other carriers in no wise under its control.<sup>3</sup> And the validity of the contract is not affected by the fact that it is to be, in part, performed beyond the territorial limits of the state within which the company is incorporated.<sup>4</sup> Where a carrier sells tickets over another line connecting with its own, and agrees to engage berths over the latter, it is liable in damages for its failure to do so.<sup>5</sup>

(c) **When Liability Throughout Considered Assumed** — *aa. AGREEMENT MUST BE CLEAR AND EXPLICIT.* — An agreement on the part of the initial carrier to extend its liability beyond its own line will not be implied from doubtful expressions or loose language, but only from clear and satisfactory evidence.<sup>6</sup>

"Issued by," etc. — It is a very general custom for tickets over several connecting lines to bear the statements, "issued by" (followed by the name of the selling company), and "good for one first-class passage;" and it would seem that such phrases could not have the effect of imposing an extraordinary liability. In one instance the point was seriously contended for by counsel, only to be rejected by the court as possessing little merit.<sup>7</sup>

*bb. PARTNERSHIP ARRANGEMENT.* — It is universally agreed that if the arrangement existing between the associated lines of carriers amounts to a partnership, each will be liable to the passenger for losses or injuries occurring anywhere along the line of transportation; but the arrangement must be in reality a partnership, with the incident of community of profit and loss.<sup>8</sup> The fact that each sells through tickets, deducting its own share of the price paid for

1. Chicago, etc., R. Co. v. Mulford, 162 Ill. 522, reversing 59 Ill. App. 479.

2. **Power to Assume Unusual Liability** — *Illinois.* — Pennsylvania R. Co. v. Connell, 112 Ill. 295, 54 Am. Rep. 238, 18 Am. & Eng. R. Cas. 339; Chicago, etc., R. Co. v. Dumser, 161 Ill. 190.

*Massachusetts.* — Najac v. Boston, etc., R. Co., 7 Allen (Mass.) 329, 83 Am. Dec. 686.

*New York.* — Talcott v. Wabash R. Co., 159 N. Y. 461; Bussman v. Western Transit Co., (Buffalo Super. Ct. Gen. T.) 9 Misc. (N. Y.) 410; Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469; Buffett v. Troy, etc., R. Co., 40 N. Y. 168; Bissell v. Michigan Southern, etc., R. Co., 22 N. Y. 258. See also Swift v. Pacific Mail Steamship Co., 106 N. Y. 206, 30 Am. & Eng. R. Cas. 105.

*Virginia.* — Wilson v. Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654.

See generally the title *ULTRA VIRES*.

3. Wheeler v. San Francisco, etc., R. Co., 31 Cal. 46, 89 Am. Dec. 147.

4. Candee v. Pennsylvania R. Co., 21 Wis. 582, 94 Am. Dec. 566; Cary v. Cleveland, etc., R. Co., 29 Barb. (N. Y.) 35; Nashville, etc., R. Co. v. Sprayberry, 9 Heisk. (Tenn.) 852.

5. Bussman v. Western Transit Co., 71 Fed. Rep. 654. See also the title *SLEEPING-CAR COMPANIES*, vol. 25, p. 1124.

6. **Agreement Must Be Clear.** — Pennsylvania R. Co. v. Jones, 155 U. S. 333; Tyler v. Pennsylvania R. Co., 18 App. Cas. (D. C.) 31; Howard v. Chesapeake, etc., R. Co., 11 App. Cas. (D. C.) 300; Talcott v. Wabash R. Co., 159

N. Y. 461, quoting Myrick v. Michigan Cent. R. Co., 107 U. S. 107.

In Chicago, etc., R. Co. v. Dumser, 161 Ill. 190, the court, while approving the rule of no extra-terminal liability, held that, upon the evidence (consisting, among other things, of posters and time-tables), the carrier must in this case be considered as having assumed liability for the whole trip.

In Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. Dec. 469, it was held that whether one of several connecting lines contracts as principal for the carriage of passengers over the entire route is a matter to be determined by evidence. See also Talcott v. Wabash R. Co., 159 N. Y. 461, modifying 89 Hun (N. Y.) 492; Najac v. Boston, etc., R. Co., 7 Allen (Mass.) 329, 83 Am. Dec. 686.

7. Chicago, etc., R. Co. v. Mulford, 162 Ill. 522. Compare Wilson v. Chesapeake, etc., R. Co., 21 Gratt. (Va.) 654.

8. **Partnership.** — Waland v. Elkins, 1 Stark. 272, 2 E. C. L. 109; Laughter v. Pointer, 5 B. & C. 547, 12 E. C. L. 311; Fromont v. Coupland, 2 Bing. 170, 9 E. C. L. 366; Wylde v. Northern R. Co., 53 N. Y. 157; Cobb v. Abbot, 14 Pick. (Mass.) 289; Fay v. Davidson, 13 Minn. 523.

**The Leading Case upon This Subject** in this country is that of Bostwick v. Champion, 11 Wend. (N. Y.) 571, 18 Wend. (N. Y.) 175, 31 Am. Dec. 376, the facts of which were as follows: Three persons ran a line of stage coaches from Utica to Rochester, the route being divided between them into three sections,

the same, and accounting to the other companies for their shares, the price being fixed according to a tariff established by each company as to its own road, may resemble but certainly does not constitute a partnership.<sup>1</sup> Nor will the mere appointment of a common agent at each end of the route to receive fares and issue through tickets have such an effect.<sup>2</sup>

*b. OF INTERMEDIATE LINE.*—Whatever may be the correct rule as to the responsibility of the initial carrier, in any event the holder of such a ticket, if injured at some point beyond the line of the selling company, may elect to proceed against the company through the fault of which he was injured.<sup>3</sup>

**XVII. PASSENGERS ON FREIGHT TRAINS**—1. **Measure of Care.**—When freight trains are equipped for the carriage of passengers, and tickets are sold for such trains, the carrier owes to the passengers thereon the same measure of care as in case of those on ordinary passenger trains.<sup>4</sup>

2. **Risks Assumed.**—At the same time, passengers on freight trains assume such risks of injury and discomfort as are incident to such mode of transportation, the carrier using reasonable prudence and skill.<sup>5</sup>

3. **Rule Requiring Ticket or Permit.**—It is a reasonable regulation to require persons wishing to take passage on freight trains to pay fare or procure a ticket<sup>6</sup> or a special permit<sup>7</sup> in advance. Of course this right carries with it the duty on the part of the carrier to afford reasonable facilities for compliance.<sup>8</sup>

4. **Contract Requiring Shipper to Remain in Caboose.**—A written contract with the carrier, signed by a shipper of live stock, providing that while being

the occupant of each section furnishing his own carriages and horses, hiring drivers, and paying the expenses of his own section; but the money received as fare of passengers, deducting therefrom only the tolls paid at turn-pike gates, was divided among the parties in proportion to the number of miles of the route run by each; this was held to be such a division of the profits among the proprietors of the several sections as to make them partners as to third persons.

But Chancellor Walworth, who gave the only written opinion in the Court of Errors (*Champion v. Bostwick*, 18 Wend. (N. Y.) 175, 31 Am. Dec. 376), said: "The case would be entirely different, if each stage owner was to receive and retain the passage money earned on his part of the line, and to sustain all the expenses thereof, and was only to act as agent of the others in receiving the passage money for them for the transportation of passengers over their parts of the line. In that case, there would be no joint interest, and no liability to third persons as partners."

1. **Joint Traffic Arrangements.**—*Pennsylvania R. Co. v. Jones*, 155 U. S. 333; *Chicago, etc., R. Co. v. Mulford*, 162 Ill. 522; *Croft v. Baltimore, etc., R. Co.*, 1 MacArthur (D. C.) 492; *Straiton v. New York, etc., R. Co.*, 2 E. D. Smith (N. Y.) 184; *Hartan v. Eastern R. Co.*, 114 Mass. 44.

2. **Common Agents.**—*Ellsworth v. Tartt*, 26 Ala. 733, 62 Am. Dec. 749; *Briggs v. Vanderbilt*, 19 Barb. (N. Y.) 222; *Bonsteel v. Vanderbilt*, 21 Barb. (N. Y.) 26.

Where several connecting lines have a common agent who issues to a person a ticket over a line different from the one asked for, the carrier on whose line transportation was asked for, and not the one whose line the ticket was by mistake sold for, is liable for the agent's act. *Scott v. Cleveland, etc., R. Co.*, 114 Ind. 125.

**Identity of Management, Employees, etc.—Liability Extends over Whole Route.**—*Howe v. Gibson*, 3 Tex. Civ. App. 263.

3. *Chicago, etc., R. Co. v. Fahey*, 52 Ill. 81, 4 Am. Rep. 587; *Schopman v. Boston, etc., R. Co.*, 9 Cush. (Mass.) 24, 55 Am. Dec. 41; *Glasco v. New York Cent. R. Co.*, 36 Barb. (N. Y.) 557. And see the cases throughout this section.

4. **Tickets for Freight Trains.**—*Sprague v. Southern R. Co.*, (C. C. A.) 92 Fed. Rep. 59; *Central of Georgia R. Co. v. Lippman*, 110 Ga. 665; *Ball v. Mabry*, 91 Ga. 782. See also the title *CARRIERS OF PASSENGERS*, vol. 5, p. 606.

5. *Steele v. Southern R. Co.*, 55 S. Car. 389, 74 Am. St. Rep. 756; *Central of Georgia R. Co. v. Lippman*, 110 Ga. 665; *Ball v. Mabry*, 91 Ga. 782.

6. **Procurement of Ticket.**—*Lake Shore, etc., R. Co. v. Greenwood*, 79 Pa. St. 373; *Reese v. Pennsylvania R. Co.*, 131 Pa. St. 422, 17 Am. St. Rep. 818; *Cross v. Kansas City, etc., R. Co.*, 56 Mo. App. 664; *Chicago, etc., R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133. See also *Jones v. Wabash, etc., R. Co.*, 17 Mo. App. 158.

**Payment of Fare or Procurement of Ticket.**—*Cleveland, etc., R. Co. v. Bartram*, 11 Ohio St. 457.

7. **Special Permit.**—*Ellis v. Houston East, etc., R. Co.*, 30 Tex. Civ. App. 172.

In *Houston, etc., R. Co. v. Jackson*, (Tex. Civ. App. 1901) 61 S. W. Rep. 440, it was held that where the ticket agent, at the time of sale, in response to the purchaser's request for the required permit, told him the conductor would furnish it, and the latter refused to do so, the company was liable for the ejection of the passenger because without a permit.

8. *Cross v. Kansas City, etc., R. Co.*, 56 Mo. App. 664; *Chicago, etc., R. Co. v. Flagg*, 43 Ill. 364, 92 Am. Dec. 133.

carried upon the train transporting his stock, he shall remain in the caboose car when it is moving, is valid and binding upon the parties thereto.<sup>1</sup>

**XVIII. PASSES — 1. Assent to Conditions.** — One who receives and uses a pass to procure free transportation is held to have assented to the conditions indorsed thereon as fully as though he had signed the same.<sup>2</sup>

**2. Contract for "Free Carriage" — Application for Pass.** — Where the company engages that a person shall be "carried free of charge," he is under no duty to apply for a pass, and if none is furnished him he is entitled to be carried without one.<sup>3</sup>

**3. Contract to Issue — a. VALIDITY OF CONTRACT FOR LIFE PASS.** — A contract based upon a good consideration, to grant a life pass, is valid and binding upon the company, and for its refusal to perform the same the company may be held liable in damages.<sup>4</sup>

Receivers of a Railroad cannot make an agreement for a free life pass which will bind subsequent owners of the road.<sup>5</sup>

**b. NATURE OF CONTRACT FOR LIFE PASS, ANNUALLY.** — A contract to issue or procure the issuance of railway passes, annually, through the life of the promisee, is not an entire contract but divisible by yearly renewals, and the measure of damages for the breach of the same is the value of the transportation to such promisee during the years the breach has occurred, and it may be sued upon for each successive breach.<sup>6</sup> But the injured party may not charge the violation of obligations which have not yet matured and anticipate the injuries he may sustain thereby.<sup>7</sup>

**4. Renewals.** — Where, upon the expiration of the first pass, application for a renewal was made, but a second renewal was not applied for, it was held to be for the jury to say whether an application was, under the circumstances, necessary or not.<sup>8</sup>

**5. Right of Passage over Lines Subsequently Acquired.** — Where, in consideration of the grant of certain water rights, the company covenanted that the grantor should "be entitled forever hereafter to ride without charge upon the trains of the said company," he has no right, under the contract, to travel free on a road subsequently leased and operated in connection with the original line.<sup>9</sup>

**6. Pass Issued to Firm.** — Where the expressed consideration of the contract is "a ticket entitling either one of a firm, but only one, on any train, to a seat in its passenger trains," the right to carriage is restricted to one member at a time, who is to present the ticket as evidence of such right.<sup>10</sup>

**7. Interstate Commerce Act.** — The application of this legislation to the subject of passes has already been fully treated.<sup>11</sup>

**8. Custom Not to Issue Passes — Gratuitous Passengers.** — When the company makes it a rule to issue no free passes, it is its duty to inform the conductors of the rights of parties who are entitled to be carried free of charge, and to instruct them to allow the same.<sup>12</sup>

1. *Ft. Scott, etc., R. Co. v. Sparks*, 55 Kan. 288.

2. *Gulf, etc., R. Co. v. McGown*, 65 Tex. 640, 26 Am. & Eng. R. Cas. 274. And see the title CARRIERS OF PASSENGERS, vol. 5, p. 508.

3. "Free Carriage." — *Grimes v. Minneapolis, etc., R. Co.*, 37 Minn. 66, 31 Am. & Eng. R. Cas. 123.

4. *Contract for Life Pass.* — *Erie, etc., R. Co. v. Doughtnet*, 88 Pa. St. 243, 32 Am. Rep. 451.

5. *Power of Receivers.* — *Martin v. New York, etc., R. Co.*, 36 N. J. Eq. 109, 12 Am. & Eng. R. Cas. 448.

6. *Curry v. Kansas, etc., R. Co.*, 58 Kan. 6,

7. *Curry v. Kansas, etc., R. Co.*, 58 Kan. 61,

*Kansas, etc., R. Co. v. Curry*, 6 Kan. App. 561.

8. *Knopf v. Richmond, etc., R. Co.*, 85 Va. 769, 37 Am. & Eng. R. Cas. 140.

9. *Western Maryland R. Co. v. Lynch*, 82 Md. 233.

10. *Knopf v. Richmond, etc., R. Co.*, 85 Va. 769, 37 Am. & Eng. R. Cas. 140. The question here was as to a pass, but the word "ticket" is used. And see *supra*, this title, *Transferability of Tickets — Ticket Intended for Several Persons*.

11. See the title INTERSTATE COMMERCE, vol. 17, p. 34.

12. *Grimes v. Minneapolis, etc., R. Co.*, 33 Minn. 66, 31 Am. & Eng. R. Cas. 123.



**9. Passes Forbidden by Law** — *a. To PUBLIC OFFICERS* — (1) *Scope and Purpose of Prohibition.* — In some of the states, public officers are, by the constitution, prohibited from soliciting, accepting, or using free passes. The clause of the *New York Constitution*, which may be regarded as typical of these inhibitions, is as follows: "No public officer, or person elected or appointed to a public office, under the laws of this state, shall directly or indirectly ask, demand, accept, receive, or consent to receive, for his own use or benefit or for the use or benefit of another, any free pass \* \* \* from any corporation, or make use of the same himself or in conjunction with another."<sup>1</sup>

The Obvious Purpose of such provisions is to prohibit public officers from receiving from corporations privileges or favors — in other words, gifts — that may improperly influence them in the discharge of their official duties.<sup>2</sup>

(2) *What Officers Within Prohibition.* — A railroad policeman, appointed by the governor, and required to take the constitutional oath, and by virtue of his appointment authorized to perform the duties of a peace officer in protecting the property of the railroad company, and that of the general public in its custody, is a public officer within the provision of the *New York Constitution*.<sup>3</sup> So, also, are a notary public,<sup>4</sup> and the officers and agents of the state railroad commission.<sup>5</sup>

(3) *Contractual Relations Between Officer and Carrier.* — The private contractual relations between a public officer and a corporation may be such as to distinguish the case from that of an ordinary public officer, so as to make legal the issue of a pass.<sup>6</sup>

(4) *What Passes Within Prohibition* — (a) *Pass upon Full Consideration.* — When the prohibition is against "free passes," only, a pass for which a full consideration is rendered is not unlawful.<sup>7</sup>

(b) *Pass from Secretary of State to Railroad Commissioners.* — The *New York* constitutional provision does not prevent the officers and agents of the state railroad commission from accepting passes from the secretary of state for transportation while engaged in public business, as provided by the General Railroad Law, since this clause of the constitution must not only be construed in the light of existing statutes, but it will be presumed that it was drafted with full recognition of them.<sup>8</sup>

(c) *Pass Issued Before Prohibition Operative.* — Where a public officer is prohibited from making use of a pass as well as from receiving one, he may not avail himself of a pass notwithstanding it was issued before the constitutional provision became operative.<sup>9</sup>

*b. STATUS OF PERSON TRAVELING ON PROHIBITED PASS.* — When by law railroad companies are prohibited from issuing free passes, a person who travels upon a pass unlawfully issued to him does not thereby become a trespasser; if the pass is unlawful, the conductor should demand the regular fare, and his failure to do so will not make the traveler a trespasser, nor destroy his rights as a passenger.<sup>10</sup>

**10. Measure of Care Toward Holder of Pass.** — The holder of a free pass is entitled to the same measure of care from the company as a passenger paying full fare.<sup>11</sup>

1. Const. N. Y., art. 13, § 5.

2. See *Dempsey v. New York Cent., etc., R. Co.*, 146 N. Y. 290.

3. *Dempsey v. New York Cent., etc., R. Co.*, 146 N. Y. 290.

4. *People v. Rathbone*, 145 N. Y. 434.

5. *Matter of Railroad Com'rs*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 103.

6. *Dempsey v. New York Cent., etc., R. Co.*, 146 N. Y. 290, the court saying: "The distinguishing feature in this case is that the plaintiff is a public officer whose only duty to

the public is limited and defined by his contract with the defendant."

7. *Dempsey v. New York Cent., etc., R. Co.*, 146 N. Y. 290.

8. *Matter of Railroad Com'rs*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 103.

9. *People v. Rathbone*, 145 N. Y. 434.

10. *Buffalo, etc., R. Co. v. O'Hara*, (Pa. 1882) 9 Am. & Eng. R. Cas. 317.

11. See the title CARRIERS OF PASSENGERS, vol. 5, p. 507, where a discussion of this topic will be found.

**11. Revocability.** — A pass for life, given without valid consideration, may be revoked, notwithstanding it was issued in pursuance of a vote of the stockholders of the company; <sup>1</sup> and it has been held that the leasing of the railroad operates the revocation of a pass issued without consideration.<sup>2</sup>

**XIX. REPRESENTATIONS, PROMISES, WAIVER, AND MODIFICATION — 1. Representations and Promises of Agents — a. IN GENERAL.** — The Principles of the Law of Agency in Their General Application have been treated elsewhere in this work.<sup>3</sup> In this place will be discussed such doctrines as seem to be specially applicable to the subject in hand.

**It Is Difficult, upon the Authorities, to Lay Down Any Definite General Rule** as to the circumstances under which a carrier of passengers will be bound by the representations, promises, and special contracts of its employees. Cases are to be found where, upon substantially the same state of facts, opposite conclusions have been reached. It would seem that it may be safely stated that a passenger, where he has no information whatsoever about the matter himself, is entitled to rely upon the representations and promises of an agent, concerning the movement and conduct of trains and the like, who has the real or apparent authority to make them. Nevertheless, the passenger must not close his eyes to other reasonable sources of information. In brief, in order to hold the carrier, the passenger's predicament must be due rather to the former's wrong than to the latter's want of ordinary care and diligence.<sup>4</sup>

**b. OBLIGATIONS OF GOOD FAITH.** — Although a carrier by water may be under no legal obligation to afford certain information as to the ship's voyage, upon the inquiry of an intending passenger, yet if it or its agents choose to answer such inquiries, knowing the party intends to act upon the information, they are bound by the obligations of good faith to answer honestly and without deceit.<sup>5</sup>

**c. CONFLICTING DIRECTIONS.** — Where the conductor and an ordinary employee make to a passenger conflicting statements as to the movement of the train, the passenger should act upon the former's instructions, and if he follows those of the other to his detriment, he has no cause of action against the company.<sup>6</sup>

**d. ILLUSTRATIONS — Carrier Held Liable.** — Under the particular circumstances shown to exist, the company has been held bound by the statements of a ticket agent concerning the movement of trains; <sup>7</sup> the agreement of a station porter, at the time in charge of the ticket office, as to the stopping of the train at a certain station; <sup>8</sup> an agreement of the conductor to like effect, although opposed to the rules; <sup>9</sup> the representations of a ticket agent at a union station, as to the time of arrival at the passenger's destination; <sup>10</sup> and the representations of the conductor of a street car as to the amount of fare.<sup>11</sup>

**Carrier Held Not Liable.** — On the other hand, the company has been held not liable for the representations of a ticket agent that a ticket may be used by one other than the original purchaser,<sup>12</sup> or for the conductor's agreement to

1. *New York, etc., R. Co. v. Ketchum*, 27 Conn. 170.

2. *Turner v. Richmond, etc., R. Co.*, 70 N. Car. 1.

3. See the title AGENCY, vol. 1, p. 930.

4. See the title CARRIERS OF PASSENGERS, vol. 5, pp. 558-607, where there is an extended treatment of this subject.

5. *The Normannia*, 62 Fed. Rep. 469.

6. *Dillon v. Lindell R. Co.*, 71 Mo. App. 631.

7. **Illustrations — Carrier Liable.** — *Gulf, etc., R. Co. v. Moorman*, (Tex. Civ. App. 1898) 46 S. W. Rep. 662; *Miller v. King*, 21 N. Y. App. Div. 192.

8. *Gulf, etc., R. Co. v. Moorman*, (Tex. Civ. App. 1898) 46 S. W. Rep. 662.

9. *Texas, etc., R. Co. v. Elliott*, 22 Tex. Civ. App. 31.

10. *Turner v. Great Northern R. Co.*, 15 Wash. 213, 55 Am. St. Rep. 883.

**Where a Person Inquired of the Agent How Long It Would Be Before the Train Arrived** and was told that it was one hour behind time, and missed the train, as it arrived at the station only forty-five minutes late, he had no cause of action. *Ohio, etc., R. Co. v. Allender*, 59 Ill. App. 620.

11. *Wright v. Glens Falls, etc., St. R. Co.*, 24 N. Y. App. Div. 617.

12. **Illustrations — Carrier Not Liable.** — *Coyle v. Southern R. Co.*, 112 Ga. 121. Here the ticket contained a provision whereby its use



forward a passenger where his train had been delayed by unavoidable accident,<sup>1</sup> or his agreement to give a passenger special notification of the arrival of a train at a certain place.<sup>2</sup>

**2. Waiver and Modification of Rules and Stipulations — a. AUTHORITY OF AGENTS.** — The stipulations of a ticket may be waived by an authorized agent of the carrier.<sup>3</sup>

**b. AFTER SALE OF TICKET.** — A ticket agent has not the implied power to bind the company after the sale of the ticket is fully completed and his duties in regard to it are at an end, by representations which contradict the plain terms of the ticket sold.<sup>4</sup>

**c. EXPRESS WARNING OF LACK OF AUTHORITY.** — It need hardly be said that if one of the conditions upon which a ticket was sold was that no agent or servant of the company had power to waive its provisions an attempted waiver by an agent is without effect.<sup>5</sup>

**d. OMISSION TO ENFORCE — (1) Frequency of Omissions — Custom.** — Although the company's employees may not have enforced such condition in other instances, yet this will not avail the passenger unless such instances were known to him and were sufficiently numerous to induce the public to believe that the requirement had been abandoned.<sup>6</sup>

was limited to the original purchaser, which was subscribed by him; also a provision that agents were without authority to modify or waive any of the terms of the contract. The representations were made to one who had purchased the ticket of the person to whom it had been issued by the agent. See *infra*, this section, *Waiver and Modification of Rules and Stipulations — Express Warning of Lack of Authority*.

1. *Houston, etc., R. Co. v. Rogers*, 16 Tex. Civ. App. 19.

2. *St. Louis S. W. R. Co. v. McCullough*, 18 Tex. Civ. App. 534.

3. See *Randall v. New Orleans, etc., R. Co.*, 45 La. Ann. 778; *Hanlon v. Illinois Cent. R. Co.*, 109 Iowa 136.

Where the Agent of the Terminal Road was not shown to be the representative of the intermediate carrier, his attempted extension of the time limit in a coupon ticket is unavailing. *Landers v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1899) 50 S. W. Rep. 528, following *Gulf, etc., R. Co. v. Looney*, 85 Tex. 158, 34 Am. St. Rep. 787. The ticket provided that no agent had authority to waive or alter any of its conditions.

**Conductor of Street Car and Ticket Agent of Steam Railroad — Distinction as to Authority to Bind Carrier.** — *Anderson v. Union Traction Co.*, 7 Pa. Dist. 41.

**Acts and Statements Held Not to Change Rates.** — *Church v. Chicago, etc., R. Co.*, 6 S. Dak. 235.

4. *Hanlon v. Illinois Cent. R. Co.*, 109 Iowa 136. Here the representations were made on the day after the sale but within twenty-four hours of the hour of sale.

Verbal declarations of the ticket agent, made after the sale of the ticket, will not bind the company in the absence of proof that he was empowered to vary in such manner the contract contained in the ticket, and such authority will not be presumed. *Boice v. Hudson River R. Co.*, 61 Barb. (N. Y.) 611. See also *Atchison, etc., R. Co. v. Cameron*, (C. C. A.) 66 Fed. Rep. 709.

**In Order to Hold a Connecting Carrier Liable** for the representations made by a foreign ticket agent, which are incorrect and different from the information given by its published time cards, they must be practically coincident with the purchase of the ticket. *Atchison, etc., R. Co. v. Cameron*, (C. C. A.) 66 Fed. Rep. 709. Here the conversation occurred three weeks before the ticket was bought, and there was nothing to show that the ticket was bought on the faith of the representations.

**5. When Ticket Negatives Expressly Agent's Authority.** — *Coyle v. Southern R. Co.*, 112 Ga. 121; *Reed v. Texas, etc., R. Co.*, (Tex. Civ. App. 1899) 50 S. W. Rep. 432; *Ketcheson v. Southern Pac. R. Co.*, 19 Tex. Civ. App. 288.

Where the ticket calls for a continuous trip and expressly declares that no agent or employee is authorized to modify its conditions, and the conductor permits a stop-over, indorsing the ticket to that effect, the passenger may be ejected from the train by another conductor when he attempts to resume his journey on such ticket. *International, etc., R. Co. v. Best*, 93 Tex. 344.

In *Galveston, etc., R. Co. v. Kinnebrew*, 7 Tex. Civ. App. 549, the plaintiff was permitted to introduce evidence that there was an agreement between himself and the ticket agent for a stop-over privilege, although the ticket did not show such privilege, and provided that no agent was empowered to alter any of its terms.

**6. Omission to Enforce Rule.** — *Watson v. Louisville, etc., R. Co.*, 104 Tenn. 194; *Houston, etc., R. Co. v. Jackson*, (Tex. Civ. App. 1901) 61 S. W. Rep. 440. See also *Marshall v. Boston, etc., R. Co.*, 145 Mass. 164, 31 Am. & Eng. R. Cas. 18.

**Statement of Rule and Illustrations.** — The fact that other passengers, or indeed the passenger in question, had been allowed to travel without having tickets stamped on other occasions, would not abrogate the rule, unless it was so common or frequent as to amount to a custom or an abandonment of the rule, and to mislead the passenger; especially when the passenger



(2) *Failure of Other Agents to Detect Defect.* — Where the ticket was not stamped, as required, a waiver of the requirement cannot be predicated upon the fact that the gatekeeper allowed the passenger to pass without punching his ticket or that the sleeping-car conductor failed to remark the defect, the regular conductor having detected it at once and called the passenger's attention to it.<sup>1</sup> Where one conductor failed to discover that the holder of a non-transferable ticket was not in fact the original purchaser, but the second conductor detected the fraud, there is no waiver of the condition in the ticket against its transfer.<sup>2</sup>

*e. CHECKING OF BAGGAGE.* — The fact that the passenger's baggage was checked on an expired ticket will not entitle him to transportation by virtue of such ticket.<sup>3</sup>

*f. RATIFICATION BY COMPANY.* — The general rule that a principal may ratify the unauthorized acts of his agent, applies in this connection.<sup>4</sup> And where the company, with knowledge that an employee has exceeded his authority, acts upon his contracts, it may not repudiate them.<sup>5</sup>

**XX. TICKET BROKERAGE — 1. Scope of Statutes.** — In recent years many states have enacted statutes which have for their object the prevention of ticket brokerage or ticket scalping. They very generally provide that it shall be unlawful for any person not an authorized agent of a railroad to sell pas-

had no knowledge of such instances. *Watson v. Louisville, etc., R. Co.*, 104 Tenn. 194.

The fact that the passenger has on other occasions been permitted to ride on an expired ticket, or even on the particular ticket in question, does not establish a custom of the company to that effect, and so entitle the passenger to transportation. *Sherman v. Chicago, etc., R. Co.*, 40 Iowa 45; *Wakefield v. South Boston R. Co.*, 117 Mass. 544; *Johnson v. Concord R. Corp.*, 46 N. H. 213, 88 Am. Dec. 199; *Hill v. Syracuse, etc., R. Co.*, 63 N. Y. 101; *Dietrich v. Pennsylvania R. Co.*, 71 Pa. St. 432, 10 Am. Rep. 711.

Nor will the fact that one of two limited tickets was honored after the expiration of the time specified constitute a waiver of the limitation in the other ticket. *Hanlon v. Illinois Cent. R. Co.*, 109 Iowa 136.

Where the holder of a mileage ticket had used it twenty times after it had expired, this did not give him the right to use it again nor estop the company to insist upon the terms of the contract. *Sherman v. Chicago, etc., R. Co.*, 40 Iowa 45.

The fact that the conductor had on two previous occasions accepted coupons from the plaintiff's season ticket for passage on a particular train, is at most only a waiver of the company's right to collect cash fares for those two trips. *New York, etc., R. Co. v. Feely*, 163 Mass. 205.

Evidence of a custom of the company's conductors permitting parties accompanying horses to ride in the car with them is admissible to show a waiver of the contract prohibition to ride elsewhere than in the caboose. *Missouri, etc., R. Co. v. Cook*, 8 Tex. Civ. App. 376, 12 Tex. Civ. App. 203.

Where the company has been accustomed to honor coupons when detached, this constitutes evidence of a waiver by it of a condition in the ticket requiring them to be detached only by the conductor. *Thompson v. Truesdale*, 61 Minn. 129.

Where the rules required a person seeking transportation on a freight train to obtain of either the ticket agent or the conductor a special permit, the failure of the agent at the time of selling a ticket, to require the purchaser to sign a permit, or to notify him that he would have to obtain one, cannot be considered as a contract on the part of the company to transport the holder on its freight train without a permit, in violation of its established rules. *Ellis v. Houston, etc., R. Co.*, 30 Tex. Civ. App. 172.

But a person who had often been permitted to ride, both before and after the adoption of the rule, without objection for the want of a ticket, could not be put off a mile or so from the station without proof of express notice or actual knowledge of the existence of the rule forbidding any one to enter the car without a ticket. And under the circumstances, posting notices of the rule in station houses was not sufficient. *Lake Shore, etc., R. Co. v. Greenwood*, 79 Pa. St. 373.

"An entire violation of the company's rules by its servants cannot," it has been said, "suspend the rule." *Anderson v. Union Traction Co.*, 7 Pa. Dist. 41.

**Not a Trespasser.** — Where a person in good faith presented a commutation ticket which was issued to another and was not transferable, and his claim to be carried was recognized, it was held that he was entitled to the rights of a passenger. *Robostelli v. New York, etc., R. Co.*, 33 Fed. Rep. 796, 34 Am. & Eng. R. Cas. 515. Here, on the third occasion on which the party had used the ticket he was killed while crossing an adjoining track after leaving the train.

1. *Bowers v. Pittsburgh, etc., R. Co.*, 158 Pa. St. 302.

2. *Dangerfield v. Atchison, etc., R. Co.*, 62 Kan. 85.

3. *Wentz v. Erie R. Co.*, 3 Hun (N. Y.) 241.

4. See the title AGENCY, vol. 1, p. 930.

5. *Southern R. Co. v. Marshall*, 111 Ky. 560.

senger tickets. Some of them forbid the companies to furnish others than their duly authorized agents with tickets to be sold, and require of those professing to be agents a certificate of authority from the company.<sup>1</sup>

**2. Constitutionality of Statutes.**—While these statutes have been assailed on constitutional grounds, they have very generally been upheld.<sup>2</sup> In *Pennsylvania* the statute was sustained, the court negating the contention that it infringed the right of enjoyment of property guaranteed by the state constitution, or any one of the several provisions of the Federal Constitution against the deprivation of liberty or property without due process of law, or the abridgment by state laws of the privileges and immunities of the citizens of the United States, or the impairment of the obligation of contracts in such manner, respectively.<sup>3</sup> The court of *Texas* has held that the statute of that state is valid as a police regulation and does not deprive one of his property without due process of law, a railroad ticket not being "property," as that term is used in the constitution.<sup>4</sup> The *New York* statutes were decided to be unconstitutional, the court refusing to sustain them as a valid exercise of the police power for the prevention of fraud or for the regulation of the business of quasi-public corporations, or of that of ticket brokerage, but condemning them as being in contravention of the constitutional prohibition against depriving the citizen of liberty and property without due process of law, in that they denied him the liberty of engaging in a legitimate employment.<sup>5</sup>

**3. Terms "Sell or Deal in," Construed.**—A statute making it unlawful for any person other than a duly authorized agent of the company to "sell or deal in" tickets, has no application to the sale of a single ticket by a person not a dealer therein.<sup>6</sup>

**4. Ticket Obtained in Another State.**—A person who buys a ticket from a dealer who is not an authorized agent of the company, in a state where such sale is lawful, is entitled to transportation into another state over the railroad by which the ticket was issued, although a statute of the latter state makes the sale unlawful.<sup>7</sup>

**5. Form and Contents of Ticket.**—In *Texas*, the statute does not apply to the holder of a ticket "upon which is not plainly printed that it is a penal offense for him or her to sell, barter, or transfer said ticket for a consideration," but such ticket is assignable.<sup>8</sup>

**6. Ticket Irregular on Its Face.**—If the ticket shows on its face that it was irregularly issued, the burden of proof to establish the broker's authority to make the sale is upon the holder in an action against the railroad for expulsion from the train.<sup>9</sup>

**1. Special Tickets — Indiana Statute.**—In *State v. Fry*, 81 Ind. 7, 6 Am. & Eng. R. Cas. 340, it was held that by virtue of section 8 of the act of March 9, 1875 (1 Rev. Stat. 1876, p. 259), regulating the issuing of railroad tickets and coupons, all special tickets are exempted from the operation of said act, whether they are half fare, excursion ticket, or tickets special in any other respect.

**2. The Statute of Indiana** (1 Rev. Stat. 1876, c. 249), prohibiting general brokerage business in the buying and selling of unused portions of railroad tickets, except under certain well-defined restrictions, is a police regulation, and, whatever may be said either for or against the justice thereof, the legislature in its enactment did not exceed its legitimate power under the state constitution. *Fry v. State*, 63 Ind. 553, 30 Am. Rep. 238. Similar rulings have been made in other states. *Com. v. Wilson*, 14 Phila. (Pa.) 384, 37 Leg. Int. (Pa.) 484, 56 Am. & Eng. R. Cas. 230; *Burdick v. People*, 149 Ill. 600, 41 Am. St. Rep. 329.

**3. Com. v. Keary**, 198 Pa. St. 500. Here the contracts, the obligation of which was alleged to be impaired by the statute, were not made until many years after the law was passed. See generally the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1030.

**4. Jannin v. State**, 42 Tex. Crim. 631.

**5. People v. Caldwell**, 168 N. Y. 671, affirming 64 N. Y. App. Div. 46; *People v. Warden*, 157 N. Y. 116, 68 Am. St. Rep. 763, reversing 26 N. Y. App. Div. 228; *People v. Hagan*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 155. See generally the titles DUE PROCESS OF LAW, vol. 10, p. 287; POLICE POWER, vol. 22, p. 914.

**6. State v. Clarke**, 109 N. Car. 739, note; *State v. Ray*, 109 N. Car. 736.

**7. Sleeper v. Pennsylvania R. Co.**, 100 Pa. St. 259, 45 Am. Rep. 380, 9 Am. & Eng. R. Cas. 291.

**8. International, etc., R. Co. v. Ing**, 29 Tex. Civ. App. 398.

**9. Comer v. Foley**, 98 Ga. 678.

**XXI. REDEMPTION AND RESCISSION — 1. Redemption of Unused Tickets —**

*a.* **STATUTORY PROVISIONS.** — Statutes are to be found in some of the states requiring carriers of passengers, under penalty, to redeem unused tickets and parts of tickets issued by them.<sup>1</sup>

*b.* **CONTENTS OF TICKET.** — In *Texas* it is expressly provided that the statute "shall not apply to any person holding a ticket upon which is not plainly printed that it is a penal offense for him or her to sell, barter, or transfer said ticket for a consideration."<sup>2</sup>

*c.* **GOOD FAITH OF PURCHASER.** — The *Iowa* statute was intended for the benefit of those purchasing tickets in good faith and for actual use, and may not be invoked by one who procures tickets with the sole object of bringing suit against the company in the event of its failure to redeem, and thereby recovering a penalty and seeking revenge for past difficulties.<sup>3</sup>

*d.* **TICKET TRANSFERRED AFTER BEING USED.** — The *Texas* statute does not apply to the case of a ticket used by the original purchaser and thereafter sold by him, although the transferee is without notice of such fact.<sup>4</sup>

*e.* **DEMAND AND RETURN OF TICKET — Time of Demand.** — Where a carrier subject to the *Iowa* statute does not limit the period within which redemption shall be demanded to "not less than ten days from date of sale," demand is timely if made within the period of the general statute of limitations.<sup>5</sup>

**Sufficiency of Demand.** — Where the agent knows the holder is at the ticket office with the tickets then in his possession, for the purpose of asking that they be redeemed, and the agent declines to redeem them, the necessity for a more formal offer is thereby obviated.<sup>6</sup>

**Necessity for Returning Ticket.** — It has been held that under an agreement to refund the purchase price provided the ticket be not used within a specified time, the return of the ticket is not, in the absence of express stipulation therefor, a condition precedent to recovery.<sup>7</sup>

*f.* **WHEN LIABILITY ATTACHES.** — The carrier's liability for the price of the ticket and for the penalty attaches, it is held, upon the mere neglect of the company to redeem within the prescribed time after demand, and the holder is not required to return to the company's office for his money within such time after demand.<sup>8</sup>

*g.* **STIPULATION AGAINST REDEMPTION.** — Where one of the provisions of a ticket sold at a reduced rate was that there should be no claim for rebate on account of the nonuse of the ticket from any cause, in case of loss the carrier is under no obligation to refund to the purchaser any sum for the unused parts of the ticket, nor any sum he may have been compelled to pay for carriage during the time covered by the ticket, nor to issue to him a duplicate for the balance of the ticket.<sup>9</sup>

1. See the statutes of the several states.

**Payment of Difference Between Fares for Distance Traveled and Price of Ticket.** — Under a statute requiring a carrier to redeem unused tickets by paying the difference between the regular fare for the distance traveled and the amount paid for the ticket, a passenger whose trips in regular fares exceed the cost of the whole ticket can recover nothing. *Smith v. Philadelphia, etc., R. Co.*, 11 Pa. Co. Ct. 555.

**Quarterly Commutation Ticket Purchased Thirteen Days After Quarter Began — Carrier Not Required to Refund Any Portion of Purchase Price.** — *Sidman v. Richmond, etc., R. Co.*, 2 Int. Com. Rep. 766, 41 Am. & Eng. R. Cas. 35, note.

2. *Donaldson v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1898) 45 S. W. Rep. 391.

3. *Jolley v. Chicago, etc., R. Co.*, 119 Iowa 491.

4. *Levinson v. Texas, etc., R. Co.*, 17 Tex. Civ. App. 617.

5. *Jolley v. Chicago, etc., R. Co.*, 119 Iowa 491.

6. *Jolley v. Chicago, etc., R. Co.*, 119 Iowa 491.

7. *Maas v. Scharbach*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 215, the theory being that the ticket was not the subject of the sale, but a mere token, valueless after the expiration of the time limited.

8. *Jolley v. Chicago, etc., R. Co.*, 119 Iowa 491.

9. *Southern R. Co. v. De Saussure*, 116 Ga. 53, the court considering that the purchaser, by the stipulation, became his own insurer that he would not lose the ticket.



**2. Rescission.** — Where there are published reports of the unseaworthiness of the ship, which are partially confirmed by a survey and by her outside appearance, purchasers of tickets for the voyage have good grounds for the rescission of their contracts and the recovery of the passage money paid, notwithstanding she may have been sound and well able to make the trip.<sup>1</sup>

**XXII. EFFECT OF CONSOLIDATION OR RECEIVERSHIP — 1. Liability for Tickets of Merged Company.** — Where two companies are consolidated, in the absence of any express stipulation to the contrary contained in the consolidation agreement, the surviving company which succeeds to the rights and franchises of the absorbed company must discharge all duties which the latter was under obligation to perform with respect to contracts for carriage entered into by it with its patrons.<sup>2</sup>

**2 Liability for Mistakes of Receiver's Ticket Agent.** — If a ticket agent in the employ of the receiver of a railroad company, by mistake, issues the wrong ticket to an intending traveler, the company is not, upon subsequently resuming control of the road, liable for such mistake.<sup>3</sup>

**XXIII. EXECUTORY CONTRACT FOR CARRIAGE — 1. Breach of, Not Tort.** — A breach by a carrier of an executory contract into which it was under no legal duty to enter, to furnish the other contracting party with transportation from one point to another, is not a tort, and does not give rise to an action *ex delicto*.<sup>4</sup>

**2 Measure of Damages.** — The damages recoverable for the violation of such a contract are to be arrived at by taking into account the value of the injured person's lost time, the cost of transportation between the two places, and any other loss or expense legitimately flowing from the failure of the company to comply with its undertaking.<sup>5</sup>

**XXIV. EXHIBITION AND SURRENDER OF TICKETS — 1. Rule or Stipulation Requiring.** — A carrier has the right to make regulations requiring passengers to exhibit and surrender their tickets to the proper train officials, at suitable and reasonable times, and may, upon failure or refusal to comply therewith, or to pay fare, expel them from the train.<sup>6</sup> And such regulations will not be condemned unless they are palpably unjust and oppressive.<sup>7</sup> It has been held that where a passenger has refused to exhibit his ticket, he does not regain the right to continue his journey by offering to show his ticket after

1. The Guardian, 89 Fed. Rep. 998.

2. *Tompkins v. Augusta Southern R. Co.*, 102 Ga. 437, holding that the expulsion from the train of the new company, of a person who presented an unexpired ticket of the merged company, was wrongful and gave him a right of action against such new company. See generally the title CONSOLIDATION OF CORPORATIONS, vol. 6, p. 810 *et seq.*

3. *Godfrey v. Ohio, etc.*, R. Co., 116 Ind. 30, 37 Am. & Eng. R. Cas. 8. See generally the titles RECEIVERS, vol. 23, p. 992; RECEIVERS OF RAILROADS, vol. 24, p. 1.

4. *Louisville, etc.*, R. Co. *v.* Spinks, 104 Ga. 692.

5. *Louisville, etc.*, R. Co. *v.* Spinks, 104 Ga. 692, holding further that physical discomfort, pain, weariness, and injuries to limb or foot, occasioned by walking between the two places indicated, are not proper elements of damage in such a case.

6. *Presentation and Surrender of Ticket — England.* — *Woodard v. Eastern Counties R. Co.*, 7 Jur. N. S. 971, 30 L. J. M. C. 126.

*Connecticut.* — *Havens v. Hartford, etc.*, R. Co., 28 Conn. 69.

*Maryland.* — *Baltimore, etc.*, R. Co. *v.* Blocher, 27 Md. 277.

*Massachusetts.* — *Loring v. Aborn*, 4 Cush. (Mass.) 608.

*Michigan.* — *Frederick v. Marquette, etc.*, R. Co., 37 Mich. 342, 26 Am. Rep. 531.

*New Jersey.* — *State v. Campbell*, 32 N. J. L. 309.

*New York.* — *People v. Caryl*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 326.

*Pennsylvania.* — *Cresson v. Philadelphia, etc.*, R. Co., 11 Phila. (Pa.) 597, 32 Leg. Int. (Pa.) 363; *Ham v. Delaware, etc.*, R. Co., 142 Pa. St. 617.

*Tennessee.* — *Louisville, etc.*, R. Co. *v.* Fleming, 14 Lea (Tenn.) 128, 18 Am. & Eng. R. Cas. 347.

In *Butler v. Manchester, etc.*, R. Co., 21 Q. B. D. 207, 33 Am. & Eng. R. Cas. 551, it was held that such a regulation did not authorize the removal of a passenger who had failed to produce a ticket.

7. *Vedder v. Fellows*, 20 N. Y. 126.

A rule requiring the production of a ticket as evidence of the right of a passenger is reasonable and one with which the traveling pub-

the train has been stopped for the purpose of putting him off.<sup>1</sup> A passenger may lawfully be required to produce his ticket before entering the train.<sup>2</sup>

**2. Right to Seat as Condition Precedent.** — The carrier may require a passenger to surrender his ticket after securing a seat in the car or other vehicle used for transportation.<sup>3</sup> It is held that a passenger who exhibits his ticket and demands a seat need not surrender his ticket until a seat is furnished.<sup>4</sup> But he may not dictate where he shall sit or in what car he shall ride.<sup>5</sup> Nor can the passenger avail himself of the benefit of transportation without a seat and, at the same time, withhold from the carrier his ticket.<sup>6</sup>

**3. Right to Token in Exchange.** — It is not unreasonable to require a passenger to render up his ticket at any time in the course of his journey, provided a conductor's check is given him in exchange.<sup>7</sup> And he may in like manner be required to deliver it up without receiving such a check, provided the next station at which the train stops is his point of destination.<sup>8</sup> But he should not be required to part with his ticket without receiving a check or other adequate token of payment of fare, at a considerable distance from his point of destination, when there are intervening stations at which the train stops.<sup>9</sup> It is incumbent upon the conductor to exercise more than ordinary care in seeing that, after he has taken the passenger's ticket, the latter shall be provided with the means of continuing his journey.<sup>10</sup>

**4. Holder of Commutation Ticket.** — A person traveling on a commutation ticket must produce the same when required by the conductor, although known by the latter to be the holder of such a ticket; and refusing or failing to so do or to pay fare, he may be ejected from the train.<sup>11</sup>

lic is familiar. *Van Dusan v. Grand Trunk R. Co.*, 97 Mich. 439, 37 Am. St. Rep. 354.

1. *Hibbard v. New York, etc., R. Co.*, 15 N. Y. 455. And see *supra*, this title, *Payment of Fare—Refusal to Pay*.

2. *Illinois Cent. R. Co. v. Louthan*, 80 Ill. App. 579; *Chicago, etc., R. Co. v. Boger*, 1 Ill. App. 472; *Pittsburgh, etc., R. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68; *Louisville, etc., R. Co. v. Fleming*, 14 Lea (Tenn.) 128, 18 Am. & Eng. R. Cas. 347.

3. **Right to Seat Before Surrender.**—*Illinois Cent. R. Co. v. Louthan*, 80 Ill. App. 579.

4. *Davis v. Kansas City, etc., R. Co.*, 53 Mo. 317, 14 Am. Rep. 457. And see the title *CARRIERS OF PASSENGERS*, vol. 5, p. 590.

5. *Memphis, etc., R. Co. v. Benson*, 85 Tenn. 627, 4 Am. St. Rep. 776, 31 Am. & Eng. R. Cas. 112; *Chesapeake, etc., R. Co. v. Wells*, 85 Tenn. 613, 31 Am. & Eng. R. Cas. 111; *Pittsburgh, etc., R. Co. v. Van Houten*, 48 Ind. 90. In this last case it was held that where all the seats in one of two passenger cars are already filled with passengers, another passenger has no right to demand a seat in that particular car and refuse to deliver his ticket unless furnished with a seat therein; and if he refuses under such circumstances, the persons in charge of the car may eject him.

6. **The Right and Duty of the Passenger** in the premises are well stated by Cockrill, C. J., in *St. Louis, etc., R. Co. v. Leigh*, 45 Ark. 368, 55 Am. Rep. 558, as follows: "When the carrier proffers transportation without a seat, and the passenger refuses to surrender his ticket, what is then the attitude of the parties under the contract? It is simply this: The carrier has offered the passenger less than his contract calls for, and the passenger has refused it in satisfaction. This he has the unquestioned right to do. If he is not accommodated in a

manner which may be deemed a fair compliance with the duty of the carrier, he may decline any compromise and resort to his action against the company for refusing to carry him as their contract or their duty requires. But he cannot accept the part that is offered him in lieu of the whole—that is, the transportation without the seat—and at the same time refuse to comply with his own undertakings, in this any more than in another contract. Upon the carrier's neglect or refusal to comply with the terms of the contract of carriage, without a just excuse, the passenger is at liberty to treat the contract as violated by the company, and he may leave the train and sue for a breach of the contract."

7. *Northern R. Co. v. Page*, 22 Barb. (N. Y.) 130.

8. *Illinois Cent. R. Co. v. Whittemore*, 43 Ill. 420, 92 Am. Dec. 138.

9. *State v. Thompson*, 20 N. H. 251.

10. *Soane v. Southern California R. Co.*, 111 Cal. 668.

11. **Commuters.**—*Ripley v. New Jersey R., etc., Co.*, 31 N. J. L. 388; *Crawford v. Cincinnati, etc., R. Co.*, 26 Ohio St. 580; *Bennett v. Railroad Co.*, 7 Phila. (Pa.) 11. And see the title *CARRIERS OF PASSENGERS*, vol. 5, p. 506.

**The Reasons for Upholding the Validity of Such a Rule** as this are clearly stated by Denio, C. J., in *Hibbard v. New York, etc., R. Co.*, 15 N. Y. 455.

**Express Stipulation in Contract.**—In *Downs v. New York, etc., R. Co.*, 36 Conn. 287, 4 Am. Rep. 77, the passenger had by mistake left his commutation ticket at home and consequently was unable to show it when called for, and it was held that in conformity with an express stipulation in his contract with the company, the latter had the right to demand ordinary fare for the passage, and that upon his refusal



**Where Commuter Has Lost His Ticket.** — Where a commutation ticket is purchased at a price less than regular fare, and contains a condition requiring it to be presented by the holder to the conductor on each trip, presentation is a condition precedent to the right of the purchaser to be transported on it, and the rule is not changed by the fact of the loss of the ticket.<sup>1</sup>

**Surrender on Last Trip.** — A regulation that monthly commutation tickets shall be surrendered by the holders to the conductor on the last trip taken during the periods for which they are issued, is reasonable.<sup>2</sup>

**5. Detachment of Coupons.** — A stipulation in a commutation ticket in coupon form that the coupons shall be void unless detached by the conductor is reasonable and valid, and the holder violates the contract by detaching them himself.<sup>3</sup> If while detaching the coupons the conductor calls his attention to the fact that it is the conductor's duty to detach them, he should desist and hand the ticket and coupons to the conductor, and it will then be the duty of the latter, if he saw the coupons detached, or can readily ascertain that they have been detached from the ticket, to accept them, but the conductor will not be bound to receive the detached coupons without seeing the ticket.<sup>4</sup> If the passenger refuses to allow the conductor to detach them, and insists upon doing it himself, he may be expelled from the train.<sup>5</sup> Especially where he not only attempts to use a previously detached coupon, but also refuses to exhibit the book to the conductor, does he forfeit the right to proceed further on the car.<sup>6</sup>

**6. Where Ticket Lost.** — It has already been seen what are the rights and duties of conductor and passenger, respectively, when the latter offers to the former an improper ticket.<sup>7</sup> The rule requiring the production of a ticket

to pay, the conductor acted lawfully in expelling him from the cars at the next regular station. *Maples v. New York, etc., R. Co.*, 38 Conn. 557, 9 Am. Rep. 434, differs from this case in that the plaintiff *Maples* had his commutation ticket on his person, but for the moment was unable to find it, and simply requested a reasonable time to find it, which was denied by the conductor; and he was ejected from the train at a place other than a regular station. The court also notes the circumstance that there was no express stipulation in his contract with the company that he should pay his fare for the trip if his ticket was not shown to the conductor; and furthermore, that he was well known to the conductor as a commuter. In this case the ejection was held to be unlawful.

1. *Southern R. Co. v. De Saussure*, 116 Ga. 53.

If the holder of a commutation ticket has lost it so as to be unable to comply with the provision as to presentation, the conductor is not bound to investigate the passenger's statement as to the cause of nonproduction, but may demand the regular fare. *Rogers v. Atlantic City R. Co.*, 57 N. J. L. 703. And see *infra*, this section, *Where Ticket Lost*.

2. *Rogers v. Atlantic City R. Co.*, 57 N. J. L. 703. And it was further held that if this regulation be indorsed on the ticket and the holder fails or refuses so to surrender it or pay the legal rate of fare, he may be ejected.

3. **Detaching Coupons.** — *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 250, 26 Am. & Eng. R. Cas. 235; *Boston, etc., R. Co. v. Chipman*, 146 Mass. 107, 4 Am. St. Rep. 293, 34 Am. & Eng. R. Cas. 336; *Houston, etc., R. Co. v. Ford*, 53 Tex. 364.

And a Rule of the Company to like effect is valid. *De Lucas v. New Orleans, etc., R. Co.*, 38 La. Ann. 930; *United R., etc., Co. v. Hardesty*, 94 Md. 661.

4. *Louisville, etc., R. Co. v. Harris*, 9 Lea (Tenn.) 180, 42 Am. Rep. 668, 16 Am. & Eng. R. Cas. 374.

**"Not Good for Passage if Detached."** — In *Wightman v. Chicago, etc., R. Co.*, 73 Wis. 169, 9 Am. St. Rep. 778, it was held that a round-trip railroad ticket punctured for separation into two parts and having on the "going" part the words "not good for passage," and on a line therewith on the "returning" part, the words "if detached," is, nevertheless, good for passage where the parts have become separated by accident, if both parts are in good faith presented to the conductor on the outward trip. The words were regarded by the court as not having the effect of a stipulation that the ticket should be deemed forfeited if such parts should be separated by any other person than the conductor, but as having been so placed upon the ticket to prevent imposition by a separation of the parts and the use of each as a single-trip ticket. Such being the case, the presentation to the conductor of the two parts, under the circumstances found, was the same in legal effect as though the parts had not been detached when so presented.

5. *Norfolk, etc., R. Co. v. Wysor*, 82 Va. 250, 26 Am. & Eng. R. Cas. 235.

6. *United R., etc., Co. v. Hardesty*, 94 Md. 661; *Louisville, etc., R. Co. v. Harris*, 9 Lea (Tenn.) 180, 42 Am. Rep. 668, 16 Am. & Eng. R. Cas. 374.

7. See especially *supra*, this title, *Nature and Effect of Ticket* — *As Evidence to Conductor*.



does not yield, even though the passenger had a ticket but lost it.<sup>1</sup> And it is obvious from the very nature of things that there can be no distinction in the rights of the passenger whether he loses or mislays his ticket before boarding the train or subsequently.<sup>2</sup> Nor, it is held, would the circumstance that the passenger exhibited his ticket to the employee stationed at the door of the car for such purpose, affect the company with knowledge so as to make his expulsion by the conductor unlawful.<sup>3</sup>

**XXV. FRAUD — ARREST OR DETENTION — 1 Fraud in Procurement or Use of Pass or Ticket**—*a.* PASS OR TICKET PROCURED BY FRAUD.—If the party to whom a pass or ticket has been issued in fraud of the company has notice of the fraud, the pass or ticket is invalid, and the company may take it up and cancel it.<sup>4</sup>

*b.* FRAUDULENT USE OF PASS OR TICKET.—One who fraudulently attempts to ride on a non-transferable ticket or pass, issued to another person, is not a passenger.<sup>5</sup>

**2. Fraudulent Neglect to Obtain Ticket.**—In *South Carolina*, by statute, if the passenger's neglect to purchase a ticket before taking passage is intended as a fraud upon the rights of the company, he is liable to a forfeiture.<sup>6</sup>

**3. Right to Arrest or Detain Passenger**—*a.* FAILURE TO SHOW TICKET OR PAY FARE.—A carrier may not detain or imprison a passenger who, after the trip is completed, is unable to produce his ticket, as the charge for carriage is a debt which must be enforced by the same remedies that any creditor has against his debtor.<sup>7</sup> Where it is the custom of steamboats to require passengers to provide themselves with tickets at the office before the boat starts, and give them up at the end of the voyage while leaving the boat, if a passenger should attempt to leave without producing his ticket, alleging that he had lost it, the company has the right to detain him a reasonable time to investigate, on the spot, the circumstances of the case.<sup>8</sup>

*b.* FRAUDULENT EVASION OF PAYMENT — STATUTES.—In some states, statutes have been enacted making a fraudulent evasion of, or attempt to evade, the payment of fare by a passenger, either by giving a false answer to the collector, or by traveling beyond the point to which he has in fact paid, or by leaving the train without having paid, or otherwise, punishable by the forfeiture of a specified sum of money; and also, in case of a refusal to pay fare, authorizing the carrier's police officer, without a warrant, to arrest the passenger and remove him to the baggage car, or other suitable car of the train, and confine him there until the arrival of the train at some station where he can be placed in charge of an officer who shall take him to a place of lawful detention.<sup>9</sup>

**1. Lost Ticket.**—*Duke v. Great Western R. Co.*, 14 U. C. Q. B. 377; *Pittsburgh, etc., R. Co. v. Daniels*, 90 Ill. App. 154; *Louisville, etc., R. Co. v. Fleming*, 14 Lea (Tenn.) 128, 18 Am. & Eng. R. Cas. 347; *Crawford v. Cincinnati, etc., R. Co.*, 26 Ohio St. 580; *Jerome v. Smith*, 48 Vt. 231, 21 Am. Rep. 125. See also *supra*, this section, *Holder of Commutation Ticket*. But see *Butler v. Manchester, etc., R. Co.*, 21 Q. B. D. 207, 33 Am. & Eng. R. Cas. 551, set out *supra*, this section, *Rule or Stipulation Requiring*.

*Compare Pullman Palace Car Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232. Here a passenger in a sleeping car had lost his ticket, but produced a written certificate from the agent selling it to him, to the effect that he was entitled to a berth. The conductor removed him, and he was allowed to recover the price of his ticket and reasonable compensation for the trouble and inconvenience suffered by being deprived of his berth in the sleeping car.

**2.** *Louisville, etc., R. Co. v. Fleming*, 14 Lea (Tenn.) 128, 18 Am. & Eng. R. Cas. 347.

**3.** *Louisville, etc., R. Co. v. Fleming*, 14 Lea (Tenn.) 128, 18 Am. & Eng. R. Cas. 347.

**4.** *Moore v. Ohio River, etc., R. Co.*, 41 W. Va. 160.

**Passes Procured Through Fraud Are Void.**—*Brown v. Missouri, etc., R. Co.*, 64 Mo. 536.

**5. Fraudulent Use.**—*Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 57 Am. Rep. 120, 27 Am. & Eng. R. Cas. 88, 329. See *supra*, this title, *Transferability of Tickets*.

**6.** *Moore v. Columbia, etc., R. Co.*, 38 S. Car. 1.

**7. Arrest or Detention.**—*Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141, 12 Am. & Eng. R. Cas. 119. See also *Chilton v. London, etc., R. Co.*, 16 M. & W. 212.

**8.** *Standish v. Narragansett Steamship Co.*, 111 Mass. 512, 15 Am. Rep. 66.

**9.** See *Massachusetts Pub. Stat.* (1882) c.

**TIDE — TIDAL RIVER — TIDAL WATER.** (See also the titles **BOUNDARIES**, vol. 4, p. 756; **NAVIGABLE WATERS**, vol. 21, p. 424; **SEAWEED**, vol. 25, p. 157; **WATERS AND WATERCOURSES**; and see **BEACH**, vol. 3, p. 901; **SHORE**, vol. 25, p. 1059.) — See note 1.

103, §§ 18, 19, c. 112, § 197. And see *Krulevitz v. Eastern R. Co.*, 143 Mass. 228; *Beckwith v. Cheshire R. Co.*, 143 Mass. 68; *Marshall v. Boston, etc., R. Co.*, 145 Mass. 164, 31 Am. & Eng. R. Cas. 18.

1. **Tide Water — Tidal River.** — In order that a river may be *tidal* at a certain spot it is not necessary that the water should be salt, but the spot must be one where the tide, in the ordinary and regular course of things, flows and reflows; and hence where, in case of exceptionally high tides, some portion of the river is dammed up and prevented from flowing down, and so rises and falls with the tide, the river cannot, on that account, be called tidal at that point. *Reece v. Miller*, 8 Q. B. D. 630.

But if the water rises and falls regularly with the ebb and flow of the tide, it is tide water, although the fluctuation is caused by the meeting of the sea water with the river water.

*Atty.-Gen. v. Woods*, 108 Mass. 436, 11 Am. Rep. 380. See to the same effect *Rex v. Smith*, 2 Dougl. 441; *Peyroux v. Howard*, 7 Pet. (U. S.) 324; *Lapish v. Bangor Bank*, 8 Me. 85.

But the flowing and reflowing of the waters of a lake into a river, caused by the occasional swell and subsidence of the lake, and not by the ebb and flow of the regular tides, do not constitute such river a *tidal river*. *Hooker v. Cummings*, 20 Johns. (N. Y.) 98, 11 Am. Dec. 249.

Tide waters, whether salt or fresh, are waters where the ebb and flow of the tide from the sea is felt. *Com. v. Vincent*, 108 Mass. 447.

Where land lying along the seashore is conveyed by boundary to *tide water*, the "sea," "seashore," or any other similar expression, the law gives effect to it, and extends it to the low-water mark. *Doane v. Willcutt*, 5 Gray (Mass.) 336, 66 Am. Dec. 369.

## TIDE LANDS.

### I. DEFINITION, 206.

### II. TITLE IN STATE, 206.

### III. STATUTES REGULATING, 206.

#### CROSS-REFERENCE.

See the title *STATE AND PUBLIC LANDS*, vol. 26, pp. 216, 226, 343 *et seq.*

**I. DEFINITION.** — "Tide lands" are lands covered and uncovered by the ordinary tides.<sup>1</sup>

**II. TITLE IN STATE.** — The title to tide lands is in the sovereign or state, either absolutely or in trust for the public benefit.<sup>2</sup>

**III. STATUTES REGULATING.** — In several of the states statutes have been adopted regulating the disposal of tide lands by the state, and prescribing the persons who shall be preferred as purchasers, etc. Cases construing such statutes will be found in the note.<sup>3</sup>

**1. Tide Lands.** — *Walker v. Marks*, 2 Sawy. (U. S.) 152; *Baer v. Moran Bros. Co.*, 153 U. S. 287, *affirming* 2 Wash. 608; *Barney v. Keokuk*, 94 U. S. 338; *Rondell v. Fay*, 32 Cal. 354; *Andrus v. Knott*, 12 Oregon 501.

**Synonymous with Beach, Shore, Strand.** — *People v. Davidson*, 30 Cal. 386; *Elliott v. Stewart*, 15 Oregon 261. See also *BEACH*, vol. 3, p. 901; *SHORE*, vol. 25, p. 1059; *STRAND*, vol. 26, p. 1126; and the title *BOUNDARIES*, vol. 4, p. 819.

**In the Strict Technical Sense** it applies to lands adjoining navigable waters, where the tides flow and reflow. *Andrus v. Knott*, 12 Oregon 503. See also *Bell v. Gough*, 23 N. J. L. 683.

**Neap Tide.** — In *Ward v. Mulford*, 32 Cal. 365, it was held that tide lands are such lands as are covered and uncovered by the flow and ebb of the neap tides.

**Permanently Submerged Lands.** — The term "tide lands" has not always been confined to land lying between the limits of high and low tide, but has been sometimes extended to lands below the low-tide line, that is, to lands always covered by water. *State v. Forrest*, 11 Wash. 227. See also *Eisenbach v. Hatfield*, 2 Wash. 236; *Scurry v. Jones*, 4 Wash. 468; *Columbia, etc., R. Co. v. Seattle*, 6 Wash. 332; *Globe Mill Co. v. Bellingham Bay Imp. Co.*, 10 Wash. 458.

But that lands permanently submerged are not ordinarily included in the term "tide lands," see *Walker v. State Harbor Com'rs*, 17 Wall. (U. S.) 648; *People v. Davidson*, 30 Cal. 379.

**Regularity of Flow of Tide.** — In *San Francisco v. Le Roy*, 138 U. S. 671, it was said: "To render lands tide lands, which the state by virtue of her sovereignty could claim, there must have been such continuity of the flow of tida water over them, or such regularity of the flow within every twenty-four hours, as to

render them unfit for cultivation, the growth of grasses, or other uses to which upland is applied."

**Lands Covered with Water Three-fourths of the Year** are not tide lands. *Andrus v. Knott*, 12 Oregon 501.

**Judicial Notice.** — In *Baer v. Moran Bros. Co.*, 153 U. S. 287, it was held that a court cannot take judicial notice of the nature and extent of tide lands. But see the title *JUDICIAL NOTICE*, vol. 17, p. 905.

**Isolated Sandbank.** — In *Elliott v. Stewart*, 15 Oregon 259, it was held that an isolated sandbank in a river alternately covered and exposed by the tide is not tide land. But see *Johnson v. Woodworth*, 18 Wash. 243; *Oliver v. Dupee*, 16 Wash. 634.

**2.** See the titles *BOUNDARIES*, vol. 4, p. 819; *NAVIGABLE WATERS*, vol. 21, p. 430; *STATE AND PUBLIC LANDS*, vol. 26, p. 216..

**3. Statutes Applicable to Public Lands Generally.** — In *Mann v. Tacoma Land Co.*, 153 U. S. 273, it was held that the general legislation of Congress in respect to public lands does not extend to tide lands. See also *Shively v. Bowlby*, 152 U. S. 1.

**"Public Lands" Held to Include "Tide Lands."** — *State v. Bridges*, 19 Wash. 431.

**California.** — In *Kimball v. Macpherson*, 46 Cal. 103, it was said: "Nothing short of a very explicit provision to that effect would justify us in holding that the legislature intended to permit the shore of the ocean, between high and low water mark, to be converted into private ownership." See also *People v. Morrill*, 26 Cal. 336; *Taylor v. Underhill*, 40 Cal. 471; *People v. Cowell*, 60 Cal. 400; *Upham v. Hosking*, 62 Cal. 258; *Shirley v. Benicia*, 118 Cal. 344; *Oakland v. Oakland Water Front Co.*, 118 Cal. 160.

**Same — Application for Purchase.** — See *Klauber v. Higgins*, 117 Cal. 451.



**TIE.** — See note 1.

**TIGER.** — See note 2.

**TIGHT.** — See note 3.

**Same — Certificate of Purchase.** — See *Northern R. Co. v. Jordan*, 87 Cal. 27; *Upham v. Hosking*, 62 Cal. 250.

**Same — Authority of City to Alienate.** — See *Oakland v. Oakland Water Front Co.*, 118 Cal. 160.

**Same — Land Subject to Sale under California Statute.** — See *Upham v. Hosking*, 62 Cal. 250; *Taylor v. Underhill*, 40 Cal. 471.

**Same — Rights of Abutting Owners.** — See *Shirley v. Benicia*, 118 Cal. 344.

**Oregon — Lands Subject to Sale.** — See *Johnson v. Knott*, 13 Oregon 308.

**Washington.** — In *State v. Forrest*, 13 Wash. 268, it was held that the Act of 1889-1890 authorized the sale of tide lands of every description, whether there were improvements thereon or whether there were abutting upland owners.

**Same — Application to Purchase.** — See *Johnson v. Woodworth*, 18 Wash. 243; *Oliver v. Dupee*, 16 Wash. 634; *State v. Forrest*, 13 Wash. 268.

**Same — Size of Parcels Offered for Sale.** — *Sullivan v. Callvert*, 27 Wash. 600.

**Same — Right to Purchase.** — *Denny v. Northern Pac. R. Co.*, 19 Wash. 298.

**Same — Contest for Purchase.** — See *Oliver v. Dupee*, 16 Wash. 634.

**Same — Abutting Owners' Right to Purchase.** — *Hays v. Merchants Bank*, 10 Wash. 573; *Denny v. Northern Pac. R. Co.*, 19 Wash. 298; *Seattle, etc., R. Co. v. Carraher*, 21 Wash. 491.

**Same — Right of Persons Making Improvements to Purchase under Washington Statute.** — See *State v. Forrest*, 12 Wash. 483; *Barlow v. Gamwell*, 12 Wash. 651; *Tullis v. Tacoma Land Co.*, 19 Wash. 140; *Sullivan v. Callvert*, 27 Wash. 600; *McKenzie v. Woodin*, 9 Wash. 414; *Globe Mill Co. v. Bellingham Bay Imp. Co.*, 10 Wash. 458.

**Same — Improvements by Boom Companies.** — *Samish Boom Co. v. Callvert*, 27 Wash. 611.

**Same — Improvements by State.** — See *Mississippi Valley Trust Co. v. Hofius*, 20 Wash. 272.

**Same — Vested Rights — Authority of State to Alter Law Giving Prior Right of Purchase.** — See *Allen v. Forrest*, 8 Wash. 700.

**Same — Appraisal — Appeals.** — See *Scott v. Forrest*, 13 Wash. 166.

**Same — Reappraisal.** — *Samish Boom Co. v. Callvert*, 27 Wash. 611.

**Same — Improvement of Harbors and Waterways with Proceeds of Sale.** — See *Tacoma Land Co. v. Young*, 18 Wash. 495.

**Same — Construction of Waterways — Lien in Favor of Contractor.** — See *Mississippi Valley Trust Co. v. Hofius*, 20 Wash. 472; *Scholpp v. Forrest*, 11 Wash. 640.

**Same — Municipality's Right to Extend Street over Tide Lands.** — See *State v. Forrest*, 12 Wash. 483; *Columbia, etc., R. Co. v. Seattle*, 6 Wash. 332. See *Seattle v. Forrest*, 14 Wash. 423 [cited in *Ilwaco v. Ilwaco R., etc., Co.*, 17 Wash. 66a]; *State v. Bridges*, 19 Wash. 428.

1. Tie. — In *Wooster v. Mullins*, 64 Conn. 343, it was said: "A tie is that which is tied. It is a knot; and when provision is made, in regulating legislative procedure, for a casting vote by

the presiding officer in case of a tie, the object is to allow him to untie this knot."

**Tie Up.** — In *U. S. v. Cassidy*, 67 Fed. Rep. 728, it was said: "'Tie up' is a railroad phrase. It means to cease work. It is used by officials and train dispatchers. Perhaps a train at Port Costa may get orders, 'Train No. 18 will tie up at Tracy.' That means that they will not go any further."

**Tied House.** — See *Rice v. Noakes*, (1900) 1 Ch. 213; *Reg. v. London, etc., R. Co.*, L. R. 9 Q. B. 145.

2. Blind Tiger. (See also TIPLING HOUSE, post.) — In *Smith v. State*, 42 Tex. Crim. 415, it was said: "The law with reference to blind tigers is different from the local-option law, and prohibits what is called a 'blind tiger,' which is described as being 'any place where liquors are sold by device, whereby the party selling or delivering the same is concealed from the person buying, or to whom the same is delivered;' and then provides a special punishment for keeping a blind tiger, more onerous than that under the penal statute prohibiting ordinary sales of liquors in local-option territory." See also *Wray v. Harrison*, 116 Ga. 93.

In *Legg v. Anderson*, 116 Ga. 404, it was said: "A 'blind tiger,' using that term to describe a place where liquors are sold on the sly in violation of law, that is, giving to the term the meaning applied to it in the opinion of the majority of this court in the case of *Cannon v. Merry*, 116 Ga. 291, is a public nuisance independently of any provision in the act under consideration; and before the passage of this act a court of equity would have had jurisdiction to abate such a nuisance when a proper case was made for the grant of an injunction. The so-called 'blind tiger law,' if construed in the way contended for in this case by the defendant in error, would be simply a declaratory statute, and work no change whatever in the existing law. We do not think it made any change in regard to the status of the blind tiger, and to this extent the law is declaratory."

**Same — Dispensary.** — A dispensary where intoxicating liquors are openly and publicly sold in a town, in good faith, under color of lawful authority, though in fact operated in violation of law, is not "what is commonly known as a 'blind tiger,'" subject to be abated or enjoined under the provisions of Act Ga. Dec. 19, 1899. *Cannon v. Merry*, 116 Ga. 291.

**Same — Libel and Slander.** — In *Schulze v. Jalonick*, 18 Tex. Civ. App. 299, *Fisher, C. J.*, said: "A 'blind tiger' we find to be a place where such intoxicating drinks as are prohibited by the local-option law are disposed of or sold in violation of that law." This was an action for libel where the plaintiff alleged that the defendant had charged him with running a blind tiger.

3. Tight. — A patented apparatus for re-sweating tobacco consisted of three parts, one of which was a wooden tobacco holder, described as a tight vessel. Upon the meaning of tight in this connection the court said: "But it is

**TILE.** — A tile is defined as a slab of stone or marble used with others like it in a pavement or revetment. In the Middle Ages such tiles of stone were frequently incised with elaborate designs, the incisions being filled with lead or a colored composition, or occasionally incrustated in mosaic.<sup>1</sup>

**TILL.** — See UNTIL.

**TILLAGE.** — Husbandry; the cultivation of land, particularly by the plow.<sup>2</sup>

**TIMBER AND TIMBER LANDS.** — See the titles LOGS AND LUMBER, vol. 19, p. 522; STATE AND PUBLIC LANDS, vol. 26, p. 197; TREES AND TIMBER, *post*.

**TIME.** (See also REASONABLE TIME, vol. 23, p. 971; and see the titles TERM, *ante*; TIME, COMPUTATION OF, *post*.) — See note 3.

claimed that this is a substantial difference, because it is insisted that complainant's claim requires his tobacco holder to be *tight*, while the defendant's tobacco holders are not *tight*. I think, however, that the word *tight*, as used in his claim, is to be construed in the light of his specifications as meaning sufficiently *tight* to subserve the purposes to be accomplished. The term, as used here, must be held, I think, to mean comparatively or approximately *tight*; close enough to exclude an excess of steam or moisture, and open or porous enough to allow the warm moisture to sweat or percolate into the tobacco holder, so as to warm and moisten its contents; and it would seem that slight crevices or openings arising from defective mechanical construction, if not large enough to admit steam in such quantity or volume as to wet the tobacco, would not violate this patentee's rule of construction." Robinson v. Sutter, 10 Biss. (U. S.) 102.

1. U. S. v. Davis, 12 U. S. App. 57, 54 Fed. Rep. 149, quoting Cent. Dict. The court also said: "It thus appears that the word *tile*, etymologically considered, is not limited to an article of one material only." And again: "Derivatively, the word means a covering, and hence is applied to such articles as are used for covering roofs, pavements, walls, and the like. The original meaning of the word refers, therefore, to the use made of the article and not to the material of which it may be composed." See also Rossman v. Hedden, 145 U. S. 561.

2. **Tillage.** — U. S. v. Williams, 18 Fed. Rep. 478. In this case it was held that a settler on public land under the pre-emption and homestead acts, after clearing the land of timber for the purpose of *tillage*, or actual cultivation, could dispose of the timber to the best advantage to himself, but the timber could not be cut for the purpose of disposing of it by sale or otherwise.

In Vigar v. Dudman, L. R. 7 C. P. 72, affirming L. R. 6 C. P. 470, it was held that where a house was built upon a portion of an acre field, and the other portion, to the extent of twenty-two perches, converted into a garden by the owner, who fenced off the house and garden from the rest of the field, the remaining portion being used as an orchard, the manner in which the field had been dealt with did not amount to a conversion of it or any part of it into *tillage*.

Land sown to clover with corn is not thereby

restored to a state of permanent pasture, but is still in *tillage*. Birch v. Stephenson, 3 Taunt. 469.

3. **Time Aforesaid.** — See AFORESAID, vol. 1, p. 919.

**Time Being.** — A charter of a bank provided that "the directors for the *time* being shall have power to appoint a cashier." In construing this provision the court said that it "must be understood as meaning only that whenever, for any reason, the appointment of a cashier should be necessary, the then board of directors should be authorized to make the appointment." Union Bank v. Ridgely, 1 Har. & G. (Md.) 432.

**Cooling Time.** — See COOLING TIME, vol. 7, p. 505, and see the title MURDER AND MANSLAUGHTER, vol. 21, p. 176.

**Time Essence of Contract.** — In Hicks v. Aylsworth, 13 R. I. 566, it was said: "The familiar phrase that *time* is of the essence or not of the essence of a contract refers to the *time* for performing it; and therefore, when a contract makes *time* of its essence, the presumption is that it means the *time* for performance; or, if it relates to an option, the *time* for taking and not merely electing to take the benefit of it."

**Time Policy.** — "A *time* policy limits the risk by a certain period of *time*, as a month or year." Leeds v. Mechanics' Ins. Co., 8 N. Y. 356, and see the title MARINE INSURANCE, vol. 19, p. 930.

**Time in Sense of Reasonable Time.** — Crook v. Bradford, 65 Vt. 513.

**Time Bargains.** — In Thacker v. Hardy, 4 Q. B. D. 689, it was said: "A real *time* bargain is, I suspect, a very rare occurrence. Grizewood v. Blane, 11 C. B. 526, 73 E. C. L. 526, affords an instance of one, and Cooper v. Neil, W. N. 1 June, 1878, as understood by the jury afforded another." See also Forget v. Ostigny, (1895) A. C. 318.

**Time of Memory.** (See the titles PRESCRIPTION, vol. 22, p. 1180; USAGES AND CUSTOMS.) — "'Time of memory' hath been long ago ascertained by the law to commence from the beginning of the reign of Richard the First, and any custom may be destroyed by evidence of its nonexistence in any part of the long period from that time to the present." 2 Black. Com. 31, quoted in Ex p. Tice, 32 Oregon 179, and Ackerman v. Shelp, 8 N. J. L. 130,

# TIME (COMPUTATION OF).

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### CROSS-REFERENCES.

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For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see in this work such titles as *AGE*, vol. 1, p. 927; *BILLS AND NOTES*, vol. 4, p. 368 *et seq.*; *DEMURRAGE*, vol. 9, p. 220; *MONTH*, vol. 20, p. 869; *STATUTES*, vol. 26, p. 551, and p. 562 *et seq.*; *WEEK*; *YEAR*; see also the various Words and Phrases in their alphabetical order, such as *BEFORE*, vol. 3, p. 908; *FOR*, vol. 13, p. 738; *FROM*, vol. 14, p. 553, etc.

**I. SCOPE OF TITLE.** — It is the purpose of this article to state briefly such general rules for the computation of time as can be deduced from the numerous conflicting cases on the subject. To ascertain the rules for the computation in particular cases, reference should be made to the appropriate titles in this work. The rules as stated here may be applied with equal precision whether the computation be by days, weeks, months, or years,<sup>1</sup> since this article is concerned merely with the question, In the computation of time should the *terminus a quo* and the *terminus ad quem* be included or excluded?<sup>2</sup> For a full discussion as to the duration of these various periods, the reader is referred to the several words and phrases throughout this work, in their alphabetical order.

**II. DEFINITION.** — Time has been defined as the system of those relations which any event has to any other, as past, present, or future,<sup>3</sup> and also as "the measure of duration."<sup>4</sup>

**III. SOLAR AND STANDARD TIME.** — The only standard of time recognized by the courts is the meridian of the sun, and an arbitrary standard set up by persons in a certain line of business will not be recognized.<sup>5</sup> The presumption is that the common time (*i. e.* solar) is that relied on, when there is noth-

1. See *Grant v. Paddock*, 30 Oregon 312. But see, however, *Aultman, etc., Co. v. Syme*, 163 N. Y. 54, 79 Am. St. Rep. 565; *Williams v. Lane*, 87 Wis. 153. And see *infra*, this title, *Sundays or Holidays in Computation of Time — Rule When Period Less than a Week*.

2. In *Sims v. Hampton*, 1 S. & R. (Pa.) 411, Tilghman, C. J., said: "In order to ascertain with certainty whether any given number of days have expired from an act done, it would be necessary to count immediately from the act, and the twenty-four hours next succeeding would make the first day. But this minuteness of inquiry would be attended with so much difficulty that it has been thought best to establish a general rule that there shall be no fraction of a day, except in case of necessity. If there shall be no fraction of a day, you must either include in your computation the whole day on which the act was done, or entirely exclude it, and begin your count on the next day; and so far as truth is concerned, it is immaterial which of those ways you take. The chance of hitting the truth is as good in one way as the other, but in neither will you probably arrive at the exact truth."

3. Cent. Dict.

4. Bouv. Law Dict.; Black's Law Dict. In the latter work it is said: "The word is expressive both of a precise point or terminus, and of an interval between two points."

5. **Solar Time.** — *Henderson v. Reynolds*, 84 Ga. 159; *Searles v. Averhoff*, 28 Neb. 668; *Ex p. Parker*, 35 Tex. Crim. 12; *Jones v. German Ins. Co.*, 110 Iowa 75; *Curtis v. March*, 3 H. & N. 866, 28 L. J. Exch. 36, 4 Jur. N. S. 1112.

In *Henderson v. Reynolds*, 84 Ga. 159, the court said: "It seems idle to waste words in saying that the standard of time fixed by persons in a certain line of business cannot be substituted at will by persons in a certain locality for the standard recognized by the statutes of the state, as well as the general law and usage of the country. \* \* \* To allow the railroads to fix the standard of time would be to allow them at pleasure to violate or defeat the law."

**The Time Appointed for the Sitting of the Court** must be understood as the mean time at the place where the court sits, and not Greenwich time, unless it so expressed. *Curtis v. March*, 3 H. & N. 866, 28 L. J. Exch. 36, 4 Jur. N. S. 1112.

ing to show that a different mode of measuring time has been in general use.<sup>1</sup>

**IV. WHEN NO RULE NECESSARY.** — It is evident that no rule for computation is needed when the first or last day on which an act may be done is expressed by a date.<sup>2</sup>

**V. RULE WHEN CLEAR DAYS ARE PRESCRIBED.** — It is equally obvious that when clear or entire days are prescribed, both the *terminus a quo* and the *terminus ad quem* are to be excluded from the computation.<sup>3</sup>

**VI. RULE AS TO FRACTIONS OF DAYS.** — In the computation of time there are no fractions of a day, and the day on which an act is done or an event happens must be entirely excluded or included. But this is not an absolute rule, and where from the nature of the case justice requires it, fractions of a day are reckoned.<sup>4</sup>

**VII. GENERAL RULES FOR COMPUTATION — 1. From Act Done — a. TERMINUS A QUO EXCLUDED — (1) At Common Law.** — Where the computation is to be made from or after an act done, or the time of an act, or the happening of an event, the rule supported by the weight of authority is that the date of the act or of the happening of the event is to be excluded, and the last day of the period included.<sup>5</sup>

**1. Presumption in Favor of Solar Time.** — In *Searles v. Averhoff*, 28 Neb. 668, a summons was duly issued and served on the defendant on a certain day at ten A. M. At the time stated in the return of the summons the plaintiff appeared, but the defendant did not. The justice then waited one hour, standard time, and rendered judgment against the defendant by default. Before eleven A. M., common time, the defendant appeared and asked leave to make his defense, which was refused. It was held that the justice should have waited until eleven A. M., common time, and that the judgment was rendered prematurely.

**2. Cooney v. Burt**, 123 Mass. 579; *Northwestern Guaranty Loan Co. v. Channell*, 53 Minn. 269.

**3. Clear Days — Both Termini Excluded — England.** — *Reg. v. Justices*, 8 Ad. & El. 173, 35 E. C. L. 367; *Mitchell v. Foster*, 12 Ad. & El. 472, 40 E. C. L. 98; *Reg. v. Middlesex*, 3 Dowl. & L. 109; *Watson v. Eales*, 23 Beav. 294; *Reg. v. Aberdare Canal Co.*, 14 Q. B. 854, 68 E. C. L. 854; *Chambers v. Smith*, 12 M. & W. 2; *Ex p. Ferrige*, L. R. 20 Eq. 289; *Rex v. Justices*, 3 B. & Ald. 581, 5 E. C. L. 385.

*Alabama.* — *State v. McLendon*, 1 Stew. (Ala.) 195; *Garner v. Johnson*, 22 Ala. 494; *Robertson v. State*, 43 Ala. 325.

*Arkansas.* — *Jones v. State*, 42 Ark. 93.

*Maryland.* — *Stewart v. Meyer*, 54 Md. 454.

See also *State v. Marvin*, 12 Iowa 99; *Willey v. Laraway*, 64 Vt. 566. And see *infra*, this title, *General Rules for Computation — Addition of "At Least" or "Not Less than."*

**4. See DAY**, vol. 8, p. 738 et seq.

**5. From an Act Done — Day Excluded — England.** — *Lester v. Garland*, 15 Ves. Jr. 248; *Webb v. Fairman*, 3 M. & W. 473; *Williams v. Burgess*, 12 Ad. & El. 635, 40 E. C. L. 142; *Gorst v. Lowndes*, 11 Sim. 434; *Blunt v. Heslop*, 8 Ad. & El. 577, 35 E. C. L. 461; *Mercer v. Ogilvy*, 3 Paton 434; *Robinson v. Waddington*, 13 Q. B. 753, 66 E. C. L. 753; *Pennell v. Churchwardens*, 8 Jur. N. S. 99, 31 L. J. M. C. 92; *South Staffordshire Tramways Co. v. Sickness, etc., Assur. Assoc.*, (1891) 1 Q. B. 402, 60 L. J. Q. B. 47.

*Canada.* — *McCrea v. Waterloo County Mut. F. Ins. Co.*, 26 U. C. C. P. 431.

*United States.* — *Sheets v. Selden*, 2 Wall. (U. S.) 177; *In re Martin*, 4 Fed. Rep. 208; *Johnson v. Meyers*, (C. C. A.) 54 Fed. Rep. 417; *Smith v. Gale*, 137 U. S. 577; *Neurath's Motion*, 17 Ct. Cl. 225; *Miner v. Mariott*, 2 Land Dec. 709; *Great Western Lode*, 5 Land Dec. 510; *Ground Hog Lode v. Parole, etc., Lode*, 8 Land Dec. 430; *Bonesell v. McNider*, 13 Land Dec. 286; *Waterhouse v. Scott*, 13 Land Dec. 718.

*Colorado.* — *Hax v. Leis*, 1 Colo. 171.

*Connecticut.* — *Weeks v. Hull*, 19 Conn. 376; *Blackman v. Nearing*, 43 Conn. 56, 21 Am. Rep. 634. See also *Pickett v. Allen*, 10 Conn. 146.

*District of Columbia.* — *Baker v. Ramsburg*, 4 Mackey (D. C.) 1.

*Florida.* — *Savage v. State*, 18 Fla. 970.

*Georgia.* — *Neal v. Crew*, 12 Ga. 93; *Baxley v. Bennett*, 33 Ga. 146; *Blitch v. Brewer*, 83 Ga. 333.

*Illinois.* — *People v. Hatch*, 33 Ill. 138; *Bowman v. Wood*, 41 Ill. 203; *Roan v. Rohrer*, 72 Ill. 582; *Zimmerman v. Cowan*, 107 Ill. 631; *Protection L. Ins. Co. v. Palmer*, 81 Ill. 88; *Cummins v. Holmes*, 11 Ill. App. 158. See also *Ewing v. Bailey*, 5 Ill. 420; *Higgins v. Halligan*, 46 Ill. 173; *Harper v. Ely*, 56 Ill. 179; *Pugh v. Reat*, 107 Ill. 440.

*Indiana.* — *Hathaway v. Hathaway*, 2 Ind. 513. See also *Swift v. Tousey*, 5 Ind. 196.

*Louisiana.* — *State v. Michel*, 52 La. Ann. 936, 78 Am. St. Rep. 364.

*Maine.* — *Pease v. Norton*, 6 Me. 229; *Wing v. Davis*, 7 Me. 31; *Cressey v. Parks*, 75 Me. 387, 46 Am. Rep. 406. See also *Berry v. Spear*, 13 Me. 187; *Simmons v. Jacobs*, 52 Me. 147; *Tuttle v. Gates*, 24 Me. 395; *Page v. Weymouth*, 47 Me. 238.

*Maryland.* — *German Lutheran, etc., Congregation v. Heise*, 44 Md. 453.

*Massachusetts.* — *Bemis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470; *Seekonk v. Rehoboth*, 8 Cush. (Mass.) 371; *Gardner v. Nute*, 2 Cush. (Mass.) 333; *Seward v. Hayden*, 150 Mass. 158, 15 Am. St. Rep. 183; *Paul v. Stone*, 112 Mass. 27; *Fuller v. Russell*, 6 Gray

(2) *Under Code Provisions* — (a) *Decisions under Code Provisions.* — And the same is held under the codes, which generally provide that in the computation of the time within which an act is to be done, the first day shall be excluded and the last included.<sup>1</sup>

(Mass.) 128; *Holden v. James*, 11 Mass. 400; 6 Am. Dec. 174; *Buttrick v. Holden*, 8 Cush. (Mass.) 233; *Millett v. Lemon*, 113 Mass. 355; *Clark v. Lancy*, 178 Mass. 460. See also *Portland Bank v. Maine Bank*, 11 Mass. 204.

*Michigan.* — *Warren v. Slade*, 23 Mich. 1, 9 Am. Rep. 70; *Harrison v. Sager*, 27 Mich. 476; *Doyle v. Mizner*, 41 Mich. 549. See also *Gorham v. Wing*, 10 Mich. 486.

*Minnesota.* — *Parkinson v. Brandenburg*, 35 Minn. 294. See also *Duncan v. Cobb*, 32 Minn. 460.

*Missouri.* — *Steamboat Mary Blane v. Beehler*, 12 Mo. 477; *Kimm v. Osgood*, 19 Mo. 60; *White v. Haworth*, 21 Mo. App. 439.

*New Jersey.* — *McCulloch v. Hopper*, 47 N. J. L. 189, 54 Am. Rep. 146; *Serrell v. Rothstein*, 49 N. J. Eq. 385.

*New York.* — *Ex p. Dean*, 2 Cow. (N. Y.) 605, 14 Am. Dec. 521; *Snyder v. Warren*, 2 Cow. (N. Y.) 518, 14 Am. Dec. 519; *Judd v. Fulton*, 10 Barb. (N. Y.) 117; *Cock v. Bunn*, 6 Johns. (N. Y.) 326; *Fairbanks v. Wood*, 17 Wend. (N. Y.) 329; *People v. Luther*, 1 Wend. (N. Y.) 42; *Campbell v. International L. Assur. Soc.*, 4 Bosw. (N. Y.) 298; *Bissell v. Bissell*, 11 Barb. (N. Y.) 96; *Morss v. Purvis*, 68 N. Y. 225; *Speidell v. Fash*, 1 Cow. (N. Y.) 234; *Mygatt v. Washburn*, 15 N. Y. 316; *Haden v. Buddensick*, (C. Pl. Gen. T.) 49 How. Pr. (N. Y.) 241; *Bowes v. New York Christian Home*, (N. Y. Super. Ct. Spec. T.) 64 How. Pr. (N. Y.) 509. See also *Cornell v. Moulton*, 3 Den. (N. Y.) 12.

*Ohio.* — *Harris v. Harris*, 7 Ohio Cir. Dec. 189, 13 Ohio Cir. Ct. 170.

*Pennsylvania.* — *Cromelien v. Brink*, 29 Pa. St. 522; *Matter of Goswiler*, 3 P. & W. (Pa.) 200; *Sims v. Hampton*, 1 S. & R. (Pa.) 411; *Menges v. Frick*, 73 Pa. St. 137, 13 Am. Rep. 731; *Marks v. Russell*, 40 Pa. St. 372; *Harker v. Addis*, 4 Pa. St. 515; *Esler v. Peterson*, 8 Phila. (Pa.) 303; *Davis v. Davis*, 128 Pa. St. 100; *Edmundson v. Wragg*, 104 Pa. St. 500, 49 Am. Rep. 500; *Brisben v. Wilson*, 60 Pa. St. 452; *Thomas v. Premium Loan Assoc.*, 3 Phila. (Pa.) 425, 16 Leg. Int. (Pa.) 174; *Gass v. Schuylkill Iron Co.*, 2 Leg. Chron. (Pa.) 241. See also *Snyder v. Smith*, 1 Leg. Gaz. (Pa.) 35.

*South Carolina.* — *Corwin v. Comptroller Gen.*, 6 S. Car. 390.

*Texas.* — *Lubbock v. Cook*, 49 Tex. 96; *Smith v. Dickey*, 74 Tex. 61; *Watkins v. Willis*, 58 Tex. 521; *Hill v. Kerr*, 78 Tex. 213; *Hammons v. State*, 35 Tex. Crim. 17; *Geistweidt v. Mann*, (Tex. Civ. App. 1896) 37 S. W. Rep. 372; *Texas, etc., R. Co. v. Moore*, (Tex. Civ. App. 1897) 43 S. W. Rep. 67; *Hunter v. Lanius*, 82 Tex. 677; *King v. State*, 32 Tex. Crim. 463; *Bach v. Ginacchio*, 1 Tex. App. Civ. Cas., § 1315. See also *Smith v. Wilson*, 15 Tex. 132.

*Vermont.* — *Muzzy v. Howard*, 42 Vt. 23; *French v. Wilkins*, 17 Vt. 341. See also *Robinson v. Robinson*, 32 Vt. 738; *Chaffee v. Harrington*, 60 Vt. 718.

*Wisconsin.* — *O'Connor v. Fond du Lac*, 109 Wis. 253.

See also *Wilson v. Knight*, 3 Greene (Iowa) 126; *Rothwell v. Gettys*, 11 Humph. (Tenn.) 136.

In *Lester v. Garland*, 15 Ves. Jr. 248, Sir William Grant, M. R., said: "It is not necessary to lay down any general rule upon this subject, but upon technical reasoning I rather think it would be more easy to maintain that the day of an act done or an event happening ought in all cases to be excluded, than that it should in all cases be included."

**Fifth Day After Meeting of Court.** — In *Hollis v. Francois*, 1 Tex. 118, it was held that "the fifth day after the meeting of the court" meant the sixth court day, but the court said that "the fifth day of the meeting of the court" would mean the fifth court day.

**Running of Statute of Limitations After Disability Removed.** — Where A became of age April 16, 1860, and brought suit April 16, 1865, it was held that he was too late. He could have brought suit any moment after midnight of April 15, 1860, and so five years expired on midnight of April 15, 1865. *Ross v. Morrow*, 85 Tex. 172; *Phelan v. Douglass*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 193.

**Computing Age of a Person.** — See AGE, vol. 1, p. 927.

**Leap Year.** — As to the reckoning of the 29th day of February in a leap year, see DAY, vol. 8, p. 737.

**Where the Defendant Had Two Months from the Appearance in which to answer, and appearance was on April 26, and an order was made on May 8 staying the proceedings until security should be given and security was given on December 4, it was held that the defendant had all of January 24 in which to answer.** *White v. White*, 12 Ir. Eq. 425.

**1. From Act Done — Day Excluded under Code.** — *United States.* — *In re Lang*, 2 Nat. Bankr. Reg. 480.

*Alabama.* — *Walker v. Walker*, 42 Ala. 489; *Cawfield v. Brown*, 45 Ala. 552; *Field v. Gamble*, 47 Ala. 443; *Loosse v. Vogel*, 80 Ala. 308; *Owen v. Slatter*, 26 Ala. 547, 62 Am. Dec. 745; *Louisville, etc., R. Co. v. Watson*, 90 Ala. 68. See also *Madden v. Floyd*, 69 Ala. 221.

*Arizona.* — *Pemberton v. Duryea*, (Ariz. 1896) 43 Pac. Rep. 220.

*California.* — *Perham v. Kuper*, 61 Cal. 331; *Dingley v. McDonald*, 124 Cal. 90.

*Colorado.* — *Evans v. Bowers*, 13 Colo. 511.

*Florida.* — *Jacksonville, etc., R., etc., Co. v. Broughton*, 38 Fla. 139.

*Georgia.* — *Cain v. Ligon*, 76 Ga. 102.

*Illinois.* — *Brainard v. Norton*, 14 Ill. App. 643.

*Indiana.* — *Towell v. Hollweg*, 81 Ind. 154; *Faure v. U. S. Express Co.*, 23 Ind. 48; *Wright v. Manns*, 111 Ind. 422; *Backer v. Pyne*, 130 Ind. 288, 30 Am. St. Rep. 231.

*Iowa.* — *Holbrook v. Mill Owners' Mut. Ins. Co.*, 86 Iowa 255; *Conklin v. Marshalltown*, 66



(b) **Applications of Code.** — The code provisions are generally in terms limited to the computation of time in cases where an act is to be done "as herein provided," but the courts apply the rule also in the construction of contracts<sup>1</sup> and of statutes,<sup>2</sup> and to criminal as well as civil cases.<sup>3</sup>

*b. EITHER TERMINUS A QUO OR TERMINUS AD QUEM EXCLUDED.* — Some cases, however, hold that one day is exclusive and the other inclusive, without specifying whether the first or the last day is to be excluded.<sup>4</sup>

Iowa 122; *Fink v. Fink*, 8 Iowa 313; *Carleton v. Byington*, 16 Iowa 588.

*Kansas.* — *Hook v. Bixby*, 13 Kan. 164. See also *Smith County v. Labore*, 37 Kan. 480.

*Louisiana.* — *State v. Ellis*, 40 La. Ann. 793.

*Minnesota.* — *Davidson v. Gaston*, 16 Minn. 230; *Frankoviz v. Smith*, 34 Minn. 403.

*Missouri.* — *Reynolds v. Missouri, etc.*, R. Co., 64 Mo. 70; *Beaudean v. Cape Girardeau*, 71 Mo. 392; *Deere v. Hucht*, 32 Mo. App. 153; *St. Louis v. Bambrick*, 41 Mo. App. 648; *Semple, etc., Mfg. Co. v. Thomas*, 10 Mo. App. 457; *State v. Stuckey*, 78 Mo. App. 533; *Jordan v. Chicago, etc., R. Co.*, 92 Mo. App. 84; *Diesing v. Reilly*, 77 Mo. App. 450; *Parsons v. Egyptian Levee Co.*, 73 Mo. App. 458.

*Nebraska.* — *Monell v. Terwilliger*, 8 Neb. 360; *Chapman v. Allen*, 33 Neb. 129; *Dale v. Doddridge*, 9 Neb. 138.

*New Hampshire.* — *Annan v. Baker*, 49 N. H. 161.

*New York.* — *Dorsey v. Pike*, 46 Hun (N. Y.) 112; *Gallt v. Finch*, (Supm. Ct. Gen. T.) 24 How. Pr. (N. Y.) 193; *McGraw v. Walker*, 2 Hilt. (N. Y.) 404.

*North Carolina.* — *Turrentine v. Richmond, etc.*, R. Co., 92 N. Car. 642; *Barcroft v. Roberts*, 92 N. Car. 249; *Zell Guano Co. v. Hicks*, 120 N. Car. 29.

*Ohio.* — *Bushong v. Graham*, 2 Ohio Cir. Dec. 464, 4 Ohio Cir. Ct. 138; *Chicago Label, etc., Co. v. Washburn*, 8 Ohio Cir. Dec. 113, 15 Ohio Cir. Ct. 510.

*Oregon.* — *Carothers v. Wheeler*, 1 Oregon 194; *Nicklin v. Robertson*, 28 Oregon 278, 52 Am. St. Rep. 790.

*Pennsylvania.* — *Com. v. Wood*, 5 Pa. Dist. 170.

*South Carolina.* — *Bigham v. Holliday*, 52 S. Car. 528.

*Tennessee.* — *Cowan v. Donaldson*, 95 Tenn. 322.

*Vermont.* — *Hicks v. Blanchard*, 60 Vt. 673.

*West Virginia.* — *State v. Beasley*, 21 W. Va. 777.

**Years.** — In *New York*, where an act was to be done so many years after another act, the first day was included, since the code only prescribes the rule for computing days, weeks, or months. *Aultman, etc., Co. v. Syme*, 163 N. Y. 54, 79 Am. St. Rep. 565, 91 Hun (N. Y.) 632, *overruling Connecticut Nat. Bank v. Bayles*, 17 N. Y. App. Div. 596.

**Both Days Excluded.** — Under the *Louisiana* Code, "within" ten days is exclusive of both. *Garland v. Holmes*, 12 Rob. (La.) 421; *Hart v. Nixon*, 25 La. Ann. 136; *State v. Judge*, 29 La. Ann. 223; *Tupery v. Edmondson*, 29 La. Ann. 850; *Catherwood v. Shepard*, 30 La. Ann. 677; *Dayton v. Commercial Bank*, 6 Rob. (La.) 17; *Miller's Succession*, 107 La. 561. But this article of the code does not apply to article 361

of the civil code, which provides that certain agreements are null and void unless preceded by vouchers, rendered "ten days previous." *Hodgson v. Roth*, 33 La. Ann. 941.

**First Day After Act Excluded.** — In *Alabama* it was held that where a party is allowed thirty days from the adjournment of court to do an act, the first day after adjournment will be excluded. *Ragsdale v. Kinney*, 119 Ala. 454.

In *Kansas City v. Gibson*, 66 Kan. 501, it was held that where the computation is from an act done, the day of the act is included; but this decision seems directly contrary to the earlier decisions and to the provisions of the General Statutes of *Kansas*, which contain the usual provisions as to the computation of time, and can be supported neither on principle nor on authority.

**1. Contracts.** — *Gray v. Worst*, 129 Mo. 122; *Chicago Title, etc., Co. v. Smyth*, 94 Iowa 401.

**Contrary Rule in Indiana.** — The opposite rule is held in *Indiana*. *Cook v. Gray*, 6 Ind. 335. But in this state the statutory rule of computation is applied to the filing of bills of exceptions. *State v. Thorn*, 28 Ind. 306. See also *Byers v. Hickman*, 36 Ind. 359.

**2. Statutes.** — *Spencer v. Haug*, 45 Minn. 231; *Johnson v. Merritt*, 50 Minn. 303; *McGinn v. State*, 46 Neb. 427, 50 Am. St. Rep. 617.

**3. Criminal Cases.** — *State v. Beasley*, 21 W. Va. 777. And in *Radcliffe v. Bartholomew*, (1892) 1 Q. B. 161, 61 L. J. M. C. 63, it was held that the same rules govern the computation, whether the statute limiting the period deals with civil or criminal matters.

**Pennsylvania Statute 1883.** — Pa. Stat. June 20, 1883, P. L. 136, is declaratory of the common law before its passage. *Lutz's Appeal*, 124 Pa. St. 273; *Com. v. Wood*, 5 Pa. Dist. 170. And it applies to cases where an act is ordered to be done by law or by rule of court; but where rights are acquired by virtue of an act done for a prescribed period, the computation must be made most favorably to the party whose rights are affected, and so it was held that from the forenoon of April 2 to the forenoon of April 1 is an entire year. *Cascade Tp. v. Lewis Tp.*, 148 Pa. St. 333.

**Minnesota Statute — Sale under Mortgage.** — The Minn. Comp. Stat., p. 630, § 43, lays down the rule for computing time in publication of legal notices, and this applies to a notice of sale under a power in a mortgage. *Worley v. Naylor*, 6 Minn. 192.

**4. From Act — One Terminus Excluded.** — *Colorado.* — Matter of Senate Resolution, 9 Colo. 632.

*Georgia.* — *Knoxville City Mills Co. v. Lovinger*, 83 Ga. 563 (under code); *Rusk v. Hill*, 117 Ga. 722 (under code), *overruling Mott v. Brunswick Pub. Co.*, 117 Ga. 149; *Walker v. Neil*, 117 Ga. 733.

*c. TERMINUS A QUO INCLUDED.* — A large number of old cases, and a few modern ones, hold that the day of the act or of the event is to be included, but nearly all of these cases are now overruled or disregarded in the jurisdictions where decided. *Kentucky*, however, still adheres to this doctrine.<sup>1</sup>

*Kentucky.* — *Sanders v. Norton*, 4 T. B. Mon. (Ky.) 464; *Smith v. Cassity*, 9 B. Mon. (Ky.) 192, 48 Am. Dec. 420; *Batman v. Megowan*, 1 Met. (Ky.) 533; *Miller v. Henshaw*, 4 Dana (Ky.) 325.

*New Jersey.* — *State v. Jackson*, 4 N. J. L. 368.

*New York.* — *Gillespie v. White*, 16 Johns. (N. Y.) 117; *Hoffman v. Ducl*, 5 Johns. (N. Y.) 232; *Charles v. Stansbury*, 3 Johns. (N. Y.) 261; *Irving v. Humphreys*, Hopk. (N. Y.) 364; *Vandenburgh v. Van Rensselaer*, 6 Paige (N. Y.) 147; *Bunce v. Reed*, 16 Barb. (N. Y.) 347. See also *Jackson v. Van Valkenburgh*, 8 Cow. (N. Y.) 260.

*Pennsylvania.* — *Boyer v. Northern Cent. R. Co.*, 1 Pearson (Pa.) 113; *Frantz v. Kaser*, 3 S. & R. (Pa.) 395.

*West Virginia.* — *State v. Mounts*, 36 W. Va. 179.

**Early Rule in Louisiana.** — The rule just stated used to be in force in Louisiana. *Robinet v. Compton*, 2 La. Ann. 856.

**Exclusive of Return Day.** — Where a rule of court required a writ to be four days in the sheriff's office, "exclusive of the return day," it was held that a writ delivered on the 15th, returnable on the 19th, was well served. *Gillespie v. White*, 16 Johns. (N. Y.) 117.

**1. From Act — Terminus a Quo Included.** — *England.* — *Norris v. Hundred of Gawtry*, 1 Hob. 139; *Clayton's Case*, 5 Coke 1; *Glassington v. Rawlins*, 3 East 407; *Rex v. Adderley*, 2 Dougl. 463; *Castle v. Burditt*, 3 T. R. 623; *Wallace v. King*, 1 H. Bl. 13; *Fano v. Coken*, 1 H. Bl. 9; *Godson v. Sanctuary*, 4 B. & Ad. 255, 24 E. C. L. 53; *Ex p. Farquhar*, Mont. & M. 7; *In re Maud*, 64 L. T. N. S. 743.

*United States.* — *Burrall v. Du Blois*, 2 Dall. (U. S.) 229; *Arnold v. U. S.*, 9 Cranch (U. S.) 104.

*Georgia.* — *Barrett v. Devine*, 60 Ga. 632; *Western, etc., R. Co. v. Carson*, 70 Ga. 388; *Peterson v. Georgia R., etc., Co.*, 97 Ga. 798; *Jones v. Kern*, 101 Ga. 309. But see *Blitch v. Brewer*, 83 Ga. 333.

*Illinois.* — *Krug v. Outhouse*, 8 Ill. App. 304.

*Indiana.* — *Ryman v. Clark*, 4 Blackf. (Ind.) 329; *Long v. McClure*, 5 Blackf. (Ind.) 319; *Jacobs v. Graham*, 1 Blackf. (Ind.) 392; *Tucker v. White*, 19 Ind. 253; *Brown v. Buzan*, 24 Ind. 194.

*Kentucky.* — *Chiles v. Smith*, 13 B. Mon. (Ky.) 461; *Long v. Hughes*, 1 Duv. (Ky.) 387; *Woods v. Patrick*, Hard. (Ky.) 465; *White v. Crutcher*, 1 Bush (Ky.) 472; *Lebus v. Wayne Ratterman Co.*, (Ky. 1893) 21 S. W. Rep. 652; *Moorar v. Covington City Nat. Bank*, 80 Ky. 305; *Mallory v. Hiles*, 4 Met. (Ky.) 53; *Bush v. Com.*, 80 Ky. 244; *Owen v. Howard Ins. Co.*, 87 Ky. 571; *National Mut. Ben. Assoc. v. Miller*, 85 Ky. 88; *O'Brien v. Com.*, 89 Ky. 354; *Newport News v. Thomas*, 96 Ky. 613; *Com. v. Shelton*, 99 Ky. 120; *Zeman v. Steinburg*, (Ky. 1899) 52 S. W. Rep. 821, 54 S. W. Rep. 178; *Harlan v. Braxdale*, (Ky. 1896) 35 S. W. Rep.

916. See also *Irwin v. Irwin*, 105 Ky. 632; *Wood v. Com.*, 11 Bush (Ky.) 220; *Edwards v. Logan*, 69 S. W. Rep. 800, 24 Ky. L. Rep. 678.

*Massachusetts.* — *Wheeler v. Bent*, 4 Pick. (Mass.) 167; *Com. v. Keniston*, 5 Pick. (Mass.) 420; *Presbrey v. Williams*, 15 Mass. 193. See also *Little v. Blunt*, 9 Pick. (Mass.) 488; *Perry v. Provident L. Ins., etc., Co.*, 99 Mass. 162; *Atkins v. Sleeper*, 7 Allen (Mass.) 487.

*Missouri.* — *State v. Gasconade County Ct.*, 33 Mo. 102 (under code); *Patchin v. Bonsack*, 52 Mo. 431 (under code).

*New Hampshire.* — *Priest v. Tarlton*, 3 N. H. 93.

*Pennsylvania.* — *Hampton v. Erenzeller*, 2 Browne (Pa.) 18; *Barber v. Chandler*, 17 Pa. St. 48, 55 Am. Dec. 533; *Agnew v. Philadelphia*, 2 Phila. (Pa.) 379, 14 Leg. Int. (Pa.) 340; *Lane v. Shreiner*, 1 Binn. (Pa.) 292. See also *Wayne v. Duffy*, 1 Phila. (Pa.) 367, 9 Leg. Int. (Pa.) 102.

*Vermont.* — *Matter of Welman*, 20 Vt. 653.

See also *Mound City Mut. L. Ins. Co. v. Twining*, 19 Kan. 349.

**Georgia Cases Distinguished.** — In *Barrett v. Devine*, 60 Ga. 632, and in *Western, etc., R. Co. v. Carson*, 70 Ga. 388, it was held that where a writ of certiorari must be filed within three months from a certain act, the day on which the act was done should be included; but in *Blitch v. Brewer*, 83 Ga. 333, it was held that where a note matured on a certain day, that day should be included in reckoning the running of the statute of limitations, and the court distinguished the two cases *supra* on the ground that a writ of certiorari could be filed on the same day as the doing of the act, whereas suit could not be brought on the note till the day after maturity.

And in *Peterson v. Georgia R., etc., Co.*, 97 Ga. 798, it was held that an action for personal injuries brought on Oct. 24, 1897, was barred by the statute of limitations of four years, the accident having occurred on Oct. 24, 1893; and the court cited with approval all three of the cases *supra*.

This case was followed in *Jones v. Kern*, 101 Ga. 309; but in *Rusk v. Hill*, 117 Ga. 722, the rule laid down in *Peterson v. Georgia R., etc., Co.*, 97 Ga. 798, was disapproved, and the opinion was expressed that the *terminus a quo* should in all cases be excluded.

**Act Not Done by Party.** — Where the act from which the computation is to be made was not done by the party, the day of the act is excluded. *Pellew v. Hundred of Wonford*, 9 B. & C. 134, 17 E. C. L. 343; *Hardy v. Ryle*, 9 B. & C. 603, 17 E. C. L. 456.

**Both Days Counted.** — In *Fortner's Case*, 2 Harr. (Del.) 461, it was held that the *Delaware* act of 1832 required that both the first and last days should be counted in the case of the discharge of imprisoned debtors after five days.

In *Voorhees v. Minor*, 10 Ohio Cir. Dec. 681, it was held that where a contract provides for

*d.* RULE OF REASON AND INTENTION. — Another view is that the day of the act should be included or excluded according to the reason of the thing and the intention of the parties or of the legislature,<sup>1</sup> and when necessary to save a forfeiture<sup>2</sup> or to prevent an estoppel;<sup>3</sup> and this rule has often influenced a court in reaching its decision, although the opinion itself may disclose no such doctrine.<sup>4</sup>

**2. From the Date or Day of Date** — *a.* EARLY RULE. — The early cases drew a distinction between the terms "date" and "day of the date," and held that where the computation was from the former the day of the date was included, but when from the latter the day of the date was excluded.<sup>5</sup>

*b.* MODERN RULE — TERMINUS A QUO EXCLUDED — (1) *At Common Law.* — It is obvious that this distinction is without merit and only calculated to mislead, and it is now recognized that there is no distinction between the two phrases,<sup>6</sup> and the universal rule is that the day of the date is excluded and the last day of the period included, whether the computation be from the date<sup>7</sup>

a period beyond which a thing may be done, the first day is included and the last excluded, but where it provides a period within which a thing must be done, a different rule prevails.

An Interesting Quære is as to how the computation should be made in construing a clause of the state constitution, the early decisions in the state being in accordance with the early English rule, while a statute passed since the adoption of the constitution provided that the first day shall be excluded. Soldiers' Voting Bill, 45 N. H. 613.

**1. Rule of Reason, etc.** — *England.* — Lester v. Garland, 15 Ves. Jr. 248; Webb v. Fairmaner, 3 M. & W. 473; *Ex p.* Fallon, 5 T. R. 283; *In re* North, (1895) 2 Q. B. 264, 64 L. J. Q. B. 694.

*United States.* — Taylor v. Brown, 147 U. S. 640; Neurath's Motion, 17 Ct. Cl. 225.

*Arkansas.* — Swisher v. Hine, 10 Ark. 497. *California.* — Price v. Whitman, 8 Cal. 412; *Iron Mountain Co. v.* Haight, 39 Cal. 740; *Garnett v.* Bost, 39 Cal. 662.

*Dakota.* — Taylor v. Brown, 5 Dak. 335. *North Carolina.* — Branch v. Wilmington, etc., R. Co., 77 N. Car. 347.

*Pennsylvania.* — Green's Appeal, 6 W. & S. (Pa.) 327; Menges v. Frick, 73 Pa. St. 137, 13 Am. Rep. 731; Ege's Appeal, 2 Watts (Pa.) 285.

*Tennessee.* — Elder v. Bradley, 2 Sneed (Tenn.) 247; Jones v. Planters' Bank, 5 Humph. (Tenn.) 619, 42 Am. Dec. 471.

*Texas.* — Burr v. Lewis, 6 Tex. 76; State v. Asbury, 26 Tex. 82; Dowell v. Vinton, 1 Tex. App. Civ. Cas., § 328; Texas, etc., R. Co. v. Goodson, 2 Tex. App. Civ. Cas., § 27; Shaline v. Goodman, 2 Tex. App. Civ. Cas., § 267; Winston v. State, 32 Tex. Crim. 59.

See also *People v. Sheriff*, 19 Wend. (N. Y.) 87.

**2. To Save a Forfeiture** — *England.* — Dowling v. Foxall, 1 Ball. & B. 193.

*Connecticut.* — Sands v. Lyon, 18 Conn. 18. See also *Weeks v. Hull*, 19 Conn. 376.

*Kansas.* — Dwelling-House Ins. Co. v. Osborn, 1 Kan. App. 197.

*Maine.* — Moore v. Bond, 18 Me. 142.

*Missouri.* — State v. Gasconade County Ct., 33 Mo. 102.

*New Jersey.* — Thorne v. Mosher, 20 N. J. Eq. 257.

*South Carolina.* — Williamson v. Farrow, 1 Bailey L. (S. Car.) 611, 21 Am. Dec. 492; McElwee v. White, 2 Rich. L. (S. Car.) 95; State v. Schnierle, 5 Rich. L. (S. Car.) 299.

See also *Blake v. Crowninshield*, 9 N. H. 304; *Millard v. Willard*, 3 R. I. 42.

**3. To Prevent an Estoppel.** — *Windsor v. China*, 4 Me. 298.

**4.** In Supreme Council, etc., v. Gootee, (C. C. A.) 89 Fed. Rep. 941, Goff, Circ. J., said: "Much of the confusion existing concerning the reported decisions of the cases involving the computation of time \* \* \* will be found, on a close examination of the opinions of the courts, to be owing to the desire to give due effect to the meaning of the parties, as expressed in the particular language or phrase used in each case."

**5. From the Date Is Inclusive.** — *Osborn v. Rider*, Cro. Jac. 135; *Hatter v. Ash*, 1 Ld. Raym. 84; *Seignoret v. Noguere*, 2 Ld. Raym. 1241; *Jones v. Smith*, 28 Ga. 41, *disapproved* in *Blitch v. Brewer*, 83 Ga. 333; *Cunningham v. Phillips*, Tappan (Ohio) 184; *Turner v. Odum*, 3 Coldw. (Tenn.) 455.

**6. No Distinction Between Date and Day of Date.** — *Pugh v. Leeds*, 2 Cowp. 714; *Llewelyn v. Williams*, Cro. Jac. 258; *Bacon v. Waller*, 3 Bulst. 204; *Oatman v. Walker*, 33 Me. 67; *Houser v. Reynolds*, 1 Hayw. (2 N. Car.) 114, 1 Am. Dec. 551.

**7. From the Date Is Exclusive of Day of Date** — *England.* — *Ackland v. Lutley*, 9 Ad. & El. 879, 36 E. C. L. 312; *Ammerman v. Digges*, 12 Ir. C. L. App. i; *Llewelyn v. Williams*, Cro. Jac. 258; *Bacon v. Waller*, 3 Bulst. 204; *Smith v. Rathbone*, 5 Dowl. 401; *Pepperell v. Burrell*, 2 Dowl. 674; *Dunn v. Hodson*, 1 Dowl. & L. 204; *Weeks v. Wray*, L. R. 3 Q. B. 212; *Liffin v. Pitcher*, 1 Dowl. N. S. 767; *Ryland v. Wormwald*, 5 Dowl. 581.

*United States.* — *Best v. Polk*, 18 Wall. (U. S.) 112; Supreme Council, etc., v. Gootee, (C. C. A.) 89 Fed. Rep. 941.

*Illinois.* — *Waterman v. Jones*, 28 Ill. 54.

*Indiana.* — *Williams v. State*, 5 Ind. 235. See also *Krohn v. Templin*, 2 Ind. 146.

*Kentucky.* — *Pyle v. Maulding*, 7 J. J. Marsh. (Ky.) 202.

*Maine.* — *Flint v. Sawyer*, 30 Me. 226; *Oatman v. Walker*, 33 Me. 67.

*Maryland.* — *Calvert v. Williams*, 34 Md. 672.



or from the day of the date.<sup>1</sup>

(2) *Under Code Provisions.* — And the same is held under the usual code provisions.<sup>2</sup>

*Michigan.* — Shelton *v.* Gillett, 79 Mich. 173.  
*Nebraska.* — Glore *v.* Hare, 4 Neb. 131.

*New Hampshire.* — Rand *v.* Rand, 4 N. H. 267; Blake *v.* Crowninshield, 9 N. H. 304.

*New Jersey.* — McCormick *v.* Hickey, 56 N. J. Eq. 848.

*New York.* — Homan *v.* Liswell, 6 Cow. (N. Y.) 659.

*North Carolina.* — Houser *v.* Reynolds, 1 Hayw. (2 N. Car.) 114, 1 Am. Dec. 551.

*Ohio.* — Paine *v.* Mason, 7 Ohio St. 198.

*Pennsylvania.* — Weld *v.* Barker, 153 Pa. St. 465; Serrill *v.* Burk, 8 Phila. (Pa.) 515; Ferris *v.* Zeidler, 5 Phila. (Pa.) 529, 21 Leg. Int. (Pa.) 4; Harlan *v.* Tripp, 7 Pa. Dist. 382; Arms *v.* Leaman, 4 Pa. L. J. Rep. 84, 6 Pa. L. J. 518.

*Texas.* — Easton *v.* Wash, 4 Tex. App. Civ. Cas., § 129.

*Wisconsin.* — Bennett *v.* Keehn, 67 Wis. 154; Milwaukee County *v.* Pabst, 64 Wis. 244.

See also Simpson *v.* Peck, 2 Swan (Tenn.) 55.

**Letters Patent.** — Where letters patent were given on Feb. 26, 1825, for fourteen years from date, it was held that letters patent issued Feb. 26, 1839, were given after the expiration of fourteen years, the day of the date being included, since an infringement on that day could have been prosecuted. Russell *v.* Ledsam, 14 M. & W. 574.

But where letters patent were granted Feb. 26, 1855, and a stamp tax paid on Feb. 26, 1858, and a statute provided that the tax should be paid before the expiration of three years from the date of the issue of the patent, it was held that the three years did not expire till twelve o'clock midnight of Feb. 26, 1858, since the day of the date must be excluded. Williams *v.* Nash, 28 Beav. 93, 28 L. J. Ch. 886.

**When No Terminus Expressed.** — Where an act is to be done within a certain time, without saying more, the time should be computed from the date, and the day of the date excluded. Blake *v.* Crowninshield, 9 N. H. 304. See also Keyes *v.* Dearborn, 12 N. H. 52.

**At the Date — Day Excluded.** — In Farwell *v.* Rogers, 4 Cush. (Mass.) 460, it was held that where an agreement was for the payment of money annually, the time commencing at the date of the agreement, the day of the date was to be excluded.

**Time to Plead.** — Where a defendant has a certain number of days to plead, the first day is excluded, and he has the whole of the last day. Pepperell *v.* Burrell, 2 Dowl. 674; Smith *v.* Rathbone, 5 Dowl. 401; Dunn *v.* Hodson, 1 Dowl. & L. 204; Weeks *v.* Wray, L. R. 3 Q. B. 212, overruling Kay *v.* Whitehead, 2 H. Bl. 35.

**1. From the Day Is Exclusive — England.** — Barwick's Case, 5 Coke 93; Howard's Case, 2 Salk. 625; Doe *v.* Watton, 1 Cowp. 189; Cornish *v.* Cawsey, Aley 77.

*United States.* — Best *v.* Polk, 18 Wall. (U. S.) 112.

*Colorado.* — Vailes *v.* Brown, 16 Colo. 462.

*Indiana.* — Smith *v.* Smith, 8 Blackf. (Ind.) 208. See also Vogel *v.* State, 107 Ind. 374.

*Iowa.* — Chicago Title, etc., Co. *v.* Smyth, 94 Iowa 401.

*Kentucky.* — Handley *v.* Cunningham, 12 Bush (Ky.) 401; Batman *v.* Megowan, 1 Met. (Ky.) 533. See also Moar *v.* Covington City Nat. Bank, 80 Ky. 305.

*Maine.* — Peables *v.* Hannaford, 18 Me. 106.  
*Massachusetts.* — Bigelow *v.* Willson, 1 Pick. (Mass.) 485; Atkins *v.* Sleeper, 7 Allen (Mass.) 487; Wiggin *v.* Peters, 1 Met. (Mass.) 127; Perry *v.* Provident L. Ins., etc., Co., 99 Mass. 162.

*Mississippi.* — Curtis *v.* Blair, 26 Miss. 309, 59 Am. Dec. 257.

*Nebraska.* — McGavock *v.* Pollack, 13 Neb. 535.

*New Hampshire.* — Bell *v.* Adams, 10 N. H. 181; Odiorne *v.* Quimby, 11 N. H. 224.

*New York.* — Krom *v.* Levy, 60 N. Y. 126; Doe *v.* Smyth, Anth. N. P. (N. Y.) 243; Mack *v.* Burt, 5 Hun (N. Y.) 28.

*Ohio.* — Koltenbrock *v.* Cracraft, 36 Ohio St. 584.

*Pennsylvania.* — Wayne *v.* Duffy, 1 Phila. (Pa.) 367, 9 Leg. Int. (Pa.) 102; Lutz's Appeal, 124 Pa. St. 273; Smaltz *v.* Lake, 2 Phila. (Pa.) 245, 14 Leg. Int. (Pa.) 85.

*Rhode Island.* — Ordway *v.* Remington, 12 R. I. 319, 34 Am. Rep. 646.

*Texas.* — Hester *v.* Bass, 30 Tex. 743.

*Vermont.* — Allen *v.* Carty, 19 Vt. 65.

See also Loret *v.* South Carolina Ins. Co., 1 Nutt & M. (S. Car.) 505.

In Bigelow *v.* Willson, 1 Pick. (Mass.) 485, Wilde, J., said: "I think \* \* \* we are warranted by the authorities to say that when time is to be computed from or after the day of a given date, the day is to be excluded in the computation. And that this rule of construction is never to be rejected, unless it appears that a different computation was intended. So, also, if we consider the question independent of the authorities, it seems to me impossible to raise a doubt. No moment of time can be said to be after a given day until that day has expired." See also Hester *v.* Bass, 30 Tex. 743.

**Officer's Commission.** — In Vogel *v.* State, 107 Ind. 374, it was held, though not necessary to the decision, that where it is provided by law that a certificate of election shall entitle the holder to enter upon his duties at the expiration of ten days from the day of election, that day is to be excluded; but where an officer's commission fixes his term at four years from a certain day, that day will be counted as part of the term.

**Since Oct. 5 and Up to Dec. 31, Inclusive,** has been held to exclude Oct. 5. Monroe *v.* Acworth, 41 N. H. 199.

**Either First or Last Excluded.** — In Reed *v.* Sexton, 20 Kan. 195, it was held that where the computation was after a day, either the first or the last day should be excluded.

In Ramirez *v.* McClane, 50 Tex. 598, it was held that an action brought on Oct. 14, 1875, was within two years from Oct. 13, 1873.

**2. From the Date under Code — Day Excluded** — *Alabama.* — Chapman *v.* Ewing, 78 Ala. 403.

*Kansas.* — Scruton *v.* Hall, 6 Kan. App. 714.

*c.* RULE WHEN PRESENT INTEREST PASSES. — Some of the cases, however, draw a distinction between the construction of the terms "after the date" and "after the day of the date" when used by way of passing a present interest or when used by way of computation, holding that in the former case the day is included.<sup>1</sup>

*d.* RULE OF REASON AND INTENTION. — Others state the rule to be that the day will be included or excluded according to reason and intention,<sup>2</sup> or custom.<sup>3</sup>

*e.* RULE AS TO PROMISSORY NOTES. — It is well settled that the day of the date of a promissory note, payable a certain number of days from date, is excluded in determining when the note falls due.<sup>4</sup>

**3. Before an Act or Day** — *a.* BOTH TERMINI EXCLUDED. — Where an act is to be done a certain length of time before or previous to another act or day, or when a number of days' notice is to be given, the only question is

*Missouri.* — *Evans v. Chicago, etc., R. Co.*, 76 Mo. App. 468; *Huhn v. Lang*, 122 Mo. 600.

*New Hampshire.* — *Scovell v. Holbrook*, 22 N. H. 269.

*Washington.* — *Spokane Falls v. Browne*, 3 Wash. 84.

**From Day under Code — Day Excluded** — *Alabama.* — *Goode v. Webb*, 52 Ala. 452.

*Iowa.* — *Teucher v. Hiatt*, 23 Iowa 527, 92 Am. Dec. 440; *Manning v. Irish*, 47 Iowa 650; *Parkhill v. Brighton*, 61 Iowa 104; *Sheldon Bank v. Royce*, 84 Iowa 288; *McCoid v. Rafferty*, 84 Iowa 532; *Ritchey v. Fisher*, 85 Iowa 560.

*Kansas.* — *Neitzel v. Hunter*, 19 Kan. 221; *English v. Williamson*, 34 Kan. 212; *Cable v. Coates*, 36 Kan. 191; *Hicks v. Nelson*, 45 Kan. 47, 23 Am. St. Rep. 709; *Hill v. Timmermeyer*, 36 Kan. 252; *Richards v. Thompson*, 43 Kan. 209.

In *Cook v. Moore*, 95 N. Car. 1, under the usual code provisions, it was held that where a cause of action accrued on Oct. 20, 1873, and suit was brought Oct. 20, 1883, it was barred by the statute of limitations, which provided that the action should be commenced within ten years after the date of the accrual of the cause of action. But the court cites with approval a number of cases which hold that the day of the date is to be excluded, and the decision and opinion cannot be reconciled.

**First Day Included under California Code.** — Where, by statute, the board of equalization must mail to certain persons a notice to appear "within seven days from the date of the notice" and show cause why the board should not take certain action, and the notice was sent on the 11th, it was held that the board could legally take action on the 18th, though the code contained the usual provisions for the computation of time. *Hagenmeyer v. Board of Equalization*, 82 Cal. 214.

**1. Passing a Present Interest.** — *Pearpoint v. Graham*, 4 Wash. (U. S.) 232; *Lysle v. Williams*, 15 S. & R. (Pa.) 136; *Nesbit v. Godfrey*, 155 Pa. St. 251.

**2. Intention and Reason** — *England.* — *Pugh v. Leeds*, 2 Cowp. 714; *Watson v. Pears*, 2 Campb. 294; *Wilkinson v. Gaston*, 9 Q. B. 137, 58 E. C. L. 137.

*California.* — *McGlynn v. Moore*, 25 Cal. 384.

*Indiana.* — *Vogel v. State* 107 Ind. 374.

*New York.* — *Thornton v. Payne*, 5 Johns. (N. Y.) 74; *Deyo v. Bleakley*, 24 Barb. (N. Y.) 9; *Meeks v. Ring*, 51 Hun (N. Y.) 329. See also *Griffith v. Bogert*, 18 How. (U. S.) 158.

*North Carolina.* — *Houser v. Reynolds*, 1 Hayw. (2 N. Car.) 114, 1 Am. Dec. 551.

*Rhode Island.* — *Ordway v. Remington*, 12 R. I. 319, 34 Am. Rep. 646.

*Tennessee.* — *Turner v. Odum*, 3 Coldw. (Tenn.) 455; *Carson v. Love*, 8 Yerg. (Tenn.) 215.

*West Virginia.* — *State v. Mounts*, 36 W. Va. 179.

**3. Custom.** — *Wilcox v. Wood*, 9 Wend. (N. Y.) 346; *Marys v. Anderson*, 24 Pa. St. 272; *Donaldson v. Smith*, 1 Ashm. (Pa.) 197.

**4. Note — Date Excluded** — *United States.* — *Hill v. Norvell*, 3 McLean (U. S.) 583; *Mitchell v. Degrand*, 1 Mason (U. S.) 176.

*Alabama.* — *Donegan v. Wood*, 49 Ala. 242, 20 Am. Rep. 275; *Bradley v. Northern Bank*, 60 Ala. 252; *Doyle v. Birmingham First Nat. Bank*, 131 Ala. 294.

*California.* — *Bell v. Sackett*, 38 Cal. 407 (under code); *Rauer v. Broder*, 107 Cal. 282 (under code).

*Connecticut.* — *Avery v. Stewart*, 2 Conn. 69, 7 Am. Dec. 240.

*Indiana.* — *Fisher v. State Bank*, 7 Blackf. (Ind.) 610; *Benson v. Adams*, 69 Ind. 353, 35 Am. Rep. 220.

*Maine.* — *Homes v. Smith*, 16 Me. 181; *Greeley v. Thurston*, 4 Me. 479, 16 Am. Dec. 285.

*Massachusetts.* — *Henry v. Jones*, 8 Mass. 453; *Blanchard v. Hilliard*, 11 Mass. 85. See also *Woodbridge v. Brigham*, 12 Mass. 403, 7 Am. Dec. 85.

*Mississippi.* — *Fleming v. Fulton*, 6 How. (Miss.) 473; *Barlow v. Planters' Bank*, 7 How. (Miss.) 129.

*New Hampshire.* — *Leavitt v. Simes*, 3 N. H. 14. See also *Blake v. Crowninshield*, 9 N. H. 304.

*New York.* — *Roehner v. Knickerbocker L. Ins. Co.*, 63 N. Y. 161.

*Ohio.* — *Wood v. Rosendale*, 10 Ohio Cir. Dec. 66.

*Tennessee.* — *State Bank v. Officer*, 3 Baxt. (Tenn.) 173.

*Texas.* — *Watkins v. Willis*, 58 Tex. 521; *Moore v. Hollaman*, 25 Tex. Supp. 81; *Campbell v. Lane*, 25 Tex. Supp. 93; *Young v. Van Benthuyzen*, 30 Tex. 762.

whether both termini shall be excluded, or only one; for it is clear that the same result will be reached whether the first day is excluded and the last included, or *vice versa*.<sup>1</sup> Some cases take the view that the day on which the act is done and the day before which it must be done are both to be excluded, the former by the general rule already stated, and the latter by the limitation of the word "before."<sup>2</sup>

*b. RULE OF REASON AND INTENTION.* — Others hold that the point should be decided according to reason and intention.<sup>3</sup>

*c. TERMINUS A QUO EXCLUDED AND TERMINUS AD QUEM INCLUDED* — (1) *At Common Law.* — The great weight of authority, however, is in favor of counting one of the days, and the usual practice is to exclude the first and include the last.<sup>4</sup>

1. *Osgood v. Blake*, 21 N. H. 550 (under code), citing *Grafton Bank v. Kimball*, 20 N. H. 107; *Speer v. State*, 2 Tex. App. 246.

See in this work BEFORE, vol. 3, p. 908; FOR, vol. 13, p. 378; and the titles PUBLICATION, 17 ENCYC. OF PL. AND PR. 26; SERVICE OF PROCESS, 19 ENCYC. OF PL. AND PR. 602.

2. *Before Act Both Termini Excluded* — *Alabama.* — *Montgomery v. Adams*, 51 Ala. 449 (under code).

*Iowa.* — *Aikin v. Appleby*, Morr. (Iowa) 8.

*Missouri.* — *Johnson v. Douglass*, 73 Mo. 168 (under code). See also *German Bank v. Stumpf*, 73 Mo. 311.

*New Hampshire.* — *Lefavour v. Bartlett*, 42 N. H. 555 (under code).

*New York.* — *Small v. Edrick*, 5 Wend. (N. Y.) 138. See also *Boerum v. Betts*, 1 Dem. (N. Y.) 471; *Nichols v. Nichols*, 10 Wend. (N. Y.) 560.

*Texas.* — *O'Connor v. Towns*, 1 Tex. 107; and see *Texas Act of March 16, 1848*.

See also *Alston v. Falconer*, 42 Ark. 114; *Dutton v. Hobson*, 7 Kan. 196; *Willey v. Laraway*, 64 Vt. 566. And see *supra*, this section, *From Act Done* — *Terminus a Quo Excluded*.

Where a statute provided that in case of levy on real estate, notice shall be given for the space of three months after such levy, and before the same shall be exposed for sale, and where the usual code provision was in force, it was held that notice given on Sept. 5 did not authorize sale on Dec. 5. *Goldsworthy v. Coyle*, 19 R. I. 323.

3. *Rule of Reason and Intention.* — *O'Connor v. Towns*, 1 Tex. 107; *Hill v. Faison*, 27 Tex. 428; *Hollis v. Francois*, 1 Tex. 118; *Manning v. Dove*, 10 Rich. L. (S. Car.) 395. See also *Hyde v. White*, 24 Tex. 137.

4. *Before Act — First Excluded and Last Included* — *England.* — *Rex v. Justices*, 4 N. & M. 378, 30 E. C. L. 380.

*Michigan.* — *Hubbell v. Rhinesmith*, 85 Mich. 30; *Arnold v. Nye*, 23 Mich. 286; *Town v. Tabor*, 34 Mich. 262; *Eaton v. Peck*, 26 Mich. 57; *People v. Barry*, 93 Mich. 542; *Brown v. Williams*, 39 Mich. 755.

*Mississippi.* — *Hall v. Cassidy*, 25 Miss. 48.

*Missouri.* — *State v. Kaufman*, 45 Mo. App. 656.

*New York.* — *Hungerford v. Wagoner*, 5 N. Y. App. Div. 590; *Columbia Turnpike Road Co. v. Haywood*, 10 Wend. (N. Y.) 422. See also *Westgate v. Handlin*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 372.

*Texas.* — *Lerch v. Snyder*, 2 Tex. Civ. App. 421.

*Virginia.* — *Bowles v. Brauer*, 89 Va. 466.

*Washington.* — *Scott v. Patterson*, 1 Wash. 487.

*No Difference Between Before and From in Computation.* — In *O'Connor v. Towns*, 1 Tex. 107, it was held that it makes no difference whether the limitation of time is before or after an act.

*First Day Included.* — In *Faulds v. People*, 66 Ill. 210, it was held that where a statute required notice to be given six days before the day of sale, the day of giving notice was to be included, so that a notice given on the 15th, for a sale on the 21st, was good.

*Pennsylvania Decisions.* — At one time it was held in Pennsylvania that where an act is to be done a certain number of days before suit brought, the day on which the act was done was to be included. *Thomas v. Afflick*, 16 Pa. St. 14. But this case was overruled in *Cromelien v. Brink*, 29 Pa. St. 522, and has never been followed by an appellate court in Pennsylvania. Nevertheless, it has been held that a three months' previous notice to quit is satisfied by a notice given Dec. 25, the lease beginning on March 25. *Duffy v. Ogden*, 64 Pa. St. 240; *McGowen v. Sennett*, 1 Brews. (Pa.) 397.

And where a rule of court prescribed that the plaintiff should be entitled to judgment on a certain day, unless the defendant should have filed an affidavit of defense before judgment be asked for in court, it was held that the defendant had the whole of such day in which to file his affidavit, and a judgment entered on such day was premature. *Duncan v. Bell*, 28 Pa. St. 516.

But in *Williams v. McAnany*, 1 Pa. Dist. 128, it was held that where premises were let on the 26th of the month, from month to month, until either party should give one month's notice previous to the expiration of the then current month, a notice served on the 26th of the month was not in time.

*One Day's Notice.* — In *Maryland* one day's notice to take evidence is satisfied by notice given one day and evidence taken the next. *Walsh v. Boyle*, 30 Md. 262.

*And Where Two Days' Notice* must be given, notice on Friday for Monday is good, even excluding Sunday. *Stewart v. Abraham*, 2 Dowl. 709.

*Scotch Law.* — Where by statute the parties to a marriage in Scotland must have lived in Scotland "for twenty-one days next preceding the



(2) *Under Code Provisions.*—And the same rule is laid down in the decisions under the usual code provisions.<sup>1</sup>

*d. ONE TERMINUS EXCLUSIVE AND THE OTHER INCLUSIVE*—(1) *At Common Law.*—On the other hand, a number of cases arrive at the same conclusion by reckoning one of the days exclusive and the other inclusive, indifferently.<sup>2</sup>

marriage," it was held in *Lawford v. Davies*, 4 P. D. 61, 47 L. J. P. 38, that under the Scotch laws a marriage on the 21st of the month, the parties having begun their period of residence in Scotland on the 1st, was not valid.

**1. Before Act—Under Code—First Excluded and Last Included—England.**—*Ex p. Foster*, 56 L. T. N. S. 573.

*United States.*—*Dutcher v. Wright*, 94 U. S. 553.

*California.*—*Bellmer v. Blessington*, 136 Cal. 3; *Landregan v. Peppin*, 86 Cal. 122; *Bates v. Howard*, 105 Cal. 173.

*Illinois.*—*Magnusson v. Williams*, 111 Ill. 450.

*Indiana.*—*Catterlin v. Frankfort*, 87 Ind. 45; *Blair v. Manson*, 9 Ind. 357; *Martin v. Reed*, 9 Ind. 180; *Blair v. Davis*, 9 Ind. 236; *Martin v. Howell*, 8 Ind. 501; *Dugdale v. Ryan*, 8 Ind. 529; *Kortepeter v. Wright*, 15 Ind. 456; *Monroe v. Paddock*, 75 Ind. 422; *Reigelsberger v. Stapp*, 91 Ind. 311; *Kerr v. Haverstick*, 94 Ind. 178; *Baltimore, etc., R. Co. v. Flinn*, 2 Ind. App. 55. See also *Womack v. McAhren*, 9 Ind. 6.

*Iowa.*—*Bonney v. Cocke*, 61 Iowa 303.

*Kansas.*—*Foster v. Markland*, 37 Kan. 32.

*Massachusetts.*—*Cooley v. Cook*, 125 Mass. 406; *Richards v. Clark*, 124 Mass. 491.

*Minnesota.*—*Mansfield v. Fleck*, 23 Minn. 61; *Smith v. Force*, 31 Minn. 119.

*Nebraska.*—*White v. German Ins. Co.*, 15 Neb. 660.

*New Hampshire.*—*Bernard v. Martel*, 68 N. H. 466.

*New York.*—*Dayton v. McIntyre*, (Supm. Ct.) 5 How. Pr. (N. Y.) 117; *Brod v. Heymann*, (Supm. Ct. Spec. T.) 3 Abb. Pr. N. S. (N. Y.) 396.

*Ohio.*—*Gilfillin v. Koke*, 2 Ohio Dec. (Reprint) 172, 1 West. L. Month. 704.

*Oregon.*—*Grant v. Paddock*, 30 Oregon 312.

*Utah.*—*Mallory v. Kessler*, 18 Utah 11, 72 Am. St. Rep. 765.

*Wisconsin.*—*Young v. Krueger*, 92 Wis. 361.

See also *infra*, this section, *Addition of "At Least" or "Not Less than,"* cases cited in note.

**Applications of Code Rule.**—It has been held that where the code prescribes a rule for the computation of the time "within which an act is to be done," the rule is not applicable where notice is to be given before a certain time. *Savings, etc., Soc. v. Thompson*, 32 Cal. 347; *Hagerman v. Ohio Bldg., etc., Assoc.*, 25 Ohio St. 186.

Where a statute provided that an action should be triable at a term of court if issues were made up ten days before the term and where the usual code provisions obtained, it was held that issues made up on Aug. 27 could be tried at a term beginning Sept. 6, the court holding that the first day to be excluded was Sept. 6, and it excluded that day and counted

backward, including Aug. 27. *Dougherty v. Porter*, 18 Kan. 206.

And the same result was reached in *Taylor v. M'Knight*, 1 Mo. 120, although the court did not adopt the same reasoning.

And see also *Paterson v. St. Thomas' Church*, 18 R. I. 349, where a statute provided that no materialman's lien should attach for materials furnished unless he should give notice "within sixty days after the materials are placed on the land," and notice was given Jan. 6, it was held that the computation should be made by excluding that day and counting backward, so that the lien covered the materials furnished on Nov. 7.

And in *England* it was held that, where a statute required "ten days' notice" of an appeal taken, and a rule of court required notice to be given "exclusive of day of notice and first day of court in all cases not otherwise directed by law," the ten days should be reckoned one exclusive and the other inclusive. *Rex v. Justices*, 4 B. & Ad. 685, 24 E. C. L. 143.

**Construction of Bankruptcy Act.**—Where the Bankruptcy Act provides that an assignment made within four months before the filing of the petition is void, and also provides that in the computation of time the first day is to be excluded and the last included, the method pursued is to exclude the day on which the petition is filed. *Dutcher v. Wright*, 94 U. S. 553; *Cooley v. Cook*, 125 Mass. 406; *Richards v. Clark*, 124 Mass. 491. And the same is held under the *English* statute. *Ex p. Foster*, 56 L. T. N. S. 573.

**Corporate Notices.**—The *New York* Code Civ. Proc., § 788, should govern the publication of notices under the by-laws of corporations. The *Vigilancia*, 68 Fed. Rep. 781.

**2. Before Act or Day—One Exclusive and Other Inclusive—England.**—*Rex v. Goodenough*, 2 Ad. & El. 463, 29 E. C. L. 144.

*Colorado.*—*Stebbins v. Anthony*, 5 Colo. 348. *Delaware.*—*Cann v. Warren*, 1 Houst. (Del.) 188.

*Indiana.*—*Fox v. Allensville, etc., Turnpike Co.*, 46 Ind. 31; *Meredith v. Chancey*, 59 Ind. 466; *Hill v. Pressley*, 96 Ind. 447. See also *Flynn v. Taylor*, 145 Ind. 533; *Conwell v. Overmeyer*, 145 Ind. 698.

*Massachusetts.*—*Walker v. Sharpe*, 14 Allen (Mass.) 43.

*Missouri.*—*Littleton v. Christy*, 11 Mo. 390.

*New Jersey.*—*Den v. Fen*, 8 N. J. L. 303; *Day v. Hall*, 12 N. J. L. 203; *State v. North Bergen*, 39 N. J. L. 694.

*North Carolina.*—*Beasley v. Downey*, 10 Ired. L. (32 N. Car.) 284; *Taylor v. Harris*, 82 N. Car. 25.

*South Carolina.*—*Buist v. Mitchell*, 3 Brev. (S. Car.) 485.

*Vermont.*—*Mason v. School Dist. No. 14*, 20 Vt. 487.

(2) *Under Code Provisions.*—And some cases adopt this method even where the code provisions are in force.<sup>1</sup>

*e. TERMINUS A QUO INCLUDED.*—And in the service of process, a number of states include the day of service and exclude the return day.<sup>2</sup>

*f. DISTINCTION BETWEEN DAY AND TIME.*—A distinction has been drawn between “before a day” and “before a time,” and it has been held that where the limitation is before a day both termini are excluded, but where before a time, only one terminus is excluded.<sup>3</sup>

**4. Addition of “At Least” or “Not Less than”**—*a. RULE IN UNITED STATES.*—A much vexed question is whether the addition of the phrases “at least” or “not less than” demands clear or entire days, for if such be the case, as seen above, both the termini must be excluded.<sup>4</sup> On principle it would seem that “three days” means the same as “at least three days,” and it is held in most jurisdictions in the United States that where “at least” or “not less than” is added, the *terminus a quo* will be excluded, and the *terminus ad quem* included, in accordance with the usual rule.<sup>5</sup>

See also *Underwood v. Jeans*, 4 Harr. (Del.) 201.

In *Ricker v. Blanchard*, 45 N. H. 39, it was held that where a statute provided that a right of redemption might be foreclosed “by entry and possession for one year,” the day of entry was to be excluded.

**1. Before Act—One Excluded and the Other Included—Under Code—California.**—*Scoville v. Anderson*, 131 Cal. 590.

*Kansas.*—*Dougherty v. Porter*, 18 Kan. 206; *Howbert v. Heyle*, 47 Kan. 58; *State v. Eggleston*, 34 Kan. 714; *Schultz v. Hine*, 39 Kan. 334.

*Missouri.*—*Bailey v. Lubke*, 8 Mo. App. 57; *Hahn v. Dierkes*, 37 Mo. 574; *Schubert v. Crowley*, 33 Mo. 564; *Knapp v. Skeele*, 31 Mo. 434; *Gray v. Worst*, 129 Mo. 122; *Leahy v. Lubman*, 67 Mo. App. 191.

**2. Before Act—Terminus a Quo Included—Alabama.**—*Garner v. Johnson*, 22 Ala. 494.

*Iowa.*—*Dilts v. Zeigler*, 1 Greene (Iowa) 164, 48 Am. Dec. 370; *Temple v. Carstens*, 1 Greene (Iowa) 492.

*Kentucky.*—*Pollard v. Yoder*, 2 A. K. Marsh. (Ky.) 264; *Ogden v. Redman*, 3 A. K. Marsh. (Ky.) 234.

*Pennsylvania.*—*Black v. Johns*, 68 Pa. St. 83.

*Massachusetts.*—*Butler v. Fessenden*, 12 Cush. (Mass.) 78.

*Ohio.*—*Barto v. Abbe*, 16 Ohio 408.

*Tennessee.*—*Dickinson v. Lee*, 2 Coldw. (Tenn.) 615.

*Virginia.*—*Turnbull v. Thompson*, 27 Gratt. (Va.) 306 (under code).

And see also the title SERVICE OF PROCESS, 19 ENCYC. OF PL. AND PR. 602.

**3. Distinction Between Day and Time.**—Thus, in *Small v. Edrick*, 5 Wend. (N. Y.) 138, it was held that where by statute notice must be given fourteen days before the first day of court, both the days were excluded. See also *Boerum v. Betts*, 1 Dem. (N. Y.) 471.

But in *Columbia Turnpike Road Co. v. Haywood*, 10 Wend. (N. Y.) 422, it was held that where summons must be served six days before the time of appearance, the day of service only would be excluded. To the like effect are *People v. Barry*, 93 Mich. 542; *Easton v. Chamberlin*, (Supm. Ct.) 3 How. Pr. (N. Y.)

412; *Dayton v. McIntyre*, (Supm. Ct.) 5 How. Pr. (N. Y.) 117.

And the same distinction is made in *State v. Weld*, 39 Minn. 426, and *Greve v. St. Paul*, etc., R. Co., 25 Minn. 327.

**4. See supra, this title, Rule When Clear Days Are Prescribed.**

**5. Addition of “At Least” Does Not Call for Clear Days—United States.**—*The Vigilancia*, 68 Fed. Rep. 781.

*California.*—*Misch v. Mayhew*, 51 Cal. 514 (under code).

*Colorado.*—*Stebbins v. Anthony*, 5 Colo. 348.

*Florida.*—*State v. Winter Park*, 25 Fla. 371; *Crawford v. Feder*, 27 Fla. 523.

*Georgia.*—*Reid v. Jordan*, 56 Ga. 282.

*Idaho.*—*Sebree v. Smith*, 2 Idaho 357.

*Illinois.*—*Wahl v. Nauvoo*, 64 Ill. App. 17; *Prior v. People*, 107 Ill. 628; *Edward Hines Lumber Co. v. Ream*, 64 Ill. App. 608.

*Iowa.*—*Richardson v. Burlington R. Co.*, 8 Iowa 260.

*Kansas.*—*Beckwith v. Douglas*, 25 Kan. 229 (under code) (“from the date”); *Warner v. Bucher*, 24 Kan. 478 (under code) (“from the date”).

*Maine.*—*Stale v. Wheeler*, 64 Me. 532.

*Massachusetts.*—*Stewart v. Griswold*, 134 Mass. 391.

*Minnesota.*—*State v. Weld*, 39 Minn. 426; *Coe v. Caledonia*, etc., R. Co., 27 Minn. 197;

*Brady v. Moulton*, 61 Minn. 185.

*Mississippi.*—*Morrison v. Gaillard*, 25 Miss. 194.

*Missouri.*—*State v. Gasconade County Ct.*, 33 Mo. 102; *Sappington v. Lenz*, 53 Mo. App. 44 (under code).

*Nebraska.*—*Messick v. Wigent*, 37 Neb. 692; *Pelton v. Drummond*, 21 Neb. 492.

*New Jersey.*—*Pedrick v. Shaw*, 2 N. J. L. 54; *Stroud v. Consumers' Water Co.*, 56 N. J. L. 422.

*New Mexico.*—*Albuquerque v. Zeiger*, 5 N. Mex. 518.

*New York.*—*Matter of Carhart*, 2 Dem. (N. Y.) 627; *People v. Burgess*, 153 N. Y. 561 (under code); *Kane v. Brooklyn*, 114 N. Y. 586; *Ball v. Mander*, (C. Pl. Gen. T.) 19 How. Pr. (N. Y.) 468.

*Pennsylvania.*—*Erie Sav. Fund, etc., Assoc.*

**6. RULE IN ENGLAND.** — But in England and some of the *United States* the contrary view obtains, and both termini are excluded.<sup>1</sup> Many of the English cases, however, state that it is so held only on the authority of the early cases, and that the doctrine cannot be supported by principle.<sup>2</sup>

**5. "After the Expiration of."** — Where it is provided that an act can be done "after the expiration of" so many days from an act or event, the act cannot be done until the prescribed number of entire days has expired, exclusive of the *terminus a quo*.<sup>3</sup>

*v. Thompson*, 13 Phila. (Pa.) 511, 34 Leg. Int. (Pa.) 456; *Socks's Estate*, 15 Pa. Super. Ct. 281; *Com. v. Richer*, 13 W. N. C. (Pa.) 142; *Certificates of Nomination*, 1 Pa. Dist. 759.

*Rhode Island*. — *Mathewson v. Ham*, 21 R. I. 203.

See also *Chicago, etc., R. Co. v. Nield*, (S. Dak. 1902) 92 N. W. Rep. 1069.

**First Day Included.** — Where a statute provided that publication of notice of sale of land, foreclosed under a mortgage, should be made "for at least thirty days before the day of sale," and the usual code provisions were in force, it was nevertheless held that sufficient notice was given by a publication on Oct. 13, the sale occurring on Nov. 12. *Northrop v. Cooper*, 23 Kan. 432.

And in *English v. Ozburn*, 59 Ga. 392, a statute provided that service of a rule *nisi* to foreclose a mortgage should be made three months, at least, previous to the 1st day of the next term, and it was held that service on Jan. 2 was sufficient, the term beginning on April 2.

Under the *Connecticut Gen. Stat.*, p. 83, § 2, requiring notice of town meetings to be given at least five days, inclusive, before the meeting, it was held that the day of giving notice should be included, and the day of the meeting should be excluded. *Brooklyn Trust Co. v. Hebron*, 51 Conn. 22n.

**1. "At Least" Demands Clear Days — England.** — For the English rule see the title *AT LEAST*, vol. 3, p. 176, and also these cases: *Chambers v. Smith*, 12 M. & W. 2; *In re Railway Sleepers' Supply Co.*, 29 Ch. D. 204, 54 L. J. Ch. 720; *Ex p. Ferrige*, L. R. 20 Eq. 289; *Reg. v. Middlesex*, 3 Dowl. & L. 109.

*United States*. — *Hicks v. National L. Ins. Co.*, (C. C. A.) 60 Fed. Rep. 690, following *Small v. Edrick*, 5 Wend. (N. Y.) 137. But see *The Vigilancia*, 68 Fed. Rep. 781.

*Arkansas*. — *Jones v. State*, 42 Ark. 93.

*Delaware*. — *Robinson v. Collins*, 1 Harr. (Del.) 498; *Warrington v. Tull*, 5 Harr. (Del.) 107; *Public Roads*, 5 Harr. (Del.) 174.

*Kansas*. — *Garvin v. Jennerson*, 20 Kan. 371 (under code).

*Michigan*. — *Dousman v. O'Malley*, 1 Dougl. (Mich.) 450; *Snell v. Scott*, 2 Mich. N. P. 108; *Sallee v. Ireland*, 9 Mich. 154; *Caupfield v. Cook*, 92 Mich. 626; *People v. Highway Com'rs*, 38 Mich. 247; *Lane v. Burnap*, 39 Mich. 736; *Taylor v. Burnap*, 39 Mich. 739; *Coquard v. Boehmer*, 81 Mich. 445; *Cox v. Highway Com'rs*, 83 Mich. 193; *Rifenburg v. Muskegon*, 83 Mich. 279; *White v. Prior*, 88 Mich. 647; *Everts v. Fisk*, 44 Mich. 515. See also *Isabelle v. Iron Cliffs Co.*, 57 Mich. 120; *Matter of Powers*, 29 Mich. 504. See, however, *People v. Barry*, 93 Mich. 542.

*Minnesota*. — *Greve v. St. Paul, etc., R. Co.*, 25 Minn. 327, distinguished in *State v. Weld*, 39 Minn. 426.

*South Carolina*. — *Adkins v. Moore*, 43 S. Car. 173.

*Texas*. — *Hill v. Faison*, 27 Tex. 428; *O'Connor v. Towns*, 1 Tex. 107.

*Wisconsin*. — *Ward v. Walters*, 63 Wis. 39, but see *Wright v. Forrestal*, 65 Wis. 341.

**Both Days Counted.** — In *Morley v. Vaughan*, 4 Burr. 2525, a statute provided that a debtor must give notice "fourteen days at least before," but the court included both days, saying it wished to be lenient.

And in *Cowie v. Harris*, M. & M. 141, 22 E. C. L. 270, it was held that an act done on March 14 was "more than two months before" the issuing of a commission on May 14.

**2.** See, for example, *Reg. v. Justices*, 8 Ad. & El. 173, 35 E. C. L. 367, and *Reg. v. St. Mary*, 1 El. & Bl. 816, 72 E. C. L. 816, where it was held that a residence from Sept. 30 in one year to the forenoon of Sept. 29 of the next year was a residence of "one whole year at the least."

**3. After the Expiration of.** — *McDonough v. Gravier*, 9 La. 531; *Steuart v. Meyer*, 54 Md. 454; *Butts v. Edwards*, 2 Den. (N. Y.) 164; *Commercial Bank v. Ives*, 2 Hill (N. Y.) 355; *Marvin v. Marvin*, 75 N. Y. 240; *Burgess v. Burgess*, 117 N. Car. 447. See also *McCarty v. McCarty*, 19 La. 300; *Matter of Evans*, 29 N. J. Eq. 571.

But an execution dated June 3 and returnable at the end of three months may be returned Sept. 3. *Chase v. Gilman*, 15 Me. 64.

Where a statute provided that no action should be taken on an application "until at least two weeks' notice of the filing of the same had been given by publication," and the first publication was made on April 28, it was held that action taken on May 12 was premature, the court saying that the action must be "after the expiration of two weeks." *Pisar v. State*, 56 Neb. 455.

And where the court provides that an act shall not go into effect until ninety days after adjournment, it was held that ninety full days were meant. *Halbert v. San Saba Springs Land, etc., Assoc.*, 89 Tex. 230.

Where the constitution provided that a judge could be elected to fill a vacancy at the first election occurring more than thirty days after the vacancy shall have happened, it was held that both termini should be excluded. *State v. Brown*, 22 Minn. 482.

**"Without Interval of More than Ninety Days."** — Where a statute provided that a lien acquired by an execution should not be lost if an alias execution should issue "without interval of more than ninety days," and the



6. "Between."—While the general rule is that the use of the word "between" excludes both termini,<sup>1</sup> there are a number of cases in which one only of the termini has been excluded.<sup>2</sup>

7. Various Words and Phrases.—For the construction of other words and phrases, see the appropriate titles in their alphabetical order throughout this work.<sup>3</sup>

**VIII. SUNDAYS OR HOLIDAYS IN COMPUTATION OF TIME — 1. Rule as to Intervening Sundays or Holidays — a. GENERAL RULE.**—The general rule is that in the computation of time the intervening Sundays or holidays will be reckoned.<sup>4</sup> But in many cases, principally where a party to a suit in court is given a limited number of days in which to do an act, the intervening Sunday has been excluded.<sup>5</sup>

original execution was issued on April 14, and an alias execution on July 14, it was held that the lien was not lost; the court holding that the phrase used was equivalent to "without interval of more days than ninety days." *Lang v. Phillips*, 27 Ala. 311.

1. See *BETWEEN*, vol. 4, p. 8. See also *Cook v. Draiss*, 2 Cinc. Super. Ct. 340.

2. *Between — One Day Counted — Alabama.*—*Allen v. Elliott*, 67 Ala. 432 (under code).

*Arkansas.*—*Shinn v. Tucker*, 33 Ark. 421.

*Illinois.*—*Brown v. Chicago*, 117 Ill. 21; *Vairin v. Edmonson*, 10 Ill. 270; *Forsyth v. Warren*, 62 Ill. 68; *Chicago, etc., R. Co. v. Evans*, 39 Ill. App. 261.

*Kentucky.*—*Fehler v. Gosnell*, 99 Ky. 380. See, however, Ky. Code of Pr., § 681. See also *Cleveland v. Sterrett*, 70 Pa. St. 204.

3. See particularly the titles *AFTER*, vol. 1, p. 921; *AT*, vol. 3, p. 167; *BEFORE*, vol. 3, p. 908; *BY*, vol. 5, p. 82; *FOR*, vol. 13, p. 731; *FROM*, vol. 14, p. 553; *TILL*, *post*; *To*, *post*; *UNTIL*.

4. *Intervening Sundays Reckoned — England.*—*Asmole v. Goodwin*, 2 Salk. 624; *Anonymous*, 1 Stra. 86; *Creswell v. Green*, 14 East 537; *M'Intosh v. Great Western R. Co.*, 1 Hare 328, 11 L. J. Ch. 283; *Pennell v. Churchwardens*, 8 Jur. N. S. 99, 31 L. J. M. C. 92.

*United States.*—*In re York*, 4 Nat. Bankr. Reg. 479; *The Mary B. Baird*, 97 Fed. Rep. 977; *York's Case*, 1 Abb. (U. S.) 503; *Pressed Steel Car Co. v. Eastern R., etc., Co.*, (C. C. A.) 121 Fed. Rep. 609; *The Tug E. W. Gorgas*, 10 Ben. (U. S.) 460.

*Illinois.*—*Gordon v. People*, 154 Ill. 664; *Kingsbury v. Buckner*, 70 Ill. 514; *Edward Hines Lumber Co. v. Ream*, 64 Ill. App. 608.

*Indiana.*—*Yocum v. Brazil First Nat. Bank*, 144 Ind. 272; *English v. Dickey*, 128 Ind. 174. See also *Womack v. McAhren*, 9 Ind. 6.

*Iowa.*—*German Sav. Bank v. Cady*, 114 Iowa 228.

*Kansas.*—*Matthews v. Arthur*, 61 Kan. 455; *Van Laer v. Kansas Triphammer Brick Works*, 56 Kan. 545. See also *Mercer v. Ringer*, 40 Kan. 189.

*Louisiana.*—*Pierce v. Cushing*, 33 La. Ann. 401 (holiday).

*Maine.*—*Cressey v. Parks*, 75 Me. 387, 46 Am. Rep. 406; *Carville v. Additon*, 62 Me. 459; *State v. Wheeler*, 64 Me. 532.

*Massachusetts.*—*Cooley v. Cook*, 125 Mass. 406.

*Michigan.*—*Anderson v. Baughman*, 6 Mich. 298; *Corey v. Hiliker*, 15 Mich. 315.

*Missouri.*—*State v. Green*, 66 Mo. 631; *Patchin v. Bonsack*, 52 Mo. 431; *Diesing v. Reilly*, 77 Mo. App. 450.

*New York.*—*Pilots Com'rs v. Erie R. Co.*, 5 Robt. (N. Y.) 366; *Brown v. Smith*, 9 Johns. (N. Y.) 84; *Central Bank v. Alden*, (Supm. Ct. Spec. T.) 41 How. Pr. (N. Y.) 102.

*North Carolina.*—*Branch v. Wilmington, etc., R. Co.*, 77 N. Car. 347; *Keeter v. Wilmington, etc., R. Co.*, 86 N. Car. 346; *Drake v. Fletcher*, 5 Jones L. (50 N. Car.) 410.

*Ohio.*—*Chicago Label, etc., Co. v. Washburn*, 8 Ohio Cir. Dec. 113, 15 Ohio Cir. Ct. 510.

*Pennsylvania.*—*Matter of Gosviler*, 3 P. & W. (Pa.) 200; *Marks v. Russell*, 40 Pa. St. 372; *Fordham v. Fordham*, 2 Del. Co. Rep. (Pa.) 78. See also *Harker v. Addis*, 4 Pa. St. 515.

*Texas.*—*Adams v. State*, 35 Tex. Crim. 285; *Payton v. State*, 35 Tex. Crim. 508; *Wood v. Galveston*, 76 Tex. 126.

*Virginia.*—*Bowles v. Brauer*, 89 Va. 466. See also *Dillard v. Krise*, 86 Va. 410.

*Washington.*—*Martin v. Sunset Telephone, etc., Co.*, 18 Wash. 260.

See also *Matter of Senate Resolution*, 9 Colo. 632; *Chicago, etc., R. Co. v. Nield*, (S. Dak. 1902) 92 N. W. Rep. 1069 (holiday).

**Point Indirectly Decided.**—It should be borne in mind that while the point has been expressly decided in the cases just cited, there are thousands of cases in which the point was assumed without discussion.

**When Computation Is by Hours.**—When the period of computation is so many hours, Sunday will nevertheless be included. *Franklin v. Holden*, 7 R. I. 215; *Casey v. Viall*, 17 R. I. 348; *State v. Green*, 66 Mo. 631. See also *Flagg v. Millbury*, 4 Cush. (Mass.) 243. But see *Ridgley v. State*, 7 Wis. 661; *Meng v. Winkleman*, 43 Wis. 41; *Porter v. Pierce*, 120 N. Y. 217.

**Running or Working Days.**—For the rule as to the inclusion or exclusion of Sunday where running or working days are called for by the terms of a contract, see the title *DEMURRAGE*, vol. 9, p. 236.

5. *Intervening Sunday Excluded — England.*—*Solomons v. Freeman*, 4 T. R. 557; *Hales v. Owen*, 2 Salk. 625; *Wathen v. Beaumont*, 11 East 271; *Roberts v. Stacey*, 13 East 21; *Shadwell v. Angel*, 1 Burr. 56; *Wheeler v. Green*, 7 Dowl. 194; *Rose v. M'Gregor*, 12 M. & W. 517; *Stewart v. Abraham*, 2 Dowl. 700; *Wardle v. Ackland*, 2 Dowl. 28; *Grosjean v.*

**b. RULE WHEN PERIOD LESS THAN A WEEK.** — The rule has been stated by some authorities to be that an intervening Sunday will be included when the computation covers a period of more than seven days, but excluded when the period is less than a week.<sup>1</sup> But this cannot be taken as a universal rule, for Sunday is often included when the number of days is less than seven,<sup>2</sup> and

Manning, 2 Crompt. & J. 635; Bullock v. Edington, 1 Sim. 481.

*Alabama.* — *Ex p. Cowert*, 92 Ala. 96; *Moog v. Randolph*, 77 Ala. 597; *Sayre v. Pollard*, 77 Ala. 608; *Robertson v. State*, 43 Ala. 325.

*Georgia.* — *Neal v. Crew*, 12 Ga. 93.

*Illinois.* — *Burton v. Chicago*, 53 Ill. 87; *Chicago v. Vulcan Iron Works*, 93 Ill. 222; *Scammon v. Chicago*, 40 Ill. 146; *McChesney v. People*, 145 Ill. 614; *Rasmussen v. People*, 155 Ill. 70.

*Indiana.* — *Link v. Clemmens*, 7 Blackf. (Ind.) 479.

*Iowa.* — *Robinson v. Foster*, 12 Iowa 186.

*Kentucky.* — *Louisville, etc., R. Co. v. Turner*, 81 Ky. 599; *O'Brien v. Com.*, 89 Ky. 354; *Long v. Hughes*, 1 Duv. (Ky.) 387; *Frazier v. Clark*, 88 Ky. 260; *Riley v. Grace*, (Ky. 1895) 33 S. W. Rep. 207.

*Louisiana.* — *Rost v. St. Francis's Church*, 5 Mart. N. S. (La.) 191; *Chandler v. Wither- spoon*, 4 La. 67; *Griffith v. Miner*, 7 La. 344; *Decoux v. Plantevignes*, 10 La. 503.

*Missouri.* — *National Bank of Metropolis v. Williams*, 46 Mo. 17; *Lewis v. Schwenn*, 15 Mo. App. 342; *Catell v. Dispatch Pub. Co.*, 88 Mo. 356; *State v. Harris*, 121 Mo. 445; *Hosli v. Yokel*, 57 Mo. App. 622; *Clerks' Sav. Bank v. Thomas*, 2 Mo. App. 367; *Kellogg v. Carrico*, 47 Mo. 157.

*New York.* — *Matter of Excelsior F. Ins. Co.*, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 8; *Porter v. Pierce*, 120 N. Y. 217.

*Ohio.* — *Littleford v. Mercantile, etc., Credit Guarantee Co.*, 4 Ohio Dec. 175. But see *Chicago Label, etc., Co. v. Washburn*, 8 Ohio Cir. Dec. 113, 15 Ohio Cir. Ct. 510.

*Pennsylvania.* — *Johnson v. Rea*, 1 Miles (Pa.) 159.

*Wisconsin.* — *Meng v. Winkleman*, 43 Wis. 41; *Ridgley v. State*, 7 Wis. 661.

See also ENCYC. OF PL. AND PR., vol. 20, p. 1202, title SUNDAYS AND HOLIDAYS.

**In Louisiana by Code Sundays Are Not Counted When They Intervene.** — *State v. Ellis*, 40 La. Ann. 793; *Garland v. Holmes*, 12 Rob. (La.) 421; *State v. Judge*, 29 La. Ann. 223; *Hart v. Nixon*, 25 La. Ann. 136; *Tupery v. Edmondson*, 29 La. Ann. 850; *Fowler v. Smith*, 1 Rob. (La.) 448; *Dayton v. Commercial Bank*, 6 Rob. (La.) 17; *State v. Boyle*, 9 La. Ann. 371; *Johns v. Boyle*, 14 La. 268; *Hall v. Mulholland*, 3 La. 113; *Howard v. Howard*, 3 La. 115.

**Sunday as Part of Term of Court.** — Sunday is not generally reckoned as one of the days of a term of court. *Read v. Com.*, 22 Gratt. (Va.) 924; *Michie v. Michie*, 17 Gratt. (Va.) 109; *Brown v. McKee*, 1 J. J. Marsh. (Ky.) 471. But the contrary view prevails in *Illinois*. *Brown v. Leet*, 136 Ill. 203; *Metropolitan Acc. Assoc. v. Froiland*, 59 Ill. App. 513; *Coleman v. Keenan*, 76 Ill. App. 315.

**Return of Bill by Governor.** — And Sunday is generally excluded from the period allowed the governor in which to return a bill to the legis-

lature. *Stinson v. Smith*, 8 Minn. 366; *People v. Rose*, 167 Ill. 147. See also *People v. Hatch*, 33 Ill. 138. See the title STATUTES, vol. 26, p. 551, note 5.

Where a rule of court requires an appeal to be taken within ten days, Sundays excluded, a legal holiday will not be excluded. *St. Clair v. Conlon*, 12 App. Cas. (D. C.) 161.

Under U. S. Rev. Stat., § 1007, Sundays are to be excluded. *Danielson v. Northwestern Fuel Co.*, 55 Fed. Rep. 49.

**1. Sunday Excluded When Days Less than Seven** — *Louisiana.* — *State v. Michel*, 52 La. Ann. 936, 78 Am. St. Rep. 364. But see *State v. King*, 104 La. 472.

*Maryland.* — *American Tobacco Co. v. Strickling*, 88 Md. 500.

*Massachusetts.* — *Thayer v. Felt*, 4 Pick. (Mass.) 354; *Hannum v. Tourtellott*, 10 Allen (Mass.) 494; *Cunningham v. Mahan*, 112 Mass. 58; *Com. v. Certain Intoxicating Liquors*, 97 Mass. 601; *Penniman v. Cole*, 8 Met. (Mass.) 496; *McIniffe v. Wheelock*, 1 Gray (Mass.) 600; *Cowley v. McLaughlin*, 141 Mass. 181; *Robbins v. Holman*, 11 Cush. (Mass.) 26.

*Michigan.* — *Caupfield v. Cook*, 92 Mich. 626; *Simonson v. Durfee*, 50 Mich. 80; *Snell v. Scott*, 2 Mich. N. P. 108; *St. Ignace First Nat. Bank v. Williams Milling Co.*, 110 Mich. 15.

*New Hampshire.* — *Mason v. Thomas*, 36 N. H. 302. See also *Lefavour v. Bartlett*, 42 N. H. 555.

*New York.* — *Whipple v. Williams*, (Ct. App. Spec. T.) 4 How. Pr. (N. Y.) 28, *disapproved* in *Taylor v. Corbiere*, (Supm. Ct.) 8 How. Pr. (N. Y.) 385.

See also *Tuttle v. Gates*, 24 Me. 398.

**Sunday Included.** — But in *Flagg v. Millbury*, 4 Cush. (Mass.) 243, it was held that the time of twenty-four hours during which a defect in a highway must have existed, in order to render a town liable for an injury occasioned by such defect, must be computed inclusive of Sunday.

**English Bankruptcy Rules.** — In *Ex p. Viney*, 4 Ch. D. 794, 46 L. J. Bankr. 80, it was held that under order lviii, rule 2, Sundays are only to be excluded when the time is less than six days or expires on a Sunday.

While in *Ex p. Hicks*, L. R. 20 Eq. 143, 44 L. J. Bankr. 106, and again in *Ex p. Hall*, 16 Ch. D. 501, 50 L. J. Ch. 400, it was held that in reckoning the twenty-one days in which an appeal must be taken under Bankruptcy Rules, rule 143, Sundays are to be excluded.

**2. Number of Days Less than Seven** — **Sunday Included.** — See, for example, the following cases:

*England.* — *Pennell v. Churchwardens*, 8 Jur. N. S. 99, 31 L. J. M. C. 92; *M'Intosh v. Great Western R. Co.*, 1 Hare 328, 11 L. J. Ch. 283.

*Iowa.* — *German Sav. Bank v. Cady*, 114 Iowa 228.

*Michigan.* — *Anderson v. Baughman*, 6 Mich. 298; *Corey v. Hiliker*, 15 Mich. 314.

some authorities maintain that Sunday is never excluded when the computation is of time given by a statute.<sup>1</sup> It must, however, be conceded that in the great majority of the cases in which an intervening Sunday has been excluded, the period of time under consideration was of short duration, although the courts lay down no such doctrine as prevails in *Massachusetts* and *Michigan*.

**2. Rule When Sunday Is Last Day — a. GENERAL RULE —** (1) *At Common Law.* — When Sunday is the last day for the performance of an act, it is usually excluded and performance on Monday allowed.<sup>2</sup> The contrary, however, has been held.<sup>3</sup>

(2) *Under Code Provisions.* — And the same is held under the codes in many states, which provide that "when the last day is Sunday it shall be excluded," and under various rules of court containing the same clause,<sup>4</sup> except in *Ala-*

*Missouri.* — *State v. Green*, 66 Mo. 631; *Diesing v. Reilly*, 77 Mo. App. 450.

*North Carolina.* — *Branch v. Wilmington*, etc., R. Co., 77 N. Car. 347; *Keeter v. Wilmington*, etc., R. Co., 86 N. Car. 346.

*Ohio.* — *Chicago Label, etc., Co. v. Washburn*, 8 Ohio Cir. Dec. 113, 15 Ohio Cir. Ct. 510.

*Texas.* — *Adams v. State*, 35 Tex. Crim. 285; *Payton v. State*, 35 Tex. Crim. 508.

*Washington.* — *Martin v. Sunset Telephone, etc., Co.*, 18 Wash. 260.

**1. Sunday Counted When Time Is Given by Statute.** — *Taylor v. Palmer*, 31 Cal. 240; *Wilkinson v. Castellow*, 14 Ga. 122; *King v. Dowdall*, 2 Sandf. (N. Y.) 131; *Taylor v. Corbiere*, (Supm. Ct.) 8 How. Pr. (N. Y.) 385; *Boyd v. Com.*, 1 Rob. (Va.) 748; *Bowles v. Brauer*, 89 Va. 466.

**2. Sunday Excluded and Performance Good on Monday — England.** — *Lee v. Carlton*, 3 T. R. 642; *Bullock v. Lincoln*, 2 Stra. 914; *Studley v. Sturt*, 2 Stra. 782; *Morris v. Barrett*, 7 C. B. N. S. 139, 97 E. C. L. 139; *Lewis v. Calor*, 1 F. & F. 306; *Hughes v. Griffiths*, 13 C. B. N. S. 324, 106 E. C. L. 324; *Milburn v. Lyster*, 5 Sim. 565.

*United States.* — *Monroe Cattle Co. v. Becker*, 147 U. S. 47; *In re Lang*, 2 Nat. Bankr. Reg. 480; *Ground Hog Lode v. Parole, etc., Lode*, 8 Land Dec. 430; *The Harbinger*, 50 Fed. Rep. 941; *Pressed Steel Car Co. v. Eastern R. Co.*, (C. C. A.) 121 Fed. Rep. 609. See also *Disney v. Furness*, 79 Fed. Rep. 810.

*Colorado.* — *Matter of Senate Resolution*, 9 Colo. 632.

*Connecticut.* — *Sands v. Lyon*, 18 Conn. 18; *Avery v. Stewart*, 2 Conn. 69, 7 Am. Dec. 240. See also *Picket v. Allen*, 10 Conn. 146.

*Georgia.* — *Turner v. Thompson*, 23 Ga. 49; *Baxley v. Bennett*, 33 Ga. 146.

*Kentucky.* — *Owen v. Howard Ins. Co.*, 87 Ky. 571.

*Louisiana.* — *State v. Judge*, 24 La. Ann. 333; *Gueringer v. His Creditors*, 33 La. Ann. 1279.

*Massachusetts.* — *Hammond v. American Mut. L. Ins. Co.*, 10 Gray (Mass.) 306; *Stebbins v. Leowolf*, 3 Cush. (Mass.) 137.

*Montana.* — *Schnepel v. Mellen*, 3 Mont. 118. *Nebraska.* — *Post v. Garrow*, 18 Neb. 682.

*New Jersey.* — *Stryker v. Vanderbilt*, 27 N. J. L. 68; *Von de Place v. Weller*, 64 N. J. L. 155; *Warne v. Wagenor*, (N. J. 1888) 15 Atl. Rep. 307; *Feuchtwanger v. McCool*, 29 N. J. Eq. 151 (Christmas).

*New York.* — *Campbell v. International L. Assur. Soc.*, 4 Bosw. (N. Y.) 298; *Broome v. Wellington*, 1 Sandf. (N. Y.) 664; *Borst v. Griffin*, 5 Wend. (N. Y.) 84; *Salter v. Burt*, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530; *Keating v. Serrell*, 5 Daly (N. Y.) 278; *Cock v. Bunn*, 0 Johns. (N. Y.) 326.

*Pennsylvania.* — *Matter of Goswiler*, 3 P. & W. (Pa.) 200; *McV'nnay v. Reader*, 6 Watts (Pa.) 34; *Lutz's Appeal*, 124 Pa. St. 273; *Edmundson v. Wragg*, 104 Pa. St. 500, 49 Am. Rep. 590; *Harker v. Addis*, 4 Pa. St. 515; *Davis v. Davis*, 128 Pa. St. 100; *Arms v. Leaman*, 4 Pa. L. J. Rep. 84, 6 Pa. L. J. 518; *Gregg v. Krebs*, 5 Pa. Dist. 779.

*Rhode Island.* — *Barnes v. Eddy*, 12 R. I. 25. See also *Street v. U. S.*, 133 U. S. 299.

*Wisconsin.* — *Siegbert v. Stiles*, 39 Wis. 533 (Jan. 1).

where a lease stipulated that a notice of quitting must be given one month prior to Oct. 1, it was held that a good notice was given on Monday, Sept. 2, Sept. 1 being a holiday. *Murrell v. Lion*, 30 La. Ann. 255.

**3. Performance on Monday Not Good. —** *Pear-point v. Graham*, 4 Wash. (U. S.) 232; *National Mut. Ben. Assoc. v. Miller*, 85 Ky. 88 (Thanksgiving); *Kilgourn v. Miles*, 6 Gill & J. (Md.) 268; *Amis v. Kyle*, 2 Yerg. (Tenn.) 31, 24 Am. Dec. 463. See also *Whittier v. McLennan*, 13 U. C. Q. B. 638.

**4. Code Provisions — Performance on Monday Good — England.** — *Taylor v. Jones*, 45 L. J. C. Pl. 110; *Ex p. Ferrige*, L. R. 20 Eq. 289.

*Canada.* — *Nicolet Election Case*, 29 Can. Sup. Ct. 178.

*Arizona.* — *Pemberton v. Duryea*, (Ariz. 1896) 43 Pac. Rep. 220.

*California.* — *Muir v. Galloway*, 61 Cal. 498; *Matter of Rose*, 63 Cal. 346; *Northey v. Banker's Life Assoc.*, 110 Cal. 547; *Robinson v. Templar Lodge No. 17*, 114 Cal. 41; *Crane v. Crane*, 121 Cal. 99; *Frassi v. McDonald*, 122 Cal. 400; *Baxter v. Vineland Irrigation Dist.*, 136 Cal. 185; *Blackwood v. Cutting Packing Co.*, 71 Cal. 461; *Jenness v. Bowen*, 77 Cal. 310.

*Florida.* — *Bacon v. State*, 22 Fla. 46.

*Georgia.* — *Morgan v. Perkins*, 94 Ga. 353.

*Illinois.* — *Gage v. Davis*, 129 Ill. 236, 16 Am. St. Rep. 260; *Brophy v. Harding*, 137 Ill. 621; *Brainard v. Norton*, 14 Ill. App. 643.

*Indiana.* — *Backer v. Pyne*, 130 Ind. 288, 30 Am. St. Rep. 231; *Hogue v. McClintock*, 76 Ind. 205.

*Iowa.* — *Conklin v. Marshalltown*, 66 Iowa



*bama, Mississippi*, and some early cases in *Missouri*.<sup>1</sup>

**b. RULE WHEN ACT IS TO BE PERFORMED UNDER REQUIREMENT OF STATUTE.**—But some cases lay down the rule that when the act to be performed is in fulfilment of a statutory requirement, Sunday will not be excluded, and performance, if not lawful on Sunday, must be made on Saturday, the court rightfully holding that it cannot extend the time given by statute.<sup>2</sup>

122; *Holbrook v. Mill Owners' Mut. Ins. Co.*, 86 Iowa 255.

*Kansas*.—*English v. Williamson*, 34 Kan. 212; *Cable v. Coates*, 36 Kan. 191; *Dougl. v. Rinehart*, 5 Kan. 392; *Hill v. Timmermeyer*, 36 Kan. 252; *Scruton v. Hall*, 6 Kan. App. 714.

*Louisiana*.—*Catherwood v. Shepard*, 30 La. Ann. 677; *Allen v. Their Creditors*, 8 La. 221. See also *Garland v. Holmes*, 12 Rob. (La.) 421. *Massachusetts*.—*Cooley v. Cook*, 125 Mass. 406.

*Minnesota*.—*Bovey De Laittre Lumber Co. v. Tucker*, 48 Minn. 223; *Johnson v. Merritt*, 50 Minn. 303.

*Missouri*.—*Hodgson v. Banking House*, 9 Mo. App. 24; *Evans v. Chicago, etc., R. Co.*, 76 Mo. App. 468, *disapproves* *Patrick v. Faulke*, 45 Mo. App. 312; *State v. Stuckey*, 78 Mo. App. 533; *Cash v. Penix*, 11 Mo. App. 597. See the *Missouri* cases in the next note.

*Nebraska*.—*State v. King*, 23 Neb. 540; *Ostertag v. Galbraith*, 23 Neb. 730.

*New York*.—*Dorsey v. Pike*, 46 Hun (N. Y.) 112; *Lucia v. Omel*, 46 N. Y. App. Div. 200; *Gibbon v. Freel*, 93 N. Y. 93.

*North Carolina*.—*Barcroft v. Roberts*, 92 N. Car. 249. See also *Glanton v. Jacobs*, 117 N. Car. 427.

*Oregon*.—*Carothers v. Wheeler*, 1 Oregon 194; *Nicklin v. Robertson*, 28 Oregon 278, 52 Am. St. Rep. 790; *Wachsmuth v. Routledge*, 36 Oregon 307.

*Washington*.—*Spokane Falls v. Browne*, 3 Wash. 84.

*Wisconsin*.—*Buckstaff v. Hanville*, 14 Wis. 77.

**New York Code Civ. Proc.** § 788, does not apply to the Saturday half-holiday provided for by Laws of 1887, c. 281. *Fries v. Coar*, (N. Y. City Ct. Spec. T.) 19 Abb. N. Cas. (N. Y.) 267. But a contrary decision was reached in *Reynolds v. Palen*, (Supm. Ct. Spec. T.) 20 Abb. N. Cas. (N. Y.) 11.

**Pennsylvania Act of July 20, 1883**, does not apply to fixing of return day of writ of attachment, and Sunday will not be excluded, even when the last day. *Protzman v. Wolff*, 4 Pa. Dist. 473.

**Performance on Monday Not Good.**—In *California*, where a cause has been heard and decided by one of the departments, a hearing in bankruptcy cannot be granted after the expiration of thirty days, even though the thirtieth day be Sunday. *Adams v. Dohrmann*, 63 Cal. 417.

And in *Williams v. Lane*, 87 Wis. 152, it was held that where an act is to be done in one or more years, and the last day falls on Sunday, performance on Monday is not good; and it was said that section 4971 of S. & B. Annot. Stat. as to the computation of time applied only to cases where the time is "expressed in days." See also *Johnson v. Meyers*, (C.

A.) 54 Fed. Rep. 417. But see *Pressed Steel Car Co. v. Eastern R. Co.*, (C. C. A.) 121 Fed. Rep. 619.

In *Merritt v. Gate City Nat. Bank*, 100 Ga. 147, and again in *Heard v. Phillips*, 101 Ga. 691, a statute required all cases to be returnable to the term "next ensuing after twenty days have elapsed from the filing, \* \* \* the purpose of this act being to require a case to be filed twenty days before the term to which it is returnable." The code provision regulating the computation of time was: "When a number of days is prescribed for the exercise of any privilege or the discharge of any duty, only the first or last day shall be counted, and if the last day shall fall on the Sabbath, another day shall be allowed in the computation." The action was begun June 12, and the term began July 2, the 1st of July being Sunday. It was held that the action was properly triable at that term, the court saying that the code did not apply, since no act was to be done on Sunday.

**1. Performance on Monday Not Good under Code**—*Alabama*.—*Allen v. Elliott*, 67 Ala. 432; *Ex p. James*, 125 Ala. 119; 73 Am. St. Rep. 31.

*Mississippi*.—*Nickles v. Kendrick*, 76 Miss. 334.

*Missouri*.—*Patrick v. Faulke*, 45 Mo. 312; *Miner v. Tilley*, 54 Mo. App. 627; *State v. Sheehan*, 55 Mo. App. 66.

**2. When Time Given by Statute**—*England*.—*Peacock v. Reg.*, 4 C. B. N. S. 264, 93 E. C. L. 264; *Rowberry v. Morgan*, 9 Exch. 730; *Ex p. Simpkin*, 2 El. & El. 392, 105 E. C. L. 392; *Reg. v. Justices*, 7 Jur. 396; *Wynne v. Ronaldson*, 12 L. T. N. S. 711; *Rawlins v. West Derby*, 2 C. B. 72, 52 E. C. L. 72.

*United States*.—*Shefer v. Magone*, 47 Fed. Rep. 872; *Johnson v. Meyers*, (C. C. A.) 51 Fed. Rep. 417; *Hermann v. U. S.*, 66 Fed. Rep. 721.

*Colorado*.—*Vailes v. Brown*, 16 Colo. 462.

*Massachusetts*.—*Haley v. Young*, 134 Mass. 364; *Alderman v. Phelps*, 15 Mass. 225. See also *Cooley v. Cook*, 125 Mass. 406.

*Michigan*.—*Drake v. Andrews*, 2 Mich. 203; *Harrison v. Sager*, 27 Mich. 476 (*overruling dictum* in *Drake v. Andrews, supra*); *Dale v. Lavigne*, 31 Mich. 149.

*New York*.—*Ex p. Dodge*, 7 Cow. (N. Y.) 147; *Bissell v. Bissell*, 11 Barb. (N. Y.) 96; *People v. Luther*, 1 Wend. (N. Y.) 42; *Ready Roofing Co. v. Chamberlin*, (C. Pl. Gen. T.) 52 How. Pr. (N. Y.) 123; *Bowes v. New York Christian Home*, (N. Y. Super. Ct. Spec. T.) 64 How. Pr. (N. Y.) 509.

*Ohio*.—*Paine v. Mason*, 7 Ohio St. 108.

*Texas*.—*Burr v. Lewis*, 6 Tex. 76; *Hanover F. Ins. Co. v. Shrader*, 89 Tex. 35, 59 Am. St. Rep. 25.

See also *American Tobacco Co. v. Strickling*,

*c. RULE AS TO PROMISSORY NOTES*—(1) *When Days of Grace Are Allowed*.—It is well settled that where a note is entitled to days of grace, and the last day of grace falls on Sunday or a legal holiday, presentment should be made on the secular day next preceding.<sup>1</sup>

(2) *When No Days of Grace Are Allowed*.—If there are no days of grace, then presentment should be made on the secular day next succeeding.<sup>2</sup> But these rules are subject to exceptions.<sup>3</sup>

**TIME IMMEMORIAL**.—See note 4.

**TIMEPIECE**.—See note 5.

**TIME TO TIME**. (See also the title *TERM*, *ante*.)—"From time to time" means occasionally; at intervals; now and then.<sup>6</sup>

**TIPPLE**.—See note 7.

**TIPPLE—TIPLING HOUSE**. (See also *TIGER*, *ante*, and see the title *INTOXICATING LIQUORS*, vol. 17, p. 372.)—To "tipple" is to drink spiritu-

88 Md. 500; *McLees v. Morrison*, 29 Ohio St. 155.

**Where the Statute Does Not in Terms require the act to be done in a certain number of days, performance on Monday is good.** *Clink v. Russell*, 58 Mich. 242.

**Performance on Monday Good When Act Done by Court**.—In *Von de Place v. Weller*, 64 N. J. L. 155, it was held that where the act was to be done by the court, and the last day fell on Sunday, the act could be done on Monday; but the court expressly refused to decide the broad question whether, when the act is one required by a statute, and is to be done by the party, he may perform it on Monday, though it intimated an opinion adverse to the rule stated in the text.

**1. Rule as to Promissory Notes With Grace**.—See the title *BILLS AND NOTES*, vol. 4, p. 368, and also the following cases:

*District of Columbia*.—*Irwin v. Brown*, 2 Cranch (C. C.) 314.

*Illinois*.—*Balkwill v. Bridgeport Wood Finishing Co.*, 62 Ill. App. 663.

*Massachusetts*.—*Barker v. Parker*, 6 Pick. (Mass.) 80.

*Mississippi*.—*Fleming v. Fulton*, 6 How. (Miss.) 473.

*New York*.—*Johnson v. Haight*, 13 Johns. (N. Y.) 470; *Griffin v. Goff*, 12 Johns. (N. Y.) 423; *Cuyler v. Stevens*, 4 Wend. (N. Y.) 566.

*South Carolina*.—*Furnan v. Harman*, 2 McCord L. (S. Car.) 436.

*Tennessee*.—*Colms v. State Bank*, 4 Baxt. (Tenn.) 422.

See also *Hagerty v. Engle*, 43 N. J. L. 299; *Capital Nat. Bank v. American Exch. Nat. Bank*, 51 Neb. 707.

**2. Rule as to Promissory Notes Without Grace**.—See the title *BILLS AND NOTES*, vol. 4, p. 369. See also *Barlow v. Gregory*, 31 Conn. 261; *Morris v. Bailey*, 10 S. Dak. 507.

**California Statute**.—A note made Feb. 29, 1868, due twelve months from date, without grace, became payable Feb. 27, 1869, the 28th being Sunday. *Hibernia Sav., etc., Soc. v. O'Grady*, 47 Cal. 579.

**3. Exceptions**.—See the title *BILLS AND NOTES*, vol. 4, p. 368, note 6. And see *German Security Bank v. McGarry*, 106 Ala. 633.

**4. Time Immemorial**.—See *Angus v. Dalton*,

3 Q. B. D. 118, and see the titles *PRESCRIPTION*, vol. 22, p. 1180; *USAGES AND CUSTOMS*.

**5. Timepiece**.—In *Le Couteur v. London, etc.*, R. Co., 6 B. & S. 961, 118 E. C. L. 961, a chronometer was held to be a *timepiece* within the meaning of a statute providing that no carrier should be liable for the loss of articles of a certain kind unless the value had been declared and an insurance price paid, a *timepiece* being one of the articles enumerated.

**6. Time to Time**.—*Upshur v. Baltimore*, 94 Md. 749.

A constitutional provision was to the effect that the legislature might increase the number of judges of the Supreme Court from *time to time*. In construing this provision in *State v. McBride*, 29 Wash. 342, the court said: "We must, therefore, look for some meaning in the words 'from *time to time*,' or conclude that they were used without purpose. These words are defined by lexicographers to mean 'occasionally.' The word 'occasionally' is defined to mean: 'As occasion demands or requires; as convenience requires; accidentally, or on some special occasion.' But whatever may be the technical meaning of the words, they certainly cannot be held to mean that the legislature may not decrease the number of judges after the increase thereof. If, therefore, the legislature has power to increase the number of judges as occasion or convenience requires, and there is no restriction upon a decrease except below five, it follows that a decrease may be had to this minimum when necessity or occasion requires, of which necessity or occasion the legislature is the exclusive judge."

**7. Tipple—Mining**.—In *Boyd v. Indian Head Mills*, 131 Ala. 356, it was said: "Plaintiff was employed by defendant to assist in pushing trams from a mine which was being opened, along and to the end of a trestle, and there emptying the car. The car had to be emptied by tipping or overturning it so that its contents would fall below. Ordinarily, in operation of mines so situated, an appliance called a *tipple*, which tips or upturns a car when the same is run upon it, is used for emptying, but none had been attached to this trestle."

ous or strong drink habitually.<sup>1</sup> A *tippling house* is a place of public resort where spirituous, fermented, or other intoxicating liquors are sold or given away, to be drunk in small quantities on the premises.<sup>2</sup>

**TIRE.**—See note 3.

1. *Yankton v. Douglass*, 8 S. Dak. 442, *quoting* Webst. Dict.

In *Harney v. State*, 8 Lea (Tenn.) 113, it was held, under a statute making it a misdemeanor subject to fine and imprisonment to sell or *tipple* any intoxicating beverage within four miles of an incorporated institution of learning, that the buyer of the liquor is not guilty of the offense; but Turney, J. (with whom McFarland, J., concurred), held that both the seller and buyer are necessary to the offense, and that the term *tipple*, in its legal sense, means a sale and consumption; that the seller cannot *tipple* by himself, but must have a purchaser, who of course is a party to the *tippling*.

2. **Tippling House.**—*Harris v. People*, 1 Colo. App. 289; *Minor v. State*, 63 Ga. 318; *Patten v. Centralia*, 47 Ill. 370; *Emporia v. Volmer*, 12 Kan. 622; *Morrison v. Com.*, 7 Dana (Ky.) 218; *Yankton v. Douglass*, 8 S. Dak. 441. See also *Harris v. People*, 21 Colo. 95; *Mohrman v. State*, 105 Ga. 714.

"**Tippling House**" Equivalent to "**Drinking House**."—See *U. S. v. Patterson*, 55 Fed. Rep. 640.

**Tippling House Public Drinking House.**—In *Harris v. People*, 21 Colo. 98, and in *Koop v. People*, 47 Ill. 329, a *tippling house* was defined to be a public drinking house.

**Name Immaterial.**—In *Hussey v. State*, 69 Ga. 54, it was held to make no difference in law whether a place is called a barroom, a glee club, a parlor, or a restaurant; if it is a place where liquor is retailed and *tippled*, and has a door for entrance which anybody can push open, to enter the place, and drink, the proprietor is guilty of keeping a *tippling house*. Nor does it matter whether the drinking is done standing or sitting, whether at the bar or around a table; in either case it is *tippling*, and the place where it is done is a *tippling house*.

**Blind Tiger.**—In *Williams v. State*, 100 Ga. 527, it was said: "Therefore, though the establishment presided over by the accused might, perhaps, be more graphically described as being what is colloquially termed a 'blind tiger,' as was suggested in the argument before us, it was nevertheless, in a legal sense, a *tippling house*."

**Georgia Code — Sabbath.**—In *Williams v. State*, 100 Ga. 526, it was said: "Our code does not attempt to define what shall constitute or be considered a *tippling house*. 'It deals with them [houses of this character] as establishments too well known to need description, and simply prescribes a penalty for keeping them open on the Sabbath day or Sabbath night.' *Minor v. State*, 63 Ga. 321. Doubtless any one of the several slightly varying definitions of the term given by law writers is broad enough to cover such an establishment as that now under consideration."

And as to what constitutes the offense of keeping open a *tippling house* on the Sabbath, see *Lucas v. State*, 92 Ga. 454; *Harmon v.*

*State*, 92 Ga. 455; *Mohrman v. State*, 105 Ga. 714.

**Retailing.**—In *Woods v. Com.*, 1 B. Mon. (Ky.) 75, it was said: "The simple act of retailing spirits in a house, on the day charged, is not keeping a *tippling house*, which must be either a house in which *tippling* and drinking is allowed, or a house kept for the purpose of making a profit by selling spirituous liquors, without furnishing accommodations for travelers with or without license."

**Less Quantities than Quart.**—Under the *Tennessee* statutes, the courts have defined a *tippling house* to be a place where spirituous liquors are sold, without license, in less quantities than a quart, or in any quantity to be drunk on the place. *Harney v. State*, 8 Lea (Tenn.) 114, *citing* *Dunnaway v. State*, 9 Yerg. (Tenn.) 350, and *Sanderlin v. State*, 2 Humph. (Tenn.) 315.

In *Moore v. State*, 9 Yerg. (Tenn.) 353, it was held that selling liquor by the quart to be drunk in the house of the defendant did not constitute the offense of keeping a *tippling house* under Act Tenn. 1811, c. 113, § 2.

**Social Club—Giving Away.**—In *Mohrman v. State*, 105 Ga. 709, it was held that the mere fact that the selling and drinking of intoxicating liquors was "only an incident and not the main object" of the incorporation of a social club will make the place where such liquors are dispensed and drunk none the less a *tippling house* within the meaning of the statute making penal the keeping open of such houses on the Sabbath.

In *Minor v. State*, 63 Ga. 318, it was held that if liquors were given away by the drink, or other small quantity, it constituted the house a *tippling house*. This was the case of a social club, each member of which contributed a certain sum on or before the Saturday preceding each Sunday for the purpose of purchasing liquors necessary for the use of the club the following Sunday, and it was held to be a *tippling house*. And see *Marmont v. State*, 48 Ind. 21.

**Drinking on Premises.**—In *Harris v. People*, 21 Colo. 98, it was said: "Neither was it necessary, as appears from the foregoing case, to show that liquors sold were actually drunk upon the premises. The sale of liquor was made in small quantities, and the invitation and the opportunity for drinking the same were furnished by the defendant to purchasers; and these facts, together with the fact that the house was kept open on the Sabbath day, were sufficient to convict." See also the title INTOXICATING LIQUORS, vol. 17, p. 372.

3. **Narrow-tired Wagon — Broad-tired Wagon.**—In *Cook v. State*, 26 Ind. App. 283, it was said: "The phrases 'narrow-tired wagon' and 'broad-tired wagon' are not technical phrases having a peculiar and appropriate meaning in law, and they are to be taken in their plain or ordinary and usual sense. Thus taken, a 'narrow-tired wagon' means a wagon



**TISSUE.**— See note 1.

having wheels with *tires* which are narrow, while a 'broad-*tired* wagon' means a wagon having wheels with broad *tires*. If *tires* of particular widths be compared, it is easy to say which is comparatively narrow and which is comparatively broad, but without any prescribed standard it is impossible to say, as a matter of law, that a *tire* two inches wide is certainly either a narrow *tire* or a broad *tire*."

1. **Tissue — Trademarks.** (See generally the title TRADEMARKS, ETC., *post*.) — In *Draper v.*

*Skerrett*, 116 Fed. Rep. 208, it was said: "It must be admitted that the plaintiff has no right to use the term 'French *tissue*' as a trademark for the emollient paper which he puts up and puts upon the market. The word 'French' is broadly geographic, indicating its origin, and the word *tissue* is descriptive of its texture, and was applied to it in France, from whence it comes, long before it was introduced into this country. Neither singly, therefore, nor in combination can these words be so employed."

Volume XXVIII.

# TITLE AND PROPERTY INSURANCE.

## I. NATURE OF POLICY DEFINED, 229.

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## III. RIGHTS, DUTIES, AND LIABILITIES OF TITLE GUARANTEE COMPANY, 230.

## IV. EFFECT OF TITLE INSURANCE UPON LIABILITY OF GRANTOR, 231.

**I. NATURE OF POLICY DEFINED.** — A policy of title insurance which insures the holder thereof against all loss or damage, not exceeding a specified sum, which the insured may sustain by reason of any defect or defects in the title of the property insured, or by reason of liens or incumbrances charging the same, is a contract designed to save the insured harmless from any loss through defects, liens, or incumbrances that may affect or burden his title when he takes it, and not to afford protection against matters that may arise after the issuance of the policy. The risks of title insurance end where the risks of other kinds of insurance begin. From the very nature of the contract, the policy usually bears the same date as the deed of the title which it purports to insure, and if, in any case, there is a discrepancy between these dates, it must be due to some exceptional circumstance which should be noted in the contract.<sup>1</sup>

**II. CONSTRUCTION OF POLICY.** — A policy of title insurance is subject to the rules of construction which are applicable to other insurance policies, and all doubts and ambiguities are to be resolved in favor of the insured.<sup>2</sup>

**Unreasonable Conditions Given Limited Application.** — Where a policy prescribes, as a condition to recovery in the event of loss, a requirement which, if literally construed, is unreasonable, the operation of the requirement will be limited to cases to which the insurer might properly have intended it to apply.<sup>3</sup>

**1. Nature of Policy Defined.** — *Trenton Potteries Co. v. Title Guarantee, etc., Co.*, 176 N. Y. 65, *affirming* 68 N. Y. App. Div. 636. In this case the policy of title insurance, covering five separate pieces of property, was not issued at the time the deeds of four of the parcels were delivered and accepted, but its issuance was postponed until after the fifth title was perfected. The evidence showed that there was no purpose on the part of either of the parties to have any of the titles insured beyond the moment when they became the property of the insured; that the issuance of a single policy after all the titles were perfected was agreed upon as a matter of convenience, with no thought of changing the liability of the insurer from what it would have been if a policy upon the first four titles had been issued when the conveyances thereof were made, but that the real date of the policy in respect to the first four conveyances was inadvertently omitted. It was held that the trial court was justified in reforming the policy so as to make it conform with the actual agreement between the parties, and that the treasurer could not be held liable for the amount paid upon an assessment which became a lien upon one of the four parcels three months after the insured

had taken title thereto and seven months before the policy was issued.

**Competency of Expert Testimony to Vary Form of Policy.** — The testimony of experts in title insurance as to what they would have done, or what ought to have been done, in the issuance of a policy in question, and as to the custom of title insurance companies in such cases, is not admissible to support the legal conclusion that the policy should have been in different form. *Trenton Potteries Co. v. Title Guarantee, etc., Co.*, 176 N. Y. 65.

**2. Construction of Policy.** — *Trenton Potteries Co. v. Title Guarantee, etc., Co.*, 50 N. Y. App. Div. 490; *Place v. St. Paul Title Ins., etc., Co.*, 67 Minn. 126, 64 Am. St. Rep. 404.

**3. Unreasonable Conditions Given Limited Application.** — A condition in a policy, providing that no right of action shall accrue unless the insured shall actually have been evicted under an adverse title, has no application where the insured, by reason of defect of title, never obtained possession; and a condition which prohibits recovery under the policy unless the insured has contracted to sell the estate or interest insured, and the title thereto has been declared by a court of last resort, of competent jurisdiction, defective or encumbered by rea-

**III. RIGHTS, DUTIES, AND LIABILITIES OF TITLE GUARANTEE COMPANY.** — A corporation organized for the purpose of examining and guaranteeing titles to real estate, which in all matters relating to conveyancing and searching titles assumes to discharge the same duties as an individual conveyancer or attorney, is subject to the same responsibilities, and its duty to its employer is governed by the same principles, applicable to attorney and client.<sup>1</sup> And it seems that the liability of a guarantee company not only protects its employers but covers, in a proper case, a loss sustained by a person who, relying upon the company's certificate, makes a transaction with such employer.<sup>2</sup>

**Effect of False Answers by Applicant for Insurance.** — Where the contract itself does not stipulate the effect of a particular false statement or representation, or merely stipulates that the misrepresentation or suppression of a material fact shall avoid the contract, the fact misrepresented or suppressed must have been material, and its materiality is a question of fact to be shown by matters outside the terms of the contract. But where the parties by their contract determine the materiality of a particular statement, as where they stipulate that a false statement of a certain fact made by the insured shall avoid the contract, the statement is in effect a warranty, which, if false, avoids the contract, and the materiality of the statement need not be shown.<sup>3</sup>

son of a defect or incumbrance for which the company would be liable under the policy, will be held to have no application where a compliance with the condition would have required the insured to sell that to which he knew he had no title, and thus defraud an innocent purchaser, or by a sham contract to sell, have a suit brought which is fictitious from start to finish and a fraud upon the court. *Place v. St. Paul Title Ins., etc., Co.*, 67 Minn. 126, 64 Am. St. Rep. 404.

**1. Duties and Liabilities of Title Guarantee Company.** — *Ehmer v. Title Guarantee, etc., Co.*, 156 N. Y. 10, affirming 89 Hun (N. Y.) 120. Here the title insurance company was employed to conduct the purchase of a certain house, and negligently procured the execution of a deed to an adjoining house instead of the one intended by the parties to the deed. The property was guaranteed to be free of all incumbrances except a mortgage for a certain amount. The grantee, upon discovering that the wrong property had been deeded, sued to reform the deed, but on procuring its reformation and obtaining the house which the conveyancing company had been employed to purchase, subject to a certain mortgage, found the property encumbered with an additional mortgage. It was held that the grantee, on being evicted through a foreclosure of such additional mortgage, the grantor being insolvent, is entitled to recover from the conveyancing company the sum paid on the purchase price, such sum being less than the amount of the additional mortgage.

*Pennsylvania.* — The Pennsylvania Act of May 9, 1886, providing for the incorporation of companies to insure titles, does not empower them to engage in the business of conveyancing, and to an action upon a title insurance policy, it is no defense that the conveyancing was done by the conveyancer of the insured. *Gauler v. Solicitors' L. & T. Co.*, 9 Pa. Co. Ct. Rep. 634.

**2. Liability to Person Other than Employer.** — *Economy Bldg., etc., Assoc. v. West Jersey Title, etc., Co.*, 64 N. J. L. 27. In this case the plaintiff agreed to make a loan to an applicant on condition that the mortgage offered as security should be certified by the defendant to be a first lien on the land. The applicant applied to the defendant, and made known to it his agreement with the plaintiff, and paid the defendant to make the required search and certificate, which it did and delivered such certificate to the applicant, to be delivered to the plaintiff and used for the purpose of obtaining said loan. It was held that the transaction disclosed either a contract between the plaintiff and the defendant made through the agency of the applicant for the loan, or a contract between the applicant and the defendant made for the benefit of the plaintiff, and that in the event of loss by the plaintiff on account of a prior incumbrance, which the defendant had negligently certified not to exist, the plaintiff had a right of action against the defendant for the damage sustained.

**3. False Answers.** — *Stensgaard v. St. Paul Real Estate Title Insurance Co.*, 50 Minn. 429. Here the application for a policy of title insurance contained this provision: "It is agreed that the following statements are correct and true to the best of the applicant's knowledge and belief, and that any false statement or any suppression of material information shall avoid the policy." To the question, "Last price paid for the property?" the plaintiff answered, "Eleven thousand dollars." The application was signed by the insured. It appeared that only three thousand dollars of the price was paid in money and that the rest consisted of a transfer of certain mining stock. Upon the question as to the truth of the answer the court instructed the jury that if they found that the three thousand dollars together with a fair market value of the stock aggregated eleven thousand dollars, or if they believed



**Records of Company, Private Property.** — An officer of a title guarantee company cannot be forced by a subpoena *duces tecum*, in a suit to establish lost public records, to produce the abstract books of the company which contained copies of the public records of land conveyances.<sup>1</sup>

**IV. EFFECT OF TITLE INSURANCE UPON LIABILITY OF GRANTOR.** — The fact that the title to the property conveyed is insured, and that losses arising from an incumbrance have been settled by the insuring company, does not deprive the grantee of his right of action against the executors of the grantor for the loss sustained, as it was his duty to give to the insuring company the benefit of all rights and remedies within his reach to make its loss as small as possible.<sup>2</sup>

**TITLE BONDS.** — See the titles BONDS, vol. 4, p. 618; COVENANTS, vol. 8, p. 43; SPECIFIC PERFORMANCE, vol. 26, pp. 90 and 96; VENDOR AND PURCHASER.

that the plaintiff honestly thought he was paying eleven thousand dollars in full cash value, and the other party accepted the sum as eleven thousand dollars in money, then they should find the answer true. The jury found the answer false. It was held that the contract was avoided thereby, and that the court's instruction was not prejudicial to the insured.

**1. Records of Company, Private Property.** — *Ex p. Calhoun*, 87 Ga. 359. In delivering the opinion of the court in this case, Bleckley, C. J., said: "These abstract books called for by the subpoena came into existence as the result of private enterprise and labor, and were afterwards purchased by this private corporation at great expense. They are its private property and are used by it in the conduct of its corpo-

rate business. They have never been published. Their contents are kept secret, except as disclosed, piecemeal, in furnishing to applicants therefor abstracts of title relating to specified parcels of real estate; and the furnishing of such abstracts is carried on as a business for pay and profit. The value of the books consists mainly in the secrecy of their contents. Were the information which they afford rendered accessible to the public by other means, the demand for it through the one source now available would be diminished, if not destroyed."

**2. Effect of Title Insurance upon Liability of Guarantor.** — *Alexander v. Greacen*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 526.

# TITLE, OWNERSHIP, AND POSSESSION.

BY HAROLD N. ELDRIDGE.

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### CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 21, p. 710.

And see in this work the title *REAL PROPERTY*, vol. 23, p. 933, and the references there given.

**I. TITLE — 1. Definition.** — As applied to real estate, title is generally defined to be the means whereby the owner of lands has the just possession of his property.<sup>1</sup>

**Personal Property.** — Technically speaking, title is not properly applied to personal property;<sup>2</sup> but when so applied it has been defined to be the means whereby the owner of personal property has just possession of it.<sup>3</sup>

**1. Title to Real Estate Defined.** — Co. Litt. 345; 2 Bl. Com. 195; And. Law Dict.; Bouv. Law Dict.; Donovan v. Pitcher, 53 Ala. 411, 25 Am. Rep. 634; Houston v. Farris, 71 Ala. 570; Marshall v. Shafter, 32 Cal. 177; Adams v. Hopkins, (Cal. 1902) 69 Pac. Rep. 228; Leary v. Durham, 4 Ga. 593; Pratt v. Fountain, 73 Ga. 261; Loy v. Home Ins. Co., 24 Minn. 315, 31 Am. Rep. 346; Chapman v. Dougherty, 87 Mo. 617, 56 Am. Rep. 469; Gregory v. Kanouse, 11 N. J. L. 62; Campfield v. Johnson, 21 N. J. L. 83; Fitzgerald v. Miller, 7 S. Dak. 61; Hoge v. Hollister, 2 Tenn. Ch. 606.

**2. Title Not Properly Applied to Personal Property.** — Cent. Dict.

**3. Title to Personal Property Defined.** — Worcester. Dict.; Pratt v. Fountain, 73 Ga. 261.

**Other Definitions of Title.** — Title is the lawful cause or ground for possessing that which is ours. Hunt v. Eaton, 55 Mich. 365; Loy v. Home Ins. Co., 24 Minn. 315, 31 Am. Rep. 346; Merrill v. Agricultural Ins. Co., 73 N. Y. 452.

Title is the means by which the right to

possess property is made to appear. Cunningham v. Ashley, 45 Cal. 485.

Title is such a claim to the exclusive control and enjoyment of a thing as the law will recognize and enforce. It signifies either a party's right to the enjoyment thereof, or the means whereby such right has accrued or by which it is evidenced. Abb. Law Dict.; Pratt v. Fountain, 73 Ga. 261.

Title is that which gives a right or claim to ownership; that by which the owner of lands or of personal property has the just possession of his property; the instrument or document by which a right to something is proved. Worcester. Dict.; Pratt v. Fountain, 73 Ga. 261.

Title is that which constitutes a just cause of exclusive possession; that which is the foundation of ownership of property. Webster. Dict.; Houston v. Farris, 71 Ala. 570; Pratt v. Fountain, 73 Ga. 261; Hunt v. Eaton, 55 Mich. 365.

**Right Compared with Title.** — See *RIGHT*, vol. 24, p. 966.

**Interest Distinguished from Title.** — See *INTEREST* — *INTERESTED*, vol. 16, p. 1102.

**2. What Constitutes Title.** — A complete title to a thing has three stages or degrees; naked possession or actual occupation, right of possession, and right of property.<sup>1</sup> But a person may be said to have title to a thing without having all these three degrees, that is, without having a complete title.<sup>2</sup> Thus one having the right of possession of a thing is said to have the title to it.<sup>3</sup> But a person in the mere naked possession cannot be said to have title,<sup>4</sup> though such possession is *prima facie* evidence of title.<sup>5</sup>

**3. Modes of Acquiring and Losing Title.** — The manner in which a title is acquired or lost is considered elsewhere in this work.<sup>6</sup>

**II. OWNER — OWNERSHIP — 1. Definition and Nature.** — The Word "Owner" has been defined to mean one who has dominion of a thing, real or personal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he is prevented by some agreement or covenant which restrains his right.<sup>7</sup> It is not, however, a

**Abstract of Title.** — See the title ABSTRACT OF TITLE, vol. 1, p. 210.

**Marketable Title.** — See MARKETABLE TITLE, vol. 19, p. 1138.

**Good Title.** — See GOOD, vol. 14, p. 1078.

**Onerous Title.** — See ONEROUS, vol. 21, p. 917.

**Possessory Title.** — See POSSESSORY TITLE, vol. 22, p. 1031.

**Color of Title.** — See COLOR OF TITLE, vol. 6, p. 214.

**1. What Constitutes Complete Title.** — 2 Bl. Com. 195; 4 Kent Com. 374; Donovan v. Pitcher, 53 Ala. 411, 25 Am. Rep. 634; Fitzhugh v. Croghan, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139; Ehle v. Quackenboss, 6 Hill (N. Y.) 539; Medley v. Medley, 81 Va. 265.

These several constituent parts of title may be divided and distributed among several persons, so that one of them may have the possession, another the right of possession, and the third the right of property. Unless they all be united in one and the same party there cannot be that consolidated right (that *jus duplicatum*, or *droit droit*, or the *jus proprietatis et possessionis*), which according to the ancient English law formed a complete title. 4 Kent Com. 374; Donovan v. Pitcher, 53 Ala. 411, 25 Am. Rep. 634.

**Naked Possession Defined.** — See *infra*, III. 2. b. *Actual Possession*.

**Right of Possession Defined.** — See RIGHT OF POSSESSION, vol. 24, p. 967.

**Right of Property Defined.** — See RIGHT OF PROPERTY, vol. 24, p. 967.

**Seizin Implies Complete Legal Title.** — "A complete legal title is the *juris et sesinæ conjunctio*, the title and possession united. This is the technical and legal import of the terms, 'seized of the legal title.' 'Seisin' means, *ex vi termini*, the whole legal title. A covenant of seizin is broken if the covenantor have not the possession, the right of possession, and the right or legal title." Fitzhugh v. Croghan, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139.

**2. Title in Its Ordinary Acceptation** is not understood to mean a perfect title. Irving v. Brownell, 11 Ill. 403.

**A Party May Have Title to Property Although He Is Not the Absolute Owner.** — Roberts v. Wentworth, 5 Cush. (Mass.) 192.

**3. One Having Right of Possession Has Title.** — Rodgers v. Palmer, 33 Conn. 155; Roberts v.

Wentworth, 5 Cush. (Mass.) 192; Chapman v. Dougherty, 87 Mo. 617, 56 Am. Rep. 469; Campfield v. Johnson, 21 N. J. L. 83; Dunster v. Kelly, 110 N. Y. 558; Carroll v. Rigney, 15 R. I. 81.

**4. One Having Naked Possession Has No Title.** — Chapman v. Dougherty, 87 Mo. 617, 56 Am. Rep. 469; Campfield v. Johnson, 21 N. J. L. 83. Title is the right of possession or property as distinguished from the actual possession. Campfield v. Johnson, 21 N. J. L. 83.

Title as used in a statute declaring that a justice of the peace shall have no cognizance of any action "where the title to land shall in any wise come in question," does not include actual possession of lands but has reference to right of possession. Ehle v. Quackenboss, 6 Hill (N. Y.) 537; Grosso v. Lead, 9 S. Dak. 165.

Title does not embrace possession in the sense in which it is used in a statute giving costs to the plaintiff in actions for the recovery of real property, or where a claim of title to real property arises on the pleading, or comes in question. As there used it is nothing less than an assertion of a right of possession. Rathbone v. McConnell, 20 Barb. (N. Y.) 316.

"Title" as used in statutes providing that whenever an action of trespass shall be brought before any justice court, and the defendant shall plead the general issue, he shall not be allowed to offer any evidence that may bring the title to real estate in question, means the right of possession and not the fact of possession. Carroll v. Rigney, 15 R. I. 81.

**5. Prima Facie Evidence of Title.** — 2 Bl. Com. 195; Ricard v. Williams, 7 Wheat. (U. S.) 59; Murphy v. Wallingford, 6 Cal. 648; Hess v. Winder, 30 Cal. 349; Hubbard v. Little, 9 Cush. (Mass.) 476; Newhall v. Wheeler, 7 Mass. 189; Lund v. Parker, 3 N. H. 50; Sankey v. Noyes, 1 Nev. 72.

**6. Modes of Acquiring and Losing Title.** — See the title REAL PROPERTY, vol. 23, p. 933.

**7. Owner Defined.** — Bouv. Law Dict.; Dow v. Gould, etc., Silver Min. Co., 31 Cal. 649; Fall Brook Irrigation Dist. v. Abila, 106 Cal. 355; McLain v. Maricle, 60 Neb. 353; Ombony v. Jones, 19 N. Y. 234; Johnson v. Crookshanks, 21 Oregon 340; Alley v. Lanier, 1 Coldw. (Tenn.) 542; Turner v. Cross, 83 Tex. 218.

An owner is one who has dominion over



technical,<sup>1</sup> but a general term,<sup>2</sup> and a word of common parlance,<sup>3</sup> and is therefore liberally construed,<sup>4</sup> the precise meaning depending upon the nature of the subject-matter and the connection in which it is used.<sup>5</sup>

Ownership has been defined as the right by which a thing belongs to an individual to the exclusion of all other persons.<sup>6</sup> It may extend to the entire thing or may be limited to an interest in it; but whatever is the subject of the ownership is held by the owner for his own individual benefit.<sup>7</sup>

**2. Who Is an Owner — Of Real Estate.** — The word "owner," when applied to real estate without any qualifying words, in common as well as legal parlance, has been held to mean *prima facie* the person in whom is the fee simple.<sup>8</sup> But an owner is not necessarily one owning the fee simple;<sup>9</sup> one having a lesser estate may be an owner;<sup>10</sup> in fact, the term has been applied to

that which is the subject of ownership. He has the right to make such use of it, consistent with the rights of others, as he may see fit. *Florman v. School Dist. No. 11*, 6 Colo. App. 319.

The popular definition of the word "owner," as given by lexicographers, is the right to own; exclusive right of possession; legal or just claim or title; proprietorship. *Woodward v. Republic F. Ins. Co.*, 32 Hun (N. Y.) 365.

**Part Owner.** — See PART, vol. 21, p. 1124.

**Synonymous with Proprietor.** — See PROPRIETOR, vol. 23, p. 267.

**Own — Owned.** — See OWN — OWNED, vol. 21, p. 1025.

**1. Not a Technical Term — England.** — *Lister v. Lobley*, 7 Ad. & El. 124, 34 E. C. L. 51; *Lewis v. Arnold*, L. R. 10 Q. B. 248.

*Alabama.* — *Poteete v. State*, 72 Ala. 558.

*Colorado.* — *McFeters v. Pierson*, 15 Colo. 201, 22 Am. St. Rep. 388.

*Georgia.* — *Hardin v. Chattanooga Southern R. Co.*, 113 Ga. 359.

*Illinois.* — *Davenport v. Farrar*, 2 Ill. 314; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415.

*Massachusetts.* — *Keith v. Maguire*, 170 Mass. 210.

*Minnesota.* — *Benjamin v. Wilson*, 34 Minn. 517.

*New Jersey.* — *Crane v. Elizabeth*, 36 N. J. Eq. 339.

*New York.* — *Danforth v. Suydam*, 4 N. Y. 66.

*Oregon.* — *Johnson v. Crookshanks*, 21 Oregon 340.

*Pennsylvania.* — *Reading R. Co. v. Boyer*, 13 Pa. St. 497.

*Tennessee.* — *Alley v. Lanier*, 1 Coldw. (Tenn.) 542.

"Owner" is not a technical word so as to be tied up to any fixed and definite legal import. *Alley v. Lanier*, 1 Coldw. (Tenn.) 542.

**2. Owner a General Term.** — *McKee v. McCordell*, 22 R. I. 71.

**3. Word of Common Parlance.** — *Poteete v. State*, 72 Ala. 558; *Benjamin v. Wilson*, 34 Minn. 517.

**4. Liberally Construed.** — The word "owner," being *nomen generalissimum*, should, especially when used in a remedial statute, be construed liberally in favor of the parties whom it is the duty and intention of the legislature to protect. *Hardin v. Chattanooga Southern R. Co.*, 113 Ga. 359.

**5. Fallbrook Irrigation Dist. v. Abila**, 106 Cal. 355; *McFeters v. Pierson*, 15 Colo. 201,

22 Am. St. Rep. 388; *Baltimore, etc., R. Co. v. Walker*, 45 Ohio St. 577; *Johnson v. Crookshanks*, 21 Oregon 340; *Schott v. Harvey*, 105 Pa. St. 222, 51 Am. Rep. 201; *McKee v. McCordell*, 22 R. I. 71.

**6. Ownership Defined.** — *Converse v. Kellogg*, 7 Barb. (N. Y.) 597; *Hill v. Cumberland Valley Mut. Protection Co.*, 59 Pa. St. 477.

**Ownership Does Not Depend upon Residence.** — *People v. State Treasurer*, 7 Mich. 366.

**Perfect and Imperfect Ownership.** — In *Louisiana*, ownership is divided by the code into perfect and imperfect ownership. Perfect ownership is perpetual, while imperfect ownership is that which terminates at a certain time or on a condition. *Marshall v. Pearce*, 34 La. Ann. 557.

**7. Interest May Be Limited.** — *Florman v. School Dist. No. 11*, 6 Colo. App. 319.

**8. Owner in Fee.** — *Fallbrook Irrigation Dist. v. Abila*, 106 Cal. 355; *McFeters v. Pierson*, 15 Colo. 201, 22 Am. St. Rep. 388; *Illinois Mut. F. Ins. Co. v. Marseilles Mfg. Co.*, 6 Ill. 236; *Hadlock v. Hadlock*, 22 Ill. 384; *Johnson v. Crookshanks*, 21 Oregon 340; *McKee v. McCordell*, 22 R. I. 71. But see *Convis v. Citizens' Mut. F. Ins. Co.*, 127 Mich. 616.

**Under a Statute Allowing the Owner of Land upon Which Lumber Has Been Cut by a trespasser to recover a penalty for such cutting it is generally held that the owner means the person who has the fee simple title.** *Jarrot v. Vaughn*, 7 Ill. 132. And see the title TREES AND TIMBER.

**A Covenant by the Vendor that He Is the Owner of certain land means that he has the absolute title.** *Rockford Ins. Co. v. Nelson*, 65 Ill. 415.

**9. Owner Not Necessarily One Owning Fee Simple.** — *Convis v. Citizens' Mut. F. Ins. Co.*, 127 Mich. 616; *Baltimore, etc., R. Co. v. Walker*, 45 Ohio St. 585.

**10. One Having Lesser Estate — England.** — *Lister v. Lobley*, 7 Ad. & El. 124, 34 E. C. L. 51; *Chauntler v. Robinson*, 4 Exch. 163; *Eglinton v. Norman*, 46 L. J. Exch. 557; *Cook v. Humber*, 11 C. B. N. S. 33, 103 E. C. L. 33, 31 L. J. C. Pl. 73; *Russell v. Shenton*, 3 Q. B. 456, 43 E. C. L. 817; *Caudwell v. Hanson*, L. R. 7 Q. B. 55; *Dawson v. Midland R. Co.*, L. R. 8 Exch. 8; *List v. Tharp*, (1897) 1 Ch. 260.

*Canada.* — *Gilchrist v. Tobin*, 7 U. C. C. P. 141.

*Alabama.* — *Tyler v. Jewett*, 82 Ala. 98; *Clifton Iron Co. v. Jemison Lumber Co.*, 108 Ala. 581; *Gravlee v. Williams*, 112 Ala. 539.

any one having a defined interest in land,<sup>1</sup> but not to one in naked possession merely.<sup>2</sup> It may mean either a trustee of lands,<sup>3</sup> or his *cestui que trust*,<sup>4</sup> a mortgagor in possession or before default,<sup>5</sup> and in a few instances the mortgagee,<sup>6</sup> though not usually,<sup>7</sup> an executor having power to sell land

*California*.—Santa Cruz Rock Pavement Co. v. Lyons, (Cal. 1896) 43 Pac. Rep. 599.

*Colorado*.—Cornell v. Conine-Eaton Lumber Co., 9 Colo. App. 225.

*Georgia*.—Hardin v. Chattanooga Southern R. Co., 113 Ga. 359.

*Indiana*.—Lemmon v. Osborn, 153 Ind. 172; Bennett v. Seibert, 10 Ind. App. 369.

*Iowa*.—Adams v. Beale, 19 Iowa 61; Morrison v. Burlington, etc., R. Co., 84 Iowa 663.

*Michigan*.—Lozo v. Sutherland, 38 Mich. 171.

*Minnesota*.—Benjamin v. Wilson, 34 Minn. 517; Parker v. Minneapolis, etc., R. Co., 79 Minn. 372.

*Missouri*.—Gitchell v. Kreidler, 84 Mo. 472.

*Nebraska*.—Winslow v. State, 26 Neb. 310.

*Nevada*.—State v. Wheeler, 23 Nev. 143.

*New Jersey*.—Tompkins v. Horton, 25 N. J. Eq. 284.

*New York*.—Lewis v. Thompson, 3 N. Y. App. Div. 329.

*Rhode Island*.—Gilligand v. Board of Aldermen, 11 R. I. 258; McKee v. McCardle, 22 R. I. 71.

*South Carolina*.—Georgia, etc., R. Co. v. Scott, 38 S. Car. 34.

*Texas*.—Turner v. Cross, 83 Tex. 218.

*West Virginia*.—Townshend v. Shaffer, 30 W. Va. 176.

**The Term "Owner," under Homestead Statutes**, has been liberally construed, and never limited to the owner in fee. Burns v. Keas, 21 Iowa 257.

**Under a Statute Giving Compensation to Abutting Owners** for damages caused by change of grade in highways, the owner may be a tenant for life or for years or from year to year. Gilligand v. Board of Aldermen, 11 R. I. 258; McKee v. McCardle, 22 R. I. 71.

**An Owner under the Metropolitan Building Act**, 18 & 19 Vict., providing that commissioners may, upon the report of their surveyor that a structure is in a dangerous state, give written notice "to the owner or occupier of such structure" "to take down, secure, or repair the same," is any one in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement other than as a tenant from year to year or for any less term, or as tenant at will. Mourilyan v. Labalmondiere, 1 El. & El. 533, 102 E. C. L. 533, 30 L. J. M. C. 95; Hunt v. Harris, 19 C. B. N. S. 13, 115 E. C. L. 13, 34 L. J. C. P. 249.

1. The word "owner" has no precise legal signification and may be applied to any defined interest in real estate. Gitchell v. Kreidler, 84 Mo. 476.

**Term Applicable to Possessors of All Estates**.—Davenport v. Farrar, 2 Ill. 315.

**Owner, in Proceedings to Redeem Property Sold for Taxes** under a *Pennsylvania* law, has been held to include every person having an interest in the property. Dubois v. Hepburn, 10 Pet. (U. S.) 1.

**Owner, Within the Meaning of Homestead Laws**, has generally been treated as including all parties who had a claim to or interest in the property although the same might be an undivided interest or fall far short of an absolute ownership. Lozo v. Sutherland, 38 Mich. 168. And see Lindsey v. Davis, 7 Mont. 214.

**Owner, in Condemnation Proceedings**, has been held to be any one having any title to or interest in the land capable of being injured by the construction of the road. Smith County v. Labore, 37 Kan. 480; Baltimore, etc., R. Co. v. Thompson, 10 Md. 76; Gerrard v. Omaha, etc., R. Co., 14 Neb. 270; Dodge v. Omaha, etc., R. Co., 20 Neb. 276; Colcough v. Nashville, etc., R. Co., 2 Head (Tenn.) 172. And see Crane v. Elizabeth, 36 N. J. Eq. 339.

**Owner, in an Application for a Fire Insurance Policy**, has been held to include any one having an insurable interest or title entitling him to possession and use. Convis v. Citizens Mut. F. Ins. Co., 127 Mich. 616.

**An Occupier of Land** is an owner within the meaning of a statute providing that commissioners may send engines with their appurtenances and firemen beyond certain limits for extinguishing fire in the neighborhood of the limits, and that the owner of the land and building where such fire shall have happened shall in such case defray the actual expense which may be thereby incurred. Lewis v. Arnold, L. R. 10 Q. B. 245.

2. **One in Naked Possession Without Interest or Title** is not an owner for any purpose. Rosa v. Missouri, etc., R. Co., 18 Kan. 124.

**Owner Is One Who Has Title**.—When the word "owner" is used with reference to property, it means one who has title. Frank v. Arnold, 73 Iowa 370.

3. **Trustee an Owner**.—Schott v. Harvey, 105 Pa. St. 222, 51 Am. Rep. 201.

**Owner, in Condemnation Proceedings**, may include a trustee. State v. Easton, etc., R. Co., 36 N. J. L. 181.

4. **Cestui Que Trust an Owner**.—Schott v. Harvey, 105 Pa. St. 222, 51 Am. Rep. 201.

5. **Mortgagor an Owner**.—Whiting v. New Haven, 45 Conn. 303; White v. Rittenmyer, 30 Iowa 270; Tompkins v. Horton, 25 N. J. Eq. 284; Wade v. Miller, 32 N. J. L. 296; Shields v. Lozeau, 34 N. J. L. 496, 3 Am. Rep. 256; Kircher v. Schalk, 39 N. J. L. 335; Astor v. Hoyt, 5 Wend. (N. Y.) 603; Woodward v. Republic F. Ins. Co., 32 Hun (N. Y.) 369.

6. **In Proceedings Relating to Assessments for Local Improvements** a statutory provision allowing the owner to appear and oppose confirmation of the assessment has been held to include a mortgagee. Morey v. Duluth, 75 Minn. 221.

**Owner, in Condemnation Proceedings, May Include Mortgagee**.—See the title EMINENT DOMAIN, vol. 10, p. 1192.

7. **Mortgagee Not an Owner for Purpose of Redeeming Mortgaged Property sold under a tax**

for certain purposes,<sup>1</sup> a tenant for life,<sup>2</sup> and the remainderman in fee,<sup>3</sup> a tenant for years,<sup>4</sup> a tenant in common,<sup>5</sup> the vendor under an executory contract for the sale of land,<sup>6</sup> and sometimes the vendee,<sup>7</sup> though not

execution against the mortgagor. *Mixon v. Stanley*, 100 Ga. 372.

**Within the Meaning of a Mechanic's Lien Law** a mortgagee is not an owner so as to be entitled to notice of a suit upon a lien claim. *Tompkins v. Horton*, 25 N. J. Eq. 284.

**1. Executor with Power of Sale.**—Under a statute providing that in the construction of a railway no entry shall be made on lands until the owner thereof shall give his consent, "owner" has been held to mean any one in control of the land and to include an executor having power to sell the same for certain purposes. *Tompkins v. Augusta*, etc., R. Co., 21 S. Car. 420; *Tutt v. Port Royal*, etc., R. Co., 28 S. Car. 388.

**2. Tenant for Life.**—*Davenport v. Farrar*, 2 Ill. 316; *Schott v. Harvey*, 105 Pa. St. 222, 51 Am. Rep. 201.

**Within Meaning of Mechanic's Lien Law.**—A life tenant of real estate is an "owner." *Lang v. Everling*, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 530.

**A Tenant in Dower** is seized of the freehold, and is, properly speaking, owner of the estate to the extent of the assignment in dower so as to make her liable for taxes and other incidental charges upon the property. *Whyte v. Nashville*, 2 Swan (Tenn.) 364.

**Owner, in Proceedings to Assess Damages for Land Taken** in the construction of a railroad, may include a life tenant. *Reading R. Co. v. Boyer*, 13 Pa. St. 497.

**3. Remainderman in Fee.**—*Schott v. Harvey*, 105 Pa. St. 222, 51 Am. Rep. 201.

**4. Tenant for Years.**—*Lister v. Lobley*, 7 Ad. & El. 124, 34 E. C. L. 51; *Poteete v. State*, 72 Ala. 558; *Davenport v. Farrar*, 2 Ill. 316; *Parker v. Minneapolis*, etc., R. Co., 79 Minn. 372; *Schott v. Harvey*, 105 Pa. St. 222, 51 Am. Rep. 201.

**Owner, in Mechanic's Lien Law**, may include a tenant for years. *Choteau v. Thompson*, 2 Ohio St. 114.

**Owner, in Condemnation Proceedings**, may include a tenant for years. *Gimbel v. Stolte*, 59 Ind. 450; *Parks v. Boston*, 15 Pick. (Mass.) 198; *Ellis v. Welch*, 6 Mass. 246, 4 Am. Dec. 122; *Watson v. New York Cent. R. Co.*, 47 N. Y. 157; *Allegheny*, etc., Turnpike Road Co. v. Brosi, 22 Pa. St. 29; *Brown v. Powell*, 25 Pa. St. 229; *North Pennsylvania R. Co. v. Davis*, 26 Pa. St. 238.

**Owner of Factory, for Purpose of Providing Fire Escape.**—A lessee in the possession of premises occupied as a factory, and not the owner in fee, is the owner of the factory within the meaning of a statute to the effect that the factories shall be provided with fire escapes by their owners. *Schott v. Harvey*, 105 Pa. St. 222, 51 Am. Rep. 201. See also *Moeller v. Harvey*, 16 Phila. (Pa.) 66, 40 Leg. Int. (Pa.) 78; *Keeley v. O'Connor*, 42 Leg. Int. (Pa.) 238.

**Owner of Tracks of Railroad.**—A railroad company leasing railroad property is the owner of the tracks within the meaning of

a statute providing that "when the tracks of two railroads cross each other, or in any way connect, at a common grade, the crossing shall be made and kept in repair, and watchmen maintained thereat, at the joint expense of the companies owning the tracks." *Baltimore*, etc., R. Co. v. *Walker*, 45 Ohio St. 577.

**The Person in Actual Occupation Is the Owner** within the meaning of a statute providing that the owner of land on which are hedges or trees prejudicing the highway may be summoned before a justice to show cause why said hedges and trees should not be cut, pruned, and the like, whether he is the actual owner or only the occupying tenant. *Woodard v. Billericay Highway Board*, 11 Ch. D. 214, 27 Moak 478.

**Owner of Private Road Interrupted by Railroad.**

—But under a statute imposing a penalty on any railroad company interrupting a road, and making such penalty in the case of a private road "payable to the owner thereof," "owner" was held not to include the tenant merely of a farm through which the road passed. *Collinson v. Newcastle*, etc., R. Co., 1 C. & K. 546, 47 E. C. L. 546.

**5. Owner, Within Meaning of Homestead Law**, may include a tenant in common. *Lozo v. Sutherland*, 38 Mich. 168; *Lindley v. Davis*, 7 Mont. 214. But see *contra Wolf v. Fleischacker*, 5 Cal. 244, 63 Am. Dec. 121; *Carroll v. Ellis*, 63 Cal. 441.

**6. A Vendor under a Contract of Sale**, no deed having been made and part of the purchase money being unpaid, is an owner within the meaning of the word as used in a condition of a fire insurance policy which stipulated that if the insured property should suffer a change of ownership the policy should be void. *Hill v. Cumberland Valley Mut. Protection Co.*, 59 Pa. St. 474.

**7. Owner, for Purposes of Mechanic's Lien**, may be one in possession of real estate under a contract of purchase. *Monroe v. West*, 12 Iowa 119, 79 Am. Dec. 524; *Stockwell v. Carpenter*, 27 Iowa 119; *Loonie v. Hogan*, 9 N. Y. 435. And see *Atkins v. Little*, 17 Minn. 342.

**Hunting in Grounds of Another Without Consent of Owner.**—An owner, within the meaning of a statute making it a misdemeanor to hunt "in the enclosed grounds of another without the consent of the owner," includes a person in possession of land under a parol contract for its purchase. *Wellington v. State*, 52 Ark. 266.

**For Purpose of Homestead Law** an owner may mean a person having a valid contract for the purchase of lands. *Blue v. Blue*, 38 Ill. 9, 87 Am. Dec. 267; *Wilder v. Haughey*, 21 Minn. 101; *Hartman v. Munch*, 21 Minn. 107.

**Owner, Within the Meaning of a Condition in a Fire Insurance Policy**, that the policy shall be void if the interest of the assured be other than the entire unconditional and sole ownership, comprehends a person in possession of land under a contract of purchase. *Rumsey v. Phoenix Ins. Co.*, 17 Blatchf. (U. S.) 527; *Hough v. City F. Ins. Co.*, 29 Conn. 10, 76 Am. Dec.



always.<sup>1</sup> And it has been held not to include a judgment creditor,<sup>2</sup> or a widow having an unassigned dower interest in lands.<sup>3</sup>

**Of Personal Property.** — The word "owner," when used in connection with personal property, does not mean necessarily the absolute legal owner only,<sup>4</sup> but it may also apply to any person having the possession and control of the property.<sup>5</sup> It may include one having the general property,<sup>6</sup> or a special property,<sup>7</sup> or even one in possession by virtue of a lien.<sup>8</sup> A mortgagor in possession after default may be an owner,<sup>9</sup> and so may a mortgagee after breach of condition.<sup>10</sup> But it has been held not to include a conditional owner out of possession of the property.<sup>11</sup>

581; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Noyes v. Hartford F. Ins. Co.*, 54 N. Y. 668; *Pelton v. Westchester F. Ins. Co.*, 77 N. Y. 605; *Lorillard F. Ins. Co. v. McCulloch*, 21 Ohio St. 176, 8 Am. Rep. 52; *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460, 2 Am. St. Rep. 686.

**1. Owner for Purpose of Giving Consent to Opening of Highway.** — The vendor, and not the vendee, of an executory contract for the sale of land, is the owner of the land within the meaning of a statute providing that no highway shall be opened or worked over land without the consent of the owner thereof. *Smith v. Ferris*, 6 Hun (N. Y.) 553.

**Owner for Purpose of Taxation.** — A person having an equity in land by virtue of an agreement of sale and the payment of the purchase price, is not the owner of the land for purposes of taxation. *Tracy v. Reed*, 38 Fed. Rep. 69.

**Owner, in Proceedings to Recover Compensation for Property Destroyed to Prevent Spread of Fire,** is not a person having merely a parol contract for a deed, the deed to be executed when the full amount of the purchase money is paid. *Ruggles v. Nantucket*, 11 Cush. (Mass.) 433.

**2. Owner, in Condemnation Proceedings,** does not include a judgment creditor. *Watson v. New York Cent. R. Co.*, 47 N. Y. 157.

**3. Within Meaning of Mechanic's Lien Law** a widow having an unassigned dower interest in lands is not the owner. *Ermul v. Kullok*, 3 Kan. 499.

**4. Absolute Owner Not Meant Necessarily.** — *Keith v. Maguire*, 170 Mass. 210; *Proctor v. Hannibal*, etc., R. Co., 64 Mo. 112.

**5. Owner May Be Any Person Having Possession and Control.** — *Keith v. Maguire*, 170 Mass. 210.

**6. A Person Having General Property in Cattle** may be held responsible under a statute providing that when any person is injured in his land by cattle he may recover damages against the owner. And it makes no difference that at the time of the injury to the land the cattle were in possession of a bailee for the purpose of being driven from one place to another. *Sheridan v. Bean*, 8 Met. (Mass.) 284, 41 Am. Dec. 507; *Hartford v. Brady*, 114 Mass. 466, 19 Am. Rep. 377.

**7. Person Having Special Property.** — *Hartford v. Brady*, 114 Mass. 466, 19 Am. Rep. 377.

**An Agistor** is an owner within a statute rendering owners of cattle liable for damages done by their cattle on fenced lands of another. See the title AGISTMENT, vol. 2, p. 9.

**The Hirer of a Carriage** is an owner within the meaning of a statute providing that the driver of any vehicle, meeting another on the high-

way, who shall neglect to turn to the right, and thereby shall drive against the vehicle so met, and injure its owner, or any person in it, or the property of any person, shall pay to the party injured treble damages; and that the owner of the vehicle so driven "shall, if the driver is unable to do so, pay such damages." *Camp v. Rogers*, 44 Conn. 291.

**A Driver of Logs** is an owner within the meaning of a statute providing that whenever two or more persons own logs or timber on any river, which are so intermixed that they cannot be conveniently separated for driving, and either owner shall refuse or neglect to make the necessary provision or to furnish the necessary labor and materials for driving them, any other owner may drive all such logs or timber, and shall receive reasonable compensation from the owner so refusing for driving the logs belonging to the latter. *Wisconsin River Log Driving Assoc. v. D. F. Comstock Lumber Co.*, 72 Wis. 464.

**An Importer of Goods** is an owner within the meaning of a charter providing for the collection of duties on the goods. *Master Pilots*, etc. *v. Hammond*, 4 Exch. 285, 18 L. J. Exch. 417.

**8. Person Having Lien.** — *Sheridan v. Bean*, 8 Met. (Mass.) 284, 41 Am. Dec. 507; *Hartford v. Brady*, 114 Mass. 466, 19 Am. Rep. 377.

**A Factor Having a Lien for Advances** is not an owner within the meaning of the Abandoned and Captured Property Act, which gives to "the owner" of any such property a right, after it has been sold by the government, to recover the proceeds of it in the treasury of the United States, though he may perhaps recover to the extent of his lien. *U. S. v. Villalonga*, 23 Wall. (U. S.) 35.

**9. A Mortgagor in Possession After Default** is an owner within the meaning of a statute providing that a person keeping any animals at livery or pasture or boarding the same for hire under any agreement with the owner thereof may detain such animals until all charges for their keeping shall have been paid. *Corning v. Ashley*, 51 Hun (N. Y.) 483.

**10. Mortgagee.** — In an action of replevin the plaintiff was allowed to prove, under the general allegation in the complaint that he was the owner and entitled to the possession, a chattel mortgage in the subject-matter of the suit from the owner to himself, and a breach of its conditions that by the terms of the instrument entitled him to the possession of the mortgaged premises. *Miller v. Adamson*, 45 Minn. 99.

**11. A Conditional Owner Not in Possession of the Property** has been held not to be an owner within the meaning of a statute making the owners of infective cattle liable for damages for

**Owner Defined by Statute.** — Statutes using the word “owner” sometimes define it.<sup>1</sup>

**3. Evidence of Ownership.** — Possession is *prima facie* evidence of ownership.<sup>2</sup>

**III. POSSESSION** — **1. Possession Defined.** — Possession is often defined to be the detention or enjoyment of a thing which a man holds or exercises by himself or by another who keeps or exercises it in his own name.<sup>3</sup> It has been said to mean simply the owning or having a thing in one's power,<sup>4</sup> and to imply a present right to deal with a thing at pleasure and to exclude other persons from meddling with it, being something more than a mere right or title to a present or future estate.<sup>5</sup>

**2. Kinds of Possession** — *a.* **IN GENERAL.** — There are two kinds of possession, actual and constructive,<sup>6</sup> or, as they are sometimes called, possession in fact and possession in law.<sup>7</sup>

*b.* **ACTUAL POSSESSION.** — Actual possession, or possession in fact, exists where the thing is in the immediate occupancy of the party,<sup>8</sup> or his agent or tenant.<sup>9</sup>

**Synonymous with Pedis Possessio.** — Actual possession is the same as *pedis possessio*, or *pedis positio*; and these mean a foot-hold on the land, an actual entry, a possession in fact, a standing upon it, as a real demonstrative act done.<sup>10</sup>

infection to other cattle. *Smith v. Race*, 76 Ill. 490.

**1. Owner Defined by Statute.** — *Reg. v. St. Marylebone*, 20 Q. B. D. 415.

A statute requiring, under penalty, the owner of every coal mine to provide a certain kind of cage for raising and lowering men, declared that the word “owner” should mean the immediate proprietor, lessee, or occupant of any coal mine or any part thereof. *Fell v. Rich Hill Coal Min. Co.*, 23 Mo. App. 216.

In providing for the assessment of taxes on real property a statute declared that for the purposes of such assessment the mortgagor should be deemed the owner until the mortgagee should take possession, after which the mortgagee should be deemed the owner. *Parker v. Baxter*, 2 Gray (Mass.) 185.

**2. Possession Prima Facie Evidence.** — *Goodwin v. Garr*, 8 Cal. 617; *Baring v. Reeder*, 1 Hen. & M. (Va.) 171.

**3. Possession Defined.** — *Republic v. Awai*, 12 Hawaii 177; *Tidwell v. Chiricahua Cattle Co.*, (Ariz. 1898) 53 Pac. Rep. 192; *Redfield v. Utica*, etc., R. Co., 25 Barb. (N. Y.) 54; *Casey v. Mason*, 8 Okla. 665; *Garrett v. Ramsey*, 26 W. Va. 369.

**Other Definitions.** — Possession of land is “the holding of and exclusive exercise of dominion over it.” *Tidwell v. Chiricahua Cattle Co.*, (Ariz. 1898) 53 Pac. Rep. 192; *Booth v. Small*, 25 Iowa 177.

Possession expresses the closest relation of fact that can exist between a corporeal thing and the person who possesses it, implying (according to its strictest etymology) an actual physical contact as by sitting or (as some would have it) by standing upon a thing. *Eurr. Law Dict.* 313; *Bryan v. Spivey*, 109 N. Car. 57.

Possession is that condition of fact under which one can exercise his power over a corporeal thing at his pleasure, to the exclusion of all others. *Rice v. Frayser*, 24 Fed. Rep. 463; *Eurr. Law Dict. tit. Possession.*

**Possess — Possessed.** — See **POSSESS**, vol. 22, p. 1030.

**Possession Distinguished from Seizin.** — See **SEIZIN** — **SEISIN**, vol. 25, p. 253.

**Possession and Occupancy Synonymous.** — See **OCCUPANCY**, vol. 21, p. 765.

**Scrambling Possession.** — See the title **FORCIBLE ENTRY AND DETAINER**, vol. 13, p. 750.

**Adverse Possession.** — See the title **ADVERSE POSSESSION**, vol. 1, p. 787.

**Hostile Possession.** — See the title **ADVERSE POSSESSION**, vol. 1, p. 787.

**4. Owning or Having a Thing in One's Power.** — *In re Egan*, (1899) 1 Ch. 691; *Hazard v. Cole*, 1 Idaho 276; *Brown v. Volkening*, 64 N. Y. 80; *Foust v. Territory*, 8 Okla. 541.

**5. Sullivan v. Sullivan**, 66 N. Y. 37; *Foust v. Territory*, 8 Okla. 541.

**6. Possession Actual or Constructive.** — *Simmons Creek Coal Co. v. Doran*, 142 U. S. 442; *Tidwell v. Chiricahua Cattle Co.*, (Ariz. 1898) 53 Pac. Rep. 192; *Morrison v. Kelly*, 22 Ill. 610, 74 Am. Dec. 169; *Newcome v. Crews*, 98 Ky. 339; *Jeffrey v. Owen*, 41 N. J. L. 260.

**7. Possession in Fact and in Law.** — *Stevenson v. Anderson*, 87 Ala. 228; *Bacon v. Sheppard*, 11 N. J. L. 197, 20 Am. Dec. 583; *Churchill v. Onderdonk*, 59 N. Y. 134.

**8. Actual Possession Defined.** — *Warner v. Johnson*, 65 Iowa 126; *Newcome v. Crews*, 98 Ky. 339; *Jeffrey v. Owen*, 41 N. J. L. 260; *Brown v. Volkening*, 64 N. Y. 80; *Foust v. Territory*, 8 Okla. 541; *Garrett v. Ramsey*, 26 W. Va. 369.

Possession in fact is where the party is in the actual use and enjoyment of the land. *Bacon v. Sheppard*, 11 N. J. L. 197, 20 Am. Dec. 583.

Actual possession of land is the purpose to enjoy, united with or manifested by such visible acts, improvements, or inclosures as will give to the locator the absolute and exclusive enjoyment of it. *Courtney v. Turner*, 12 Nev. 345.

**9. Agent or Tenant.** — *Tidwell v. Chiricahua Cattle Co.*, (Ariz. 1898) 53 Pac. Rep. 192; *Garrett v. Ramsey*, 26 W. Va. 369.

**10. Synonymous with Pedis Possessio.** — *Stevenson v. Anderson*, 87 Ala. 228; *Churchill v.*



**Naked or Bare Possession.** — Actual possession of property, without apparent right or shadow or pretense of right to hold or continue such possession, is called naked or bare possession,<sup>1</sup> and is the lowest degree of a complete title.<sup>2</sup>

**Acts Constituting Actual Possession.** — A discussion of what acts amount to actual possession appears elsewhere in this work.<sup>3</sup>

**c. CONSTRUCTIVE POSSESSION.** — Constructive possession, or possession in law, as it is sometimes called,<sup>4</sup> is that possession which the law annexes to the legal title or ownership of property<sup>5</sup> where there is a right to the immediate actual possession of such property,<sup>6</sup> but no actual possession.<sup>7</sup>

**Party Dispossessed Is in Constructive Possession.** — Where a party in actual possession becomes dispossessed, and is afterwards restored, by re-entry or in some other lawful manner, he is then deemed to have been, during the period which intervened between the dispossession and the restoration, in possession by relation of law or constructively.<sup>8</sup>

**TO.** (See also the titles **BOUNDARIES**, vol. 4, p. 805; **TIME, COMPUTATION OF**, *ante*; and see **FROM**, vol. 14, p. 553.) — The word “to” is a term of exclusion unless it is by necessary implication used in a different sense.<sup>9</sup> But the word “to” may sometimes be taken inclusively according to the subject-matter.<sup>10</sup>

Onderdonk, 59 N. Y. 134. And see **PEDIS POSSESSIO**, vol. 22, p. 654.

**1. Naked or Bare Possession.** — *Gillett v. Gaffney*, 3 Colo. 360.

**2. Lowest Degree of Complete Title.** — See *supra*, this title, *Definition*.

**3. Acts Constituting Actual Possession.** — See the titles **ADVERSE POSSESSION**, vol. 1, p. 822; **FORCIBLE ENTRY AND DETAINER**, vol. 13, p. 745.

**4. Sometimes Called Possession in Law.** — *Bacon v. Sheppard*, 11 N. J. L. 197, 20 Am. Dec. 583.

Constructive possession is “a possession in law, without possession in fact.” *Hodges v. Eddy*, 38 Vt. 327.

**5. Title or Ownership Necessary.** — *Simmons Creek Coal Co. v. Doran*, 142 U. S. 442; *Morrison v. Kelly*, 22 Ill. 610, 74 Am. Dec. 160; *Jeffrey v. Owen*, 41 N. J. L. 260; *Clements v. Yturria*, 81 N. Y. 292; *Brown v. Majors*, 7 Wend. (N. Y.) 495; *Ehle v. Quackenboss*, 6 Hill (N. Y.) 537.

**Properly Speaking, Constructive Possession Is That Possession Which the Law Annexes to the Title.** — *M’Colman v. Wilkes*, 3 Strobh. L. (S. Car.) 471, 51 Am. Dec. 637.

Possession which, as an inference of law, arises presumptively from the legal title, is a mere constructive possession, and is founded on the existence of title in some form. *Jeffrey v. Owen*, 41 N. J. L. 260.

**6. Right of Immediate Actual Possession.** — *Garrett v. Ramsey*, 26 W. Va. 369.

Where one has the legal estate in fee in lands, he has the constructive possession unless there is an actual possession in some one else. *Renshaw v. Lloyd*, 50 Mo. 369.

**7. No Actual Possession.** — *Newcome v. Crews*, 98 Ky. 339; *Brown v. Volkening*, 64 N. Y. 80; *Foust v. Territory*, 8 Okla. 541; *Mitchell v. Brudgers*, 113 N. Car. 63; *Graham v. Houston*, 4 Dev. L. (15 N. Car.) 232.

**Other Definitions of Constructive Possession.** — Constructive possession is that which exists in contemplation of law without actual personal enjoyment or occupation. *Newcome v. Crews*,

98 Ky. 339; *Jeffrey v. Owen*, 41 N. J. L. 260; *Brown v. Volkening*, 64 N. Y. 80; *Foust v. Territory*, 8 Okla. 541.

Constructive possession is such a possession as the law carries to the owner by virtue of his title only, there being no actual occupation of any part of the land by anybody. *Mitchell v. Bridgers*, 113 N. Car. 63; *Graham v. Houston*, 4 Dev. L. (15 N. Car.) 232.

Constructive possession may exist without an actual *pedis possessio* where there is a present right and the possession is either vacant or is consistent with the right of the owner to an immediate and actual possession by himself. *Sullivan v. Sullivan*, 66 N. Y. 37.

**8. Party Dispossessed Is in Constructive Possession.** — *Bacon v. Sheppard*, 11 N. J. L. 197, 20 Am. Dec. 583.

**9. Term of Exclusion.** — *Axline v. Shaw*, 35 Fla. 305; *Newby v. Rogers*, 40 Ind. 9; *Garden City v. Merchants’*, etc., Nat. Bank, 8 Kan. App. 785; *Bradley v. Rice*, 13 Me. 198; *Bonney v. Morrill*, 52 Me. 252; *People v. Robertson*, 39 Barb. (N. Y.) 9; *McCuaig v. Phillips*, 10 Manitoba 694.

“To an object, excludes the terminus referred to.” *Bonney v. Morrell*, 2 Me. 256, quoted in *State v. Bushey*, 84 Me. 460. And see generally *Schumacker v. Toberman*, 56 Cal. 508; *Stearns v. Sweet*, 78 Ill. 446.

**Description of Premises.** — *To* is a word of exclusion “when used in describing premises, unless it is by necessary implication manifestly used in a different sense.” *Axline v. Shaw*, 35 Fla. 305; *Bradley v. Rice*, 13 Me. 198; *Bonney v. Morrill*, 52 Me. 252; *Montgomery v. Reed*, 69 Me. 514; *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491; *People v. Jones*, 112 N. Y. 605. Compare the cases in the succeeding note under the catchline *Boundaries*.

**10. Term Construed Inclusively.** — *McCartney v. Chicago*, etc., R. Co., 112 Ill. 626; *Moses v. Pittsburgh*, etc., R. Co., 21 Ill. 516; *State v. Flutcher*, 166 Mo. 582; *Penn Placer Min. Co. v. Schreiner*, 14 Mont. 121; *Richmond v. Dayton*, 10 Johns. (N. Y.) 393; *St. Louis Com-*



**Time or Place.** — “The preposition ‘to’ is properly applicable to place or position, while ‘till’ or ‘until’ properly applies to time. Yet ‘to’ is in common parlance and sometimes in legal phraseology applied to time. It has

mission Co. *v.* Calloway, 5 Okla. 393; Conawingo Petroleum Refining Co. *v.* Cunningham, 75 Pa. St. 140; Western Pennsylvania R. Co.’s Appeal, 99 Pa. St. 155; Rio Grande R. Co. *v.* Brownsville, 45 Tex. 88.

**Intention.** — The term *to* may be either inclusive or inclusive, according to the manifest intention of the person using it. *Rex v. Stevens*, 5 East 244, *cited* in *Gottlieb v. Fred W. Wolf Co.*, 75 Md. 126.

**“To the Final Determination of the Matter.”** — A Vermont statute regulating the appraisal of land damages contained the following provision: “The proceedings thereafter shall be the same as those provided for in sections 3815 to 3821 of the Vermont Statutes, and said sections shall govern all proceedings had by said commissioners and corporation, and by the court and all concerned, *to* the final determination of the matter.” The only provision for an appeal was contained in Stat. Vt., § 3821, and it was contended that this provision was not applicable under the words “*to* the final determination of the matter.” The court, after stating that *to* was generally a word of exclusion, said: “In this instance it is clear that the legislature considered that section 3821 was included; for the act provides that in all subsequent proceedings ‘the court’ shall be governed by the sections referred to, and there could be no subsequent proceedings before any court unless section 3821 was included.” *Littleton Bridge Co. v. Daniel*, 72 Vt. 8.

**“To That Day” Held to Mean “to Meeting of Court on That Day.”** — In *Clark v. Ewing*, 87 Ill. 34, it was held, where time to plead was by rule extended *to* a specified day, that the defendant did not have the whole of such day in which to plead, but that the words “*to* that day” must be construed to mean “until the meeting of the court upon that day.”

**To and For.** — It was provided that an affidavit for a mechanic’s lien should state *to* and for whom the labor might have been performed or the materials furnished by virtue of a contract between the affiant and such person. In construing this provision the court said: “But in the affidavit it is stated that the material was furnished and delivered ‘*to* and for the construction of the St. Paul City Railway,’ at prices agreed upon between the plaintiff and the construction company (the contractor). This does not show *to* and for whom the material was furnished.” *Fleming v. St. Paul City R. Co.*, 47 Minn. 127. See generally the title MECHANICS’ LIENS, vol. 20, p. 255.

**“To” in Sense of “In.”** — A description of land in a tax deed as a certain specified lot in “block No. 19, *to* the village,” etc., instead of “in the village,” etc., was held not to be fatally defective under Laws Wis. 1866, c. 53, although the court said that it would probably have rendered the deed invalid for uncertainty before the passage of that act. The court said: “The word *to*, though not so accurate

and proper as the word ‘in,’ was obviously used as having the same meaning.” *Delorme v. Ferk*, 24 Wis. 203.

**Boundaries — Highways.** (See also the title BOUNDARIES, vol. 4, p. 813.) — In *Oxton v. Groves*, 68 Me. 372, it was said: “The rule is now well settled that when a line is given running ‘*to* the road and thence by the road,’ the grant is *to* the centre of the road.” *To* the same effect see *Hunt v. Rich*, 38 Me. 195; *Cottle v. Young*, 59 Me. 105; *Phillips v. Bowers*, 7 Gray (Mass.) 21; *Newhall v. Ireson*, 8 Cush. (Mass.) 595; *Reed’s Petition*, 13 N. H. 384; *Goodeno v. Hutchinson*, 54 N. H. 159.

But in *Brown v. Heard*, 85 Me. 297, it was said: “But it is never held that a grant *to* the seashore, *to* the bank of a river, or *to* the line of a highway carries title beyond high water or the side of the river or road.” See also *Sibley v. Holden*, 10 Pick. (Mass.) 249; *O’Linda v. Lothrop*, 21 Pick. (Mass.) 295.

In *Cole v. Haynes*, 22 Vt. 588, the words “*to* the road” were held not to include any part of the road.

General terms of description in a deed, like *to*, “upon,” or “along” a highway or railroad, do not convey the land to the centre of the road or highway unless the grantor owns the fee therein. *Church v. Stiles*, 59 Vt. 644.

**Boundaries — To or Near.** — See *Mizell v. Simmons*, 79 N. Car. 182.

**Boundaries — To Shore.** — See the title BOUNDARIES, vol. 4, p. 821.

**Boundaries — Flats.** — In *Thomas v. Hatch*, 3 Sumn. (U. S.) 178, it was held that a boundary *to* a stream includes the flats, at least to low water mark, and in many cases to the middle thread of the river, though it was said that it might be different where the boundary was *to* the bank.

**City Boundary.** — In *Municipality No. 2 v. Municipality No. 1*, 17 La. 576, it was said: “The city of New Orleans does not embrace the river. The limits are declared by law to extend *to* the river, and this court held, in the case of *Thompson v. Blackwell*, that in designating boundaries, the word *to*, without the word ‘inclusive,’ excludes the object to which the line runs. 5 La. 465.”

**To City.** — But the word *to* may be sometimes taken inclusively, according to the subject-matter, and where a turnpike company was empowered by its charter to carry the road *to* a certain city, it was held that the object of the grant was to open a good road to the compact part of the city, and that the road did not terminate on arriving at the bounds or charter limits, several miles from the business centre. *Farmer’s Turnpike Road Co. v. Coventry*, 10 Johns. (N. Y.) 389. And see to the same effect *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88; *FROM*, vol. 14, p. 555.

**To and From.** (See also *FROM*, vol. 14, p. 556.) — The phrase “*to* and from the Illinois shore,” in a contract by a railroad company with a ferry company always to employ the latter’s ferry to transport across the river all

also various significations indicating 'toward,' 'to,' and 'into.' In regard to time it often indicates a coming or passing into a day, as well as arrival at it."<sup>1</sup>

**"To" Indicates Direction.** — "The preposition 'to' generally indicates direction, and an agreement to convey title 'to' the government would be plain. It indicates direction toward as plainly as 'from' indicates direction away from."<sup>2</sup>

**TOBACCO.** — See note 3.

**TOGETHER.** — See note 4.

freight and passengers arriving or departing by the said company's railroad, was held not to mean "*to* and from" all parts of the shore. *Wiggins Ferry Co. v. Chicago, etc., R. Co.,* 5 Mo. App. 347, 6 Cent. L. J. 215.

There cannot be derived from the charter provisions of a company to run "*to* and from" a town, the obligation to run trains to a particular spot within its limits. *People v. Louisville, etc., R. Co.,* (Ill. 1886) 5 N. E. Rep. 383, 25 Am. & Eng. R. Cas. 235.

A reservation in a deed of a right to lay tracks "*to* and from" certain kilns *to* the track of a railway was construed to mean to and from the locality where the kilns were situated, in such a manner and to such an extent as to enable the owner to enjoy their use and possession for the purposes named in the reservation. *James v. Fonda,* 58 Vt. 453.

**"From" and "To" in Sense of "Between."** — In *State v. Stone,* 20 R. I. 269, where a penal statute contained the words "from the first day of January *to* the first day of October," it was held that the intent was sufficiently clear to permit of the construction of the words "from" and *to* as equivalent to "between," so that the phrase would read, "between the first day of January and the first day of October."

**As to Her Separate Estate.** — See the title SEPARATE PROPERTY OF MARRIED WOMEN, vol. 25, p. 331. And see *Aultman, etc., Co. v. Rush,* 26 S. Car. 517.

**1. Time or Place.** — *Conawingo Petroleum Refining Co. v. Cunningham,* 75 Pa. St. 140.

**"To" in Sense of "Until."** (See also UNTIL.) — In *McCuaig v. Phillips,* 16 Can. L. T. 15, it was said: "The word *to* used in reference to a limit of time has the same meaning as 'until.'"

**2. Title To.** — *Balch v. Arnold,* 9 Wyo. 33. But in that case, where a grantor in a deed warranted the title against the claims of every person whatever "saving and excepting the title *to* the government of the United States," it was held that the word *to* was meaningless if used in the sense of the text. The court said further: "The words 'title *to*' also have a well-understood meaning when followed by the word 'property,' 'land,' or the like, meaning ownership of the land or property. But we know of no circumstances under which the expression can be correctly or even intelligibly used as describing the title of the owner. Appearing upon the face of the instrument, it is what is termed a patent ambiguity."

**Reaching Specified Point.** — In *Moran v. Lezotte,* 54 Mich. 87, it was said that "the word *to*, as commonly made use of, conveys to the mind the idea of movement towards and actually reaching a specified point or object; and the meaning is not satisfied unless the point

or object is actually attained. But this use is not universal; the word is sometimes employed in a sense that embraces a part of this idea only, or simply as a word of direction."

**3. Tobacco — Sunday Laws.** — See the title SUNDAYS AND HOLIDAYS, vol. 27, p. 402, note. And see Anonymous, (N. Y. Super. Ct. Spec. T.) 12 Abb. N. Cas. (N. Y.) 458.

**Drink.** — In *Baker v. Jacobs,* 64 Vt. 200, the court said: "We do not deem it necessary to decide whether *tobacco* falls within the strict meaning of the terms 'victuals or drink,' as has been ingeniously argued by the defendant's counsel." But Taft, J., concurring, said: "When the act under which we are asked to affirm the judgment was passed, in 1791, 'to drink *tobacco*' was a common phrase. It was used in that sense by the best authors, like Spenser, Dryden, Pope, and rare Ben Jonson. Webster says to drink is 'to absorb,' 'to take in.' Do you not often meet men who have absorbed and taken in so much *tobacco* that you can scent them as far as the hound can the fox? According to these definitions they drink it."

**Tobacco Pressing.** — An application for insurance stated that the purpose for which the building to be insured was used was "*tobacco*-pressing; no manufacturing." It appeared that the applicant used an addition to the main building for the manufacturing of hogsheads for the *tobacco*. It was held that the representation would not necessarily be such a concealment of the uses of the building as to constitute a breach of warranty which would vitiate the policy. The court said: "The plaintiff sought to prove that the business of making the hogsheads in which the *tobacco* was packed was incident to and appertained to the business of pressing, and by general custom was included and understood to be included in the term '*tobacco*-pressing,' without being specially mentioned. If such were the fact there was no false warranty, and it was no more necessary for the plaintiff to state that branch of the business than any other." *Sims v. State Ins. Co.,* 47 Mo. 54.

**The Term "Granulated Tobacco,"** as used in the internal-revenue laws, is not synonymous with snuff, but refers to certain kinds of chewing and smoking *tobacco*. *Venable v. Richards,* 1 Hughes (U. S.) 326.

**4. Together — Lewd and Lascivious Cohabitation.** — In *State v. Foster,* 21 W. Va. 775, it was said: "We are of opinion that the allegation of the indictment that the said 'James Foster, on, etc., in the said county, from that day to, etc., did lewdly and lasciviously associate and cohabit with one Sarah Foster, the said James Foster and Sarah Foster not being married to each other during all the time aforesaid,' is not equivalent to saying that they during that

**TOILET.** — See note 1.

**TOKEN.** (See also the titles FALSE PRETENSES AND CHEATS, vol. 12, p. 792; FRAUD AND DECEIT, vol. 14, p. 12.) — A material, visible sign of the existence of a fact.<sup>2</sup>

**TOLERABLY SAFE.** — See DANGER — DANGEROUS, vol. 8, p. 725.

**TOLERATE.** (See also PERMIT — PERMISSION, vol. 22, p. 699; SUFFER, vol. 27, p. 363.) — To allow so as not to hinder; to permit as something not wholly approved; to suffer; to endure; to admit.<sup>3</sup>

**TOLL.** (See also the titles BOOM COMPANIES, vol. 4, p. 707; BRIDGES, vol. 4, p. 918; CARRIERS OF GOODS, vol. 5, p. 154; FERRIES, vol. 12, p. 1086; TURNPIKES AND TOLL ROADS.) — The word "toll" applies at common law to a very large class of dues and exactions which are in the nature of fixed rights, and which cannot be lawfully exceeded. They are generally if not universally connected with some franchise which involves duties as well as privileges of a general or public nature. The right to receive fixed tolls is found in fairs, markets, mills, turnpikes, ferries, bridges, and many other classes of interests where the owner of the franchise is obliged to accommodate the public, and the public in turn are protected from extortion by an obligation to pay only regular dues.<sup>4</sup> The word "toll" is also used to express the com-

time lewdly and lasciviously associated and cohabited *together*, as the statute has it, or with 'each other,' which would be equivalent words, because, in the absence of such words, for aught that appears in the indictment she may be entirely innocent of the 'lewd and lascivious' commerce, which is the distinctive feature of the statutory offense; as has been suggested, she might be insane, or she might in good faith believe she was only discharging towards the man she believed to be her husband the duties of a wife."

**Living Together.** — See the title LEWD AND LASCIVIOUS COHABITATION AND CONDUCT, vol. 18, p. 841.

1. The Term "Toilet Preparations" Includes Dentifrices. — *Russman v. U. S.*, 107 Fed. Rep. 266.

2. **Token.** — Abb. L. Dict. A "sign" or "mark." *State v. Green*, 18 N. J. L. 181. As used in a statute punishing the obtaining of a signature, money, etc., by any false *token* or pretense, it means "a sign, a mark, a symbol." *Jones v. State*, 50 Ind. 476.

"A Bank Check may be a false *token*, and would be such, under the [California] statute, if the drawer knew when he gave it, payable to a person other than himself, that he had neither funds to meet it nor credit at the bank upon which he drew it." *People v. Donaldson*, 70 Cal. 118.

"The common law extended to cheats effected by means of any false *token* having a semblance of public authority or in any manner touching the public interest." *People v. Johnson*, 12 Johns. (N. Y.) 292. See also *Respublica v. Powell*, 1 Dall. (Pa.) 47.

And where fraud at common law is charged to have been effected by means of a false *token*, the *token* must be such as indicates a general intent to defraud; a mere privy *token*, or counterfeit letters in other men's names, seem not to come within the term "false *token*," as used at common law. *People v. Stone*, 9 Wend. (N. Y.) 182. And see *Com. v. Warren*, 6 Mass. 72.

**Promissory Notes.** — *State v. Patillo*, 4 Hawks

(11 N. Car.) 348, set out under the title FALSE PRETENSES AND CHEATS, vol. 12, p. 809.

**Banknotes.** — The false passing, as a true note, of a false and forged note purporting to be a note of a bank (which bank never existed), and procuring goods by means thereof, is not such an offense as comes within an act to prevent the deceitfully obtaining goods by privy *token* or counterfeit letters; but it is a public cheat indictable at common law, if the defendant knew that it was a false note, and it is necessary in such case to aver the *scienter* in the indictment. *Com. v. Speer*, 2 Va. Cas. 65. See also *Rex v. Wheatly*, 2 Burr. 1125; *Rex v. Lara*, 2 Leach C. C. 652.

3. *Gregory v. U. S.*, 17 Blatchf. (U. S.) 330.

4. **Toll.** — *McKee v. Grand Rapids, etc.*, St. R. Co., 41 Mich. 279.

In *Pennsylvania Coal Co. v. Delaware, etc., Canal Co.*, 3 Abb. App. Dec. (N. Y.) 477, it was said: "**Toll** is defined to be a compensation or payment in markets and fairs for goods, cattle, etc., bought and sold. *Jac. L. Dict.* A tribute or custom paid for passage, or a duty imposed on goods and passengers traveling public roads, bridges, etc.; a tribute for passage; a reasonable sum due to the lord of a fair for things sold there which are *tollable*. *Burr. L. Gloss.*, **Toll**, 1; *Crabb on Real Prop.*, § 863. It is defined by Webster, (1) a tax paid for some liberty or privilege, particularly for the privilege of passing on a bridge, or a highway, or for that of vending goods in a fair, market, or the like; (2) a liberty to buy and sell within the bounds of a manor; (3) a portion of grain taken by a miller as a compensation for grinding. The derivation of the word, signifying the cutting or taking off a portion of a thing, points undoubtedly to an immediate payment or exaction, as by a miller from the grain brought for grinding, or by the lord of a fair or market from the price of articles sold. Yet even in the case of *tolls* for a market, the proprietor may bring his action and recover them afterward. *Stamford v. Pawlett*, 1 Crompt. & J. 81, and cases cited; while in the case of a *toll* for the use of a highway or a bridge, the



pensation allowed by law and custom to a miller for grinding grain.<sup>1</sup> It is also used in reference to the sum which one railroad company has received from another for the use of its tracks.<sup>2</sup>

**TOLLBRIDGE.** (See also the title BRIDGES, vol. 4, p. 918.)—A tollbridge is a public highway over which everybody, with his goods and vehicles, has the right to pass.<sup>3</sup>

word is used or applied in a manner more remote from its etymological sense and derivation."

In *Pennsylvania Coal Co. v. Delaware, etc., Canal Co.*, 29 Barb. (N. Y.) 592, the court, by Clerke, J., said: "**Toll** is a Saxon word, originally signifying a payment in towns, markets, and fairs, for goods and cattle bought and sold there. It is defined in the Institutes to be a reasonable sum of money due to the owner of the fair or market, upon sale of things **tollable**, within the same. It is now, also, popularly applied to the charges which canal and railroad companies require for the transportation of goods, payable no doubt at once, in all cases, where there is no right or arrangement importing the contrary—precisely as goods sold are presumed to be sold for cash, unless by express terms, or from the circumstances of the case, the transaction shows a credit. The word means nothing more than a compensation for the privilege or service granted or rendered; and the period of payment depends entirely, as in every other case, upon the express or implied understanding of the parties."

"**Tolls** and freights are a compensation for services rendered or facilities furnished to a passenger or transporter." *State Freight Tax's Case*, 15 Wall. (U. S.) 278.

**Toll** is a tribute or custom paid for passage. *Boyle v. Philadelphia, etc., R. Co.*, 54 Pa. St. 314, *quoted* in *Geiger v. Perkiomen, etc., Turnpike Road*, 167 Pa. St. 585.

**Toll Distinguished from Freight.**—See **FREIGHT**, vol. 14, p. 546. And see also *Lake Superior, etc., R. Co. v. U. S.*, 93 U. S. 454, and *dissenting* opinion of Mr. Justice Miller on p. 457.

**Tolls and Taxes Distinguished.**—In *State Freight Tax's Case*, 15 Wall. (U. S.) 278, it was said: "A tax is a demand of sovereignty; a **toll** is a demand of proprietorship."

In *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, it was held that the exaction of **toll** under a state statute for the use of an improved natural highway was not a taking of property without due process of law. See also the title **DUE PROCESS OF LAW**, vol. 10, p. 287.

**Time of Payment.**—In *Pennsylvania Coal Co. v. Delaware, etc., Canal Co.*, 3 Abb. App. Dec. (N. Y.) 470, it was held that the word **toll** in a contract to pay for the passage of boats of one party on the canal of the other party during a specified period did not necessarily import that payment was to be made at the time of every passage.

**Highways.** (See also the title **TURNPIKES AND TOLL ROADS.**)—**Toll** is a consideration for the use of a highway. *Pennsylvania R. Co. v. Sly*, 65 Pa. St. 205; *Boyle v. Philadelphia, etc., R. Co.*, 54 Pa. St. 310; *Geiger v. Perkiomen, etc., Turnpike Road*, 167 Pa. St. 582.

In *St. Louis v. Green*, 7 Mo. App. 468, it was said: "**Toll** is the price of the privilege of travel over that particular highway, and it is a *quid pro quo*. It rests on the principle that he who receives the **toll** does or has done something as an equivalent to him who pays it. Every traveler has the right to use the turnpike as any other highway, but he must pay the **toll**."

**Corporation Authorized to Receive Fare or Toll.**—In *McNeal Pipe, etc., Co. v. Howland*, 111 N. Car. 624, it was said: "The word **toll** in the sense used in the statute is a tax paid for some use or privilege or other reasonable consideration (*Century Dictionary*), and the definitions in all the books are substantially the same." The provision of the code in question was to afford a remedy against that class of quasi-public corporations where the franchise ought not to be separated from the plant or property for reasons of public policy, and the words of the provision were "against any corporation authorized to receive fare or **tolls**."

**Action of Debt.**—An action of debt has been held to lie to recover **tolls**. *Seward v. Baker*, 1 T. R. 616; *Ayres v. Turnpike Co.*, 9 N. J. L. 33; *Carlisle v. Wilson*, 5 East 3.

**Assumpsit.**—That assumpsit will lie for **tolls**, see *Peacock v. Harris*, 10 East 104; *Medford Turnpike Corp. v. Torrey*, 2 Pick. (Mass.) 538; *Chesley v. Smith*, 1 N. H. 20.

1. **Miller.**—*Lake Superior, etc., R. Co. v. U. S.*, 93 U. S. 458.

2. **Railroads.**—*Com. v. New York, etc., R. Co.*, 145 Pa. St. 38; *Boyle v. Philadelphia, etc., R. Co.*, 54 Pa. St. 310; *Cumberland Valley R. Co.'s Appeal*, 62 Pa. St. 218.

**Charges and Fare Distinguished from Toll.**—*New York, etc., R. Co. v. Pennsylvania*, 158 U. S. 435; *Boyle v. Philadelphia, etc., R. Co.*, 54 Pa. St. 310; *Pennsylvania R. Co. v. Sly*, 65 Pa. St. 205; *Geiger v. Perkiomen, etc., Turnpike Road Co.*, 167 Pa. St. 582; *Camblos v. Philadelphia, etc., R. Co.*, 4 Brews. (Pa.) 596, 4 Fed. Cas. No. 2,331; *Reg. v. London, etc., R. Co.*, 1 Q. B. 574, 41 E. C. L. 678; *Great Northern R. Co. v. Southern Yorkshire R., etc., Co.*, 9 Exch. 642.

**Illustrations.**—In *Wallis v. London, etc., R. Co.*, L. R. 5 Exch. 62, where a statute provided that if a person failed to pay **tolls** it should be lawful for the company to retain and sell the goods for carriage, it was held that carriers' charges were not **tolls**. See also *Caledonian R. Co. v. Guild*, 1 Sc. Sess. Cas. (4th ser.) 198.

In *State v. Haight*, 30 N. J. L. 447, it was held that a railroad company furnishing its own conveyances, carrying nothing but passengers, and charging a certain price as fare, could not be considered a **toll-collecting** company.

3. **Tollbridge.**—*McLeod v. Savannah, etc.,*

**TOLLHOUSES.** — See note 1.

**TOLL-THOROUGH.** — See note 2.

**TOMATO.** — See note 3.

**TOMB.** — See VAULT; and see the title CEMETERIES, vol. 5, p. 781.

**TON.** (See also the title WEIGHTS AND MEASURES.) — “Ton” is used to denote both weight <sup>4</sup> and measure. <sup>5</sup>

R. Co., 25 Ga. 462, *per* Benning, J. See also State *v.* Hannibal, etc., R. Co., 97 Mo. 348, 37 Am. & Eng. R. Cas. 406.

A *tollbridge* “is a franchise created for the use and convenience of the traveling public, as a link in the highway system of the country.” People *v.* San Francisco, etc., R. Co., 35 Cal. 619.

1. **Tollhouses.** — See Schuylkill Nav. Co. *v.* Berks County, 11 Pa. St. 203.

2. **Toll-thorough.** — In Dodge County *v.* Chandler, 96 U. S. 208, it was said: “Comyns’s Digest, title *Toll-thorough*, commences thus: ‘*Toll-thorough* is a sum demanded for a passage through an highway; or for a passage over a ferry, bridge, etc.; or for goods which pass by such a port in a river; and it may be demanded in consideration of the repair of the pavement in a high street, or of the repair of a sea-wall, bridge, etc. But *toll-thorough* cannot be claimed simply, without any consideration.’ These few sentences indicate conclusively that the existence of a *toll* is not inconsistent with the public character of the work on which it is exacted.” See also Lake Superior, etc., R. Co. *v.* U. S., 93 U. S. 458.

3. **Tomatoes.** — In Nix *v.* Hedden, 149 U. S. 307, in holding *tomatoes* to be vegetables and not fruit, within the meaning of the tariff act, the court said: “Botanically speaking, *tomatoes* are the fruit of a vine, just as are cucumbers, squashes, beans, and peas. But in the common language of the people, whether sellers or consumers of provisions, all these are vegetables which are grown in kitchen gardens, and which, whether eaten cooked or raw, are, like potatoes, carrots, parsnips, turnips, beets, cauliflower, cabbage, celery, and lettuce, usually served at dinner in, with, or after the soup, fish, or meats which constitute the principal part of the repast, and not, like fruits generally, as dessert.”

4. **Weight.** — In England the *ton* is estimated at twenty hundredweight of one hundred and twelve pounds each, known as the “long *ton*.” 41 and 42 Vict., c. 49, § 14.

In the United States the *ton* is estimated at twenty hundred pounds, known as the “short *ton*.” In the appraisal of imports the word *ton* is declared by statute to mean twenty hundredweight, each hundredweight being one hundred and twelve pounds. Rev. Stat. U. S., § 2951.

In Pennsylvania two thousand pounds avoirdupois constitute a *ton*. Weaver *v.* Fegely, 29 Pa. St. 27, 70 Am. Dec. 151, *following* Evans *v.* Myers, 25 Pa. St. 114. So in New York. Heydecker’s Rev. Stat. N. Y. (1901), p. 2801, § 4.

**Gross Ton of Bituminous Rock.** — See Higgins *v.* California Petroleum, etc., Co., 109 Cal. 310.

**Gross Ton.** — See GROSS, vol. 14, p. 1119.

**Usage and Custom.** (See also the title USAGES AND CUSTOMS.) — The custom or common understanding as to the meaning of the word may be shown, and will control its meaning when used in a contract. In The Miantinomi, 3 Wall. Jr. (C. C.) 46, a contract had been made to furnish coal by the *ton*, which up to the time of making the contract was understood to be two thousand two hundred and forty pounds. It was held that that number of pounds must be furnished, notwithstanding the fact that the state had previously fixed the weight of coal at two thousand pounds per *ton*. In Many *v.* Beekman Iron Co., 9 Paige (N. Y.) 188, where the parties to a contract intended to contract for a certain number of *tons* gross weight at a specified price per *ton*, but in the written contract the term *tons* only was used, it was held that in an action at law upon the contract it could not be shown that any other than the statute *ton* of two thousand pounds was intended, but that the party injured by the mistake might file a bill to reform the written contract so as to make it conform with the intention of the parties.

In Green *v.* Moffett, 22 Mo. 529, it was held that by the statute law of Missouri (Act Mo. 1841, p. 86) a *ton* of hemp was two thousand pounds avoirdupois and not two thousand two hundred and forty, and that evidence to the effect that by custom or mercantile usage a *ton* of hemp consisted of two thousand two hundred and forty pounds was not admissible in the interpretation of contracts.

In Barry *v.* Bennett, 7 Met. (Mass.) 354, it was held that the words “one *ton* of wire,” used in a contract, might be shown by parol evidence to mean a certain mass of wire stored in a certain place and denominated a *ton*, and not a precise *ton* by weight.

5. **Measurement — Cargo.** (See also TONNAGE, *post.*) — “In freighting ships forty cubic feet of merchandise is considered a ton, unless that bulk would weigh more than two thousand pounds, in which case freight is charged by weight.” Cent. Dict.

Where a charter-party stipulated that the steamer was to carry out “seven hundred *tons* measurement of assorted cargo, or more, if that does not make her draw over fourteen feet of water,” it was held to be no violation of the charter-party if, when laden with three hundred and sixty tons, she drew fourteen feet, and the owner refused to carry more. Roberts *v.* Opdyke, 40 N. Y. 260.

**Measurement of Vessels.** — The word *ton*, as applied to the measurement of vessels, “has a certain definite meaning, well settled by custom and by the navigation laws of the United States, and it means one hundred cubic feet of interior space.” The Thomas Melville, (C. C. A.) 62 Fed. Rep. 751.

**TONNAGE.** (See also the titles INTERSTATE COMMERCE, vol. 17, pp. 50, 112; SHIPS AND SHIPPING, vol. 25, p. 870; TAXATION, vol. 27, p. 567; and see POUNDAGE, vol. 22, p. 1083.)—"Tonnage is a custom or impost paid to the king for merchandise carried out or brought in ships or such like vessels, according to a certain rate upon every ton."<sup>1</sup> Tonnage, in the *United States*, is a vessel's internal cubical capacity in tons of one hundred cubic feet each, to be ascertained in the manner prescribed by Congress.<sup>2</sup> And tonnage duties are duties upon vessels in proportion to this capacity.<sup>3</sup>

**1. Tonnage.**—*Inman Steamship Co. v. Tinker*, 94 U. S. 243, quoting Cowel's L. Dict.

In *Washington v. Barnes*, 6 D. C. 231, it is said: "In the English law *tonnagium (tonnage)* was a custom or impost upon wines and other merchandise exported or imported according to a certain rate per ton."

**2.** Rev. Stat. U. S., § 4153; *Inman Steamship Co. v. Tinker*, 94 U. S. 238.

**Capacity to Carry Cargo.**—In *Thwing v. Great Western Ins. Co.*, 103 Mass. 405, it was said: "The *tonnage* of a vessel is her capacity to carry cargo; and a charter of 'the whole *tonnage*' of a ship transfers to the charterer only the space necessary for that purpose." See also *Hooe v. Groverman*, 1 Cranch (U. S.) 214; *Ashburner v. Balchen*, 7 N. Y. 262; *Cuthbert v. Cumming*, 10 Exch. 809.

**Stores and Equipment.**—*Tonnage* does not include things put on board as necessary parts of a ship's stores or provisions or equipment. It does not apply to guns and ammunition for the defense of the vessel nor to spare chains and anchors, nor to coal carried to be consumed on board, nor to articles shipped for the purpose of serving as ballast or dunnage. *Thwing v. Great Western Ins. Co.*, 103 Mass. 406.

**Tons Burden Ascertained by Official Measurement.**—In *The Craigendoran*, 31 Fed. Rep. 88, it was said: "Evidently the word *tonnage*, in commercial designation, means the number of tons burden the ship will carry as estimated and ascertained by the official admeasurement and computation prescribed by the public authority."

**Same — Tons Burden.**—The words "tons burden" used in the *English Merchant Shipping Act*, 1894, have been held to refer to the net tonnage, and therefore to involve the deduction from the gross tonnage of the allowances for the engine room and crew space. *The Brunel*, (1900) P. 24.

**Crew Space and Engine Room — Gross Tonnage.**—Gross tonnage includes crew space and en-

gine room. *The John McIntyre*, 6 P. D. 202; *The Petrel*, (1893) P. 327.

**Gross Tonnage and Net Tonnage.**—See GROSS, vol. 14, p. 1120.

**Registered Tonnage.**—In *Thwing v. Great Western Ins. Co.*, 103 Mass. 405, it was said: "The registered *tonnage* of a vessel, as regulated by Act of Congress, is intended as a safe standard of her capacity to carry cargo, and is usually less than her actual *tonnage*."

**Tonnage Equivalent to Registered Tonnage.**—See *The Petrel*, (1893) P. 327.

**3. Tonnage Duties.**—Bouv. L. Dict., and see the titles INTERSTATE COMMERCE, vol. 17, pp. 60, 112; SHIPS AND SHIPPING, vol. 25, p. 870; TAXATION, vol. 27, p. 567.

In *Alexander v. Wilmington, etc.*, R. Co., 3 Strobb. L. (S. Car.) 599, it was said: "On referring to Bouvier's Law Dictionary, I find that after giving the general definition of *tonnage*, 'the capacity of a ship or vessel,' he adds, 'the duties paid on the *tonnage* of a ship or vessel are also called *tonnage*.'"

*Tonnage* duties are duties upon vessels in proportion to their capacity. *Inman Steamship Co. v. Tinker*, 94 U. S. 238, quoting Bouv. L. Dict.

"*Tonnage* duties are duties laid on the carrying capacity of vessels, the only means or instruments of distant commerce known at the adoption of the constitution, though doubtless the principle is applicable to railroad tonnage as a means of external commerce." *Com. v. Erie R. Co.*, 62 Pa. St. 297.

A clause in the charter of a railroad company provided that all *tonnage* of whatever kind or description, except the ordinary baggage of passengers, carried or conveyed on said railroad, should be subject to a toll or duty for the use of the commonwealth. It was held that such a tax was not in violation of the Constitution of the United States. *Pennsylvania R. Co. v. Com.*, 3 Grant Cas. (Pa.) 131.



## TONTINE INSURANCE.

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**I. ORIGIN AND NATURE.** — Tontine insurance is that form of life insurance which adds and applies to the ordinary contract of indemnity the principles involved in the scheme of financiering invented by Lorenzo Tonti, an Italian banker of the seventeenth century, the essence of which consisted in reserving for the last survivor among several investors the profits realized from their common investment.<sup>1</sup> Originally the scheme was used as a method of floating public loans, and seems to have made its appearance in the insurance field for the first time in 1853, when a life insurance company conducting business on the tontine plan was organized in Philadelphia.<sup>2</sup>

**Tontine Distinguished from Other Policies.** — In most of its provisions the tontine policy does not differ from the ordinary form of life insurance contract,<sup>3</sup> its chief peculiarities lying in its provisions regarding forfeiture for nonpayment of premiums,<sup>4</sup> and the participation of the insured in the profits of the company.<sup>5</sup>

**Not a Gambling Contract.** — The tontine scheme, at least before its application to life insurance, was often viewed as a species of lottery,<sup>6</sup> but the courts have declined to construe insurance policies based on this plan as having more of the gambling feature than other forms of insurance contract.<sup>7</sup>

**Analogies in Other Branches of the Law.** — A resemblance to the tontine idea is to be found in the common-law doctrine of survivorship in joint tenancies.<sup>8</sup> Another analogy is seen in certain associations which hold property in common under an arrangement by which the last survivor is to receive the whole. Such associations are lawful and will be protected by the courts, and a member's privilege of withdrawal during life is not transmissible to his personal representative, so as to enable the latter to recover the intestate's portion.<sup>9</sup>

1. For the History and Development of the tontine plan, see Tabor, *Three Systems of Life Insurance* (1886); Fowler, *History of Insurance in Philadelphia* (1888).

2. Fowler, *History of Insurance in Philadelphia* (1888) pp. 697-698. In another place (p. 756) the same author speaks of "tontinism" as "a New York movement starting in 1867."

3. See Tabor, *Three Systems of Life Insurance* (1886), p. 39.

4. See *infra*, this title, *Forfeiture*.

5. See *infra*, this title, *Tontine Fund*.

6. See *Encyclopædia Britannica*, vol. 23, p. 544.

7. **Not a Gambling Contract.** — *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309, 15 Ins. L. J. 150; *Hill v. United L. Ins. Assoc.*, 154 Pa. St. 29, 35 Am. St. Rep. 807. And see Tabor, *Three Systems of Life Insurance*, pp. 43, 44. See generally the title *GAMBLING*

*CONTRACTS*, vol. 14, p. 614, and the cross-references there given.

8. **Analogy to Joint Tenancy.** — This analogy seems to have been borne in mind by Ch. J. Paxson, in *Hill v. United L. Ins. Assoc.*, 154 Pa. St. 29, 35 Am. St. Rep. 807, where, speaking of the tontine arrangement, he says: "It appears to resemble to some extent a conveyance between two or more persons as tenants in common, with a right of survivorship." The right of survivorship, however, was not an incident of tenancies in common, but of joint tenancies alone. See also *Farr v. Grand Lodge*, etc., 83 Wis. 446, 35 Am. St. Rep. 73, where a similar analogy is suggested; and the title *JOINT TENANTS AND TENANTS IN COMMON*, vol. 17, p. 649.

9. **Association Holding Property in Common.** — See *Schriber v. Rapp*, 5 Watts (Pa.) 351, 30 Am. Dec. 327.

**II. STATUS OF POLICY HOLDERS — Compared to Partnership.** — The tontine relation has been compared to a partnership,<sup>1</sup> but the comparison is correct only in a general and popular sense. It has been expressly decided that holders of ordinary policies in companies organized on the stock plan are not partners even though they share to a limited extent in the profits,<sup>2</sup> and the same has been held of members of mutual life-insurance companies<sup>3</sup> and unincorporated benefit associations.<sup>4</sup> There seems to be no decision which applies a different rule to tontine policy holders, and the cases denying to them the right to compel an accounting would seem to settle their status as different from that of partners.<sup>5</sup>

**Policy Holders Are Not Members or Stockholders** of the company. Since they do not participate in its management, or enjoy other rights of membership, they are not subject to its burdens.<sup>6</sup>

**Are Mere Creditors.** — In *Illinois* the tontine fund seems to be regarded as trust money creating the relation of trustee and *cestui que trust* between the company and the policy holder;<sup>7</sup> but, according to the weight of authority, a life insurance company is not a trustee for the holders of its ordinary forms of policies,<sup>8</sup> and the same principle is applied to holders of tontine policies, the relation between them and the company being regarded as merely that of debtor and creditor.<sup>9</sup> Where, however, this theory would favor one class of policy holders to the prejudice of others, the legal principles applicable to the relation of debtor and creditor will not be strictly applied.<sup>10</sup>

**III. TONTINE FUND.** — As in the case of ordinary life insurance<sup>11</sup> every premium payment is regarded as composed of three parts, each of which is apportioned to a particular fund which the company maintains.<sup>12</sup>

**1. Compared to Partnership** — "A tontine policy holder is somewhat like a special partner, putting capital into a mercantile business for a term of years. He would not be allowed to withdraw his capital at will — that might ruin the business — but at the end of the partnership period he would have the right to withdraw his entire capital and his full share of the profits." Report of Committee of *Ohio* Legislature, appointed to investigate insurance, 1885. "The name of a partnership composed of creditors or recipients of perpetual or life rents or annuities, formed on the condition that the rents of those who may die shall accrue to the survivors, either in whole or in part." *Bouv. L. Dict.* (15th ed.).

**2. Holders of Ordinary Policies Not Partners.** — *People v. Security L. Ins., etc., Co.*, 78 N. Y. 123, 34 Am. Rep. 522. See also *Bewley v. Equitable L. Assur. Soc.*, (Supm. Ct. Spec. T.) 61 How. Pr. (N. Y.) 345, 10 Ins. L. J. 636.

**3. Mutual Companies.** — See the title *MUTUAL INSURANCE*, vol. 21, p. 254. See also *Taylor v. Charter Oak L. Ins. Co.*, (C. Pl.) 59 How. Pr. (N. Y.) 468.

**4. Unincorporated Benefit Associations.** — See the title *BENEVOLENT OR BENEFICIAL ASSOCIATIONS*, vol. 3, p. 1055. See also *Brown v. Stoerkel*, 74 Mich. 269.

**5.** See cases cited *infra*, this title, *Tontine Fund*.

**6. Are Not Members or Stockholders.** — *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56, 1 Am. St. Rep. 433, 18 Ins. L. J. 110.

**7. Illinois — Trust Relation.** — *Chicago Mut. L. Indemnity Assoc. v. Hunt*, 127 Ill. 257.

**8. Not a Trust Relation.** — *Hencken v. U. S. Life Ins. Co.*, 9 Ins. L. J. 912, 16 N. Y. Wkly. Dig. 44; *Bewley v. Equitable L. Assur. Soc.*,

(Supm. Ct. Spec. T.) 61 How. Pr. (N. Y.) 345; *Matthew v. Northern Assur. Co.*, 9 Ch. D. 80. Compare *In re Haycock's Policy*, 1 Ch. D. 611; *Lothrop v. Stedman*, 42 Conn. 589.

**9. Relation That of Debtor and Creditor.** — *Everson v. Equitable L. Assur. Co.*, 68 Fed. Rep. 258, affirmed (C. C. A.) 71 Fed. Rep. 570; *Hunt v. Equitable L. Assur. Soc.*, 45 Fed. Rep. 661; *Fuller v. Knapp*, 24 Fed. Rep. 100; *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56, 1 Am. St. Rep. 433, 18 Ins. L. J. 110; *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 428, 4 Am. St. Rep. 482; *Bogardus v. New York L. Ins. Co.*, 101 N. Y. 328; *Avery v. Equitable L. Assur. Soc.*, 117 N. Y. 451, 19 Ins. L. J. 250.

**10. When Not Treated as Creditors.** — In *Fraternal Guardian's Assigned Estate*, 159 Pa. St. 594, wherein, under a plan by which mutual benefit certificates were issued, maturing in twenty-eight years, with eight equal periods of distribution, it was held that, in proceedings to wind up the concern, members whose certificates had earned the amount of the first distribution were not creditors in the sense that such amount could be paid in full out of the assets of the company, but that these assets were to be shared equally among all members.

**11. Premiums Divided as in Ordinary Life Insurance.** — *Nashville L. Ins. Co. v. Mathews*, 8 Lea (Tenn.) 499, 11 Ins. L. J. 219.

**12. The Funds Need Not Be Kept Separate**, but distinct accounts of them must be maintained. *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56, 1 Am. St. Rep. 433, 18 Ins. L. J. 110; *Bogardus v. New York L. Ins. Co.*, 101 N. Y. 328; *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309. And see *Fuller v. Metropolitan L. Ins. Co.*, 70 Conn. 647.

**Distribution of Fund.** — By the tontine plan the surplus, or tontine fund, is accumulated during the time for which the policies run (called the tontine period), and at the expiration thereof is distributed to such policy holders only as have survived the period and met their premium payments throughout.<sup>1</sup> Until the apportionment of the surplus by the company the holder of a policy has no such title to any portion thereof as will enable him to maintain an action at law therefor,<sup>2</sup> and no distribution thereof can be compelled;<sup>3</sup> nor has a beneficiary, previously to the expiration of the tontine period, any vested interest in such fund.<sup>4</sup>

**Discretion of Company in Making Distribution.** — The entire surplus need not be distributed, but only such portion as the company thinks best; and the apportionment made by the company will be deemed *prima facie* equitable, and the courts will not disturb it at the instance of a dissatisfied holder of a matured policy unless he show fraud or irregularity.<sup>5</sup>

**Effect of Misrepresentations as to Probable Share.** — That the share in the tontine fund which is apportioned to a policy holder is not so large as the representations made by the company at the time he was induced to enter into his contract had led him to expect, will not entitle him to recover the difference between the amount represented and that actually apportioned,<sup>6</sup> nor will it authorize a reformation of the policy at the instance of the beneficiary.<sup>7</sup>

**Cannot Distribute Guaranty Fund.** — The company in its handling of the different funds must not use one of them for distribution among its matured policy holders in violation of the statute under which it was organized. Thus, where a company so distributed a "guaranty fund," which the statute provided should be applied to no other purpose than the payment of death benefits, this was held to justify a dissolution of the company. *Chicago Mut. L. Indemnity Assoc. v. Hunt*, 127 Ill. 527.

**Tontine Bookkeeping.** — As to the method of maintaining the three funds and keeping accounts under the tontine system, see Tabor, *Three Systems of Life Insurance* (1886), pp. 47, 48.

**1. Distribution of Tontine Fund.** — See Tabor, *Three Systems of Life Insurance* (1886), pp. 39-41; *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56, 1 Am. St. Rep. 433, 18 Ins. L. J. 110; *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309, 15 Ins. L. J. 150; *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 427, 4 Am. St. Rep. 482; *Nashville L. Ins. Co. v. Mathews*, 8 Lea (Tenn.) 499, 11 Ins. L. J. 219.

As to what constitutes the surplus which is distributable at the end of the period, see *Fuller v. Metropolitan L. Ins. Co.*, 70 Conn. 647. And as to the policy holders' right to participate in the profits, generally, see *TITLE LIFE INSURANCE*, vol. 19, p. 97; *MUTUAL INSURANCE*, vol. 21, p. 269.

**Dividend Not Interest Bearing.** — Where by the terms of the policy the dividend is to form part thereof on its accrual, such dividend is no more interest bearing than the amount of the face of the policy. *Stevens v. Germania L. Ins. Co.*, 26 Tex. Civ. App. 156.

**2. No Action at Law for Portion of Undistributed Surplus.** — *Greeff v. Equitable L. Assur. Soc.*, 160 N. Y. 19, 73 Am. St. Rep. 659.

**3. Distribution Not Compellable.** — *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309, 15 Ins. L. J. 150.

**4. Beneficiary's Interest Contingent.** — *Stevens v. Germania L. Ins. Co.*, 26 Tex. Civ. App. 156.

**Where the Insured Dies Before the Expiration of the Tontine Period,** the beneficiary is not entitled to share in the surplus, although the last premium has been paid before the death of the insured. *New York L. Ins. Co. v. Miller*, (Ky. 1900) 56 S. W. Rep. 975.

**5. Apportionment Prima Facie Equitable.** — *Gadd v. Equitable L. Assur. Soc.*, 97 Fed. Rep. 834; *Everson v. Equitable L. Assur. Co.*, 68 Fed. Rep. 258, (C. C. A.) 71 Fed. Rep. 570; *Greeff v. Equitable L. Assur. Soc.*, 160 N. Y. 19, 73 Am. St. Rep. 659.

**Right of Policy Holder to Compel Accounting.** — Where the policy holder is deemed to stand in the relation of a mere creditor of the company, it is held that mere dissatisfaction with the apportionment of the surplus will not entitle him to an accounting in the absence of any such ground of equitable jurisdiction as fraud or mistake. *Bain v. Aetna L. Ins. Co.*, 20 Ont. 6; *Fuller v. Knapp*, 24 Fed. Rep. 100; *Hunton v. Equitable L. Assur. Soc.*, 45 Fed. Rep. 661; *Everson v. Equitable L. Assur. Co.*, 68 Fed. Rep. 258, *affirmed* (C. C. A.) 71 Fed. Rep. 570; *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 421, 4 Am. St. Rep. 482.

But in *Massachusetts*, under a statute giving courts of equity jurisdiction "when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law," an accounting may be decreed. *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56, 1 Am. St. Rep. 433, 18 Ins. L. J. 110.

And in *Illinois*, since the company is regarded as a trustee of the tontine fund, it would seem that a policy holder could compel an accounting. See *Chicago Mut. L. Indemnity Assoc. v. Hunt*, 127 Ill. 527.

**6. Misrepresentations as to Probable Share.** — *Donoho v. Equitable L. Assur. Soc.*, 22 Tex. Civ. App. 192.

**7. Will Not Authorize Reformation of Policy.** — *Avery v. Equitable L. Assur. Soc.*, 117 N. Y. 451, 19 Ins. L. J. 250; *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309, 15 Ins. L. J. 150.



**IV. FORFEITURE.** — Since the tontine system of insurance requires for its fullest success the addition to the tontine fund of all lapses, or accumulated payments on policies, the holders of which are subsequently in default,<sup>1</sup> therefore tontine policies are generally excepted from the operation of non-forfeiture statutes, and the clause in such policies providing for prompt payment of premiums under penalty of losing all rights in the contract is rigidly enforced.<sup>2</sup>

**V. ASSIGNMENT OF POLICY** — Assignability as Against Beneficiary. — As in the case of other life insurance policies,<sup>3</sup> the right of the insured to assign a tontine policy is subordinate to the interest of the beneficiary therein and cannot be exercised so as to cut off the latter's rights.<sup>4</sup>

Notice to the Company is, in *New York*, held not to be essential to the validity of an assignment.<sup>5</sup>

**TOOK.** — See note 6.

**TOOLS.** (See also the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 118.) — A tool is "an instrument of manual operation, apparatus, or utensil."<sup>7</sup> The word comprehends, in its general acceptation, instruments and implements of manual operation, particularly such as are used by mechanics and farmers.<sup>8</sup>

**1. Forfeitures Essential to System.** — Tabor, *Three Systems of Life Insurance* (1886) p. 43; *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309, 15 Ins. L. J. 150; *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 421, 4 Am. St. Rep. 482.

**2. Forfeitures Enforced.** — Alexander on Life Insurance, p. 12; *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56, 1 Am. St. Rep. 433, 18 Ins. L. J. 110; *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.) 309, 15 Ins. L. J. 150.

**Not Entitled to Paid-up Policy.** — Under a policy providing that, until the expiration of the tontine period, it shall have no surrender value, either in cash or a paid-up policy, the holder is not entitled to a paid-up policy if he ceases to pay before the period has expired; nor does a clause allowing a reduction in amount give him such right. *Equitable L. Assur. Soc. v. Spillman*, (Ky. 1900) 56 S. W. Rep. 710.

**Where a Paid-up Policy Is Provided for in case of default, an unmaturing semi-tontine policy, though having no "cash surrender value," has an actual value constituting a right of property in the insured which passes to his trustee in bankruptcy.** *In re Welling*, (C. C. A.) 113 Fed. Rep. 189.

**3.** See the title LIFE INSURANCE, vol. 19, p. 90.

**4. Cannot Affect Beneficiary's Rights.** — *Ferdon v. Canfield*, 104 N. Y. 143, 17 Ins. L. J. 73, wherein it was held that the insured could not assign a policy so as to cut off the rights of beneficiaries who paid the premiums, even though it provided that the surplus dividends, if any, should be payable to the insured "or assigns."

**Where Payable to the Insured's Estate, a tontine assignment of the policy to a fiduciary agency is valid, and payment to the latter is a good defense to an action by the administrator of the insured.** *Hill v. United L. Ins. Assoc.*, 154 Pa. St. 29, 35 Am. St. Rep. 807.

**5. Notice to Company Not Essential.** — *Columbia Bank v. Equitable L. Assur. Soc.*, 61 N. Y.

App. Div. 594, wherein a previous assignment, although without notice to the company, was held to be a good defense in an action against the company by a judgment creditor of the assignor. As to notice in general, see the title LIFE INSURANCE, vol. 19, p. 94.

**6. Took.** — In *Harrison v. Manship*, 120 Ind. 43, a complaint charging that the defendant "took and drove off my ducks and sold them," without a colloquium or innuendo, was held to state no cause of action. But in *Stringham v. Cook*, 75 Wis. 593, it was held that a complaint alleging that the defendant wrongfully took timber from the lands was a substantial charge of "wrongful cutting." See generally the title TROVER AND CONVERSION.

**7. Tool.** — *Filsch v. Hogg*, 35 U. C. Q. B. 102.

**8. Lovewell v. Westchester F. Ins. Co.**, 124 Mass. 418; *Oliver v. White*, 18 S. Car. 235.

**Forfeiture.** — An act of Congress provided for the forfeiture of any raw material found on the premises of any person intending to manufacture the same into articles of a kind subject to taxation for the purpose of selling such manufactured articles or things with a design to avoid the payment of such tax, and also all tools, implements, etc., in the place or building where such articles or raw materials should be found. It was held that the tools, implements, etc., were not limited to the property of the person having the fraudulent purpose mentioned, or to property constituting part of the manufacturing apparatus used in the business. *U. S. v. Distillery*, 11 Blatchf. (U. S.) 255.

**Crucible.** — In *State v. Zadock*, 6 Vt. 594, it was held that a crucible was not a tool or instrument, under a *United States* statute making it a criminal offense for one to "have in his possession any die, stamp, or other instrument or tool \* \* \* for the purpose of forging or counterfeiting any current coin of the United States."

**Annealing Pots.** — On the sale of malleable iron works "and all machinery and tools

**TOP.** — See note 1.

**TOPMOST.** — See note 2.

**TOPPING.** — See note 3.

**TORCH.** — See note 4.

**TORNADO.** (See also **CYCLONE INSURANCE**, vol. 8, p. 534; **HURRICANE**, vol. 15, p. 783.) — A tornado has been defined as "a violent gust of wind, or a tempest, distinguished by a whirling, progressive motion, usually accompanied with severe thunder, lightning, and torrents of rain, and commonly of short duration and small breadth; a hurricane." <sup>5</sup>

\* \* \* connected therewith," it was held that annealing pots used in the manufacture of iron would pass under the word *tools*. *Filsch v. Hogg*, 35 U. C. Q. B. 94.

**In a Policy of Insurance — Patterns.** — Patterns used in manufacturing are included within the meaning of the word *tools*, used in an insurance policy insuring fixed and movable machinery, engines, lathes, and *tools*. *Lovewell v. Westchester F. Ins. Co.*, 124 Mass. 418. So a policy of insurance on "*tools* used in the manufacture of boots and shoes" covers patterns for making boots and shoes. *Adams v. New York Bowery F. Ins. Co.*, 85 Iowa 6.

**Tie Beam — Tools and Appliances — Master and Servant.** — In *Griffiths v. New Jersey, etc., R. Co.*, (N. Y. Super. Ct. Tr. T.) 5 Misc. (N. Y.) 320, the plaintiff, a carpenter in the defendants' employ, engaged in the erection of a building, stepped upon a tie beam which gave way, causing him to fall and injure himself. It was contended that this beam came within the rule that the master must furnish suitable machinery and appliances. The court said: "The joist containing the knot which caused the injury was neither machinery, *tools*, nor appliances." See also the title **MASTER AND SERVANT**, vol. 20, p. 71.

**1. Top.** (See also **APEX**, vol. 2, p. 421, and see the title **MINES AND MINING CLAIMS**, vol. 20, pp. 714, 727.) — In *Duggan v. Davey*, 4 Dak. 141, it was said: "The word *top*, while including 'apex,' may also include a succession of points—that is, a line—so that by the *top* of a vein would be meant the line connecting a succession of such highest points or apices, thus forming an edge." See also *Iron Mine v. Loella Mine*, 2 McCrary (U. S.) 121.

**Top of Bank — Boundary.** — In *Robertson v. Watson*, 27 U. C. C. P. 579, it was said: "Now these words, 'the *top* of the bank of the Grand river,' are abundantly sufficient to convey and will convey to the waters of the river and *ad medium filum aquæ*, unless there be some words forming part of the description,

or introduced by way of exception, which clearly exclude whatever may lie between the bank and the *medium filum aquæ*. For this position it is sufficient merely to quote *Kains v. Turville*, 32 U. C. Q. B. 17, and *Parker v. Elliott*, 1 U. C. C. P. 470, and the onus lies upon the plaintiff, who asserts that there is such a strip, to show its existence and that it is excluded from the deed to the defendant." See also the title **BOUNDARIES**, vol. 4, p. 830.

**Top Coal.** — See *Island Coal Co. v. Greenwood*, 151 Ind. 476.

**Top of Prime Lambs.** — See *Sanders v. Bond*, (Ky. 1902) 66 S. W. Rep. 635.

**2. Topmost Story.** — By Schedule 1 of the *English Metropolitan Building Act*, 1855, the thickness of the external and party walls of dwelling houses and warehouses throughout the different stories is regulated in accordance with rules there laid down, the necessary thickness varying with the height and width of the wall. By Rule 5 provision is made for the mode of measuring the height of every *topmost* story, and by Rule 6 the height of every wall is to be measured from the base of the wall to the level of the top of the *topmost* story. It was held that a *topmost* story need not necessarily be contained within four vertical walls, and that floors or rooms enclosed on three sides by vertical walls and in front by the sloping roof of the house were stories within the meaning of the schedule and rules. *Foot v. Hodgson*, 25 Q. B. D. 160.

**3. Topping and Lopping Distinguished.** — In *Unwin v. Hanson*, (1891) 2 Q. B. 121, it was said, *per Lopes, L. J.*: "In country life two entirely distinct terms, 'lopping' and *topping*, are used with respect to the cutting of trees, 'lopping' meaning the cutting off the branches of a tree laterally, and *topping* meaning the cutting off its top."

**4. Torch.** — See *Saltsburg Gas Co. v. Saltsburg*, 138 Pa. St. 250.

**5. Spensley v. Lancashire Ins. Co.**, 54 Wis. 441, *quoting* *Webst. Dict.*

## TORRENS ACTS.

**Origin.** — The system of judicial registration of titles to land, known as the "Torrens system," was formulated by Sir Robert Torrens and was adopted by the South Australian Parliament in 1857. Similar acts were adopted in 1861 by Queensland; in 1862 by New South Wales, Victoria, and Tasmania; in 1870 by New Zealand; in 1874 by Western Australia; and in 1876 by Fiji.<sup>1</sup>

In the United States the first act of this nature to be adopted was passed by the *Illinois* legislature in 1895, but was declared to be unconstitutional;<sup>2</sup> but a subsequent act, passed in 1897, was held not to be open as an entirety to objection on constitutional grounds.<sup>3</sup> In 1898 the system was adopted in *Massachusetts*, and the validity of the act was upheld by a divided court.<sup>4</sup> The *Minnesota* act, which was passed in 1901, has also been declared constitutional.<sup>5</sup> In *Ohio* the act was passed in 1896, but was repealed in 1898,

1. See Niblack on Torrens System, p. 6. For the construction of these acts, see Duffy and Eagleson on Transfer of Land Act; Morris on Land Registration.

2. **Illinois Act of 1895 Unconstitutional.** — *People v. Chase*, 165 Ill. 527, holding the act invalid because it conferred judicial powers on the registrar and examiners.

3. **Act of 1897 Not Invalid.** — *People v. Simon*, 176 Ill. 165, 68 Am. St. Rep. 175, holding that there was nothing in the act which rendered it void as a whole, but leaving for consideration when occasion should demand construction of certain sections which, even though they should be found unconstitutional in themselves, yet would not invalidate the whole act.

**The Proceeding for Initial Registration Is One in Chancery**, and the relation of the examiner to the court and parties is analogous to that of a master in chancery. *Gage v. Consumers' Electric Light Co.*, 194 Ill. 30.

**Evidence Before Examiner.** — On a hearing before the examiner upon an application for initial registration it is error to allow the introduction, over objection, of abstracts showing the record of conveyances of the lot sought to be registered, unless a proper basis for the introduction of such secondary evidence be laid by showing the loss or destruction of the original deeds, or otherwise. *Glos v. Hallowell*, 190 Ill. 65.

**Objections to the Examiner's Findings Are Waived** by a failure to file any specific objections or exceptions thereto, and the parties cannot thereafter complain of the adoption of such findings by the court. *Gage v. Consumers' Electric Light Co.*, 194 Ill. 30.

**Outstanding Tax Deed — Reimbursement.** — One who seeks initial registration of land on which a tax deed is outstanding must reimburse the holder of such deed as a condition precedent to the registration. *Gage v. Consumers' Electric Light Co.*, 194 Ill. 30.

4. **Massachusetts Act Upheld.** — *Tyler v. Judges*, 175 Mass. 71 (Lathrop and Loring, JJ., dissenting).

In *Tyler v. Judges*, 179 U. S. 405, the court dismissed the writ of error on the ground that the petitioner did not show himself to be personally interested in the proceeding, and declined to consider the constitutionality of the act.

**Reporting Case to Supreme Judicial Court.** — The court of registration may report a case to the Supreme Judicial Court, although no order or decree has been rendered, if nothing is left but the determination of a doubtful point of law, on the decision whereof the decree is to be immediately rendered. *Welsh, Petitioner*, 175 Mass. 68.

And the Superior Court may, under its general powers, report cases appealed to it from the court of registration. *Lancy v. Snow*, 180 Mass. 411.

5. **Minnesota Act Upheld.** — *State v. Westfall*, 85 Minn. 437.

**The Publication of Summons to nonresidents and unknown parties is sufficient** if made in accordance with the provisions of the Torrens Act. These provisions are intended to be complete and exclusive as to the method of publication, and Minn. Gen. Stat. 1894, § 5204, relating to publication of summons in general, need not be followed. *Dewey v. Kimball*, 89 Minn. 454, rehearing in part granted (Minn. 1903) 95 N. W. Rep. 895, affirmed (Minn. 1903) 96 N. W. Rep. 704.

**Failure to Make Person Suggested by Examiner a Defendant.** — An applicant for registration under the *Minnesota* act cannot ignore a suggestion by the examiner that a certain person be made a party defendant, and if such person be not made a defendant the judgment is invalid as to him and all persons who are in privity with him and not defendants in the proceeding. *Dewey v. Kimball*, 89 Minn. 454, rehearing in part granted (Minn. 1903) 95 N. W. Rep. 895, affirmed (Minn. 1903) 96 N. W. Rep. 704.

**Affidavit to Open Judgment.** — Under the *Minnesota* act persons claiming liens who were not notified of the proceeding may obtain leave within sixty days after the rendition of the



having been declared unconstitutional by the Supreme Court of the state.<sup>1</sup> Similar acts were adopted in *California* in 1897, in *Oregon* in 1901, and in *Colorado* and *Hawaii* in 1903, but they have not at this writing been construed by the courts.

**TORTFEASOR.** (See also the titles *TRESPASS, post*; *TORTS, post*.) — A wrongdoer; one who commits or is guilty of a tort.<sup>2</sup>

decree to come in and assert their rights. An affidavit for leave to come in may be made on behalf of a partnership by one of the partners, and in behalf of a corporation by the president thereof; and in either case the positive statement of the affiant that the partnership or corporation had no knowledge of the proceeding is sufficient. *Reed v. Carlson*, (Minn. 1903) 95 N. W. Rep. 303.

**Right of Defendant to Contest on Opening of Judgment.** — Where a defendant, against whom judgment had been entered after due service of summons, sought to come in and defend against lien claimants who had obtained leave to open the judgment, it was held that

he could not defend as a matter of right, and that the court, in the exercise of its discretion, properly refused to grant him leave. *Reed v. Carlson*, (Minn. 1903) 95 N. W. Rep. 303.

**1. Ohio Act Unconstitutional** — *State v. Guilbert*, 56 Ohio St. 575, 60 Am. St. Rep. 756, holding the act invalid because it provided for the taking of property without due process of law; because it attempted to authorize the taking of private property for uses not public and without compensation; and because it attempted to confer judicial powers on the county recorder.

**2. Bouv. L. Dict.**

# TORTS.

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**I. SCOPE OF TITLE.** — As the whole law of torts has been treated, or will be treated, in various titles throughout this work, it is deemed unnecessary to attempt a comprehensive treatment of the subject here. The purpose of this title is merely to gather together the general principles and to direct the reader's attention to the specific titles under which the various branches of the subject are discussed. The General Index of this work should also be consulted.

**II. DEFINITION.** — According to Mr. Bishop, "the word 'tort' means nearly the same thing as the expression 'civil wrong.' It denotes an injury inflicted otherwise than by a mere breach of contract; or, to be more nicely accurate, a tort is one's disturbance of another in rights which the law has created, either

in the absence of contract or in consequence of a relation which a contract had established between the parties."<sup>1</sup>

**III. NATURE OF CAUSE OF ACTION — 1. In General.** — A liability for a tort which has not been reduced to judgment is not a "debt,"<sup>2</sup> nor does the recovery of judgment convert the liability into a contractual obligation within the meaning of constitutional provisions forbidding impairment of the obligation of contracts.<sup>3</sup> The right of action for a tort is not, strictly speaking, a chose in action, though it falls within the meaning of that term as ordinarily used,<sup>4</sup> and is also usually regarded as embraced within the term "claim."<sup>5</sup> It constitutes a valuable consideration for a promise to pay damages,<sup>6</sup> and is a proper subject of compromise.<sup>7</sup> It is generally not assignable.<sup>8</sup> For other general matters relating to the liability and the remedy, see the cross-references given in the note.<sup>9</sup>

**2. Distinguished from Crime.** — While a tort, as such, is only a civil injury giving to the injured party a right of action for damages, yet the same state of facts which constitutes a tort may constitute an offense against the state for which the offender may be prosecuted criminally.<sup>10</sup>

**1. Bishop's Definition.** — Bishop on Non-contract Law, § 4. The author adds: "Of course the wrong must be of a sort which the law redresses; not a mere infraction of good morals."

**Pollock's Definition.** — "A tort is an act or omission giving rise, in virtue of the common-law jurisdiction of the court, to a civil remedy which is not an action of contract." Pollock on Torts, 4.

**Bouvier's Definition.** — "The word 'torts' is used to describe that branch of the law which treats of the redress of injuries which are neither crimes nor arise from the breach of contracts. All acts or omissions of which the law takes cognizance may in general be classed under the three heads of contracts, torts, and crimes. Contracts include agreements, and the injuries resulting from their breach; torts include injuries to individuals; and crimes, injuries to the public or state." Bouv. L. Dict., tit. Torts; 1 Hill on Torts, 1.

**Applies to Rights and Duties Created by Statute.** — "In general, it may be said that whenever the law creates a right, the violation of such right will be a tort; and wherever the law creates a duty, the breach of such duty, coupled with consequent damage, will be a tort also. This applies not only to the common law, but also to such rights and duties as may be created by statute." Bouv. L. Dict., tit. Torts.

**2. Not a Debt.** — See the title DEBT, vol. 8, p. 991.

**Not Provable in Bankruptcy.** — See the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 783.

**3. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS,** vol. 15, p. 1039.

**4. Whether a Chose in Action.** — See the title CHOSSES IN ACTION, vol. 6, p. 4.

**5. Whether a Claim.** — See the title CLAIM, vol. 6, p. 102.

**6. As Valuable Consideration.** — See the title CONSIDERATION, vol. 6, p. 710.

**7. Liability May Be Compromised.** — See the title CONSIDERATION, vol. 6, p. 715.

**8. Not Assignable.** — See the title ASSIGNMENTS, vol. 2, p. 1020.

**9. Jurisdiction of Equity.** — See the title EQUITY, vol. 11, p. 192.

**Malice as an Element of Tort.** — See the title MALICE, vol. 19, p. 625.

**Necessity for Demand Before Recovery.** — See the title DEMAND, vol. 9, p. 208.

**Conflict of Laws.** — See the title PRIVATE INTERNATIONAL LAW, vol. 22, p. 1378.

**Right to Arrest in Action ex Delicto.** — See the title IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS, vol. 16, p. 17.

**Right to Attachment in Action ex Delicto.** — See the title ATTACHMENT, vol. 3, p. 191.

**Right to Claim Exemption from Execution on a judgment founded on a tort.** See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 169.

**Damages.** — See the titles DAMAGES, vol. 8, p. 537; DAMNUM ABSQUE INJURIA, vol. 8, p. 694; DEMURRAGE, vol. 9, p. 264; EXEMPLARY DAMAGES, vol. 12, p. 2.

**10. Torts and Crimes Distinguished.** — See the title CRIMINAL LAW, vol. 8, p. 279.

"The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity." 4 Bl. Com. 5.

Judge Cooley says: "Certain acts or omissions are made public offenses by the common law or by statute, either because their inherent qualities and necessary tendencies make them prejudicial to organized society, or because it is believed that the evils likely to flow from them will be so serious that the general good will be subserved by forbidding them, and penalties are attached to them, which are imposed on public grounds. These, according to their grade, are crimes or misdemeanors, or they are simply things prohibited under penalty. But where the same wrongful acts cause damage to private individuals, they come directly within the definition of torts, and are such." Cooley on Torts (2d ed.) 81.

**Merger of Tort in Felony.** — See the title MERGER, vol. 20, p. 600.



**3. Distinguished from Breach of Contract.** — A tort may be distinguished from a breach of contract in that the right of action in the latter case arises out of the agreement of the parties, whereas the right of action for a tort arises out of a duty fixed by law and independent of the will of the parties.<sup>1</sup>

**Joint Tortfeasors** are, as a rule, severally liable without any right of contribution from each other.<sup>2</sup>

**Persons Incapable of Contracting** are nevertheless liable for torts committed by them.<sup>3</sup>

**Abatement by Death.** — At common law a cause of action *ex delicto* does not, like one *ex contractu*, survive against the estate of a deceased defendant or in favor of that of a deceased plaintiff; the death of either party destroys the right of action.<sup>4</sup>

**Election of Remedies.** — The line of demarkation between contracts and torts is not, however, perfectly defined. Many torts arise out of a state of facts which constitutes also a breach of contract, and in that event the injured party may elect to bring his action either *ex contractu* or *ex delicto*.<sup>5</sup> Again, there are cases in which a tort may be so committed as to give rise to an implied contract; as where one wrongfully disposes of the property of another and receives the consideration therefor. In such cases the injured party may waive the tort and sue on the contract for the consideration received by the wrongdoer.<sup>6</sup>

**IV. PERSONS LIABLE FOR TORTS — 1. For Their Own Torts.** — In General, every person who commits a tort is liable therefor.

**Married Women, Infants, and Lunatics.** — While capacity may be material as a question of fact, yet, as a rule, the personal status of a tortfeasor is immaterial in law in determining his liability, and therefore an action for a tort will lie against a married woman,<sup>7</sup> an infant,<sup>8</sup> or a lunatic.<sup>9</sup>

**Servants, Agents, and Deputies** are liable for their own torts notwithstanding the master or principal may also be liable therefor.<sup>10</sup>

**Private Corporations**, as well as natural persons, are liable in damages for their torts.<sup>11</sup>

**Public Corporations** are also liable for their torts, though to a more limited extent.<sup>12</sup>

**1. Tort Distinguished from Breach of Contract.** — See Pollock on Torts, p. 1. See also the title CONTRACTS, vol. 7, p. 88.

**2. No Contribution Between Joint Tortfeasors.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 364.

**Effect of Releasing One Joint Tortfeasor.** — See the title RELEASE AND DISCHARGE, vol. 24, p. 306.

**Effect of Judgment Against One Joint Tortfeasor** as a bar to an action against the others, see the title RES JUDICATA, vol. 24, p. 764.

**3.** See the titles HUSBAND AND WIFE, vol. 15, p. 894; INFANTS, vol. 16, p. 307; INSANITY, vol. 16, p. 622.

**4. Abatement by Death.** — See the title DEBTS OF DECEDENTS, vol. 8, p. 1027. And see 21 ENCYC. OF PL. AND PR. 309, title SURVIVAL OF ACTIONS.

**5. Election of Remedies.** — See 7 ENCYC. OF PL. AND PR. 360, title ELECTION OF REMEDIES.

**6. Waiving Tort and Suing on Contract.** — See the title IMPLIED OR QUASI CONTRACTS, vol. 15, p. 1111.

**7. Married Woman's Liability.** — See the title HUSBAND AND WIFE, vol. 15, p. 894.

**8. Infant's Liability.** — See the title INFANTS, vol. 16, p. 307.

**9. Lunatic's Liability.** — See the title INSANITY, vol. 16, p. 622.

**10. Servant's Liability.** — See the title MASTER AND SERVANT, vol. 20, p. 51.

**Agent's Liability.** — See the title AGENCY, vol. 1, p. 1131.

**Deputy's Liability.** — See the titles DEPUTY, vol. 9, p. 388; SHERIFFS AND CONSTABLES, vol. 25, p. 679; UNITED STATES MARSHALS.

**11. Private Corporations.** — See the title CORPORATIONS, vol. 7, p. 824; and as to particular kinds of corporations, see the cross-references following the analysis of that article. And see the title ULTRA VIRES.

As to the liability of corporations for libel, see the title LIBEL AND SLANDER, vol. 18, p. 1058. As to the liability of banks for the wrongful dishonor of checks, see the title CHECKS, vol. 5, p. 1059. As to the liability of foreign corporations for torts committed against nonresidents, see the title FOREIGN CORPORATIONS, vol. 13, p. 897.

**Consolidation of Corporations.** — Liability for the torts of the constituent corporations, see the title CONSOLIDATION OF CORPORATIONS, vol. 6, pp. 819, 824.

**12. Liability of Public Corporations.** — See the title MUNICIPAL CORPORATIONS, vol. 20, p. 1191, and the cross-references following the analysis of that article. See also the titles COUNTIES, vol. 7, p. 947; TOWNS AND TOWNSHIPS, *post*.

**Professional Men** are required to exercise such a degree of care and diligence as prudent men of fair ability in their respective professions would exercise, and for failure to do so they are liable in damages.<sup>1</sup>

**Public Officers** are in many cases liable for a failure to perform their official duties and for wrongful acts in excess of their power when damages result therefrom.<sup>2</sup>

**2. For Torts of Others.**—While, as before stated, every person is individually liable for his own torts, yet the tortfeasor may sustain such a relation to another person as to render such other also liable.

**The Master Is Liable for the Torts of His Servant**, committed by the latter while acting within the scope of his employment.<sup>3</sup>

**Principal and Agent.**—A principal may, under similar circumstances, be liable for the torts of his agent.<sup>4</sup>

**Officer and Deputy.**—So a public officer may be held liable for torts committed by his deputy.<sup>5</sup>

**A Parent May Be Held Liable for the Torts of His Child**, committed in the parent's service, and in doing work authorized or commanded by the parent.<sup>6</sup>

**Husband and Wife.**—At common law, the husband is liable for the torts of his wife.<sup>7</sup>

**Partnership.**—On the principle that each partner is the agent of the firm, a partnership is liable for the torts of its members, committed within the scope of their agency.<sup>8</sup>

**Liability of Counties and Municipalities for Mob Violence.**—In some jurisdictions, counties and municipalities are made liable by statute for damages caused within their borders by riotous mobs.<sup>9</sup>

**V. WHO MAY SUE.**—The right to maintain actions for torts of various kinds will be found discussed under the titles treating of specific torts. A few additional references are given in the notes.<sup>10</sup>

**1. Liability of Professional Men.**—For the liability of attorneys, see the title **ATTORNEY AND CLIENT**, vol. 3, p. 278; for the liability of physicians and surgeons, see the title **PHYSICIANS AND SURGEONS**, vol. 22, p. 798. See generally the title **NEGLIGENCE**, vol. 21, p. 455.

**2. Liability of Public Officers.**—See the title **PUBLIC OFFICERS**, vol. 23, p. 314, and the cross-references following the analysis. See also the titles **BOARDS OF HEALTH**, vol. 4, p. 607; **NOTARY PUBLIC**, vol. 21, p. 572; **UNITED STATES MARSHALS**.

As to the liability of public officers for false imprisonment, see the title **FALSE IMPRISONMENT**, vol. 12, p. 719.

As to their liability for malicious prosecution, see the title **MALICIOUS PROSECUTION**, vol. 19, p. 691.

As to the liability of military officers for their torts, see the title **MILITARY LAW**, vol. 20, p. 615.

**3. Master Liable for Servant's Torts.**—See the titles **FELLOW SERVANTS**, vol. 12, p. 893; **MASTER AND SERVANT**, vol. 20, p. 163.

As to the liability of private corporations for the acts of their officers and agents, see the title **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**, vol. 21, p. 912. See also the titles **DE FACTO OFFICERS**, vol. 8, p. 771; **RECEIVERS**, vol. 23, p. 992; **RECEIVERS OF RAILROADS**, vol. 24, p. 1.

As to the liability of public corporations for the torts of their officers and agents, see the titles **COUNTIES**, vol. 7, p. 898; **MUNICIPAL CORPORATIONS**, vol. 20, p. 1123; **TOWNS AND TOWNSHIPS**, *post*.

**4. Principal Liable for Agent's Torts.**—See the title **AGENCY**, vol. 1, p. 1151.

**5. Officer Liable for Deputy's Torts.**—See the title **DEPUTY**, vol. 9, p. 390.

**6. Parent's Liability for Child's Torts.**—See the title **PARENT AND CHILD**, vol. 21, p. 1057.

As to an infant's liability for its own torts, see the title **INFANTS**, vol. 16, p. 307.

**7. Husband's Liability for Wife's Torts.**—See the title **HUSBAND AND WIFE**, vol. 15, p. 894.

As to the liability of community property for the husband's torts, see the title **COMMUNITY PROPERTY**, vol. 6, p. 340.

**8. Partnership Liable for Member's Torts.**—See the title **PARTNERSHIP**, vol. 22, pp. 166, 171.

**9. Damages by Mobs.**—See the titles **COUNTIES**, vol. 7, p. 949; **MUNICIPAL CORPORATIONS**, vol. 20, p. 1206.

**10. Principal and Agent.**—As to the right of an agent to maintain an action against a third party for a tort, see the title **AGENCY**, vol. 1, p. 1166.

As to the principal's right to sue, see the title **AGENCY**, vol. 1, p. 1179.

**Husband and Wife.**—As to the right of husband and wife to sue one another for torts, see the title **HUSBAND AND WIFE**, vol. 15, p. 857.

As to their right of action against third persons for torts, see the title **HUSBAND AND WIFE**, vol. 15, p. 838.

**Foreign Corporation.**—Right to sue for torts, see the title **FOREIGN CORPORATIONS**, vol. 13, p. 892.

**VI. SPECIFIC TORTS — 1. Wrongs Affecting Personal Safety and Freedom —****a. ASSAULT AND BATTERY.** — See note 1.**b. FALSE IMPRISONMENT.** — See note 2.**2. Wrongs Affecting Reputation — a. LIBEL AND SLANDER.** — See note 3.**b. SLANDER OF TITLE.** — See note 4.**3. Wrongs Affecting Domestic Relations — a. OF HUSBAND AND WIFE.** — See note 5.**b. OF PARENT AND CHILD.** — See note 6.**c. OF MASTER AND SERVANT.** — See note 7.**4. Malicious Wrongs — a. DECEIT.** — See note 8.**b. MALICIOUS PROSECUTION.** — See note 9.**c. MALICIOUS ABUSE OF PROCESS.** — See note 10.**d. MALICIOUS INTERFERENCE WITH CONTRACT.** — See note 11.**e. CONSPIRACY.** — See note 12.**5. Negligent Wrongs.** — See note 13.

**1. Assault and Battery.** — See the title ASSAULT AND BATTERY, vol. 2, p. 952, and cross-references there given. See also the titles PRIZE FIGHTS, vol. 23, p. 104; RECAPTION, vol. 23, p. 974; SELF-DEFENSE, vol. 25, p. 256; TRESPASS, *post*.

For injuries caused by spring guns and traps, see the title NUISANCES, vol. 21, p. 701.

**2. False Imprisonment.** — See the title FALSE IMPRISONMENT, vol. 12, p. 719, and cross-references there given. See also the title ARREST, vol. 2, p. 893.

**3. Libel and Slander.** — See the title LIBEL AND SLANDER, vol. 18, p. 851. See also the titles LIBERTY OF THE PRESS, vol. 18, p. 1125; MERCANTILE AGENCIES, vol. 20, p. 578.

As to the validity of contracts to indemnify the publisher of libelous matter, see the title INDEMNITY CONTRACTS, vol. 16, p. 171.

As to proving the plaintiff's general bad character in mitigation of damages, see the title CHARACTER (IN EVIDENCE), vol. 5, p. 865.

**4. Slander of Title.** — See the title SLANDER OF TITLE OR PROPERTY, vol. 25, p. 1073.

**5. Wrongs Affecting Relation of Husband and Wife.** — See the title HUSBAND AND WIFE, vol. 15, p. 858, and the cross-references following the analysis of that article. See also the titles ABDUCTION, vol. 1, p. 162; CIVIL DAMAGE ACTS, vol. 6, p. 36; CRIMINAL CONVERSATION, vol. 8, p. 260; DEATH BY WRONGFUL ACT, vol. 8, p. 851.

As to interference with the right to the custody and burial of the body of a deceased husband or wife, see the titles CEMETERIES, vol. 5, p. 781; DEAD BODY, vol. 8, p. 834.

**6. Wrongs Affecting Relation of Parent and Child.** — See the title PARENT AND CHILD, vol. 21, p. 1044, and the cross-references following the analysis to that article.

As to the parent's right of action for the seduction of a daughter, see the title SEDUCTION, vol. 25, p. 183.

**7. Wrongs Affecting Relation of Master and Servant.** — See the title MASTER AND SERVANT, vol. 20, pp. 181, 184. See also the titles INTERFERENCE WITH CONTRACT RELATIONS, vol. 16, p. 1109; LABOR COMBINATIONS, vol. 18, p. 80.

As to the master's right of action for the seduction of a servant, see the title SEDUCTION, vol. 25, p. 183.

**8. Deceit.** — See the title FRAUD AND DECEIT, vol. 14, p. 12, and the cross-references there given. See also the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 210.

**9. Malicious Prosecution.** — See the title MALICIOUS PROSECUTION, vol. 19, p. 647.

As to the admissibility of evidence of the plaintiff's bad character in mitigation of damages and as tending to show probable cause, see the title CHARACTER (IN EVIDENCE), vol. 5, p. 866.

**10. Malicious Abuse of Process.** — See the title MALICIOUS ABUSE OF PROCESS, vol. 19, p. 630, and the cross-references there given.

**11. Malicious Interference with Contract.** — See the title INTERFERENCE WITH CONTRACT RELATIONS, vol. 16, p. 1109, and the cross-references there given.

**12. Conspiracy.** — See the title CONSPIRACY, vol. 6, p. 872, and the cross-references following the analysis of that title.

**13. Negligence.** — See the titles COMPARATIVE NEGLIGENCE, vol. 6, p. 361; CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368; NEGLIGENCE, vol. 21, p. 455.

See also the titles ACCIDENT, vol. 1, p. 272; ACCIDENT INSURANCE, vol. 1, p. 284; ACT OF GOD, vol. 1, p. 584; ANIMALS, vol. 2, p. 341; ATTORNEY AND CLIENT, vol. 3, p. 379; BAILMENTS, vol. 3, p. 732; CARRIERS OF GOODS, vol. 5, p. 154; CARRIERS OF LIVE STOCK, vol. 5, p. 427; CARRIERS OF PASSENGERS, vol. 5, p. 474; COMMON CARRIERS, vol. 6, p. 236; CONNECTING CARRIERS, vol. 6, p. 603; COUPLING CARS, vol. 7, p. 1046; CROSSINGS, vol. 8, p. 335; DEATH BY WRONGFUL ACT, vol. 8, p. 851; DRUGGIST, vol. 10, p. 266; ELECTRIC-LIGHT COMPANIES, vol. 10, p. 861; ELECTRIC RAILROADS, vol. 10, p. 877; ELEVATED RAILROADS, vol. 10, p. 896; ELEVATORS, vol. 10, p. 944; EVIDENCE, vol. 11, p. 510; EXEMPLARY DAMAGES, vol. 12, p. 2; EXPLOSIONS AND EXPLOSIVES, vol. 12, p. 499; EXPRESS COMPANIES, vol. 12, p. 542; FELLOW SERVANTS, vol. 12, p. 893; FENCES, vol. 12, p. 1039; FERRIES, vol. 12, p. 1107; FIRE INSURANCE, vol. 13, p. 130; FIRES, vol. 13, p. 404; FLOODS, vol. 13, p. 685; FORWARDERS, vol. 13, p. 1165; GAS COMPANIES, vol. 14, p. 915; HIGHWAYS, vol. 15, p. 343; INDEPENDENT CONTRACTORS, vol. 16, p. 186; INJURIES TO ANIMALS BY RAILROADS, vol. 16, p. 471; INNS AND INN-KEEPERS, vol. 16, p. 505; INSANITY, vol. 16, p.



**6. Injuries to Property and Possession — a. WRONGS AFFECTING REAL PROPERTY.** — See note 1.

**b. WRONGS AFFECTING PERSONAL PROPERTY.** — See note 2.

**c. INFRINGEMENTS OF COPYRIGHTS, PATENTS, AND TRADEMARKS.** — See note 3.

**d. VIOLATION OF WATER RIGHTS.** — See note 4.

**e. DAMAGE BY ANIMALS.** — See note 5.

**7. Nuisances.** — See note 6.

**8. Escape of Dangerous Substances.** — See note 7.

**TORTURE.** — Torture is defined as extreme pain, anguish of body or mind, pang, agony, torment.<sup>a</sup>

623; LATERAL OR BRANCH RAILROADS, vol. 18, p. 569; LAW OF THE ROAD, vol. 18, p. 577; MASTER AND SERVANT, vol. 20, p. 3; MUNICIPAL CORPORATIONS, vol. 20, p. 1209; PHYSICIANS AND SURGEONS, vol. 22, p. 798; PILOTS, vol. 22, p. 821; PUBLIC OFFICERS, vol. 23, p. 375; RAILROADS, vol. 23, p. 667; RECEIVERS, vol. 23, p. 1096; RECEIVERS OF RAILROADS, vol. 24, p. 1; SHIPS AND SHIPPING, vol. 25, p. 854; STATIONS (RAILROAD), vol. 26, p. 495; STREET RAILWAYS, vol. 27, p. 3; STREETS AND SIDEWALKS, vol. 27, p. 99; TELEGRAPHS AND TELEPHONES, vol. 27, p. 998; TURNPIKES AND TOLL ROADS; TURN-  
TABLES; WAREHOUSE AND WAREHOUSEMAN.

**1. Injuries to Real Property.** — See the title TRESPASS, *post*.

For injuries by trespassing animals, see the title ANIMALS, vol. 2, p. 354.

For trespass in pursuit of game, see the title GAME AND GAME LAWS, vol. 14, p. 656.

For violations of the right of support, see the titles LATERAL AND SUBJACENT SUPPORT, vol. 18, p. 541; PARTY WALLS, vol. 22, p. 236.

For license in real estate law, see the title LICENSE (REAL PROPERTY), vol. 18, p. 1127.

For injuries to the fee by the tenant in possession, see the title WASTE.

**Wrongs Affecting Easements.** — See the title EASEMENTS, vol. 10, p. 397, and the cross-references there given.

**2. Injuries to Personal Property.** — See the title PERSONAL PROPERTY, vol. 22, p. 746, and the cross-references there given. See also the titles ACCESSION, vol. 1, p. 247; ANIMALS, vol. 2, p. 354; BAILMENTS, vol. 3, p. 732; CARRIERS OF GOODS, vol. 5, p. 154; CARRIERS OF LIVE STOCK, vol. 5, p. 427; CONFUSION OF GOODS, vol. 6, p. 592; LOGS AND LUMBER, vol. 19, p. 547; PLEDGE AND COLLATERAL SECURITY, vol. 22, p. 839; REPLEVIN, vol. 24, p. 475; SHERIFFS AND CONSTABLES, vol. 25, p. 658; TRESPASS, *post*; TROVER AND CONVERSION, *post*.

**3. Infringements of Copyrights, Patents, and Trademarks.** — See the titles COPYRIGHT, vol. 7, p. 567; PATENTS, vol. 22, p. 449; TRADEMARKS, *post*. See also the title LABELS, vol. 18, p. 70.

**4. Violation of Water Rights.** — See the titles BRIDGES, vol. 4, p. 918; DAMS, vol. 8, p. 699; DRAINS AND SEWERS, vol. 10, p. 220; FLOODS, vol. 13, p. 685; IRRIGATION, vol. 17, p. 485; LAKES AND PONDS, vol. 18, p. 129; NAVIGABLE WATERS, vol. 21, p. 424; WATERS AND WATERCOURSES.

**5. Injuries by Animals.** — See the title ANIMALS, vol. 2, p. 341.

As to the intervening acts of animals as affecting the question of natural and proximate cause, see DAMAGES, vol. 8, p. 573.

**6. Nuisances.** — See the title NUISANCES, vol. 21, p. 679, and the cross-references there given. See also the titles ABATEMENT OF NUISANCES, vol. 1, p. 63; BRIDGES, vol. 4, p. 925; HIGHWAYS, vol. 15, p. 491; NAVIGABLE WATERS, vol. 21, p. 443.

**7. Escape of Dangerous Substances.** — As to the liability of gas companies for the escape of gas, see the title GAS COMPANIES, vol. 14, p. 933.

As to explosions of dangerous substances, see the title EXPLOSIONS AND EXPLOSIVES, vol. 12, p. 499.

As to the escape of fire, see the title FIRES, vol. 13, p. 404.

As to the escape of water in dangerous quantities, see the titles DAMS, vol. 8, p. 717; FLOODS, vol. 13, p. 698.

See generally the title NUISANCES, vol. 21, p. 679.

**8. Burning.** — Territory *v.* Vialpando, 8 N. Mex. 211, quoting Webst. Dict., and holding further that a killing by burning was one perpetrated by means of *torture*.

**Cruelty to Animals.** (See also the title CRUELTY TO ANIMALS, vol. 8, p. 443.) — Under a statute providing that "every person who shall maliciously and cruelly maim, beat, or *torture* any horse, ox, or other cattle, whether belonging to himself or another, shall on conviction be adjudged guilty of a misdemeanor," etc., an indictment charging that the defendant did "unlawfully, maliciously, and cruelly *torture* the horses of one Samuel Hearrell \* \* \* by then and there tying brush and boards to the tails of said horses," was held to be insufficient. The court said: "In all acts of this character, the means of producing the torture must be averred, and the courts must see that such means have the inevitable and natural tendency to produce the effect in which the criminal charge consists. \* \* \* The *torture* here alluded to must consist in some violent, wanton, and cruel act necessarily producing pain and suffering to the animal." State *v.* Pugh, 15 Mo. 510. See also State *v.* Falkenhain, 73 Md. 466.

In the Stage-Horse Cases, (C. Pl. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 51, it was held that the driving of a horse while ignorant of the fact that it is sick or sore is not *per se* tormenting or *torturing* it within the meaning of the act relating to the powers of agents of

**TOTAL.** — See note 1.

**TOTAL DISABILITY.** — See the titles ACCIDENT INSURANCE, vol. 1, p. 296 *et seq.*; BENEVOLENT OR BENEFICIAL ASSOCIATIONS, vol. 3, p. 1110.

**TOTAL LOSS.** — See the titles ABANDONMENT AND TOTAL LOSS, vol. 1, p. 4; FIRE INSURANCE, vol. 13, p. 323; MARINE INSURANCE, vol. 19, p. 1052.

**TOUCH.** — See note 2.

**TOUCH AND STAY.** — See the title DEVIATION (IN MARINE INSURANCE), vol. 9, p. 437.

the American Society for the Prevention of Cruelty to Animals.

**Same — Pigeon Shooting.** — In *Waters v. People*, 23 Colo. 33, it was held that pigeon shooting was *torture*. To the same effect see *State v. Porter*, 112 N. Car. 887. Compare *State v. Bogardus*, 4 Mo. App. 215; *Com. v. Lewis*, 140 Pa. St. 261.

1. **Total.** — “The word *total* means ‘all,’ ‘the whole.’” *East Texas F. Ins. Co. v. Blum*, 76 Tex. 663.

“**Total Concurrent Insurance \$4,000.**” — See *East Texas F. Ins. Co. v. Blum*, 76 Tex. 653.

**Total Destruction of Building — Fire Insurance.** (See also the title FIRE INSURANCE, vol. 13, p. 323.) — In *Corbett v. Spring Garden Ins. Co.*, 85 Hun (N. Y.) 255, it was said: “There was sufficient to go to the jury upon the question

of whether the building had ‘lost its identity and specific character as a building.’ If it had, then there was a *total* destruction, within the meaning and intent of the parties and the policy. It is true there was no evidence to show that there was a total destruction of the component parts and material that made up the building; but there was evidence tending to show a *total* destruction of the building as a building, and it was this that was the subject-matter of the insurance.”

2. **Touch.** — In *Sloan v. State*, 42 Ind. 572, it was said: “The indictment also omits the word *touch*, which is found in the statute. In lieu of it the pleader has used the words ‘beat, strike, kick, stamp, trample upon, and wound,’ which, we think, and no doubt the prosecuting witness thinks, are fully equivalent to the word *touch*.”

# TOWAGE TUGS, AND TOWS.

BY HAROLD N. ELDRIDGE.

## I. DEFINITIONS, 261.

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### CROSS-REFERENCES.

*For a consideration of the rights and liabilities of tugs and tows with respect to third vessels, see the title SHIPS AND SHIPPING, vol. 25, p. 930.*

**I. DEFINITIONS.** — A Towage Service has been defined as the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating her progress.<sup>1</sup>

The Distinction Between Towage and Salvage is treated elsewhere in this work.<sup>2</sup>

A Tug is defined to be a small but powerful steam vessel, whether screw or paddle, constructed for the purpose of towing other vessels.<sup>3</sup>

A Tow means a vessel or a number of vessels that are being towed.<sup>4</sup>

**II. STATUTORY REGULATIONS** — 1. **Towage by Foreign Tugs Prohibited.** — In the *United States* by statute foreign steam tugs are prohibited under a penalty from towing documented vessels of the *United States* plying from one port or place in the same to another, except in cases where the towing in whole or in part is within or upon foreign waters.<sup>5</sup>

2. **Carrying Lights.** — Statutes exist in the *United States* regulating the carrying of lights by tugs and tows. These statutes are considered elsewhere in this work.<sup>6</sup>

**III. CONTRACTS OF TOWAGE** — 1. **Usage or Custom.** — As in other maritime contracts, usages or customs are usually applicable and binding on the parties to a contract for towage to explain doubtful, or to supplement incomplete, agreements and stipulations.<sup>7</sup>

2. **Authority of Master to Contract** — of Tug. — The usual business of a tug being to tow vessels, the master of the tug has ordinarily the implied authority

1. **Towage Defined.** — *The Princess Alice*, 3 W. Rob. 139; *The Nettie Quill*, 124 Fed. Rep. 667. See also *The Kilby*, 26 Eng. L. & Eq. 596, note; *The Reward*, 1 W. Rob. 177; *The Emily B. Souder*, 15 Blatchf. (U. S.) 189; *The H. B. Foster*, Abb. Adm. 222; *The Williams*, Brown Adm. 218; *McConnochie v. Kerr*, 9 Fed. Rep. 53; *The Fox*, 15 Fed. Rep. 639; *Smith v. Pierce*, 1 La. 349.

"When a tug is called or taken by a Sound vessel as a mere means of saving time, or from considerations of convenience, the service is classed as towage." *The Flottbek*, (C. C. A.) 118 Fed. Rep. 954.

2. **Distinguished from Salvage.** — See the title *SALVAGE*, vol. 24, p. 1185.

3. **Tug Defined.** — Cent. Dict.

"Towboat" Used Interchangeably with "Tug." — *Hays v. Paul*, 51 Pa. St. 134, 88 Am. Dec. 569.

4. **Tow Defined.** — Cent. Dict.

5. **Towage by Foreign Tugs Prohibited.** — *Dunsmuir v. Bradshaw*, (C. C. A.) 50 Fed. Rep. 440; *The Pilot*, (C. C. A.) 50 Fed. Rep. 437, reversing 48 Fed. Rep. 319, holding that under the treaty between the *United States* and *Great Britain* in 1846, fixing the boundary between the two countries in the *Straits of San Juan de Fuca* by a line following the middle of the strait, but also securing to each nation the right of free navigation over all waters of the strait, all the waters north of the boundary line are "foreign waters" within the meaning of the statute.

6. **Carrying Lights.** — See the title *SHIPS AND SHIPPING*, vol. 25, p. 954.

7. **Usages or Customs.** — *The Queen of the East*, 12 Fed. Rep. 165. And see *The Zouave*, Brown Adm. 110; *The Allie & Evie*, 24 Fed. Rep. 749. See also for a discussion of the general principles governing usage or custom the title *USAGE AND CUSTOM*.

to enter into towage contracts and bind the owner thereof.<sup>1</sup> But this implied authority does not extend to the master of a vessel whose usual business is not the towing of other vessels, so as to bind the owner of the towing vessel.<sup>2</sup>

**Of Tow.** — The master of a tow has the implied authority to enter into a towage contract and bind the owner thereby only when such towage is necessary.<sup>3</sup>

**IV. DUTIES IMPOSED ON TUG — 1. Duty as to Skill and Care Generally.** — An engagement to tow imposes on those in charge of the tug the duty of exercising a certain degree of skill and care with regard to everything connected with the towage service. The highest degree of skill and care is not required, however,<sup>4</sup> the tug being neither a common carrier<sup>5</sup> nor an insurer.<sup>6</sup> But rea-

**1. Vessels Engaged in Business of Towing.** — *The Thetis*, L. R. 2 A. & E. 365, 38 L. J. Adm. 42; *The Renpor*, 8 P. D. 115; *The James A. Wright*, 10 Blatchf. (U. S.) 160.

**2. Vessels Not Engaged in Business of Towing.** — *Walsh v. The Carl Haasted*, 3 N. J. L. J. 18, 29 Fed. Cas. No. 17,113; *Kimball v. The Dispatch*, 5 West. L. Month. 209, 14 Fed. Cas. No. 7,773.

**3. Services Must Be Necessary.** — A contract of towage between a tug and a shipmaster made when the ship was sixty miles at sea, the terms of the contract being that the ship should be taken into port and about the harbor when required and also to sea when ready if desired, is beyond the scope of the master's authority as being a contract for services not necessary at the time and as to the necessity for which in the future the master could know nothing. *The Clan MacLeod*, 38 Fed. Rep. 447.

See generally the title *MASTERS OF VESSELS*, vol. 20, p. 193.

**4. Highest Degree of Skill and Care Not Required.** — *The Margaret*, 94 U. S. 494; *The Tug Mosher*, 4 Biss. (U. S.) 274; *The Cayuga*, 16 Wall. (U. S.) 177; *Molenbrock v. St. Louis*, etc., *Packet Co.*, 5 McCrary (U. S.) 294; *Ulrich v. The Sunbeam*, 1 N. Y. L. J. 141, 24 Fed. Cas. No. 14,329; *The Hercules*, (C. C. A.) 73 Fed. Rep. 255; *The W. H. Simpson*, (C. C. A.) 80 Fed. Rep. 153; *Pederson v. John D. Spreckles*, etc., Co., (C. C. A.) 87 Fed. Rep. 938.

**Not Liable for Mere Errors of Judgment.** — *The W. E. Gladwish*, 17 Blatchf. (U. S.) 82; *The George L. Garlick*, 16 Fed. Rep. 703; *The Packer*, 28 Fed. Rep. 156; *The Wilhelm*, 52 Fed. Rep. 602, *affirming* 47 Fed. Rep. 89; *The Battler*, (C. C. A.) 72 Fed. Rep. 537; *The Hercules*, (C. C. A.) 73 Fed. Rep. 255; *The E. V. MacCauley*, 84 Fed. Rep. 500; *The Taurus*, 95 Fed. Rep. 699; *The E. Luckenbach*, (C. C. A.) 113 Fed. Rep. 1017, *affirming* 109 Fed. Rep. 487; *The Czarina*, 112 Fed. Rep. 541.

**5. Not a Common Carrier** — *United States*. — *The Steamer New Philadelphia*, 1 Black (U. S.) 62; *The Steamer Webb*, 14 Wall. (U. S.) 406; *The J. L. Hasbrouck*, 14 Blatchf. (U. S.) 30; *The Margaret*, 94 U. S. 494; *Transportation Line v. Hope*, 95 U. S. 297; *The J. P. Donaldson*, 167 U. S. 603; *Abbey v. The Steamboat Robert L. Stevens*, (U. S. Dist. Ct.) 22 How. Pr. (N. Y.) 78, 1 Fed. Cas. No. 8; *The Steamboat Angelina Corning*, 1 Ben. (U. S.) 109, 1 Fed. Cas. No. 384; *Brawley v. Steamboat Jim Watson*, 2 Bond (U. S.) 356, 4 Fed. Cas. No. 1,817; *The Steam Tug Enterprise*, 3 Wall. Jr. (C. C.) 58, 8 Fed. Cas. No. 4,500; *The Neaffie*,

1 Abb. (U. S.) 465, 17 Fed. Cas. No. 10,063; *The Princeton*, 19 Fed. Cas. No. 11,433a, *affirmed* 3 Blatchf. (U. S.) 54, 19 Fed. Cas. No. 11,434; *The Stranger*, Brown Adm. 281, 23 Fed. Cas. No. 13,525; *Bothwell v. Vessel-Owners' Towing Assoc.*, 6 Chicago Leg. N. 256, 3 Fed. Cas. No. 1,687; *Ulrich v. The Sunbeam*, 1 N. Y. L. J. 141, 24 Fed. Cas. No. 14,329; *Dunn v. The Steam-tug Young America*, 14 Phila. (Pa.) 532, 37 Leg. Int. (Pa.) 30, 8 Fed. Cas. No. 4,178; *The James Jackson*, 9 Fed. Rep. 614; *The Fannie Tuthill*, 12 Fed. Rep. 446; *The D. Newcomb*, 16 Fed. Rep. 274; *The M. J. Cummings*, 18 Fed. Rep. 178; *The Niagara*, 20 Fed. Rep. 152; *Bust v. Cornell Steam Boat Co.*, 24 Fed. Rep. 188; *The Allie & Evie*, 24 Fed. Rep. 745; *The Henry Buck*, 38 Fed. Rep. 611; *The A. R. Robinson*, 57 Fed. Rep. 667; *The Jacob Brandow*, 39 Fed. Rep. 831; *Munks v. Jackson*, 66 Fed. Rep. 571, 29 U. S. App. 482; *The W. H. Simpson*, (C. C. A.) 80 Fed. Rep. 153; *The Lady Wimet*, 92 Fed. Rep. 399; *Baker-Whiteley Coal Co. v. Neptune Nav. Co.*, (C. C. A.) 120 Fed. Rep. 247. But see *contra Vanderslice v. The Superior*, 2 Am. L. J. N. S. 347, 28 Fed. Cas. No. 16,843.

*Maine*. — *Berry v. Ross*, 94 Me. 270.

*Maryland*. — *Pennsylvania*, etc., *Steam Nav. Co. v. Dandridge*, 8 Gill & J. (Md.) 248, 29 Am. Dec. 543.

*New York*. — *Caton v. Rumney*, 13 Wend. (N. Y.) 387; *Alexander v. Greene*, 3 Hill (N. Y.) 9; *Wells v. Steam Nav. Co.*, 2 N. Y. 204, 8 N. Y. 375; *Parmalee v. Wilks*, 22 Barb. (N. Y.) 539; *Merrick v. Brainard*, 38 Barb. (N. Y.) 574; *Wooden v. Austin*, 51 Barb. (N. Y.) 9; *Arctic F. Ins. Co. v. Austin*, 54 Barb. (N. Y.) 559; *Carpenter v. Eastern Transp. Line*, 67 Barb. (N. Y.) 570; *Emiliusen v. Pennsylvania R. Co.*, 30 N. Y. App. Div. 203; *Tilley v. Beverwyck Towing Co.*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 581.

*Pennsylvania*. — *Leach v. Steamboat Miner*, 1 Phila. (Pa.) 144, 8 Leg. Int. (Pa.) 11; *Leonard v. Hendrickson*, 18 Pa. St. 40, 55 Am. Dec. 587; *Taylor v. Campbell*, 1 Pittsb. (Pa.) 459; *Hays v. Paul*, 51 Pa. St. 134, 88 Am. Dec. 569; *Brown v. Clegg*, 63 Pa. St. 51, 3 Am. Rep. 522.

But see *contra*, *White v. The Steam Tug Mary Ann*, 6 Cal. 462, 65 Am. Dec. 523; *Smith v. Pierce*, 1 La. 349; *Davis v. Houren*, 6 Rob. (La.) 255; *Millaudon v. Martin*, 6 Rob. (La.) 534; *Creen v. Croce*, 17 La. Ann. 3; *Clapp v. Stanton*, 18 La. Ann. 683; *Wood v. Harbor Towboat Co.*, McGloin (La.) 121; *Walston v. Myers*, 5 Jones L. (50 N. Car.) 174.

**6. Not an Insurer.** — *The Margaret*, 94 U. S.

sonable care and skill — the care and skill that prudent navigators employ in similar services — must be exercised in everything done;<sup>1</sup> and while, often, each case must be decided on its own peculiar facts, yet there are general rules of conduct which govern prudent navigators engaged in the business of towage and which those in charge of every tug undertake to know and follow, and disobey at their peril. These general rules as deduced from the cases are considered below.

**At Risk of Tow.** — An agreement that the towing shall be at the risk of the tow does not exempt the tug from reasonable skill and care in her navigation.<sup>2</sup>

494; *The Tug Mosher*, 4 Biss. (U. S.) 274; *The J. L. Hasbrouck*, 14 Blatchf. (U. S.) 30; *The Niagara*, 20 Fed. Rep. 152; *The Jacob Bradow*, 39 Fed. Rep. 831; *The T. J. Schuyler v. The Isaac H. Tillyer*, 41 Fed. Rep. 477; *The W. H. Simpson*, (C. C. A.) 80 Fed. Rep. 153; *The E. V. MacCaulley*, 84 Fed. Rep. 500; *The Lady Wimett*, 92 Fed. Rep. 399; *The E. Luckenbach*, (C. C. A.) 113 Fed. Rep. 1017, *affirming* 109 Fed. Rep. 487; *The Startle*, 115 Fed. Rep. 555; *Tilley v. Beverwyck Towing Co.*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 581.

**Not Liable for Inevitable Accidents.** — Inevitable accidents are necessary risks of the engagement. *The Julia*, 14 Moo. P. C. 210; *The Steamboat Deer*, 4 Ben. (U. S.) 352.

**1. Reasonable Skill and Care Required** — *England.* — *The Lyon*, Brown Adm. 59; *The Stranger*, Brown Adm. 281.

*United States.* — *Brawley v. Steamboat Jim Watson*, 2 Bond (U. S.) 356; *The Tug Oconto*, 5 Biss. (U. S.) 460; *The Neaffie*, 1 Abb. (U. S.) 465; *The Steamboat Angelina Corning*, 1 Ben. (U. S.) 109; *The Steamer Webb*, 14 Wall. (U. S.) 406; *The Princeton*, 3 Blatchf. (U. S.) 54; *The Brazos*, 14 Blatchf. (U. S.) 446; *The W. E. Gladwish*, 17 Blatchf. (U. S.) 77; *The Margaret*, 94 U. S. 494; *Transportation Line v. Hope*, 95 U. S. 297; *The J. P. Donaldson*, 167 U. S. 599; *Powell v. Steam-tug Willie*, 2 Fed. Rep. 95, *affirmed* 8 Fed. Rep. 768; *The James Jackson*, 9 Fed. Rep. 614; *The Fannie Tuthill*, 12 Fed. Rep. 446; *The D. Newcomb*, 16 Fed. Rep. 274; *The Bordentown*, 16 Fed. Rep. 270; *The M. J. Cummings*, 18 Fed. Rep. 178; *The Annie Williams*, 20 Fed. Rep. 866; *The E. A. Packer*, 22 Fed. Rep. 668; *The Mary R. McKillop*, 23 Fed. Rep. 829; *The Snap*, 24 Fed. Rep. 292; *Philadelphia, etc., R. Co. v. New England Transp. Co.*, 24 Fed. Rep. 505; *The Allie & Evie*, 24 Fed. Rep. 747; *The B. B. Saunders*, 25 Fed. Rep. 727; *The Young America*, 26 Fed. Rep. 174; *The Ellen McGovern*, 27 Fed. Rep. 868; *The Wm. N. Beach*, 29 Fed. Rep. 303; *The Robert H. Burnett*, 30 Fed. Rep. 214; *Phillips v. The Sarah*, 38 Fed. Rep. 252; *The Pierrepont*, 42 Fed. Rep. 687; *Pettie v. Boston Tow-boat Co.*, (C. C. A.) 49 Fed. Rep. 464; *The A. R. Robinson*, 57 Fed. Rep. 667; *The Hercules*, (C. C. A.) 73 Fed. Rep. 255; *The Nannie Lamberton*, (C. C. A.) 85 Fed. Rep. 983; *The Lady Wimett*, 92 Fed. Rep. 399; *The Kalkaska*, (C. C. A.) 107 Fed. Rep. 950; *The E. Luckenbach*, 109 Fed. Rep. 487; *The Czarina*, 112 Fed. Rep. 541; *The Startle*, 115 Fed. Rep. 561; *The Somers N. Smith*, 120 Fed. Rep. 569; *The Jane McCrea*, 121 Fed. Rep. 932; *The Temple Emery*, 122 Fed. Rep. 180; *The Acme*, 123 Fed. Rep. 814; *The Nettie Quill*, 124 Fed. Rep. 667.

*New York.* — *Wells v. Steam Nav. Co.*, 2 N. Y. 204; *Alexander v. Greene*, 3 Hill (N. Y.) 9; *Caton v. Rumney*, 13 Wend. (N. Y.) 389; *Parmalee v. Wilks*, 22 Barb. (N. Y.) 539; *Merrick v. Brainard*, 38 Barb. (N. Y.) 574; *Arctic F. Ins. Co. v. Austin*, 54 Barb. (N. Y.) 559; *Taft v. Carter*, 59 Barb. (N. Y.) 67; *Tilley v. Beverwyck Towing Co.*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 581.

*Pennsylvania.* — *Leech v. Steamboat Miner*, 1 Phila. (Pa.) 144, 8 Leg. Int. (Pa.) 14; *Leonard v. Hendrickson*, 18 Pa. St. 40, 55 Am. Dec. 587; *Brown v. Clegg*, 63 Pa. St. 51, 3 Am. Rep. 522; *Hays v. Paul*, 51 Pa. St. 134, 88 Am. Dec. 569; *Delaware, etc., Steam Towboat Co. v. Starrs*, 69 Pa. St. 36.

**Tug Is Bailee for Hire** and therefore responsible for ordinary skill and diligence. *The Merrimac*, 2 Sawy. (U. S.) 586; *The Princeton*, 19 Fed. Cas. No. 11,433a; *Bust v. Cornell Steam Boat Co.*, 24 Fed. Rep. 188; *Alexander v. Greene*, 3 Hill (N. Y.) 9. But see *contra*, that a tug is not a bailee, the dictum of Bronson, J., in *Wells v. Steam Nav. Co.*, 2 N. Y. 208, *criticised* in *The Merrimac*, 2 Sawy. (U. S.) 586.

**In Determining What Constitutes Reasonable Skill and Care** all the circumstances of the time and place, the capacity of the tug, the nature of the tow, and the length of the trip, must be taken into account. *The Frederick E. Ives*, 25 Fed. Rep. 447.

**Care and Attention Must Be in Proportion to Dangers Encountered** and the consequence of neglect. This is but common prudence. The greater the risk, the greater should be the effort to avoid it. *The W. E. Gladwish*, 17 Blatchf. (U. S.) 77.

**2. United States.** — *The Steamboat Brooklyn*, 2 Ben. (U. S.) 547; *The Princeton*, 3 Blatchf. (U. S.) 54; *The Syracuse*, 6 Blatchf. (U. S.) 2; *Deems v. Albany, etc., Line*, 14 Blatchf. (U. S.) 474; *The James Jackson*, 9 Fed. Rep. 614; *Hibernia Ins. Co. v. St. Louis, etc., Transp. Co.*, 17 Fed. Rep. 478, *affirmed* 120 U. S. 166; *The M. J. Cummings*, 18 Fed. Rep. 178; *The Rescue*, 24 Fed. Rep. 190; *The Packer*, 28 Fed. Rep. 156; *The Bordentown*, 40 Fed. Rep. 682; *The American Eagle*, 54 Fed. Rep. 1010; *The Jonty Jenks*, 54 Fed. Rep. 1023; *In re Moran*, 120 Fed. Rep. 556; *The Somers N. Smith*, 120 Fed. Rep. 569.

*New Jersey.* — *Ulrich v. The Tug Sunbeam*, 1 N. J. L. J. 141; *Ashmore v. Pennsylvania Steam Towing, etc., Co.*, 28 N. J. L. 180.

*New York.* — *Wells v. Steam Nav. Co.*, 8 N. Y. 375; *Wooden v. Austin*, 51 Barb. (N. Y.) 9; *Arctic F. Ins. Co. v. Austin*, 54 Barb. (N. Y.) 559.

*Pennsylvania.* — *Delaware, etc., Steam Tow-boat Co. v. Starrs*, 69 Pa. St. 36; *Vanderslice*



**2. Seaworthiness of Vessels Offered for Service** — *a. TUG.* — The tug offered for service must be properly equipped,<sup>1</sup> and of sufficient capacity and power to perform the service undertaken.<sup>2</sup>

*b. TOW.* — It is the duty of the tug not to undertake to tow a vessel which it knows or ought to know is unfit for the voyage to be undertaken,<sup>3</sup> by reason, for instance, of a weak or rotten hull,<sup>4</sup> defective equipment,<sup>5</sup> or improper loading.<sup>6</sup>

**3. Manning Tug.** — The tug offered for service must be properly manned.<sup>7</sup> This includes some responsible person in charge, separate and distinct from the wheelman and having no other duties during navigation,<sup>8</sup> a competent lookout,<sup>9</sup> and sometimes a pilot, where the navigation is unfamiliar and dangerous or it is the custom to employ one.<sup>10</sup>

**4. Making Up Tow.** — It is the duty of the tug to see that the tow is properly made up.<sup>11</sup>

**Securing Tow.** — The tug must ordinarily see that the tow is securely fastened<sup>12</sup>

*v. The Steam Towboat Superior*, 2 Am. L. J. 347, 4 Pa. L. J. Rep. 388.

But see *contra* *The United Service*, 9 P. D. 3.

**1. Properly Equipped.** — *The Merrimac*, 2 Sawy. (U. S.) 593; *The Miranda*, 43 Fed. Rep. 309; *The Minnehaha*, 15 Moo. P. C. 133.

**Defective Rudder Chain.** — *The M. M. Caleb*, 10 Blatchf. (U. S.) 467.

**Defective Compass.** — *The Frank G. Fowler*, 8 Fed. Rep. 360. And see *The Kalkaska*, (C. C. A.) 107 Fed. Rep. 962.

**Defective Steering Gear.** — *The Acme*, 123 Fed. Rep. 814.

**2. Sufficient Capacity and Power.** — *The Tug-Boat Francis King*, 7 Ben. (U. S.) 13; *The Merrimac*, 2 Sawy. (U. S.) 593; *Wilson v. Charleston Pilots' Assoc.*, 57 Fed. Rep. 227; *The Zouave*, 122 Fed. Rep. 890.

**Tug Reasonably Adequate for Work Undertaken.** — *The Allie & Evie*, 24 Fed. Rep. 745; *The Startle*, 115 Fed. Rep. 561.

**Tug Must Not Undertake to Tow More Vessels than It Can Properly Manage.** — *The Steam-tug George Farrell*, 4 Ben. (U. S.) 316.

**3. Unfit for Voyage.** — *Connolly v. Ross*, 11 Fed. Rep. 342; *The Bordentown*, 16 Fed. Rep. 270; *The Wm. Kraft*, 33 Fed. Rep. 847; *The Favorite*, 50 Fed. Rep. 569.

**Usual Examination Not Made.** — In *The Favorite*, 50 Fed. Rep. 569, the master of a tug was held to have failed in his duty who did not make the usual examination of the tow to ascertain her actual condition but relied on the assurance of the master of the tow that she was all right. In this case the unseaworthiness of the tow would have appeared on examination.

**4. Weak or Rotten Hull.** — *The Syracuse*, 18 Fed. Rep. 828; *The Wm. Kraft*, 33 Fed. Rep. 847.

**If Tugs Undertake to Handle Vessels Known to Be Old and Weak** they are bound to exercise additional caution in their treatment. *The Syracuse*, 18 Fed. Rep. 828.

**5. Defective Steering Apparatus.** — Where several vessels are to be towed the duty of the tug to the other vessels forbids the taking of a vessel known to steer badly. *Orhanovich v. The Steam-tug America*, 4 Fed. Rep. 337.

**6. Tow Improperly Loaded.** — *Mason v. The Steam-Tug William Murtaugh*, 3 Fed. Rep. 404; *Williams v. The Steam-tug Wm. Cox*, 3

Fed. Rep. 645; *Connolly v. Ross*, 11 Fed. Rep. 342.

**If the Character and Loading of the Tow Are Visible and Open to All**, such as an open flat loaded with metal, and her depth in the water and everything in regard to her is patent to all, the tug must not undertake to tow such flat if too heavily loaded or if containing too much water to be towed with safety. *Hays v. Paul*, 51 Pa. St. 134, 88 Am. Dec. 569.

**7. Properly Manned.** — *The Minnehaha*, 15 Moo. P. C. 133; *The Armstrong*, Brown Adm. 130.

**8. Responsible Person in Charge Distinct from Wheelman.** — *The Victor*, Brown Adm. 449; *The Coleman*, Brown Adm. 456; *The Zouave*, Brown Adm. 110; *The Armstrong*, Brown Adm. 130; *The John Fretter*, 13 Fed. Cas. No. 7,342.

**Master Must Not Act as Pilot and Engineer.** — *The Armstrong*, Brown Adm. 130.

**9. Lookout Necessary.** — *The Armstrong*, Brown Adm. 130; *The Frank G. Fowler*, 8 Fed. Rep. 360; *The Elk*, 95 Fed. Rep. 846.

**Master Acting as Pilot Not a Sufficient Lookout.** — *The Sea Breeze*, 2 Hask. (U. S.) 510, 21 Fed. Cas. No. 12,572a.

**10. A Pilot Is Part of the Tug's Crew** ordinarily, and the tug is responsible for his acts or omissions, *Pettie v. Boston Tow-boat Co.*, (C. C. A.) 49 Fed. Rep. 464; although he is licensed, *The E. M. Norton*, 15 Fed. Rep. 686; *The Martin Kalbfleisch*, (C. C. A.) 55 Fed. Rep. 336.

**Unlicensed Pilot.** — If the pilot is competent, it is immaterial, as affecting the tug's responsibility, that he is unlicensed. *Tebo v. Jordan*, 147 N. Y. 387, affirming 73 Hun (N. Y.) 218.

**11. Properly Made Up.** — *The Quickstep*, 9 Wall. (U. S.) 665; *The Stranger*, Brown Adm. 281; *The Mechanic*, 9 Fed. Rep. 526; *The Bordentown*, 16 Fed. Rep. 270; *The Pres. Briarly*, 24 Fed. Rep. 478; *The Florence*, 88 Fed. Rep. 302; *Tilley v. Beverwyck Towing Co.*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 581.

**12. Securely Fastened.** — *The Florence*, 88 Fed. Rep. 302; *Tilley v. Beverwyck Towing Co.*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 581.

In *The Sweepstakes*, Brown Adm. 514, the court says: "Undoubtedly it was the duty of the tug to see that the line was securely fastened, no matter what mode of fastening was adopted, and so as to hold in all emergencies likely to happen, whether ordinary or extraor-

to the tug, with lines of proper length,<sup>1</sup> and of strength sufficient to hold them together in any weather ordinarily to be anticipated.<sup>2</sup> And it is the duty of the tug to see that the lines are of sufficient strength although they are furnished by the tow.<sup>3</sup>

**Tow Whether Abreast or Behind Tug.** — The position of the tow with reference to the tug, whether abreast or behind, especially when there are several boats in tow, will sometimes depend on the width of the channel.<sup>4</sup>

**Where Several Boats Are in Tow** their position with reference to each other must often be determined from such circumstances as their condition of seaworthiness,<sup>5</sup> and draught.<sup>6</sup>

**5. Navigating Tow** — *a. GENERAL CONSIDERATIONS* — (1) *Tow in Control of Tug.* — Ordinarily the tug has control of the tow during navigation and is responsible for the time and manner of making the voyage or transportation,<sup>7</sup> although the relation between the tug and tow may be modified by express agreement, or by the reasonable implication arising from the circumstances and nature of the employment in a particular case, so as to make the tug the mere servant of the tow and under its direction.<sup>8</sup>

dingary; and the fact that it did not so hold is the best evidence that the duty was not performed. I know of no safe rule other than to hold tugs responsible *prima facie*, in all cases, for injuries resulting from the tow line slipping or giving way from its fastening upon the tug. The expert testimony shows, and without it common sense teaches, that a tow line can be fastened so that it will not slip, and therefore the above rule is not unreasonable."

**Must Be Properly Coupled.** — *The Pencoyd*, 113 Fed. Rep. 682.

**1. Lines of Proper Length.** — *O'Brien v. New etc.*, Transp. Co., 31 Fed. Rep. 494.

**For Towing Through the Draw of a River Bridge** a line thirty-five fathoms or more is too long. *Booye v. L'Engle*, 57 Fed. Rep. 306.

**For Towing in a Narrow Channel** a vessel with a bowsprit fourteen feet long, a line which brings such bowsprit within forty feet of the stern of the tug is not too long. *O'Brien v. New York, etc.*, Transp. Co., 31 Fed. Rep. 494.

**For Towing Through Hell Gate** a hawser measuring two hundred and fifty feet is not too long. *The Josephine B.*, (C. C. A.) 58 Fed. Rep. 813.

**2. Lines of Proper Strength.** — *The Tug-boat Francis King*, 7 Ben. (U. S.) 11; *The Quickstep*, 9 Wall. (U. S.) 665; *The Margaret*, 94 U. S. 494; *The Pres. Briarly*, 24 Fed. Rep. 478; *The E. V. MacCaulley*, 84 Fed. Rep. 500; *The Florence*, 88 Fed. Rep. 302; *The Columbia*, (C. C. A.) 109 Fed. Rep. 660; *Baker-Whiteley Coal Co. v. Neptune Nav. Co.*, (C. C. A.) 120 Fed. Rep. 247; *In re Moran*, 120 Fed. Rep. 563; *Tilley v. Beverwyck Towing Co.*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 581. And see *The E. V. McCaulley*, (C. C. A.) 90 Fed. Rep. 510.

**Breaking of Old Hawser by Swell of Passing Steamer** causing additional strain on line, see *The Columbia*, 124 Fed. Rep. 745.

**3. Lines Furnished by Tow.** — *The Quickstep*, 9 Wall. (U. S.) 671. In this case the court said: 'In the nature of the employment her [the tug's] officers could tell better than the men on the boats what sort of a line was re-

quired to secure the boats together and to keep them in their positions."

**4. Taking Tow Abreast Between Piers of Bridges.** — *The Lady Pike*, 21 Wall. (U. S.) 1; *The Julia*, 91 Fed. Rep. 171; *Taft v. Carter*, 59 Barb. (N. Y.) 67. And see *The Florence*, 88 Fed. Rep. 302.

**5. Putting Boat in Hawser Tier.** — An open deck canal boat deeply laden, with low coamings, is unfit to go in the hawser tier where the trip undertaken will occupy a sufficient time to encounter all kinds of weather. *The Niagara*, 20 Fed. Rep. 152.

**A Badly Steering Vessel** must not be put at the rear of the tow. *Orhanovich v. The Steam-tug America*, 4 Fed. Rep. 337.

**6. Vessels of Heavy Draught** should be placed behind those of lighter draught. *The Zouave*, Brown Adm. 110; *The Morton*, Brown Adm. 139; *The Sweepstakes*, Brown Adm. 509; *O'Brien v. New York, etc.*, Transp. Co., 31 Fed. Rep. 494. And see *Orhanovich v. The Steam-tug America*, 4 Fed. Rep. 337.

**7. Tow under Control of Tug Ordinarily.** — *The Merrimac*, 2 Sawy. (U. S.) 593; *Sturgis v. Boyer*, 24 How. (U. S.) 122; *The Minnie*, 20 Fed. Rep. 543; *The Delaware*, 20 Fed. Rep. 797; *The T. J. Schuyler v. The Isaac H. Tillyer*, 41 Fed. Rep. 477; *Pettie v. Boston Tow-Boat Co.*, (C. C. A.) 49 Fed. Rep. 466; *The Florence*, 88 Fed. Rep. 302; *The Ashbourne*, 112 Fed. Rep. 687; *In re Moran*, 120 Fed. Rep. 563.

**Tow Is Dominant Mind.** — In the towing of vessels without motive power the tug is to be regarded as the dominant mind or will in the adventure. *The Margaret*, 94 U. S. 496; *The Fannie Tuthill*, 12 Fed. Rep. 446; *The Allie & Evie*, 24 Fed. Rep. 745.

**8. Tug When Servant of Tow.** — *The Merrimac*, 2 Sawy. (U. S.) 593.

**Effect of Custom.** — In passing through Hell Gate, where a special pilot is taken on board the tow, the established custom and duty as between the tug and tow are for the pilot to control and direct the navigation through Hell Gate, and for the tug to keep ahead of the tow as nearly as possible and to govern her

(2) *Giving Directions for Management of Tow.* — The responsibility resting with the tug to control the navigation requires it to give proper directions and orders for the management of the tow from time to time as occasion requires,<sup>1</sup> depending on the dangers and hazards encountered;<sup>2</sup> and to see that such directions are obeyed.<sup>3</sup>

(3) *As to Speed.* — Due care and skill require that the tug shall accustom its speed to the perils of navigation.<sup>4</sup>

**Sudden Jerks.** — Care must be taken to have the speed fairly uniform so that no danger to the tow will result from sudden jerks.<sup>5</sup>

(4) *Knowledge of Waterways and Channels.* — Due skill and care in the navigation of the tow require that the tug shall know the proper and accustomed waterways and channels.<sup>6</sup> This includes a knowledge of the proper course to be pursued,<sup>7</sup> condition of the bottom,<sup>8</sup> ascertained obstructions,<sup>9</sup>

course and actions by the course of her tow. *The Strathay*, 27 Fed. Rep. 562.

**1. Must Give Proper Directions and Orders.** — *The Jane McCrea*, 121 Fed. Rep. 932; *Hays v. Paul*, 51 Pa. St. 134, 88 Am. Dec. 569.

**Confused and Contradictory Orders** must not be given. *Dutton v. Steam-tug Express*, 3 Cliff. (U. S.) 462.

**An Improper Order Given in a Moment of Imminent Peril** is not a fault, however. *The Zouave*, Brown Adm. 110.

**2. Depending on Dangers and Hazards Encountered.** — *The Jane McCrea*, 121 Fed. Rep. 932.

**3. Must See that Directions Obeyed.** — *The Jane McCrea*, 121 Fed. Rep. 932.

**Must See that Tow Follows in Wake.** — *The N. and W. No. 2*, 102 Fed. Rep. 921.

In going through narrow channels where any sheering on the part of the tow would be dangerous, it is the duty of the tug to see that the tow is following in the wake of the tug as near as possible. *Gildersleeve v. New York, etc., R. Co.*, 82 Fed. Rep. 763.

**4. Proper Speed.** — *The Steamboat Angelina Corning*, 1 Ben. (U. S.) 109; *Wilson v. Chicago*, 42 Fed. Rep. 506; *The Rambler*, 66 Fed. Rep. 355; *Pederson v. John D. Spreckles, etc., Co.*, (C. C. A.) 87 Fed. Rep. 938; *The Delta*, 125 Fed. Rep. 133.

**Vessel Towed So Fast Against Ebb Tide as to Cause Tow to Capsize.** — See *The Tug Trojan*, 8 Ben. (U. S.) 498.

**Vessel Towed So Fast Through Swells from Steamboat as to cause a lighter to careen, take water, and capsize.** See *The J. J. Driscoll*, 27 Fed. Rep. 521.

**Vessel Towed So Slowly in Swift Current as to Carry Tow Ashore.** — See *The Farnsworth*, 6 Fed. Rep. 307.

**5. Sudden Jerks.** — *The E. Luckenback*, 23 Fed. Rep. 725, *affirming* 15 Fed. Rep. 924; *Wilson v. Sibley*, 36 Fed. Rep. 379.

**6. Proper Waterways and Channels.** — *The Armstrong*, Brown Adm. 130; *The Steamer Webb*, 14 Wall. (U. S.) 414; *The Tug Mosher*, 4 Biss. (U. S.) 274; *The Steamer America*, 6 Ben. (U. S.) 122; *The Margaret*, 94 U. S. 494; *The Effie J. Simmons*, 6 Fed. Rep. 639; *The Henry Chapel*, 10 Fed. Rep. 777; *The E. M. Norton*, 15 Fed. Rep. 686; *The Venture*, 18 Fed. Rep. 462; *The Mary N. Hogan*, 30 Fed. Rep. 927; *Phillips v. The Sarah*, 38 Fed. Rep. 252; *The Pierrepont*, 42 Fed. Rep. 687; *Pettie*

*v. Boston Tow-boat Co.*, (C. C. A.) 49 Fed. Rep. 464; *Charles Warner Co. v. U. S.*, 101 Fed. Rep. 884; *The Somers N. Smith*, 120 Fed. Rep. 569; *The Jane McCrea*, 121 Fed. Rep. 932.

**7. Proper Course Pursued.** — *The Propeller Burlington*, 137 U. S. 386; *Dutton v. Steam-tug Express*, 3 Cliff. (U. S.) 462; *The Tug C. F. Ackerman*, 8 Ben. (U. S.) 496; *The Nathan Hale*, 91 Fed. Rep. 682; *The Zouave*, 122 Fed. Rep. 890.

**What Is a Proper Course** is sometimes very hard to determine, as it is largely dependent upon the season of the year, the state of the weather, the velocity of the wind, the probability of a storm, and the proximity of the harbors of refuge. A course is not proper, however, which good seamanship would deem unauthorized and reckless. *The James P. Donaldson*, 19 Fed. Rep. 264; or which is manifestly more dangerous than the other open courses. *The Steam Tug Mohawk*, 7 Ben. (U. S.) 139.

**Usual Course Not Always Proper Course.** — *The Gladiator*, (C. C. A.) 79 Fed. Rep. 445.

**8. Condition of Bottom.** — *The Effie J. Simmons*, 6 Fed. Rep. 639; *The Robert H. Burnett*, 30 Fed. Rep. 214.

**Nature and Formation of Bottom, Whether in Its Natural State or as Changed by Permanent Excavations,** must be known. *The Henry Chapel*, 10 Fed. Rep. 777.

**A Shifting Channel,** however, the tug cannot and is not obliged to know. *The Tug Mosher*, 4 Biss. (U. S.) 274.

**9. Ascertained and Accustomed Obstructions** must be known. *Pettie v. Boston Tow-boat Co.*, (C. C. A.) 49 Fed. Rep. 464; *The Steamer America*, 6 Ben. (U. S.) 122; *The Ellen McGovern*, 27 Fed. Rep. 868; *The Mary N. Hogan*, 35 Fed. Rep. 554; *The T. J. Schuyler v. The Isaac H. Tillyer*, 41 Fed. Rep. 477; *The Pierrepont*, 42 Fed. Rep. 687; *The Mascot*, (C. C. A.) 57 Fed. Rep. 512, 48 Fed. Rep. 917; *The Florence*, 88 Fed. Rep. 302; *The Nettie Quill*, 124 Fed. Rep. 670.

**Location of Well-known Reef.** — *The Robert H. Burnett*, 30 Fed. Rep. 214.

**Location of Well-known Ledge of Rock.** — *The Mary N. Hogan*, 35 Fed. Rep. 554.

**Well-known Sunken or Dilapidated Piers** — *The Steamboat Deer*, 4 Ben. (U. S.) 352; *The Jonty Jenks*, 54 Fed. Rep. 1021; *Vessel Owners'*



bridges,<sup>1</sup> position of buoys,<sup>2</sup> depth of water,<sup>3</sup> shoals<sup>4</sup> and bars,<sup>5</sup> currents,<sup>6</sup> and tides as affecting depth of water and action on the tow in taking it out of the wake of the tug.<sup>7</sup>

(5) *Handling of Tow Such as to Avoid Unusual Contacts.* — There is no doubt that tugs in undertaking the towage of vessels are entitled to assume, in the absence of notice to the contrary, that they are in reasonably sound condition and able to receive without damage all the usual and ordinary contacts of navigation, whether in making up or shifting the tow, or in landing the boats at the piers. But this rule in no way justifies any rude, rough, or indifferent handling of boats, nor absolves the tug from the duty of navigating with reasonable care, so as to avoid contacts that may become injurious.<sup>8</sup>

**Old and Weak Boats.** — If tugs undertake to handle boats that are known to be old and weak they must handle them with more than ordinary care and prudence.<sup>9</sup>

*Towing Co. v. Wilson*, (C. C. A.) 63 Fed. Rep. 626.

**Well-known Sunken Wrecks.** — *O'Hare v. The Steam-tug Brilliant*, 3 Fed. Rep. 719; *The Sally McDevitt v. The J. W. Paxton*, 24 Fed. Rep. 302; *The Rescue*, 74 Fed. Rep. 847; *The Florence*, 88 Fed. Rep. 302; *The Edmund L. Levy*, 108 Fed. Rep. 435; *The Mabel S.*, 113 Fed. Rep. 971.

**Unknown Obstructions.** — But it is of course not the duty of the tug to know unascertained obstructions in the regular channel. *The Steamboat Angelina Corning*, 1 Ben. (U. S.) 109; *The Steamer America*, 6 Ben. (U. S.) 122; *Powell v. Steam-tug Willie*, 2 Fed. Rep. 95; *The James A. Garfield*, 21 Fed. Rep. 474; *The Mary N. Hogan*, 30 Fed. Rep. 927; *The Pierrepont*, 42 Fed. Rep. 687; *The Mascot*, (C. C. A.) 57 Fed. Rep. 512; *The Taurus*, 95 Fed. Rep. 699.

**Position of Unknown Log in Channel Cannot Be Known.** — *The Nettie Quill*, 124 Fed. Rep. 667.

**Location of Unknown Sunken Rocks Cannot Be Known.** — *The Steamboat Angelina Corning*, 1 Ben. (U. S.) 109; *Whitehead v. The Tempest*, 29 Fed. Cas. No. 17,563a; *The James A. Garfield*, 21 Fed. Rep. 474; *The Pierrepont*, 42 Fed. Rep. 687; *The Florence*, 88 Fed. Rep. 302; *The Belle*, (C. C. A.) 93 Fed. Rep. 833.

**1. Must Keep Tow Away from Bridge Piers.** — *The Steamboat Brooklyn*, 2 Ben. (U. S.) 547; *The Venture*, 18 Fed. Rep. 462; *The Isaac H. Tillyer v. The T. J. Schuyler*, 35 Fed. Rep. 551; *Booye v. L'Engle*, 57 Fed. Rep. 306; *The J. H. De Graff*, 66 Fed. Rep. 351; *Gildersleeve v. New York, etc., R. Co.*, 82 Fed. Rep. 763; *The Julia*, 91 Fed. Rep. 171; *The C. F. Roe*, 108 Fed. Rep. 285; *The Belle*, 110 Fed. Rep. 451.

**Must Exercise Care in Towing Vessel under Bridge** which is too low at certain stages of the tide. *McMillan v. Moran*, 107 Fed. Rep. 149.

**2. Buoys.** — But the tug cannot rely absolutely on the position of a buoy in the harbor. *The Hercules*, 81 Fed. Rep. 218.

**3. Depth of Water.** — *The Effie J. Simmons*, 6 Fed. Rep. 639; *The Henry Chapel*, 10 Fed. Rep. 777; *The Atlas*, 12 Fed. Rep. 798; *The C. B. Sanford*, 13 Fed. Rep. 910; *The Minnie*, 20 Fed. Rep. 543; *The Robert H. Burnett*, 30 Fed. Rep. 214; *The T. J. Schuyler v. The Isaac H. Tillyer*, 41 Fed. Rep. 477; *Pettie v. Boston Tow Boat Co.*, (C. C. A.) 49 Fed. Rep. 464.

**How Near the Shore or Bank of Channel It Is Safe to Go Should Be Known.** — *The Vigilant*, 8

Fed. Rep. 921; *The Atlas*, 12 Fed. Rep. 798; *The Ellinmere*, 39 Fed. Rep. 909; *The S. S. Wilhelm*, (C. C. A.) 59 Fed. Rep. 169.

**Soundings** must be made where there is any doubt as to the depth of the water. *The Zouave*, Brown Adm. 110; *The Adelia*, 154 U. S. 593.

**4. Shoals.** — *The Oceanic*, (C. C. A.) 74 Fed. Rep. 642; *Berry v. Ross*, 94 Me. 270.

**5. Must Know Bars** and when it is safe to cross. *The Brazos*, 14 Blatchf. (U. S.) 446; *Humboldt Lumber Manufacturers' Assoc. v. Christopherson*, (C. C. A.) 73 Fed. Rep. 239; *The Florence*, 88 Fed. Rep. 302.

**6. Currents.** — *The T. J. Schuyler v. The Isaac H. Tillyer*, 41 Fed. Rep. 477; *Pettie v. Boston Tow-Boat Co.*, (C. C. A.) 49 Fed. Rep. 464; *Hays v. Paul*, 51 Pa. St. 134, 88 Am. Dec. 569.

**Cross Currents** between piers of bridges which span rivers somewhat diagonally are not infrequent, and as they are not always fully appreciable to the casual observer, it is important that master mariners should know of their existence and something of their force in order that they may steer the tug properly through such a passage. *The Lady Pike*, 21 Wall. (U. S.) 1.

**7. Tides.** — *The Steamboat Brooklyn*, 2 Ben. (U. S.) 547; *The Brazos*, 14 Blatchf. (U. S.) 446; *The Minnie*, 20 Fed. Rep. 543; *The Delaware*, 20 Fed. Rep. 797; *The T. J. Schuyler v. The Isaac H. Tillyer*, 41 Fed. Rep. 477; *Pettie v. Boston Tow-Boat Co.*, (C. C. A.) 49 Fed. Rep. 464; *The America*, 95 Fed. Rep. 191.

**8. Unusual Contacts Avoided.** — *The Victoria*, 88 Fed. Rep. 524.

"The practice of running vessels or canal boats in tow, whether new or old, against other vessels or piers, for the purpose of rapid handling, is dangerous, sure to lead to disputes, and when approaching anything like a forcible blow, must be held to be at the risk of those who practice it." *The Syracuse*, 18 Fed. Rep. 828.

**Bumping Against Piers Must Be Reasonable.** — *The Workman*, 1 Lowell (U. S.) 504; *The Steam Tug Gen. Geo. G. Meade*, 8 Ben. (U. S.) 481; *The Syracuse*, 18 Fed. Rep. 828; *O'Neil v. The I. M. North*, 37 Fed. Rep. 270; *The Victoria*, 88 Fed. Rep. 524; *In re Ramsay*, 95 Fed. Rep. 299.

**9. Handling Old and Weak Boats.** — *The Syracuse*, 18 Fed. Rep. 828; *The Wm. Kraft*, 33 Fed. Rep. 847.

*b. PROPER TIME FOR STARTING.* — Ordinarily, the tug must undertake the towage service only when the conditions are such that in the judgment of nautical men it is reasonably safe to do so.<sup>1</sup> It often shows want of care on the part of a tug to start out during or on the eve of a storm,<sup>2</sup> or when darkness has set in or is near at hand,<sup>3</sup> or during a fog,<sup>4</sup> or when the wind is very strong<sup>5</sup> and there is a heavy sea running,<sup>6</sup> or when navigation is unsafe by reason of floating ice.<sup>7</sup> But the law does not require that the tug shall start only when there is no possible danger.<sup>8</sup> And the parties to the towage service may agree that the start shall be made at an improper time, in which case, of course, the tug is only liable for due care and skill in navigating at a perilous time.<sup>9</sup>

*c. GETTING TOW INTO AND OUT OF PIER.* — The method adopted by the tug in getting the tow into and out of piers must be such as experience shows is proper and safe.<sup>10</sup>

*d. DEVIATIONS AND DELAYS* — (1) *In General.* — It may be said generally that it is the duty of the tug to convey the tow expeditiously and by the most direct customary route to her destination.<sup>11</sup> But deviations and delays are sometimes permitted and sometimes are necessary for safety.

(2) *To Land Other Boats in Tow.* — Parties who take their places in tow with other boats do so on the implied understanding that the other boats are to be, or may be, left on the way, and any necessary delay or deviation for that purpose is permissible, the only duty of the tug being so to land boats as not to imperil in any way the safety of those not landing.<sup>12</sup>

(3) *Seeking Refuge and Anchorage.* — Conditions may arise during the tow-

1. **Conditions Must Indicate a Safe Trip.** — The *Allie & Evie*, 24 Fed. Rep. 745; The *T. J. Schuyler v. The Isaac H. Tillyer*, 41 Fed. Rep. 477.

**Circumstances Considered.** — The time for performing the towage service must be selected with reference to the craft to be towed, the wind and tide, and other ordinary peculiarities of the navigation. The *Merrimac*, 2 Sawy. (U. S.) 593.

**Observing Weather Predictions.** — It is not the duty of tugs navigating the Hudson river to be advised of weather predictions as to storms on the Atlantic coast before starting out, where it is not the custom to be governed by such predictions and it does not appear that Hudson river navigation is ordinarily affected by coast storms. The *Victoria*, (C. C. A.) 95 Fed. Rep. 184.

2. **Storm.** — The *Steamboat Blanche Page*, 4 Ben. (U. S.) 186; The *Adelia*, 154 U. S. 593; The *E. A. Packer*, 22 Fed. Rep. 668; The *Allie & Evie*, 24 Fed. Rep. 745; *Bouker v. Smith*, 40 Fed. Rep. 839; The *W. J. Keyser*, (C. C. A.) 56 Fed. Rep. 731; The *Hercules*, (C. C. A.) 73 Fed. Rep. 255; The *Victoria*, 79 Fed. Rep. 122; The *E. V. MacCaulley*, 84 Fed. Rep. 500, (C. C. A.) 90 Fed. Rep. 510; The *E. Luckenbach*, (C. C. A.) 113 Fed. Rep. 1017; The *Temple Emery*, 122 Fed. Rep. 180; *Tucker v. Gallagher*, 122 Fed. Rep. 847.

In the *Allie & Evie*, 24 Fed. Rep. 749, the court says: "But there is no rule of law, and I am not prepared to hold, that short towing trips must be condemned so long as the barometer is low, though rising, and cautionary signals are displayed, in the absence of all other indications of probable bad weather."

3. **Darkness.** — The *Adelia*, 154 U. S. 593.

**Passing Through a Drawbridge in the Darkness**

is dangerous. *Booye v. L'Engle*, 57 Fed. Rep. 306.

4. **Fog.** — The *Battler*, 62 Fed. Rep. 612; The *E. Luckenbach*, 117 Fed. Rep. 977.

5. **Wind May Be So Strong as to Make Venturing Out Unsafe.** — The *Snap*, 24 Fed. Rep. 292; The *Bordentown*, 40 Fed. Rep. 682; *In re McWilliams*, (C. C. A.) 74 Fed. Rep. 648; The *Nannie Lamberton*, 79 Fed. Rep. 121, (C. C. A.) 85 Fed. Rep. 983; The *Ashbourne*, 112 Fed. Rep. 687.

6. **Heavy Sea Running.** — The *Vandercook*, 65 Fed. Rep. 251.

7. **Floating Ice.** — The *Steam-tug U. S. Grant*, 7 Ben. (U. S.) 337; The *Steam-tug Gen. Wm. McCandless*, 10 Ben. (U. S.) 453.

8. **Possibility of Danger Need Not Be Considered.** — The *Allie & Evie*, 24 Fed. Rep. 745.

9. **Agreement to Make Start at Unsuitable Time.** — The *Steamtug Alfred and Edwin*, 7 Ben. (U. S.) 137; The *E. A. Packer*, 22 Fed. Rep. 668.

**Ice Obstructions.** — Start made by agreement notwithstanding ice made navigation dangerous. The *E. A. Packer*, 22 Fed. Rep. 670. And see The *W. E. Gladwish*, 17 Blatchf. (U. S.) 83.

10. **Method Adopted Must Be Safe.** — The *Propeller M. A. Lennox*, 4 Ben. (U. S.) 190; The *Steam-tug M. A. Caleb*, 4 Ben. (U. S.) 15.

11. **Must Convey Expeditiously and by Most Direct Route.** — *Phillips v. The Sarah*, 38 Fed. Rep. 252.

**Delay Resulting in Stranding of Tow by Reason of Fall of Tide.** — *Preston v. Biornstad*, (1898) A. C. 513, 67 L. J. P. 73.

12. **May Deviate to Land Boats.** — *White v. Steam-tug Lavergne*, 2 Fed. Rep. 788; The *Mary R. McKillop*, 23 Fed. Rep. 829.

age service which make it unsafe to continue on the course.<sup>1</sup> In such a case it becomes the duty of the tug to seek a safe refuge and anchorage for the tow until the voyage can with safety be undertaken again.<sup>2</sup>

*e. ABANDONMENT OF TOW* — (1) *Temporary Abandonment*. — Where refuge and anchorage are sought because of bad weather, the state of the tide, or for any other good reason, due care does not require that the tug shall stay by the tow the whole time, but it may leave the same and, if it likes, engage in other business in the meantime.<sup>3</sup> Before doing so, however, it must exercise care and skill in seeing that the tow is in a safe place and securely moored;<sup>4</sup> and where there is any doubt of the safety of the tow, watch should be kept over it to ascertain occasionally and seasonably whether assistance is needed.<sup>5</sup>

*Towing Vessels in Sections*. — Where there are several vessels in tow it may become necessary or convenient to tow at times in sections, in which case, of course, the tug is obliged to be away from one or more sections. The only duty of the tug is to see that a section temporarily abandoned is in a safe place and is properly moored.<sup>6</sup>

(2) *Permanent Abandonment*. — A tug does not warrant that she will be able to complete the voyage under all circumstances and hazards, but only that she will use her best endeavors to do so.<sup>7</sup> Where the voyage is abandoned on account of obstacles which the tug does not undertake to overcome, there still remains the obligation to take reasonable care of the tow and not to leave it until it is in a place of safety;<sup>8</sup> unless, of course, that becomes impossible or perilous to do, as where the tow is sinking or past saving or the tug is injured or in great danger.<sup>9</sup>

*f. TERMINATION OF VOYAGE*. — It is the duty of the tug at the end of the

1. *Snowstorm Obstructing Sight*. — The *Armstrong*, Brown Adm. 130.

*Impending Storm*. — The *M. M. Caleb*, 10 Blatchf. (U. S.) 467; The *Frank G. Fowler*, 8 Fed. Rep. 340; The *George L. Garlick*, 16 Fed. Rep. 704; The *Young America*, 25 Fed. Rep. 207; The *Frederick E. Ives*, 25 Fed. Rep. 447; The *Charles Runyon*, 46 Fed. Rep. 813; The *Wilhelm*, 47 Fed. Rep. 89; The *American Eagle*, 54 Fed. Rep. 1010; The *Taurus*, 63 Fed. Rep. 137; The *John M. Nicol*, (C. C. A.) 63 Fed. Rep. 275; The *Governor*, 77 Fed. Rep. 1000; The *Carbonero*, (C. C. A.) 122 Fed. Rep. 753.

*Winds and Tides* such as to prevent tug from entering home port. The *Margaret*, 94 U. S. 494; The *Steamboat P. C. Schultz*, 10 Ben. (U. S.) 536.

*Low Tide*. — The *Thomas Purcell, Jr.*, (C. C. A.) 92 Fed. Rep. 406.

*Thick Fog* preventing tug from following true course. The *Gratitude*, 25 Fed. Rep. 160.

2. *Safe Place of Refuge and Anchorage*. — The *Battler*, (C. C. A.) 72 Fed. Rep. 537; The *Thomas Purcell, Jr.*, (C. C. A.) 92 Fed. Rep. 406; The *Alabama*, 114 Fed. Rep. 214.

3. *Tug Need Not Stay by Tow*. — The *Steamboat P. C. Schultz*, 10 Ben. (U. S.) 536; The *Charles Runyon*, 46 Fed. Rep. 813; The *Battler*, 55 Fed. Rep. 1006, (C. C. A.) 72 Fed. Rep. 537. And see *The Mechanic*, 9 Fed. Rep. 526.

4. *Left in Safe Place*. — *Connolly v. Ross*, 11 Fed. Rep. 342; The *Battler*, 55 Fed. Rep. 1006; The *Steamboat P. C. Schultz*, 10 Ben. (U. S.) 536; The *Charles Runyon*, 46 Fed. Rep. 813.

5. *Watch Kept over Tow*. — The *Battler*, 55 Fed. Rep. 1006.

6. *Abandoning Sections Temporarily*. — *Connolly v. Ross*, 11 Fed. Rep. 342; The *Charles Runyon*, 46 Fed. Rep. 813.

7. The *Minnehaha*, 15 Moo. P. C. 133.

8. *Cokeley v. The Snap*, 24 Fed. Rep. 504. In this case the trip was abandoned on account of ice.

"If in a storm the hawser breaks, and prudence requires the crew of the tow to board the tug, this does not justify the master of the tug in turning his back, and abandoning the property intrusted to him." *In re Moran*, 120 Fed. Rep. 564.

9. *When Tug May Abandon Tow Permanently*. — *In re Moran*, 120 Fed. Rep. 564. See also The *Clematis*, Brown Adm. 499; The *Miranda*, 40 Fed. Rep. 533; The *W. J. Keyser*, (C. C. A.) 56 Fed. Rep. 731; The *O. L. Halenbeck*, 110 Fed. Rep. 556; *Jacobsen v. Lewis Klondike Expedition Co.*, (C. C. A.) 112 Fed. Rep. 73; The *Czarina*, 112 Fed. Rep. 541; *Cahill's Appeal*, (C. C. A.) 124 Fed. Rep. 63.

*When a Tow Grounds* it is ordinarily the tug's duty to remain with her after the grounding and attempt to put her in a position of safety. The *M. D. Wheeler*, 100 Fed. Rep. 859; unless in doing so the tug is endangered, The *Tug Mosher*, 4 Biss. (U. S.) 274.

*Cutting the Tow Adrift Is Sometimes Justifiable* when both tug and tow are in great danger of being driven ashore during a severe storm. *Sonsmith v. The J. P. Donaldson*, 21 Fed. Rep. 671; The *Del Norte*, 111 Fed. Rep. 542.

*Where the Tow Breaks Loose* it may be so dangerous for the tug to pick her up as to justify abandonment. The *R. C. Veit*, 56 Fed. Rep. 122.



voyage to stay by the tow so long as anything remains to be done affecting the safety of the tow.<sup>1</sup>

**V. DUTIES IMPOSED ON TOW — 1. Duty as to Skill and Care Generally.** — The contract of towage imposes on the tow the duty of exercising reasonable care and skill generally throughout the voyage as to everything which it undertakes or is obliged by the express or implied terms of the contract or by law to perform.<sup>2</sup>

**2. Seaworthiness of Tow Offered for Service.** — The vessel offered for towage must be seaworthy<sup>3</sup> or fit for the voyage,<sup>4</sup> and sufficiently strong, stanch, and sound to meet and withstand the ordinary perils to be encountered.<sup>5</sup> The equipment must be proper<sup>6</sup> and there must be no overloading.<sup>7</sup>

**Giving Notice of Infirmary.** — If the boat to be towed has some infirmity which makes her less stanch and strong than she appears to be, it is incumbent on the owner of the boat to give notice of such infirmity so that she may be handled with more care by the tug.<sup>8</sup>

**As to Misrepresentations.** — All representations by the tow of material facts affecting the way in which she will be handled must be correctly stated.<sup>9</sup>

**3. Making Up Tow.** — Ordinarily, it is the duty of the tug properly to make up the tow.<sup>10</sup> But where the tow takes control of some of the work it must see that what it does is properly executed.<sup>11</sup>

**4. During Navigation — Tow Lashed to Tug.** — The responsibility of the tow during navigation is dependent on the mode of towage. Where the tow is lashed to the side of the steam tug and depends entirely upon the latter as well for steerage as for motive power, the responsibility for the navigation of both is wholly on the steam tug, as the tow is as completely under the control of the steam tug as if she were a part of that vessel. Cases arise, however,

**1. Duty at Termination of Voyage.** — *Wilming-ton Transp. Co. v. The Old Kensington*, 39 Fed. Rep. 496; *The A. M. Ball*, 43 Fed. Rep. 170; *Emiliusen v. Pennsylvania R. Co.*, 30 N. Y. App. Div. 203.

**2. Reasonable Skill and Care by Tow.** — *The Margaret*, 94 U. S. 494; *The M. J. Cummings*, 18 Fed. Rep. 178; *The Jacob Brandow*, 39 Fed. Rep. 831; *Pederson v. John D. Spreckles, etc., Co.*, (C. C. A.) 87 Fed. Rep. 938; *The Mars*, 116 Fed. Rep. 204; *The Thomas Wilson*, 124 Fed. Rep. 654; *Sproul v. Hemmingway*, 14 Pick. (Mass.) 7.

**3. Seaworthy.** — *The Merrimac*, 2 Sawy. (U. S.) 593; *Cramer v. Allen*, 5 Blatchf. (U. S.) 248; *The J. L. Hasbrouck*, 14 Blatchf. (U. S.) 30; *The Jonty Jenks*, 54 Fed. Rep. 1023; *Bouker v. Smith*, 40 Fed. Rep. 843; *The Favorite*, 50 Fed. Rep. 569.

**Must Be as Seaworthy as Vessels of the Same Class and Construction Usually Are.** — *The Mer-rimac*, 2 Sawy. (U. S.) 593.

**4. Fit for Voyage.** — *Mason v. The Steam-tug William Murtaugh*, 3 Fed. Rep. 408.

**Hatches must not be imperfect.** *Philadelphia, etc., R. Co. v. New England Transp. Co.*, 24 Fed. Rep. 505.

**5. Sufficiently Strong to Withstand Ordinary Perils.** — In *Mason v. The Steam-tug William Murtaugh*, 3 Fed. Rep. 408, the court says: "It is undoubtedly true that a master of a boat, offering his boat to be towed, represents her as seaworthy, or fit for the voyage, and sufficiently strong, stanch, and sound to meet and withstand the ordinary perils to be encountered upon the voyage; and, in many cases of the loss of the boat towed upon the voyage, the tug has been absolved from responsibility be-

cause of the unseaworthiness of the tow, and her inability, by reason of weakness and decay, or of leaks, to bear the voyage."

**But Strength Need Not Be Sufficient to Withstand Stranding Without Leakage.** — *Bouker v. Smith*, 40 Fed. Rep. 839.

**6. Anchor Part of Equipment.** — *Cramer v. Allen*, 5 Blatchf. (U. S.) 248; *The J. L. Hasbrouck*, 14 Blatchf. (U. S.) 30; *Brown v. Cornell Steamboat Co.*, 110 Fed. Rep. 780.

**Pumps should be in good condition.** *Philadelphia, etc., R. Co. v. New England Transp. Co.*, 24 Fed. Rep. 505.

**Sufficient and Proper Ballast.** — *La Escoesso*, 116 Fed. Rep. 400; *Williamson v. McCaldin Bros. Co.*, (C. C. A.) 122 Fed. Rep. 63.

**Lights or Other Means of Signaling should be part of the tow's equipment.** *The M. J. Cummings*, 18 Fed. Rep. 178.

**Lines.** — The tow must have proper hawsers and moving lines. *The J. L. Hasbrouck*, 14 Blatchf. (U. S.) 30; *The No. 6 H*, 108 Fed. Rep. 433.

**7. Tow Properly Loaded.** — *The King Kalakau*, 43 Fed. Rep. 172; *The Harry and Fred*, 49 Fed. Rep. 681; *The Jonty Jenks*, 54 Fed. Rep. 1023.

**8. Notice of Infirmary.** — *The Syracuse*, 18 Fed. Rep. 828.

**9. Must Not Misrepresent Draught of Tow.** — *The Coney Island*, 115 Fed. Rep. 751.

**10. See supra, this title, Duties Imposed on Tug — Making Up Tow.**

**11. The Tow Must See that It Is Securely Fastened to the tug when the tow assumes to look after the fastenings.** *Pederson v. John D. Spreckles, etc., Co.*, (C. C. A.) 87 Fed. Rep. 938.

where the tow is propelled by a hawser extending from the forward part of the tow to the stern of the steam tug, and in such cases a different rule applies.<sup>1</sup>

**Tow Propelled by Hawser.** — While a tow propelled by a line or hawser is in a general sense under the control of the tug,<sup>2</sup> still there are certain duties incumbent on it.<sup>3</sup> It must obey all proper orders of the tug,<sup>4</sup> be steered properly and follow as far as possible in the wake of the tug,<sup>5</sup> and, in short, perform all those duties which nautical skill demands for the proper management of a tow.<sup>6</sup>

**VI. COMPENSATION FOR TOWAGE SERVICE** — 1. Amount of Compensation —  
*a. FIXED BY AGREEMENT.* — Where the parties have agreed on the amount of compensation for the towage, such agreement will be enforced provided it is not unconscionable.<sup>7</sup>

**As to Pro Rata Recovery.** — Where it is agreed for a fixed amount to tow from one place to another, and it becomes impossible, through no fault of either tug or tow, to perform the contract of towage, there can nevertheless be no recovery by the tug of *pro rata* compensation for whatever towage has been performed, the contract of towage being entire.<sup>8</sup>

*b. NOT FIXED BY AGREEMENT.* — Where the parties have not agreed upon the amount of compensation for the towage, a reasonable compensation will be allowed.<sup>9</sup>

**What Is a Reasonable Compensation** depends sometimes upon whether the towage is done by a tug fitted for and engaged in the business of towing, or by a vessel engaged in a different business. It has been held that reasonable compensation in the case of a merchant vessel plying between ports, which goes out of its way to render towage service to a disabled vessel, means something more than ordinary towage compensation.<sup>10</sup>

*c. ADDITIONAL COMPENSATION AS SALVAGE.* — If in the performance of the contract of towage, by sudden violence of wind or waves, or other accidents, the ship in tow is placed in danger, and the towing vessel incurs risks

1. Dutton *v.* Steam-tug Express, 3 Cliff. (U. S.) 462.

2. **Tow in Control of Tug.** — See *supra*, this title, *Duties Imposed on Tug — Navigating Tow — General Considerations — Tow in Control of Tug.*

3. **Certain Duties Incumbent on Tow.** — See The Tug Margaret, 5 Biss. (U. S.) 357.

4. **Must Obey Proper Orders.** — Dutton *v.* Steam-tug Express, 3 Cliff. (U. S.) 462; The Margaret, 94 U. S. 494; The Zouave, Brown Adm. 110; The Annie Williams, 20 Fed. Rep. 866; The Jacob Brandow, 39 Fed. Rep. 831; The J. H. De Graff, 66 Fed. Rep. 351.

**Must Keep Close Watch and Obey All Signals.** — The Maria Martin, 2 Biss. (U. S.) 41; The Mars, 116 Fed. Rep. 204.

**Must Not Obey Improper Signals, However.** — The J. H. De Graff, 66 Fed. Rep. 351.

**Tow Has Right to Assume that Any Signal from the Tug Was Made with Authority.** — The J. H. De Graff, 66 Fed. Rep. 351.

5. **Steered Properly and Kept in Wake.** — The Margaret, 94 U. S. 494; The Merrimac, 2 Sawy. (U. S.) 593; The Zouave, Brown Adm. 110; Stretch *v.* The Tug Margaret, 2 Fed. Rep. 255; The Jacob Brandow, 39 Fed. Rep. 831; The T. J. Schuyler *v.* The Isaac H. Tillyer, 41 Fed. Rep. 477; The N. and W. No. 2, 102 Fed. Rep. 921; The Ravenscourt, 103 Fed. Rep. 668; The Columbia, (C. C. A.) 109 Fed. Rep. 660.

In The Tug Margaret, 5 Biss. (U. S.) 353, the court says: "It will not do, in other words, to leave the tow without a suitable man

at the helm, and the course of the tow must be directed in the wake of the tug."

**The Tow Must Not Follow in the Tug's Wake** However, if it sees the tug running into danger and dragging it there also. In such a case the duty of the tow is to use all means to avoid the danger, even to cutting loose if necessary. The Thomas Wilson, 124 Fed. Rep. 649.

6. **Must Perform All Duties Which Nautical Skill Demands.** — The Tug Margaret, 5 Biss. (U. S.) 353.

7. **Agreement Must Not Be Unconscionable.** — The Sophia Hanson, 16 Fed. Rep. 144.

**In Nature of Salvage.** — Where the service is in the nature of salvage an agreement for compensation in excess of customary towage rates will be enforced. The Atkins Hughes, 114 Fed. Rep. 410.

8. **Pro Rata Recovery.** — The Madras, (1898) P. 90, 67 L. J. P. 53, 78 L. T. N. S. 325, 8 Asp. M. Cas. 397.

9. **Reasonable Compensation Allowed.** — The Steamer Leipsic, 5 Fed. Rep. 113; The Flottbek, (C. C. A.) 118 Fed. Rep. 954; Syson *v.* Hieronymus, 127 Ala. 482.

**Running Expenses,** including the amount and value of coal used on the towage trip, are properly considered in arriving at the proper compensation when no amount was agreed on. Syson *v.* Hieronymus, 127 Ala. 482.

10. **Compensation for Towage by Merchant Vessel.** — The Emily B. Souder, 15 Blatchf. (U. S.) 191; The J. C. Pfluger, 109 Fed. Rep. 93.

and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor instead of being restricted to the sum stipulated to be paid for mere towage. Whether this larger remuneration is to be considered in addition to, or in substitution for, the price of towage, is of little consequence practically. The measure of the sum to be allowed as salvage would, of course, be increased or diminished according as the price of towage was or was not included in it. In the cases on this subject the towage contract is generally spoken of as superseded by the right to salvage.<sup>1</sup>

**2. When Payable.** — In the absence of some express stipulation in the contract of towage fixing the time of payment, the ordinary rule that payment for services is not exigible until after the services are rendered will prevail, in the absence of a custom of the port where the contract is made fixing the time of payment.<sup>2</sup>

**VII. MARITIME LIENS — 1. In General.** — The general principles relating to maritime liens are treated elsewhere in this work.<sup>3</sup>

**2. For Towage Services.** — Where towage services are not rendered in the home port of the tow,<sup>4</sup> a maritime lien is generally presumed to exist upon the tow in favor of the tug for such services,<sup>5</sup> in the absence of any evidence that they were rendered on the personal credit of the party making the contract or of other circumstances negating a credit on the tow.<sup>6</sup>

**Service Not Fully Performed.** — Where only a part of the towage service contracted for has been rendered, a lien exists nevertheless to the extent of the whole service to be performed.<sup>7</sup> But no lien exists where the contract for the service is wholly executory, that is, where none of the service contracted for has been rendered.<sup>8</sup>

**Dredges and Scows Used in One Enterprise.** — Several dredges and scows when used together in one dredging enterprise do not constitute a single vessel so as to give a lien on all for towage services performed for one or more.<sup>9</sup>

**As to Priority of Lien for Towage** — The priority of a lien for towage services is treated elsewhere in this work.<sup>10</sup>

**1. Additional Compensation as Salvage.** — The *Minnehaha*, 15 Moo. P. C. 152.

For the distinction between towage and salvage service, see the title *SALVAGE*, vol. 24, p. 1185.

**2. When Payable.** — *The Queen of the East*, 12 Fed. Rep. 165. In this case it was held that by reason of a custom of the port the whole amount of compensation was due before the tow left the port.

**3. For General Principles relating to maritime liens**, see the title *MARITIME LIENS*, vol. 19, p. 1123.

**4. Exception Where Services Rendered in Home Port.** — *Dalzell v. The Daniel Kaine*, 31 Fed. Rep. 746. But see *contra* *The General Cass*, Brown Adm. 334.

**5. Lien Presumed to Exist.** — *The Canal Boat W. J. Walsh*, 5 Ben. (U. S.) 72; *Sturtevant v. The Bark George Nicholas*, Newb. Adm. 449, 23 Fed. Cas. No. 13,578; *Ward v. The Banner*, 14 Law Rep. 465, 29 Fed. Cas. No. 17,149; *The John Cuttrell*, 9 Fed. Rep. 777; *The Samuel J. Christian*, 16 Fed. Rep. 796; *The Frank G. Fowler*, 17 Fed. Rep. 653; *The J. W. Tucker*, 20 Fed. Rep. 129; *The Grapeshot*, 22 Fed. Rep. 123; *The Alabama*, 22 Fed. Rep. 449; *The Frank*, 25 Fed. Rep. 287; *The Mystic*, 30 Fed. Rep. 73; *L'Hommiedieu v. The H. L. Dayton*, 38 Fed. Rep. 926; *Saylor v. Taylor*, (C. C. A.) 77 Fed. Rep. 476; *A Scow Without a Name*,

80 Fed. Rep. 736; *The Sleepy Hollow*, 114 Fed. Rep. 367; *The Newport*, (C. C. A.) 114 Fed. Rep. 713; *The Acadia*, Brown Adm. 73; *Learmouth v. The Yuba*, 14 Quebec 132.

**6. Presumption of Lien Overcome.** — *The Canal Boat J. M. Welsh*, 8 Ben. (U. S.) 211, 13 Fed. Cas. No. 7,327; *The Sarah Cullen*, (C. C. A.) 49 Fed. Rep. 166; *The Erastina*, 50 Fed. Rep. 126; *The Stroma*, (C. C. A.) 53 Fed. Rep. 281; *The Columbus*, (C. C. A.) 67 Fed. Rep. 553; *The Tillie A.*, 84 Fed. Rep. 684; *The Saratoga*, 100 Fed. Rep. 480.

**Giving Notice by Owner of Tow that Bill Was to Be Rendered to Third Party** may affect the existence of the lien. *The Tillie A.*, 84 Fed. Rep. 684.

**When the Tow Is Chartered, Knowledge by the Tug of That Fact** may affect the existence of the lien in the absence of some express understanding with the owner of the tow. *The Mary A. Tryon*, 93 Fed. Rep. 220.

**7. Part Performance.** — *The Queen of the East*, 12 Fed. Rep. 165.

**8. Unexecuted Contract.** — *The Prince Leopold*, 9 Fed. Rep. 333. In this case there was no performance, nor even tender of performance.

**9. Dredges and Scows Not One Vessel.** — *The Columbus*, (C. C. A.) 67 Fed. Rep. 553, affirming 65 Fed. Rep. 430.

**10. Priority of Lien for Towage.** — See the title *MARITIME LIENS*, vol. 19, p. 1123.



**3. For Damages to Tow.** — A maritime lien exists upon the tug in favor of the tow for damages resulting to the tow through the negligence of the tug.<sup>1</sup> But such a lien is subordinate to seamen's wages and also to claims of materialmen for repairs and coal which were subsisting at the time the damages occurred.<sup>2</sup>

**4. Waiver of Lien.** — The rule is well settled that a lien for towage service must be enforced without undue delay, and unless due diligence is exercised it is waived as against a purchaser without notice.<sup>3</sup>

**VIII. ACTIONS — 1. Jurisdiction.** — The subject of the jurisdiction of courts of admiralty over towage contracts is treated elsewhere in this work.<sup>4</sup>

**2. For Negligence of Tug in Performance of Duties** — *a. IN GENERAL.* — For the failure of the tug to exercise reasonable care and skill in the performance of the towage contract, whereby an injury results to the tow, an action *ex delicto* by the tow lies to recover damages for such injury.<sup>5</sup>

The Direct and Immediate Cause of the Injury to the tow must be the failure of the tug to exercise reasonable skill and care. If the negligence is only the remote cause of the injury no action lies.<sup>6</sup>

*b. PARTY DEFENDANT.* — The owner of the tug is ordinarily responsible for the failure of the crew to exercise due care and skill, whereby an injury occurs to the tow.<sup>7</sup>

*c. EFFECT OF CONTRIBUTORY NEGLIGENCE OF TOW.* — The failure of the tow to exercise due care and skill in the performance of the towage contract, whereby it contributes to the injury it has suffered, does not affect the tow's right of action against the tug for negligence where the action is brought in a

**1. Lien upon Tug for Damages.** — The John G. Stevens, 170 U. S. 113.

**2. Subordinate to What.** — The Samuel J. Christian, 16 Fed. Rep. 796.

**3. Waiver of Lien.** — The Frank, 25 Fed. Rep. 287.

**4. Jurisdiction of Admiralty Courts over Towage Contracts.** — See the title ADMIRALTY JURISDICTION, vol. 1, pp. 661, 662.

**5. Tort Lies for Negligence.** — The Steamboat Brooklyn, 2 Ben. (U. S.) 547; The Steamboat Deer, 4 Ben. (U. S.) 352; Dutton v. Steam Tug Express, 3 Cliff. (U. S.) 462; The M. J. Cummings, 18 Fed. Rep. 178; The Jacob Brandow, 39 Fed. Rep. 831; The Startle, 115 Fed. Rep. 556; Ashmore v. Pennsylvania Steam Towing, etc., Co., 28 N. J. L. 180.

**Obligation Not to Commit Tort Does Not Arise Out of Contract of Towage.** — In The Steamboat Brooklyn, 2 Ben. (U. S.) 547, Blatchford, J., said: "In the present case the obligation of the steamboat not to commit a tort against the canal boat did not arise out of the contract of towage any more than the obligation of a third vessel meeting the canal boat on her trip, not to collide with her, arose out of such contract or out of any contract. The obligation of the steamboat not to commit such tort arose out of the principle applicable in all cases of tort — *sic utere tuo ut non alienum ladas*. Her duty did not result from the consideration paid or to be paid for the towage. It was imposed by the law, and would have existed even though her service had been gratuitous. If the libellant's property was lawfully where it was, the steamboat owed a duty toward it independent of any contract of towage, and is liable for a collision and the consequent damage to such property caused by negligent navigation

amounting to a breach of such duty. The duty was of the same character as that imposed by the law upon a third and stranger vessel."

**6. Direct and Immediate Cause.** — The E. V. McCaulley, (C. C. A.) 90 Fed. Rep. 510; The M. D. Wheeler, 100 Fed. Rep. 859; The Startle, 115 Fed. Rep. 555; *In re Moran*, 120 Fed. Rep. 556; The Thomas Wilson, 124 Fed. Rep. 649.

"There are always many antecedents to a given catastrophe, but for the existence of which the result inquired about would not have occurred. It is, however, only the direct and immediate cause, under the control of human agency, which can be judicially considered." The Startle, 115 Fed. Rep. 555, quoted in *In re Moran*, 120 Fed. Rep. 556.

**Negligent Coupling** held not a cause of injury to tow, The Pencoyd, 113 Fed. Rep. 682.

**Breaking of Imperfect Hawser When Tow Was Sinking** held not to contribute to disaster, The E. V. McCaulley, 84 Fed. Rep. 500. And see The E. V. McCaulley, (C. C. A.) 90 Fed. Rep. 510.

**Line of Improper Length.** — It is not negligence under all circumstances for a tug to tow a vessel with a great length of line. To render her liable it must be shown by a fair preponderance of proof that the collision resulted from such dangerous length of line. The Captain Sam, 115 Fed. Rep. 1000.

**7. Owner Liable for Negligence of Crew.** — The Adam W. Spies, 70 L. J. P. 25.

**Owner Liable for Negligence of Pilot** though employed at request of owner of tow. The Martin Kalbfleisch, (C. C. A.) 55 Fed. Rep. 336; or by compulsion of law, The Adam W. Spies, 70 L. J. P. 25.

court of admiralty.<sup>1</sup> It does, however, affect the amount of damages that the tow can recover.<sup>2</sup>

**IX. DAMAGES — 1. Resulting from Negligent Towage — a. IN GENERAL.** — In the absence of contributory negligence the damages recoverable by the tow for injuries sustained by it because of the failure of the tug to exercise reasonable skill and care are such as are the direct and immediate result of such failure to use care and skill.<sup>3</sup>

*b. AS TO DIVISION OF DAMAGES.* — But where the tow contributes to the injuries sustained by it through the negligence of the tug, no matter what the degree of contribution is, courts of admiralty will divide the damages growing out of the injuries received, and each party must bear one-half of the same.<sup>4</sup>

**2. Resulting from Breach of Contract to Tow.** — The damages recoverable for the failure of the tug to carry out the contract of towage are the difference between the contract price agreed upon, and the expense the tow is put to in securing another tug to complete the contract.<sup>5</sup>

**X. EVIDENCE — 1. Burden of Proof in Action Ex Delicto.** — In actions *ex delicto* by a tow against a tug for injuries received through the failure of the tug to exercise reasonable skill and care in the performance of the towage contract, the burden of proof is upon the tow to show that the act of the tug

**1. Right of Action Not Affected.** — *Cramer v. Allen*, 5 Blatchf. (U. S.) 248; *Mason v. The Steam Tug William Murtaugh*, 3 Fed. Rep. 404; *Pettie v. Boston Tow-boat Co.*, 44 Fed. Rep. 383; *The Favorite*, 50 Fed. Rep. 569; *The Jonty Jenks*, 54 Fed. Rep. 1021; *The Julia*, 91 Fed. Rep. 171.

**2. Affects Amount of Damages Recoverable.** — See *infra*, this title, IX. *b. As to Division of Damages.*

**3. Damages Such as Naturally Result from Negligent Towage.** — *Cramer v. Allen*, 5 Blatchf. (U. S.) 248; *McCormick v. Jarrett*, 37 Fed. Rep. 380; *Pettie v. Boston Tow-boat Co.*, 44 Fed. Rep. 382; *The Startle*, 115 Fed. Rep. 555.

**The Drifting of a Tow Down Niagara River and over the Falls** was held, in *Cramer v. Allen*, 5 Blatchf. (U. S.) 248, to be the direct and immediate consequence of a collision of the tow with piles in the river some four miles above the falls, whereby the hawser fastening the tow to the tug broke, and damages were recoverable for the total loss of the tow.

**The Cost of Pumping a Tow**, which sunk and filled with water, from the time of the accident until she was taken to the dry-dock, is a proper item of damages. *O'Hare v. The Steam-Tug Brilliant*, 3 Fed. Rep. 719.

**The Cost of Rescuing a Stranded Tow** is a proper item of damages; but when the tow refuses the offer of the negligent tug to rescue her, the damages recoverable are limited to what the loss would have been if the offer had been accepted. *The Bronx*, 86 Fed. Rep. 808.

**The Amount Paid for Repairs to the Injured Tow** may be recovered as damages. *O'Hare v. The Steam-tug Brilliant*, 3 Fed. Rep. 719; *The James H. Brewster*, 34 Fed. Rep. 77.

But only such amount can be recovered for repairs as is sufficient to put the tow in a condition corresponding with its previous condition. *O'Neil v. The I. M. North*, 37 Fed. Rep. 270.

**Any Loss Caused to Personal Property** on board the tow is a proper item of damages. *The Steam Propeller J. L. Hasbrouck*, 6 Ben. (U.

S.) 272; *O'Hare v. The Steam-tug Brilliant*, 3 Fed. Rep. 719; *The Favorite*, 50 Fed. Rep. 569.

**Demurrage** for the tow from the time of the accident until the time she was let off the ways may be recovered as damages. *O'Hare v. The Steam-tug Brilliant*, 3 Fed. Rep. 719.

**Cost of Removing Wrecked Tow** from channel of river a proper item of damages, *The Wm. Kraft*, 33 Fed. Rep. 847.

**Salvage Paid by Tow for Being Hauled Off Shoal Is a Proper Item of Damage.** — *The Tug C. F. Ackerman*, 8 Ben. (U. S.) 496.

**4. Damages Divided.** — *The Maria Martin*, 2 Biss. (U. S.) 41; *Cramer v. Allen*, 5 Blatchf. (U. S.) 248; *The J. L. Hasbrouck*, 14 Blatchf. (U. S.) 30; *Mason v. The Steam-tug William Murtaugh*, 3 Fed. Rep. 404; *The M. J. Cummings*, 18 Fed. Rep. 178; *The Syracuse*, 18 Fed. Rep. 828; *The E. A. Packer*, 22 Fed. Rep. 668; *Philadelphia, etc., R. Co. v. New England Transp. Co.*, 24 Fed. Rep. 505; *The Wm. Kraft*, 33 Fed. Rep. 847; *The W. A. Levering*, 36 Fed. Rep. 511; *Pettie v. Boston Tow-boat Co.*, 44 Fed. Rep. 382; *The Favorite*, 50 Fed. Rep. 569; *The Jonty Jenks*, 54 Fed. Rep. 1021; *The William W. Wood*, 66 Fed. Rep. 601; *The C. R. Stone*, 68 Fed. Rep. 934; *The N. and W. No. 2*, 102 Fed. Rep. 921; *Brown v. Cornell Steamboat Co.*, 110 Fed. Rep. 780; *The Jane McCrea*, 121 Fed. Rep. 932.

**If the Tow Be Unfit to Encounter the Hazards of the Trip**, Damage for any loss sustained by the tow due in part to such unfitness will be divided. *Mason v. The Steam-tug William Murtaugh*, 3 Fed. Rep. 404; *The William Cox*, 9 Fed. Rep. 672; *Connolly v. Ross*, 11 Fed. Rep. 342; *The Bordentown*, 16 Fed. Rep. 270; *The M. J. Cummings*, 18 Fed. Rep. 178; *The Wm. Kraft*, 33 Fed. Rep. 847.

**5. Damages Resulting from Breach of Contract.** — *The Vincenz Pinotti*, 16 Fed. Rep. 926. In this case the master of the tow refused to state what it cost to have the contract completed, and damages were given for the contract price.



causing the injuries was a negligent one.<sup>1</sup> Nevertheless very little evidence is sometimes necessary to sustain such burden of proof. Thus the mere circumstance of the place where the injury occurs may be enough to justify the conclusion, in the absence of a satisfactory explanation from the tug, that the injury was the result of the tug's negligence.<sup>2</sup>

**At Owner's Risk.** — Where the tug seeks to show an agreement that the towage was to be at the risk of the tow, the burden of proof is upon the tug to show such agreement.<sup>3</sup>

**2. Burden of Proof in Action Ex Contractu — In General.** — The burden is always upon him who alleges the breach of a contract to tow, to show such breach.<sup>4</sup>

**As to Remuneration for Services of Tug.** — The party seeking to show an agreement for compensation for towage service rendered has the burden of proof.<sup>5</sup>

**That Lien for Towage Service Was Not Intended.** — The burden of showing that towage services were not intended to be a lien on the tow, but that they were rendered on the personal credit of some one, is ordinarily on the tow, the presumption being that a lien was intended.<sup>6</sup>

## TOWARDS. (See also TO, *ante*.) — See note 7.

**1. Burden of Proof on Tow.** — The Princeton, 3 Blatchf. (U. S.) 54; The W. E. Gladwish, 17 Blatchf. (U. S.) 82; The Steamer Webb, 14 Wall. (U. S.) 414; The Propeller Burlington, 137 U. S. 386; The Mechanic, 9 Fed. Rep. 526; The Mary, 14 Fed. Rep. 584; The Packer, 28 Fed. Rep. 156; The Pierrepoint, 42 Fed. Rep. 687; Richter *v.* The Olive Baker, 40 Fed. Rep. 904; Munks *v.* Jackson, (C. C. A.) 66 Fed. Rep. 571; The W. H. Simpson, (C. C. A.) 80 Fed. Rep. 153; The Carbonero, (C. C. A.) 106 Fed. Rep. 329; The Kalkaska, (C. C. A.) 107 Fed. Rep. 962; The Pencoyd, 113 Fed. Rep. 682; The Startle, 115 Fed. Rep. 555; *In re* Moran, 120 Fed. Rep. 567; The Nettie Quill, 124 Fed. Rep. 670.

**No Presumption that Injury Was Caused by Negligence of Tug.** — The Steamer Webb, 14 Wall. (U. S.) 414; The Propeller Burlington, 137 U. S. 391; The J. P. Donaldson, 167 U. S. 599; *In re* Moran, 120 Fed. Rep. 567; The Thomas Wilson, 124 Fed. Rep. 649.

**2. Deviation from the True Course,** causing stranding of the tow, may be so great as to be almost conclusive evidence, in the absence of explanation by the tug, of carelessness or unskilfulness in the navigation of the tug. The Steamer Webb, 14 Wall. (U. S.) 406; The Kalkaska, (C. C. A.) 107 Fed. Rep. 962; The Mars, 116 Fed. Rep. 204.

*In The Kalkaska*, (C. C. A.) 107 Fed. Rep. 959, it was shown that in a storm with a wind at no time exceeding twenty miles an hour, along a well-known coast, and in going a distance of not over one hundred miles, the Kalkaska and her tow were at least seventeen miles out of the proper course. These circumstances were held to cast upon the Kalkaska the burden of establishing some excuse for the deviation.

**3. Burden of Showing Agreement as to Risk.** — The James Jackson, 9 Fed. Rep. 614; The Somers N. Smith, 120 Fed. Rep. 575.

**4. Burden of Showing Failure to Tow.** — The Propeller Burlington, 137 U. S. 386; The Steamer Webb, 14 Wall. (U. S.) 406.

**5. Burden of Showing Agreement for Compensation.** — The Minnehaha, 15 Moo. P. C. 133; Lush 335.

**6. Burden of Showing Lien.** — The Erastina, 50 Fed. Rep. 126.

**7. Insulting Language.** (See also the title MURDER AND MANSLAUGHTER, vol. 21, p. 181.) — *In Stewart v. State*, 4 Tex. App. 519, it was said: "The court instructed the jury that 'insulting words or conduct of the person killed *towards* a female relation of the party guilty of the homicide will reduce a voluntary homicide to manslaughter.' It is insisted that this portion of the charge was too general; that 'the word *towards* has two meanings—a physical and a moral one—and in an instance of this kind the two meanings may combine or stand separate. It may imply a direct address to the female relation present, or imply 'reference to' or 'concerning of' a female relation not present. In this case she was not present. Then connect with the phrase 'insulting words' the phrase 'or conduct;' the physical meaning, or the meaning carrying the implication that the female must be present, is injected with great force into the charge of the court, there being no insulting conduct *toward* the female relation in this case, as she was absent.' The objection, we think, is too hypercritical."

The word *towards* in a statute making insulting language *towards* a female relative of the prisoner a mitigation of homicide from murder to manslaughter, was held not to mean simply "to," but to include insulting words about a female relative, whether she was present or absent. *Hudson v. State*, 6 Tex. App. 565.

**Towards and Unto.** — In an indictment for an obstruction of a public way, describing it as from A "*towards* and unto" B, it was held that proof of the public way leading from A to B, though turning backwards between A and B at an acute angle, and though the part from A to the angle was an immemorial way and the part from the angle to B was but recently dedicated, was sufficient to sustain an indictment.



**TO WIT.** (See also the title **SCILICET** OR **VIDELICET**, 19 ENCYC. OF PL. AND PR. 251.) — That is to say; namely; the same as “videlicet” or “scilicet.”<sup>1</sup>

*Rex v. Downshire*, 4 Ad. & El. 232, 31 E. C. L. 58, in which Williams, J., said: “The question comes shortly to this: Do the words ‘*towards* and unto’ imply any degree of directness? There is no rule which lays down that because a road forms an acute angle in order to reach a terminus, it does not lead ‘*towards* and unto’ the terminus.”

1. “The office and effect of the phrase *to wit*, or ‘videlicet,’ as it is called, is to particularize what is too general in a preceding sentence, and render clear and of certain application what might seem otherwise doubtful or obscure.” *Buck v. Lewis*, 9 Minn. 314.

An imperfect particular description after the phrase *to wit*, or “videlicet,” will not control

a sufficient general description. It was so held in a case where a will was in controversy. *Bagnell v. Abnett*, 4 Mod. 141.

**In Pleading.** — The phrase *to wit*, or “videlicet,” is used in pleading to avoid any variance between the averments and proof; and its effect is to sustain the positive averments in declarations which require strict proof. See *Brown v. Berry*, 47 Ill. 175; *Paine v. Fox*, 16 Mass. 129; *Waller v. Ellis*, 2 Munf. (Va.) 88.

But where time is material to the merits the substance of the issue must be strictly proved, and the insertion of a videlicet will not help. *And. Steph. Pl.*, § 162; *Min. Inst.*, vol. 4, p. 66; *Grimwood v. Barrit*, 6 T. R. 462.

# TOWNS AND TOWNSHIPS.

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For other matters of *SUBSTANTIVE LAW and EVIDENCE*, see the following titles in this work: *ADVERSE POSSESSION*, vol. 1, p. 787; *APPORTIONMENT ACTS*, vol. 2, p. 478; *BOROUGHES*, vol. 4, p. 721; *BOUNDARIES*, vol. 4, p. 756; *BRIDGES*, vol. 4, p. 918; *COUNTIES*, vol. 7, p. 898; *COUNTY COMMISSIONERS*, vol. 7, p. 975; *DEDICATION*, vol. 9, p. 20; *DRAINS AND SEWERS*, vol. 10, p. 220; *ELECTRIC LIGHT COMPANIES*, vol. 10, p. 861; *ELEVATED RAILROADS*, vol. 10, p. 896; *GAS COMPANIES*, vol. 14, p. 915; *HIGHWAYS*, vol. 15, p. 343; *JUDICIAL NOTICE*, vol. 17, p. 892; *MASTER AND SERVANT*, vol. 20, p. 3; *MUNICIPAL AID*, vol. 20, p. 1082; *MUNICIPAL CORPORATIONS*, vol. 20, p. 1123; *MUNICIPAL COURTS*, vol. 21, p. 1; *MUNICIPAL RECORDS*, vol. 21, p. 8; *MUNICIPAL SECURITIES*, vol. 21, p. 13; *NUISANCES*, vol. 21, p. 679; *ORDINANCES*, vol. 21, p. 943; *PARKS AND PUBLIC SQUARES*, vol. 21, p. 1065; *POLICE POWER*, vol. 22, p. 914; *POOR AND POOR LAWS*, vol. 22, p. 944; *PUBLIC OFFICERS*, vol. 23, p. 314; *REWARDS*, vol. 24, p. 940; *SCHOOLS*, vol. 25, p. 4; *STREET RAILWAYS*, vol. 27, p. 3; *STREETS AND SIDEWALKS*, vol. 27, p. 99; *TAXATION*, vol. 27, p. 567; *TELEGRAPHS AND TELEPHONES*, vol. 27, p. 998; *WATER WORKS AND WATER COMPANIES*.

**I. DEFINITIONS AND DISTINCTIONS — 1. Towns — a. DEFINITIONS.** — In the New England States and New York towns are involuntary territorial divisions into which the territory of the state is divided by the legislature for political purposes for the more convenient and effectual administration of certain functions of political government.<sup>1</sup>

The Inhabitants of Districts having all the powers, privileges, and immunities of towns, are to be considered as towns to all intents and purposes except in the election of a representative.<sup>2</sup>

In Other States the term implies and signifies an aggregation of inhabitants and a collection of occupied dwellings and other buildings.<sup>3</sup>

**1. Towns in New England and New York.** — *Bloomfield v. Charter Oak Bank*, 121 U. S. 121; *Turney v. Bridgeport*, 55 Conn. 412; *State v. Williams*, 68 Conn. 131; *Lovejoy v. Foxcroft*, 91 Me. 367; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Merrimack County v. Grafton County*, 63 N. H. 550; *Doolittle v. Walpole*, 67 N. H. 554.

**Towns Are Component Parts of the State and Aggregately Taken Are the State.** — *Wooster v. Plymouth*, 62 N. H. 193; *Doolittle v. Walpole*, 67 N. H. 554; *Galen v. Clyde, etc.*, *Plank Road Co.*, 27 Barb. (N. Y.) 543; *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312; *Lorillard v. Monroe*, 11 N. Y. 392, 62 Am. Dec. 120.

**An Unincorporated Place**, having inhabitants and established territorial limits corresponding in extent to the general territorial character of towns and included among towns in the general law for the apportionment of the public taxes, is to be considered as a town. *Russell v. Dyer*, 40 N. H. 173.

**Towns in the New England States Differ from Trading Companies** and even from municipal corporations elsewhere. *Bloomfield v. Charter Oak Bank*, 121 U. S. 121.

**2. Districts as Towns.** — *Opinion of Justices*, 3 Mass. 568.

**3. Town Is a Collection of People and Buildings.** — *Webst. Dist.*, definition of word "town."

In a Generic Sense the word "town" embraces all bodies corporate, less than counties, which have local government.<sup>1</sup>

**Towns Not Municipal Corporations.** — Towns are often called in common parlance, and sometimes unguardedly in statutes, municipal corporations, in connection with counties, cities, and villages; but when so called it is in the sense of mere corporations, or *quasi* corporations, corporations *sub modo* only, and not in the sense of municipalities proper.<sup>2</sup>

*England.* — Reg. v. Cottle, 16 Q. B. 412, 71 E. C. L. 412; Elliott v. South Devon R. Co., 2 Exch. 725; London, etc., R. Co. v. Blackmore, L. R. 4 H. L. 610.

*California.* — Klauber v. Higgins, 117 Cal. 451; Siskiyou Lumber, etc., Co. v. Rostel, 121 Cal. 511.

*Georgia.* — Wight, etc., Co. v. Wolff, 112 Ga. 169; Sessions v. State, 115 Ga. 18.

*Illinois.* — Martin v. People, 87 Ill. 524; People v. Harvey, 142 Ill. 573; Phillips v. Scales Mound, 195 Ill. 353.

*Iowa.* — Steyer v. Dwyer, 31 Iowa 20.

*Kentucky.* — Cheaney v. Hooser, 9 B. Mon. (Ky.) 330.

*Mississippi.* — Burnley v. Tufts, 66 Miss. 48, 14 Am. St. Rep. 540.

*Missouri.* — Glasgow v. St. Louis, 15 Mo. App. 123.

*Texas.* — State v. Eidson, 76 Tex. 302; Willis v. Willis, 84 Tex. 398.

**A Local and Peculiar Signification** extending beyond the mere idea of a collection of houses, may be proved. Steyer v. Dwyer, 31 Iowa 20.

1. "**Town**" as **Generic Term.** — Burr. L. Dict.; 1 Bl. Com. 114.

*United States.* — Enfield v. Jordan, 119 U. S. 680.

*California.* — Klauber v. Higgins, 117 Cal. 451.

*Colorado.* — Garfield County Ct. v. Schwarz, 13 Colo. 291.

*Indiana.* — Flinn v. State, 24 Ind. 286; State v. Denny, 118 Ind. 449; State v. Craig, 132 Ind. 54, 32 Am. St. Rep. 237; Indianapolis v. Higgins, 141 Ind. 1.

*Iowa.* — Finley v. Dietrick, 12 Iowa 516; Truax v. Pool, 46 Iowa 256.

*Massachusetts.* — Lynn v. Essex County, 153 Mass. 40.

*Minnesota.* — Odegard v. Albert Lea, 33 Minn. 351.

*Missouri.* — Glasgow v. St. Louis, 15 Mo. App. 123; State v. Simmons, 35 Mo. App. 374.

*New Hampshire.* — Union School Dist. v. Dist. No. 20, 71 N. H. 269.

*New Jersey.* — State v. Newark, 40 N. J. L. 550, 29 Am. Rep. 266; Van Riper v. Parsons, 40 N. J. L. 1; Pell v. Newark, 40 N. J. L. 71; Sutterly v. Common Pleas Ct., 41 N. J. L. 495; Banta v. Richards, 42 N. J. L. 497; Anderson v. Trenton, 42 N. J. L. 486; Broome v. New York, etc., Telephone Co., 49 N. J. L. 624; Stout v. Glen Ridge, 59 N. J. L. 201; Long Branch Police, etc., Commission v. Dobbins, 61 N. J. L. 659; Hermann v. Guttenberg, 62 N. J. L. 605; Brown v. Union, 62 N. J. L. 142.

*New York.* — Public Charities, etc., Com'rs v. McGurrian, 6 Daly (N. Y.) 349.

*Ohio.* — Peck v. Weddell, 17 Ohio St. 271.

*Pennsylvania.* — Road in Milton, 40 Pa. St. 300.

*Rhode Island.* — State v. Glennon, 3 R. I. 276.

*Wisconsin.* — Crane v. Fon du Lac, 16 Wis. 196; State v. Milwaukee, 20 Wis. 87; State v. Goldstucker, 40 Wis. 124.

*Wyoming.* — Union Pac. R. Co. v. Ryan, 2 Wyo. 408.

**Other Definitions** — *United States.* — Laramie County v. Albany County, 92 U. S. 307; Chicago, etc., R. Co. v. Oconto, 50 Wis. 189, 36 Am. Rep. 840.

*Connecticut.* — State v. Williams, 68 Conn. 131.

*Georgia.* — Savannah v. Steam Boat Co., R. M. Charl. (Ga.) 342.

*Iowa.* — Steyer v. Dwyer, 31 Iowa 20.

*Kansas.* — Ralston v. Dodge City, etc., R. Co., 53 Kan. 337.

*Kentucky.* — Cheaney v. Hooser, 9 B. Mon. (Ky.) 330.

*Maine.* — Bradford v. Cary, 5 Me. 339; Thorndike v. Camden, 82 Me. 39.

*Minnesota.* — State v. Sharp, 27 Minn. 38; Altnow v. Sibley, 30 Minn. 186, 44 Am. Rep. 191.

*Missouri.* — State v. Campbell, 120 Mo. 396.

*Nebraska.* — Meyer v. Lincoln, 33 Neb. 566, 29 Am. St. Rep. 500.

*New Hampshire.* — Bristol v. New-Chester, 3 N. H. 524.

*New Jersey.* — State v. Newark, 40 N. J. L. 550, 29 Am. Rep. 266; Broome v. New York, etc., Telephone Co., 49 N. J. L. 624; Banta v. Richards, 42 N. J. L. 497.

*North Carolina.* — Weith v. Wilmington, 68 N. Car. 24; State v. Green, 126 N. Car. 1032.

*Wisconsin.* — Chicago, etc., R. Co. v. Oconto, 50 Wis. 189, 36 Am. Rep. 840; State v. Cunningham, 81 Wis. 440; State v. Lammers, 113 Wis. 398.

**But There Is a Technically Specific Sense in Which Towns and Cities Differ**, a town being a municipality whose municipal laws and regulations are established by the popular vote of the town, and intrusted for execution to officers elected by that vote; and a city is a municipality where the making and execution of the municipal laws and regulations are committed by the popular vote of the city to its officers elected by that vote. Union Pac. R. Co. v. Ryan, 2 Wyo. 408.

**2. Towns Not Municipal Corporations.** — Eaton v. Manitowoc County, 44 Wis. 489.

**Terms "Town" and "Village" Are Synonymous.** — Enfield v. Jordan, 119 U. S. 680 [overruling Welch v. Post, 99 Ill. 471]; Martin v. People, 87 Ill. 524; People v. Pike, 197 Ill. 449. But see Truax v. Pool, 46 Iowa 256.

**As a General Rule** "town" does not include

*b.* AS DISTINGUISHED FROM CITIES. — The marked and characteristic distinction between a town organization and that of a city is that in the former, all the qualified inhabitants meet, deliberate, act, and vote in their natural and personal capacities, in the exercise of their corporate powers; whereas under a city government this is all done by representatives.<sup>1</sup>

*c.* AS DISTINGUISHED FROM PRIVATE CORPORATIONS. — Towns are in their nature widely different from private corporations. They are created, not for private emolument, but for great public purposes. In general their duties are imposed and their privileges granted either by the constitution or the general laws of the state. All the corporate property is devoted to public purposes. No individual has any direct private interest in it — no interest that he can release, or convey to another. It is a common concern of all the members, that the corporation should possess sufficient funds to answer all its purposes, but the private interest of individuals is not otherwise affected by the loss or gain of corporate property than as it may tend to augment or diminish the contributions they may eventually be called upon to make for the corporate expenses. In fact, an inhabitant of a town has no other interest in the property of the town than he has in the property of the state, or of the United States.<sup>2</sup>

**2. Townships** — *a.* DEFINITIONS. — In *England* a township generally denotes a district containing a town and under the same administration.<sup>3</sup> In some statutes “township” is nearly synonymous with “parish.”<sup>4</sup> In the

boroughs when the word is used in a statute. *Glen Ridge v. Stout*, 58 N. J. L. 598.

“Town” Is Sometimes Employed to Designate a Township, but “unincorporated town” is seldom, if ever, employed to embrace such a body. *Harris v. Schryock*, 82 Ill. 119.

Towns Are Quasi Corporations, and in their characteristic qualities radically differ from trading and commercial corporations as to liability arising from acts of agents. And in some essentials towns differ from ordinary municipal corporations, whose chartered powers are conferred at the request of the inhabitants, and to effectuate in some degree and to some extent purposes not public or governmental. *Turney v. Bridgeport*, 55 Conn. 412.

A Town Cannot Be Considered as a Contract between the government and such town. *Marietta v. Fearing*, 4 Ohio 429.

“Town” May Be Construed to Include the Action of the Town by its proper agents or authorities, if necessary to avoid an absurd construction of the statutes. *Farnsworth v. Pawtucket*, 13 R. I. 82.

A Village means an assemblage of houses less than a city but nevertheless urban or semi-urban in its character, and having a density of population greater than can usually be found in rural districts. A very common definition of a village found in the books is as follows: Any small assemblage of houses, for dwelling or business, or both, in the country, whether situated upon regularly laid out streets and alleys or not. *Illinois Cent. R. Co. v. Williams*, 27 Ill. 48; *State v. Lammers*, 113 Wis. 398. See *People v. McCune*, 14 Utah 152.

A Village and a Town Are Not Identical. — Webster defines a village to be an assemblage of houses in the country, less than a town or city, and inhabited by farmers and other laboring people. So far as they are farmers their farms constitute their means of support.

Townpeople are more usually traders and artisans. They do not derive their support ordinarily from the cultivation of land. *Truax v. Pool*, 46 Iowa 256.

The Words “Town” and “Citizens” may both mean the people of the town. *Macon, etc., R. Co. v. Gibson*, 85 Ga. 1, 21 Am. St. Rep. 135.

A Town Is Not Always a City, but a city is always a town. *Harvey v. Osborn*, 55 Ind. 535. Compare *Atty.-Gen. v. Dover*, 62 N. J. L. 40.

The Word “Town” Often, but Not Always, Means Township, but “township” never means town in the sense of a platted village or town site. *Herrick v. Morrill*, 37 Minn. 250, 5 Am. St. Rep. 841; *Holmes v. Jersey City*, 12 N. J. Eq. 299; *King v. Reed*, 43 N. J. L. 186.

The Words “Town” and “Township” Have Been Used Synonymously in referring to the political divisions of the county. *Phillips v. Scales Mound*, 195 Ill. 353.

A Town Population Is Distinguished from a Rural Population, which is understood to signify a people scattered over a county and engaged in agricultural pursuits or some similar avocation requiring a considerable area of territory for its support. A section of county so inhabited cannot be called a town nor treated as part of a town without doing violence to the meaning ordinarily attached to that word. *State v. Eidson*, 76 Tex. 302.

1. As Distinguished from City. — *Warren v. Charlestown*, 2 Gray (Mass.) 84.

2. As Distinguished from Private Corporations. — *Eustis v. Parker*, 1 N. H. 275.

3. Township in England. — When a hamlet is adjacent to a town, but governed by separate officers, it is to some purposes, in law, looked upon as a distinct township. 1 Bl. Com. 115.

4. Township Synonymous with Parish. — *E. g.*, “township, parish, or place,” in the beer



*United States* a town organized under township organization laws is a political or civil subdivision of a county; it is created as a subordinate agency to aid in the administration of the general state and local government.<sup>1</sup>

Civil Townships and School Townships are distinct artificial beings.<sup>2</sup>

*b. AS DISTINGUISHED FROM INCORPORATED TOWNS.* — When a county adopts township organization and a town is organized such town becomes a local subdivision of the state, created by the sovereign will, without the particular solicitation or consent or concurrent action of the people who inhabit the town. It is an involuntary organization for governmental purposes.<sup>3</sup> An incorporated town, on the other hand, is given corporate existence at the request or by the consent of the inhabitants thereof for the interest, advantage, or convenience of the locality and its people.<sup>4</sup>

**II. ORIGIN AND NATURE — 1. Origin.** — The word “town,” philologically construed, is a change in the orthography and pronunciation of the Anglo-Saxon “tun,” from the verb “tyan,” meaning to enclose. “Tun” meant a collection of houses enclosed by a wall.<sup>5</sup> The first use of the word in the United States was to define the original or primary civil or governmental organizations of the early colonists of New England, who knew by bitter experience the oppressive tyranny of imperial law and who desired above all things to be governed, not only by laws made by themselves in primary assembly, but by laws having a limited and local application to their wants in small and independent communities.<sup>6</sup>

**2. Nature — Quasi-corporations.** — Towns and townships possess so few of the attributes which distinguish the ordinary public or private corporation, and rank so low down in the scale of corporate existence, that when made the object of judicial consideration they are, as a general rule, denominated

license law. 3 & 4 Vict., c. 61, § 1; *Preston v. Buckley*, L. R. 5 Q. B. 391.

**1. Township in the United States.** — *Garfield County v. Schwarz*, 13 Colo. 291; *Valverde v. Shattuck*, 19 Colo. 104, 41 Am. St. Rep. 208; *Waltham v. Kemper*, 55 Ill. 346, 8 Am. Rep. 652; *People v. Martin*, 178 Ill. 611.

**Other Definitions.** — *Phillips v. Scales Mound*, 195 Ill. 353; *Brattleboro Sav. Bank v. Hardy* Tp., 98 Fed. Rep. 524; *Waltham v. Kemper*, 55 Ill. 346, 8 Am. Rep. 652; *Martin v. People*, 87 Ill. 524; *People v. Harvey*, 142 Ill. 573; *Wallis v. Johnson School Tp.*, 75 Ind. 368; *Axt v. Jackson School Tp.*, 90 Ind. 101; *Union School Tp. v. Crawfordsville First Nat. Bank*, 102 Ind. 464; *State v. Fountain County*, 147 Ind. 235; *Union Pac. R. Co. v. Ryan*, 2 Wyo. 408.

**2. Civil Townships and School Townships Are Distinct.** — *Carmichael v. Lawrence*, 47 Ind. 554; *McLaughlin v. Shelby Tp.*, 52 Ind. 114; *Huntington v. Day*, 55 Ind. 7; *Utica Tp. v. Miller*, 62 Ind. 230; *Harrison Tp. v. McGregor*, 67 Ind. 380; *Gardner v. Haney*, 86 Ind. 17; *Middleton v. Greeson*, 106 Ind. 18; *Braden v. Leibenguth*, 126 Ind. 336; *Jarvis v. Robertson*, 126 Ind. 281.

**The Word “Township” Is Sometimes Used in Statutes to Designate the Political Units of Counties not under township organization.** *Union Pac. R. Co. v. Howard County*, (Neb. 1902) 92 N. W. Rep. 579.

**Each Civil Township Is a Body Politic and Corporate.** — *Union Tp. v. Anthony*, 26 Ind. 487.

**The Word “Township” in a Statute May Stand for the Township Committee.** — *Orvil Tp. v. Woodcliff*, 64 N. J. L. 286.

**Township Includes Precinct and Ward.** — *Com-*

*stock v. Grand Rapids*, 54 Mich. 641; *Whitall v. Chosen Freeholders*, 40 N. J. L. 302.

**Fractional Townships** are to be treated as whole townships. *Rice v. Ruddiman*, 10 Mich. 125.

**“Township” Has Been Construed as Meaning a Surveyed Township.** — *Manistee Lumber Co. v. Springfield Tp.*, 92 Mich. 277.

**The Civil Township and the School Township**, though they have the same limits, are not the same corporation. *Heizer v. Yohn*, 37 Ind. 415.

**A Town, Created under a Township Organization, Is Not an Incorporated Town** in the proper sense. *People v. Harvey*, 142 Ill. 573; *People v. Thornton*, 186 Ill. 162; *Phillips v. Scales Mound*, 195 Ill. 353.

**3. Township an Involuntary Organization.** — *Phillips v. Scales Mound*, 195 Ill. 353; *Garfield County Ct. v. Schwarz*, 13 Colo. 291; *Valverde v. Shattuck*, 19 Colo. 104, 41 Am. St. Rep. 208; *Waltham v. Kemper*, 55 Ill. 346, 8 Am. Rep. 652; *Harris v. Schryock*, 82 Ill. 119; *Martin v. People*, 87 Ill. 524; *Woo-Sung v. People*, 102 Ill. 648; *People v. Harvey*, 142 Ill. 573; *People v. Martin*, 178 Ill. 611.

**4. Township and Incorporated Town Distinguished.** — *Martin v. People*, 87 Ill. 524; *People v. Harvey*, 142 Ill. 573; *People v. Martin*, 178 Ill. 611.

**Townships Are Not Municipal Corporations Proper.** — *Freeland v. Stillman*, 49 Kan. 197.

**5. Origin of Town.** — *Territory v. Stewart*, 1 Wash. 98; *Chicago, etc., R. Co. v. Oconto*, 50 Wis. 189, 36 Am. Rep. 840.

**6. First Use of “Town” in United States.** — *Chicago, etc., R. Co. v. Oconto*, 50 Wis. 189, 36 Am. Rep. 840.

*quasi*-corporations. Most courts refuse to dignify them with corporate distinction except in this modified and apologetic way.<sup>1</sup>

**III. CREATION AND ORGANIZATION — 1. In General.** — Towns derive existence only from the will of the legislature,<sup>2</sup> and the legislature may exercise this power at such time and in such manner as will best promote the public good, unless the time, manner, or other circumstance of the act violates some provision of the constitution.<sup>3</sup>

The Usual Act of Incorporation simply provides that certain defined territory, with the inhabitants thereof, be incorporated into a town by the name designated.<sup>4</sup>

**Location of Township.** — The statute creating a township should locate the new creation with convenient certainty, and this may be done by referring to rivers and lands which bound such township.<sup>5</sup>

The Consent of a Particular Portion of the Community is not a circumstance necessary to give validity to the exercise of the power of the legislature.<sup>6</sup>

**Acceptance of Act of Incorporation.** — Inasmuch as towns exist at the pleasure of the state and not at their own pleasure, it is not necessary to such existence that they accept the act of incorporation.<sup>7</sup>

**Act of Incorporation Not a Contract.** — An act incorporating a town has none of the elements of a contract or compact, conferring upon its inhabitants, against the state, a vested right that the territorial limits of the town shall continue for any particular period as when incorporated; but it is simply an act of the legislature, enacted for the public good, to be amended or repealed

**1. Nature** — *United States.* — *Brattleboro Sav. Bank v. Hardy* Tp., 98 Fed. Rep. 524.

*Colorado.* — *Valverde v. Shattuck*, 19 Colo. 104, 41 Am. St. Rep. 208.

*Connecticut.* — *Turney v. Bridgeport*, 55 Conn. 412.

*Illinois.* — *Waltham v. Kemper*, 55 Ill. 346, 8 Am. Rep. 652; *People v. Harvey*, 142 Ill. 573.

*Indiana.* — But see *McIlwaine v. Adams*, 46 Ind. 580.

*Kansas.* — *Eikenberry v. Bazaar* Tp., 22 Kan. 561, 31 Am. Rep. 198; *Freeland v. Stillman*, 49 Kan. 197; *Rathbone v. Hopper*, 57 Kan. 240.

*Maine.* — See also *Frankfort v. Winterport*, 54 Me. 250.

*Massachusetts.* — *Fourth School Dist. v. Wood*, 13 Mass. 193; *Damon v. Granby*, 2 Pick. (Mass.) 345; *Overseers of Poor v. Sears*, 22 Pick. (Mass.) 122; *Stone v. Charlestown*, 114 Mass. 214; *Flood v. Leahy*, 183 Mass. 232.

*New Hampshire.* — *Wells v. Burbank*, 17 N. H. 393.

*New York.* — But see *North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 109.

*Ohio.* — *Hopple v. Brown* Tp., 13 Ohio St. 311.

*Pennsylvania.* — *Shronk v. Penn* Tp., 3 Rawle (Pa.) 347; *Funk v. Washington* Tp., 13 Pa. Co. Ct. 385; *Union Tp. v. Gibboney*, 94 Pa. St. 536.

*Vermont.* — *Londonderry v. Andover*, 28 Vt. 416.

*Wisconsin.* — *Norton v. Peck*, 3 Wis. 714; *Eaton v. Manitowoc County*, 44 Wis. 489.

**2. Towns Created by Legislature.** — *Webster v. Harwinton*, 32 Conn. 131; *People v. Bancroft*, 3 Idaho 356; *Cicero v. Chicago*, 182 Ill. 301; *Gorham v. Springfield*, 21 Me. 58; *Westbrook v. Deering*, 63 Me. 231; *South Portland*

*v. Cape Elizabeth*, 92 Me. 328, 69 Am. St. Rep. 502; *Prince George's County v. Bladensburg*, 51 Md. 468; *New-Boston v. Dunbarton*, 12 N. H. 409; *Manly v. Raleigh*, 4 Jones Eq. (57 N. Car.) 370.

**In Massachusetts**, upon the settlement of the colony, the several towns or plantations were at first mere villages or clusters of settlers dwelling near each other; but by successive acts of the General Court, authorizing them to manage their own affairs and to elect representatives and local officers, they soon became in effect municipal corporations, without any express legislative act or charter. *Lynn v. Nahant*, 113 Mass. 433.

**3. Manly v. Raleigh**, 4 Jones Eq. (57 N. Car.) 370.

**4. Provisions of Incorporating Act.** — *Westbrook v. Deering*, 63 Me. 231.

**5. Description of Township.** — *Com. v. Fullerton*, 12 Pa. St. 266.

**In Illinois** it has been held that the courts will take judicial notice of the county in which an incorporated town is situated, and of the fact whether such county is under township organization. *People v. Suppiger*, 103 Ill. 434; *Bruner v. Madison County*, 111 Ill. 11; *Jones v. Lake View*, 151 Ill. 663; *Phillips v. Scales Mound*, 195 Ill. 353.

**But in Missouri** the courts hold that judicial notice will not be taken as to whether a county has adopted township organization. See the title JUDICIAL NOTICE, vol. 17, p. 913.

**6. Consent of Community Not Necessary.** — *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Prince George's County v. Bladensburg*, 51 Md. 468; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Manly v. Raleigh*, 4 Jones Eq. (57 N. Car.) 370.

**7. Acceptance of Act of Incorporation.** — *Gorham v. Springfield*, 21 Me. 58.

only by the sovereign power which created it, whenever and however, under the constitution, it deems the same end may require.<sup>1</sup>

**2. Essential Requisites** — *a. LIMITED TERRITORY.* — A town must be, first, of limited territorial extent.<sup>2</sup>

**Nature of Territory Included.** — It may not always be practicable to incorporate a town without including within its limits some territory devoted purely to pastoral or agricultural pursuits. Something may be allowed for prospective expansion, where no constitutional prohibition is contravened.<sup>3</sup>

*b. CONTIGUOUS TERRITORY.* — The territory must be compact and contiguous.<sup>4</sup>

*c. CONTINUOUS BOUNDARIES.* — The boundaries must be clearly defined and continuous.<sup>5</sup>

*d. POPULATION.* — An act of incorporation cannot apply to places which have no inhabitants. The incorporation is of the inhabitants of the town or township, and not the grantees of it.<sup>6</sup> The requisite number of inhabitants is usually prescribed by statute.<sup>7</sup>

**The Inhabitants of the Towns Are Made a Political Agency,** and particular duties and liabilities for purposes of administration are imposed upon them, even without their consent. They are not a voluntary association. They cannot escape the duties and burdens imposed except by a removal of themselves and their property from the town territory.<sup>8</sup> They have been declared to be a body politic and corporate.<sup>9</sup>

*e. CONSENT OF LEGAL VOTERS.* — Frequently the statutes provide that township organization cannot be adopted unless a majority of the legal voters of the county shall declare in favor thereof.<sup>10</sup> It is not sufficient that a majority of those voting on the question so declare.<sup>11</sup>

**3. Creation upon Petition.** — As a general rule, towns may be created upon the petition of the citizens essentially interested, or a majority of them.<sup>12</sup>

**1. Act of Incorporation Not a Contract.** — *Westbrook v. Deering*, 63 Me. 231.

**2. Essential Requisites — Limited Territory.** — *Little Meadows Borough*, 35 Pa. St. 335; *Chicago, etc., R. Co. v. Oconto*, 50 Wis. 189, 36 Am. Rep. 840.

**In Illinois**, a town cannot be created which contains less than seventeen square miles. *Jefferson v. People*, 87 Ill. 503.

**Where There Are No Territorial Limitations in the Statute** requiring a town to be of a certain number of acres, a town may be organized with only sixteen acres. *Guebelle v. Epley*, 1 Colo. App. 199.

**The Legislature May Include Adjoining Lands** within the corporate limits of a town incorporated by it, where such act does not contravene any constitutional prohibition. *State v. McReynolds*, 61 Mo. 203.

**3. Nature of Territory Included.** — *State v. McReynolds*, 61 Mo. 203; *State v. Eidson*, 76 Tex. 302; *State v. Baird*, 79 Tex. 63.

**4. Contiguous Territory.** — *Watervliet v. Colonie*, 27 N. Y. App. Div. 394; *Chicago, etc., R. Co. v. Oconto*, 50 Wis. 189, 36 Am. Rep. 840.

**5. Boundaries Continuous.** — *Watervliet v. Colonie*, 27 N. Y. App. Div. 394; *Chicago, etc., R. Co. v. Oconto*, 50 Wis. 189, 36 Am. Rep. 840.

**A Single Tract of Land Surrounded by an Unbroken Boundary Line**, capable of being traversed from one extremity to the other without leaving its territory, may be organized as a town. *Grunert v. Spalding*, 104 Wis. 193.

**6. Inhabitants Essential.** — *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Wells v. Burbank*, 17 N. H. 393; *Grunert v. Spalding*, 104 Wis. 193.

**7. Statutory Provisions as to Inhabitants.** — See the statutes of the various states.

**Six Persons Not Sufficient.** — Where a place designated by name was abandoned for several years, and in it there were afterwards established a ferry, one store, a dwelling house for two families, and a warehouse from which a small amount of goods was shipped, and the population of the place consisted of two families, numbering in all six persons, this was not a town. *Murray v. Menefee*, 29 Ark. 561.

**8. Status of Inhabitants.** — *Lovejoy v. Foxcroft*, 91 Me. 367.

**9. Inhabitants a Body Corporate and Politic.** — *Hooper v. Emery*, 14 Me. 375.

**All the Inhabitants Are Parties of the Quasi Corporation.** — *Granby v. Thurston*, 23 Conn. 416; *Webster v. Harwinton*, 32 Conn. 131.

**10. Consent of Legal Voters.** — *People v. Brown*, 11 Ill. 478; *Taylor v. Ft. Wayne*, 47 Ind. 274; *State v. McGowan*, 138 Mo. 187; *Macey v. Carter*, 76 Mo. App. 490.

**11. Majority of Those Voting Insufficient.** — *People v. Brown*, 11 Ill. 478; *State v. McGowan*, 138 Mo. 187.

**12. Creation upon Petition.** — See for example the statutes in *Alabama, Arizona, Arkansas, California, Colorado, the Dakotas, Florida, Georgia, Idaho, Illinois, Iowa, Minnesota, Montana, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Utah, Washington, West*



But there is no inherent power in the inhabitants of a town to create a municipal government. This can only be done in pursuance of, and in compliance with, legislative enactment on the subject.<sup>1</sup>

**The Inhabitants Do Not Derive Private or Personal Rights** under the act of incorporation; they acquire no vested right in those forms of municipal government which exist under the general laws in towns, as distinguished from those by which the affairs of cities are regulated.<sup>2</sup>

**4. Delegation of Creative Power.** — Statutes may confer upon county boards and upon certain courts the power under certain conditions to establish towns,<sup>3</sup> and it is constitutional to provide in such statutes that no appeal shall lie from the judgment of such courts.<sup>4</sup>

**5. Existence by Prescription.** — Towns may exist by prescription, which presupposes an authorized and legitimate creation. The exercise of corporate powers over a place for several years, with knowledge on the part of the public, is conclusive evidence of a charter or of a town by prescription.<sup>5</sup>

**6. Creation by Implication.** — Where it is necessary to the enjoyment of powers and privileges or for the enforcement of liabilities of a town, it may be declared to be a body corporate by implication for particular purposes.<sup>6</sup>

*Virginia*, and *Wyoming*. See also *Somonauk v. People*, 178 Ill. 631; *Anonymous*, 31 Me. 592; *State v. McGowan*, 138 Mo. 187; *Macey v. Carter*, 76 Mo. App. 490; *Van Horn v. State*, 46 Neb. 62; *Manly v. Raleigh*, 4 Jones Eq. (57 N. Car.) 370.

**Petition by Legal Voters.** — Where the statute provides that the petition must be by the legal voters of the county it is not sufficient that it is by the taxpayers of such county. *Macey v. Carter*, 76 Mo. App. 490.

**Petition Obtained Secretly.** — The fact that the petition to the County Court to appoint commissioners to call an election for town incorporation was obtained secretly was held immaterial. So also was the fact that the proposed territory did not exceed sixteen acres. *Guebelle v. Epley*, 1 Colo. App. 199.

**Evidence of Requisite Number of Petitioners.** — The order of the County Court directing the election on the question of town organization is conclusive evidence that the petition upon which it was made was signed by one hundred legal voters of the county. *State v. Weatherby*, 45 Mo. 17; *Snoddy v. Pettis County*, 45 Mo. 361; *State v. Young*, 84 Mo. 90; *Riggins v. O'Brien*, 34 Mo. App. 613; *In re Rothwell*, 44 Mo. App. 219; *State v. Searcy*, 46 Mo. App. 421; *White v. Brim*, 48 Mo. App. 113; *State v. Mackin*, 51 Mo. App. 307; *Rousey v. Wood*, 63 Mo. App. 460.

**Petitioners May Withdraw Their Names** after a petition has been presented and before the organization of the new township for which the petition is made. And this is so even where such withdrawal leaves the petition with a number of signatures less than that required by statute and defeats the organization. *Littell v. Vermilion County*, 198 Ill. 205.

**1. Power of Inhabitants to Create.** — *Enterprise v. State*, 29 Fla. 128.

**2. Rights of Inhabitants under Incorporating Act.** — *Chandler v. Boston*, 112 Mass. 200.

**Creation by Special Act.** — An act incorporating a town, which declares that it is to have all the privileges and rights which were accorded to another town previously incorporated, does not confer any rights accorded to the older town

by an act amendatory to the incorporating act. *Tatum v. Tamaroa*, 14 Fed. Rep. 103.

**3. Delegation of Creative Power.** — *Somonauk v. People*, 178 Ill. 631; *Morton v. Woodford*, 99 Ky. 367; *Kayser v. Bremen*, 16 Mo. 88; *State v. Weatherby*, 45 Mo. 17.

**Incorporation of Farming Lands.** — *State v. McReynolds*, 61 Mo. 203.

**Condition Precedent to Jurisdiction.** — Where a statute confers jurisdiction upon the County Court to submit the question of township organization to the voters only when one hundred legal voters petition therefor, such petition is a condition precedent to jurisdiction in court. *Rousey v. Wood*, 57 Mo. App. 650.

**Extent of Power Delegated.** — An act which empowers a court to incorporate "any town or village containing three hundred inhabitants" does not authorize the combining of two villages into one, much less the working up with the mass a tract of country which is no village at all. *West Philadelphia Case*, 5 W. & S. (Pa.) 281.

**4. Decision of Court Conclusive.** — *Morton v. Woodford*, 99 Ky. 367; *Rousey v. Wood*, 63 Mo. App. 460.

**5. Existence by Prescription.** — *Worley v. Harris*, 82 Ind. 493; *Bassett v. Porter*, 4 Cush. (Mass) 487; *New-Boston v. Dunbarton*, 15 N. H. 201; *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489; *Robie v. Sedgwick*, 35 Barb. (N. Y.) 319; *Trenton v. McDaniel*, 7 Jones L. (52 N. Car.) 107; *Londonderry v. Andover*, 28 Vt. 416.

**No Retrospective Law Can Undo the Corporate Existence** of a body of people who have organized themselves under color of law into an ordinary town and have gone on year after year raising taxes, making improvements, and exercising their usual franchises. Their rights are properly regarded as depending quite as much on such acquiescence as on the regularity of their origin. *People v. Maynard*, 15 Mich. 463.

**6. Creation of Body Corporate by Implication.** — *Russell v. Devon County*, 2 T. R. 667; *Jordan v. Cass County*, 3 Dill. (U. S.) 185; *Broking v. Van Valen*, 56 N. J. L. 85 [citing Fourth

**7. De Facto Organization.** — Towns being *quasi*-corporations, it is not necessary to show a strict legal organization. It is sufficient that the town was organized *de facto*.<sup>1</sup>

**8. When Creation and Organization Complete.** — In the absence of conditional provisions therein, an act of incorporation becomes imperative and binding whenever it takes effect, without any formal acceptance on the part of the inhabitants.<sup>2</sup>

**9. How Existence Shown.** — Where no charter or act of incorporation of a town can be found, it may be proved to be a town by reputation, or it may be shown to have claimed and exercised the powers of a town for a long period with the knowledge and assent of the legislature and without objection or interruption.<sup>3</sup>

Oral Evidence is admissible to prove the existence of a town.<sup>4</sup>

**Judicial Notice of Name and Existence.** — A complete discussion of judicial notice as to the names and existence of towns will be found in another part of this work.<sup>5</sup>

**Evidence of Previous Incorporation.** — An act of incorporation is not conclusive evidence that a town was never before incorporated.<sup>6</sup>

**10. Irregularities in Organization.** — Irregularities in the organization of a town may be waived by the public, and a private person cannot question the regularity of a town's existence.<sup>7</sup>

**IV. CHARTERS — 1. In General.** — A charter of a township is a grant of the land within the limits specified, and it does not constitute a town within the meaning of the statutes. The tracts of land thus granted are generally denominated townships, and where the inhabitants are numerous enough to act as a town a special act of incorporation is usually passed.<sup>8</sup>

The Charter Is Not a Contract, because there is but one party.<sup>9</sup>

**2. Royal Charters.** — Long Island Towns were in nearly all instances created by royal charters, and the patents were intended not only to create the corporate bodies and thus clothe the inhabitants with the power of government but also to convey the title to the land within the bounds of towns. Under the char

School Dist. *v.* Wood, 13 Mass. 193]; Bath *v.* Boyd, 1 Ired. L. (23 N. Car.) 194.

In *Blair v. West Point Precinct*, 2 McCrary (U. S.) 459, it was held that only in cases where a *bona fide* contract can be otherwise enforced, will courts hold that a corporation has been created by implication.

**1. De Facto Organization Sufficient.** — *Londonderry v. Andover*, 28 Vt. 416.

**Not Subject to Collateral Attack.** — *Riverton, etc., v. Water Co.* *v.* Haig, 58 N. J. L. 295; *Decorah v. Gillis*, 10 Iowa 234.

**2. When Creation and Organization Complete.** — *Westbrook v. Deering*, 63 Me. 231.

In *Indiana* a town is not organized in a proper sense until its officers and its board of trustees have been elected and a president of the board designated. *State v. Arnold*, 38 Ind. 41.

**The Statute of Limitations Does Not Begin to Run Against a Town until It Is Incorporated.** — *Reilly v. Choquette*, 18 Mo. 220.

**3. How Existence Shown.** — *People v. Maynard*, 15 Mich. 473; *New-Boston v. Dunbarton*, 15 N. H. 201; *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489; *Londonderry v. Andover*, 28 Vt. 416.

**Recognition Essential.** — *New Boston v. Dunbarton*, 12 N. H. 409.

**4. Oral Evidence of Existence.** — *Milarkey v. Foster*, 6 Oregon 378, 25 Am. Rep. 531.

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**5. Judicial Notice of Towns.** — See the title JUDICIAL NOTICE, vol. 17, p. 892.

**6. Not Conclusive as to Previous Incorporation.** — *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489.

**7. Irregularities in Organization.** — *Searcy v. Yarnell*, 47 Ark. 269; *Worley v. Harris*, 82 Ind. 493; *Enfield v. Permit*, 5 N. H. 280, 20 Am. Dec. 580; *Gardner v. Christian*, 70 Hun (N. Y.) 547.

**Irregularities in First Election.** — The question of the existence of a township as a political organization is not at all affected by an irregularity in the first election of its officers. *Lones v. Harris*, 71 Iowa 478.

**The Validity of a Town's Existence Can Be Contested Only by a Quo Warranto.** — *Kayser v. Bremen*, 16 Mo. 88.

**Neglect to Make Return of Election.** — The neglect of the proper officer to cause an abstract of the returns of an election for the adoption of township government is not such an irregularity as will nullify the vote adopting township organization. *Rousey v. Wood*, 63 Mo. App. 460.

**8. Charters.** — *Wells v. Burbank*, 17 N. H. 393.

**9. Charter Not a Contract.** — *Conner v. Bent*, 1 Mo. 235; *Weeks v. Gilmanton*, 60 N. H. 500; *Wooster v. Plymouth*, 62 N. H. 193; *People v.*



ters of these towns they took, in their corporate character, title to the undivided and unchartered lands within their bounds.<sup>1</sup>

**3. Construction of Charters.** — In the construction of a charter granted to a town the practical interpretation it has received from those interested therein, and acquiescence in such interpretation for a long series of years, is the most important evidence in the determination of rights existing thereunder, and the strict letter of the instrument becomes of comparatively little importance.<sup>2</sup>

**4. Conflict Between Charter and Practical Location.** — If there is a practical location of the town under the charter, with lines marked and well defined but varying from the charter, such actual location may govern.<sup>3</sup>

**V. EXTENT AND BOUNDARIES — 1. In General.** — Towns must have clearly defined and continuous territorial limits or boundaries.<sup>4</sup>

**A Description of Town Boundaries Is Sufficient** if a surveyor would be enabled thereby to run out the lines around the territory composing the town.<sup>5</sup>

**2. Water Boundaries.** — Ordinarily, where a stream of water constitutes one of the boundary lines of a town, such town holds to the middle of the stream.<sup>6</sup> But general repute may show that the boundary of the town is at high-water mark.<sup>7</sup>

**3. Determination of Boundaries — a. IN GENERAL.** — The determination of the boundaries of a town, either by perambulation, by agreement between towns, or by the legislature, does not operate to transfer to the town the title to any land not previously held by it.<sup>8</sup>

**b. DETERMINATION BY COMMISSIONERS.** — Statutes in some states provide for the appointment of commissioners to determine the disputed boundary lines of towns.<sup>9</sup>

**Oath.** — Unless the statute so requires, it is not necessary that commissioners appointed to determine a boundary line should be sworn.<sup>10</sup> And even where the statute provides that an oath must be taken, the report of the commissioners need not state that the oath was duly taken.<sup>11</sup>

**The Previous Employment of a Commissioner by a Town to run a line as a surveyor, in no way disqualifies him from acting as one of the commissioners to determine such line.**<sup>12</sup>

**The Line as Declared by Commissioners appointed to determine a dividing line**

Pinckney, 32 N. Y. 377; *Mills v. Williams*, 11 Ired. L. (33 N. Car.) 558; *Erie v. Erie Canal Co.*, 59 Pa. St. 174, 2 Kent Com. 305.

**1. Royal Charters — Long Island Towns.** — *Rogers v. Jones*, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493; *North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 109; *Atkinson v. Bowman*, 42 Hun (N. Y.) 404; *Brookhaven v. Strong*, 60 N. Y. 57; *East Hampton v. Kirk*, 68 N. Y. 459; *People v. New York, etc., R. Co.*, 84 N. Y. 565; *Robins v. Ackerly*, 91 N. Y. 98; *Hand v. Newton*, 92 N. Y. 88; *Southampton v. Mecox Bay Oyster Co.*, 116 N. Y. 1.

**2. Construction of Charter.** — *Southampton v. Mecox Bay Oyster Co.*, 116 N. Y. 1.

**3. Actual Location.** — *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491.

**4. Boundaries Must Be Clear and Continuous.** — *Enterprise v. State*, 20 Fla. 128; *Cutting v. Stone*, 7 Vt. 471; *Gray v. Sheldon*, 8 Vt. 403; *Chicago, etc., R. Co. v. Oconto*, 50 Wis. 189, 36 Am. Rep. 840.

**An Unincorporated Town in Texas has no legally defined boundaries.** *Ex p. Tummins*, 32 Tex. Crim. 117.

**Boundaries of the Several Towns in Massachusetts are prescribed by public statute, of which the courts take judicial notice.** *Com. v. Springfield*, 7 Mass. 9.

**5. Sufficient Description.** — *Williams v. Wilbard*, 23 Vt. 369.

**6. Towns Bounded by River.** — *Granger v. Avery*, 64 Me. 292; *Cold Spring Iron Works v. Tolland*, 9 Cush. (Mass.) 492; *Flynn v. Boston*, 153 Mass. 372; *State v. Gilmanton*, 14 N. H. 467; *Boscawen v. Canterbury*, 23 N. H. 188.

**Where an Island Lies West of the Centre Line of a River at ordinary pitch of water, such island belongs to the town on the west side of such river.** *Stevens v. Thatcher*, 91 Me. 70.

**7. Boundaries at High-water Mark.** — *Forest River Lead Co. v. Salem*, 165 Mass. 193.

**8. Determination of Boundaries.** — *Porter v. Sullivan*, 7 Gray (Mass.) 444; *Com. v. Roxbury*, 9 Gray (Mass.) 510; *Seabrook v. Fowler*, 67 N. H. 428; *People v. Saxton*, 15 N. Y. App. Div. 263.

**Effect on Settlement of Pauper.** — See the title *POOR AND POOR LAWS*, vol. 22, p. 944.

**9. Determination by Commissioners.** — See for example the statutes of *Maine, Pennsylvania, and Vermont*.

**10. Oath Not Necessary.** — *Winthrop v. Readfield*, 90 Me. 235.

**11. Report Need Not Show Oath.** — *Somerset v. Glasterbury*, 61 Vt. 449.

**12. Previous Employment of Commissioner by Town.** — *Winthrop v. Readfield*, 90 Me. 235.



between towns remains the dividing line until a court having jurisdiction pronounces the proceeding of the commissioners void.<sup>1</sup>

The Testimony of One of the Commissioners appointed to determine a town line, introduced for the purpose of proving the location of the line, can have no more weight than if the evidence came from other parties than the commissioner.<sup>2</sup>

c. PROOF OF ANCIENT BOUNDARIES. — The territorial boundaries of towns, when they grow to be ancient, and cease to be marked by visible monuments, may be proved by general reputation in the absence of better evidence.<sup>3</sup>

An Old Plan of a Town, made in accordance with an act of the legislature, is *prima facie* evidence of the true lines between towns.<sup>4</sup>

4. Extension of Limits — Annexation of Territory — a. IN GENERAL. — By the same authority which gives to the legislature the power to incorporate towns, the limits of such towns may be extended and additional land and people brought under the municipal authority. It may do this with the consent of the people in the locality to be affected, or as they may deem best, and the question whether or not the consent of the majority in the territory to be annexed or the consent of the whole town shall be required is one which addresses itself solely to the legislature. It is not, as a matter of law, essential that any consent should be obtained.<sup>5</sup>

b. NATURE OF TERRITORY INCLUDED. — The limits of a town covering only a few square miles cannot be so extended as to include several square miles of rural territory.<sup>6</sup>

c. PREVENTION OF ANNEXATION. — Persons who do not reside or own property either in the territory proposed to be annexed, or in the town from which such territory is taken, cannot interfere to prevent annexation.<sup>7</sup> When, however, the validity of an act extending the limits of a town is made to depend upon its acceptance within a stipulated time by certain officers of the town, such acceptance is a necessary prerequisite to the annexation.<sup>8</sup>

d. APPORTIONMENT OF PROPERTY. — Upon the annexation of the whole or a part of a town to another town the legislature has the power to apportion the property and charge the liabilities of the annexed territory upon the town or towns to which it is annexed, in such manner and proportion as may seem just.<sup>9</sup>

e. EFFECT OF ANNEXATION ON SETTLEMENT OF PAUPERS. — This subject has been fully treated under another title in this work.<sup>10</sup>

1. Duration of Line Established. — Plunkett v. Creek v. Shrewsbury, 3 Pa. Dist. 613.

2. Testimony of Commissioner. — Magoon v. Davis, 84 Me. 178.

3. Proof of Ancient Boundaries. — Morgan v. Mobile, 49 Ala. 349.

4. Old Plan Prima Facie Evidence. — Wells v. Jackson Iron Mfg. Co., 48 N. H. 491.

5. Extension of Limits. — Scruggs v. Huntsville, 45 Ala. 220; Dodson v. Ft. Smith, 33 Ark. 508; Harris v. Schryock, 82 Ill. 119; Cicero v. Chicago, 182 Ill. 301; Morford v. Unger, 8 Iowa 82; Sharp v. Dunavan, 17 B. Mon. (Ky.) 223; Stoner v. Flournoy, 28 La. Ann. 850; Manly v. Raleigh, 4 Jones Eq. (57 N. Car.) 370.

Acts of County Commissioners in Detaching Territory from one town and annexing it to another are purely political or legislative in their nature, and will not be reviewed on certiorari. *In re Wilson*, 32 Minn. 145; *Lemont v. Dodge County*, 39 Minn. 385; *Christlieb v. Hennepin County*, 41 Minn. 142.

Presumption as to Legality of Annexation. — Where a part of one town is annexed to a parish that is included within another town, and

such annexation is acquiesced in for the period of nearly eighty years, it will be presumed that the annexation in the first instance was legal. *Cobb v. Kingman*, 15 Mass. 197.

6. Power to Include Rural Territory. — *State v. Eidson*, 76 Tex. 302.

Commons — Farm Lands. — *State v. McReynolds*, 61 Mo. 203.

7. Prevention of Annexation. — *Perkins v. Holman*, 43 Ark. 219.

8. Acceptance of Town Officers. — *Manly v. Raleigh*, 4 Jones Eq. (57 N. Car.) 370.

9. Apportionment of Property. — *Morgan v. Beloit*, 7 Wall (U. S.) 613; *Foreman v. Marianna*, 43 Ark. 324; *Olney v. Harvey*, 50 Ill. 453, 99 Am. Dec. 530; *Jamaica v. Vance*, 96 Ill. App. 598; *Thompson v. Abbott*, 61 Mo. 176; *Dunmore's Appeal*, 52 Pa. St. 374; *Goodhue v. Beloit*, 21 Wis. 636; *Depere v. Bellevue*, 31 Wis. 120, 11 Am. Rep. 602; *La Pointe v. O'Malley*, 47 Wis. 332; *Knight v. Ashland*, 61 Wis. 233.

10. Effect of Annexation on Settlement of Paupers. — See the title POOR AND POOR LAWS, vol. 22, p. 980.

**5. Two Towns over Same Territory.** — While it is true that there cannot be two towns at the same time over the same territory, this must be understood as meaning two legal and effective organizations.<sup>1</sup> There may be a *de facto* organization in actual government and, at the same time, a legal corporation entitled to govern.<sup>2</sup>

**6. Perambulation of Town Lines.** — Statutory provision is made in some states for periodical perambulation of town lines by the selectmen of towns or, if a place on a county line is unorganized, by the county commissioners.<sup>3</sup>

**7. Alteration of Boundaries** — *a. IN GENERAL.* — The legislatures have the power, under their general authority, to pass all useful and reasonable laws changing the boundaries of towns provided no constitutional provision is contravened.<sup>4</sup>

**The Consent of the Inhabitants** is not required in order to give force to acts of the legislature changing the limits of towns.<sup>5</sup>

*b. ALTERATION BY INDIVIDUAL.* — The power to change the boundary line of a town resides only in the legislature, and an individual has no such power.<sup>6</sup>

*c. ALTERATION UPON PETITION.* — It is sometimes provided that the inhabitants of a town may petition the town council asking a change in the corporate limits of the town. Upon the presentation of such a petition the council, after satisfying themselves that there are the requisite number of petitioners and that the proposed change is set forth with sufficient definiteness, must order a vote on the change proposed.<sup>7</sup>

*d. ALTERATION BY COMMISSIONERS.* — **The Duty of the Commissioners** appointed to alter town lines is to go upon the ground and view the lines which form the subject of their view and report. Failure to perform their duty in this respect would require the court to set aside their report. It is not necessary that they go within any particular distance of the proposed line. Their duty is to go upon the ground to get information from a personal view, and if they go near enough to the lines to get a view that will enable them to form an intelligent opinion, it is sufficient.<sup>8</sup>

**They Are Not Restricted** to the approval or rejection of the line established by the report of former commissioners. They may adopt a different line from that of their predecessors.<sup>9</sup>

**1. No Two Towns over Same Territory.** — *State v. Winter Park*, 25 Fla. 371; *Enterprise v. State*, 29 Fla. 128.

**2. De Facto and De Jure Organizations.** — *State v. Winter Park*, 25 Fla. 371.

**3. Perambulation of Town Lines.** — See for example the statutes of *Connecticut*, *Maine*, *Massachusetts*, and *New Hampshire*.

**As to Procedure in Perambulating,** see *Gorrill v. Whittier*, 3 N. H. 267; *Boscawen v. Canterbury*, 23 N. H. 188; *Campton v. Holderness*, 25 N. H. 225.

**Where Objections to a Perambulation** by the selectmen of one of the towns are frivolous and unfounded the court may order such town to pay all the costs of the perambulation. *Campton v. Holderness*, 25 N. H. 225.

**Municipal Officers of Organized Plantations** are subject to the performance of the duties devolving on the municipal officers of towns in relation to perambulation. *Small v. Lufkin*, 56 Me. 30.

**4. Power of Legislature to Change Boundaries.** — *North Yarmouth v. Skillings*, 45 Me. 133, 71 Am. Dec. 530; *Opinion of Justices*, 6 Cush. (Mass.) 578; *Dartmouth College v. Woodward*, 1 N. H. 111; *Bristol v. New-Chester*, 3 N. H.

532; *State v. Canterbury*, 28 N. H. 195; *Changing Boundary Line of Town*, 21 R. I. 581.

**5. Consent of Inhabitants.** — *Dartmouth College v. Woodward*, 1 N. H. 111; *Bristol v. New-Chester*, 3 N. H. 532; *State v. Canterbury*, 28 N. H. 195.

**6. A Diversion of a Stream by Artificial Means by a Mill Owner** does not change the boundary line of the town, but it continues to exist in the centre line of a stream as the stream flowed before it was artificially diverted. *Changing Boundary Line of Town*, 21 R. I. 581.

**The Acts of Adjoining Land Owners Cannot in Law Bind the Town**, and where a stone wall has been recognized by the adjoining proprietors for a period of twenty years as the line of the town, this does not affect the rights of the town. *Smith v. Rockingham*, 25 Vt. 645.

**7. Alteration upon Petition.** — *Russell v. Fulton County*, 3 Ohio Cir. Dec. 407, 6 Ohio Cir. Ct. 185; *Shank v. Ravenwood*, 43 W. Va. 242.

**Signatures to Petition.** — *Russell v. Fulton County*, 3 Ohio Cir. Dec. 407, 6 Ohio Cir. Ct. 185.

**8. Alteration by Commissioners — Duties.** — *Exeter, etc.*, Tp. Line, 8 Pa. Co. Ct. 524.

**9. Not Restricted to Former Lines.** — *Exeter, etc.*, Tp. Line, 8 Pa. Co. Ct. 524.

Their Report must show that the proposed alteration will be a convenience generally to the inhabitants of the township. It is not sufficient that such change will be a convenience to a few of the inhabitants.<sup>1</sup> They must further report on the propriety of changing the township lines, and it must appear that due notice of such intended change was given to the inhabitants of the township.<sup>2</sup>

**Plan of Alteration.** — Where commissioners are appointed to alter township lines it is their duty to return with their report a map or plan of the intended alterations, unless natural lines dispense with it.<sup>3</sup> The plan need contain only such lines as it is intended to alter. It is not essential that a draft of the whole township be made.<sup>4</sup>

**The Court Cannot Alter This Plan,** as such change might lead to a discrepancy between the lines designated on the plan and those confirmed.<sup>5</sup>

**c. POWER TO SETTLE BOUNDARIES DISTINGUISHED FROM POWER TO ALTER.** — The power to settle and establish is not a power to alter. A power to settle a boundary is only a power to determine the location of an existing line, while the authority to alter gives the right to abandon an existing line and establish a new one.<sup>6</sup>

**8. Subdivision** — *a. WHO MAY MAKE* — (1) *Legislature.* — The legislature may enact a law dividing a town and taking territory from it.<sup>7</sup>

(2) *Board of Supervisors or Commissioners.* — The board of supervisors or commissioners has the power to divide the townships when the public convenience requires that such division be made.<sup>8</sup>

(3) *County Courts.* — County courts, in some states, have authority within their respective counties to divide townships into two or more parts so as to suit the convenience of the inhabitants thereof.<sup>9</sup>

*b. PROCEEDINGS BY COMMISSIONERS.* — Statutes sometimes provide that

1. **Report — Convenience to Inhabitants.** — Rockdale, etc., Tp. Line, 23 Pa. Co. Ct. 170.

2. **Propriety of Change and Notice.** — Norwegian Tp., 20 Pa. St. 324.

3. **Plan of Alteration.** — Matter of Catharine, etc., Tp., 31 Pa. St. 303; Wetmore Tp., 68 Pa. St. 340.

4. **Contents of Plan.** — Matter of Catharine, etc., Tp., 31 Pa. St. 303.

5. **Change of Plan by Court.** — Wetmore Tp., 68 Pa. St. 340.

6. **Power to Settle and Power to Alter.** — Gorrell v. Whittier, 3 N. H. 265.

7. **Subdivision — By the Legislature** — *United States*. — Laramie County v. Albany County, 92 U. S. 307.

*Arkansas.* — Eagle v. Beard, 33 Ark. 497.

*Illinois.* — Cicero v. Chicago, 182 Ill. 301.

*Maine.* — South Portland v. Cape Elizabeth, 92 Me. 328, 69 Am. St. Rep. 502.

*Massachusetts.* — Cottage City v. Edgartown, 134 Mass. 67.

*Michigan.* — Harrison Tp. v. Schoolcraft County, 117 Mich. 215.

*Minnesota.* — State v. Lake City, 25 Minn. 404.

*New Jersey.* — Neilson v. Newark, 49 N. J. I. 246.

*Ohio.* — Metcalf v. State, 49 Ohio St. 586.

*Oregon.* — Morrow County v. Hendryx, 14 Oregon 397.

*Vermont.* — Montpelier v. East Montpelier, 29 Vt. 12, 67 Am. Dec. 748.

*Wisconsin.* — Cathcart v. Comstock, 56 Wis. 590; Yorty v. Paine, 62 Wis. 154; State v. Forest County, 74 Wis. 610.

8. **By County Supervisors or Commissioners.** — Territory v. Armstrong, 6 Dak. 226; Lones v. Harris, 71 Iowa 478.

**A Township Organized by the Legislature** cannot be divided by a board of county commissioners unless such division is made in pursuance of a petition signed by the freeholders of the township. Atty.-Gen. v. Rice, 64 Mich. 385.

**A Certificate of County Supervisors** which describes only the dividing line and does not specifically declare which part of a town is erected into a new town, may be explained by the petition requesting the division if such petition is sufficiently explicit. People v. Carpenter, 24 N. Y. 86.

**Failure to Name the Subscribers** in the published notice does not render defective an application to the county supervisors to set off a new town. People v. Carpenter, 24 N. Y. 86.

**The Petition to the County Commissioners** by a township for a portion of its territory to be set off to form a new town should be a corporate act and not an individual petition of the electors, however numerously signed. State v. Mantor, 14 Minn. 437.

9. **By County Courts.** — McKean v. Mt. Vernon, 51 Iowa 306; Monk v. George, 86 Iowa 315; Greenwood Tp., 3 Grant Cas. (Pa.) 261; Maccungie Tp. Case, 3 Rawle (Pa.) 459; Matter of North Whitehall Tp., 47 Pa. St. 156.

**Courts of Quarter Sessions.** — Maccungie Tp. Case, 3 Rawle (Pa.) 459.

**Territory Including Streets and Alleys.** — McKean v. Mt. Vernon, 51 Iowa 306.



if in the discretion of the court and jury a town ought not to include within its limits the territory sought to be severed, commissioners may be appointed to adjust and determine the terms of separation.<sup>1</sup>

**The Order of the Court Appointing Commissioners** is their authority for acting, and must contain an explicit direction to them, according to the express terms of the law, to inquire into the propriety of granting the prayer of the petitioners.<sup>2</sup>

**It Is the Duty of the Commissioners** to inquire into the propriety of granting the prayer of the petitioners for the division of the township, and to report to the court their opinion of the same in order that the court may take such order thereupon as may appear just and reasonable.<sup>3</sup>

**Drafts.** — When it is proposed simply to divide a township, a draft should be made of the lines of the old township with the division lines marked thereon. But where it is intended to divide two or more townships and to erect a new township, the commissioners should not only return a draft of the new township, but a draft of the townships as they remain after the new township is stricken off.<sup>4</sup>

**The Adjournment of Commissioners** is analogous to the adjournment of a court; the session is in law continuous, and the adjournment from day to day is a matter of convenience of which parties interested are bound to take notice.<sup>5</sup>

**c. CONSENT OF INHABITANTS.** — The legislature may, unless controlled by a special constitutional provision upon the subject, submit the question of dividing towns to a vote of the inhabitants of the territory immediately affected. The matter belongs exclusively to the legislature, and it may determine whether there shall or shall not be a submission to popular vote, and also how the vote shall be taken upon any act so submitted.<sup>6</sup>

**A Division Through the Business Portion of a Town** may properly be refused under a statute which authorizes a severance of territory if the court or jury shall be satisfied that justice and equity require that the prayer of the petitioners shall be granted. *Monk v. George*, 86 Iowa 315.

**When a Return Has Been Made Favorable to a Division of a Town**, it is the duty of the Court of Quarter Sessions to order an election. The court cannot confirm such a return absolutely, though they may pass upon and sustain or dismiss exceptions before referring the matter to a popular vote. *Matter of North Whitehall Tp.*, 47 Pa. St. 156.

**A Town May Be Divided** by the court where it consists of two villages separated by about a mile of unplatted and unused land. *Ashley v. Calliope*, 71 Iowa 466.

**1. Proceedings by Commissioners.** — *Ashley v. Calliope*, 71 Iowa 466.

**2. Appointment of Commissioners.** — *Matter of Bethel Tp.*, 1 Pa. St. 97; *In re Harrison Tp.*, 5 Pa. St. 447; *In re Plum Tp.*, 83 Pa. St. 73.

**3. Duties of Commissioners — Inquiry to Report.** — *In re Harrison Tp.*, 5 Pa. St. 447; *In re Limestone Tp.*, 11 Pa. St. 270.

**A Report of Commissioners Is Insufficient** unless it states how they arrived at the conclusions stated therein. *In re Limestone Tp.*, 11 Pa. St. 270.

**Where the Commissioners Are Not Commanded to Report** whether in their opinion the township ought to be divided, such failure is fatal even though the commissioners voluntarily certify that they think the division appropriate, for in doing so they act beyond the terms of the order, and act unofficially. *Matter of*

*Bethel Tp.*, 1 Pa. St. 97; *In re Plum Tp.*, 83 Pa. St. 73.

**Extent of Authority.** — *Green Tp. Case*, 9 W. & S. (Pa.) 22.

**Where Two of Three Viewers Appointed to Inquire into the Propriety of Dividing a Town** report in favor of granting the prayers of the petitioners, and the court confirms their report, it is to be presumed that all the viewers attended, and that only two of them joined in the report. *Windsor Tp. Case*, 9 Watts (Pa.) 248.

**4. Drafts.** — *Wyalusing Tp. Case*, 2 S. & R. (Pa.) 402; *In re Harrison Tp.*, 5 Pa. St. 447.

**When Commissioners Return a Draft and Give Their Opinion that a Division Is Convenient**, it is to be presumed that the commissioners have taken the proper means of judging which cannot be taken without a view of the country. *Wyalusing Tp. Case*, 2 S. & R. (Pa.) 402.

**Reference to an Old Draft** which has been adopted by the commissioners renders a new draft unnecessary. *In re Harrison Tp.*, 5 Pa. St. 447.

**A Draft of the Whole Township Intended to Be Divided May Be Dispensed with** provided the court be furnished with a draft of the new township, or such a description of the division line of the two townships by natural boundaries as will sufficiently designate the dividing line. *Wyalusing Tp. Case*, 2 S. & R. (Pa.) 402.

**5. Adjournment of Commissioners.** — *Division of Lansford*, 141 Pa. St. 134.

**6. Consent of Inhabitants.** — *People v. Salmon*, 51 Ill. 37; *Stone v. Charlestown*, 114 Mass. 214; *Clarke v. Rochester*, 28 N. Y. 605; *Manly v. Raleigh*, 4 Jones Eq. (57 N. Car.) 370; *Com. v. Judges*, 8 Pa. St. 391; *Bull v. Read*, 13 Gratt. (Va.) 78.

*d.* DIVISION DISTINGUISHED FROM SEPARATION AND ANNEXATION. — A distinction was early taken between a division of a town and a separation of a part from one and its annexation to another town. In the former case those absent from the town which is divided, at the time of its division, but having their last dwelling place on the portion constituting the new town, follow the territory and acquire a settlement in the new town thus created, though absent therefrom. In the case of annexation the settlement of no person is transferred to the town to which the annexation is made unless such person has a settlement in the town from which the territory is taken and actually dwells on the territory at the time of its separation.<sup>1</sup>

*e.* APPORTIONMENT OF PROPERTY AND LIABILITIES — (1) *In General.* — Where the legislature does not prescribe any regulations for any apportionment of property, or that the new corporation shall pay any portion of the debt of the old, the old corporation will hold all the corporate property within its new limits, and be entitled to all the claims owing to the old corporation, and be responsible for all the debts of the corporation existing before and at the time of the division.<sup>2</sup> And there are decisions to the effect that in the absence of express legislation on the division of a town

In Pennsylvania no township can be divided into two or more, and no new township can be erected out of two or more adjoining ones, without the concurring vote of the people affected by the change. *Matter of Clay, etc., Tp.,* 33 Pa. St. 366.

**Division of Unincorporated Town — Consent Held Unnecessary.** — *Harris v. Schryock*, 82 Ill. 119; *Woo-Sung v. People*, 102 Ill. 648.

**Consent Determined by Area.** — *State v. Mantor*, 14 Minn. 437.

**1. Division Distinguished from Separation and Annexation.** — *Hallowell v. Bowdoinham*, 1 Me. 129; *New Portland v. Rumford*, 13 Me. 299; *Starks v. New Sharon*, 39 Me. 369; *Manchester v. West Gardiner*, 53 Me. 523.

**2. Apportionment of Property and Liabilities — United States.** — *Brewis v. Duluth*, 3 McCrary (U. S.) 219; *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149, *affirmed* 10 How. (U. S.) 541; *Morgan v. Beloit*, 7 Wall. (U. S.) 615; *Laramie County v. Albany County*, 92 U. S. 307; *Mt. Pleasant v. Beckwith*, 100 U. S. 532; *Mobile v. Watson*, 116 U. S. 289.

*Colorado.* — *Cooke v. School Dist. No. 12*, 12 Colo. 453.

*Illinois.* — *Richland County v. Lawrence County*, 12 Ill. 1; *Olney v. Harvey*, 50 Ill. 453, 99 Am. Dec. 530; *People v. School Trustees*, 86 Ill. 613.

*Kansas.* — *Fender v. Neosho Falls Tp.*, 22 Kan. 305.

*Kentucky.* — *Montgomery County v. Menefee County Ct.*, 93 Ky. 33.

*Louisiana.* — *West Carroll v. Gaddis*, 34 La. Ann. 928.

*Maine.* — *Poland v. Strout*, 19 Me. 121; *North Yarmouth v. Skillings*, 45 Me. 133, 71 Am. Dec. 530; *Veazie v. Howland*, 47 Me. 127; *Frankfort v. Winterport*, 54 Me. 250; *South Portland v. Cape Elizabeth*, 92 Me. 328, 69 Am. St. Rep. 502.

*Maryland.* — *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572.

*Massachusetts.* — *Simmons v. Nahant*, 3 Allen (Mass.) 316; *Blackstone v. Taft*, 4 Gray (Mass.) 250; *Windham v. Portland*, 4 Mass. 384; *Richards v. Dagget*, 4 Mass. 539;

*Brunswick v. Dunning*, 7 Mass. 445; *Minot v. Curtis*, 7 Mass. 441; *Cobb v. Kingman*, 15 Mass. 197; *Hampshire v. Franklin County*, 16 Mass. 86.

*Michigan.* — *Pierson Tp. v. Township Board*, 49 Mich. 224.

*Minnesota.* — *State v. Lake City*, 25 Minn. 404.

*Mississippi.* — *Chickasaw County v. Sumner County*, 58 Miss. 619.

*New Hampshire.* — *Union Baptist Soc. v. Candia*, 2 N. H. 20; *South Hampton v. Fowler*, 52 N. H. 225; *Greenville v. Mason*, 53 N. H. 515.

*New Jersey.* — *McCully v. Board of Education*, 63 N. J. L. 18; *McCully v. Tracy*, 66 N. J. L. 489. But see *State v. Elvins*, 32 N. J. L. 362.

*New York.* — *North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 109; *Sill v. Corning*, 15 N. Y. 297.

*Texas.* — *Graham v. Greenville*, 67 Tex. 62; *Mills County v. Brown County*, 85 Tex. 391.

*West Virginia.* — *Board of Education v. Board of Education*, 30 W. Va. 424.

*Wisconsin.* — *Goodhue v. Beloit*, 21 Wis. 636; *Depere v. Bellevue*, 31 Wis. 120, 11 Am. Rep. 602; *Butternut v. O'Malley*, 50 Wis. 333; *Knight v. Ashland*, 61 Wis. 233; *Ackley v. Vilas*, 79 Wis. 157; *Spooner v. Minong*, 104 Wis. 425; *La Pointe v. O'Malley*, 47 Wis. 332.

**The Legal View** is that the old town remains in existence and so remains chargeable with all its previous obligations. *Courtright v. Brooks Tp.*, 54 Mich. 182.

**The Liability of a Town to Construct a Highway Is Not Affected by a Division** of the town which separates the part in which the highway is situated. *Page, Petitioner*, 37 Me. 553.

**New Town Has Mere Right to Receive Property.** — *Simmons v. Nahant*, 3 Allen (Mass.) 316.

**Where Township Bisected by New County Line.** — *Plunkett's Creek Tp. v. Crawford*, 27 Pa. St. 107.

**The Legal Identity of a Township** remains unchanged after division, so far as corporate existence is concerned, unless otherwise provided by law. *Board of Health v. East Saginaw*, 45 Mich. 257.

or township, each division is entitled to hold in severalty the public property which falls within its territorial limits.<sup>1</sup>

But as a General Rule the legislature may provide for an equitable apportionment or division of the corporate property, and impose upon the new town, or upon the people and territory thus disannexed, the obligation to pay an equitable proportion of the corporate debt.<sup>2</sup>

The Apportioning Power of the Legislature Extends to only such property as is held by the town in its corporate or municipal capacity and which is to be applied for municipal purposes. There is no power in the legislature to order a division of property held in trust by the town for specific purposes and which is not designated for the use of the town as a municipality.<sup>3</sup> Only debts due or contracted at the time of the division can be apportioned. Statutes providing

1. Title Passes to Property Divided. — School Tp. v. School Town, 109 Ind. 559; Towle v. Brown, 110 Ind. 65; North Hempstead v. Hempstead, 2 Wend. (N. Y.) 109; Denton v. Jackson, 2 Johns. Ch. (N. Y.) 320.

2. Apportionment by Legislature — United States. — Broughton v. Pensacola, 93 U. S. 266; Barkley v. Levee Com'rs, 93 U. S. 258. See also Laramie County v. Albany County, 92 U. S. 307.

Alabama. — State v. Mobile, 24 Ala. 701.

Arkansas. — Eagle v. Beard, 33 Ark. 497; Hempstead County v. Howard County, 51 Ark. 344.

Colorado. — Matter of House Bill No. 231, 9 Colo. 624; Matter of House Bill No. 122, 9 Colo. 639.

Connecticut. — New-London v. Montville, 1 Root (Conn.) 184; Willimantic School Soc. v. First School Soc., 14 Conn. 457; Granby v. Thurston, 23 Conn. 417.

Florida. — Canova v. State, 18 Fla. 512.

Illinois. — Richland County v. Lawrence County, 12 Ill. 1; Sangamon County v. Springfield, 63 Ill. 66; People v. Oran, 121 Ill. 650; Olney v. Harvey, 50 Ill. 453, 99 Am. Dec. 530. See also Jamaica v. Vance, 96 Ill. App. 598.

Kansas. — Sedgwick County v. Bailey, 11 Kan. 631; Ottawa County v. Nelson, 19 Kan. 234, 27 Am. Rep. 101; Hurt v. Hamilton, 25 Kan. 82; Marion County v. Harvey County, 26 Kan. 181; Craft v. Lofinck, 34 Kan. 365; State v. Kiowa County, 41 Kan. 630; Vandriss v. Hill, 58 Kan. 611.

Kentucky. — Justices v. Justices, 2 Bush (Ky.) 93.

Maine. — Gorham v. Springfield, 21 Me. 61; North Yarmouth v. Skillings, 45 Me. 133, 71 Am. Dec. 530; Frankfort v. Winterport, 54 Me. 250; South Portland v. Cape Elizabeth, 92 Me. 328, 69 Am. St. Rep. 502.

Maryland. — Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572.

Massachusetts. — Lakin v. Ames, 10 Cush. (Mass.) 198; Waldron v. Lee, 5 Pick. (Mass.) 323; School Dist. No. 1 v. Richardson, 23 Pick. (Mass.) 62; Brewster v. Harwich, 4 Mass. 278; Richards v. Dagget, 4 Mass. 534; Harrison v. Bridgeton, 16 Mass. 16; Whitney v. Stow, 111 Mass. 372; Rawson v. Spencer, 113 Mass. 45; Agawam v. Hampden County, 130 Mass. 530; Cottage City v. Edgartown, 134 Mass. 67; Kingman, Petitioner, 153 Mass. 573.

Minnesota. — State v. Lake City, 25 Minn. 405; State v. Browne, 56 Minn. 269.

Mississippi. — Chickasaw County v. Clay County, 62 Miss. 325.

Missouri. — Hughes v. School Dist. No. 29, 72 Mo. 643.

Montana. — Territory v. Cascade County, 8 Mont. 396.

New Hampshire. — Bristol v. New-Chester, 3 N. H. 524; Londonderry v. Derry, 8 N. H. 320; Sanbornton v. Tilton, 55 N. H. 603.

New Jersey. — Neilson v. Newark, 49 N. J. L. 246; Carlstadt v. Berger Tp., 60 N. J. L. 360.

New York. — North Hempstead v. Hempstead, 2 Wend. (N. Y.) 109; Sill v. Corning, 15 N. Y. 297; People v. Draper, 15 N. Y. 532.

North Carolina. — Love v. Schenck, 12 Ired. L. (34 N. Car.) 304.

Oregon. — Morrow County v. Hendryx, 14 Oregon 397.

Pennsylvania. — Dunmore's Appeal, 52 Pa. St. 374; Incorporation of Sharon Hill, 140 Pa. St. 250.

Texas. — Mills County v. Brown County, 85 Tex. 391.

Vermont. — Tileston v. Newman, 23 Vt. 421; Montpelier v. East Montpelier, 29 Vt. 12, 67 Am. Dec. 748.

West Virginia. — Board of Education v. Board of Education, 30 W. Va. 424.

Wisconsin. — Milwaukee v. Milwaukee, 12 Wis. 93; Schriber v. Langlade, 66 Wis. 616; Knight v. Ashland, 61 Wis. 233; State v. Harshaw, 73 Wis. 211; Pelican v. Rock Falls, 81 Wis. 428; State v. Maik, 113 Wis. 239.

A Promise to Pay Is Implied where a statute provides that the new town shall pay a portion of the debts of the old town. Farwell v. Rockland, 62 Me. 301; Mt. Desert v. Tremont, 72 Me. 348; South Portland v. Cape Elizabeth, 92 Me. 328, 69 Am. St. Rep. 502; Brewster v. Harwich, 4 Mass. 278.

Liability for Particular Debt. — Vanderbeck v. Englewood Tp., 39 N. J. L. 345.

Property May Be Taken from the Old Town and transferred to the new organization if the legislature so determines. Bristol v. New-Chester, 3 N. H. 524. See also Laramie County v. Albany County, 92 U. S. 307.

Funds in the Hands of the Treasurer of the Commissioners of Highways of a town are to be divided or apportioned upon a division of the town. Jamaica v. Vance, 96 Ill. App. 598.

3. Property Held for Specific Purpose. — Harrison v. Bridgeton, 16 Mass. 16; Montpelier v. East Montpelier, 29 Vt. 12, 67 Am. Dec. 748.



for apportionment of property and liabilities do not contemplate debts created or contracted after the division.<sup>1</sup>

**Choses in Action and Kindred Property.** — In the absence of express legislation as to choses in action or other kindred property, the respective claims of the town become a matter of equity jurisdiction and must be adjudged upon equitable principles.<sup>2</sup>

(2) *Jurisdiction of Courts.* — The power exercised in the division of towns is purely legislative, and the power to prescribe the rule by which the property of the town shall be divided and its debts apportioned, being incident to the power to divide the territory, must be strictly legislative. The courts have no authority over the subject, and can only construe the act of the legislature and see that the legislative will is carried into effect.<sup>3</sup>

(3) *Status of New Town.* — Upon the division of a town the original town no longer has power to act for the whole territory. The new town is an independent corporation, and its inhabitants are not debarred from asserting all their rights even against the original town.<sup>4</sup>

**The Act Setting Apart Such New Town** operates like an original act of incorporation. All the inhabitants in the newly incorporated town gain a settlement therein and are entitled to their support and maintenance.<sup>5</sup>

(4) *Effect of Division on Pending Suit.* — The fact that since the commencement of a suit to abate a nuisance a town has been divided, so that the place where the nuisance is alleged to exist falls within the new town, has no effect to vacate the suit where the act of incorporation contains a saving clause sufficient to avoid such effect.<sup>6</sup>

**No Appeal Lies from an Act Dividing a Town** unless the statute in terms gives such appeal.<sup>7</sup>

(5) *Effect of Division on Territorial System.* — Where a particular town belongs to a territorial system which includes various towns, as, for example, to a county, or to an election district for the choice of senator, councillor, district attorney, representative in Congress or in the general court, or to a judicial district, and such town is divided by the incorporation of a portion thereof as a new town, with a new name, the portion of the original town which retains the old name continues to belong to the same county, the same election district, and the same judicial district; and the newly incorporated town does also, unless there is something in the statute to show a contrary intention.<sup>8</sup>

(6) *Effect of Division on Settlement of Paupers.* — The effect of the division of a town upon the settlement of paupers has been fully treated elsewhere in this work.<sup>9</sup>

**1. Apportionable Debts.** — *Bulson v. Green Island*, (Supm. Ct. Spec. T.) 80 N. Y. Supp. 551.

**Where a Contract Does Not Create a Liability until After the Division** of a town the new town cannot be held to contribute to the payment of the obligation. *Westbrook v. Deering*, 63 Me. 231.

**2. Choses in Action.** — *Mt. Pleasant v. Beckwith*, 100 U. S. 514; *Zartman v. State*, 109 Ind. 360; *Towle v. Brown*, 110 Ind. 65.

**Recovery of Excess Payment.** — *Ackley v. Vilas*, 79 Wis. 157.

**3. St. Louis v. Russell**, 9 Mo. 507; *Bristol v. New-Chester*, 3 N. H. 524; *Overseers of Poor v. Overseers of Poor*, 18 Johns. (N. Y.) 382.

**4. Status of New Town.** — *Veazie v. Howland*, 47 Me. 127; *Pierson Tp. v. Township Board*, 49 Mich. 224.

**5. Nature of Dividing Act.** — *Westport v. Dartmouth*, 10 Mass. 341.

**6. Effect on Pending Suit.** — *Springfield v. Con-*

*necticut River R. Co.*, 4 Cush. (Mass.) 63.

**7. Right of Appeal.** — *In re Valley Tp. Div.*, 146 Pa. St. 111.

**In Wisconsin** the validity of any ordinance purporting to organize or set off any new town or to change the boundaries of any existing town or towns may be tested by certiorari, brought directly for the purpose of vacating such ordinance, in a court of competent jurisdiction. *Austrian v. Guy*, 21 Fed. Rep. 508; *Sherry v. Gilmore*, 58 Wis. 332; *Schriber v. Langlade*, 66 Wis. 625; *State v. Forest County*, 74 Wis. 610.

**8. Effect of Division on Territorial System.** — *Com. v. Brennan*, 150 Mass. 63.

**Commissions of Justices of the Peace of the District** are not vacated by the division of a township. *Com. v. Sheriff*, 4 S. & R. (Pa.) 275.

**9. Effect of Division on Settlement of Paupers.** — See the title POOR AND POOR LAWS, vol. 22, p. 977.

(7) *Right of Residents to Elect Which Town They Will Join.* — Where the legislature divides a town it may provide that all persons dwelling on lands adjoining the division line shall have the liberty to belong with their lands to either town at their election, if made within a limited time. This election is not merely a personal privilege terminating at the death of the party, but is a definitive and perpetual change of the line of territorial jurisdiction.<sup>1</sup>

(8) *Evidence of Division in Fact.* — Where a division in fact of a town is the only division ever made, and has never been questioned by the proprietors, but has always been treated and acted on as the division of the lands in that town, the book purporting to be the records of the original proprietors is evidence of such division in fact, particularly against a stranger.<sup>2</sup>

(9) *Local Subdivisions* — (a) *Precincts.* — Upon the petition of the requisite number of legal voters, inhabitants of a village situated in any town or in two or more towns, the selectmen of such town or towns shall fix by a suitable boundary a village precinct to include the whole village.<sup>3</sup>

(b) *Parishes.* — Upon the division of a town into two or more parishes by reason of the incorporation of a parish within the limits of the town, all the parochial burdens as well as the parochial property devolve upon that corporation which by force of the statute is constituted the first parish.<sup>4</sup>

(c) *Road Districts.* — Where townships are divided into road districts, such districts are not political entities or corporations in which property rights may vest, and which as such have corporate powers or capacity to conduct the affairs for which they are created. They exist merely for the purpose of the election of road supervisors, and the better caring for and improving the roads by such officers.<sup>5</sup>

(d) *Blocks.* — The courts will take judicial notice of the fact that a township, whether used in the sense of a municipal division of a county or of a township according to government survey, has no subdivisions known as "blocks." That term is applied only to the subdivisions of a platted town, village, or city.<sup>6</sup>

**VI. POWERS — 1. In General.** — A town or township upon being created becomes an institution of the state, established for certain public purposes, and for effecting those purposes it is invested with certain powers and is charged with corresponding duties, all either expressly or impliedly provided for in the statutes and adapted to the peculiar end.<sup>7</sup> Within the proper scope of

1. *Election of Town of Residence.* — *Cumberland v. Prince*, 6 Me. 408.

2. *Evidence of Division in Fact.* — *Hubbard v. Austin*, 11 Vt. 129.

An Imperfect Division Evidenced by a plan or even by a parol acquiesced in by all the proprietors is a good division, binding upon them, and clearly is good against strangers. *Sawyer v. Newland*, 9 Vt. 383.

3. *Subdivision into Precincts.* — *Osgood v. Clark*, 26 N. H. 307.

4. *Subdivision into Parishes.* — *Medford v. Pratt*, 4 Pick. (Mass.) 222.

5. *Road Districts.* — *Denver v. Myers*, 63 Neb. 107.

6. *No "Blocks" in Township.* — *Herrick v. Morrill*, 37 Minn. 250, 5 Am. St. Rep. 841.

7. *Powers — In General* — *United States*. — *Brattleboro Sav. Bank v. Hardy Tp.*, 98 Fed. Rep. 524.

*Connecticut.* — *White v. Stamford*, 37 Conn. 578; *Watson v. New Milford*, 72 Conn. 561, 77 Am. St. Rep. 345.

*Illinois.* — *Greeley v. People*, 60 Ill. 19; *Bloomington v. Lillard*, 39 Ill. App. 616.

*Indiana.* — *Deutschman v. Charlestown*, 40

Ind. 449; *Wallis v. Johnson School Tp.*, 75 Ind. 371; *Axt v. Jackson School Tp.*, 90 Ind. 101; *Union School Tp. v. Crawfordsville First Nat. Bank*, 102 Ind. 464.

*Maine.* — *Hooper v. Emery*, 14 Me. 375; *Gorham v. Springfield*, 21 Me. 58; *Ham v. Sawyer*, 38 Me. 37; *Opinion of Justices*, 52 Me. 595; *Frankfort v. Winterport*, 54 Me. 250; *Westbrook v. Deering*, 63 Me. 231; *Vose v. Frankfort*, 64 Me. 229; *Bessey v. Unity Plantation*, 65 Me. 342.

*Massachusetts.* — *Fourth School Dist. v. Wood*, 13 Mass. 193; *Parsons v. Goshen*, 11 Pick. (Mass.) 396; *Willard v. Newburyport*, 12 Pick. (Mass.) 227; *Keyes v. Westford*, 17 Pick. (Mass.) 273; *Bancroft v. Lynnfield*, 18 Pick. (Mass.) 566, 29 Am. Dec. 623; *Allen v. Taunton*, 19 Pick. (Mass.) 485; *Spaulding v. Lowell*, 23 Pick. (Mass.) 71; *Simmons v. Hanover*, 23 Pick. (Mass.) 188; *Anthony v. Adams*, 1 Met. (Mass.) 286; *Hardy v. Waltham*, 3 Met. (Mass.) 163; *Babbitt v. Savoy*, 3 Cush. (Mass.) 530; *Cushing v. Stoughton*, 6 Cush. (Mass.) 389; *Vincent v. Nantucket*, 12 Cush. (Mass.) 103; *Hadsell v. Hancock*, 3 Gray (Mass.) 526; *Friend v. Gilbert*, 108 Mass. 408; *Arlington v.*

these purposes, powers, and duties, its corporate acts bind the organization, while all others being foreign thereto are without law and have no binding effect.<sup>1</sup> And accordingly, in the absence of a special statute, a town cannot appropriate money for the purposes of local defense against an invading enemy,<sup>2</sup> nor to build places of amusement for its inhabitants,<sup>3</sup> nor to abate taxes,<sup>4</sup> nor to pay a private fire company,<sup>5</sup> nor to build a court house,<sup>6</sup> or a county jail,<sup>7</sup> or a bridge in another county,<sup>8</sup> nor to aid a private cemetery association.<sup>9</sup>

**2. Source of.**—Towns and townships derive none of their powers from, nor are any duties imposed upon them by, the common law. They have been denominated *quasi*-corporations, and their whole corporate powers and duties are derived through legislative enactments.<sup>10</sup> They do not possess and

Cutter, 114 Mass. 344; Coolidge v. Brookline, 114 Mass. 592; Connolly v. Beverly, 151 Mass. 437; Flood v. Leahy, 183 Mass. 232.

*Michigan.*—Tweed v. Metcalf, 4 Mich. 578.

*New Hampshire.*—Cardigan v. Page, 6 N. H. 182; McIntire v. Pembroke, 53 N. H. 462; Tucker v. Aiken, 7 N. H. 113.

*New Jersey.*—State v. Hammonton, 38 N. J. L. 430, 20 Am. Rep. 404.

*New York.*—Cornell v. Guilford, 1 Den. (N. Y.) 510; People v. Works, 7 Wend. (N. Y.) 486; Sweet v. Hulbert, 51 Barb. (N. Y.) 312; Verona v. Peckham, 66 Barb. (N. Y.) 103.

*Ohio.*—Hopple v. Brown Tp., 13 Ohio St. 311.

*South Dakota.*—Miles v. Benton Tp., 11 S. Dak. 450.

*Vermont.*—Beach v. Haynes, 12 Vt. 15; Van Sicklen v. Burlington, 27 Vt. 70; Bates v. Bassett, 60 Vt. 530.

*Wisconsin.*—Beaver Dam v. Frings, 17 Wis. 398; Goodhue v. Beloit, 21 Wis. 636.

**Until a Town Is Incorporated** it is not clothed with any powers or charged with any duties by law. Reilly v. Chouquette, 18 Mo. 220.

**A Town Has the Power to Provide for the Wants of the Future** as well as the present. Jones v. Sanford, 66 Me. 585.

**1. Act Binding on Organization**—*Connecticut.*—Granby v. Thurston, 23 Conn. 416; Abendroth v. Greenwich, 29 Conn. 363; Booth v. Woodbury, 32 Conn. 118; Webster v. Harwinton, 32 Conn. 131; Turney v. Bridgeport, 55 Conn. 412.

*Illinois.*—Petersburg v. Metzker, 21 Ill. 205.

*Indiana.*—Deutschman v. Charlestown, 40 Ind. 449; Wallis v. Johnson School Tp., 75 Ind. 368; Axt v. Jackson School Tp., 90 Ind. 101; Union School Tp. v. Crawfordsville First Nat. Bank, 102 Ind. 464; State v. Fountain County, 147 Ind. 235.

*Maine.*—Hooper v. Emery, 14 Me. 375; Gorham v. Springfield, 21 Me. 58; Ham v. Sawyer, 38 Me. 37; Opinion of Justices, 52 Me. 595; Westbrook v. Deering, 63 Me. 231; Thorndike v. Camden, 82 Me. 39; Lovejoy v. Foxcroft, 91 Me. 367.

*Massachusetts.*—Staton v. Kempton, 13 Mass. 272, 7 Am. Dec. 145; Fourth School Dist. v. Wood, 13 Mass. 193; Flood v. Leahy, 183 Mass. 232; Parsons v. Goshen, 11 Pick. (Mass.) 396; Anthony v. Adams, 1 Met. (Mass.) 284; Vincent v. Nantucket, 12 Cush. (Mass.) 104.

*Michigan.*—People v. Onondaga, 16 Mich. 254; Atty.-Gen. v. Burrell, 31 Mich. 25.

*New Hampshire.*—Merrill v. Plainfield, 45 N. H. 126.

*New York.*—Lorillard v. Monroe, 11 N. Y. 392, 62 Am. Dec. 120; Fishkill v. Fishkill, etc., Plank Road Co., 22 Barb. (N. Y.) 634; Sweet v. Hulbert, 51 Barb. (N. Y.) 312.

*Rhode Island.*—McAleer v. Angell, 19 R. I. 688.

*Vermont.*—Van Sicklen v. Burlington, 27 Vt. 70.

*Wisconsin.*—Eaton v. Manitowoc County, 44 Wis. 489.

**2. Cannot Raise Money for Local Defense.**—Stetson v. Kempton, 13 Mass. 272, 7 Am. Dec. 145; Van Sicklen v. Burlington, 27 Vt. 70.

**3. Cannot Build Places of Amusement.**—Cooley v. Granville, 10 Cush. (Mass.) 56.

**4. Cannot Raise Money to Abate Taxes.**—Cooley v. Granville, 10 Cush. (Mass.) 56.

**5. Cannot Raise Money for Private Fire Company.**—Greenough v. Wakefield, 127 Mass. 275.

**6. Cannot Raise Money to Build a Court House.**—Bachelder v. Epping, 28 N. H. 354.

**7. Cannot Raise Money to Build a County Jail.**—Drew v. Davis, 10 Vt. 506, 33 Am. Dec. 213; Van Sicklen v. Burlington, 27 Vt. 70.

**8. Cannot Raise Money to Build Bridge in Another County.**—Concord v. Boscawen, 17 N. H. 465.

**9. Cannot Raise Money to Aid Private Cemetery.**—Luques v. Dresden, 77 Me. 186.

**10. Source of Powers**—*Iowa.*—Clark v. Des Moines, 19 Iowa 199, 87 Am. Dec. 423.

*Kansas.*—Walnut Tp. v. Jordan, 38 Kan. 562.

*Louisiana.*—Cook v. Dendinger, 38 La. Ann. 261.

*Maine.*—Hooper v. Emery, 14 Me. 375; Alley v. Edgcomb, 53 Me. 448.

*Massachusetts.*—Fourth School Dist. v. Wood, 13 Mass. 193; Salem Mill Dam Corp. v. Ropes, 6 Pick. (Mass.) 23; Loker v. Brookline, 13 Pick. (Mass.) 343; Minot v. West Roxbury, 112 Mass. 1, 17 Am. Rep. 52; Coolidge v. Brookline, 114 Mass. 592; Spaulding v. Peabody, 153 Mass. 129; Flood v. Leahy, 183 Mass. 232.

*Michigan.*—Bogart v. Lamotte Tp., 79 Mich. 294. See also Atty.-Gen. v. Burrell, 31 Mich. 25.

*Missouri.*—Cheeney v. Brookfield, 60 Mo. 53.

*New Hampshire.*—Carlton v. Bath, 22 N. H. 559.

*New York.*—Cornell v. Guilford, 1 Den. (N. Y.) 510; Lorillard v. Monroe, 11 N. Y. 392,



never have possessed any inherent legal power.<sup>1</sup>

**3. Nature of.** — The powers of towns are wholly of a public nature, and they are at all times subject to the will of the legislature unless restricted by the constitution.<sup>2</sup>

**4. Construction of.** — As a general rule, statutes concerning the powers of towns must be construed strictly, and all reasonable doubts concerning the existence of a power are to be resolved against it.<sup>3</sup>

**5. Exercise of.** — Inasmuch as towns act, not by any inherent right of legislation, like the legislature of the state, but by delegated authority, their powers must be strictly pursued.<sup>4</sup>

**6. Miscellaneous Powers** — *a.* **POWER TO PARTICIPATE IN SUITS.** — As a general rule, towns and townships have power to sue and be sued.<sup>5</sup>

The Power of the Town Is Not Limited to Suits in Which It Is a Party, but embraces those in which it is interested. The only question is whether the town is interested in the controversy so that it may raise money and incur liabilities in regard thereto.<sup>6</sup>

*b.* **POLICE POWER.** — Police power may be intrusted to the local authori-

62 Am. Dec. 120; *Fishkill v. Fishkill*, etc., Plank Road Co., 22 Barb. (N. Y.) 634.

*Ohio.* — *Hopple v. Brown Tp.*, 13 Ohio St. 311.

*South Dakota.* — *Van Antwerp v. Dell Rapids Tp.*, 5 S. Dak. 447; *Aldrich v. Collins*, 3 S. Dak. 154.

*Vermont.* — *Van Sicklin v. Burlington*, 27 Vt. 70.

**1. No Inherent Power in Towns.** — *Hayden v. Noyes*, 5 Conn. 391; *Willard v. Killingworth*, 8 Conn. 247; *Higley v. Bunce*, 10 Conn. 436; *New London v. Brainard*, 22 Conn. 553; *Abendroth v. Greenwich*, 29 Conn. 356; *Baldwin v. North Branford*, 32 Conn. 47; *Booth v. Woodbury*, 32 Conn. 118; *Webster v. Harwinton*, 32 Conn. 131.

**2. Nature of Powers** — *United States.* — *Beckwith v. Racine*, 7 Biss. (U. S.) 142; *Barkley v. Levee Com'rs*, 93 U. S. 258; *Mt. Pleasant v. Beckwith*, 100 U. S. 514.

*Alabama.* — *State v. Mobile*, 24 Ala. 701.

*Connecticut.* — *Granby v. Thurston*, 23 Conn. 416.

*Illinois.* — *Richland County v. Lawrence*, County, 12 Ill. 1; *Olney v. Harvey*, 50 Ill. 453, 99 Am. Dec. 530; *Sangamon County v. Springfield*, 63 Ill. 66.

*Maine.* — *Gorham v. Springfield*, 21 Me. 58; *North Yarmouth v. Skillings*, 45 Me. 133, 71 Am. Dec. 530.

*Michigan.* — *Smith v. Adrian*, 1 Mich. 495.

*Missouri.* — *St. Louis v. Russel*, 9 Mo. 507.

*New Hampshire.* — *Londonderry v. Derry*, 8 N. H. 320.

*New York.* — *People v. Morrell*, 21 Wend. (N. Y.) 563; *Sill v. Corning*, 15 N. Y. 297; *People v. Draper*, 15 N. Y. 532; *People v. Pinckney*, 32 N. Y. 377.

*Pennsylvania.* — *Dunmore's Appeal*, 52 Pa. St. 375; *Burns v. Clarion County*, 62 Pa. St. 422.

*Virginia.* — *Wade v. Richmond*, 18 Gratt. (Va.) 583.

*Wisconsin.* — *Milwaukee v. Milwaukee*, 12 Wis. 93.

**3. Construction of Powers.** — *Cook v. Den- dinger*, 38 La. Ann. 261; *Minot v. West Rox-*

*bury*, 112 Mass. 1, 17 Am. Rep. 52; *Coolidge v. Brookline*, 114 Mass. 592; *Spaulding v. Pea- body*, 153 Mass. 129; *Atty.-Gen. v. Burrell*, 31 Mich. 25.

**4. Exercise of Powers.** — *Willard v. Killing- worth*, 8 Conn. 247; *Higley v. Bunce*, 10 Conn. 436.

**5. Power to Sue and Be Sued** — *Illinois.* — *Wolf v. Boettcher*, 64 Ill. 316.

*Indiana.* — *Union Tp. v. Anthony*, 26 Ind. 487; *Sebrell v. Fall Creek Tp.*, 27 Ind. 86; *Mc- Ilwaine v. Adams*, 46 Ind. 580; *Bittinger v. Bell*, 65 Ind. 455; *State v. Wilson*, 113 Ind. 501.

*Kansas.* — *Ralston v. Dodge City*, etc., R. Co., 53 Kan. 337.

*Massachusetts.* — *Campbell v. Upton*, 113 Mass. 67.

*Michigan.* — *Buckeye Tp. v. Clark*, 90 Mich. 432.

*Missouri.* — *Reilly v. Chouquette*, 18 Mo. 220.

*New York.* — *Fishkill v. Fishkill*, etc., Plank Road Co., 22 Barb. (N. Y.) 634; *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312; *Cornell v. Guilford*, 1 Den. (N. Y.) 510.

*Ohio.* — *Harding v. New Haven Tp.*, 3 Ohio 227.

*Pennsylvania.* — *Shronk v. Penn Tp.*, 3 Rawle (Pa.) 347.

The Power to Sue and Be Sued Must Be Limited to cases where the assertion of their corporate rights or the enforcement of their corporate liabilities requires such proceeding. *Fishkill v. Fishkill*, etc., Plank Road Co., 22 Barb. (N. Y.) 634; *Lorillard v. Monroe*, 11 N. Y. 392, 62 Am. Dec. 120.

Until a Town Is Incorporated it has no capacity to sue or be sued. *Reilly v. Chouquette*, 18 Mo. 220.

The Right of the Town to Sue Depend upon the vote of the town meeting, and the suit must conform to the resolution of such meeting. *Lyons v. Cole*, 3 Thomp. & C. (N. Y.) 431.

Submission to Arbitration. — *Campbell v. Up- ton*, 113 Mass. 67.

**6. Suits in Which Town Has Interest.** — *Bloomington v. Lillard*, 39 Ill. App. 616; *Briggs v. Whipple*, 6 Vt. 95.

ties of towns, and the exercise of this power comes either from the express statutory law applicable to the whole state, or from the power conferred by the legislature upon a chartered town to make regulations, ordinances, or by-laws for its own government.<sup>1</sup>

**Abatement of Nuisances.** — The power is often given to towns to declare what shall constitute a nuisance, and to prevent, abate, and remove the same, and to take such other measures for the preservation of the public health as they shall deem necessary.<sup>2</sup>

**c. POWER OVER INHABITANTS AND PROPERTY.** — The powers of a town over the inhabitants and property within its territory are limited to such as are necessary for the efficient discharge of those duties and liabilities which are expressly or by necessary implication imposed by the legislature to effectuate the purpose of their creation, and even these limited powers are to be exercised upon the citizen and his property only with such precautions and in such manner as may be prescribed by the statute.<sup>3</sup>

**d. DISTRIBUTION OF TOWN FUNDS.** — Ordinarily a town has no authority to raise money for the purpose of redistributing it among its citizens, nor can it raise money for the purpose of refunding an amount voluntarily paid to the town without expectation of repayment.<sup>4</sup>

**But Where Money of a Person Is Improperly Paid into the Town Treasury** by its agent, the town has power to pass a vote to repay it, and having passed such vote is bound by it; the vote is not revocable, but gives a right of action which cannot be defeated without the consent of the party in whose favor it was made.<sup>5</sup>

**e. WATER SUPPLY.** — A town or township may construct and maintain a system of waterworks for the use and benefit of residents and property owners within its limits and for the use and benefit of persons who may have occasion to travel its highways.<sup>6</sup>

**f. EXPENDITURES TO ADVOCATE OR OPPOSE ANNEXATION OR DIVISION.** — In the absence of a special statute, a town cannot expend money to advocate or oppose the annexation or division of a town.<sup>7</sup> Where such statutes exist, a town may employ and pay counsel for representing it before a committee of the legislature.<sup>8</sup>

**g. POWER TO REPAIR DRAINS.** — When a statute authorizes county commissioners to build a drain, the towns through which it is laid may repair the parts thereof within their boundaries.<sup>9</sup>

**h. ESTABLISHING AND PERPETUATING SECTION CORNERS.** — The expense of establishing and perpetuating section corners of quarter sections does not

1. **Police Power.** — *Haller v. Sheridan*, 27 Ind. 494; *McIntire v. Pembroke*, 53 N. H. 462.

2. **Abatement of Nuisances.** — *Haller v. Sheridan*, 27 Ind. 494.

**A Statute Authorizing Towns to Abate and Remove Nuisances** can be exercised only in reference to those things that are nuisances in themselves, and necessarily so. A cemetery is not included in this category. *Lake View v. Letz*, 44 Ill. 81.

3. **Power of Towns over Inhabitants and Property.** — *Lovejoy v. Foxcroft*, 91 Me. 367.

4. **Refunding Money.** — *Hooper v. Emery*, 14 Me. 375; *Opinion of Justices*, 52 Me. 505; *Perkins v. Milford*, 59 Me. 315; *Withington v. Harvard*, 8 Cush. (Mass.) 66.

5. **Money Improperly Paid into Treasury.** — *Hall v. Holden*, 116 Mass. 172.

**A Vote to Refund the Money Contributed by Individuals** for the purpose of raising recruits for the army is not passed in fulfilment of any legal obligation which rests on the town, nor

does it constitute a valid agreement by virtue of which the town is liable to pay a specific sum to any particular person. *Shepard v. Turner*, 13 Allen (Mass.) 92.

6. **Water Supply.** — *Smith v. Westerly*, 19 R. I. 437; *Miles v. Benton Tp.*, 11 S. Dak. 450. See generally the title **WATERWORKS AND WATER COMPANIES**.

**Waterworks Cannot Be Constructed by a Town Unless a Resolution Therefor Has Been Adopted** at the last preceding annual town meeting. *Farnsworth v. Pawtucket*, 13 R. I. 82; *Dulanty v. Vaughn*, 77 Wis. 38.

7. **Expenses Relating to Annexation or Division.** — *Westbrook v. Deering*, 63 Me. 231; *Thorn-dike v. Camden*, 82 Me. 39; *Minot v. West Roxbury*, 112 Mass. 1, 17 Am. Rep. 52; *Coolidge v. Brookline*, 114 Mass. 592.

8. **Statutes Authorizing Expenditures.** — *Connolly v. Beverly*, 151 Mass. 437.

9. **Power to Repair Drains.** — *Melrose v. Highland*, 163 Mass. 303.

come within the term "ordinary expenses" and cannot be undertaken by a town.<sup>1</sup>

*i.* PAYMENT OF EXPENSES OF INCORPORATION. — Newly incorporated towns cannot make provision for the payment of expenses incurred by individuals in procuring the passage of the act of incorporation.<sup>2</sup>

*j.* ERECTION OF ILLUMINATING PLANT. — It is beyond the legal right and power of a town to erect and maintain electric works for the purpose of lighting its streets.<sup>3</sup>

*k.* POWER TO BORROW MONEY. — If money is needed for the performance of a town duty, and the state has not commanded an assessment of taxes for it, the majority of the inhabitants of a town can, in a legal town meeting, under a sufficient town warrant, bind all the inhabitants to determine to borrow part or even all of the money, rather than raise it at once from taxes.<sup>4</sup> But this power of a town to borrow money is strictly limited to money necessary for a discharge of its legal liabilities. It is limited in amount as well as in purpose, and it may be exercised by the town in town meeting upon proper warrant and by vote either authorizing the act of borrowing beforehand or afterwards ratifying the prior act. It is not enough that the money was paid to some town officer and by him used in discharging some legal duty or liability of the town.<sup>5</sup> When, however, a town has the power to borrow money it may borrow through an agent appointed for that purpose and may appoint its treasurer such agent.<sup>6</sup> A town cannot borrow upon the credit of its inhabitants more money than it actually needs for a specified purpose, and its agent, whether the treasurer or some other person, cannot borrow more money, nor for any other purpose, than is specified by the terms of the vote. When the need of the town is supplied, or the limit of the vote is reached, the power of the agent is exhausted and he cannot bind the town further.<sup>7</sup>

*l.* UNIFORMS FOR MILITARY COMPANY. — A town has no authority to raise money for the purpose of procuring uniforms for a military company.<sup>8</sup>

*m.* FIRE DEPARTMENT — FIRE LIMITS. — These subjects have already been discussed in this work.<sup>9</sup>

*n.* MARKETS. — The power of a town to erect and control markets and market houses is fully treated under a previous title in this work.<sup>10</sup>

*o.* HIGHWAYS, STREETS, AND SIDEWALKS. — The power of towns in relation to these subjects is treated under other titles in this work.<sup>11</sup>

*p.* POWER TO INDEMNIFY OFFICERS. — A town may indemnify its officers against liabilities incurred in the *bona fide* discharge of their official duties

1. Establishing and Perpetuating Section Corners. — *Mills v. Richland Tp.*, 72 Mich. 100.

2. Payment of Expenses of Incorporation. — *Frost v. Belmont*, 6 Allen (Mass.) 152.

3. Erection of Illuminating Plant. — *Spaulding v. Peabody*, 153 Mass. 129. That the legislature may confer such power, see the case just cited; also *Opinions of Justices*, 150 Mass. 592.

4. Power to Borrow for Performance of Town Duty. — *Barleyville v. Lowell*, 20 Me. 178; *Belfast Nat. Bank v. Stockton*, 72 Me. 522; *Brown v. Winterport*, 79 Me. 305; *Lovejoy v. Foxcroft*, 91 Me. 367; *Clarke v. School Dist. No. 7*, 3 R. I. 199.

In *Michigan* neither townships nor their officers have any power to borrow money or to issue bonds except as that power is conferred upon them by act of the legislature. *Bogart v. Lamotte Tp.*, 79 Mich. 294.

5. Limitation of Power to Borrow. — *Lovejoy v. Foxcroft*, 91 Me. 367.

6. Town May Borrow Through an Agent. — *Lovejoy v. Foxcroft*, 91 Me. 367.

7. Extent of Power to Borrow Money. — *Lovejoy v. Foxcroft*, 91 Me. 367; *Lowell Five Cents Sav. Bank v. Winchester*, 8 Allen (Mass.) 109; *Benoit v. Conway*, 10 Allen (Mass.) 528.

Payment of Commissions to a Broker is not authorized by a vote empowering the treasurer to borrow money. *Butterfield v. Melrose*, 6 Allen (Mass.) 187.

Giving a New Town Note in Renewal of an Old One is not authorized by a vote empowering the treasurer to hire money for the use of the town. *Abbott v. North Andover*, 145 Mass. 484.

8. Uniforms for Military Company. — *Tash v. Adams*, 10 Cush. (Mass.) 254; *Claffin v. Hopkinton*, 4 Gray (Mass.) 502.

9. Fire Department — Fire Limits. — See the titles FIRE DEPARTMENT, vol. 13, p. 73; FIRE LIMITS, vol. 13, p. 396.

10. Markets. — See the title MARKETS, vol. 19, p. 1139.

11. Highways, Streets, and Sidewalks. — See the titles HIGHWAYS, vol. 15, p. 343; STREETS AND SIDEWALKS, vol. 27, p. 99.



where such liabilities are connected with the exercise of the powers of a town and where the officer acts as the agent of the town.<sup>1</sup> But it is well settled that in the case of officers who act not as the agents or servants of the town, but in a judicial capacity, where the town has no direction or control of them, is not responsible for their fidelity, gains nothing by their diligence, and loses nothing by their carelessness, where the duties are imposed specifically by statute on the officer, and the town has no duty to perform, no right to defend, and no direct interest to protect, the town cannot properly indemnify the officer in the discharge of his duties, and any attempt to do so, any vote or contract to that effect, will be void.<sup>2</sup>

*q.* EMPLOYMENT OF LOBBY MEMBERS. — A town has no power legally to raise and expend money in order to send lobby members to the legislature.<sup>3</sup>

*r.* COMPROMISE OF DISPUTED CLAIMS. — A town has the power to settle disputed claims against it, if such settlement is made in good faith and in the exercise of sound discretion.<sup>4</sup>

*s.* CELEBRATION OF ANNIVERSARIES. — Statutes may authorize towns to appropriate money for the purpose of celebrating any anniversary of their incorporation.<sup>5</sup> But in the absence of authorization by charter or statute the appropriation of money for the celebration of an anniversary is not within the powers of a town.<sup>6</sup>

*t.* DISPOSITION OF BOOKS RECEIVED FROM STATE. — The distribution of books by the state to the several towns is a part of the mode of publishing the statutes and judicial decisions for the information of the inhabitants and the officers of each town, and the town can make no disposition of them inconsistent with the purpose for which they are delivered and received.<sup>7</sup>

*u.* TOWN CLOCKS. — A provision for one or more public clocks for the common regulation of time seems to be an object of common convenience and necessity in all large towns, and the power to provide for them not only seems to be incidental to the proper execution of several powers expressly given to towns, as the regulation of schools, to which time is important, but is warranted by long usage and practice.<sup>8</sup>

*v.* STATE AID. — Towns may appropriate money for state aid; but where a person seeking such aid does not bring himself within the terms of the statute, the town has no authority to raise or appropriate money for the purpose of aiding him.<sup>9</sup>

*w.* RELEASE OF DEBT. — A town may release part of a debt by way of

**1. Power to Indemnify Officers — Connecticut.** — *Gregory v. Bridgeport*, 41 Conn. 76, 19 Am. Rep. 485.

*Massachusetts.* — *Nelson v. Milford*, 7 Pick. (Mass.) 18; *Bancroft v. Lynnfield*, 18 Pick. (Mass.) 568, 29 Am. Dec. 623; *Babbitt v. Savoy*, 3 Cush. (Mass.) 530; *Hadsell v. Hancock*, 3 Gray (Mass.) 526; *Fuller v. Groton*, 11 Gray (Mass.) 340. See also *Friend v. Gilbert*, 108 Mass. 408.

*Michigan.* — *Bristol v. Johnson*, 34 Mich. 123; *Dawson v. Aurelius Tp.*, 49 Mich. 479; *Canip v. Algansee Tp.*, 50 Mich. 4; *Wallace v. Sortor*, 52 Mich. 161; *Anderson v. Hill*, 54 Mich. 477; *Alcona County v. White*, 54 Mich. 505; *Barker v. Vernon Tp.*, 63 Mich. 517; *Taylor v. Avon Tp.*, 73 Mich. 604; *Jenney v. Mussey Tp.*, 121 Mich. 229.

*New Hampshire.* — *Pike v. Middleton*, 12 N. H. 278; *Merrill v. Plainfield*, 45 N. H. 127.

*New Jersey.* — *State v. Hammonton*, 38 N. J. L. 430 20 Am. Rep. 404; *Rubon v. Woolwich Tp.*, 55 N. J. L. 489.

*Vermont.* — *Briggs v. Whipple*, 6 Vt. 95.

**2. Indemnity to Officers Not Agents of Town.** — *Vincent v. Nantucket*, 12 Cush. (Mass.) 104; *Anthony v. Adams*, 1 Met. (Mass.) 284; *Parsons v. Goshen*, 11 Pick. (Mass.) 396; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Wadsworth v. Henniker*, 35 N. H. 189; *Gove v. Epping*, 41 N. H. 539; *Merrill v. Plainfield*, 45 N. H. 126; *Gates v. Hancock*, 45 N. H. 528.

**3. Employment of Lobby Members.** — *Frankfort v. Winterport*, 54 Me. 250.

**4. Compromise of Disputed Claims.** — *Vose v. Frankfort*, 64 Me. 229.

**5. Celebration of Anniversaries — By Statute.** — *Hill v. Easthampton*, 140 Mass. 381.

**6. Unauthorized Appropriation.** — *Hood v. Lynn*, 1 Allen (Mass.) 103; *Gerry v. Stoneham*, 1 Allen (Mass.) 319; *Tash v. Adams*, 10 Cush. (Mass.) 252.

**7. Disposition of Books Received from State.** — *Litchfield v. Parker*, 64 N. H. 443.

**8. Town Clocks.** — *Willard v. Newburyport*, 12 Pick. (Mass.) 227.

**9. State Aid.** — *Cusick v. Brookline*, 123 Mass. 91.

compromise,<sup>1</sup> but it cannot release an admitted debt by way of mere gift.<sup>2</sup>

*x. ACQUISITION OF TOWN HOUSE.* — A town has power to purchase a site and erect a building and any necessary outbuildings for the purposes of elections and town meetings.<sup>3</sup>

*The Size, Style, and Cost* of such buildings may, within reasonable limits, be left to the discretion of the town.<sup>4</sup>

*Where a Town Hall Becomes Unfit for Use* the town has power to build a new town hall, and having on its hands the old building may repair it for rental purposes.<sup>5</sup>

*y. AID TO RAILROADS.* — A township may aid in the construction of a railroad through the township.<sup>6</sup>

*z. CERTAIN OTHER POWERS — Power to Take Security.* — A town may take security where the subject-matter of the contract is the appropriate business and interest of the town.<sup>7</sup>

*Regulation of Fisheries.* — Statutes may allow towns to prescribe the times, places, and manner of taking fish, and such further rules and regulations as may be deemed expedient for the preservation of fisheries, but under such statutes a town has no power to enter upon the lands of another and to interfere with dams across any stream.<sup>8</sup>

*Grant of Water.* — A town may make a grant, not of a pond, but of the waters which flow therefrom, with the right to regulate and control the flow thereof by the erection of dams and sluices and other methods at its outlet, for the convenient and advantageous operation of a mill on the brook or stream which runs out of such pond. The grant of such a right in no way interferes with any use for which the waters of the pond are held by the town nor impairs the full enjoyment of it by the public.<sup>9</sup>

*Ascertainment of Ratable Polls.* — Towns in ascertaining the number of ratable polls in order to determine the number of representatives whom they are entitled to send may include in the number of such ratable polls the polls of aliens residing within their limits.<sup>10</sup>

*Administration of Trust Fund.* — A town may take, and through its selectmen administer, a fund for the benefit of a worthy class of its inhabitants, though not strictly paupers.<sup>11</sup>

*Taxation.* — There is and must be an inherent power in every town to bring

1. *Release of Part of Debt.* — *Agnew v. Brall*, 124 Ill. 312; *Matthews v. Westborough*, 131 Mass. 521, 134 Mass. 555; *Prout v. Pittsfield*, 154 Mass. 450; *Wells v. Putnam*, 169 Mass. 226.

2. *Release of Debt as Gift.* — *Wells v. Putnam*, 169 Mass. 226.

3. *Acquisition of Town House.* — *White v. Stamford*, 37 Conn. 578; *Watson v. New Milford*, 72 Conn. 561, 77 Am. St. Rep. 345; *Thorp v. King*, 42 Ill. App. 513; *Greeley v. People*, 60 Ill. 19; *French v. Quincy*, 3 Allen (Mass.) 9; *Spaulding v. Lowell*, 23 Pick. (Mass.) 71; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Bates v. Bassett*, 60 Vt. 530; *Beaver Dam v. Frings*, 17 Wis. 398.

In *Michigan* it is held that the ordinary expenses of a township do not include those incurred in building a town hall for the public gatherings of its citizens, whether in whole or in part for the use of the town. *Mills v. Richland Tp.*, 72 Mich. 100.

*The Fact that a Town Has a Right to Hire a Town House* at the public expense does not justify a tax for improving property the title to which is not in the town in its corporate capacity. *People v. Works*, 7 Wend. (N. Y.) 486.

*Employment of Bell-ringer.* — *Woodbury v. Hamilton*, 6 Pick. (Mass.) 101.

4. *Size, Style, and Cost.* — *White v. Stamford*, 37 Conn. 578; *Jones v. Sanford*, 66 Me. 585; *French v. Quincy*, 3 Allen (Mass.) 9.

5. *Town Hall Unfit for Use.* — *Bates v. Bassett*, 60 Vt. 530.

6. *Aid to Railroads.* — *Jordan v. Cass County*, 3 Dill. (U. S.) 185; *Demaree v. Bridges*, 30 Ind. App. 131. And see the title MUNICIPAL AID, vol. 20, p. 1082.

7. *Power to Take Security.* — *Pawlet v. Strong*, 2 Vt. 442.

8. *Regulation of Fisheries.* — *Swift v. Falmouth*, 167 Mass. 115.

*Where a Right of Fishery Is Sold for Three Years*, the sale by the town is in the nature of a lease, and the lessee is estopped to deny the title of the town or its right to sell the fishery unless he is evicted or interrupted by some one having a paramount title. *Eastham v. Anderson*, 119 Mass. 526.

9. *Grant of Waters.* — *Berry v. Raddin*, 11 Allen (Mass.) 577.

10. *Ascertainment of Ratable Polls.* — *Opinion of Judges*, 7 Mass. 523.

11. *Administration of Trust Fund.* — *Lovell v. Charlestown*, 66 N. H. 584.

into the treasury the money necessary for the purposes of its creation, and if its course is obstructed by the negligence or mistake of its agents, it may proceed to enforce the end and object by correcting the means, and whether this be done by resorting to its original power of voting to raise money a second time for the same purposes, or by directing to reassess the sum before raised by vote, is immaterial.<sup>1</sup>

**7. Validation of Unlawful Expenditure.** — An unlawful expenditure of the money of a town cannot be rendered valid by usage, however long continued.<sup>2</sup>

**8. By-laws and Ordinances** — *a. IN GENERAL.* — Towns are empowered to make and agree upon such necessary rules, orders, and by-laws for the directing, managing, and ordering of their prudential affairs as they shall judge most conducive to the peace, welfare, and good order thereof, not repugnant to the general laws of government.<sup>3</sup>

**Prudential Affairs** embrace that large class of miscellaneous subjects affecting the condition and convenience of the inhabitants, which have been placed under the municipal jurisdiction of towns by statute or by usage.<sup>4</sup>

**The Term "By-laws" Has a Peculiar and Limited Signification**, being used to designate the orders and regulations which a corporation, as one of its legal incidents, has power to make, and which are usually exercised to regulate its own action and concerns and the rights and duties of its members amongst themselves. This has been somewhat extended in the case of *quasi*-corporations, but a broad distinction has always been made between the authority of corporations to make by-laws and the general power of making laws.<sup>5</sup>

**The Validity of an Ordinance** depends upon the power conferred upon the town to pass it.<sup>6</sup>

**1. Taxation.** — *Nelson v. Milford*, 7 Pick. (Mass.) 18. For a full discussion of this subject see the title *TAXATION*, vol. 27, p. 567.

**The Words "Other Necessary Town Charges,"** when used in a statute, do not constitute a new and distinct grant of indefinite and unlimited power to raise money for any purpose whatsoever, at the will and pleasure of the majority. They only embrace all incidental expenses arising directly or indirectly in the due and legitimate exercise of the various powers conferred by statute. Opinion of Justices, 52 Me. 95.

**The Term "Township Expenses"** is usually applied to the ordinary expenses of township government, and as commonly used would not cover many sums which it might be proper and even necessary that the township should raise for local purposes. *Upton v. Kennedy*, 36 Mich. 215.

**2. Validation of Unlawful Expenditure.** — *Hood v. Lynn*, 1 Allen (Mass.) 103.

**3. By-laws and Ordinances** — *Connecticut.* — *Hayden v. Noyes*, 5 Conn. 391; *Higley v. Bunce*, 10 Conn. 436; *Webster v. Harwinton*, 32 Conn. 131.

*Illinois.* — *Roberts v. Ogle*, 30 Ill. 459, 83 Am. Dec. 201.

*Indiana.* — *Haller v. Sheridan*, 27 Ind. 494; *Nealis v. Hayward*, 48 Ind. 19.

*Kentucky.* — *McKee v. McKee*, 8 B. Mon. (Ky.) 433.

*Massachusetts.* — *West Roxbury v. Stoddard*, 7 Allen (Mass.) 158; *Com. v. Turner*, 1 Cush. (Mass.) 493; *Com. v. Dow*, 10 Met. (Mass.) 382; *Gilmore v. Holt*, 4 Pick. (Mass.) 258; *Willard v. Newburyport*, 12 Pick. (Mass.) 227.

*New York.* — *Roger v. Jones*, 1 Wend. (N.

Y.) 237, 19 Am. Dec. 493; *Denton v. Jackson*, 2 Johns. Ch. (N. Y.) 320; *Bush v. Seabury*, 8 Johns. (N. Y.) 418.

*Tennessee.* — *Raleigh Corp. v. Dougherty*, 3 Humph. (Tenn.) 11, 39 Am. Dec. 149; *Robinson v. Franklin*, 1 Humph. (Tenn.) 156, 34 Am. Dec. 625.

**4. Willard v. Newburyport**, 12 Pick. (Mass.) 227.

**The Trustees Cannot Arbitrarily Pass What Laws They Please.** — Their laws are to be prudential, and aimed at the correction of some public evil. *Dunham v. Rochester*, 5 Cow. (N. Y.) 462.

**The Fact that a Town Charter Authorizes the Town to Adopt an Ordinance** and prescribes for its punishment, does not render any one liable to a penalty until the town adopts such ordinance and it has been published as required by charter. *Elizabethtown v. Lefler*, 23 Ill. 90.

**Where the Statute Requires a Certificate to Be Filed** in the clerk's office of the Circuit Court by the inspector of an election, no valid ordinance can be passed by the officer elected at such election until such filing. *Dinwiddie v. Rushville*, 37 Ind. 66.

**5. Signification of "By-law."** — *Com. v. Turner*, 1 Cush. (Mass.) 493.

**6. Validity of Ordinances.** — *Martinsville v. Frieze*, 33 Ind. 507, cited in *Deutschman v. Charlestown*, 40 Ind. 449.

**To Render a By-law of a Town Valid** it must appear that the meeting of the town had been specially warned for that purpose, and this not appearing on the doings of the town nor therein proved *alimunde*, the act is not valid. *Willard v. Killingworth*, 8 Conn. 248.

**Examples of Valid By-laws and Ordinances** — *Alabama.* — *Marion v. Chandler*, 6 Ala. 899.



*b.* FORM. — Where no particular form in which a by-law should be engrossed is required by the statute, and no law or custom restrains the town from selecting such form of expression as suits them, no particular form is necessary, provided enough be contained to signify their will that the by-law exist, and to indicate the terms of it, and the objects to which it should apply.<sup>1</sup>

*c.* REQUISITES. — Ordinances and by-laws must be reasonable and not oppressive in their character. Any unreasonable ordinance or by-law is void.<sup>2</sup> And where the statute requires publication, such publication must be duly made before the ordinance can be enforced.<sup>3</sup>

**An Ordinance May Be Void for Uncertainty** by reason of its vagueness in respect to the amount of the penalty, as where the penalty is not fixed, or is left open between one dollar and twenty dollars, to be afterwards determined by the magistrate on the trial according to the circumstances of each case.<sup>4</sup>

*d.* MEANS OF ENFORCEMENT. — Towns are given the power to impose fines for the violation of their ordinances, and usually these fines are limited.<sup>5</sup> And in some cases the statutes conferring on towns the authority to make by-laws indicate the means by which those by-laws are to be enforced. In such a case the town cannot provide other means.<sup>6</sup>

*e.* DURATION OF. — When the period intended to be regulated by a by-law expires, such by-law, without doubt, ceases to be a rule to regulate what

*Connecticut.* — *Hayden v. Noyes*, 5 Conn. 391; *Higley v. Bunce*, 10 Conn. 436.

*Illinois.* — *Roberts v. Ogle*, 30 Ill. 459, 83 Am. Dec. 201.

*Indiana.* — *Haller v. Sheridan*, 27 Ind. 494; *Nealis v. Hayward*, 48 Ind. 19.

*Kentucky.* — *McKee v. McKee*, 8 B. Mon. (Ky.) 433.

*Massachusetts.* — *West Roxbury v. Stoddard*, 7 Allen (Mass.) 158; *Com. v. Dow*, 10 Met. (Mass.) 382; *Gilmore v. Holt*, 4 Pick. (Mass.) 258.

*New York.* — *Rogers v. Jones*, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493.

*North Carolina.* — *Louisburg v. Harris*, 7 Jones L. (52 N. Car.) 281.

**Examples of Invalid By-laws and Ordinances —**  
*Connecticut.* — *Woodruff v. Neal*, 28 Conn. 165.  
*Illinois.* — *Lake View v. Letz*, 44 Ill. 81.

*Indiana.* — *Martinsville v. Frieze*, 33 Ind. 507; *Martinsville v. Gillig*, 33 Ind. 510; *Steinmetz v. Versailles*, 40 Ind. 249; *Princeton v. Vierling*, 40 Ind. 340; *Deutschman v. Charles-town*, 40 Ind. 449.

*Louisiana.* — *Reynolds v. Shreveport*, 13 La. Ann. 426.

*Massachusetts.* — *Com. v. Turner*, 1 Cush. (Mass.) 493.

*New Jersey.* — *State v. Zeigler*, 32 N. J. L. 262.

*New York.* — *Dunham v. Rochester*, 5 Cow. (N. Y.) 462.

*North Carolina.* — *Beaufort v. Duncan*, 1 Jones L. (46 N. Car.) 239.

*Tennessee.* — *Raleigh Corp. v. Dougherty*, 3 Humph. (Tenn.) 11, 39 Am. Dec. 149.

**Power to Pass Laws for the Preservation of the Health and Comfort of the Town** is limited to the enactment of such ordinances as relate to these two objects. *Raleigh Corp. v. Dougherty*, 3 Humph. (Tenn.) 11, 39 Am. Dec. 149.

**A Town Cannot Pass By-laws Inconsistent with the Constitution and Laws of the State.** — Robin-

*son v. Franklin*, 1 Humph. (Tenn.) 156, 34 Am. Dec. 625.

**1. Form.** — See the title ORDINANCES, vol. 21, p. 974.

**Where the Word "Building" Is Used in a Town By-law** it is broad enough to include a tenement. *Com. v. Hersey*, 144 Mass. 297; *Com. v. Lee*, 148 Mass. 8; *Com. v. Quinlan*, 153 Mass. 483; *Easthampton v. Hill*, 162 Mass. 302.

**Enumeration of Articles Exempt.** — *Thomas v. Mt. Vernon*, 9 Ohio 290.

**2. Must Be Reasonable.** — *Jones v. Sanford*, 66 Me. 585; *Whitfield v. Longest*, 6 Ired. L. (28 N. Car.) 268.

**3. Publication.** — *Barnett v. Newark*, 28 Ill. 62.

**Place of Publication.** — *Tisdale v. Minonk*, 46 Ill. 9.

**4. Definiteness.** — *Louisburg v. Harris*, 7 Jones L. (52 N. Car.) 281.

**An Ordinance to Establish the Grade of Certain Streets** in a town is not void for uncertainty, where there would be no difficulty in ascertaining therefrom the grade established. *Burr v. Newcastle*, 49 Ind. 322.

**5. Power to Impose Fines.** — *M'Kee v. Anderson*, Rice L. (S. Car.) 24.

**The Penalties May Be Recovered** by complaint before a justice of the peace. *Com. v. Dow*, 10 Met. (Mass.) 382.

**Power to Collect Fines and Forfeitures** by process of law is vested exclusively in the town treasurer. *Com. v. Fahey*, 5 Cush. (Mass.) 408.

**General Authority of Towns to Make By-laws for Restraining Cattle from Going at Large.** — *Whitlock v. West*, 26 Conn. 406; *Grover v. Huckins*, 26 Mich. 476.

**Distribution of Penalty.** — *Bradley v. Baldwin*, 5 Conn. 288.

**6. Means of Enforcement Prescribed.** — *Miles v. Chamberlain*, 17 Wis. 446.

subsequently occurs, but it does not cease to be the law for the original period.<sup>1</sup>

*f. APPLICATION OF.* — Local jurisdiction is vested in the town authorities and embraces all persons and things within the local bounds; and any one who comes within the limits of the town is no longer a stranger, but, for the time being, is subject to jurisdiction as an inhabitant.<sup>2</sup>

**VII. TOWN MEETINGS** — 1. **Definitions and Distinctions** — *a. DEFINITIONS.* — A town meeting is the primary meeting of the corporate body of a town or township, legally summoned for the consideration of matters of local administration.<sup>3</sup>

**A Town Meeting Is a Deliberative Body**, and acts, in determining all matters that may lawfully be determined by it, as any other deliberative body, except in the election of certain officers of the town, and except in matters as to which, by express law, the question to be determined by the electors of the town is required to be determined by a vote by ballot.<sup>4</sup>

**It Is, in a Sense, a Legislative Assembly**, held for a time and for the transaction of business not definitely prescribed by law.<sup>5</sup>

**The Phrase "Town Election"** can only refer to the annual town meeting at which officers are elected.<sup>6</sup>

**Meetings for the Election of National, State, District, and County Officers** are not, strictly speaking, town meetings.<sup>7</sup>

**The Theory of Annual Town Meetings** is that the corporate body of the town is present for the purpose of transacting, and is competent to transact, all corporate business of the town not especially delegated to specified officers.<sup>8</sup>

*b. AS DISTINGUISHED FROM A DISTRICT MEETING.* — A town meeting is the coming together of the people of a town, in which every elector may discuss and act upon any question legally before the meeting; while a district meeting is the coming together of the people of a certain district in a town, in which only the electors of the district may discuss and act upon questions submitted.<sup>9</sup>

**2. Time of Meeting.** — The time for holding the annual town meeting is usually prescribed by statute.<sup>10</sup>

**1. Duration of.** — *Stevens v. Dimond*, 6 N. H. 330; *Lisbon v. Clark*, 18 N. H. 234.

**Where a Statute Provides that the Validity of an Ordinance May Be Tested** within two years from the date of such ordinance, such statute is not subject to attack after two years have elapsed if it does not appear that any court has vacated the ordinance. *Spooner v. Minong*, 104 Wis. 425.

**2. Application of.** — *Com. v. Dow*, 10 Met. (Mass.) 382; *Gilmore v. Holt*, 4 Pick. (Mass.) 258; *Plymouth v. Pettijohn*, 4 Dev. L. (15 N. Car.) 591; *Whitfield v. Longest*, 6 Ired. L. (28 N. Car.) 268.

**Interpretation of Ordinance.** — An ordinance enacting that every person from a certain place infected with small-pox is prohibited from coming to the town is to be construed to mean those persons coming immediately or directly from such infected place. *Salisbury v. Powe*, 6 Jones L. (51 N. Car.) 134.

**3. Town Meetings — Definition.** — See *Cent. Dict.*, "Town Meeting."

**A Town Meeting Is an Election** within the general meaning of that word. *Phillips v. Albany*, 28 Wis. 340.

**4. Town Meeting a Deliberative Body.** — *State v. Davidson*, 32 Wis. 114; *State v. Racine County*, 70 Wis. 543.

**5. Quasi-legislative Assembly.** — *Com. v. Smith*, 132 Mass. 289.

**6. Town Election.** — *People v. Sackett*, 15 N. Y. App. Div. 290.

**But a Constitutional Provision** requiring all elections by the people to be by ballot does not authorize the conclusion that the meetings of district townships are designed to be elections within the meaning of the popular use of that term. *Seaman v. Baughman*, 82 Iowa 216.

**7. Elections of Other than Town Officers.** — *Com. v. Smith*, 132 Mass. 289.

**8. Theory of Town Meetings.** — *Chicago, etc., R. Co. v. Mallory*, 101 Ill. 583; *Thorp v. King*, 42 Ill. App. 513.

**The Whole Theory of the New England Town Meeting** is that upon all necessary occasions the inhabitants upon short notice can come together. *Jones v. Sanford*, 66 Me. 585.

**9. As Distinguished from District Meeting.** — *Comstock v. School Committee*, 17 R. I. 827.

**10. Time of Meeting.** — See the statutes of *Connecticut, Illinois, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New York, Vermont, and Wisconsin.*

**In Rhode Island** town meetings may be held at such time as may be by by-law or vote provided, unless otherwise directed by law. See *Gen. Laws R. I.*, c. 37, § 2.

**In Massachusetts** the selectmen of towns are authorized to fix the time of holding town meetings. *Rand v. Wilder*, 11 Cush. (Mass.) 294.

**3. Place of Meeting.** — The statutes usually provide that towns may determine the place of holding the meeting.<sup>1</sup>

**Town Meetings Need Not Be Held in the Town House,** even where the town owns such a building.<sup>2</sup>

**Whenever a Town Is Divided into Several Election Districts** the polling place in the district designated as the first precinct becomes the place for thereafter holding the town meetings in such town, and the officers there elected are entitled to their office.<sup>3</sup>

**4. Application for.** — Certain officers are sometimes given authority to call a meeting upon application of the requisite statutory number of voters or freeholders, and in such case it need not appear in the application that such persons are in fact voters or freeholders.<sup>4</sup> If the application is genuine, and correct in form, and there is some evidence, presumably at least, before the officers, calling for the exercise of their judgment, and nothing appears to affect the integrity of their conduct or the honesty of their decision, their determination of the qualification of the applicants is final and conclusive, except upon a review by some competent tribunal, in a direct proceeding authorized by law.<sup>5</sup>

**The Application Is Sufficient** if a question can be spelled out from the paper and if it expresses a desire and request to have a vote taken at a town meeting. If such facts are made to appear in the paper itself it is immaterial how inartificially they are set forth.<sup>6</sup>

**Petitioners May Withdraw Their Names** at any time before the application is acted upon, and if less than the required number of signatures remain after such withdrawal the application is void.<sup>7</sup>

**Recording of Application.** — It has been held that it is not necessary to record the application,<sup>8</sup> and a statute requiring it is merely directory, and the mere failure to make such record prior to the meeting does not vitiate the action thereof.<sup>9</sup>

**5. Warrant or Notification** — *a.* **IN GENERAL.** — The warrant for a town meeting is, as its name imports, the warrant or authority under which the meeting is held.<sup>10</sup>

As a General Rule a warrant for a town meeting duly issued by competent authority, and a return showing that the inhabitants have been notified in conformity with the provisions of law by one duly authorized, are essential

**Between Sunrise and Sunset.** — Where the statute stipulates that town meetings shall be kept open for the purpose of voting in the daytime only between the rising and setting of the sun, it is sufficient if the polls are open at nine o'clock in the forenoon and continue open from that time until sunset, except one hour from twelve noon until one P. M. *People v. Austin*, 20 N. Y. App. Div. 1; *Goodel v. Baker*, 8 Cow. (N. Y.) 286.

**1. Place of Meeting.** — See for example the statutes of *Illinois*, *Minnesota*, and *Wisconsin*.

**A Town Meeting Is Not Illegal** for the reason that it is conducted not within the walls of the room named in the warrant, but just outside in the open air in front of the building. *Brown v. Winterport*, 79 Me. 305.

**Where No Particular Room of a House Has Been Appointed** for the holding of a town meeting, the ballots may be taken in an upper room whilst the resolutions are moved from the piazza of the house. *People v. Tabor*, (Supm. Ct.) 21 How. Pr. (N. Y.) 42.

**2. Need Not Be Held in Town House.** — *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302.

**3. To Be Held in First Precinct.** — *State v. Doyle*, 84 Wis. 678.

**Where the Places of Holding the Elections Are Nine Miles Apart**, it cannot be contended that it is impossible for the electors to attend at both places. *Auditor-Gen. v. Duluth, etc.*, R. Co., 116 Mich. 122.

**4. Meeting upon Application — Description of Applicants.** — *Fletcher v. Lincolnville*, 20 Me. 439.

**It Must Appear** that the application is in writing, signed by the requisite number of voters or freeholders. *McVichie v. Knight*, 82 Wis. 137.

**5. Determination of Officers Conclusive.** — *State v. Lime*, 23 Minn. 521.

**6. Sufficiency of Application.** — *Oyster Bay v. Harris*, 21 N. Y. App. Div. 227.

**7. Withdrawal of Signatures.** — *Dutton v. Hanover*, 42 Ohio St. 215.

**8. Not Necessary to Record Application.** — *Soper v. School Dist. No. 9*, 28 Me. 193.

**9. Effect of Failure to Record.** — *State v. Decatur*, 58 Wis. 291.

**10. Definition.** — *Com. v. Smith*, 132 Mass. 289.



preliminaries to a legal town meeting;<sup>1</sup> although, where the time for holding a town meeting is fixed by law, it has been held that the law operates as a notice of the time, and the necessity of even the statutory notice has been doubted in such cases.<sup>2</sup>

In Some States the statutes provide that no notice of the annual or biennial town meeting is necessary.<sup>3</sup>

Under Statute. — Where a statute prescribes the mode or manner of calling a town meeting the notice for such meeting must be in accordance therewith.<sup>4</sup>

In the Absence of a Statutory Provision towns may prescribe by by-law a mode for warning the inhabitants,<sup>5</sup> and if such by-law is complied with the meeting is legally notified.<sup>6</sup>

Under an Act Creating Fire Districts which provides that they may adopt by-laws prescribing by whom and how meetings may be called and notified, and one of the by-laws provides that the annual meeting shall be called according to law, it is sufficient if the meeting is notified in compliance with the provisions of the general laws.<sup>7</sup>

*b. GENERAL REQUISITES.* — While the warrant or notification of a town meeting must set forth the subjects to be acted upon with such clearness and particularity that the voter may not be misled in reference thereto, and must be broad enough in its terms to include the business actually done,<sup>8</sup> a technical precision in the wording of the articles is not required. It was long ago found that to require entire accuracy in the wording of the articles would be to impose upon town officers a duty which in many cases they could not perform. The rule running through all the decisions is that an article in a warrant for a town meeting is sufficient if it gives notice with reasonable certainty of the subject-matter.<sup>9</sup>

Seals Are Not Essential to warrants for town meetings.<sup>10</sup>

*c. PRESUMPTION AS TO LEGALITY.* — It will be presumed that the notice of an annual town meeting was legal, unless it shall be shown that the time or manner was not according to an appointment of the town, or was so unreasonable as to raise a presumption of fraud on the part of those by whom the meeting was called.<sup>11</sup>

1. *Warrant or Notification of Meeting Essential.* — *Bearce v. Fossett*, 34 Me. 575; *Reynolds v. New Salem*, 6 Met. (Mass.) 340.

2. *Necessity of Notice Doubted.* — *Thorp v. King*, 42 Ill. App. 513.

3. *Notice Unnecessary.* — See the statutes of *Michigan*, *New York*, and *Wisconsin*.

4. *Mode or Manner of Calling Meeting — Under Statute.* — *Baldwin v. North Branford*, 32 Conn. 47; *McVichie v. Knight*, 82 Wis. 137.

*Refusal of Selectmen to Call Meeting.* — Where the statute requires the selectmen to issue a warrant calling the meeting, and a majority of them unreasonably refuse to do so, any ten or more legal voters of the town may apply to a justice of the peace of the county, who may issue his warrant calling such meeting. *Southard v. Bradford*, 53 Me. 389; *Jones v. Sanford*, 66 Me. 585.

*A Meeting Not Warned Agreeably to the Mode Designated by the Statute* is no legal congregation of the town, and its acts in that capacity are void. *Hayden v. Noyes*, 5 Conn. 391.

5. *In Absence of Statute.* — *State v. Williams*, 25 Me. 561; *Jones v. Sanford*, 66 Me. 585; *Beals v. James*, 173 Mass. 591; *Marden v. Champlin*, 17 R. I. 423.

6. *Compliance with By-law.* — *Beals v. James*, 173 Mass. 591.

7. *Notification of Fire District.* — *Fritz v. Crean*, 182 Mass. 433.

8. *General Requisites — Clearness and Particularity.* — *Moore v. Beattie*, 33 Vt. 221; *Blush v. Colchester*, 39 Vt. 195; *Wyley v. Wilson*, 44 Vt. 404.

9. *General Requisites — Technical Precision — Connecticut.* — *South School Dist. v. Blakeslee*, 13 Conn. 234; *Bull v. Warren*, 36 Conn. 83.

*Maine.* — *Belfast, etc., R. Co. v. Brooks*, 60 Me. 568.

*Massachusetts.* — *Blackburn v. Walpole*, 9 Pick. (Mass.) 97; *Torrey v. Millbury*, 21 Pick. (Mass.) 64; *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 81, 32 Am. Dec. 243; *Haven v. Lowell*, 5 Met. (Mass.) 35; *Avery v. Stewart*, 1 Cush. (Mass.) 496; *Rand v. Wilder*, 11 Cush. (Mass.) 298; *Fuller v. Groton*, 11 Gray (Mass.) 340; *Grover v. Pembroke*, 11 Allen (Mass.) 88; *Sherman v. Torrey*, 99 Mass. 472. *Rhode Island.* — *Marden v. Champlin*, 17 R. I. 423; *Smith v. Westerly*, 19 R. I. 437.

*Vermont.* — *Alger v. Curry*, 40 Vt. 437. *Test of Sufficiency.* — Where no voter whose attention could have failed to understand the subjects to be considered at the meeting, the notice is sufficient. *Marden v. Champlin*, 17 R. I. 423.

10. *Seal Not Essential.* — *Bucksport v. Spofford*, 12 Me. 487; *Colman v. Anderson*, 10 Mass. 105.

11. *Presumption as to Legality.* — *Gilmore v. Holt*, 4 Pick. (Mass.) 258.

*d. CONTENTS — (1) Objects of Meeting.* — In order to secure to the inhabitants of a town previous notice of the objects upon which action is to be taken at the meeting, the warning should enumerate such objects in an intelligible manner.<sup>1</sup>

*(2) Time of Meeting.* — The warning or notice must specify the time of holding the meeting.<sup>2</sup>

*(3) Place of Meeting.* — The place of the meeting must be stated in the warning.<sup>3</sup> And where a meeting is called to be held at a certain building this must be understood to mean within the walls of such building,<sup>4</sup> although where it is difficult to obtain the will of the crowded meeting within such walls it has been held to be no objection to the validity of the meeting if the proceedings are conducted in the open air just outside the building.<sup>5</sup>

*(4) Signatures.* — Where it is required that the warrant shall be under the hands of "the selectmen" a warrant bearing the signature of only one selectman and purporting to have been taken by order of the selectmen is not a sufficient compliance with the statute; it must appear that the warrant is under the hands of at least a majority of the selectmen.<sup>6</sup>

*(5) Notice of Two Meetings.* — A warrant is not illegal because two town meetings are called by it, provided the qualifications of the respective voters in each meeting are distinctly specified.<sup>7</sup>

*(6) Alteration of Districts.* — Where an article in a warrant is to see if the town will make alterations in certain districts, it is unnecessary to name any of the individuals who wish to be transferred from one district to another; and because some are named in the warning the town is not precluded from transferring from one district to another some who were not named.<sup>8</sup>

*e. CONSTRUCTION.* — The articles inserted in the warrants for calling town

**1. Contents — Objects of Meeting — United States.** — *Bloomfield v. Charter Oak Bank*, 121 U. S. 121.

*Connecticut.* — *Hayden v. Noyes*, 5 Conn. 391; *Willard v. Killingworth*, 8 Conn. 247; *Isbell v. New York, etc., R. Co.*, 25 Conn. 556; *South School Dist. v. Blakeslee*, 13 Conn. 227; *Baldwin v. North Branford*, 32 Conn. 47; *Wilson v. Waltersville School Dist.*, 44 Conn. 157; *Brooklyn Trust Co. v. Hebron*, 51 Conn. 22; *Wright v. North School Dist.*, 53 Conn. 576; *Turney v. Bridgeport*, 55 Conn. 415; *Pinney v. Brown*, 60 Conn. 164.

*Maine.* — *Cornish v. Pease*, 19 Me. 184; *Austin v. York*, 57 Me. 304; *Belfast, etc., R. Co. v. Brooks*, 60 Me. 568; *Lovejoy v. Foxcroft*, 91 Me. 367.

*Massachusetts.* — *Blackburn v. Walpole*, 9 Pick. (Mass.) 97; *Fuller v. Groton*, 11 Gray (Mass.) 340; *Grover v. Pembroke*, 11 Allen (Mass.) 89; *Sherman v. Torrey*, 99 Mass. 472.

*New Hampshire.* — *Brackett v. Whidden*, 3 N. H. 17; *Tucker v. Aiken*, 7 N. H. 113.

*Rhode Island.* — *Smith v. Westerly*, 19 R. I. 437.

*Vermont.* — *Schoff v. Bloomfield*, 8 Vt. 472; *Alger v. Curry*, 40 Vt. 437; *Daggett v. Mendon*, 64 Vt. 323; *Adams v. Sleeper*, 64 Vt. 544.

In Illinois the law invests the annual town meeting with full power to transact all the business of the town, and notice only of the time and place of its meeting is required by the statute. It is even doubted that the statutory notice of such annual meeting is necessary. *Thorp v. King*, 42 Ill. App. 513.

A Warrant Should State in Distinct Articles the business to be acted upon. *Austin v. York*, 57 Me. 304.

It Is Not Necessary to State that the town had been called upon to grant money if the subject named is one which is likely to require money. *Blackburn v. Walpole*, 9 Pick. (Mass.) 97; *Fuller v. Groton*, 11 Gray (Mass.) 340.

One Article in a Warrant May Include Several Notes and Orders to be acted upon if they are distinctly and separately named. *Brown v. Winterport*, 79 Me. 305.

In Illinois Only in Case a Special Town Meeting Is Called, is the town clerk required to set forth in the notice a statement of the object and purpose for which the meeting is called. *Thorp v. King*, 42 Ill. App. 513.

**2. Time of Meeting.** — *Beals v. James*, 173 Mass. 591.

**3. Place of Meeting.** — *Thorp v. King*, 42 Ill. App. 513; *Chamberlain v. Dover*, 13 Me. 466, 29 Am. Dec. 517; *Beals v. James*, 173 Mass. 591; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *McVichie v. Knight*, 82 Wis. 137.

A Notice Is Materially Defective in calling a town meeting at the several voting places when there are more than one voting place or precinct in the town. *McVichie v. Knight*, 82 Wis. 137.

**4. Within Walls of Building.** — *Chamberlain v. Dover*, 13 Me. 466, 29 Am. Dec. 517.

**5. Meeting Conducted Outside Building.** — *Brown v. Winterport*, 79 Me. 305.

**6. Signatures of Selectmen.** — *Reynolds v. New Salem*, 6 Met. (Mass.) 340.

**7. Two Town Meetings.** — *Ford v. Clough*, 8 Me. 334; *Cragie v. Mellen*, 6 Mass. 7.

**8. Alteration of Districts.** — *Hall v. School Dist. No. 3*, 46 Vt. 19.

meetings, presenting the various subjects for the consideration of the inhabitants, are, from the very nature of the case, general, and are oftentimes inartificial in their construction. They are the mere abstracts, or heads of propositions which are to be laid before the inhabitants for their action; and matters incidental to and connected with such propositions are alike proper for their consideration and action.<sup>1</sup> They should not be interpreted narrowly. While a town is limited by such articles in the transaction of its business, a liberal construction has always been given to their language so as to include all that is properly, even if incidentally, embraced in the subject to which they relate.<sup>2</sup>

*f.* TO WHOM ADDRESSED. — Notice of the town meeting need not be addressed to the inhabitants of the town. A written notice of the meeting is all that is necessary.<sup>3</sup>

*g.* BY WHOM POSTED. — Town meetings shall be notified by the person to whom the warrant is directed by posting an attested copy thereof in the proper place or places.<sup>4</sup>

Selectmen are public officers authorized by law to warn town meetings.<sup>5</sup>

*h.* PLACE OF POSTING. — Warrants must be posted in public or conspicuous places unless the town has appointed a different mode.<sup>6</sup>

**1. Construction.** — *Haven v. Lowell*, 5 Met. (Mass.) 35; *Com. v. Wentworth*, 145 Mass. 50; *Wheeler v. Carter*, 180 Mass. 382.

**2. Construction to Be Liberal.** — *Wheeler v. Carter*, 180 Mass. 382; *Pittsburg v. Danforth*, 56 N. H. 272.

The Subject-matter in the Warrant May Properly Include authority to act upon minute specifications and particulars included and necessarily involved in that subject-matter and which need not be in particular terms enumerated. *Pittsburg v. Danforth*, 56 N. H. 272.

**Various Articles Construed — Connecticut.** — *South School Dist. v. Blakeslee*, 13 Conn. 227. *Illinois.* — *People v. Sisson*, 98 Ill. 335.

*Kentucky.* — *Williamstown Graded Free School Dist. v. Webb*, 89 Ky. 264.

*Maine.* — *Farrar v. Perley*, 7 Me. 404; *Davenport v. Hallowell*, 10 Me. 317; *Deane v. Washburn*, 17 Me. 100; *State v. Beeman*, 35 Me. 242; *Belfast, etc., R. Co. v. Brooks*, 60 Me. 568; *Canton v. Smith*, 65 Me. 203; *Drisko v. Columbia*, 75 Me. 73; *Brown v. Winterport*, 79 Me. 305; *Gerry v. Herrick*, 87 Me. 219.

*Massachusetts.* — *Blackburn v. Walpole*, 9 Pick. (Mass.) 97; *Torrey v. Millbury*, 21 Pick. (Mass.) 64; *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; *Haven v. Lowell*, 5 Met. (Mass.) 35; *Kingsbury v. Centre School Dist.*, 12 Met. (Mass.) 99; *Avery v. Stewart*, 1 Cush. (Mass.) 496; *Wood v. Quincy*, 11 Cush. (Mass.) 487; *Hadsell v. Hancock*, 3 Gray (Mass.) 526; *Fuller v. Groton*, 11 Gray (Mass.) 340; *Grover v. Pembroke*, 11 Allen (Mass.) 88; *Sherman v. Torrey*, 99 Mass. 472; *Whitney v. Stow*, 111 Mass. 368; *Reed v. Acton*, 117 Mass. 384; *Westhampton v. Searle*, 127 Mass. 502; *Matthews v. Westborough*, 131 Mass. 521; *Kittredge v. North Brookfield*, 138 Mass. 286; *Com. v. Wentworth*, 145 Mass. 50; *Wheeler v. Carter*, 180 Mass. 382; *Smith v. Abington Sav. Bank*, 171 Mass. 178.

*Michigan.* — *Briggs v. Borden*, 71 Mich. 87.

*Missouri.* — *Mason v. Kennedy*, 89 Mo. 23.

*New Hampshire.* — *Tucker v. Aiken*, 7 N. H. 113; *Baker v. Shephard*, 24 N. H. 208; *Con-*

*verse v. Porter*, 45 N. H. 385; *Sawyer v. Manchester, etc., R. Co.*, 62 N. H. 135, 13 Am. St. Rep. 541; *Child v. Colburn*, 54 N. H. 71.

*New Jersey.* — *Zabriskie v. School Dist. No. 10*, 52 N. J. L. 104.

*New York.* — *People v. Board of Education*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 593; *Birge v. Berlin Iron Bridge Co.*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 596.

*Rhode Island.* — *Seabury v. Howland*, 15 R. I. 446.

*Texas.* — *Reynolds Land, etc., Co. v. McCabe*, 72 Tex. 57.

*Vermont.* — *Dix v. School Dist. No. 2*, 22 Vt. 309; *Moore v. Beattie*, 33 Vt. 219; *Hunne- man v. Fire Dist. No. 1*, 37 Vt. 40; *Ovitt v. Chase*, 37 Vt. 196; *Blodgett v. Holbrook*, 39 Vt. 336; *Kittredge v. Walden*, 40 Vt. 211; *Alger v. Curry*, 40 Vt. 437; *Weeks v. Batchelder*, 41 Vt. 317; *Hickok v. Shelburne*, 41 Vt. 409; *Mudgett v. Johnson*, 42 Vt. 423; *Sargent v. Ludlow*, 42 Vt. 726; *Wyley v. Wilson*, 44 Vt. 404; *Atwood v. Lincoln*, 44 Vt. 332; *Allen v. Burlington*, 45 Vt. 202; *Hall v. School Dist. No. 3*, 46 Vt. 19; *Hubbard v. Newton*, 52 Vt. 346; *Wilmot v. Lathrop*, 67 Vt. 671.

**3. To Whom Addressed.** — *Baldwin v. North Branford*, 32 Conn. 47.

**4. By Whom Posted.** — *Parker v. Titcomb*, 82 Me. 180.

**5. Selectmen May Warn Meetings.** — *Bull v. Warren*, 36 Conn. 83; *Blackburn v. Walpole*, 9 Pick. (Mass.) 97; *Cardigan v. Page*, 6 N. H. 182; *Alger v. Curry*, 40 Vt. 347.

**6. Place of Posting — Must Be Public.** — *State v. Williams*, 25 Me. 561; *Christ's Church v. Woodward*, 26 Me. 172; *Bearce v. Fossett*, 34 Me. 575; *Fossett v. Bearce*, 29 Me. 523; *Brown v. Witham*, 51 Me. 29; *Hamilton v. Phippsburg*, 55 Me. 193; *Parker v. Titcomb*, 82 Me. 180; *Osgood v. Blake*, 21 N. H. 550.

Where Notices Are Posted in Places Neither Public nor Conspicuous, and the town had not appointed a different mode of notice, town meetings under such notices are illegal. *Bearce v.*



The Word "Conspicuous" is used in the statute to prevent the possibility of calling a town meeting in a secret manner by posting a notice in a public place and yet in such a position that but few if any persons would be likely to notice it.<sup>1</sup>

A Public Place is supposed to mean a place where people are in the habit of resorting for the purpose of religious worship, amusement, or the transaction of business. In thinly settled communities where there are no places to which people are in the habit of resorting for such purposes, a bridge, guide-board, or post-box by the wayside, where newspapers are left for subscribers or others, may be regarded as a public place. The question is one partly of fact and partly of law. The nature and situation of the place are matters of fact to be settled by a jury, and when these are settled, whether the place is to be considered a public place within the intent of the statute is purely a question of law.<sup>2</sup>

Notices Need Not Be Posted at the Same Places Every Year; the statutes, as a general rule, only require that the selectmen shall post notices at three public places in their respective towns.<sup>3</sup>

Posting the Original Warrant instead of a copy is no legal objection to the meeting. It is at least as good a notice as could be given by posting a copy.<sup>4</sup>

i. TIME OF POSTING. — It is usually required that the notice be posted a certain number of days before the date of the meeting.<sup>5</sup>

The Time That Shall Elapse Between the Notification of the Meeting and the Holding of the Same must, of course, be a reasonable one. In the absence of any vote of the

Fossett, 34 Me. 575; Fossett v. Bearce, 29 Me. 523; Hamilton v. Phippsburg, 55 Me. 193.

**Sufficient Posting.** — Where the usual mode of notifying town meetings in a town was by posting a notice on the door of a meeting house, which was also used for a town house, such notification is sufficient if it is posted on a town house which was built after said meeting house was torn down. Briggs v. Murdock, 13 Pick. (Mass.) 305.

**Destruction by Fire of a Town Hall,** at which the statute requires notice to be posted, is sufficient to authorize the posting of the warrant at another hall where the meeting is to be held. Com. v. Sullivan, 165 Mass. 183.

1. Purpose of "Conspicuous." — Christ's Church v. Woodward, 26 Me. 172.

**Posting a Notice upon the Inside of the Door of the Meeting House** where the meeting is to be held, and locking the door and keeping it locked until the day of the meeting, is not a sufficient posting, although the notice is posted at the place of meeting. So far as the spirit of the statute requiring the public notice is to be regarded, or the inhabitants of the town are to be considered, there might just as well have been no copy whatever posted up. Osgood v. Blake, 21 N. H. 550.

2. Maine. — Fletcher v. Lincolnville, 20 Me. 439; Soper v. School Dist. No. 9, 28 Me. 193; State v. Beeman, 35 Me. 242.

Massachusetts. — Briggs v. Murdock, 13 Pick. (Mass.) 305.

New Hampshire. — Tidd v. Smith, 3 N. H. 178; Cardigan v. Page, 6 N. H. 182; Cambridge v. Chandler, 6 N. H. 271; Gibson v. Bailey, 9 N. H. 168; Wells v. Burbank, 17 N. H. 393; Osgood v. Blake, 21 N. H. 551; Baker v. Shephard, 24 N. H. 208; Scammon v. Scammon, 28 N. H. 419; Chapin v. School Dist. No. 2, 30

N. H. 25; Russell v. Dyer, 40 N. H. 173; Wells v. Jackson Iron Mfg. Co., 47 N. H. 235, 90 Am. Dec. 575; Cahoon v. Coe, 52 N. H. 518; French v. Spalding, 61 N. H. 395; Hoitt v. Burnham, 61 N. H. 620.

Rhode Island. — Seabury v. Howland, 15 R. I. 446.

Wisconsin. — McVichie v. Knight, 82 Wis. 137.

A Mechanic's Shop is not a public place for the posting of notices. Tidd v. Smith, 3 N. H. 178.

Houses of Public Worship are ordinarily and *prima facie* to be regarded as public places for the purpose of posting notices of a town meeting. Scammon v. Scammon, 28 N. H. 419. See also Tidd v. Smith, 3 N. H. 178.

3. Posting Places May Be Changed. — Stoddard v. Gilman, 22 Vt. 568.

4. Posting Original Warrant. — Brewster v. Hyde, 7 N. H. 206; Norris v. Eaton, 7 N. H. 284.

5. Time of Posting. — Chamberlain v. Dover, 13 Me. 466, 29 Am. Dec. 517; State v. Williams, 25 Me. 561; Christ's Church v. Woodward, 26 Me. 172; Bearce v. Fossett, 34 Me. 575; Brown v. Witham, 51 Me. 29; Sanborn v. Machias Port, 53 Me. 82; Clark v. Wardwell, 55 Me. 61; Hamilton v. Phippsburg, 55 Me. 193; Com. v. Shaw, 7 Met. (Mass.) 52; Rand v. Wilder, 11 Cush. (Mass.) 294; Osgood v. Blake, 21 N. H. 550.

A By-law Requiring Three Months' Notice for an ordinary town meeting is unreasonable, and it is an abuse rather than a fair use of the power intrusted to the town. Jones v. Sanford, 66 Me. 585.

Where the Maximum and the Minimum Number of Days for posing the notice are provided by the statute, a notice is invalid that is posted for

town on the subject, usage would aid in deciding the legality of the notice. If there had been an entirely uniform practice of notifying a certain number of days before the meeting, for a considerable length of time, and such meetings thus called had been sanctioned by silent acquiescence of the inhabitants by transacting at them their ordinary business, a meeting so called would be reasonably notified in point of time.<sup>1</sup>

**Presumption as to Time.** — Where thirty days have passed since a town meeting it will be presumed that a notice which was posted remained posted the required time.<sup>2</sup>

**j. RETURN OF OFFICER.** — The person who notifies the meeting shall make his return on the warrant, stating the manner of notice and the time it was given. In order that this be done, the person must state what he did and when he did it.<sup>3</sup>

**A Defective Return** renders void a town meeting held under it, whatever may be the consequences resulting from such determination.<sup>4</sup>

**Where No Return Appears upon the Warrant** the persons who were selectmen at the time and whose duty it was to make such return may, upon motion and upon statutory evidence that the facts would justify them, be permitted by the court to make the proper return, and the town clerk for that year may have leave also to amend the record accordingly.<sup>5</sup>

**Amendment to Return.** — An officer will be allowed to amend his return at any time during his continuance in office.<sup>6</sup>

**k. DEFECTIVE WARNING.** — An act of the legislature may validate a vote at a town meeting notwithstanding a defective warning.<sup>7</sup> But a court cannot presume that a town intended to ratify the proceedings of a meeting not legally called unless there is language so clear and explicit that there can be no doubt of the town's purpose.<sup>8</sup>

**l. EVIDENCE OF WARNING.** — The records of the town containing a copy of the warrant are competent evidence of the proceedings of the town and of the warning of the meeting.<sup>9</sup>

**m. EVIDENCE OF POSTING.** — A record of the warning of the meeting, setting the date of such meeting and stating that the inhabitants met agreeably to the notification and thereupon chose all of their town officers and voted on their tax, is sufficient *prima facie* to show that the warning was in fact posted in conformity to the provisions of the law.<sup>10</sup>

**6. Adjournment.** — When a meeting is fairly organized it possesses the incidental power of adjournment to a future time.<sup>11</sup> The adjourned meeting is

more than the maximum period. *McVichie v. Knight*, 82 Wis. 137. And see the title **TIME** (**COMPUTATION OF**), *ante*, p. 209.

**1. Time Must Be Reasonable.** — *Rand v. Wilder*, 11 Cush. (Mass.) 294.

**2. Presumption as to Time.** — *Schoff v. Gould*, 52 N. H. 512.

**3. Return of Officer.** — *State v. Williams*, 25 Me. 561; *Christ's Church v. Woodward*, 26 Me. 172; *Parker v. Titcomb*, 82 Me. 180; *Cardigan v. Page*, 6 N. H. 182. But see *Bucksport v. Spofford*, 12 Me. 487.

**Sufficient Return.** — See *Parker v. Titcomb*, 82 Me. 180; *Rand v. Wilder*, 11 Cush. (Mass.) 294.

**Insufficient Return.** — See *Christ's Church v. Woodward*, 26 Me. 172; *State v. Williams*, 25 Me. 561.

**The Return Must Show** that the notices were posted in public and conspicuous places. *Allen v. Archer*, 49 Me. 346.

**The Return Should State the Day** when the advertisement was put up; it is not enough that it states the advertisement to have been posted

up more than eight weeks. *Nelson v. Pierce*, 6 N. H. 194.

**The Return Is Not Conclusive** of the day on which the notification was given. *Thayer v. Stearns*, 1 Pick. (Mass.) 109; *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243.

**4. State v. Williams**, 25 Me. 561.

**5. Subsequent Return.** — *Bean v. Thompson*, 19 N. H. 290, 49 Am. Dec. 154.

**6. Amendment to Return.** — *Kellar v. Savage*, 17 Me. 444; *Thayer v. Stearns*, 1 Pick. (Mass.) 109.

**7. Act of Legislature.** — *Stuart v. Warren*, 37 Conn. 225.

**8. Presumption.** — *Southard v. Bradford*, 53 Me. 380.

**9. Evidence of Warning.** — *Houghton v. Davenport*, 23 Pick. (Mass.) 235; *Com. v. Shaw*, 7 Met. (Mass.) 52.

**10. Evidence of Posting.** — *Lemington v. Blodgett*, 37 Vt. 210.

**11. Adjournment.** — *Carter v. McFarland*, 75 Iowa 196; *Chamberlain v. Dover*, 13 Me. 466

merely a continuation of the original one, and while the meeting lasts the voters have the same control of the business before them as they originally had.<sup>1</sup>

**The Right to Adjourn Is Subject to Certain Limitations**, as that a few persons cannot by concert or otherwise attend at the precise time appointed and thereupon adjourn from the central to an extreme part of the town.<sup>2</sup>

**Upon Adjournment of a Town Meeting** from the place designated therefor, proclamation of such adjournment should be made, and a constable or some other proper person should be stationed at the place where the meeting was opened to notify all persons arriving at such place that the meeting has been adjourned. But the meeting is not rendered invalid if this is not done, provided that no person is misled by the omission.<sup>3</sup>

**An Adjournment Cannot Be Proved by Parol**, nor can an officer amend a record so as to show an adjournment of a meeting held previous to his election.<sup>4</sup>

**7. Presiding Officer.** — The presiding officer of town meetings, the manner of his selection, and his duties are usually provided for by statute.<sup>5</sup>

**8. Course of Procedure.** — It has been held that town meetings are not governed by the strict rules of deliberative legislation. The presiding officer regulates the business of the meeting, and he may prescribe rules of proceeding, which may be altered by the town, and he must decide all questions of order.<sup>6</sup> But it has also been held that where the course of procedure which is to be pursued is not fully marked out by the statute and where the statute does not give direction, the general rules of parliamentary law, so far as they may be applicable, should be observed and enforced in conducting the business of the meeting.<sup>7</sup>

**9. Functions.** — With the exception of the election of those officers who the statute prescribes shall be elected by ballot, all, or nearly all, of the functions of a town meeting are such as pertain to a deliberative body or assembly, and the subjects upon which it may act are numerous and diversified.<sup>8</sup>

**10. Presumption as to Regularity of Proceedings.** — There is no presumption as to the regularity of the proceedings of recent town meetings.<sup>9</sup>

**Conversely** where, from lapse of time, it may be presumed that the officers who made the records are no longer living, or have lost a recollection of the

29 Am. Dec. 517; *Canton v. Smith*, 65 Me. 203; *Atty.-Gen. v. Simonds*, 111 Mass. 256; *Goodell v. Baker*, 8 Cow. (N. Y.) 286; *Schoff v. Bloomfield*, 8 Vt. 472; *State v. Racine County*, 70 Wis. 543; *Wisconsin Cent. R. Co. v. Ashland County*, 81 Wis. 1.

**The Illegal Election of a Moderator** does not invalidate an adjournment of a town meeting. The vote of adjournment does not depend upon the election of a moderator, and it may be adopted without being preceded by the election of such officer. The adjournment is good even though a person without legal authority, but without objection, is permitted to act as presiding officer for the time being. *Atty.-Gen. v. Simonds*, 111 Mass. 256.

**1. Business at Adjourned Meeting.** — *Canton v. Smith*, 65 Me. 203; *Carter v. McFarland*, 75 Iowa 196; *Schoff v. Bloomfield*, 8 Vt. 472.

**A Town Meeting May Be Adjourned Immediately** upon being opened, and such adjournment may be to the next day and at another place. *Goodell v. Baker*, 8 Cow. (N. Y.) 286.

**2. Limitation on Right.** — *Chamberlain v. Dover*, 13 Me. 466, 29 Am. Dec. 517.

**3. Notice of Adjournment.** — *Wisconsin Cent. R. Co. v. Ashland County*, 81 Wis. 1.

**4. Proof of Adjournment.** — *Taylor v. Henry*, 2 Pick. (Mass.) 397.

**5. Presiding Officer.** — See for example the statutes of *Connecticut*, *Illinois*, *Maine*, *Massachusetts*, *Michigan*, *New Hampshire*, *New Jersey*, *Rhode Island*, *Vermont*, and *Wisconsin*.

**6. Course of Procedure.** — *Hill v. Goodwin*, 56 N. H. 441. In this case the court said: "However wise or necessary parliamentary rules may be for legislative bodies, they are not adapted to the successful or prompt dispatch of business in town meetings, and the statute therefore wisely allows the moderator a large discretion in prescribing rules for the government of his meeting, subject only to revision by the town."

**A Liberal and Favorable Construction** has prevailed to support the proceedings of towns. *Kellar v. Savage*, 17 Me. 444.

**7. Course of Procedure.** — *State v. Davidson*, 32 Wis. 114.

**8. Functions of Town Meetings.** — *State v. Davidson*, 32 Wis. 114.

**The Power and Jurisdiction of the Annual Town Meeting** do not depend upon anything stated or omitted as to its object in the notice of the clerk. *Thorp v. King*, 42 Ill. App. 513.

**9. Presumption as to Regularity — Recent Meetings.** — *Bloomfield v. Charter Oak Bank*, 121 U. S. 121; *Bishop v. Cone*, 3 N. H. 515; *Cavis v. Robertson*, 9 N. H. 524.



facts, so that no amendment can be made, or where it is proved in point of fact that such officers have died, so that the records cannot be corrected, every presumption is to be made in favor of the regularity of the proceedings of towns.<sup>1</sup>

**11. Voting at Town Meetings — a. IN GENERAL.** — Usually votes are given by ballot or *viva voce*, but it is sufficient, in the absence of a requirement to the contrary, to give them in any recognized manner.<sup>2</sup>

**Votes to Raise Money** need indicate only in general terms the purpose or object for which the money is raised, and if that purpose or object is such as comes within the scope of the powers of the town, it is sufficient. It is not necessary to the validity of the vote that it should state the particular facts which show the present necessity of the town for the use of the money. The object specified being within the powers of the town, it is to be intended that the town has judged properly as to the occasion and necessity for the exercise of the power in the particular instance.<sup>3</sup>

**Where a Vote on Its Face Refers to Other Papers**, such papers must be taken together with the vote and as a part of it, and if the papers are lost their contents may be shown by parol, as in the case of other lost documents.<sup>4</sup>

**b. DECLARATION OF VOTE.** — Where the statute provides that the moderator shall make public declaration of all votes, it is sufficient if a declaration made by the tellers in the presence of the moderator is received by the meeting. The declaration of the tellers is a declaration by the moderator within the statute.<sup>5</sup>

**c. RECONSIDERATION OF VOTE.** — A town may reconsider its action at the same meeting or at a subsequent meeting if seasonably done, that is, if the action of the town has not already accomplished its purpose. If the vote of a town once accomplishes its purpose, works out the intended result, and spends its force, it cannot be reconsidered and taken back.<sup>6</sup>

**Where a Vote Is in Effect a Contract** between the town and an individual, it cannot be rescinded.<sup>7</sup>

**d. EFFECT OF VOTE.** — In all measures in regard to which towns are authorized to act at legal town meetings, the votes of the majority present

**1. Ancient Meetings.** — *Brownell v. Palmer*, 22 Conn. 107; *State v. Taff*, 37 Conn. 392; *Gibson v. Bailey*, 9 N. H. 168; *Cavis v. Robertson*, 9 N. H. 524; *Peterborough v. Lancaster*, 14 N. H. 383; *Willey v. Portsmouth*, 35 N. H. 303.

**2. Manner of Voting.** — *Seaman v. Baughman*, 82 Iowa 216.

**A Vote Deficient in Precision** may nevertheless be valid. *State v. Middletown*, 24 N. J. L. 124.

**3. Votes to Raise Money.** — *Blodgett v. Holbrook*, 39 Vt. 336.

**A Vote Which Provides for Raising a Sum in Gross** for the current expenditure of the town, without designating each particular object, is not illegal. *Tucker v. Aiken*, 7 N. H. 113.

**The Vote of a Town Need Not Designate the Sum to Be Expended** by a committee appointed to superintend certain work, where the statute does not require the amount to be designated, but itself fixes the limit of expenditure. *Drew v. West Orange Tp.*, 64 N. J. L. 481.

**4. Writings as Part of Vote.** — *Brownell v. Palmer*, 22 Conn. 107.

**5. Declaration of Vote.** — *Fritz v. Crean*, 182 Mass. 433.

**6. Reconsideration of Vote — Connecticut.** — *Terrett v. Sharon*, 34 Conn. 105.

*Illinois.* — *Thorp v. King*, 42 Ill. App. 513.

*Maine.* — *Getchell v. Wells*, 55 Me. 433;

*Brown v. Winterport*, 79 Me. 305; *Parker v. Titcomb*, 82 Me. 180.

*Massachusetts.* — *Allen v. Taunton*, 19 Pick. (Mass.) 485; *Hunneman v. Grafton*, 10 Met. (Mass.) 454; *Withington v. Harvard*, 8 Cush. (Mass.) 66; *Morse v. Dwight*, 13 Allen (Mass.) 163.

*New York.* — *Denton v. Jackson*, 2 Johns. Ch. (N. Y.) 320.

*Vermont.* — *Stoddard v. Gilman*, 22 Vt. 568; *Cox v. Mt. Tabor*, 41 Vt. 28; *Estey v. Starr*, 56 Vt. 600.

**Where a Town Acts under a Vote** by duly electing three persons selectmen, no reconsideration could be voted that would deprive these persons of the rights and emoluments which belong to their official place, but a vote fixing the number might be reconsidered with a view to make the number larger. *Atty.-Gen. v. Dole*, 168 Mass. 562.

**A Town Is Free to Act Within Its Legal Scope as It Pleases.** — It may take action in one direction to-day and in another to-morrow, provided it does not impair intervening rights. *Parker v. Titcomb*, 82 Me. 180.

**7. Where Vote Constitutes Contract.** — *Brown v. Winterport*, 79 Me. 305; *Nelson v. Milford*, 7 Pick. (Mass.) 18; *Jewett v. Alton*, 7 N. H. 253.

bind not only the minority but all who are absent.<sup>1</sup>

**A Vote of a Town Meeting Ratifying Illegal Doings** of a former meeting ratifies such doings to the precise extent indicated by the vote, and not beyond it.<sup>2</sup>

**12. Record of Proceedings** — *a.* IN GENERAL. — It is the duty of the town clerk to record the doings of the town at its regular meetings, and proof of these prerequisites is indispensable to the validity of the proceedings,<sup>3</sup> although if the clerk makes an erroneous record of the proceedings of the meeting the town is not bound by it merely because others confide in its correctness.<sup>4</sup>

**Grammatical Precision and Verbal Accuracy Are Not to Be Expected** in the records of the proceedings of town meetings, and the want of such qualities vitiates nothing, provided the true intent can fairly be ascertained, looking at the record in the light afforded by a knowledge of the purpose, occasion, and circumstances of the proceedings.<sup>5</sup>

*b.* RECORD AS EVIDENCE. — The statement in the record of the meeting that it was "legally warned" shows only that it has been duly warned, not for what purpose.<sup>6</sup>

**Where the Record Is Dated the Day of the Annual Town Meeting** and is sufficient to show the action taken by the meeting, it should be presumed that the action was taken at the time provided by statute.<sup>7</sup>

*c.* AMENDMENT OF RECORD. — If through inadvertency or misapprehension a record of the proceedings of a town meeting is defectively made, it is competent for the town clerk to complete it by amending it according to the truth.<sup>8</sup>

**The Town Clerk of a Former Year** who has ceased to hold the office cannot be allowed to come in and amend the record made while he was in office;<sup>9</sup> but

**1. Effect of Vote.**—*Chamberlain v. Dover*, 13 Me. 466, 29 Am. Dec. 517; *Reiger v. Beaufort*, 70 N. Car. 319; *Schoff v. Bloomfield*, 8 Vt. 472.

**The Inhabitants of a Town Cannot Avoid Being Bound** by their vote at a meeting legally called, with authority in the warrant to act upon the subject, by proof that the vote was passed near the close of the meeting after a portion of the voters had retired. *Bean v. Jay*, 23 Me. 117.

**2. Ratification of Illegal Proceedings.**—*Hamilton v. Phippsburg*, 55 Me. 193.

**The Article under Which a Vote Is Passed** will usually aid in its construction. *Andrews v. Prouty*, 13 Allen (Mass.) 93.

**3. Record of Proceedings.**—*Bearce v. Fossett*, 34 Me. 575; *Hill v. Goodwin*, 56 N. H. 441.

**4. Erroneous Record.**—*Chamberlain v. Dover*, 13 Me. 466, 29 Am. Dec. 517.

**5. Grammar and Verbal Accuracy Not Required.**—*Hart v. Holden*, 55 Me. 572; *Pottle v. Maidstone*, 39 Vt. 72.

**6. Record as Evidence.**—*Bloomfield v. Charter Oak Bank*, 121 U. S. 121.

**A Record of Warning**, dated the 18th of February, for a meeting on the 4th of March, and that the inhabitants met agreeably to the above notification and thereupon chose their town officers and voted all their taxes, is sufficient, *prima facie*, to show that the warning was, in fact, posted up in conformity to the provisions of the law. *Lemington v. Blodgett*, 37 Vt. 210.

**7. Presumption from Record.**—*Auditor-Gen. v. Longyear*, 110 Mich. 223.

**8. Amendment of Record.**—*Boston Turnpike Co. v. Pomfret*, 20 Conn. 590; *Chamberlain v. Dover*, 13 Me. 466, 29 Am. Dec. 517; *Allen v.*

*Archer*, 49 Me. 346; *Welles v. Battelle*, 11 Mass. 477; *Bishop v. Cone*, 3 N. H. 513; *Cardigan v. Page*, 6 N. H. 182; *Gibson v. Bailey*, 9 N. H. 168; *Low v. Pettengill*, 12 N. H. 337; *Smith v. Messer*, 17 N. H. 420; *Cass v. Bellows*, 31 N. H. 501, 64 Am. Dec. 347; *Pierce v. Richardson*, 37 N. H. 306; *Roberts v. Holmes*, 54 N. H. 560.

**An Officer Cannot Amend** the record of a meeting held previous to his election so as to show an adjournment of such meeting to the day of such election. *Taylor v. Henry*, 2 Pick. (Mass.) 307; *Gibson v. Bailey*, 9 N. H. 168.

**9. Amendment to Record of Former Year.**—*Boston Turnpike Co. v. Pomfret*, 20 Conn. 590; *Chamberlain v. Dover*, 13 Me. 466, 29 Am. Dec. 517; *Hartwell v. Littleton*, 13 Pick. (Mass.) 229.

These cases are to be distinguished from *Welles v. Battelle*, 11 Mass. 477, wherein it was held that when a clerk continues in office several years, by repeated annual elections, he may amend the record of a former year, notwithstanding an election has intervened, and though he does not hold the office under the same appointment. In a case like the latter, the clerk not only knew the fact in relation to which the amendment is to be made, but he still enjoys the confidence of the town, is by its vote intrusted with the custody of the records, and is held responsible for their purity and correctness under the sanction of his official oath, and all such other guards as the law has thought it necessary to prescribe in the case of a clerk actually in office. The intervening election is substantially a continuation of the clerk in the same office.

this rule is not without its exceptions.<sup>1</sup>

**13. Disturbance of Meeting.** — Where town meetings are recognized in the constitution and laws of the state, and the elections made and the business transacted by the citizens at those meetings lie at the foundation of the whole civil polity, an indictment for disorderly conduct may be supported even though there is no statute prohibiting such conduct.<sup>2</sup>

**VIII. ELECTION OF OFFICERS — 1. Date of.** — Town officers are usually chosen at the annual or biennial town meeting.<sup>3</sup>

**An Officer May Be Elected at an Adjourned Meeting** if the election of such officer could properly take place at the original meeting.<sup>4</sup>

**A Statute Providing for the Election of Officers at the Annual Meeting** refers to the meeting on which the ballots are cast, and not to the day town officers canvass the returns of the inspectors from the several election districts;<sup>5</sup> but when the annual date has, by some means free from design or fraud, been passed by, the words of the statute are only directory and do not take away the power to elect afterwards.<sup>6</sup>

**2. Mode of Election.** — The law requires town officers to be elected by a major vote, and, in the absence of evidence to the contrary, the record of "voted and chose" must be deemed to imply an election by major vote.<sup>7</sup>

**When, in a New Town Erected by the County Board** in the division of the county into towns and townships, at the first meeting of said board, the offices of the town board as well as that of town clerk are all vacant, it is the duty of the county clerk to fill such vacancies, as well as all other vacancies in the offices of the town, by appointment.<sup>8</sup>

**3. Tenure of Office.** — As a general rule town officers hold their office until the next election and until others are elected or appointed in their place and are qualified.<sup>9</sup>

**Where a New Town Is Created Out of an Old Town,** the offices of such new town are vacant, and the officers elected to fill them hold only until the expiration of the term of the officers of the old town.<sup>10</sup>

**1. Amendment by Ex-clerk.** — *Bishop v. Cone*, 3 N. H. 513; *Gibson v. Bailey*, 9 N. H. 168; *Cass v. Bellows*, 31 N. H. 501, 64 Am. Dec. 347; *Pierce v. Richardson*, 37 N. H. 306.

**2. Disturbance of Meeting.** — *Com. v. Hoxey*, 16 Mass. 385. And see the title *DISTURBING MEETINGS*, vol. 9, p. 664.

**3. Election of Officers — Date of.** — See the statutes of *Connecticut, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Vermont, and Wisconsin*.

**In Rhode Island** annual meetings for the election of officers shall be held at such time as is or may be by law or vote provided, unless otherwise directed by law. Gen. Laws R. I., c. 37. And where a notice of a meeting to assess taxes is duly given, the fact that a meeting for the election of officers is held at the same time does not render the meeting illegal or void. *Warwick, etc., Water Co. v. Carr*, 24 R. I. 226.

**4. Election at Adjourned Meeting.** — *Carter v. McFarland*, 75 Iowa 196.

**5. Interpretation of Statute.** — *Matter of Foley*, (Supm. Ct. Spec. T.) 8 Misc. (N. Y.) 58.

**6. Election After Statutory Date.** — *People v. Fairbury*, 51 Ill. 149.

**7. Election by Major Vote.** — *Portland, etc., R. Co. v. Standish*, 65 Me. 63; *Gerry v. Herrick*, 87 Me. 219.

**Where the Statute Requires an Officer to Be**

**Elected by Ballot,** and provides that the polls shall be open from 9 o'clock in the morning till 5.30 P. M., an election of such officer is illegal that takes place by acclamation at a re-opening of the polls after the time specified. *Budlong's Petition*, 15 R. I. 332.

**Where Two or More Candidates Have an Equal Number of Votes** for the same office at an annual election in a town meeting for a township office, the town committee shall, at their next meeting thereafter, elect between those having an equal number of votes, unless there shall be a special town meeting made for that purpose, and in that case they shall have power to call such special meeting as provided by law. The committee shall do one of two things — elect between those having an equal number of votes, or call a special town meeting to elect. *Brown v. Boden*, 51 N. J. L. 114.

**8. Officers in New Town.** — *State v. Forney*, 21 Neb. 223.

**9. Tenure of Office.** — *Badger v. U. S.*, 93 U. S. 599; *De Armond v. State*, 40 Ind. 469; *State v. McMullen*, 46 Ind. 307; *Everroad v. Flatrock Tp.*, 49 Ind. 451; *State v. Wells*, 144 Ind. 231; *Lafferty v. Huffman*, 99 Ky. 80; *Johnston v. Wilson*, 2 N. H. 202, 9 Am. Dec. 50; *State v. Hadley*, 64 N. H. 473; *Montgomery v. O'Dell*, 67 Hun (N. Y.) 169.

**10. New Town Created from Old Town.** — *Matter of Collins*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 598.



4. **Order of Election.** — Where the statute provides an orderly procedure for the election of town officers, such statute should be followed, and the election of one officer cannot regularly and properly be held before the balloting for another officer has been completed.<sup>1</sup>

5. **Acceptance and Qualification** — *a. ACCEPTANCE* — (1) *In General.* — After the election of an officer, if there be a commission, an oath of office, or any ceremony of inauguration, these are forms only, which may or may not be necessary to the validity of any acts under the appointment, according as usage and positive statute may or may not render them indispensable. But in no case can the office itself be considered as filled till an acceptance of the appointment by the person chosen. That acceptance, however, need not be signified in express terms. It is often implied from previous conduct as well as from a subsequent receipt of a commission, taking the oath of office, or discharging some of its duties.<sup>2</sup>

(2) *Refusal to Accept Office.* — As a general rule, towns possess adequate means to compel the observance of the obvious duty of the citizen, chosen to office, to enter upon and discharge the duty imposed thereby, and where a penalty is provided for a refusal to accept an office the payment thereof does not relieve the officer from service. A peremptory writ of mandamus will issue to compel him to discharge the duties of the office.<sup>3</sup>

(3) *Officers Affected by Penalty.* — It has been held that the penalty annexed by law to the refusal to accept certain town offices applies only to those offices which yield no profit to the incumbent.<sup>4</sup>

*b. QUALIFICATION* — (1) *Oath of Office.* — Certain officers are required to file an oath of office within a prescribed time, but it has been held that if the oath is filed by an officer before the beginning of his official term and prior to the appointment of another person by the town board, the officer does not forfeit his office by the technicality of his failure to act within the statutory period.<sup>5</sup>

**Title to the Office Vests** when the officer from whom an oath is required has filed such oath. When that has been done the office is deemed to have been accepted, and that is equivalent to saying that the officer elect has entered upon his duties.<sup>6</sup>

(2) *Bonds.* — Where the statute requires that an officer file a bond within a certain time after his election, his failure to do so will be deemed an abandonment of the office.<sup>7</sup>

(3) *Certificate of Election.* — Where a certificate of election is required to be filed, this must be done before an officer who has been elected can perform acts or make ordinances which are valid and binding.<sup>8</sup>

1. **Order of Election.** — *In re Election of Town Officers*, 20 R. I. 784.

2. **Acceptance of Office.** — *Johnston v. Wilson*, 2 N. H. 202, 9 Am. Dec. 50; *Twombly v. Pinkham*, 3 N. H. 370.

3. **Refusal to Accept Office.** — *People v. Williams*, 145 Ill. 575, 36 Am. St. Rep. 514.

4. **Offices Affected by Penalty.** — *Morrell v. Sylvester*, 1 Me. 248. But see *Hoke v. Henderson*, 4 Dev. L. (15 N. Car.) 1, 25 Am. Dec. 677, wherein the court said that the acceptance of resignations, in respect to lucrative offices, has been so much a matter of course that it has become the common understanding that to resign is a matter of right, but the law is otherwise. "The public has a right to the services of all the citizens, and may demand them in all civil departments as well as in the military."

5. **Oath of Office.** — *Matter of Drury*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 288.

**Inferior Officers May Be Exempted** by the legislature from taking the prescribed oath of office. A township treasurer appointed by the board of trustees of schools falls with the designation of inferior officers. *School Directors v. People*, 79 Ill. 511.

6. **When Title to Office Vests.** — *Matter of Bradley*, 141 N. Y. 527.

7. **Bonds — Failure to File.** — *State v. Johnson*, 100 Ind. 489; *Morrell v. Sylvester*, 1 Me. 248.

"Bond to Satisfaction of Treasurer." — *Briggs v. Hopkins*, 16 R. I. 83.

**An Office Is Vacated** where the person elected fails to take the statutory oath and give the statutory bond. Such person is not an officer *de facto*. *State v. Beloit*, 21 Wis. 280, 91 Am. Dec. 474.

8. **Certificate of Election.** — *Pratt v. Luther*, 45 Ind. 250.

**6. Extension of Term.** — A town officer elected for a specified period, who has entered upon his term, cannot be kept in office for a longer period by subsequent legislation. His right to the office depends upon the law existing when he was elected.<sup>1</sup>

**7. Evidence of Election.** — The record of the town meeting may be sufficient *prima facie* proof of a choice in a legal manner.<sup>2</sup>

Those Claiming to Be Officers Are Bound to Show the Legality of the Meeting at which they were elected, and if it was not a legal meeting they hold no official position.<sup>3</sup>

A Party Who Is Bound to Show the Authority of a Third Person as a town officer may rest on proof that he is or was at the time an acting officer. Whatever may be the qualifications or prerequisites required by the law before he is qualified to act, the proof that he is an acting officer is *prima facie* evidence of his having these qualifications and of having complied with those requisites as well as of his election or appointment.<sup>4</sup>

A Statute Requiring a Record of the Persons Sworn into Office is directory and does not prevent the fact from being otherwise proved when there is no such record made.<sup>5</sup>

**8. Powers of Officers** — *a.* IN GENERAL. — Where the whole *modus operandi* of town organization is committed to the legislature, the constitution prescribing no particular officers, the legislature has the power to limit and fix the powers of township officers and to modify them at will.<sup>6</sup>

The Subject of Choosing Officers Includes as an Incident any special authority that the town by statute is authorized to confer upon them in the exercise of their official duties.<sup>7</sup>

Town Officers Have No Functions Outside of Their Constitutional or Statutory Powers, and they can under no circumstances delegate their trusts to commissioners appointed by the state, or appoint these men to any such offices, or abdicate their own authority; they can give no rights by acquiescence that they could not give in any other way.<sup>8</sup>

*b.* ASCERTAINMENT OF POWERS BY THIRD PERSONS. — Persons dealing with towns through the medium of their officers must, at their peril, take notice of the scope and measure of the powers of such officers.<sup>9</sup>

**9. Liability of Officers** — *a.* IN GENERAL. — However negligent or wrongful the conduct of officers acting strictly within the line of official duty as agents of the town, or so long as they act and are understood to act only as agents, no implication of a personal interest will arise.<sup>10</sup>

*b.* WRONGFUL RETENTION OF PUBLIC MONEY. — The law applicable to

**1. Extension of Term.** — *People v. Randall*, 151 N. Y. 497.

**2. Evidence of Election — Record.** — *Atty.-Gen. v. Crocker*, 138 Mass. 214; *Com. v. Sullivan*, 165 Mass. 183.

**3. Officers to Show Legality of Meeting.** — *Bearce v. Fossett*, 34 Me. 575; *Allen v. Archer*, 49 Me. 346.

**4. Proof by Third Party.** — *Johnston v. Wilson*, 2 N. H. 202, 9 Am. Dec. 50; *Londonderry v. Chester*, 2 N. H. 268, 9 Am. Dec. 61; *Bath v. Haverhill*, 2 N. H. 555; *Tucker v. Aiken*, 7 N. H. 113; *Blake v. Sturtevant*, 12 N. H. 567; *Bean v. Thompson*, 19 N. H. 290, 49 Am. Dec. 154; *Baker v. Shephard*, 24 N. H. 208; *Bixby v. Harris*, 26 N. H. 125; *Pierce v. Richardson*, 37 N. H. 306; *Prescott v. Hayes*, 42 N. H. 56; *Hodgdon v. Shannon*, 44 N. H. 572; *Pearson v. Wheeler*, 55 N. H. 41; *Lucier v. Pierce*, 60 N. H. 13.

**5. Proof Dehors the Record.** — *Kellar v. Savage*, 17 Me. 444.

**6. Powers of Officers — In General.** — *People v. Cook County*, 176 Ill. 576.

**7. Grant of Special Authority.** — *Sherman v. Torrey*, 99 Mass. 472; *Com. v. Wentworth*, 145 Mass. 50.

**8. Extent and Delegation of Authority.** — *Hubbard v. Springwells*, 25 Mich. 153; *Davenport v. Johnson*, 49 Vt. 403.

**Township Officers Cannot Do by Indirection** that which they might not do directly. *State v. Marion County*, 21 Kan. 419; *Salt Creek Tp. v. King Iron Bridge, etc., Co.*, 51 Kan. 520.

**9. Ascertainment of Powers by Third Persons.** — See the title PUBLIC OFFICERS, vol. 23, p. 385.

**10. Liability of Officers.** — *Nickerson v. Dyer*, 106 Mass. 320; *Thibodaux v. Thibodaux*, 46 La. Ann. 1528.

**Acts in Excess of Authority** which fail to bind the town do not as a consequence bind the officers doing such acts. *Leet v. Shedd*, 42 Vt. 277; *Spafford v. Norwich*, 71 Vt. 78.

settlements between private parties does not apply to settlements between a town and its officers respecting the handling of public money. Notwithstanding such settlements, if an officer, by a mistake or otherwise, wrongfully retains public money in his hands, he may be proceeded against therefor at any time thereafter, upon discovery of the facts, within the period of the statute of limitations.<sup>1</sup>

**10. Official Good Faith.** — The power of a town or township officer to do acts or make contracts in which he has an interest adverse to the town or township has already been discussed under other titles in this work.<sup>2</sup>

**11. Vacation of Office** — *a.* **RESIGNATION.** — The Township Organization Law provides for the contingency of resignation by the various town officers and provides for a method by which the vacancies caused by these resignations shall be filled.<sup>3</sup>

*b.* **REMOVAL.** — Undoubtedly the removal of a town or township officer from the town or township may, under some circumstances, vacate his office and authorize the election or appointment of his successor;<sup>4</sup> but it does not necessarily vacate the office under all circumstances.<sup>5</sup> A removal out of a township in order to create a vacancy must be a voluntary removal. A removal by operation of law, resulting from an act of legislature cutting off a portion of the township, and leaving a person out of the township who when elected was a resident within its territory, is not a removal out of the township.<sup>6</sup>

**12. Compensation.** — This subject has been fully treated under another title in this work.<sup>7</sup>

**13. Various Boards and Officers** — *a.* **GOVERNING BOARD** — (1) *In General.* — The Function of a Governing Board of a Town must be the government of the town. All the internal affairs must be under the control of the board of town officers, so far as official action can go. Of course the inherent power of the people is left undisturbed and unlimited, and there is no restriction upon its action in a public town meeting.<sup>8</sup>

(2) *Town and Township Boards* — (a) *In General.* — A township board is a board of special and limited jurisdiction. The rules applicable to agencies of circumscribed, limited, and special authority must be applied to their proceedings, and it must appear on the face of their records that they had jurisdiction to act in the matter which is called in question.<sup>9</sup>

**1. Wrongful Retention of Public Money.** — Palo Alto County *v.* Burlingame, 71 Iowa 201; Boardman Tp. *v.* Flagg, 70 Mich. 372; Otsego Lake Tp. *v.* Kirsten, 72 Mich. 1, 16 Am. St. Rep. 524; Cady *v.* Bailey, 95 Wis. 370.

**2. Official Good Faith.** — See the titles **ILLEGAL CONTRACTS**, vol. 15, p. 975; **PUBLIC OFFICERS**, vol. 23, p. 368.

**3. Vacation of Office — Resignation.** — U. S. *v.* Badger, 6 Biss. (U. S.) 308.

Where an Act Repeals the Charter of a Town and imposes upon the officers at the time the duty to levy taxes and pay the debts of the town, and does not provide for their successors or any other persons, the officers cannot by resignation absolve themselves from the duty. Gorgas *v.* Blackburn 14 Ohio 252.

A Supervisor is a township officer and his resignation should be addressed to the township clerk. State *v.* Taylor, 26 Neb. 580.

**Resignation Does Not Relieve a Supervisor or Town Clerk from the responsibilities of his office until a successor is appointed.** Badger *v.* U. S., 93 U. S. 599, 6 Biss. (U. S.) 308.

See generally the title **PUBLIC OFFICERS**, vol. 23, p. 421.

**4. Removal from Town or Township — May Vacate Office.** — Salamanca Tp. *v.* Wilson, 109

U. S. 627; Barre *v.* Greenwich, 1 Pick. (Mass.) 129; Gage *v.* Dudley, 64 N. H. 437; Matter of Bagley, (Supm. Ct. Spec. T.) 27 How. Pr. (N. Y.) 151.

**5. Does Not Necessarily Vacate Office.** — Salamanca Tp. *v.* Wilson, 109 U. S. 627.

**6. Removal Creating a Vacancy.** — Stewart *v.* Riverside Tp., 68 N. J. L. 571.

7. See the title **PUBLIC OFFICERS**, vol. 23, p. 385.

**8. Governing Boards — In General.** — Adey *v.* Arnou, 91 Hun (N. Y.) 329.

**9. Town Board — In General.** — People *v.* Blackman, 14 Mich. 336; Harding *v.* Bader, 75 Mich. 316.

**A Township Board May Vote to Raise Money** only for the ordinary expenses of the township, and then it can do so only when the township electors have failed or neglected to take such action. Mills *v.* Richland Tp., 72 Mich. 100.

**Where Only an Abstract of the Proceedings of a Town Board Is Given in the Record,** parol evidence is admissible to show the proceedings of such board. Rock Creek Tp. *v.* Coddington, 42 Kan. 649.

**A Township Board Is Not Authorized to Vote Such Sums of Money as it shall deem best for the township expenses,** nor is it authorized to



(b) **Composition of.** — The town board is, in some instances, composed of the supervisor, the town clerk, and the justices of the peace, or any two of such justices;<sup>1</sup> in others it consists of the supervisor, the two justices of the peace whose term will soonest expire, and the county clerk. Any three of these constitute a quorum for the transaction of business, and it is not necessary that the record of their meeting should show formally that the two justices present were the two whose terms of office would soonest expire.<sup>2</sup>

(c) **Meetings — Notification.** — No meeting of a township board can be legal which is not attended by all the members, unless it appears that the meeting has been duly called and notified. The mere attendance of a quorum does not make a legal meeting, but every member has a right to be present and participate in its action.<sup>3</sup>

(d) **Must Act as Board.** — Action by members of a town board unless assembled as a board cannot be regarded as an act of the town.<sup>4</sup>

(e) **Effect of Division of Township.** — Where a part of the township is declared to be a city of the second class, such declaration does not have the effect to put the citizens of that part of the old township not embraced in the city outside the pale of government. Its township board still exists, although all its members live within the limits of the newly constituted city, and the officers are at least *de facto* officers.<sup>5</sup>

(3) **Township Trustees** — (a) **In General.** — Township trustees are special agents possessing statutory power only, and are without general authority to bind the township. They can bind it only when they do what the statute authorizes, in the prescribed manner.<sup>6</sup>

(b) **Trustee of Both Civil and School Townships.** — While a township trustee may, by virtue of his office, act as trustee of the school township,<sup>7</sup> he should designate the character in which he acts in any particular case, and where he describes himself as acting for the township, this should be taken to mean the civil township.<sup>8</sup>

(c) **Powers.** — In the exercise of their powers as trustees of the township, the trustees can take nothing by implication beyond the authority conferred by statute.<sup>9</sup>

vote money to defray expenses at its pleasure. Its authority, in this regard, depends upon the neglect or refusal of the qualified voters at the annual township meeting to vote such sum or sums as may be necessary to defray the ordinary township expenses. *Harding v. Bader*, 75 Mich. 316.

1. **Composition of.** — *Adee v. Arnaw*, 91 Hun (N. Y.) 329.

2. *Harding v. Bader*, 75 Mich. 316; *Newaygo County Mfg. Co. v. Echinaw*, 81 Mich. 416; *Laroue v. Conway*, 118 Mich. 559.

**In Case of a Temporary Disability of One of the Elder Justices** to act at a meeting of a town board, one of the remaining justices may be notified by any member of the board, and shall meet with the board, and shall have the same authority as the other members in case there may not be three members of the board able and competent to act. *Grondin v. Logan*, 88 Mich. 247.

3. **Meetings — Notification.** — *Township Board v. Hastings*, 52 Mich. 528. Compare *Boyce v. Auditor-Gen.*, 90 Mich. 314.

4. **Must Act as a Board.** — *Blue v. Briggs*, 12 Ind. App. 105; *Adee v. Arnaw*, 91 Hun (N. Y.) 329.

5. **Effect of Division of Township.** — *Walnut Tp. v. Jordan*, 38 Kan. 562.

6. **Township Trustees.** — *Marion First Nat.*

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*Bank v. Adams School Tp.*, 17 Ind. App. 375; *Clinton School Tp. v. Lebanon Nat. Bank*, 18 Ind. App. 42; *Wrought Iron Bridge Co. v. Hendricks County*, 19 Ind. App. 672; *Peck-Williamson Heating, etc., Co. v. Steen School Tp.*, 30 Ind. App. 637.

**Township Trustee Can Issue Obligations Binding on the Township** only in case a debt has been contracted. *Indiana v. Glover*, 155 U. S. 513.

7. **Trustee of Both Civil and School Township.** — *Middleton v. Greeson*, 106 Ind. 18.

8. **Designation of Character.** — *Jackson Tp. v. Home Ins. Co.*, 54 Ind. 184.

9. **Powers.** — *Hopple v. Brown Tp.*, 13 Ohio St. 311.

**The President of the Board of Trustees Cannot Convey More Property** than is intended to be sold by the town. That portion of the deed which assumes to convey the premises not sold by the town is void for want of power in the officer of the corporation to execute it. *De Forest v. Huntington*, 78 Hun (N. Y.) 611.

**Trustees Cannot Extinguish an Old Town and Create a New One** consisting of the same territory. *People v. Bancroft*, 3 Idaho 356.

**See Generally the Following Cases as to Power of Trustees:**

*California.* — *Rice v. Haywards*, 107 Cal. 398.

*Idaho.* — *People v. Bancroft*, 3 Idaho 356.

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Where Township Trustees Are Constituted a Board of Health and have charge of all cemeteries within the limits of their township, they have the right to sell property which has been purchased for the purpose of cemeteries, and provide in the deed that such nuisances as affect the public health shall not be placed thereon.<sup>1</sup>

**Power Dependent upon Petition.** — Where the statute provides that upon the filing of a petition by a majority of the resident owners of lots the trustees of a town shall have power to pass an ordinance or make contracts in reference to the improvement of streets, the filing of such petition is a prerequisite to the power of the trustees to act, and they may be enjoined from proceeding without such petition.<sup>2</sup>

(d) **Meetings.** — Where a majority of the township trustees are declared by statute to be a quorum to do business at all meetings of the trustees, it is quite certain that neither a majority nor all of the trustees, acting separately, can, by thus concurring in an act, do anything officially valid. For special meetings, all must have notice, and a majority must meet and act jointly and together.<sup>3</sup>

(e) **Record of Proceedings.** — The board of trustees are required to keep a true record of all their proceedings, and they can speak only by such record.<sup>4</sup>

(4) **Selectmen** — (a) **In General.** — The selectmen of a town are its general prudential officers, and are charged with the duty of superintending the concerns of the town, but in so doing they act as the agents of the town and exercise a delegated authority.<sup>5</sup>

(b) **Effect of Invalid Election.** — While the election of selectmen has been held to be invalid where the moderator at the town meeting is illegally elected,<sup>6</sup> it has also been held that persons elected to such office at a meeting which is invalid by reason of a defect in the return upon the warrant are nevertheless selectmen *de facto*, and as such have a right to call subsequent meetings.<sup>7</sup>

(c) **Eligibility to Hold Other Office.** — No selectman can hold the office of town clerk, town treasurer, or collector of town taxes during the same official year, but a person who has been elected a selectman and resigned that office may enter upon the duties of such other offices although the year for which he was elected selectman has not ended.<sup>8</sup>

(d) **Oath of Office.** — When the law requires selectmen to be sworn, it will be

*Indiana.* — *State v. Parker*, 33 Ind. 285; *Burr v. Newcastle*, 49 Ind. 322; *Madison Tp. v. Dunkle*, 114 Ind. 262; *Murphy v. Oren*, 121 Ind. 59; *Florer v. State*, 133 Ind. 453; *Williams v. Markland*, 15 Ind. App. 669.

*Iowa.* — *Young v. Webster City, etc.*, R. Co., 75 Iowa 140.

*Kentucky.* — *Covington v. McNickle*, 18 B. Mon. (Ky.) 262.

*North Carolina.* — *Paine v. Caldwell*, 65 N. Car. 488.

*Ohio.* — *Fox v. Fox*, 24 Ohio St. 335; *New London Tp. v. Miner*, 26 Ohio St. 452.

1. **Trustees as Board of Health.** — *Bushnel v. Whitlock*, 77 Iowa 285.

2. **Power Dependent upon Petition.** — *Covington v. Nelson*, 35 Ind. 532.

3. **Meetings.** — *Slicer v. Elder*, 2 Ohio Dec. (Reprint) 218, 2 Cinc. L. Bul. 90.

4. **Record of Proceedings.** — *Fayette County v. Chitwood*, 8 Ind. 504; *Ross v. State*, 131 Ind. 548.

**A Record of Township Trustees** who have no power to act is not admissible in evidence. *Matlock v. Hawkins*, 92 Ind. 225.

5. **Selectmen** — **In General.** — *Tomlinson v. Leavenworth*, 2 Conn. 292; *Griswold v. North Stonington*, 5 Conn. 367; *Union v. Crawford*,

19 Conn. 331; *Sharon v. Salisbury*, 29 Conn. 113; *Hine v. Stephens*, 33 Conn. 497, 89 Am. Dec. 217; *Ladd v. Franklin*, 37 Conn. 53; *State v. Clerkin*, 58 Conn. 98; *Pinney v. Brown*, 60 Conn. 164; *Smith v. Cheshire*, 13 Gray (Mass.) 318; *Bean v. Hyde Park*, 143 Mass. 245; *Farr v. Ware*, 173 Mass. 403; *Atty.-Gen. v. Marston*, 66 N. H. 485.

**One of the Limitations of Their Authority** as town managers of its prudential affairs is that the act done must be one necessary for the town to do in the discharge of its duties or in the protection of its rights. *Richards v. Columbia*, 55 N. H. 96.

**Town Must Act Through the Preliminary Agency of the Selectmen** in order to render their acts valid. *State v. New London*, 22 Conn. 163.

6. **Effect of Invalid Election.** — *Atty.-Gen. v. Simonds*, 111 Mass. 256.

7. **Selectmen De Facto.** — *Cushing v. Frankfort*, 57 Me. 541.

8. **Eligibility to Hold Other Office.** — *State v. Fowler*, 66 Conn. 294.

**Neither the Treasurer Nor the Collector of Taxes** can be a member of a board of selectmen. *Atty.-Gen. v. Marston*, 66 N. H. 485.

presumed that they have been so sworn unless the contrary is shown, in cases where they undertake to protect themselves from personal liability by reason of their office.<sup>1</sup>

(e) **Powers.** — The powers of selectmen are for the most part conferred by some statute. In respect to the matters mentioned in these statutes they cannot go beyond the special limits of the statute. In other matters long usage has given the selectmen of towns certain powers. In either case their authority is in the nature of a personal trust to be performed by themselves. They have no power to appoint another to perform the duties that devolve upon them; and still less do they have authority to appoint an agent to exercise other powers of the town which they cannot themselves exercise.<sup>2</sup>

(5) **Supervisors** — (a) **In General.** — Supervisors are, within the scope of their authority, the legal representatives and agents of their respective towns and townships.<sup>3</sup>

(b) **Duty to Act as a Body.** — One supervisor cannot bind the township by the performance of an act the propriety of doing which is the subject of deliberation and the exercise of judgment, but he may in a matter purely ministerial. When the business requires deliberation, consultation, and judgment, all should be consulted, because the advice and the opinion of all may be useful. Though they do not unite in opinion a majority may act when there are more than two.<sup>4</sup>

(c) **Powers.** — Supervisors have no powers except those vested in them by legislative enactments, and these powers can only be exercised in the manner therein stated and required.<sup>5</sup>

1. **Oath of Office.** — *Lemington v. Blodgett*, 37 Vt. 210.

2. **Powers** — *Connecticut.* — *Leavenworth v. Kingsbury*, 2 Day (Conn.) 323; *Tomlinson v. Leavenworth*, 2 Conn. 292; *Griswold v. North Stonington*, 5 Conn. 367; *Union v. Crawford*, 19 Conn. 331; *Burlington v. New Haven, etc.*, R. Co., 26 Conn. 51; *Sharon v. Salisbury*, 29 Conn. 113; *Hine v. Stephens*, 33 Conn. 497, 89 Am. Dec. 217; *Ladd v. Franklin*, 37 Conn. 53; *Hoyle v. Putnam*, 46 Conn. 56; *Haddam v. East Lyme*, 54 Conn. 34; *Farrel v. Derby*, 58 Conn. 234; *Rocky Hill v. Hollister*, 59 Conn. 434; *Pinney v. Brown*, 60 Conn. 164; *Mallory v. Huntington*, 64 Conn. 88.

*Maine.* — *Jackson v. Belmont*, 12 Me. 494; *Christ's Church v. Woodward*, 26 Me. 172; *Deming v. Houlton*, 64 Me. 254, 18 Am. Rep. 253.

*Massachusetts.* — *Kean v. Stetson*, 5 Pick. (Mass.) 492; *Goff v. Rehoboth*, 12 Met. (Mass.) 26; *Smith v. Cheshire*, 13 Gray (Mass.) 318; *Reed v. Scituate*, 5 Allen (Mass.) 120; *Long v. Sargent*, 101 Mass. 117; *Campbell v. Upton*, 113 Mass. 67; *Bean v. Hyde Park*, 143 Mass. 245; *Swift v. Falmouth*, 167 Mass. 115.

*New Hampshire.* — *Gorrill v. Whittier*, 3 N. H. 265; *Richards v. Columbia*, 55 N. H. 96; *Tyler v. Flanders*, 58 N. H. 371.

*Vermont.* — *Brookline v. Westminster*, 4 Vt. 224; *Lemington v. Stevens*, 48 Vt. 38; *Scott v. Mt. Tabor*, 48 Vt. 391; *Davenport v. Johnson*, 49 Vt. 403.

**Where Selectmen Act under Authority Conferred on Them by Statute**, they are not the agents of the town, or subject to be directed, restrained, or controlled by its votes. *Dill v. Wareham*, 7 Met. (Mass.) 438.

**Power of One to Act for All.** — If the selectmen agree among themselves and authorize one of their number to act for them, the act of this

selectman is the act of all and binds the town. *Guyette v. Bolton*, 46 Vt. 228.

3. **Supervisors** — **In General.** — *People v. Wood*, 59 Hun (N. Y.) 616, 12 N. Y. Supp. 436; *People v. Delaware County*, 45 N. Y. 196; *Aldrich v. Collins*, 3 S. Dak. 154; *F. C. Austin Mfg. Co. v. Twin Brooks Tp.*, (S. Dak. 1902) 91 N. W. Rep. 470.

**A School Trustee** is incapable not only of holding the office of supervisor, but also of being elected to that office. *People v. Purdy*, 151 N. Y. 439, 61 Am. St. Rep. 624.

4. **Duty to Act as a Body.** — *Cooper v. Lampeter Tp.*, 8 Watts (Pa.) 125; *American Road Mach. Co. v. Washington Tp.*, 9 Pa. Super. Ct. 105; *Union Tp. v. Gibboney*, 94 Pa. St. 537; *Eshleman v. Martic Tp.*, 152 Pa. St. 68; *Tamaqua, etc., St. R. Co. v. Inter-County St. R. Co.*, 167 Pa. St. 91; *North Manheim Township's Appeal*, (Pa. 1888) 14 Atl. Rep. 137.

**The Execution of a Contract by Two of the Three Supervisors** is sufficient. *Beaver Dam v. Frings*, 17 Wis. 398.

5. **Powers** — *Illinois.* — *McCracken v. Lavelle*, 41 Ill. App. 573.

*New York.* — *Cook v. Kelly*, (C. Pl. Gen. T.) 14 Abb. Pr. (N. Y.) 466; *Matter of Hemmstead*, 36 N. Y. App. Div. 321; *Reynolds v. Mt. Vernon*, 26 N. Y. App. Div. 581; *Hardmann v. Bowen*, 39 N. Y. 196; *Matter of Second Ave. M. E. Church*, 66 N. Y. 395; *Parker v. Saratoga County*, 106 N. Y. 392; *Wuesthoff v. Germania L. Ins. Co.*, 107 N. Y. 580; *Barker v. Oswegatchie*, (Supm. Ct. Spec. T.) 10 N. Y. Supp. 834.

*Pennsylvania.* — *Maneval v. Jackson Tp.*, 141 Pa. St. 426.

*South Dakota.* — *Aldrich v. Collins*, 3 S. Dak. 154; *F. C. Austin Mfg. Co. v. Twin Brooks Tp.*, (S. Dak. 1902) 91 N. W. Rep. 470.

*Wisconsin.* — *State v. Hayden*, 32 Wis. 663; *State v. Curtis*, 86 Wis. 140.



(6) *Township Committee* — (a) *In General*. — A township committee may act as the governing board of a township,<sup>1</sup> but such committee is not the corporation, and the inhabitants of the township do not act through the committee as managers or directors.<sup>2</sup>

(b) *Must Act in Corporate Meeting*. — Where a statute requires the consent of the township committee, it is essential to a valid consent that it should be given when the members or a majority of them are assembled in corporate meeting.<sup>3</sup>

(c) *Powers — In General*. — The township committee has power to audit the accounts of the township officers, and to direct the expenditure of money raised for township purposes, but it has no power to raise any tax, or to bind the township by borrowing money.<sup>4</sup>

(d) *Evidence of Action by Committee*. — The fact that the book of records of the township committee fails to show the action of the committee is inconclusive and insufficient to overcome the *prima facie* evidence of the action, since the committee might well meet and deliberate upon a matter without such action having been known to the town clerk and recorded by him.<sup>5</sup>

(7) *Town Councils* — (a) *In General*. — Town councils are not the agents or the servants of the various towns which they represent, in the ordinary meaning of that term, in the laying out of highways, but they are public officials, forming an important part of the government, with certain well-defined powers, and charged with certain well-defined duties by the statute law of the state.<sup>6</sup>

**The Town and the Town Council Are Distinct Bodies with distinct powers.<sup>7</sup>**

The Number of Town Councilmen must be determined before the election of such officers has begun at the town meeting. This determination may be by common consent or acquiescence, as well as by formal vote.<sup>8</sup>

(b) *Appointment of Officers*. — Where the statute has conferred authority on town councils to appoint all necessary officers for the execution of their ordinances, and also fixed their compensation, a vote of the town to abolish Saturday-night and Sunday police does not bind the town council and cannot prevent its action in the election of an officer and the allowance of his compensation.<sup>9</sup>

**All Officers Elected by Town Council Are Subject to Removal** by that body at any time for sufficient cause, and it is well settled that such an officer may be removed without notice, at the pleasure of the council.<sup>10</sup>

**And While the Court May Doubtless Interfere** in a proper proceeding to prevent the council from transcending its powers or proceeding arbitrarily and in clear

1. *Township Committee — In General*. — *Ridgefield Park v. Ridgefield Tp.*, 61 N. J. L. 433.

2. *Committee Not Corporation*. — *Musgrove v. Kennell*, 23 N. J. Eq. 75.

3. *Must Act in Corporate Meeting*. — *West Jersey Traction Co. v. Camden Horse R. Co.*, 53 N. J. Eq. 163.

4. *Powers — In General*. — *Musgrove v. Kennell*, 23 N. J. Eq. 75; *Mason v. Cranbury Tp.*, 68 N. J. L. 149.

*Acquisition of Property*. — Where a town charter gives the board of commissioners power to acquire land as sites for buildings for the use of the town, the commissioners have a large discretion in such matters and they may acquire, regulate, and dispose of such property in such manner as to them may seem best for the interest of the town. *Shaver v. Salisbury*, 68 N. Car. 291.

*Power to Contract for Water Supply*. — *Conger v. Summit Tp.*, 52 N. J. L. 483.

*Power to Release Collector from Collection of Taxes*. — *Painter v. Blairstown Tp.*, 43 N. J. Eq. 317.

*Acceptance of Order Drawn by Road Commissioner*. — *Wayne Tp. v. Cahill*, 49 N. J. L. 144.

*Division of Town into Lighting Districts*. — *Allison v. Corker*, 67 N. J. L. 596.

*Power to Raise Money for Notes and Bonds* by special acts at town meetings cannot be delegated to the township committee. *State v. Koster*, 38 N. J. L. 308.

5. *Evidence of Action by Committee*. — *West Jersey Traction Co. v. Camden Horse R. Co.*, 52 N. J. Eq. 452.

6. *Town Councils — In General*. — *Westerly Waterworks Co. v. Westerly*, 80 Fed. Rep. 611; *Smart v. Johnston*, 17 R. I. 778.

7. *Town and Town Council Distinct*. — *Westerly Waterworks Co. v. Westerly*, 80 Fed. Rep. 611.

8. *Number of Town Councilmen*. — *State v. Andrews*, 15 R. I. 394.

9. *Appointment of Officers*. — *Willis v. Angell*, 19 R. I. 617.

10. *Removal of Appointees*. — *State v. McQuade*, 12 Wash. 554.

violation of the rights of the official whom it has power to remove, yet no appeal lies from the doings of the council whether such doings be right or wrong.<sup>1</sup>

*b* **VARIOUS OFFICERS** — (1) *Town and Township Clerks*. — Town and township clerks are mere agents or servants of the town or township for keeping record of the proceedings of the town or township. All papers, writings, books, and records of the clerk's office are required to be delivered to his successor. The record is, in legal contemplation, in the custody of the town or township when in the possession of the clerk.<sup>2</sup>

The Words "Clerk" and "Secretary" are used to describe the same officer and are synonymous.<sup>3</sup>

(2) *Town and Township Treasurers* — **In General**. — Town and township treasurers are not the financial agents of their respective organizations, and have no power whatever as such to bind the inhabitants to repay money borrowed by them for the town or township and used by them in discharging town or township liabilities. They are unlike the cashier of a bank, or the treasurer of a trading corporation. They are simply public officers charged by law, not by the town or township, with the duty of receiving and guarding the public money and disbursing it upon lawful warrants.<sup>4</sup>

**School Money**. — A township treasurer has no right to receive for school moneys anything which the law has not authorized to be so received, and where a statute provides that he shall pay the amount received for such purpose to the order of the school district officers, their liability is distinct from his liability for township money.<sup>5</sup>

**Division of a Township** during the term of a township treasurer, whereby the territory in which such treasurer resides is annexed to an adjoining city, authorizes the town board to appoint another treasurer, and the former officer has no right to demand or receive money belonging to the township.<sup>6</sup>

(3) *Collectors of Taxes*. — This subject has been fully treated under another title in this work.<sup>7</sup>

(4) *Overseers of Poor*. — For a full discussion of this subject the reader is referred to another title in this work.<sup>8</sup>

1. **Appeal from Act of Council**. — *Walsh v. Town Council*, 18 R. I. 88.

2. **Town and Township Clerks** — **In General**. — *Chamberlain v. Dover*, 13 Me. 466, 29 Am. Dec. 517; *Beace v. Fossett*, 34 Me. 575; *Halleck v. Boylston*, 117 Mass. 469; *Boyce v. Auditor-Gen.*, 90 Mich. 314; *Young v. Crane*, 67 N. J. L. 453; *State v. Buchanan*, 65 Vt. 445.

3. **Clerk and Secretary Synonymous**. — *Griffin v. Cordyon*, (Ky. 1898) 44 S. W. Rep. 629.

4. **Town and Township Treasurers** — **In General**. — *School Directors v. People*, 79 Ill. 511; *Ireland v. Hunnel*, 90 Iowa 98; *Lovejoy v. Foxcroft*, 91 Me. 367; *Otis v. Stockton*, 76 Me. 506; *Brown v. Winterport*, 79 Me. 305; *Hurd v. St. Albans*, 81 Me. 343; *Dickinson v. Conway*, 12 Allen (Mass.) 487; *Railroad Nat. Bank v. Lowell*, 109 Mass. 214; *Agawam Nat. Bank v. South Hadley*, 128 Mass. 503; *Brown v. Melrose*, 155 Mass. 587; *Abbott v. North Andover*, 145 Mass. 484; *Portland Stone Ware Co. v. Taylor*, 17 R. I. 33.

**A Town Treasurer Has No Authority to Convey Property for the Town**, and a note issued in payment therefor is void as being without consideration. *Monson v. Tripp*, 81 Me. 24, 10 Am. St. Rep. 235.

**Treasurer, as Such, Cannot Hold Real Estate in Trust**. — *Treasurer v. Gibbs, Brayt.* (Vt.) 76.

**The Legislature Cannot Pass a Statute to Reimburse a Township Treasurer for moneys paid by him to the township to make good an amount of township money which he had lost by robbery while he was such treasurer**. *Bristol v. Johnson*, 34 Mich. 123.

**Action on a Note or Security by a Treasurer in His Own Name** cannot be instituted unless such note or security was given to him or his predecessor in his official capacity. *Augusta v. Leadbetter*, 16 Me. 45.

**Ratification of Payment**. — Where the treasurer of a precinct, acting in his official capacity, pays bills for constructing a sewer, and the precinct brings an action to recover from the town the money so paid, such action is sufficient evidence of the precinct's ratification of the payment. *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753; *Contoocook F. Precinct v. Hopkinton*, 71 N. H. 574.

5. **School Money**. — *Jones v. Wright*, 34 Mich. 371.

6. **Effect of Division of Township**. — *Youngblood v. Stellwagen*, 33 Mich. 1.

7. **Collector of Taxes**. — See the title **TAXATION**, vol. 27, p. 765.

8. **Overseers of the Poor**. — See the title **POOR AND POOR LAWS**, vol. 22, p. 1022.

(5) *Auditors* — (a) *In General*. — A town has authority to appoint an auditor and require that all bills against the town shall be approved by him before payment thereof shall be made by the town treasurer.<sup>1</sup>

(b) *Duties*. — The duties of auditors are purely statutory. These duties may include auditing, settling, and adjusting of the accounts of town officers, the viewing of fences, the appraising of the loss or damage done to sheep by dogs,<sup>2</sup> and the requiring of bonds from certain officers.<sup>3</sup>

(c) *Jurisdiction of Court*. — The extent of the jurisdiction of the court over a board of town auditors by mandamus goes no further than to command action in respect to the amount to be awarded on account of a legal claim.<sup>4</sup>

(6) *Assessors*. — Where the law demands that towns not only appoint an assessor or assessors but cause them to be sworn, the mere appointment is only a partial performance of the duties required. Until the persons chosen have accepted, and have been sworn, they are not assessors, and it cannot in strictness be said that before they have been thus sworn they have been appointed assessors.<sup>5</sup>

Where Assessors Have Not Been Legally Chosen they are liable for acts done by the collector under their direction.<sup>6</sup>

(7) *Constables*. — Constables are ancient town officers, and are *ex officio* collectors of taxes when no other person is distinctly and exclusively appointed collector.<sup>7</sup>

(8) *Town Marshals*. — By statute the authority of the town marshal may be extended beyond the town limits in certain cases. His jurisdiction may be measured by that of the sheriff in the prevention and suppression of crime and arrest of offenders against the laws of the state, and is co-extensive with the limits of the county.<sup>8</sup>

A Marshal of the Town May Arrest a Person who violates an ordinance of the town in his presence or view, whether the ordinance expressly authorizes him to do so or not.<sup>9</sup>

(9) *Commissioners of Excise*. — Where a statute provides for the election of commissioners of excise such officers are town officers.<sup>10</sup>

(10) *Grading Commissioners*. — Grading commissioners appointed to grade a street are not town officers and cannot be so denominated. They cannot be legislated out of office by a statute which declares that all town offices shall be vacated.<sup>11</sup>

(11) *Field Drivers*. — The whole corporate power of a town in relation to field drivers is exercised and exhausted in their election. It has afterwards no guardianship, control, or authority over them in respect to their observance or neglect of a single specific duty which the law imposes upon them. It is not responsible for their fidelity, and it cannot gain by their diligence or lose by their official inattention or carelessness.<sup>12</sup>

1. *Auditors*. — Foster v. Angell, 19 R. I. 285.

2. *Duties*. — Com. v. Upper Darby, 2 Pa. Dist. 89.

Where the Statute Requires Town Auditors to Examine and Adjust the Accounts of Town Officials immediately before each annual town meeting, and report such accounts at such meetings, it is not necessary that such accounts should be adjusted and reported to the day of such meeting. State v. Brattleboro, 68 Vt. 520.

3. *Bonds*. — Rice's Case, 158 Pa. St. 157.

4. *Jurisdiction of Court*. — People v. Matthies, 92 N. Y. App. Div. 16.

5. *Assessors — Appointment*. — State v. New London, 22 Conn. 163.

The Office of Assistant Assessor no longer exists in Pennsylvania. Assistant Assessors No. 1, 3 Pa. Dist. 252.

6. *Assessors Not Legally Chosen*. — Allen v. Archer, 49 Me. 346.

7. *Constables*. — Deane v. Washburn, 17 Me. 100; Colman v. Anderson, 10 Mass. 105. See the title SHERIFFS AND CONSTABLES, vol. 25, p. 658.

8. *Town Marshals*. — Newburn v. Durham, 88 Tex. 288.

9. *Arrest for Violation of Ordinance*. — Scircle v. Neeves, 47 Ind. 289.

10. *Commissioners of Excise*. — Montgomery v. O'Dell, 67 Hun (N. Y.) 169.

11. *May Employ Attorney*. — Matter of Ryan, (Supm. Ct. Spec. T.) 6 Misc. (N. Y.) 478.

12. *Grading Commissioners*. — Matter of Fifth Ave., 91 Hun (N. Y.) 259.

12. *Field Drivers*. — Vincent v. Nantucket, 12 Cush. (Mass.) 103.



(12) *Firewardens*. — Firewardens do not constitute a board; they have no organization; their number is indefinite, and they have no ordinary duties by virtue of their office. When a fire breaks out they take the direction of all operations, provided any of their number are present, otherwise certain officers are designated to exercise that authority.<sup>1</sup>

The Establishment of a Fire Department does not vacate the office of firewarden. The firewardens still remain the officers of the town, although they have no occasion to act when the officers of the fire department are present.<sup>2</sup>

(13) *School Committee*. — It is the power and duty of towns to choose a committee to superintend their schools.<sup>3</sup>

(14) *Road Overseers*. — A road overseer is not an officer of a district, but of the township in which the road district is situated.<sup>4</sup>

(15) *Commissioners of Highways*. — This subject has been fully treated under another title in this work.<sup>5</sup>

(16) *Agents* — (a) *In General*. — A town, like any other corporation,<sup>6</sup> may appoint an agent for any proper purpose, but such appointment must be made by vote in a town meeting duly warned for that purpose.<sup>7</sup>

An Agent of a Town Must Pursue His Authority Strictly. — If he goes beyond his written authority his act is not valid, and persons dealing with him must look to the corporate act of the town as the source and limit of his powers; and any claimed ratification of previously unauthorized acts must be made by the town in a lawful manner and, as a rule, directly and not by implication, and be made with full knowledge of all material facts.<sup>8</sup>

(b) *Committee as Agent*. — Where a committee is appointed by a town to superintend the doing of certain work, such committee is an agent of the town and not a judicial body or a board of public officers, and the committee may act by agreement of individual members separately obtained. The committee is responsible to no other party than the town even though it exceeds its authority.<sup>9</sup>

**IX. LEGISLATIVE CONTROL OF TOWNS AND TOWNSHIPS.** — Towns and townships are created at the pleasure of the legislature, and they have no vested rights. As a general rule the legislature has supreme power over them and may divide or alter them, detach properties from them, or even abolish them at the legislative pleasure, subject only to the restraint of the constitution that the power shall not be exercised by local or special law, but shall be by

1. *Firewardens — Status*. — Long v. Sargent, 101 Mass. 117.

2. *Effect of Establishing Fire Department*. — Long v. Sargent, 101 Mass. 117.

3. *School Committee*. — Fuller v. Groton, 11 Gray (Mass.) 340. See the title SCHOOLS, vol. 25, p. 4.

4. *Road Overseers*. — Denver v. Myers, 63 Neb. 107.

5. *Commissioners of Highways*. — See the title HIGHWAYS, vol. 15, p. 410.

6. *Agents*. — See the title AGENCY, vol. 1, p. 944.

7. *May Be Appointed by Town*. — Pinney v. Brown, 60 Conn. 164; Cornell v. Guilford, 1 Den. (N. Y.) 510.

A Town Agent Is Not an Officer of the Town, nor is there any statute that defines any duty to be performed by such an officer. Pinney v. Brown, 60 Conn. 164.

Agents Cannot Be Appointed to Discharge the Duties of the Several Governmental Officers of the Town. — People v. Town Auditors, 85 Hun (N. Y.) 114.

8. *Agents — Authority*. — Turney v. Bridge-

port, 55 Conn. 412; Barton v. Pittsford, 44 Vt. 371.

Where a Committee Is Limited to a Certain Sum in carrying out the vote of the town, an expenditure in excess of such sum is not authorized, and the acceptance of the committee's report by the town does not ratify the additional expenditure where it does not appear that such report informed the inhabitants that such additional sum had been expended. Brown v. Melrose, 155 Mass. 587.

Extent of Liability. — Where, in pursuance of an article in the warrant calling a meeting for that purpose, the town votes to invest the surplus revenue in bank stock, and chooses an agent to carry the vote into effect, and such agent receives and disposes of the money as he is authorized by the vote, he is discharged from all responsibility unless he has violated some legal agreement by which he bound himself. Cornish v. Pease, 10 Me. 184.

9. *Committee as Agents*. — Dibble v. New Haven, 56 Conn. 199; Shea v. Milford, 145 Mass. 528; Danville v. Montpelier, etc., R. Co., 43 Vt. 144.

general uniform law.<sup>1</sup> But it has nevertheless been held that towns may have private rights and interests vested in them under their charter; and as to those rights, they are to be regarded and protected the same as if they were the rights and interests of individuals, or of private corporations; and grants of property to them, in trust for other purposes than corporate and municipal use, are no more the subject of legislative control than are the private and vested rights of individuals.<sup>2</sup>

**X. TOWN AND TOWNSHIP PROPERTY — 1. Acquisition — a. IN GENERAL.** — Towns and townships have to acquire and hold land within their limits for the use of the inhabitants,<sup>3</sup> and the right of acquisition of land does not depend upon the necessity of such land for the erection of public buildings.<sup>4</sup>

Land Beyond the Limits of a Town cannot be acquired by such town. This follows necessarily from the fact that no power is given to a town beyond its limits.<sup>5</sup>

Civil Townships are not lawfully authorized to purchase property for the use of schools.<sup>6</sup>

**b. MANNER OF ACQUISITION.** — As a general rule, towns and townships may acquire property by purchase or gift in the same manner that an individual may acquire it.<sup>7</sup>

**1. Legislative Control.** — *Laramie County v. Albany County*, 92 U. S. 307; *Cicero v. Chicago*, 182 Ill. 301; *Bradford v. Cary*, 5 Me. 339; *North Yarmouth v. Skillings*, 45 Me. 133, 71 Am. Dec. 530; *South Portland v. Cape Elizabeth*, 92 Me. 328, 69 Am. St. Rep. 502; *Opinion of Justices*, 6 Cush. (Mass.) 578; *Weymouth, etc., Fire Dist. v. Norfolk County*, 108 Mass. 142; *Manly v. Raleigh*, 4 Jones Eq. (57 N. Car.) 370; *Marietta v. Fearing*, 4 Ohio 429.

The Legislature May Confirm the Proceedings of Towns which have been void for some informality. *Simmons v. Hanover*, 23 Pick. (Mass.) 188.

**2. Rights Not Subject to Legislative Control.** — *Montpelier v. East Montpelier*, 29 Vt. 12, 67 Am. Dec. 748.

**3. Acquisition of Property — In General — Massachusetts.** — *Windham v. Portland*, 4 Mass. 384; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Worcester v. Eaton*, 13 Mass. 371, 7 Am. Dec. 155; *Willard v. Newburyport*, 12 Pick. (Mass.) 227; *Spaulding v. Lowell*, 23 Pick. (Mass.) 71; *Hadsell v. Hancock*, 3 Gray (Mass.) 526; *French v. Quincy*, 3 Allen (Mass.) 9. See also *Hardy v. Waltham*, 3 Met. (Mass.) 163.

*Michigan.* — *Atty.-Gen. v. Burrell*, 31 Mich. 25.

*New Hampshire.* — *Atty.-Gen. v. Dublin*, 38 N. H. 459; *Lovell v. Charlestown*, 66 N. H. 584.

*New York.* — *North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 109; *People v. Works*, 7 Wend. (N. Y.) 486; *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312.

*Vermont.* — *Boothe v. Coventry*, 4 Vt. 295; *Beach v. Haynes*, 12 Vt. 15; *Lyndon v. Belden*, 14 Vt. 423.

**4. Need Not Be for Erection of Public Buildings.** — *Worcester v. Eaton*, 13 Mass. 371, 7 Am. Dec. 155; *Atty.-Gen. v. Burrell*, 31 Mich. 25; *Beach v. Haynes*, 12 Vt. 15.

**5. Land Beyond the Limits of a Town.** — *North Hempstead v. Hempstead*, 2 Wend. (N. Y.) 109.

**6. Civil Townships — School Property.** — *Car-*

*michael v. Lawrence*, 47 Ind. 554; *Jackson Tp. v. Barnes*, 55 Ind. 136.

**7. May Acquire Land by Purchase.** — *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Worcester v. Eaton*, 13 Mass. 371, 7 Am. Dec. 155; *Spaulding v. Lowell*, 23 Pick. (Mass.) 71; *Hadsell v. Hancock*, 3 Gray (Mass.) 526; *French v. Quincy*, 3 Allen (Mass.) 9; *People v. Works*, 7 Wend. (N. Y.) 486; *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312; *Beach v. Haynes*, 12 Vt. 15.

By an Act of Incorporation a town at once acquires title to all the lands within its limits not before granted. *South Hampton v. Fowler*, 52 N. H. 225.

An Act of Incorporation Without Words of Grant of the soil vests no part of the property of the government in such town. *Com. v. Roxbury*, 9 Gray (Mass.) 451.

The Action of a Board of Supervisors in fixing the line between two towns does not operate to place in either town the ownership of any land which it did not before possess. *People v. Saxton*, 15 N. Y. App. Div. 263.

In Order to Transfer the Title to Lands from the proprietor of a town site and to secure such lands to the public use by virtue of the plat thereof, a compliance with the requirements of the statute in that behalf is just as essential to divest the proprietor of his title as it would be in a deed of conveyance by one person to another. *Gardiner v. Tisdale*, 2 Wis. 153, 60 Am. Dec. 407; *Emmons v. Milwaukee*, 32 Wis. 434.

Bonds Sold to Pay for Land and signed by the treasurer in office at their date, and not by one in office when they were sold, are valid. *Stoughton v. Paul*, 173 Mass. 148.

A Condition in a Deed of Land, that such land shall not be used for any other purposes than as a place for a town house for the inhabitants, does not prevent the town from renting such rooms in the town house as it does not have occasion to use for the time being, or it may allow them to be used gratuitously. The provision in the deed cannot be construed more

c. **POWER TO HOLD AS TRUSTEE.** — Towns may take and hold property in trust for any purpose not foreign to their institutions or incompatible with the objects of their organization.<sup>1</sup>

2. **Nature of Ownership.** — The ownership which towns and townships have in their property is analogous in its nature to the ownership of private persons.<sup>2</sup>

3. **Improvements.** — Towns have power to make such prudential rules as they may think proper for the improving of lands owned by them in their corporate capacity and for making fences around the same or any part thereof.<sup>3</sup>

**XI. TOWN AND TOWNSHIP CONTRACTS** — 1. **In General.** — Towns and townships may contract and be contracted with in relation to objects concerning which they have a duty to perform, an interest to protect, or a right to defend, but this is the extent of their right and power.<sup>4</sup>

Towns Cannot Engage in Contracts Foreign to the Purpose of Their Incorporation, nor can they assume responsibilities which involve undertakings not within the compass of their corporate powers.<sup>5</sup>

Civil Townships Cannot Contract for School Purposes where the statute shows unequivocally an intention on the part of the legislature to create school corporations as distinct and separate organizations.<sup>6</sup>

2. **General Requisites** — a. **IN GENERAL.** — Where the mode of contracting named in a statute is permissive merely, no good reason can be given why other modes may not be employed; but where such mode is exclusive, that mode alone is valid.<sup>7</sup>

b. **AUTHORIZATION BY TOWN MEETING.** — It has frequently been held that a town cannot make a contract or authorize any officer or agent to make one in its behalf, except by vote in a town meeting duly notified and warned.<sup>8</sup>

c. **PETITION FOR CONTRACT.** — Where a petition is required to have a certain number of names before a contract can be made, it is not sufficient that the requisite number of signatures was obtained, if some of them are withdrawn before the execution of the contract.<sup>9</sup>

3. **Ratification.** — Where towns have no authority to make a contract in the beginning they are powerless afterwards to ratify the contract,<sup>10</sup> but a

strictly than to require the town to maintain a town house on the land, which shall not be put to any illegal or unauthorized use. *French v. Quincy*, 3 Allen (Mass.) 9.

1. **Power to Hold as Trustee.** — *Atty.-Gen. v. Dublin*, 38 N. H. 459; *Lovell v. Charlestown*, 66 N. H. 584.

2. **Nature of Ownership.** — *Park Com'rs v. Detroit*, 248 Mich. 228, 15 Am. Rep. 202.

3. **Improvements.** — *People v. Works*, 7 Wend. (N. Y.) 486.

4. **Town and Township Contracts — In General** — *Union Tp. v. Anthony*, 26 Ind. 487; *Jones v. Sanford*, 66 Me. 585; *Willard v. Newburyport*, 12 Pick. (Mass.) 227; *Allen v. Taunton*, 19 Pick. (Mass.) 485; *Vincent v. Nantucket*, 12 Cush. (Mass.) 103; *Arlington v. Cutter*, 114 Mass. 344; *Childs v. Hillsborough Electric Light, etc., Co.*, 70 N. H. 318; *Goodhue v. Beloit*, 21 Wis. 636.

**A Vote of a Town Fixing the Salary of Certain Officers** constitutes a contract with such officers by which the town is bound. *Parks v. Waltham*, 120 Mass. 160.

**Implied Contract.** — A promise by a town to pay for a bridge cannot be implied from the use made of it by the inhabitants of such town. *Knowlton v. Plantation No. 4*, 14 Me. 20.

5. **Contracts Beyond Corporate Powers.** — *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Parsons v. Goshen*, 11 Pick. (Mass.) 396; *Anthony v. Adams*, 1 Met. (Mass.) 284; *Vincent v. Nantucket*, 12 Cush. (Mass.) 103; *Norton v. Mansfield*, 16 Mass. 48; *Minot v. West Roxbury*, 112 Mass. 1, 17 Am. Rep. 52; *Greenough v. Wakefield*, 127 Mass. 275; *Mead v. Acton*, 139 Mass. 341; *Spaulding v. Peabody*, 153 Mass. 129; *McAlier v. Angell*, 19 R. I. 688.

6. **Civil Townships — School Purposes.** — *Car-michael v. Lawrence*, 47 Ind. 554; *McLaughlin v. Shelby Tp.*, 52 Ind. 114; *Jackson Tp. v. Barnes*, 55 Ind. 136.

7. **General Requisites — Mode of Making.** — *Winterport Water Co. v. Winterport*, 94 Me. 215.

8. **Authorization by Town Meeting.** — *Bloom-field v. Charter Oak Bank*, 121 U. S. 121; *Turney v. Bridgeport*, 55 Conn. 412; *Moor v. Newfield*, 4 Me. 44; *Reynolds v. New Salem*, 6 Met. (Mass.) 340; *Third School Dist. v. Ather-ton*, 12 Met. (Mass.) 105.

9. **Petition for Contract.** — *Suburban Electric Light Co. v. Hempstead*, 38 N. Y. App. Div. 355.

10. **Ratification — Unauthorized Contract** — *Mc-Kissick v. Mt. Pleasant Tp.*, 48 Mo. App. 416.



vote not to pay an obligation contracted by its officers does not preclude the town from a subsequent ratification.<sup>1</sup>

4. **Rescission.** — A town has no power to rescind a contract once legally made, any more than has an individual.<sup>2</sup>

**XII. DUTIES AND LIABILITIES** — 1. **In General.** — Towns are subject to such duties and liabilities only as are expressly or by necessary implication imposed upon them by the legislature to effectuate the purpose of their creation.<sup>3</sup>

**In the Absence of an Express Statute** imposing the liability, towns and townships, though possessing corporate capacity and power to levy taxes and raise money, are not liable for neglect of public duty. Such organizations exist only for the purposes of general political government of the state, and all the duties with which they are charged are the duties of the state. In the performance of governmental duties, the sovereign power is not amenable to individuals, and therefore these organizations are not liable at common law for such neglect, and can be made liable only by statute. They are organized without their consent, and while duties may be imposed and their performance compelled under penalties, the corporators who are made such *volens volens* are not, and cannot be considered in the light of, persons who have voluntarily and for a consideration assumed obligations so as to owe a duty to every person interested in the performance.<sup>4</sup>

2. **Nature of.** — The duty, right, or interest must be corporate as distinguished from the individual duty, right, or interest of the inhabitants of the town. No matter how important or general these individual rights or duties are, they do not thereby become corporate within the meaning of the rule.<sup>5</sup>

3. **Duty to Light Streets.** — Towns are under no obligation to light their streets for the purpose of making them more convenient for travelers.<sup>6</sup>

4. **Duty to Repair Common Drain.** — If a common drain runs through private land the duty of the town to repair it is the same as if it were in a highway.<sup>7</sup> Such duty may even be made to extend beyond the limits of the town.<sup>8</sup>

1. **Subsequent Ratification.** — *Pierce v. Greenfield*, 96 Me. 350.

2. **Rescission.** — *Burlington v. New Haven, etc., Co.*, 26 Conn. 51; *Jewett v. Alton*, 7 N. H. 253.

3. **Duties and Liabilities in General.** — *Lovejoy v. Foxcroft*, 91 Me. 367.

**No Liability Can Be Incurred Except Through the Proper Officers of the town.** *Walnut Tp. v. Jordan*, 38 Kan. 562.

**A Township Organized from a Dissolved County succeeds to the liabilities of such county.** *Garfield Tp. v. Herman*, 66 Kan. 256.

**Liabilities Must Be Incurred and Duties Must Be Performed by Every Town;** and the safety of each individual depends upon the execution of the corporate duties and trusts. *Nelson v. Milford*, 7 Pick. (Mass.) 18.

4. **Neglect of Public Duty** — *England.* — *Russell v. Men of Devon*, 2 T. R. 671.

*Connecticut.* — *Turney v. Bridgeport*, 55 Conn. 412; *Chidsey v. Canton*, 17 Conn. 475.

*Illinois.* — *Waltham v. Kemper*, 55 Ill. 346, 8 Am. Rep. 652. See also *Hedges v. Madison County*, 6 Ill. 567.

*Kansas.* — *Eikenberry v. Bazaar Tp.*, 22 Kan. 556, 31 Am. Rep. 198.

*Maine.* — *Adams v. Wiscasset Bank*, 1 Me. 361, 10 Am. Dec. 88.

*Massachusetts.* — *Mower v. Leicester*, 9 Mass. 250; *Tisdale v. Norton*, 8 Met. (Mass.) 388; *Holman v. Townsend*, 13 Met. (Mass.) 297.

*New Hampshire.* — *Eustis v. Parker*, 1 N. H. 273; *Farnum v. Concord*, 2 N. H. 392; *Otis v. Strafford*, 10 N. H. 352; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302.

*South Carolina.* — *White v. Charleston*, 2 Hill L. (S. Car.) 571.

*Vermont.* — *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114, 52 Am. Dec. 84; *Hyde v. Jamaica*, 27 Vt. 443.

5. **Nature of.** — *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Flood v. Leahy*, 183 Mass. 232.

**The Duties Enjoined upon a Town by Law** are enjoined upon it as part of government and not otherwise. They are therefore public in their nature, that is to say, they are duties to the state and not to private persons. *Altnow v. Sibley*, 30 Minn. 186, 44 Am. Rep. 191.

6. **Duty to Light Streets.** — *Sparhawk v. Salem*, 1 Allen (Mass.) 30, 79 Am. Dec. 700; *Tyson v. Booth*, 100 Mass. 258; *Randall v. Eastern R. Co.*, 106 Mass. 276, 8 Am. Rep. 327; *Spaulding v. Peabody*, 153 Mass. 120.

7. **Duty to Repair Common Drain** — **In Private Land.** — *Bates v. Westborough*, 151 Mass. 174; *Melrose v. Hiland*, 163 Mass. 305.

8. **May Extend Beyond Limits of Town.** — *Com. v. Newburyport*, 103 Mass. 129; *Carter v. Cambridge, etc., Bridge*, 104 Mass. 236; *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601.

5. **Liability for Support of Paupers.** — This subject has been fully treated under another title in this work.<sup>1</sup>

6. **Liability for Support of Prisoners.** — A town in which a jail is situated is not liable for the support of prisoners committed for public offenses to such jail.<sup>2</sup> But it has been held otherwise in regard to prisoners detained on civil process.<sup>3</sup>

7. **Liability for Destruction of Buildings.** — A town is not only liable for houses and buildings it may destroy in order to prevent the spread of fire, but it is equally liable for personal property situated in such houses or buildings and which is destroyed as a result of the razing.<sup>4</sup>

8. **Liability for Borrowed Money.** — Where a town borrows money it is liable to the person from whom it was borrowed, even although the town is not expressly authorized to borrow money.<sup>5</sup>

9. **Liability for Defective and Unsafe Highways.** — This subject has been fully treated under another title in this work.<sup>6</sup>

10. **Liability for Benefits Received.** — A town may be liable for benefits received, even where such benefits are rendered in compliance with an illegal vote of the town.<sup>7</sup>

11. **Liability for Supplies Furnished.** — There can be no recovery from the township for supplies furnished unless the articles purchased are suitable and reasonably necessary and are actually delivered to and accepted by the township.<sup>8</sup>

12. **Liability for Attorneys' Fees.** — Towns are not liable for lawyers' fees unless such lawyers are actually employed. A lawyer cannot obtrude himself in a case and still recover.<sup>9</sup>

13. **Liability for Acts of Town Meeting.** — There is no right of action against a town to an individual to whom reference may be made in a vote of the town, or in a report of a committee accepted by it, in a manner which, if it were so made by a private person, would be libelous. What is done by the town is done by it in such a case as a political body and as a part of the administration of the government.<sup>10</sup>

14. **Liability for Acts of Individuals** — *a.* IN GENERAL. — Individuals acting independently and for themselves are in no sense agents or legal representatives of the town in its corporate capacity, and they cannot create a

1. **Liability for Support of Paupers.** — See the title POOR AND POOR LAWS, vol. 22, p. 1000.

2. **Support of Prisoners.** — *Norwich v. Hyde*, 7 Conn. 529; *Adams v. Wiscasset*, 5 Mass. 328. But see *Strafford County v. Somersworth*, 38 N. H. 21; *Merrimack v. Concord*, 30 N. H. 299; *Powers v. Sullivan*, 63 N. H. 275.

3. *Cargill v. Wiscasset*, 2 Mass. 547. See also the title POOR AND POOR LAWS, vol. 22, p. 1008.

**A Town Wherein a Boy Resides When Committed to the Reform School,** and not the town in which he may have resided when he committed the offense, is liable for his support while at such reform school. *Scammon v. Wells*, 50 Me. 584.

4. **Destruction of Buildings.** — *Dawson v. Kuttner*, 48 Ga. 133. And see the titles FIRE DEPARTMENT, vol. 13, p. 80; MUNICIPAL CORPORATIONS, vol. 20, p. 1205.

**A Town Is Not Liable to a Person Not the Owner** of the building destroyed. The liability does not exist in favor of a person who has a right to a deed of the property upon payment of the amount due thereon. *Ruggles v. Nantucket*, 11 Cush. (Mass.) 433.

5. **Liability for Borrowed Money.** — *Chillicothe*

*Bank v. Chillicothe*, 7 Ohio (pt. ii.) 31, 30 Am. Dec. 185.

6. **Liability for Defective and Unsafe Highways.** — See the title HIGHWAYS, vol. 15, p. 420.

7. **Liability for Benefits Received.** — *Helms v. State*, 19 Ind. App. 360; *Bachelor v. Epping*, 28 N. H. 354.

**The Acceptance and Use of a Sewer by a Town** with knowledge that it is expected to pay the cost of its construction, is equivalent to original authorization in fixing its liability. *Contoocook Fire Precinct v. Hopkinton*, 71 N. H. 574.

8. **Liability for Supplies Furnished.** — *F. C. Austin Mfg. Co. v. Smithfield Tp.*, 21 Ind. App. 609.

9. **Liability for Attorneys' Fees.** — *People v. Wood*, 59 Hun (N. Y.) 616.

**When a Town Agent Is an Attorney** and as such performs professional services in suits where the town is a party, the town may be liable for such services. *Langdon v. Castleton*, 30 Vt. 285.

10. **Liability for Acts of Town Meeting** — *Howland v. Maynard*, 159 Mass. 434, 38 Am. St. Rep. 445.

liability against it without some action by the town itself.<sup>1</sup>

*b. ACTS OF OFFICERS* — (1) *Acts Within Scope of Authority*. — The acts of town and township officers, when done within the scope of the powers of such officers, are the acts of the town or township itself, and are consequently binding thereon.<sup>2</sup>

(2) *Negligent and Unauthorized Acts*. — A town or township cannot be made liable either for the negligence or the illegal or unauthorized acts of its officers or agents, except in those cases where the statute expressly provides that it shall be so liable,<sup>3</sup> or where such acts are subsequently ratified by

**1. Liability for Acts of Individuals.** — *Jeffries Neck Pasture v. Ipswich*, 153 Mass. 42.

**2. Acts Within Scope of Authority — Indiana.** — *Jefferson School Tp. v. Litton*, 116 Ind. 467; *State v. Hauser*, 63 Ind. 155; *Bicknell v. Widener School Tp.*, 73 Ind. 501; *Reeve School Tp. v. Dodson*, 98 Ind. 497; *Boyd v. Mill Creek School Tp.*, 114 Ind. 210; *Boyd v. Black School Tp.*, 123 Ind. 1; *Boyd v. Mill Creek School Tp.*, 124 Ind. 193; *Reed v. Orleans*, 1 Ind. App. 25; *Killian v. State*, 15 Ind. App. 261.

*Kansas.* — *Walnut Tp. v. Jordan*, 38 Kan. 562.

*Maine.* — *Veazy v. Harmony*, 7 Me. 91; *Ford v. Clough*, 8 Me. 334, 23 Am. Dec. 513; *Bean v. Jay*, 23 Me. 117; *Vose v. Frankfort*, 64 Me. 229; *Canton v. Smith*, 65 Me. 203; *Industry v. Starks*, 65 Me. 167; *Woodcock v. Calais*, 66 Me. 234; *Bucksport, etc., R. Co. v. Buck*, 68 Me. 81; *Lovejoy v. Foxcroft*, 91 Me. 367.

*Massachusetts.* — *Damon v. Granby*, 2 Pick. (Mass.) 345; *Willard v. Newburyport*, 12 Pick. (Mass.) 227; *Hawks v. Charlemont*, 107 Mass. 414; *Friend v. Gilbert*, 108 Mass. 408; *Campbell v. Upton*, 113 Mass. 67; *West Bridgewater v. Wareham*, 138 Mass. 305; *Farr v. Ware*, 173 Mass. 403.

*Michigan.* — *Rae v. Flint*, 51 Mich. 526; *Elliott v. Kalkaska*, 58 Mich. 452, 55 Am. Rep. 706; *Wilkinson v. Long Rapids Tp.*, 74 Mich. 63.

*New Hampshire.* — *Greenland v. Weeks*, 49 N. H. 472.

*New York.* — *Woolsey v. Rondout*, 4 Abb. App. Dec. (N. Y.) 639; *Matter of Ryan*, (Supm. Ct. Spec. Tt.) 6 Misc. (N. Y.) 478; *Shaw v. Potsdam*, 11 N. Y. App. Div. 508.

*Ohio.* — *Akron v. McComb*, 18 Ohio 229, 51 Am. Dec. 453.

*Pennsylvania.* — *Climax Road Mach. Co. v. Corydon Tp.*, 5 Pa. Dist. 436; *Cook v. Deerfield Tp.*, 64 Pa. St. 445, 3 Am. Rep. 605.

*Wisconsin.* — *Colby v. Franklin*, 15 Wis. 311.

**To Bind the Town the Supervisors Must Act as a Town Board.** — *Deichsel v. Maine*, 81 Wis. 553.

**Where One Commissioner Assumes to Take Charge of a Particular Piece of Work and to carry out the instructions and wishes of all the commissioners as a body, his acts bind the town where it does not appear that he was acting beyond the scope of his authority.** *White v. Ellisburgh*, 18 N. Y. App. Div. 514.

**Where a Lender of Money Proceeds Against a Town on the ground that the officer who borrowed the money had authority to do so for lawful purposes to meet the obligations of the town, he is bound, in order to recover, to show the appropriation of the money to legitimate**

expenses of the town. *Bessey v. Unity Plantation*, 65 Me. 342.

**3. Negligent and Unauthorized Acts — Connecticut.** — *Turney v. Bridgeport*, 55 Conn. 412; *Goodwin v. East Hartford*, 70 Conn. 18.

*Indiana.* — *Steinbach v. State*, 38 Ind. 483; *Axt v. Jackson School Tp.*, 90 Ind. 101; *Reeve School Tp. v. Dodson*, 98 Ind. 497; *Union School Tp. v. Crawfordsville First Nat. Bank*, 102 Ind. 470; *State v. Hawes*, 112 Ind. 323; *Grimsley v. State*, 116 Ind. 130; *Honey Creek School Tp. v. Barnes*, 119 Ind. 213; *Shirts v. Noblesville Tp.*, 122 Ind. 580; *Boyd v. Mill Creek School Tp.*, 114 Ind. 210; *State v. Mills*, 142 Ind. 569; *State v. Fountain County*, 147 Ind. 235; *Union Civil Tp. v. Berryman*, 3 Ind. App. 344; *Marion First Nat. Bank v. Adams School Tp.*, 17 Ind. App. 375; *Clark School Tp. v. Grossius*, 20 Ind. App. 322; *Clinton School Tp. v. Lebanon Nat. Bank*, 18 Ind. App. 42; *Laporte v. Gamewell Fire Alarm Tel. Co.*, 146 Ind. 466, 58 Am. St. Rep. 359.

*Kansas.* — *Salt Creek Tp. v. King Iron Bridge, etc., Co.*, 51 Kan. 520; *Pleasant View Tp. v. Shawgo*, 54 Kan. 742.

*Maine.* — *Brown v. Vinalhaven*, 65 Me. 402; *Parsons v. Monmouth*, 70 Me. 262; *Lincoln v. Stockton*, 75 Me. 141; *Otis v. Stockton*, 76 Me. 506; *Brown v. Winterport*, 79 Me. 305; *Hurd v. St. Albans*, 81 Me. 343; *Lovejoy v. Foxcroft*, 91 Me. 367; *Pierce v. Greenfield*, 96 Me. 350.

*Massachusetts.* — *Loker v. Brookline*, 13 Pick. (Mass.) 343; *Perley v. Georgetown*, 7 Gray (Mass.) 464; *Bigelow v. Randolph*, 14 Gray (Mass.) 541; *Chenery v. Holden*, 16 Gray (Mass.) 125; *Hafford v. New Bedford*, 16 Gray (Mass.) 297; *Walcott v. Swampscott*, 1 Allen (Mass.) 101; *Dickinson v. Conway*, 12 Allen (Mass.) 487; *Railroad Nat. Bank v. Lowell*, 109 Mass. 214; *Agawam Nat. Bank v. South Hadley*, 128 Mass. 503; *Abbott v. North Andover*, 145 Mass. 484; *Neff v. Wellesley*, 148 Mass. 487; *Jeffries Neck Pasture v. Ipswich*, 153 Mass. 42; *Brown v. Melrose*, 155 Mass. 587; *Murphy v. Clinton*, 182 Mass. 198.

*Michigan.* — *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450; *People v. Bingham Tp.*, 32 Mich. 492; *Chase v. Middleton*, 123 Mich. 647.

*Minnesota.* — *Kreger v. Bismarck Tp.*, 59 Minn. 3.

*New Hampshire.* — *Wilkinson v. Albany*, 28 N. H. 9; *Ball v. Winchester*, 32 N. H. 435; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302.

*New York.* — *People v. Wood*, 59 Hun (N. Y.) 616, 12 N. Y. Supp. 436; *East Hampton v. Bowman*, 60 Hun (N. Y.) 163; *People v. Board of Auditors*, 73 Hun (N. Y.) 615, 26 N. Y.



the town.<sup>1</sup>

**An Officer Who Does Not Observe the Provisions of the Statute** cannot bind his township either directly or indirectly, and a contract made by him is void; being void it cannot be ratified. No subsequent act can estop the township from setting up its invalidity. The delivery and acceptance of goods under it does not create an obligation to pay therefor.<sup>2</sup>

**XIII. TOWN AND TOWNSHIP ORDERS — 1. In General.** — Town and township orders are not bills of exchange or contracts of any kind, but are merely directions to the township treasurer to pay certain money on account of the town or township. They are the usual form in which all public debts are paid.<sup>3</sup> They are not such negotiable instruments that the holders thereof may bring

Supp. 564; *People v. Warren County*, 82 Hun (N. Y.) 298; *Riley v. Brodie*, (Supm. Ct. Eq. T.) 22 Misc. (N. Y.) 374; *People v. Vanderpoel*, 35 N. Y. App. Div. 73; *Holroyd v. Indian Lake*, 85 N. Y. App. Div. 246.

*Pennsylvania.* — *Langdon v. Chartiers Tp.*, 131 Pa. St. 77.

*Rhode Island.* — *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434; *State v. White*, 16 R. I. 591; *Dodge v. Granger*, 17 R. I. 664, 33 Am. St. Rep. 901; *Smart v. Johnston*, 17 R. I. 778; *Sweet v. Conley*, 20 R. I. 381; *Mathewson v. Hawkins*, 19 R. I. 16; *Briggs v. Allen*, 24 R. I. 80.

*South Dakota.* — *Van Antwerp v. Dell Rapids Tp.*, 5 S. Dak. 447.

*Vermont.* — *Erwin v. Richmond*, 42 Vt. 557; *White v. Marshfield*, 48 Vt. 20; *Chelsea v. Washington*, 48 Vt. 610.

*Wisconsin.* — *Hubbard v. Lyndon*, 28 Wis. 674; *Beyer v. Crandon*, 98 Wis. 306.

**A Statutory Enactment** that a town shall be liable to make good all damages renders such town immediately answerable for the official misconduct or neglect of an officer to any person sustaining injury thereby. *Lyman v. Windsor*, 24 Vt. 575.

**An Act by One Selectman** which is not authorized by the other selectmen does not bind the town. *Hunkins v. Johnson*, 45 Vt. 131.

**An Agent of a Town to "Prosecute and Defend" Suits** cannot make any promise to pay a claim that would be binding upon the town. *Clay v. Wright*, 44 Vt. 538.

**Statutes May Make Towns Liable** for the neglect or default of their officers. *Bronson v. Washington*, 57 Conn. 346; *Martin v. Wells*, 43 Vt. 428.

**The Statutory Provisions that a Trustee Has No Power to Bind His Township** by contracting a debt in excess of the funds on hand to which the debt is chargeable, and of the funds to be derived from the tax assessed against his township for the year in which such debt is to be incurred, without first producing an order from the board of county commissioners, do not prevent a trustee from binding his township for property retained and used in his township. *Boyd v. Black School Tp.*, 123 Ind. 1; *Clinton School Tp. v. Lebanon Nat. Bank*, 18 Ind. App. 42.

**Where the Constable Receives a Partial Payment of His Compensation** from the town treasurer, this does not tend to show that there was any authority from the town to employ such constable at its expense, and the town is not liable to him. *Murphy v. Clinton*, 182 Mass. 198.

**Where Supervisors Act Merely as Governmental Officers** charged with the execution of a police power, the town cannot be held liable for their acts. *State v. McNay*, 90 Wis. 104.

**Evidence of Control by Town.** — The fact that the selectmen requested and urged a collector to be diligent in collecting a tax, and cautioned him to proceed legally, and referred him to an attorney who was under a general retainer as counsel for the town, is not sufficient evidence to show that the selectmen controlled the collector and so made his acts the acts of the town. *Hunt v. Eden*, 75 Vt. 119.

**1. Subsequent Ratification.** — *Otis v. Stockton*, 76 Me. 506; *Brown v. Winterport*, 79 Me. 305; *Hurd v. St. Albans*, 81 Me. 343; *Lovejoy v. Foxcroft*, 91 Me. 367; *Pierce v. Greenfield*, 96 Me. 350; *Perley v. Georgetown*, 7 Gray (Mass.) 464; *Kreger v. Bismarck Tp.*, 59 Minn. 3; *Greenland v. Weeks*, 49 N. H. 472; *Topsham v. Rogers*, 42 Vt. 189; *Earle v. Wallingford*, 44 Vt. 367; *Mt. Holly v. Buswell*, 45 Vt. 354.

But see *Gates v. Hancock*, 45 N. H. 528, wherein it was held that a vote by the town to ratify the unauthorized action of the selectmen can have no greater validity than a vote directing such action.

**Where an Officer Does Not Act as the Agent or Representative of a Precinct** the commencement and prosecution of a suit cannot be regarded as a ratification of his acts. *Contoocook Fire Precinct v. Hopkinton*, 71 N. H. 574.

**Where an Agreement Is for the Benefit of the Town**, the bringing of an action upon it is sufficient evidence of an acceptance of it and of a ratification of the act of the selectmen in making such agreement. *Melrose v. Hiland*, 163 Mass. 303.

**2. Act Not Within Statute.** — *Wrought Iron Bridge Co. v. Hendricks County*, 19 Ind. App. 672; *Peck-Williamson Heating, etc., Co. v. Steen School Tp.*, 30 Ind. App. 637; *Dickinson v. Poughkeepsie*, 75 N. Y. 65; *People v. Gleason*, 121 N. Y. 631; *Kramrath v. Albany*, 127 N. Y. 575; *La France Fire Engine Co. v. Syracuse*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 516; *McGillivray v. Joint School Dist. No. 1*, 112 Wis. 354.

**3. Town and Township Orders.** — *Dyer v. Covington Tp.*, 19 Pa. St. 200.

**Receiving a Town Order in Payment of a Claim** against the town does not bar an action for the balance. *Wilkinson v. Long Rapids Tp.*, 74 Mich. 63.

**The Presumption Is that Claims Have Been Audited and Allowed** as just claims against the town, otherwise the officers of the town would

suits thereon in their own names, nor will such instruments bear interest. If the payment of a debt due by the town be unreasonably delayed, interest thereon may be recovered under certain circumstances in a suit on the original indebtedness.<sup>1</sup>

When Payable to Order and Indorsed, they are not, in the purview of the law, regarded as commercial paper in the hand of *bona fide* indorsees for value, so as to exclude evidence touching the legality of their inception; and whoever receives them is subject to the same defense that would be good against the payee.<sup>2</sup>

**2. When Liability Arises.** — A town is not liable on an order drawn on its treasurer until the order has been presented for payment and payment refused. Like a bill of exchange or a check, there is no default until the drawee has refused payment.<sup>3</sup>

**3. Payment.** — Where the town orders are payable out of any money in the town fund not otherwise appropriated, or out of separate funds which the town officers are not authorized to use, they are payable out of the general funds of the town.<sup>4</sup>

**XIV. CLAIMS AGAINST TOWNS AND TOWNSHIPS — 1. In General.** — A claim against a town or township is not valid unless it is founded upon a statute or upon a contract entered into with the proper person in accordance with the provisions of the statute.<sup>5</sup>

A Claim Cannot Be Supported and Enforced Solely upon the General Principles of Equity and good conscience applied to individuals and corporations. A town is never estopped from invoking the defense of *ultra vires*.<sup>6</sup>

A Township Charge is any amount which is a fixed liability of the township, and entitled to be paid.<sup>7</sup>

**2. To Whom Presented.** — Where a town has no treasurer the presentation of a claim to the supervisor of the town is a sufficient compliance with the statute requiring that claims be presented for payment to the chief fiscal officer of the town.<sup>8</sup>

**3. Allowance by Auditors.** — *a. IN GENERAL.* — Where a board of auditors exists, no claim against a town is obligatory upon, or enforceable against, the town until it has been audited, examined, and allowed. The

be guilty of a gross violation of legal duty in issuing orders for their payment. *Brown v. Jacobs*, 77 Wis. 29.

**Fraudulent Transfer.** — Where one of the selectmen signs a town order and delivers it to the chairman of the board in blank, and such chairman fraudulently transfers it and receives money thereon, the selectman who first signed it is not liable to the holder of such order. *Fuller v. Mower*, 81 Me. 380.

**1. Holder Cannot Sue in Own Name.** — *Reeside v. Knox*, 2 Whart. (Pa.) 233, 30 Am. Dec. 247; *Warner v. Com.*, 1 Pa. St. 154, 44 Am. Dec. 114; *Dyer v. Covington Tp.*, 19 Pa. St. 200; *Allison v. Juniata County*, 50 Pa. St. 351; *East Union Tp. v. Ryan*, 86 Pa. St. 459; *Snyder Tp. v. Bovaird*, 122 Pa. St. 442, 9 Am. St. Rep. 118; *Mueller v. Cavour*, 107 Wis. 599.

**2. Willey v. Greenfield**, 30 Me. 452; *Sturtevant v. Liberty*, 46 Me. 459; *Emery v. Maria-ville*, 56 Me. 315.

**3. When Liability Arises.** — *Packard v. Bovina*, 24 Wis. 382.

**4. Payment of — Fund.** — *Brown v. Jacobs*, 77 Wis. 29; *Marvin v. Jacobs*, 77 Wis. 31.

A Town Order Made Payable to a Particular Person Which Has Been Paid by the town treasurer is no longer a valid contract, and cannot

be issued in payment of other indebtedness of the town. *Mitchell v. Albion*, 81 Me. 482.

Where Six Years Have Elapsed Since the Issuing of Town Orders for work and labor performed, and payment has been refused nearly as long, they cannot be enforced, as the lapse of time is too great. *People v. Lincoln Tp.*, 41 Mich. 415; *Avery v. Krakow Tp.*, 73 Mich. 622.

**5. Claims Against Towns and Townships — In General.** — *Sherfey, etc., Co. v. Clay County*, 26 I. d. App. 66; *Martin v. Montgomery County*, 27 Ind. App. 98; *Peck-Williamson Heating, etc., Co. v. Steen School Tp.*, 30 Ind. App. 637.

The Appropriation of Public Moneys for the Payment of a Claim which is neither legal nor equitable contravenes the provisions of the constitution which prohibits the appropriation of moneys by municipalities for other than public purposes. *Rockefeller v. Taylor*, 69 N. Y. App. Div. 176.

**6. Claim Not Based on Moral or Equitable Principles.** — *Lovejoy v. Foxcroft*, 91 Me. 367; *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167.

**7. Township Charge.** — *Marathon Tp. v. Oregon Tp.*, 8 Mich. 372.

**8. o Whom Presented.** — *Stanton v. Taylor*, 64 Hun (N. Y.) 633, 19 N. Y. Supp. 43.

board's jurisdiction over claims is not only original, but it is conclusive until brought under review in a court in a manner prescribed by law.<sup>1</sup>

**b. REFUSAL OF BOARD OF AUDIT TO ACT.** — Where the petitioner has a clear legal right to have his claim audited, as where the statute commands it to be done, and the board of audit refuses such audit, mandamus may issue to set the board in motion and compel it to perform its statutory or legal duties.<sup>2</sup>

**c. MODE OF PROCEDURE.** — There is no mode of procedure described by which a board of town auditors is to take proof or obtain knowledge respecting the validity of any claim presented for audit. It is the habit of such bodies to acquire information from any quarter where it is obtainable, and presumably the practice is legitimate. Its members must acquire knowledge to enable them to act with wisdom in subservience to established rules. They may act upon their own knowledge acquired by observation.<sup>3</sup>

If an Account Is Allowed Wholly or in Part the board of auditors shall make a certificate to that effect signed by at least a majority of them, and if allowed only in part they shall state in the certificate the items or parts of items allowed and the items or parts of items rejected, and shall cause a duplicate of every certificate allowing an account wholly or in part to be made, and the board may be compelled to do this by mandamus.<sup>4</sup>

**4. Claims Barred by Limitation.** — Town officers cannot receive claims against their town after the statute of limitations has effectually defeated all remedy for their collection.<sup>5</sup>

**5. Evidence of Claim.** — The minutes of an illegal town meeting are inadmissible to prove a claim audited at such meeting.<sup>6</sup>

**6. Collection.** — Where a claim has been audited its collection can be enforced only by a writ of mandamus to compel it to be included in the tax levy and collected and paid, in the same way as payment for judgment has to be enforced.<sup>7</sup>

**XV. ACTIONS AGAINST TOWNS — 1. Notice of Intent to Sue.** — Where a statute provides that no person shall sue any town for any debt or demand whatever unless the complainant shall have made a demand upon the proper

**1. Allowance of Claims — By Auditors.** — *Latting v. Oyster Bay*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 568; *People v. Barnes*, 114 N. Y. 317.

Where There Has Been No Adjudication by a Town Board upon the Merit of a Claim, the claimant may be entitled to present the bill for audit to the incoming town board, or he may maintain an action thereon to enforce the liability created by the contract. *People v. Town Auditors*, 49 N. Y. App. Div. 4.

The Fees of the Deputy Sheriff, acting as a business officer in criminal actions tried before a magistrate, where the offense is alleged to have been committed, are a legal charge against the town, and it is the duty of the board of auditors to audit such fees. *People v. Clinton*, 28 N. Y. App. Div. 478.

**2. Refusal of Board of Audit to Act.** — *Hull v. Oneida County*, 19 Johns. (N. Y.) 259, 10 Am. Dec. 223; *People v. New York*, (N. Y. Super. Ct. Spec. T.) 3 Misc. (N. Y.) 131; *Matter of Ryan*, (Supm. Ct. Spec. T.) 6 Misc. (N. Y.) 478; *People v. Supervisors*, 32 N. Y. 473; *People v. Delaware County*, 45 N. Y. 196; *People v. Otsego County*, 51 N. Y. 401; *People v. Westchester County*, 73 N. Y. 173; *People v. Schuyler*, 79 N. Y. 189; *People v. Town Auditors*, 82 N. Y. 80; *People v. Auditors*, 71

*Hun* (N. Y.) 461. And see the title *MANDAMUS*, vol. 19, p. 782.

**3. Mode of Procedure.** — *People v. Pople*, 81 *Hun* (N. Y.) 383; *People v. Vanderpoel*, 35 N. Y. App. Div. 73; *Wall v. Trumbull*, 16 Mich. 228.

Where a Bill, Although Made Out in Items, Consists of Service in One Suit, and under one originator, and is in fact a single claim, the auditors are not compelled to pass on each item contained in the bill specifically. *People v. Vanderpoel*, 35 N. Y. App. Div. 73.

**4. Certificate Allowing Claim.** — *People v. Manning*, 37 N. Y. App. Div. 141.

**5. Claims Barred by Limitation.** — *McGrory v. New York*, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 56; *Butler v. Johnson*, 111 N. Y. 204; *Schutz v. Morette*, 146 N. Y. 137.

**6. Evidence of Claim.** — *Jackson v. Collins*, 62 *Hun* (N. Y.) 618, 16 N. Y. Supp. 651.

**Evidence of Invalidity.** — The mere fact that the aggregate of the judgments against a town exceeds two per cent. of the assessed value of the taxable property of the township is not conclusive of the invalidity of the demands upon which the judgments were founded. *Plains Township's Appeal*, 21 Pa. Super. Ct. 68.

**7. Collections.** — *Latting v. Oyster Bay*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 568.



town authorities, the requirements of such statute are a condition precedent to the maintenance of the suit.<sup>1</sup>

**2. Liability of Property of Inhabitants.** — In *Connecticut*, *Massachusetts*, and *Maine*, by the common law or immemorial usage, the property of any inhabitant may be taken on execution upon a judgment against the town.<sup>2</sup>

**XVI. CRIMINAL PROSECUTION OF TOWNS.** — Where a duty is imposed upon a town which the town is under an obligation to perform, a neglect to comply with such duty renders the town liable to be indicted.<sup>3</sup>

**XVII. DISSOLUTION — 1. In General.** — Towns derive existence only from the will of the legislature, and by it they may be destroyed if it is deemed for the interest of the state or the inhabitants of the town. The court cannot control or modify the exercise of this power.<sup>4</sup>

**2. Effect of.** — When an act of incorporation is repealed the territory of the former town remains unchanged in its boundaries, and the inhabitants of such territory simply lose their rights under the former municipal charter.<sup>5</sup>

**TOWN SITE.** — See the title STATE AND PUBLIC LANDS, vol. 26, p. 308.

**TOXICOLOGY.** — See the titles ABORTION, vol. 1, p. 186; DRUGGIST, vol. 10, p. 266; MEDICAL JURISPRUDENCE, vol. 20, p. 529; MURDER AND MANSLAUGHTER, vol. 21, p. 83; POISONS AND POISONING, vol. 22, p. 911.

**1. Notice of Intent to Sue.** — *Pitt County v. Greenville*, 130 N. Car. 87; *Beaudette v. Fond du Lac*, 40 Wis. 44.

**Where Payment Was Refused on Some Other Ground** than improper presentation of the claim, a formal presentation is not necessary before commencing suit. *Rock Creek Tp. v. Codding*, 42 Kan. 649.

**2. Liability of Property of Inhabitants on Judgment Against Town.** — *Bloomfield v. Charter Oak Bank*, 121 U. S. 121.

*Connecticut.* — *Atwater v. Woodbridge*, 6 Conn. 223, 16 Am. Dec. 46; *McLoud v. Selby*, 10 Conn. 390, 27 Am. Dec. 689; *Beardsley v. Smith*, 16 Conn. 368, 41 Am. Dec. 148; *Webster v. Harwinton*, 32 Conn. 131; *White v. Stamford*, 37 Conn. 586; *Ladd v. Franklin*, 37 Conn. 65; *Fyler*, 48 Conn. 158; *East Hartford v. American Nat. Bank*, 49 Conn. 553; *Turney v. Bridgeport*, 55 Conn. 412.

*Maine.* — *Adams v. Wiscasset Bank*, 1 Me. 361; *Fernald v. Lewis*, 6 Me. 264.

*Massachusetts.* — *Chase v. Merrimack Bank*, 19 Pick. (Mass.) 569; *Gaskill v. Dudley*, 6 Met. (Mass.) 546, 39 Am. Dec. 750.

*Vermont.* — See *Hopkins v. Elmore*, 49 Vt. 176.

**3. Criminal Prosecution of Towns.** — *State v. Kittery*, 5 Me. 254; *State v. Gorham*, 37 Me. 451; *Davis v. Bangor*, 42 Me. 522; *Com. v. Petersham*, 4 Pick. (Mass.) 110; *State v. Barksdale*, 5 Humph. (Tenn.) 154; *State v. Murfreesboro*, 11 Humph. (Tenn.) 217; *State v. Whitingham*, 7 Vt. 391; *State v. Alburgh*, 23 Vt. 262.

**The Removal or Abatement of Nuisances Erected or Created by Private Persons** cannot be construed as a corporate duty imposed by law upon towns, and a failure to make such removal or abatement does not render the towns liable to indictment. *State v. Burlington*, 36 Vt. 521.

**4. Dissolution.** — *Idaho.* — *People v. Bancroft*, 3 Idaho 356.

*Illinois.* — *Cicero v. Chicago*, 182 Ill. 301.

*Maine.* — *Gorham v. Springfield*, 21 Me. 58; *South Portland v. Cape Elizabeth*, 92 Me. 328, 69 Am. St. Rep. 502.

*Massachusetts.* — *Weymouth, etc., Fire Dist. v. Norfolk County*, 108 Mass. 142.

*New Hampshire.* — *Dartmouth College v. Woodward*, 1 N. H. 111; *Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 52; *Bristol v. New Chester*, 3 N. H. 532; *Londonderry v. Derry*, 8 N. H. 320; *Berlin v. Gorham*, 34 N. H. 266; *Merrimack County v. Grafton County*, 63 N. H. 550.

*New York.* — *Watervliet v. Colonie*, 27 N. Y. App. Div. 394; *Gertum v. Kings County*, 109 N. Y. 170; *Bronx Gas, etc., Co. v. New York*, (Supm. Ct. Tr. T.) 17 Misc. (N. Y.) 433.

*Pennsylvania.* — *Com. v. Judges*, 8 Pa. St. 391.

**In Alabama** a town is not *ipso facto* dissolved or destroyed by a nonuser of its powers. It requires a judicial sentence to effect the dissolution of a town. *Ex p. Moore*, 62 Ala. 471; *Harris v. Nesbit*, 24 Ala. 398.

**In Illinois** the right of township government cannot be taken away except by a vote at a general election, when all may be presumed to attend. *People v. Couchman*, 15 Ill. 142.

**In Missouri**, where a county has adopted township organization the question of continuing the same may be submitted to a vote of the electors of such county at a general election, in the manner that shall be provided by law, and if a majority of all the votes cast upon that question shall be against township organization, it shall cease in said county. *State v. McGowan*, 138 Mo. 187.

**A Town Composed of Detached Shreds of Territory** overlooked in making a division, and destitute of inhabitants, cannot be continued. *Watervliet v. Colonie*, 27 N. Y. App. Div. 394.

**5. Effect of.** — *Adams v. Piscataquis County*, 87 Me. 503.

**TOY.**—A toy is a plaything; a thing the main use or purpose of which is the amusement of children.<sup>1</sup>

**TRACK.** (See also the titles CROSSINGS, vol. 8, p. 335; NEGLIGENCE, vol. 21, p. 455; RAILROADS, vol. 23, p. 667; STREET RAILWAYS, vol. 27, p. 3; TAXATION, vol. 27, p. 567.)—The word "track," as applied to a railroad, is defined to be "the two continuous lines of rails on which the railway cars run."<sup>2</sup>

1. **Toys.**—*Maddock v. Magone*, 41 Fed. Rep. 882. See also *Zeh v. Cadwalader*, 42 Fed. Rep. 525, *affirmed* 151 U. S. 171; *Wanamaker v. Cooper*, 69 Fed. Rep. 466; *U. S. v. Schwartz*, 76 Fed. Rep. 452.

2. *Atchison, etc., R. Co. v. Kansas City, etc., R. Co.*, (Kan. 1902) 70 Pac. Rep. 940, *quoting* Cent. Dict.

**Space Between Double Tracks.**—Upon the question whether a street railway company was bound to keep in repair that part of a street lying between double *tracks*, the court said: "Here two distinct spaces are referred to and described. The first is described as lying 'within the rails' and is called the *track*; from the other space not only is that name withheld, but no other name is given to it. It is described in a general way as 'a space between the double *tracks*.' But that the two spaces are entirely distinct from each other in the eye of the section is further shown by the fact that the maximum width of the one to which the term *track* is applied is fixed at five feet, while nothing is said concerning the maximum width of the other; the only direction given is as to the maximum width of the space, which is required simply to be 'sufficient for the passage of the cars.' From this it is entirely manifest that the term *track* does not, in the meaning of the section, include the space between double *tracks*, but is confined to the only space remaining, that is to say, the space bounded by the rails along which the cars run and between which the teams travel, and the greatest width of which is limited to five feet." *Robbins v. Omnibus R. Co.*, 32 Cal. 474.

A declaration in an action for personal injuries in some of its counts alleged that the plaintiff was, at the time of the accident, lawfully on the east *track*, and in others, that he was lawfully on the west *track*. There was no evidence as to how far apart the *tracks* were, nor what was the space between the *tracks*. The court held that if the plaintiff was within the space which the car, running on the rails, occupied as it passed, he was on the *track* within the meaning of the allegation of the declaration. *Potter v. Leviton*, 199 Ill. 93.

**The Terms "Track" and "Roadbed."**—See *Anniston, etc., R. Co. v. Jacksonville, etc., R. Co.*, 82 Ala. 299; *Mobile, etc., R. Co. v. Alabama Midland R. Co.*, 87 Ala. 523; *Delaware, etc., Canal Co. v. Whitehall*, 90 N. Y. 21; *Rochester, etc., R. Co. v. Rochester*, 163 N. Y. 608, 17 N. Y. App. Div. 265.

**"Track" Distinguished from "Roadbed."**—See *Gates v. Chicago, etc., R. Co.*, 82 Iowa 527, 50 Am. & Eng. R. Cas. 164.

The term "roadbed," strictly speaking, refers to the bed upon which the superstructure of a railroad rests, or it may be used as inclusive of *track*. *Dunn v. Burlington, etc., R. Co.*, 35 Minn. 80.

**Right of Way — Roadbed.**—In *Delaware, etc., Canal Co. v. Whitehall*, 90 N. Y. 21, it was held that the word *track* signifies the entire roadbed, and not merely the iron or railway, but includes turnouts and switches or other contrivances for passing engines or cars from one line of rails to another or for public traffic purposes. See also *Matter of Folts St.*, 18 N. Y. App. Div. 568.

**Same — Depot.**—In *Portland, etc., R. Co. v. Saco*, 60 Me. 198, it was said: "The exemption from taxation is limited to 'the *track* of the road and the land on which it is constructed;' it does not, in terms, extend to their appurtenances. Railroad depots constitute no part of 'the *track* of the road.' If they are exempted from taxation, it is because they are to be regarded as 'the land on which the *track* is constructed.'"

**Track Distinguished from Right of Way.**—A *track* is "merely a part of the right of way—that part on which the rails and ties are laid." *Drainage Com'rs v. Illinois Cent. R. Co.*, 158 Ill. 361.

**Railroad and Track.**—The term "railroad" has a far more extended signification than the term *track*. *U. S. Trust Co. v. Atlantic, etc., R. Co.*, 8 N. Mex. 689.

**Track and Line.**—See *Ft. Worth St. R. Co. v. Rosedale St. R. Co.*, 68 Tex. 179.

**Taxation.**—See *Chicago, etc., R. Co. v. People*, 195 Ill. 184, and see the title TAXATION (CORPORATE), vol. 27, p. 920.

**Taxation — Bridges.**—A bridge for railroad purposes was assessed as a railroad *track* in *Anderson v. Chicago, etc., R. Co.*, 117 Ill. 26.

**Railway Track and Street-railway Track.**—A statute provided that no railway *track* could be located and laid down until the damages to abutting owners were ascertained and compensated. In construing this statute the court said: "As thus used in the statute, does 'railway *track*' mean or include 'street-railway *track*,' operated by horse power? We think not. Railway *track*, as generally understood, means only a *track* on which steam is used as the motive power, and it will be presumed that the general assembly used such words in that sense, unless the context or subject-matter contemplated by the statute requires that a different meaning than that in ordinary use should be adopted." *Sears v. Marshalltown St. R. Co.*, 65 Iowa 744. See also *RAILROAD — RAILWAY*, vol. 23, p. 645. And see the title STREET RAILWAYS, vol. 27, p. 3.

**Tracks Sought to Be Used.**—The *tracks* of a street-railway corporation extended through a city into an adjoining town. The city granted a license to another corporation to enter upon and use a portion of said *tracks* lying wholly within the limits of the city. Upon the question as to whether application to the selectmen of the town for permission to use such portion of the *tracks* was necessary, the court said:

**TRACT.** (See also SUBDIVISION, vol. 27, p. 193.)—See note 1.

**TRACTION ENGINE.**—A traction engine is defined as. "a locomotive engine for drawing heavy loads upon common roads, or over arable land, as in agricultural operations."<sup>2</sup>

**TRADE.** (See also BUSINESS, vol. 5, p. 71; DEAL—DEALER, vol. 8, p. 846; OCCUPATION, vol. 21, p. 769; TRADER, *post*; and see the titles BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS, vol. 5, p. 2; INSOLVENCY AND BANKRUPTCY, vol. 16, p. 636.)—In ordinary language, the word "trade" is employed in three different senses: first, in that of the business of buying and selling; second, in that of an occupation generally; and third, in that of a mechanical employment, in contradistinction to agriculture and the liberal arts.<sup>3</sup> Trade has been defined as "the exchange of commodities for other commodities, or for money; the business of buying and selling; dealing by way of sale or exchange."<sup>4</sup> The term is sometimes, particularly in exemption

"We are of opinion that the Pub. Stat., c. 113, § 49, making provision for a disagreement between two cities or towns 'if the *track* of either company is in two or more cities or towns,' does not require concurrent action when all the *track* of the petitioning company and all the *track* of the other company sought to be used are in the same city. So far as the latter company is concerned, the *track* sought to be used must be what is meant by the word *track*." New Bedford, etc., St. R. Co. v. Acushnet St. R. Co., 143 Mass. 200.

**Sidetrack.**—See SIDETRACK—SIDING, vol. 25, p. 1063, and see the title RAILROADS, vol. 23, p. 667.

**1. Size of Parcel.**—In Cade v. Larned, 99 Ga. 589, it was said: "The word *tract* in its common signification does not imply anything as to the size of the parcel of land, and if the legislature intended that the exception above referred to should apply only to a *tract* of a certain kind or size, they would have said so."

**Large District.**—The word *tract* may embrace a district or large body of land. Matter of Drainage of Lands, 35 N. J. L. 508.

**Tracts and Lots.**—In Mayor v. Piquet, 2 La. 475, it was said: "We are of a different opinion from the judge of the first instance. In common parlance, it is true, town lots are not designated by the terms '*tracts* of land,' but strictly speaking, the latter embrace the former."

**Tract or Lot—Taxation.**—For the meaning of the term *tract* in a statute providing that each *tract* or lot shall be chargeable only with its own taxes, see Yeaman v. Lepp, 167 Mo. 61.

**Plantation and Tract.**—In Nash v. Savage, 2 Hill Eq. (S. Car.) 50, it was said: "The term 'plantation,' as well as *tract*, is used as merely descriptive of a body of land. In common parlance they are used as convertible terms, and we speak of 'our plantation,' or 'our *tract* of land,' intending to be understood as speaking of the same body of land. A plantation may consist of several *tracts* or parcels of land; indeed, it is most commonly the case that it does."

**Timber.**—In U. S. v. Richard, 8 Pet. (U. S.) 472, it was said: "The concession is loosely worded, but is understood to allude to land. After granting permission to build a mill on the place designated, the governor adds: 'and this *tract* not being sufficient,'

plainly indicating the *tract* on which the mill was to be constructed, 'I grant him the equivalent quantity in Cedar Swamp.' The word *tract* means land, not timber, and the words 'equivalent quantity' refer to the antecedent word *tract*, and consequently also mean land."

**2. Traction Engine.**—Toedtemeier v. Clackamas County, 34 Oregon 66, quoting Encyc. Dict.

**3. Trade.**—Queen Ins. Co. v. State, 86 Tex. 250. See also Betz v. Maier, 12 Tex. Civ. App. 219.

**Trade and Business Distinguished.**—See Harris v. Amery, L. R. 1 C. P. 154; Adams v. Boston, etc., R. Co., Holmes (U. S.) 35, 1 Fed. Cas. No. 47; and see *infra*, *Broad Sense of Term*.

**Trade and Occupation Distinguished.**—State v. Hunt, 129 N. Car. 686. See also *infra*, *Broad Sense of Term*.

**4. Buying or Selling.**—In re Grand Jury, 62 Fed. Rep. 841; U. S. v. Coal Dealers' Assoc., 85 Fed. Rep. 265; U. S. v. Cassidy, 67 Fed. Rep. 705.

Trade is defined as "any sort of dealings by way of sale or exchange; commerce; traffic." Bouv. L. Dict., quoted in People v. Sheldon, 66 Hun (N. Y.) 590, and Gower v. Jonesboro, 83 Me. 145.

Trade is defined to mean "mutual traffic; buying, selling, or exchange of articles between members of the same community." People v. Sheldon, 66 Hun (N. Y.) 590, quoting Jac. L. Dict.

"Trade comprehends every species of exchange or dealing, either in the produce of land, in manufactures, in bills, or in money, but it is chiefly used to denote the barter or purchase and sale of goods, wares, and merchandise either by wholesale or retail." State v. Hunt, 129 N. Car. 690, per Douglas, J.

**Manufacturer.**—In Grainger v. Gough, (1896) A. C. 345, Lord Davey said: "*Trade* in its largest sense is the business of selling, with a view to profit, goods which the trader has either manufactured or himself purchased."

**Trade in Sense of Traffic.**—In Texas, etc., Coal Co. v. Lawson, 89 Tex. 401, it was said: "The word *trade* means 'traffic,' which is defined to be 'the passing of goods and commodities from one person to another for an equivalent in goods or money.'" See also Queen Ins. Co. v. State, 86 Tex. 250.

**Trade in Sense of Bargain.**—"Young says



acts, confined to the occupation of a mechanic.<sup>1</sup> But the word is generally used in a broader sense, as equivalent to any occupation, employment, or business, whether manual or mercantile.<sup>2</sup>

that the deed and notes were given up, 'and the whole *trade* was canceled by agreement of the parties.' Now this sentence must be construed with reference to the subject-matter which would interest the parties; that is, the deed and the notes. By the word *trade*, distorting it from its proper meaning, that of traffic in merchandise, the witness meant the bargain which he had made with the plaintiffs." *Barrett v. Barron*, 13 N. H. 161.

**Personal Property Employed in Trade.**—The plaintiff caused to be cut from a tract of wild land owned by him, firewood, pulp wood, and kiln wood in a large quantity, and two hundred piles, which wood and piles he caused to be conveyed to a landing, there to remain until sold in small quantities or by the whole lot. It was held that the wood and piles were personal property employed in *trade* as within the meaning of a tax act. *Gower v. Jonesboro*, 83 Me. 144.

**Buying and Selling Real Estate.**—In *Finnegan v. Noerenberg*, 52 Minn. 245, it was said: "Giving a reasonably liberal meaning to the word *trade*, in the act, it would include the buying and selling of real estate." The statute under consideration was one authorizing the formation of co-operative associations for the purposes "of *trade*, or of carrying on any lawful mechanical, manufacturing, or agricultural business."

**Trade and Commerce.** (See also *COMMERCE*, vol. 6, p. 219.)—In *Hooker v. Vandewater*, 4 Den. (N. Y.) 349, it was said: "The words *trade* and 'commerce' are said by Jacob, in his Law Dictionary, not to be synonymous; that commerce relates to dealings with foreign nations; *trade*, on the contrary, means mutual traffic among ourselves, or the buying, selling, or exchanging of articles between members of the same community." And that "commerce" is a broader term than *trade*, see *In re Grand Jury*, 62 Fed. Rep. 841; *U. S. v. Cassidy*, 67 Fed. Rep. 705; *U. S. v. Coal Dealers' Assoc.*, 85 Fed. Rep. 265.

As to the word *trade* used as an equivalent to "commerce," see *Queen Ins. Co. v. State*, 86 Tex. 263.

**Course of Trade.**—See *COURSE*, vol. 8, p. 19; *USUAL*; and see the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 310.

**Coastwise Trade.**—See *COAST*, vol. 6, p. 171. And see *Ravies v. U. S.*, 35 Fed. Rep. 919, 37 Fed. Rep. 447.

**Trade Description — English Merchandise Marks Act, 1887.**—See *Cameron v. Wiggins*, (1901) 1 Q. B. 5.

**Restraint of Trade.**—See the title *RESTRAINT OF TRADE*, vol. 24, p. 841.

**Trade to.**—See *The Rutland*, (1896) P. 281.

**Stock in Trade.**—See *STOCK, STOCK IN TRADE*, ETC., vol. 26, p. 785.

**1. Confined to Mechanical Trade.**—See the title *EXEMPTIONS (FROM EXECUTION)*, vol. 12, p. 105.

So in *Massachusetts*, the law exempting tools, implements, etc., necessary for carrying

on a *trade* or business has been held to be intended for the protection of mechanics, artisans, and handicraftsmen, and others whose manual labor and skill afford means of earning their livelihood. *Wallace v. Bartlett*, 108 Mass. 53. It has been accordingly applied to tailors, shoemakers, milliners, fiddlers, and carriage makers. *Dowling v. Clark*, 1 Allen (Mass.) 283; *Daniels v. Hayward*, 5 Allen (Mass.) 43; *Rayner v. Whicher*, 6 Allen (Mass.) 292; *Woods v. Keyes*, 14 Allen (Mass.) 236; *Godard v. Chaffee*, 2 Allen (Mass.) 395; *Eager v. Taylor*, 9 Allen (Mass.) 156. But it has been held not to include those merely engaged in the business of buying and selling merchandise; nor to exempt weights and measures, horses and carriages, and other articles used by them in their *trade*. *Wilson v. Elliott*, 7 Gray (Mass.) 69; *Gibson v. Gibbs*, 9 Gray (Mass.) 62; *Reed v. Neale*, 10 Gray (Mass.) 242. And see the title *EXEMPTIONS (FROM EXECUTION)*, vol. 12, p. 98.

**Same — Plumber.**—A statute provided for the registration of "employing or master plumbers" and made it a misdemeanor for any person to engage in that *trade*, business, or calling without such registration. In construing this provision the court said: "The terms '*trade*, business, or calling' employed in the statute are synonymous and have relation to the mechanical employment. One's *trade* is that business which he has learned and fitted himself to follow, and when the legislature speaks of a 'person intending to conduct the *trade*, business, or calling of a plumber,' it has used the words as they would naturally and ordinarily be understood by all, and particularly by that class of the people to whom they were intended to apply." *People v. Warden*, 144 N. Y. 538.

**Same — Circus.**—In *Speak v. Powell*, L. R. 9 Exch. 25, it was held that the business of a traveling circus was not a *trade*, and that carriages belonging to a circus were not such as were used for the conveyance of goods or merchandise in the course of *trade*, so as to be within a statute exempting such.

**Same — Farming and Gardening.**—In *In re Wallis*, 14 Q. B. D. 950, it was held that a person who occupied a residential property and engaged in farming and market gardening for his pleasure, but carried on the occupation at a profit, was not carrying on a *trade* or business within the meaning of a bankruptcy act.

**Lawful Trade.**—In an exemption statute the word *trade* has been held to mean lawful *trade*. *Walsch v. Call*, 32 Wis. 161.

**2. Broad Sense of Term.**—See the title *EXEMPTIONS (FROM EXECUTION)*, vol. 12, p. 105. See also *Queen Ins. Co. v. State*, 86 Tex. 263.

In *Queen Ins. Co. v. State*, 86 Tex. 263, it was said: "Ordinarily, when we speak of *trade*, we mean commerce or something of that nature; when we speak of 'a *trade*,' we mean an occupation in the more general or the limited sense."

**Intention.**—In *The Nymph*, 1 Ware (U. S.)

**TRADE, BOARD OF.** — See the title STOCK AND PRODUCE EXCHANGES, vol. 26, p. 788, and see BOARD OF TRADE OR PRODUCE EXCHANGE, vol. 4, p. 594.

**TRADE COMBINATIONS AND CORPORATE TRUSTS.** — See the titles LABOR COMBINATIONS, vol. 18, p. 80; MONOPOLIES AND CORPORATE TRUSTS, vol. 20, p. 844.

**TRADE FIXTURES.** — See the title FIXTURES, vol. 13, p. 594.

260, it was said: "The primary signification of the word *trade* is traffic, or buying and selling. But this is not its only sense. It is the appropriate word to designate a mechanical art or mystery, and it is also familiarly used to express a customary or usual occupation in a mechanical art, in mercantile or in other business, as distinguished from employment in the liberal arts or learned professions. The meaning, therefore, which the word has in any given case must be learned from its connection, from the subject-matter of the discourse in which it is used, and from the apparent intention of the person who uses it."

**Profession.** — A statute provided that the accounts of merchants, tradesmen, etc., by custom, became due at the end of the year and bore interest. In construing this position in *Woodfield v. Colzey*, 47 Ga. 124, the court said: "The word 'tradesman' does not, perhaps, ordinarily cover physicians, but they have a *trade*, an art, a mystery. They usually give it a more dignified name, to wit, 'profession;' but as time rolls on and new ways come in, we have professors of dancing and of almost every other occupation. One of the definitions of *trade* given by Webster is: 'The business a man has learned, by which he earns his livelihood.'"

In *Demers v. O'Connor*, 10 Quebec Super. Ct. 371, it was held that the word *trade* in an exemption statute was not applicable to the liberal professions, *e. g.*, medicine.

In *Danbridge v. Washington*, 2 Pet. (U. S.) 370, the word *trade*, as used in a will, was held to denote one of the mechanical arts, and the contention that it was applicable to one of the learned professions was not allowed.

**Asylum — Home.** — On a covenant by a lessee not to use the leased premises for the purposes of *trade* or business, it was held that the lessee could restrain their use as a home for working girls, even though it appeared that no profits were made, the payments made by the inmates being insufficient to pay the working expenses of the home. *Rolls v. Miller*, 25 Ch. D. 206. But see *Doe v. Bird*, 2 Ad. & El. 161, 29 E. C. L. 57, where it was held that such a lease was not forfeited by using the premises as a private lunatic asylum, the word *trade* in the covenant being applicable only to a business conducted by buying and selling.

**Carrier.** — In the extended sense of the text the word *trade* is understood in the *Boat Eliza*, 2 Gall. (U. S.) 4. In this case the vessel was employed in the transportation of merchandise on freight or for hire, and was held to be within the operation of a statute providing regulations for the coasting trade. See also *The Schooner Two Friends*, 1 Gall. (U. S.) 118; *U. S. v. Brig Eliza*, 7 Cranch (U. S.) 113.

**Employment Agent.** — The occupation of en-

gaging or procuring laborers to accept employment in another state was held in *State v. Hunt*, 129 N. Car. 686, to be a *trade*.

**Fishery.** — In *The Schooner Nymph*, 1 Sumn. (U. S.) 517, in interpreting the word *trade* as used in a statute declaring that if any licensed vessel or ship "shall be employed in any other *trade* than that for which she is licensed" she shall be forfeited, Story, J., said: "The word *trade* is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Wherever any occupation, employment, or business is carried on for the purpose of profit or gain or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a *trade*." In this case it was held that codfishery was a *trade*.

**Foreign Merchant.** — In *Grainger v. Gough*, (1896) A. C. 325, it was held that a foreign merchant who canvasses through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom does not exercise a *trade* in the United Kingdom within the meaning of the Income Tax Acts, so long as all contracts for the sale and all deliveries of the merchandise to customers are made in a foreign country.

**Insurance.** — In *Matter of Pinkney*, 47 Kan. 91, which case arose upon the construction of the word *trade* in a title to an anti-trust law, the court said: "It is argued that the usual meaning of the word should govern, and in that sense it has reference to the business of selling or exchanging some tangible substance or commodity for money, or the business of dealing by way of sale or exchange in commodities; and it is said that the use of the word in connection with that of 'products,' in the title, qualifies the meaning of *trade*, and makes it all the more apparent that the construction contended for is the correct one. This is the commercial sense of the word, and possibly may be the most common signification which is given to it; but it is not the only one, nor the most comprehensive meaning in which the word is properly used. In the broader sense, it is any occupation or business carried on for subsistence or profit. \* \* \* The broader signification given to the word by most of the lexicographers would fairly embrace and cover the provision of the act with reference to the business of insurance. The title prefixed to an act may be broad and general, or it may be narrow and restricted, but in either event it must be a fair index of the provisions of the act. \* \* \* That the broader meaning of the word *trade* was the one intended by the legislature is manifest from the incorporation of the insurance provision in the body of the act." But in *State v. Phipps*, 50 Kan. 609, it was held that the

**TRADE LABELS.** — See the title TRADEMARKS, TRADE NAMES, AND UNFAIR COMPETITION, *post*.

**TRADE LIBEL.** — See the title LIBEL AND SLANDER, vol. 18, p. 954.

word *trade* did not mean interstate commerce, nor was such meaning within the contemplation of the court at the time of the decision in *Matter of Pinkney*, 47 Kan. 89.

**Insurance Agent.** — The word *trade*, as used in an exemption act, has been held to include the business of a life insurance agent. *Betz v. Maier*, 12 Tex. Civ. App. 219.

**Publisher.** — The business of an editor and publisher of a weekly newspaper has been held to be a *trade* within the meaning of an exemption act. See *Green v. Raymond*, 58 Tex. 80. See also *St. Louis Type Foundry v. International Live Stock, etc., Co.*, 74 Tex. 651, and see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 119.

**Railroad.** — A grantee covenanted that he would not "carry on or permit to be carried on upon said premises any noxious, offensive, or dangerous *trade* or business." It was held that this covenant was not violated by maintaining a temporary steam railroad upon the land for dumping matter excavated by him as a city contractor for a reservoir. *Bohnsack v. McDonald*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 493.

**Telegraph Company.** — In *Chartered Mercantile Bank v. Wilson*, 3 Ex. D. 108, it was held that the business of a telegraph company was a *trade* within the meaning of a statute exempting premises occupied for purposes of *trade*.

**In Trade.** — For a certain consideration W. agreed to give to D. forty dollars in *trade*.

In construing this contract the court said: "The creditor in this case undoubtedly had the right to select the kind of *trade* he would have, confining himself, however, to such articles as the parties had in view at the time of making the contract. If the case showed that the debtor was a merchant, there could be no question that the creditor would be confined in his selection to such articles as his debtor usually *traded* in, and that he would be bound to make the demand and receive the goods at his store, and at the usual prices." *Woods v. Dial*, 12 Ill. 73.

**Trade Price.** — The measure of damages for breach of a contract to pay a thousand dollars in goods at the regular *trade* price is a sum which bears the same proportion to the thousand dollars that the market price on the goods does to the regular *trade* price. *Meserve v. Ammidon*, 109 Mass. 415.

**The Trade of Merchandise.** — Any person engaged in the business of purchasing articles to be sold again, either in the same or in an improved shape, must be regarded as using the *trade* of merchandise. *Wakeman v. Hoyt*, 5 Law Rep. 309. See also *Spring v. Gray*, 6 Pet. (U. S.) 151.

The taking of goods by one purchaser on agreement to account to the merchant is not a *trade* of merchandise between merchant and merchant, within the *New York* statute of limitations. *Murray v. Coster*, 20 Johns. (N. Y.) 576.



# TRADEMARKS, TRADE NAMES, AND UNFAIR COMPETITION.

BY WILLIAM B. HALE.

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**I. DEFINITION AND NATURE OF SUBJECT — I. Unfair Competition.** — Unfair competition consists essentially in the conduct of a trade or business in such a manner that there is an express or implied representation that the goods or business of one man are the goods or business of another.<sup>1</sup> This is a legal wrong for which the courts will afford a remedy.<sup>2</sup> The remedy proceeds upon the theory that the reputation and good will which a man acquires in business are property, and as such entitled to protection against invasion,<sup>3</sup>

**1. What Constitutes Unfair Competition — England.** — *Singer Mfg. Co. v. Loog*, 18 Ch. D. 412, 52 L. J. Ch. 481; *Powell v. Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 88; *Saxlehner v. Apollinaris Co.*, (1897) 1 Ch. 893; *Reddaway v. Banham*, (1896) A. C. 199.

*Canada.* — *Provident Chemical Works v. Canada Chemical Mfg. Co.*, 2 Ont. L. Rep. 182.

*United States.* — *Globe-Wernicke Co. v. Brown*, (C. C. A.) 121 Fed. Rep. 90; *Thomas G. Plant Co. v. May Co.*, 100 Fed. Rep. 72; *Centaur Co. v. Marshall*, (C. C. A.) 97 Fed. Rep. 785; *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. Rep. 651; *Centaur Co. v. Neathery*, (C. C. A.) 91 Fed. Rep. 898; *Vitascope Co. v. U. S. Phonograph Co.*, 83 Fed. Rep. 30; *Pennsylvania Salt Mfg. Co. v. Myers*, 79 Fed. Rep. 87.

*New York.* — *Day v. Webster*, 23 N. Y. App. Div. 601; *Royal Baking Powder Co. v. Jenkins*, Price & S. T. M. Cas. 309.

*Ohio.* — *Lippman v. Martin*, 8 Ohio Dec. 485, 5 Ohio N. P. 120.

See generally *infra*, this title, *Infringement and Unfair Competition*.

**2. A Legal Wrong — England.** — *Sykes v. Sykes*, 3 B. & C. 541, 10 E. C. L. 176; *Seixo v. Provezende*, L. R. 1 Ch. 195; *Edelsten v. Edelsten*, 1 De G. J. & S. 185; *Reddaway v. Bentham Hemp-Spinning Co.*, (1892) 2 Q. B. 639; *Reddaway v. Banham*, (1896) A. C. 199.

*Canada.* — *Pabst Brewing Co. v. Ekers*, 21 Quebec Super. Ct. 545, 20 Quebec Super. Ct. 23.

*United States.* — *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 676; *Keuffel, etc., Co. v. H. S. Crocker Co.*, 118 Fed. Rep. 187; *Baker v. Baker*, (C. C. A.) 115 Fed. Rep. 297; *Shaver v. Heller, etc., Co.*, (C. C. A.) 108 Fed. Rep. 821, *affirming* 102 Fed. Rep. 882; *Saxlehner v. Neilsen*, (C. C. A.) 91 Fed. Rep. 1004, *modifying* 88 Fed. Rep. 71; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, (C. C. A.) 86 Fed. Rep. 608; *Clark Thread Co. v. Armistage*, 67 Fed. Rep. 900.

*California.* — *Schmidt v. Brieg*, 100 Cal. 672.

*Illinois.* — *The Fair v. Morales*, 82 Ill. App. 499.

*Massachusetts.* — *Flagg Mfg. Co. v. Holway*, 178 Mass. 83.

*Ohio.* — *Drake Medicine Co. v. Glessner*, 68 Ohio St. 337; *Lippman v. Martin*, 8 Ohio Dec. 485, 5 Ohio N. P. 120.

See also *infra*, this title, *What Protected as Trademark or Trade Name; Infringement and Unfair Competition; Remedies and Procedure*.

"The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another." *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 674.

In *Coats v. Merrick Thread Co.*, 149 U. S.

566, Mr. Justice Brown, announcing this doctrine, says: "Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals." *Followed* in *Centaur Co. v. Neathery*, (C. C. A.) 91 Fed. Rep. 898.

**3. Reputation and Good Will Protected as Property — England.** — *Levy v. Walker*, 10 Ch. D. 447; *Powell v. Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 83; *Cash v. Cash*, 84 L. T. N. S.) 349; *Valentine Meat Juice Co. v. Valentine Extract Co.*, 83 L. T. N. S. 259; *Pinet v. Maison Louis Pinet*, (1898) 1 Ch. 179, 67 L. J. Ch. 41.

*Canada.* — *Grand Hotel Co. v. Wilson*, 2 Ont. L. Rep. 322.

*United States.* — *Leidersdorf v. Flint*, 8 Biss. (U. S.) 327; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 673; *Keuffel, etc., Co. v. H. S. Crocker Co.*, 118 Fed. Rep. 187; *Peck v. Peck Bros. Co.*, (C. C. A.) 113 Fed. Rep. 296; *Van Hoboken v. Mohns*, 112 Fed. Rep. 528; *Kentucky Distilleries, etc., Co. v. Wathen*, 110 Fed. Rep. 642; *Hostetter Co. v. Martinoni*, 110 Fed. Rep. 524; *Shaver v. Heller, etc., Co.*, (C. C. A.) 108 Fed. Rep. 821, *affirming* 102 Fed. Rep. 882; *Thomas G. Plant Co. v. May Co.*, (C. C. A.) 105 Fed. Rep. 377; *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. Rep. 281, 43 C. C. A. 233; *Proctor, etc., Co. v. Globe Refining Co.*, (C. C. A.) 92 Fed. Rep. 357; *Stuart v. F. G. Stewart Co.*, (C. C. A.) 91 Fed. Rep. 243; *Anheuser-Busch Brewing Assoc. v. Fred. Miller Brewing Co.*, 87 Fed. Rep. 864; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 86 Fed. Rep. 608, 58 U. S. App. 490; *Hostetter Co. v. Sommers*, 84 Fed. Rep. 333; *Hostetter Co. v. William Schneider Wholesale Wine, etc., Co.*, 107 Fed. Rep. 705; *Hostetter Co. v. Martinoni*, 110 Fed. Rep. 524; *Gage-Downs Co. v. Featherbone Corset Co.*, 83 Fed. Rep. 213; *Hilson Co. v. Foster*, 80 Fed. Rep. 896; *Garrett v. Garrett*, 78 Fed. Rep. 472, 47 U. S. App. 250; *Shaw Stocking Co. v. Mack*, 12 Fed. Rep. 707.

*Georgia.* — *Larrabee v. Lewis*, 67 Ga. 562, 44 Am. Rep. 735.

*Michigan.* — *Penberthy Injector Co. v. Lee*, 120 Mich. 174.

*Missouri.* — *Skinner v. Oakes*, 10 Mo. App. 45.

*New York.* — *Cutter v. Gudebrod Bros. Co.*, 36 N. Y. App. Div. 362; *Godillot v. Hazard*, 44 N. Y. Super. Ct. 427; *Frohman v. Payton*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 275.

Good will and reputation are as much a part

and also in part upon the theory of protection to the public against fraud.<sup>1</sup> It may be likened to the case of a wrong against the public resulting in special damage to an individual.<sup>2</sup>

**2. Trademarks.** — In order to obtain the advantage of one's good will and reputation it has long been the custom to affix to the goods employed in a particular trade or business some particular mark to distinguish such goods from similar goods employed by others engaged in the same business. Broadly speaking, such distinguishing marks are trademarks, and their use has been widespread in all countries from very ancient times.<sup>3</sup> A trademark may be defined as a name, sign, symbol, or device which is applied or attached to goods offered for sale in the market so as to distinguish them from similar goods and to identify them with a particular trader, or with his successors, as owners of a particular business, as being made, worked upon, imparted, selected, certified, or sold by him or them.<sup>4</sup> Manifestly, the use of a trade-

of a man's assets as his mill or his counting-house. *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 900.

"One person has no right, by simulating the trade devices of another, to take away his customers, or undermine his business. While the law justifies and encourages manly competition, it will not tolerate, but on the other hand will restrain and prevent, the use of artifices by which dealers may be deprived of well-earned advantages lawfully secured by fair dealing and honest trading." *Per Daniels, J.*, in *Royal Baking Powder Co. v. Jenkins*, Price & S. T. M. Cas. 309.

**1. Protection to Public** — *United States*. — *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 673; *Heller, etc., Co. v. Shaver*, 102 Fed. Rep. 882; *Stuart v. F. G. Stewart Co.*, (C. C. A.) 91 Fed. Rep. 243; *Vitascope Co. v. U. S. Phonograph Co.*, 83 Fed. Rep. 30; *Shaw Stocking Co. v. Mack*, 12 Fed. Rep. 707. But see *American Washboard Co. v. Saginaw Mfg. Co.*, (C. C. A.) 103 Fed. Rep. 281.

*Illinois*. — *Hopkins Amusement Co. v. Frohman*, 202 Ill. 541; *Imperial Mfg. Co. v. Schwartz*, 105 Ill. App. 525; *Hopkins Amusement Co. v. Frohman*, 103 Ill. App. 613.

*Missouri*. — *Skinner v. Oakes*, 10 Mo. App. 45.

*New York*. — *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599.

See *Reeder v. Brodt*, 6 Ohio Dec. 248.

**2.** See *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. Rep. 281, 43 C. C. A. 233, holding that deception of the public by the defendant would not support a private suit unless it resulted in a sale of the defendant's goods as those of the complainant.

"It is not so much that the public may be deceived, *per se*, as that the complainant may be injured." *Kentucky Distilleries, etc., Co. v. Wathen*, 110 Fed. Rep. 645.

**3.** For an interesting account of the antiquity and general use of trademarks, see *Browne on Trade-marks*, chapter 1.

**4. Trademark Defined** — *England*. — *Leather Cloth Co. v. American Leather Cloth Co.*, 35 L. J. Ch. 61.

*United States*. — *Columbia Mill Co. v. Alcorn*, 150 U. S. 460; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51; *McLean v. Fleming*, 96 U. S. 245; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665; *Delaware, etc.,*

*Canal Co. v. Clark*, 13 Wall. (U. S.) 322; *Leidersdorf v. Flint*, 8 Biss. (U. S.) 327; *Shaw Stocking Co. v. Mack*, 12 Fed. Rep. 707; *Ex p. Frieberg*, 20 Pat. Off. Gaz. 1164.

*Georgia*. — *Larrabee v. Lewis*, 67 Ga. 562, 44 Am. Rep. 735.

*Iowa*. — *Shaver v. Shaver*, 54 Iowa 208, 37 Am. Rep. 194.

*Kentucky*. — *Avery v. Meikle*, 81 Ky. 73.

*Louisiana*. — *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946, 39 Am. Rep. 286.

*New York*. — *People v. Krivitzky*, 168 N. Y. 182; *Potter v. McPherson*, 21 Hun (N. Y.) 559; *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1.

*Ohio*. — *Reeder v. Brodt*, 6 Ohio Dec. 248.

A trademark is one's commercial signature to his goods. *Leidersdorf v. Flint*, 8 Biss. (U. S.) 327.

**Office of Trademark.** — In *Marshall v. Pinkham*, 52 Wis. 572, 38 Am. Rep. 756, Price & S. T. M. Cas. 497, Cassoday, J., gave as part of the opinion: "It seems to be the office of a trademark to point out the true source, origin, or ownership of the goods to which the mark is applied, or to point out and designate a dealer's place of business, distinguishing it from the business locality of other dealers. Such is substantially the rule laid down by many authorities." And see the following cases:

*United States*. — *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 666; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51; *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 322; *Albany Perforated Wrapping Paper Co. v. John Hoberg Co.*, 102 Fed. Rep. 157; *Deering Harvester Co. v. Whitman, etc., Mfg. Co.*, (C. C. A.) 91 Fed. Rep. 376; *Tetlow v. Tappan*, 85 Fed. Rep. 774; *Royal Baking Powder Co. v. Raymond*, 70 Fed. Rep. 376. See *Hoyt v. J. T. Lovett Co.*, 71 Fed. Rep. 173, 39 U. S. App. 1.

*Connecticut*. — *Boardman v. Meriden Britannia Co.*, 35 Conn. 402, 95 Am. Dec. 270.

*Louisiana*. — *Handy v. Commander*, 49 La. Ann. 1119.

*Minnesota*. — *J. R. Watkins Medical Co. v. Sands*, 83 Minn. 326.

*Missouri*. — *Oakes v. St. Louis Candy Co.*, 146 Mo. 391; *Fillee v. Fassett*, 44 Mo. 168, 100 Am. Dec. 275.

*New York*. — *Gillott v. Esterbrook*, 48 N. Y. 374, 8 Am. Rep. 553; *Amoskeag Mfg. Co. v.*

mark in connection with particular goods or a particular business is a representation that those goods or that business are the goods or business of the person to whom the trademark belongs, that is, with whom the trademark has become identified. If such representation is false, a case of unfair competition is presented. The law of trademarks, therefore, is merely a specialized branch of the broader doctrine of unfair competition.<sup>1</sup> Relief in trademark cases is often afforded upon the express ground that every person is entitled to secure such profits as result from a reputation for superior skill, industry, or enterprise, or, in other words, from his good will.<sup>2</sup> But, as has just been seen, this is the precise principle upon which relief is afforded in all cases of unfair competition.<sup>3</sup> Usually, however, relief in technical trademark cases is afforded upon the ground of an exclusive property right in the trademark. The mere use or close imitation of it by another *ipso facto* creates a cause of action, regardless of the effect of such use or imitation, and regardless of intent.<sup>4</sup> Unfair competition, as distinguished from infringement of trademark, does not involve the violation of any exclusive right to the use of a word, mark, or symbol.<sup>5</sup> It may be committed by the use of words, marks,

Spear, 2 Sandf. (N. Y.) 599; Fetridge v. Wells, (Super. Ct. Spec. T.) 13 How. Pr. (N. Y.) 385.

Ohio.—Reeder v. Brodt, 6 Ohio Dec. 248. Pennsylvania.—Putnam Nail Co. v. Du-laney, 140 Pa. St. 205, 23 Am. St. Rep. 228.

Rhode Island.—Barrows v. Knight, 6 R. I. 434, 78 Am. Dec. 452.

Wisconsin.—Dunbar v. Glenn, 42 Wis. 118, 24 Am. Rep. 395.

**1. Relation of Trademarks and Unfair Competition.**—See *infra*, this title, *Historical Development and Present Status of Subject*.

**2. Protection to Good Will the Basis of Relief—United States.**—Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51; Van Hoboken v. Mohns, 112 Fed. Rep. 528; Kann v. Diamond Steel Co., (C. C. A.) 89 Fed. Rep. 706; Royal Baking Powder Co. v. Raymond, 70 Fed. Rep. 376; Cleveland Stone Co. v. Wallace, 52 Fed. Rep. 431.

Georgia.—Larrabee v. Lewis, 67 Ga. 562, 44 Am. Rep. 735.

Louisiana.—Handy v. Commander, 49 La. Ann. 1119.

New York.—Partridge v. Menck, 2 Barb. Ch. (N. Y.) 103, 47 Am. Dec. 281; Amoskeag Mfg. Co. v. Spear, 2 Sandf. (N. Y.) 599; Burnett v. Phalon, 3 Keyes (N. Y.) 594; Partridge v. Menck, 2 Sandf. Ch. (N. Y.) 622; Falk v. American West Indies Trading Co., 71 N. Y. App. Div. 320, affirmed 36 Misc. (N. Y.) 376; Godillot v. Hazard, 44 N. Y. Super. Ct. 427; Royal Baking Powder Co. v. Jenkins, Price & S. T. M. Cas. 309. See Hopkins Amusement Co. v. Frohman, 103 Ill. App. 613.

"The court proceeds upon the ground that the complainant has a valuable interest in the good will of his trade or business." Leidersdorf v. Flint, 8 Biss. (U. S.) 327. To same effect see McLean v. Fleming, 96 U. S. 245.

The essence of the wrong called infringement of trademark is the sale of the goods of one person as being those of another by the use of the latter's trademark. William J. Moxley Co. v. Braun, etc., Co., 93 Ill. App. 183.

**Trademark Inseparable from Good Will.**—See *infra*, this title, *Loss or Termination of Right*

—*Separation from Good Will; Assignment, Transfer, and License*.

**3.** See *supra*, this section, *Unfair Competition*. See also C. F. Simmons Medicine Co. v. Mansfield Drug Co., 93 Tenn. 84. And see *infra*, this title, *Historical Development and Present Status of Subject*.

**4. Property Right in Trademarks Protected.**—Bass v. Feigenspan, 96 Fed. Rep. 206; Dennison Mfg. Co. v. Thomas Mfg. Co., 94 Fed. Rep. 651; Vitascope Co. v. U. S. Phonograph Co., 83 Fed. Rep. 30; Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U. S. 676; Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537. See Lafean v. Weeks, 177 Pa. St. 412. But see Kann v. Diamond Steel Co., (C. C. A.) 89 Fed. Rep. 706.

Generally to the effect that the right to a trademark is property, see *infra*, this title, *Historical Development and Present Status of Subject*.

**5. Unfair Competition Distinguished from Infringement of Trademark—England.**—Knott v. Morgan, 2 Keen 213; Singer Mfg. Co. v. Wilson, 2 Ch. D. 434, 45 L. J. Ch. 490.

Canada.—Pabst Brewing Co. v. Ekers, 20 Quebec Super. Ct. 22.

United States.—Searle, etc., Co. v. Warner, (C. C. A.) 112 Fed. Rep. 674; Shaver v. Heller, etc., Co., (C. C. A.) 108 Fed. Rep. 821, affirming 102 Fed. Rep. 882; Williams v. Mitchell, (C. C. A.) 106 Fed. Rep. 168; Illinois Watch-Case Co. v. Elgin Nat. Watch Co., (C. C. A.) 94 Fed. Rep. 667, 35 C. C. A. 237; Dennison Mfg. Co. v. Thomas Mfg. Co., 94 Fed. Rep. 651; La Republique Francaise v. Schultz, 94 Fed. Rep. 500; Pillsbury-Washburn Flour Mills Co. v. Eagle, (C. C. A.) 86 Fed. Rep. 608; Cleveland Stone Co. v. Wallace, 52 Fed. Rep. 431; Kinney v. Basch, 16 Am. L. Reg. N. S. 596.

Illinois.—The Fair v. Morales, 82 Ill. App. 499.

New York.—Reckitt v. Kellogg, 28 N. Y. App. Div. 111.

In C. F. Simmons Medicine Co. v. Mansfield Drug Co., 93 Tenn. 84, infringement of trademarks and unfair competition are carefully contrasted.



or symbols not subject to exclusive appropriation by any one, and its existence depends upon the question of fact whether what was done in any special case tends to pass off the goods of one man as being those of another.<sup>1</sup> This is the only substantial distinction between cases of unfair competition, or passing off actions, which is the *English* term, and cases of infringement of trademarks.

**3. Trade Names.** — Trade names have been frequently confused with trademarks, and, broadly considered, they do include names which may constitute technical trademarks.<sup>2</sup> But, more properly, trade names are names which are used in trade to designate a particular business of certain individuals considered somewhat as an entity, or the place at which a business is located, or a class of goods, but which are not technical trademarks either because not applied or affixed to goods sent into the market, or because not capable of exclusive appropriation by any one as trademarks.<sup>3</sup> In this limited sense trade names are not entitled to protection in the same manner and to the same extent as trademarks, though such a doctrine has been sometimes asserted, but the proprietor of a trade name is entitled to protection against the use by others of his trade name in such a manner or under such circumstances as to constitute unfair competition.<sup>4</sup>

**II. HISTORICAL DEVELOPMENT AND PRESENT STATUS OF SUBJECT.** — The law of unfair competition, including trademarks and trade names, is of com-

**1.** *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 676; *Shaver v. Heller, etc., Co.*, (C. C. A.) 108 Fed. Rep. 821; *La Republique Francaise v. Saratoga Vichy Spring Co.*, 99 Fed. Rep. 733; *La Republique Francaise v. Schultz*, 94 Fed. Rep. 500; *Anheuser-Busch Brewing Assoc. v. Fred. Miller Brewing Co.*, 87 Fed. Rep. 864; *St. Louis Carbonating, etc., Co. v. Eclipse Carbonating Co.*, 58 Mo. App. 411; *Goodman v. Bohls*, 3 Tex. Civ. App. 183. See also *infra*, this title, *Infringement and Unfair Competition*.

**2. Trade Names as Inclusive of Trademarks.** — *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125; *Samuels v. Spitzer*, 177 Mass. 226; *Ayer v. Hall*, 3 Brews. (Pa.) 509. See Paul on Trademarks, § 160. See also generally *infra*, this title, III. 2. *Particular Words, Names, Marks, or Symbols*.

**3. Trade Names Distinguished from Trademarks.** — *Draper v. Skerrett*, 116 Fed. Rep. 206; *Hainque v. Cyclops Iron Works*, 136 Cal. 351; *Church v. Kresner*, 26 N. Y. App. Div. 349; *Koehler v. Sanders*, 122 N. Y. 65.

It has been said that a trade name differs from a trademark in the fact that the former appeals more to the ear than to the eye, while in the case of trademarks the reverse is the case. *N. K. Fairbank Co. v. Luckel*, 102 Fed. Rep. 327, 42 C. C. A. 376.

An exclusive right to use a particular trade name in a particular locality may be acquired. *Miskell v. Prokop*, 58 Neb. 628.

**4. Trade Names Protected Against Unfair Competition.** — *England.* — *North Cheshire, etc., Brewery Co. v. Manchester Brewery Co.*, (1899) A. C. 83, 68 L. J. Ch. 74, 79 L. T. N. S. 645; *Daniel v. Whitehouse*, (1898) 1 Ch. 685, 67 L. J. Ch. 262; *Manchester Brewery Co. v. North Cheshire, etc., Brewery Co.*, (1898) 1 Ch. 539, 67 L. J. Ch. 351, 78 L. T. N. S. 537; *Cash v. Cash*, 84 L. T. N. S. 349; *Pinet v. Maison Louis Pinet*, (1898) 1 Ch. 179, 67 L.

*J. Ch.* 41; *Valentine Meat Juice Co. v. Valentine Extract Co.*, 83 L. T. N. S. 259.

*Canada.* — *Provident Chemical Works v. Canada Chemical Mfg. Co.*, 2 Ont. L. Rep. 182; *Grand Hotel Co. v. Wilson*, 2 Ont. L. Rep. 322.

*United States.* — *Draper v. Skerrett*, 116 Fed. Rep. 206; *Baker v. Baker*, (C. C. A.) 115 Fed. Rep. 297; *Edison v. Hawthorne*, (C. C. A.) 108 Fed. Rep. 839; *Shaver v. Heller, etc., Co.*, (C. C. A.) 108 Fed. Rep. 821, *affirming* 102 Fed. Rep. 882; *Hansen v. Siegel-Cooper Co.*, 106 Fed. Rep. 691; *Williams v. Mitchell*, (C. C. A.) 106 Fed. Rep. 168; *Continental Ins. Co. v. Continental Fire Assoc.*, 96 Fed. Rep. 846; *Block v. Standard Distilling, etc., Co.*, 95 Fed. Rep. 978; *Gage-Downs Co. v. Featherbone Corset Co.*, 83 Fed. Rep. 213; *Garrett v. Garrett*, (C. C. A.) 78 Fed. Rep. 472; *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 904. See *Carlsbad v. Tibbetts*, 51 Fed. Rep. 852.

*California.* — *Hainque v. Cyclops Iron Works*, 136 Cal. 351; *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271, 82 Am. St. Rep. 346; *Weinstock v. Marks*, 109 Cal. 529, 50 Am. St. Rep. 57.

*Illinois.* — *Hopkins Amusement Co. v. Frohman*, 202 Ill. 541.

*Massachusetts.* — *Viano v. Baccigalupo*, 183 Mass. 160; *Samuels v. Spitzer*, 177 Mass. 226.

*Michigan.* — *Penberthy Injector Co. v. Lee*, 120 Mich. 174.

*Missouri.* — *St. Louis Carbonating, etc., Co. v. Eclipse Carbonating Co.*, 58 Mo. App. 411.

*New York.* — *Slater v. Slater*, 78 N. Y. App. Div. 454; *Frohman v. Payton*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 275; *Cutter v. Gudebrod Bros. Co.*, 36 N. Y. App. Div. 362.

*Ohio.* — *Cincinnati Vici Shoe Co. v. Cincinnati Shoe Co.*, 9 Ohio Dec. 579, 7 Ohio N. P. 135.

See also *infra*, this title, *Infringement and Unfair Competition*.

For specific instances, see *infra*, this title,

paratively recent origin.<sup>1</sup> The early cases fully recognized this doctrine,<sup>2</sup> but as unfair competition by means of the imitation or infringement of trademarks covered by far the most numerous class of cases presented, the courts fell into the practice of deciding the cases upon the doctrines of trademark law, and to a greater or less extent lost sight of the broader principle of unfair competition.<sup>3</sup> Many cases have been decided upon the expressed grounds of infringement of trademark whereas the facts presented only a case of unfair competition, there being in fact no valid trademark involved.<sup>4</sup> But as the result reached would have been the same, in most cases, even upon correct principles, the error in the theory of the decisions was overlooked, and as a consequence much apparent conflict and confusion were brought into the cases. Thus the law of trademarks became specialized, and the law of unfair competition remained in abeyance, or, if recognized at all, was not recognized to its full extent or under that name, relief when afforded being "upon principles analogous to trademarks."<sup>5</sup> The right to a trademark was early recognized as a species of property, and protected as such,<sup>6</sup> and for a long time the principal inquiry in the cases was confined to the ascertainment of what might be monopolized as a trademark.<sup>7</sup> After a while the courts recognized that justice required the application of a broader principle than that of protection to property rights in trademarks, and it was perceived that this principle was not an ultimate or fundamental principle, but was merely a corollary or specialized application of the broader principle that no one has the right to pass off his goods and business as the goods or business of another. Obviously this wrong might be committed by

### III. 2. *Particular Words, Names, Marks, or Symbols.*

1. **Early Cases.**—Singleton v. Bolton, 3 Dougl. 293, 26 E. C. L. 114; Hogg v. Kirby, 8 Ves. Jr. 215.

But see Southern v. How, Popham 144, Cro. Jac. 471, which was, perhaps, a case of trademark. And see Magnolia Metal Co. v. Tandem Smelting Syndicate, 17 R. P. C. 477, 484.

In Blanchard v. Hill, 2 Atk. 484, Hardwicke, L. C., said: "Every particular trader has some particular mark or stamp; but I do not know any instance of granting an injunction here to restrain one trader from using the same mark with another; and I think it would be of mischievous consequence to do it."

Since the cases of Singleton v. Bolton, 3 Dougl. 293, 26 E. C. L. 114, decided by Lord Mansfield (1783), and Hogg v. Kirby, 8 Ves. Jr. 215, decided by Lord Eldon (1803), in which the fundamental principle of the right of a trader to protection in the exclusive use of his trademarks was laid down, there has grown up, without the aid of statute, an elaborate system of law, covering multitudinous questions and establishing principles and rules of law suited to almost every form of piracy which the ingenuity of man can devise.

2. **Early Recognition of the Doctrine of Unfair Competition.**—Taylor v. Carpenter, 3 Story (U. S.) 458; Thomson v. Winchester, 19 Pick. (Mass.) 214, 31 Am. Dec. 135. See Canham v. Jones, 2 Ves. & B. 219; Sykes v. Sykes, 3 B. & C. 541, 10 E. C. L. 176, 3 L. J. K. B. 46; Cruttwell v. Lye, 17 Ves. Jr. 335; Longman v. Winchester, 16 Ves. Jr. 269; Hogg v. Kirby, 8 Ves. Jr. 215.

3. **Cases of Unfair Competition Decided upon Ground of Trademarks.**—Thornton v. Crowley, 47 N. Y. Super. Ct. 527; Ayer v. Hall, 3 Brews.

(Pa.) 509; C. F. Simmons Medicine Co. v. Mansfield Drug Co., 93 Tenn. 84.

4. See Hogg v. Kirby, 8 Ves. Jr. 215; Taylor v. Carpenter, 3 Story (U. S.) 458; Clark v. Clark, 25 Barb. (N. Y.) 76.

For specific instances, see *infra*, this title, III. 2. *Particular Words, Names, Marks, or Symbols.*

5. Christy v. Murphy, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 77; Ayer v. Hall, 3 Brews. (Pa.) 509.

6. **Trademarks a Species of Property—England.**—Bradbury v. Dickens, 27 Beav. 53; Millington v. Fox, 3 Myl. & C. 338; Edelsten v. Edelsten, 1 De G. J. & S. 185; Hall v. Barrows, 4 De G. J. & S. 150, 32 L. J. Ch. 548, 33 L. J. Ch. 204; Leather Cloth Co. v. American Leather Cloth Co., 1 Hem. & M. 271, 4 De G. J. & S. 137, 11 H. L. Cas. 533; Perry v. Truefitt, 6 Beav. 66. But see Singer Mfg. Co. v. Loog, 18 Ch. D. 412, 52 L. J. Ch. 481; Collins Co. v. Brown, 3 Kay & J. 426.

*United States.*—Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U. S. 676; McLean v. Fleming, 96 U. S. 245; Royal Baking Powder Co. v. Raymond, 70 Fed. Rep. 380.

*Louisiana.*—Handy v. Commander, 49 La. Ann. 1119.

*New York.*—Volger v. Force, 63 N. Y. App. Div. 124; Clark v. Clark, 25 Barb. (N. Y.) 76; Corwin v. Daly, 7 Bosw. (N. Y.) 222.

*Ohio.*—Reeder v. Brodt, 6 Ohio Dec. 248.

*Pennsylvania.*—Joseph Dixon Crucible Co. v. Guggenheim, 2 Brews. (Pa.) 321.

Property in trademarks exists at common law and does not depend upon statute. Reeder v. Brodt, 6 Ohio Dec. 248.

7. **What May Be a Trademark.**—See *infra*, this title, *What Protected as Trademark or Trade Name.*



the use or imitation of names, marks, or symbols, one or all combined, in which no one could claim an exclusive proprietary interest as a trademark. Accordingly the courts proceeded to apply the broader principle, and it is now well settled that irrespective of any exclusive property interest in any particular name, mark, or symbol, a person is entitled to protection against the use by another of such mark, name, or symbol in such a manner as to enable the latter to pass off upon the public his goods or business as being the goods or business of the former.<sup>1</sup> Under the name of "unfair competition" this doctrine has been greatly developed in recent years, and the tendency of the decisions now is to make every case turn upon the question whether or not the effect of what was done is to pass off the goods of one person for those of another, regardless of the existence of any technical trademark.<sup>2</sup> In other words, the existence of a property right in the reputation and good will of one's business is recognized and protected against invasion regardless of the particular means of invasion employed.<sup>3</sup> The law of trade-

**1. Exclusive Property in Symbol Unnecessary to Protection Against Unfair Competition.**—*Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311; *Thomas G. Plant Co. v. May Co.*, (C. C. A.) 105 Fed. Rep. 377. See *Thornton v. Crowley*, 47 N. Y. Super. Ct. 527.

One is entitled to protection against unfair competition even though he has no trademark. *Reckitt v. Kellogg*, 28 N. Y. App. Div. 111.

The law of trademarks is merely one branch of the law of unfair competition. *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. Rep. 659.

The imitation of a technical trademark constitutes unfair competition. *C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84.

**2. Unfair Competition — England.**—*Cash v. Cash*, 84 L. T. N. S. 349; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Powell v. Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 79; *Reddaway v. Banham*, (1896) A. C. 199; *Reddaway v. Bentham Hemp-Spinning Co.*, (1892) 2 Q. B. 639; *Pabst Brewing Co. v. Ekers*, 20 Quebec Super. Ct. 20, 21 Quebec Super. Ct. 545; *Singer Mfg. Co. v. Charlebois*, 16 Quebec Super. Ct. 167; *Knott v. Morgan*, 2 Keen 213.

**United States.**—*Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 676; *Good-year's India Rubber Glove Mfg. Co. v. Good-year Rubber Co.*, 128 U. S. 598; *Globe-Wernicke Co. v. Brown*, (C. C. A.) 121 Fed. Rep. 90; *Draper v. Skerrett*, 116 Fed. Rep. 206; *Searle, etc., Co. v. Warner*, (C. C. A.) 112 Fed. Rep. 676; *Van Hoboken v. Mohns*, 112 Fed. Rep. 528; *Shaver v. Heller, etc., Co.*, (C. C. A.) 108 Fed. Rep. 821, *affirming* 102 Fed. Rep. 882; *Williams v. Mitchell*, (C. C. A.) 106 Fed. Rep. 168; *Oxford University v. Wilmore-Andrews Pub. Co.*, 101 Fed. Rep. 443; *Thomas G. Plant Co. v. May Co.*, 100 Fed. Rep. 72; *La Republique Francaise v. Saratoga Vichy Spring Co.*, 99 Fed. Rep. 733; *California Fig Syrup Co. v. Worden*, 95 Fed. Rep. 132; *Block v. Standard Distilling, etc., Co.*, 95 Fed. Rep. 978; *La Republique Francaise v. Schultz*, 94 Fed. Rep. 500; *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. Rep. 651; *Illinois Watch Case Co. v. Elgin Nat. Watch Co.*, (C. C. A.) 94 Fed. Rep. 667; *Centauro Co. v. Neathery*, (C. C. A.) 91 Fed. Rep. 808; *Anheuser-Busch Brewing Assoc. v. Fred Miller Brewing Co.*, 87 Fed. Rep.

864; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, (C. C. A.) 86 Fed. Rep. 608; *Vitascope Co. v. U. S. Phonograph Co.*, 83 Fed. Rep. 30; *Morgan Envelope Co. v. Walton*, 82 Fed. Rep. 469; *Garrett v. Garrett*, (C. C. A.) 78 Fed. Rep. 472; *Bucks Stove, etc., Co. v. Kiechle*, 76 Fed. Rep. 758; *Goldstein v. Whelan*, 62 Fed. Rep. 124; *Cleveland Stone Co. v. Wallace*, 52 Fed. Rep. 431; *Kinney v. Basch*, 16 Am. L. Reg. N. S. 596.

**California.**—*Schmidt v. Brieg*, 100 Cal. 672. **Illinois.**—*Hopkins Amusement Co. v. Frohman*, 202 Ill. 541; *The Fair v. Morales*, 82 Ill. App. 499.

**Kentucky.**—*Rains v. White*, 107 Ky. 114.

**Massachusetts.**—*New England Awl, etc., Co. v. Marlborough Awl, etc., Co.*, 168 Mass. 154, 60 Am. St. Rep. 377.

**New York.**—*Volger v. Force*, 63 N. Y. App. Div. 122; *Reckitt v. Kellogg*, 28 N. Y. App. Div. 111; *Fettridge v. Merchant*, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 156.

**Ohio.**—*Drake Medicine Co. v. Glessner*, 68 Ohio St. 337.

**Pennsylvania.**—*Lafean v. Weeks*, 177 Pa. St. 412; *Shepp v. Jones*, 3 Pa. Dist. 539.

**Texas.**—*Goodman v. Bohls*, 3 Tex. Civ. App. 183.

**3. Property in Reputation and Good Will — England.**—*Valentine Meat Juice Co. v. Valentine Extract Co.*, 83 L. T. N. S. 267; *Gillett v. Lumsden*, 4 Ont. L. Rep. 300; *Provident Chemical Works v. Canada Chemical Mfg. Co.*, 2 Ont. L. Rep. 182; *Bradbury v. Dickens*, 27 Beav. 53.

**United States.**—*McLean v. Fleming*, 96 U. S. 245; *Leidersdorf v. Flint*, 8 Biss. (U. S.) 327; *Peck v. Peck Bros. Co.*, (C. C. A.) 113 Fed. Rep. 296; *Hosstetter Co. v. Martinoni*, 110 Fed. Rep. 525; *Shaver v. Heller, etc., Co.*, (C. C. A.) 108 Fed. Rep. 821; *Thomas G. Plant Co. v. May Co.*, (C. C. A.) 105 Fed. Rep. 377; *American Washboard Co. v. Saginaw Mfg. Co.*, (C. C. A.) 103 Fed. Rep. 281; *Proctor, etc., Co. v. Globe Refining Co.*, (C. C. A.) 92 Fed. Rep. 357; *Gage-Downs Co. v. Featherbone Corset Co.*, 83 Fed. Rep. 213; *Garrett v. Garrett*, (C. C. A.) 78 Fed. Rep. 472.

**California.**—*Hainque v. Cyclops Iron Works*, 136 Cal. 351.

**New York.**—*Royal Baking Powder Co. v. Jenkins, Price & S. T. M. Cas.* 309; *Thornton*



marks, however, has been too thoroughly specialized and crystallized by statute and decision to become wholly merged in the law of unfair competition. It therefore remains as a distinct subject, and furnishes the rule of decision in all cases to which it is applicable.<sup>1</sup>

**III. WHAT PROTECTED AS TRADEMARK OR TRADE NAME — 1. Essentials of Valid Trademark — a. DISTINCTIVENESS.** — A trademark must be distinctive. Either by its own meaning or by association, it must point to the origin or ownership of the article to which it is attached, and distinguish such article from similar articles of other proprietors or traders, for this is the purpose and sole function of trademarks.<sup>2</sup> Such distinctiveness is ordinarily acquired by priority of appropriation, and exclusive user,<sup>3</sup> or it may be acquired by registration under statutory authority.<sup>4</sup> It is not necessary that the name or place of business of the proprietor should appear upon the trademark,<sup>5</sup> nor that the purchaser should actually know to whom the mark refers or belongs.<sup>6</sup> It is sufficient if the mark points to some definite though unknown person, as the

*v. Crowley*, 47 N. Y. Super. Ct. 527; *Godillot v. Hazard*, 44 N. Y. Super. Ct. 427.

*Ohio*. — *Lippman v. Martin*, 8 Ohio Dec. 485, 5 Ohio N. P. 120.

*Rhode Island*. — *American Solid Leather Button Co. v. Anthony*, 15 R. I. 338, 2 Am. St. Rep. 898.

See also *supra*, this title, *Definition and Nature of Subject — Unfair Competition*.

The broad principle underlying all these cases "is that property shall be protected from unlawful assaults; that where a party has for long years advertised his goods by a certain name, so that they are distinguished in the market by that name, the court will not permit a newcomer, by assuming that name, to destroy or impair an established business." *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 904.

**A Demand for Goods Created by Advertising** belongs to the advertiser, and he will be protected therein against unfair competition by another who seeks to take advantage of such advertisement to sell his own goods. *Lever v. Smith*, 112 Fed. Rep. 998; *Searle, etc., Co. v. Warner*, (C. C. A.) 112 Fed. Rep. 674; *N. K. Fairbank Co. v. Luckel*, (C. C. A.) 102 Fed. Rep. 327; *Thomas G. Plant Co. v. May Co.*, 100 Fed. Rep. 72; *Stuart v. F. G. Stewart Co.*, (C. C. A.) 91 Fed. Rep. 243; *Hilson Co. v. Foster*, 80 Fed. Rep. 896; *Pennsylvania Salt Mfg. Co. v. Myers*, 79 Fed. Rep. 87; *Samuels v. Spitzer*, 177 Mass. 226; *Centaur Co. v. Link*, 62 N. J. Eq. 147; *Cooke, etc., Co. v. Miller*, 169 N. Y. 475, *affirming* 53 N. Y. App. Div. 120; *Frohman v. Payton*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 275; *Pabst Brewing Co. v. Ekers*, 20 Quebec Super. Ct. 22; *Grand Hotel Co. v. Wilson*, 2 Ont. L. Rep. 322.

**1. Trademarks Still a Special Subject.** — See *Searle, etc., Co. v. Warner*, (C. C. A.) 112 Fed. Rep. 674; *C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84.

**2. Trademarks Must Be Distinctive — United States.** — *Columbia Mill Co. v. Alcorn*, 150 U. S. 460; *Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co.*, (C. C. A.) 113 Fed. Rep. 468; *Albany Perforated Wrapping-Paper Co. v. John Hoberg Co.*, 102 Fed. Rep. 157; *New York Asbestos Mfg. Co. v. Ambler Asbestos Air-Cell Covering Co.*, 99 Fed. Rep. 85; *Deer-*

*ing Harvester Co. v. Whitman, etc., Mfg. Co.*, (C. C. A.) 91 Fed. Rep. 376. But see *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 904.

*District of Columbia*. — *U. S. v. Duell*, 17 App. Cas. (D. C.) 475.

*Georgia*. — *Larrabee v. Lewis*, 67 Ga. 562, 44 Am. Rep. 735.

*Minnesota*. — *J. R. Watkins Medical Co. v. Sands*, 83 Minn. 326.

*Missouri*. — *Oakes v. St. Louis Candy Co.*, 146 Mo. 391.

*New York*. — *Fischer v. Blank*, 138 N. Y. 244; *Newman v. Alvord*, 51 N. Y. 189, 10 Am. Rep. 588.

**Descriptive Terms** which others may use with equal truth in describing their goods are not distinctive and do not constitute valid trademarks. See *infra*, this section, 2. o. *Descriptive Words and Marks*.

**A Loss of Distinctiveness** terminates trademark rights in a particular mark, word, or symbol. See *infra*, this title, *Loss or Termination of Right — Loss of Distinctiveness*.

**A Large Number of Different Names Used on the Same Article**, and tending to cause confusion rather than certainty as to origin, will not be protected as trademarks for that article. *Albany Perforated Wrapping-Paper Co. v. John Hoberg Co.*, 102 Fed. Rep. 157.

**3. See *infra*, this title, *Original Acquisition of Right — Adoption and User*.**

**4. See *infra*, this title, *Statutory Regulation*.**

**5. Name or Place of Business Need Not Appear.** — *People v. Fisher*, 50 Hun (N. Y.) 552; *Godillot v. Harris*, 81 N. Y. 263; *Volger v. Force*, 63 N. Y. App. Div. 122; *Peurrung v. Compton*, 3 Ohio Cir. Dec. 548, 6 Ohio Cir. Ct. 483; *Sheppard v. Stuart*, 13 Phila. (Pa.) 117, 36 Leg. Int. (Pa.) 234; *American Solid Leather Button Co. v. Anthony*, 15 R. I. 338, 2 Am. St. Rep. 898; *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946, 39 Am. Rep. 286. But see *Ferguson v. Davol Mills*, 7 Phila. (Pa.) 253; *White v. Schlecht*, 14 Phila. (Pa.) 88, 37 Leg. Int. (Pa.) 298.

**6. Proprietor Unknown.** — *Volger v. Force*, 63 N. Y. App. Div. 124; *People v. Fisher*, 50 Hun (N. Y.) 552. See *infra*, this title, *Infringement and Unfair Competition — Each Party Inserting Own Name*.

proprietor obtains the benefit of the reputation of his goods, and purchasers may obtain those goods if desired.<sup>1</sup>

*b. APPLICATION TO GOODS.* — It is essential to the validity of a trademark as such that there shall be some actual physical connection between the goods and the mark, so that the mark goes with the goods into the market.<sup>2</sup> Words, marks, or symbols used in advertisements, circulars, and other similar ways, but not actually affixed to the goods, are not valid technical trademarks.<sup>3</sup> It is sufficient if the mark is affixed, either upon the goods themselves or upon the box or wrapper containing them, or is in some other way physically attached to the goods.<sup>4</sup> Words not actually affixed to the goods frequently constitute trade names and are protected as such against unfair competition.<sup>5</sup>

*c. NOVELTY AND INVENTION.* — Neither novelty nor invention is necessary to the validity of a trademark as such.<sup>6</sup> But priority in the adoption and user of a given mark in connection with particular goods confers a prior right to the exclusive use of such mark as a trademark for such goods.<sup>7</sup>

*d. LEGALITY.* — A trademark can be acquired only in connection with a legitimate and lawful business,<sup>8</sup> and the words, marks, or symbols adopted as a trademark must not be themselves illegal, immoral, or against public policy.<sup>9</sup>

*e. TRUTHFULNESS* — (1) *Effect of Misrepresentations.* — It is a general rule of equity jurisprudence that he who seeks equity must do equity; he must come into equity with clean hands. This maxim has been applied in trademark cases with great vigor, and there are many cases where, although the imitation of the plaintiff's labels and trademarks has been of a most flagrant nature, yet the protection of equity has been denied him in consequence of some false statement contained upon his label or on some publication issued in connection with the sale of his goods. False statements as to ingredients, maker, cures, harmlessness, purity, place of manufacture, and even words not intended to mislead but capable of being misunderstood, have been held to be sufficient to disentitle a plaintiff to relief.<sup>10</sup> To protect such

1. *Volger v. Force*, 63 N. Y. App. Div. 124.

2. *Mark Must Be Attached to Goods.* — *Jay v. Ladler*, 40 Ch. D. 649; *Singer Mfg. Co. v. Wilson*, 2 Ch. D. 434; *Lorillard v. Pride*, 28 Fed. Rep. 434; *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 142 Ill. 494, affirming 40 Ill. App. 430; *William J. Moxley Co. v. Braun, etc., Co.*, 93 Ill. App. 183; *Oakes v. St. Louis Candy Co.*, 146 Mo. 391; *St. Louis Piano Mfg. Co. v. Merkel*, 1 Mo. App. 305.

*Article of Commerce.* — A label as an article of commerce, and not attached to any goods, cannot be protected as a trademark. It must be protected, if at all, by a copyright or design patent. *Schumacher v. Schwenke*, 36 Pat. Off. Gaz. 457. See generally the titles COPYRIGHT, vol. 7, p. 508; PATENTS, vol. 22, p. 260.

3. *Words and Symbols Used in Advertisements.* — *Oakes v. St. Louis Candy Co.*, 146 Mo. 391; *St. Louis Piano Mfg. Co. v. Merkel*, 1 Mo. App. 305. But see *Wheeler v. Johnston*, 3 L. R. Ir. 284.

In *Rowley v. Houghton*, 2 Brews. (Pa.) 303, Ludlow, J., said: "No right can be absolute in a name as a name merely. It is only when that name is printed or stamped upon a particular label or jar, and thus becomes identified with a particular style and quality of goods, that it becomes a trademark."

4. *Sufficiency of Affixation.* — *Jay v. Ladler*, 40 Ch. D. 649; *Singer Mfg. Co. v. Wilson*, 2 Ch. D. 441.

*Branding the Mark on a Cork*, though it cannot be seen until the cork is drawn, is a sufficient affixation. *Moet v. Pickering*, 6 Ch. D. 770.

5. See *infra*, this section, *Particular Words, Names, Marks, or Symbols*, and *infra*, this title, *Infringement and Unfair Competition*. See also Slater on Copyright and Trademarks, p. 233.

6. *Novelty or Invention Unnecessary.* — Trade Mark Cases, 100 U. S. 82; *Titlow v. Tappan*, 85 Fed. Rep. 774; *William J. Moxley Co. v. Braun, etc., Co.*, 93 Ill. App. 183; *Handy v. Commander*, 49 La. Ann. 1119; *Schneider v. Williams*, 44 N. J. Eq. 391; *Rowley v. Houghton*, 7 Phila. (Pa.) 39.

7. See *infra*, this title, *Original Acquisition of Right — Adoption and User*.

8. *Legality of Business.* — *Portsmouth Brewing Co. v. Portsmouth Brewing, etc., Co.*, 67 N. H. 433. See *Hostetter Co. v. Martinoni*, 110 Fed. Rep. 524.

9. *Mark Must Not Be Illegal or Immoral.* — *Cohn v. People*, 149 Ill. 486, 41 Am. St. Rep. 304; *Cigar Maker's Protective Union v. Lindner*, 3 Ohio Dec. 244, 2 Ohio N. P. 114; *McVey v. Brendel*, 144 Pa. St. 235, 27 Am. St. Rep. 625.

10. *Misrepresentation Bars Relief Against Judgment.* — *England.* — *Pidding v. How*, 8 Sim. 477. But see *Cochrane v. Macnish*, (1896) A. C. 225.

a trademark would be to secure to the plaintiff the exclusive privilege of thereby deceiving the public.<sup>1</sup> The general rule seems to be that the misstatement of any material fact calculated to deceive the public will be sufficient to defeat an application for relief.<sup>2</sup>

(2) *Particular Misrepresentations* — (a) *As to Ingredients*. — A misrepresentation as to the ingredients of an article is sufficient to debar a plaintiff from relief.<sup>3</sup> Thus, false representations that the article was pure and unadulterated,<sup>4</sup> or free from harmful substances,<sup>5</sup> or that cigars were made of Havana tobacco,<sup>6</sup> have all been held fatal. Whether or not there is a substantial misrepresentation is, of course, a question of fact in each case.<sup>7</sup>

*United States*. — *Holzappel's Compositions Co. v. Rahtjen's American Composition Co.*, 183 U. S. 1; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218; *Blackwell v. Dibrell*, 3 Hughes (U. S.) 151; *Heller, etc., Co. v. Shaver*, 102 Fed. Rep. 882; *Alaska Packers' Assoc. v. Alaska Imp. Co.*, 60 Fed. Rep. 103; *Chattanooga Medicine Co. v. Thedford*, 58 Fed. Rep. 347; *Schumacher v. Schwenke*, 36 Pat. Off. Gaz. 457.

*California*. — *Joseph v. Macowsky*, 96 Cal. 518.

*Colorado*. — *Schradskey v. Appel Clothing Co.*, 10 Colo. App. 195.

*Maryland*. — *Robertson v. Berry*, 50 Md. 591, 33 Am. Rep. 328.

*Massachusetts*. — *Hoxie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149; *Connell v. Reed*, 128 Mass. 477, 35 Am. Rep. 397.

*New York*. — *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24; *Smith v. Woodruff*, 48 Barb. (N. Y.) 438; *Hobbs v. Francois*, (N. Y. Super. Ct. Spec. T.) 19 How. Pr. (N. Y.) 567; *Fetridge v. Wells*, (Super. Ct. Spec. T.) 13 How. Pr. (N. Y.) 385; *Koehler v. Sanders*, 48 Hun (N. Y.) 48, *affirmed* 122 N. Y. 65; *Dale v. Smithson*, (C. Pl. Gen. T.) 12 Abb. Pr. (N. Y.) 237; *Falk v. American West Indies Trading Co.*, 71 N. Y. App. Div. 320; *Fleischmann v. Fleischmann*, 7 N. Y. App. Div. 280.

*Ohio*. — *Brundred v. Rice*, 49 Ohio St. 640, 34 Am. St. Rep. 589; *Piso Co. v. Voight*, 6 Ohio Dec. 479, 4 Ohio N. P. 347.

*Pennsylvania*. — *Palmer v. Harris*, 60 Pa. St. 156, 100 Am. Dec. 557; *McNair v. Cleave*, 10 Phila. (Pa.) 155, 31 Leg. Int. (Pa.) 212.

*Tennessee*. — *C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84.

1. *Hobbs v. Francois*, (N. Y. Super. Ct. Spec. T.) 19 How. Pr. (N. Y.) 567.

2. *What Misrepresentations Fatal*. — *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523; *Solis Cigar Co. v. Pozo*, 16 Colo. 388, 25 Am. St. Rep. 279. See also *infra*, this section, *When Misrepresentation Not Fatal*.

*Masonic Symbols*. — As to the validity of the Freemasons' square and compasses as a trademark in the *United States*, see *In re Tolle*, 2 Pat. Off. Gaz. 415, and *In re Thomas*, 14 Pat. Off. Gaz. 821. In the former it was held that such a symbol had acquired a well-known special significance and its use would be deceptive. Thacher, Acting Com'r, said: "There can be no doubt that this device, so commonly worn and employed by Masons, has an established mystic significance, universally recognized as existing; whether comprehended by

all or not, is not material to this issue. \* \* \* It will be universally understood, or misunderstood, as having a Masonic significance, and therefore as a trademark must constantly work deception." In the latter case this view is departed from, and it is held that the Masons have no monopoly in their symbols.

*Application of the Trademark to Other Goods* than those to which it may be properly applied is such a misrepresentation as will defeat the right to an injunction. *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24. See also *Krauss v. Jos. R. Peebles' Sons Co.*, 58 Fed. Rep. 585; *Prince's Metallic Paint Co. v. Prince Mfg. Co.*, (C. C. A.) 57 Fed. Rep. 938.

3. *Misrepresentations as to Ingredients Fatal*. — *Cox's Manual of Trade-Mark Cases* 232.

*England*. — *Estcourt v. Estcourt Hop Essence Co.*, L. R. 10 Ch. 276; *Pidding v. How*, 8 Sim. 477; *Perry v. Truefitt*, 6 Brev. 66.

*United States*. — *Clotworthy v. Schepp*, 42 Fed. Rep. 62; *Ginter v. Kinney Tobacco Co.*, 12 Fed. Rep. 782; *In re Dole*, 12 Pat. Off. Gaz. 939; *Re American Sardine Co.*, 3 Pat. Off. Gaz. 495. But see *Centaur Co. v. Robinson*, 91 Fed. Rep. 889.

*Colorado*. — *Solis Cigar Co. v. Pozo*, 16 Colo. 388, 25 Am. St. Rep. 279.

*Kentucky*. — *Laird v. Wilder*, 9 Bush (Ky.) 131, 15 Am. Rep. 707.

*New York*. — *Wolfe v. Burke*, 56 N. Y. 115; *Dale v. Smithson*, (C. Pl. Gen. T.) 12 Abb. Pr. (N. Y.) 237; *Fetridge v. Wells*, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 144; *Bloss v. Bloomer*, 23 Barb. (N. Y.) 604.

*Pennsylvania*. — *Phalon v. Wright*, 5 Phila. (Pa.) 464, 21 Leg. Int. (Pa.) 116.

4. *Purity*. — *Krauss v. Jos. R. Peebles' Sons Co.*, 58 Fed. Rep. 585.

5. *Harmlessness*. — *Laird v. Wilder*, 9 Bush (Ky.) 131, 15 Am. Rep. 707.

6. *Havana Tobacco*. — *Hilson Co. v. Foster*, 80 Fed. Rep. 896; *Solis Cigar Co. v. Pozo*, 16 Colo. 388, 25 Am. St. Rep. 279. Compare *Feder v. Brundo*, 8 Ohio Dec. 179, 5 Ohio N. P. 275.

7. *Falsity of Representation a Question of Fact*. — *Hilson Co. v. Foster*, 80 Fed. Rep. 896; *Carlsbad v. Kutnow*, (C. C. A.) 71 Fed. Rep. 167; *Cleveland Stone Co. v. Wallace*, 52 Fed. Rep. 431.

*"Syrup of Figs" Case*. — Protection was refused to the name "Syrup of Figs" as applied to a laxative preparation, upon the ground of misrepresentation, fig juice being an unimportant element in the composition. *Worden v. California Fig Syrup Co.*, 187 U. S. 516 [*reversing* 102 Fed. Rep. 334, 42 C. C. A. 383,



(b) **As to Cures.** — The cases are very diverse upon this branch of the subject. If a remedy is advertised and sold as a cure for a disease, and it can be shown that it could by no possibility produce any beneficial result in the treatment of the particular disease, the trademarks for such an article would probably be refused protection. But many excellent proprietary remedies are advertised and sold as useful in the treatment of a large number of ailments to which the remedy is in fact more or less applicable, and often more is claimed for the preparation than it will actually accomplish. In such cases, some judges have taken the high ground that it is beneath the dignity of a court of equity to occupy itself in the consideration of cases of this character.<sup>1</sup> Some judges, on the other hand, recognizing the fact that the proprietary medicine business is a large and reputable business, conducted to a great extent by reputable men, who sell articles which, while they have not the power to do all that may be claimed for them, are still good and useful remedies, and will in many cases render valuable assistance to those who are too poor or too careless to employ a physician, have not hesitated to protect the trademarks for these remedies. And this seems to be the better view. Unless some direct false statement can be proven to have been made, such as a claim of an ingredient which is not contained in the article, or that it is harmless when in fact it is harmful, or that it will cure a disorder to which it is not at all applicable, the trademarks of a proprietary medicine will be sustained, and such statements as are merely exaggerations, or statements that the remedy will cure a number of diseases without stating the stage at which the cure may be effected, or the length of time the treatment should be continued, or any of the essential facts which would be necessary to enable a physician to say that the claims for the compound are false, will be disregarded.<sup>2</sup>

(c) **As to Origin or Place of Manufacture.** — A false statement as to the origin of the article, or as to the place of manufacture, is such deceit as will disentitle the plaintiff to relief against infringement.<sup>3</sup>

(d) **As to Maker — Assignees.** — The name of the maker of an article has

which *affirmed* 95 Fed. Rep. 132]; *California Fig Syrup Co. v. Stearns*, (C. C. A.) 73 Fed. Rep. 812, *affirming* 67 Fed. Rep. 1008; *California Fig Syrup Co. v. Putnam*, 69 Fed. Rep. 740, 33 U. S. App. 283, *affirming* 66 Fed. Rep. 750.

**Contra.** — *California Fig-Syrup Co. v. Worden*, 86 Fed. Rep. 212; *California Fig Syrup Co. v. Improved Fig Syrup Co.*, 51 Fed. Rep. 296.

1. **Relief Refused.** — *Cox's Manual of Trademark Cases*, 90, 144, 133; *Heath v. Wright*, 3 Wall. Jr. (C. C.) 141; *Kohler Mfg. Co. v. Beeshore*, (C. C. A.) 59 Fed. Rep. 572; *Wolfe v. Burke*, 56 N. Y. 115; *Smith v. Woodruff*, 48 Barb. (N. Y.) 438; *Fetridge v. Wells*, (Super. Ct. Spec. T.) 13 How. Pr. (N. Y.) 385; *Fowle v. Spear*, 4 Pa. L. J. Rep. 145, 7 Pa. L. J. 176; *C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84.

2. **Relief Granted.** — *Cox's Manual of Trademark Cases*, 180; *Holloway v. Holloway*, 13 Beav. 209; *McLean v. Fleming*, 96 U. S. 245; *Filkins v. Blackman*, 13 Blatchf. (U. S.) 340; *Samuel v. Hostetter Co.*, (C. C. A.) 118 Fed. Rep. 257; *California Fig-Syrup Co. v. Worden*, 95 Fed. Rep. 132; *Houchens v. Houchens*, 95 Md. 37; *Comstock v. White*, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 421; *Fetridge v. Merchant*, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 156.

The fact that the subject-matter is a pro-

prietary medicine will not disentitle a plaintiff to relief. *Ellis v. Zeilin*, 42 Ga. 91.

3. **Falsity as to Origin or Place of Manufacture Fatal — England.** — *Bischoff v. Toler*, 65 L. J. M. C. 1, 15 Reports 607, 73 L. T. N. S. 402.

**United States.** — *Manhattan Medicine Co. v. Wood*, 108 U. S. 218; *Allan B. Wrisley Co. v. Iowa Soap Co.*, 104 Fed. Rep. 548; *Raymond v. Royal Baking Powder Co.*, 85 Fed. Rep. 231, *affirming* 70 Fed. Rep. 376; *American Cereal Co. v. Eli Pettijohn Cereal Co.*, 72 Fed. Rep. 903; *Royal Baking Powder Co. v. Raymond*, 70 Fed. Rep. 376; *Prince's Metallic Paint Co. v. Prince Mfg. Co.*, (C. C. A.) 57 Fed. Rep. 938; *Ex p. Farnum*, 18 Pat. Off. Gaz. 412. But see *Clark Thread Co. v. Armitage*, (C. C. A.) 74 Fed. Rep. 936, *affirming* 67 Fed. Rep. 896.

**California.** — *Millbrae Co. v. Taylor*, (Cal. 1894) 37 Pac. Rep. 235; *Joseph v. Macowsky*, 96 Cal. 518.

**Georgia.** — *Coleman, etc., Co. v. Dannenberg Co.*, 103 Ga. 784, 68 Am. St. Rep. 143.

**Maryland.** — *Kenny v. Gillet*, 70 Md. 574; *Siebert v. Abbott*, 61 Md. 276, 48 Am. Rep. 101. **Massachusetts.** — *Connell v. Reed*, 128 Mass. 477, 35 Am. Rep. 397.

**New York.** — *Dale v. Smithson*, (C. Pl. Gen. T.) 12 Abb. Pr. (N. Y.) 237; *Hobbs v. Francis*, (N. Y. Super. Ct. Spec. T.) 19 How. Pr. (N. Y.) 567.

**Pennsylvania.** — *Palmer v. Harris*, 60 Pa. St. 156, 100 Am. Dec. 557.

always been considered the best guaranty of genuineness; hence it is that the use of a name of high reputation, upon goods not made by the person whose name they bear, is an injury to the person whose name is used, and also a deception of the public, who buy the goods under the belief that they are getting the goods of the man whose name is used. Accordingly a false representation in this regard is a bar to relief.<sup>1</sup> This case most often happens where a business formerly carried on by one man is purchased and continued by others under the name of the former proprietor, without making any change in the name or style of the concern. In some cases this has been held sufficient to forfeit a right of action, upon the ground that a trademark necessarily points to the original adopter, and therefore cannot be used by others without deception unless coupled with a statement that they are assignees or purchasers.<sup>2</sup> But in other cases this objection has been disregarded and the assignee protected in the use of the trademark or trade name.<sup>3</sup> A general rule deducible from the authorities is, that where the trademark or name under which the goods are sold does not contain any direct false statement, relief will not be refused, if purchasers of the goods could reasonably understand that the goods bearing the trademark or trade name are of a certain standard kind or quality, or are made in a certain manner, or after a particular formula, by persons who are carrying on the same business formerly carried on by the person whose name is in the trademark, and it seems to be established that if the plaintiff is really carrying on the business of the original adopter of the mark, so that the original meaning of the mark has been preserved, and the public are not misled, his rights will be sustained, notwithstanding the fact that he does not designate himself an assignee or purchaser of the original proprietor.<sup>4</sup> An assignee will not, of course, be protected in

**1. Falsity as to Maker Fatal.**—*Manhattan Medicine Co. v. Wood*, 108 U. S. 218; *Raymond v. Royal Baking Powder Co.*, (C. C. A.) 85 Fed. Rep. 231, *affirming* 70 Fed. Rep. 376; *Krauss v. Jos. R. Peebles Sons Co.*, 58 Fed. Rep. 585; *Chattanooga Medicine Co. v. Thedford*, 58 Fed. Rep. 347; *Societe Anonyme, etc., v. Western Distilling Co.*, 43 Fed. Rep. 416; *Joseph v. Macowsky*, 96 Cal. 518. See *Perry v. Truefit*, 6 Beav. 66.

In *Lichtenstein v. Goldsmith*, 37 Fed. Rep. 359, *Colt, J.*, said: "Again, it is said that the complainants deceive the public in that they allow the boxes to be labeled with the names of dealers to whom the cigars are sold, or for whom they are made. But this is shown to be a custom in the cigar trade, and I do not think it results in any deception or false representation. All these cigars are in fact made at the Elk factory, and they are so stamped, and when the public buy them they are purchasing a genuine Elk cigar made by these complainants; and I do not see that the additional label put on the box, in accordance with a custom of the trade, is in any just sense such a false representation as should invalidate the trademark." See also *Samuel v. Berger*, (Supm. Ct. Spec. T.) 4 Abn. Pr. (N. Y.) 88.

In *Meriden Britannia Co. v. Parker*, 39 Conn. 450, 12 Am. Rep. 401, *Rogers Bros.*, having acquired a reputation for the manufacture of plated spoons and forks, entered the employ of the complainants, who then marked their spoons and forks "1847, Rogers Bros. A 1." Suit was brought to restrain imitation. The defense was misrepresentation as to manufacturer. *Carpenter, J.*, said: "All that the public or the trade cared to know was that the

goods were the production of their (*Rogers Bros.*) skill and experience. That fact, as it seems to us, clearly appears. The further fact that the petitioners furnished capital and machinery, employed and paid laborers, and sold the goods, is entitled to but little weight so far as this question is concerned; although it shows that, in another sense, the petitioners were the manufacturers of the goods. We are satisfied that there is no such misrepresentation as the cases contemplate which hold that a trademark which states a falsehood is not entitled to protection."

**2. Relief Refused to Assignee.**—*Stachelberg v. Ponce*, 23 Fed. Rep. 430; *Sherwood v. Andrews*, 5 Am. L. Reg. N. S. 588; *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1. See *Pillsbury v. Pillsbury-Washburn Flour Mills Co.*, (C. C. A.) 64 Fed. Rep. 841; *Symonds v. Jones*, 82 Me. 302, 17 Am. St. Rep. 485; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218.

**3. Relief Granted to Assignee.**—*Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137; *Edelsten v. Vick*, 11 Har 78, 23 Eng. L. & Eq. 51; *Kidd v. Johnson*, 100 U. S. 617; *Clark Thread Co. v. Armitage*, (C. C. A.) 74 Fed. Rep. 936, *affirming* 67 Fed. Rep. 896; *Royal Baking Powder Co. v. Raymond*, 70 Fed. Rep. 376; *Feder v. Benkert*, (C. C. A.) 70 Fed. Rep. 613; *Jennings v. Johnson*, 37 Fed. Rep. 364, *distinguishing* *Manhattan Medicine Co. v. Wood*, 108 U. S. 218; *Hoxie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149; *Fulton v. Sellers*, 4 Brews. (Pa.) 42; *Joseph Dixon Crucible Co. v. Guggenheim*, 2 Brews. (Pa.) 321; *Carmichel v. Latimer*, 11 R. I. 395, 23 Am. Rep. 481.

**4. General Rule as to Assignees.**—*Kidd v.*

the use of a trademark personal in its nature,<sup>1</sup> and therefore not assignable.<sup>2</sup>

(e) **As to Corporate Character.** — A misrepresentation as to corporate character may be sufficient to induce the court to deny relief.<sup>3</sup> A partnership can have no property in a trade name which imports that it is a corporation.<sup>4</sup>

(f) **Wrongful Use of Word "Patent."** — The Revised Statutes of the *United States* provide that every person who uses upon anything made, used, or sold by him, for which he has not obtained a patent, the name, or an imitation of the name, of any person who has obtained a patent therefor, without the license or consent of such patentee or his assigns or legal representatives, or who, with intent to imitate the mark or device of the patentee, employs the word "patent" or "patentee," or who, for the purpose of deceiving the public, employs "patent" or any word importing that the article offered for sale is patented when such is not the fact, shall be liable for each offense to a penalty of one hundred dollars.<sup>5</sup> Under this provision, the use of the word "patent" on an article which might be, but is not, the subject of a patent, whether one ever existed upon it or not, in such a manner as to convey the idea that the article was subject to the protection of a patent, would be such a false statement as would disentitle a manufacturer to relief in equity.<sup>6</sup> The word "patent" may be used, however, in such a manner as not to convey the meaning that the article is subject to the control of a patent, but only that the design is that of a certain patent or patentee, the patent for which may have expired.<sup>7</sup> The *English* courts have been less rigid on this subject than those of the *United States*, and in many cases the use of the word "patent" after the expiration of a patent on the product of the same manufacturer or factory, has been sustained by them. But a clear misrep-

Johnson, 100 U. S. 617; *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440; *Bauer v. La Societe*, etc., (C. C. A.) 120 Fed. Rep. 74; *Societe Anonyme, etc., v. Western Distilling Co.*, 43 Fed. Rep. 416; *Hoxie v. Chaney*, 143 Mass. 502, 58 Am. Rep. 149; *Drake Medicine Co. v. Glessner*, 68 Ohio St. 337. See also cases cited in the last preceding note.

1. **Personal Trademarks.** — *Alaska Packers' Assoc. v. Alaska Imp. Co.*, 60 Fed. Rep. 103; *Messer v. The Fadettes*, 168 Mass. 140, 60 Am. St. Rep. 371; *Hoxie v. Chapey*, 143 Mass. 502, 58 Am. Rep. 149; *Skinner v. Oakes*, 10 Mo. App. 45; *Helmhold v. Henry T. Helmhold Mfg. Co.*, (Supm. Ct.) 53 How. Pr. (N. Y.) 453; *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1. See *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440.

2. See *infra*, this title, *Assignment, Transfer, and License*.

3. **Wrongful Assumption of Corporate Name.** — *Block v. Standard Distilling, etc., Co.*, 95 Fed. Rep. 978; *Koehler v. Sanders*, 48 Hun (N. Y.) 48, *affirmed* 122 N. Y. 65; *McNair v. Cleave*, 10 Phila. (Pa.) 155, 31 Leg. Int. (Pa.) 212. See *Coleman, etc., Co. v. Dannenberg Co.*, 103 Ga. 784, 68 Am. St. Rep. 143.

4. *Clark v. Aetna Iron Works*, 44 Ill. App. 510.

5. **Penalty for Wrongful Use of Word "Patent."** — U. S. Rev. Stat., § 4901. For a full discussion of this subject, see title PATENTS, vol. 22, p. 260.

6. **Wrongful Use of Word "Patent" Fatal.** — *Ford v. Foster*, L. R. 7 Ch. 611; *Holzappel's Compositions Co. v. Rahtjen's American Composition Co.*, 183 U. S. 1, *reversing* 101 Fed. Rep. 257; *Preservative Mfg. Co. v. Heller Chemical Co.*, 118 Fed. Rep. 103; *Consolidated*

*Fruit Jar Co. v. Dorflinger*, (Pa. 1874) 2 Am. L. T. Rep. N. S. 511; *Cnapman v. Shepard*, 39 Conn. 413; *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946, 39 Am. Rep. 286; *Stirling Silk Mfg. Co. v. Sterling Silk Co.*, 59 N. J. Eq. 394; *Lauferty v. Wheeler*, (C. Pl. Spec. 1.) 63 How. Pr. (N. Y.) 488, 11<sup>th</sup> Abb. N. Cas. (N. Y.) 220; *Fleischmann v. Fleischmann*, 7 N. Y. App. Div. 280. See *In re Richardson*, 3 Pat. Off. Gaz. 120.

**A False Statement that a Label Is Registered as a trademark bars relief.** *Brown v. Doscher*, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 900.

But the mere use of the word "trademark" does not imply that it is a registered trademark. *Sen Sen Co. v. Britten*, (1899) 1 Ch. 692, 68 L. J. Ch. 250, 80 L. T. N. S. 278.

The use of the words "registered trademark" after application for registry, but before actual registry, is not fatal. *Read v. Richardson*, 45 L. T. N. S. 54.

7. **"Patent" Used in Innocent Sense.** — *Ransome v. Graham*, 51 L. J. Ch. 897; *Cheavin v. Walker*, 5 Ch. D. 850; *Solis Cigar Co. v. Pozo*, 16 Colo. 388, 25 Am. St. Rep. 279.

**"Patented" instead of "Registered."** — The erroneous use of the word "patented" instead of "registered," applying to the trademark and not to the manufactured article, there being no fraudulent intention, will not bar relief. *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946, 39 Am. Rep. 286.

**"Registered" instead of "Copyrighted."** — The erroneous use of the word "registered" in connection with a trademark, instead of the word "copyrighted," has been held not fatal where the public could not have been deceived. *C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84.



sensation that the article is "patented" will bar relief.<sup>1</sup> Where the deceptive word "patented" did not appear in the trademark itself, but only in collateral circulars and advertisements, relief was granted in one case,<sup>2</sup> but denied in another.<sup>3</sup>

(g) **Infringement by Plaintiff.** — Unlawful acts on the part of the plaintiff, such as the imitation by him of the trademark or trade name of another, will, as a rule, disentitle him to relief and protection as against a rival.<sup>4</sup>

(3) **When Misrepresentation Not Fatal.** — Innocent misrepresentations, made without any design to mislead, do not disentitle the plaintiff to relief.<sup>5</sup> Immaterial or trivial inaccuracies of statement or mere "trade talk" will not bar relief;<sup>6</sup> minute accuracy is not required.<sup>7</sup> Although, by a strict construction, a meaning might be given to the words used which would be false, yet where there was no motive or intent to deceive, and the likelihood of deception is very remote, relief will be afforded in what are otherwise proper cases.<sup>8</sup> Collateral fraud or misrepresentation in regard to articles not involved

1. **English Rule.** — *Marshall v. Ross*, L. R. 8 Eq. 651; *Ransome v. Graham*, 51 L. J. Ch. 897; *Cheavin v. Walker*, 5 Ch. D. 850; *Morgan v. M'Adam*, 36 L. J. Ch. 228; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523; *Flavel v. Harrison*, 10 Hare 467; *Edelsten v. Vick*, 11 Hare 78; *Cochrane v. Macnish*, (1896) A. C. 225.

In *Sykes v. Sykes*, 3 B. & C. 541, 10 E. C. L. 176, the plaintiffs, manufacturers of shot-belts and powder-flasks, obtained a patent for their manufacture, which was subsequently judicially declared invalid. They continued the use of the words "Sykes Patent" as a trademark, and sued the defendants for imitation. The court, by Abbott, C. J., decided in their favor, the use of the word "patent" apparently not entering into consideration in the decision.

2. **Collateral Misrepresentations in Advertisements, etc.** — *Ford v. Foster*, L. R. 7 Ch. 611.

3. *Preservalline Mfg. Co. v. Heller Chemical Co.*, 118 Fed. Rep. 103, upon the ground that it could not be determined to what extent the value of the business sought to be protected was due to the misrepresentation. Compare *C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84.

4. **Infringement by Plaintiff Bars Relief.** — *Parlett v. Guggenheimer*, 67 Md. 542, 1 Am. St. Rep. 416; *Van Horn v. Coogan*, 52 N. J. Eq. 380; *Schumacher v. Schwenke*, 36 Pat. Off. Gaz. 457, Price & S. T. M. Cas. 1098. Compare *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24.

5. **Innocent Misrepresentations.** — *Cochrane v. Macnish*, (1896) A. C. 225; *C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84.

The use to a limited extent of the name of a firm to which the plaintiff believed itself to have succeeded will not bar relief. *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 896, affirmed (C. C. A.) 74 Fed. Rep. 936.

6. **Immaterial and Trivial Inaccuracies.** — *Tarrant v. Hoff*, (C. C. A.) 76 Fed. Rep. 959; *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 896, affirmed (C. C. A.) 74 Fed. Rep. 936; *William J. Moxley Co. v. Braun, etc.*, Co., 93 Ill. App. 183. See also *supra*, this section, *Particular Misrepresentations — As to Cures*.

Extravagant claims of the virtue of a medicine will not disentitle the plaintiff to relief.

*Comstock v. White*, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 421.

False assumption of the title "Professor" and extravagant claims of cures were held insufficient to disentitle the plaintiff to relief, in *Holloway v. Holloway*, 13 Beav. 209.

7. *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 896, affirmed (C. C. A.) 74 Fed. Rep. 936.

Erroneous statements which are immediately corrected by correct statements in the same connection will not bar relief against unfair competition. *Centaur Co. v. Robinson*, 91 Fed. Rep. 889; *Conrad v. Joseph Uhrig Brewing Co.*, 8 Mo. App. 277; *Ransom v. Ball*, 4 Silv. Sup. (N. Y.) 217.

8. **Deception Improbable.** — *Read v. Richardson*, 45 L. T. N. S. 54; *Societe Anonyme, etc., v. Western Distilling Co.*, 43 Fed. Rep. 416; *Conrad v. Joseph Uhrig Brewing Co.*, 8 Mo. App. 277; *Hennessy v. Wheeler*, 69 N. Y. 271, 25 Am. Rep. 188; *Ransom v. Ball*, 4 Silv. Sup. (N. Y.) 217, 54 Hun (N. Y.) 635; *Buckland v. Rice*, 40 Ohio St. 526, Price & S. T. M. Cas. 864. See also *supra*, this section, *Particular Misrepresentations — As to Cures*.

The use by the plaintiff on two classes of goods of labels which might be mistaken for each other, but the statements on both of which were true, is no defense. *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 896, affirmed (C. C. A.) 74 Fed. Rep. 936.

False statements as to editions are insufficient to disentitle the plaintiff to relief when they are justified by custom of trade. *Metzler v. Wood*, 8 Ch. D. 608.

In *Chappell v. Sheard*, 2 Kay & J. 117, a false suggestion of authorship was held insufficient, although the words used were actually true. See also *Chappell v. Davidson*, 2 Kay & J. 123.

In *Hogg v. Kirby*, 8 Ves. Jr. 215, in reference to "The Wonderful Magazine, by William Granger," a nominal author, the Lord Chancellor said: "I have considerable difficulty as to the false colors under which the original publication appears. Though this is very usual, I cannot represent it to my mind otherwise than as something excessively like a fraud on the public. But it will be better to leave that as an ingredient in the action for damages." An injunction was granted.

in the suit is no defense.<sup>1</sup> There is a class of cases in which there exists a seeming misrepresentation, but which has nevertheless received the protection of the courts. They are cases in which the name of an old firm is used by its successors in business, although no one of the names of the original founders of the business is connected with it; cases also in which a business is conducted under a fictitious name, where there is no claim to corporate existence. These cases have rested upon the ancient custom of merchants, which has existed from a very early period, of perpetuating the style of business houses of high reputation. In some states this matter is recognized by statute.<sup>2</sup> Cases sometimes arise in which a trademark owner, who has been guilty of misrepresentation, discovers the weakness of his position and endeavors to overcome the evil by erasing from his labels and advertisements all false statements, preparatory to bringing suit. It is a doubtful question how far this can be done with success. In one case it was allowed where done before suit was brought;<sup>3</sup> but in another relief was denied where a false statement was not altered until after suit was instituted;<sup>4</sup> while in a third case it was held that the property rights sought to be protected had been built up through the instrumentality of a long course of falsehood and misstatement, to which the property owed whatever value it had, and although the falsehood had been stopped before suit was brought, still the property could not be protected because tainted with fraud.<sup>5</sup>

**2. Particular Words, Names, Marks, or Symbols** — *a. GENERAL RULE.* — As a general rule, any name, mark, symbol, or device which is capable, when known in the market, of distinguishing one person's goods from those of another, and which other persons cannot use with equal truth as applied to their own goods, may be appropriated as a trademark.<sup>6</sup> But no sign, symbol, or form

**1. Collateral Misrepresentations.**—*Ford v. Foster*, L. R. 7 Ch. 611; *Heller, etc., Co. v. Shaver*, 102 Fed. Rep. 882. See *Baker v. Baker*, (C. C. A.) 115 Fed. Rep. 297; *Hennessy v. Wheeler*, 69 N. Y. 271, 25 Am. Rep. 188.

Misrepresentations as to the plaintiff, made after the institution of a suit, are collateral merely, and will not debar him from protection. *Siebert v. Findlater*, 7 Ch. D. 801, citing *Ford v. Foster*, L. R. 7 Ch. 611, as decisive on the point.

False statements in advertisements, not used upon or in direct connection with the sale of an article, but in newspapers, were considered insufficient to disentitle the plaintiff to relief, in *Curtis v. Bryan*, 2 Daly (N. Y.) 312, 36 How. Pr. (N. Y.) 33.

A single misleading circular, issued long after the establishment of the business and eight years before bringing suit, is no defense to a suit for infringement. *C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84.

**2. Trade Names Used by Successors.**—*Edelsten v. Vick*, 11 Hare 78, 23 Eng. L. & Eq. 51; *Leather Cloth Co. v. American Leather Cloth Co.*, 4 DeG. J. & S. 137; *Oakes v. Tousmierre*, 4 Woods (U. S.) 547; *Rogers v. Taintor*, 97 Mass. 291; *Bowman v. Floyd*, 3 Allen (Mass.) 76, 80 Am. Dec. 55. See also titles NAME, vol. 21, p. 305, and PARTNERSHIP, vol. 22, p. 2.

**Doing Business under Fictitious Names** will not disentitle to relief except where a statute exists prohibiting it. *Dale v. Smithson*, (C. Pl. Gen. T.) 12 Abb. Pr. (N. Y.) 237.

**3. Subsequent Purging of Falsehood.**—*Symonds v. Jones*, 82 Me. 302, 17 Am. St. Rep. 485, wherein the court said: "Of course they can-

not have any damages or accounting for things done by the respondent while they were themselves offending, but if they are now themselves doing equity they may ask the court to require the respondent to do equity also."

In *Baker v. Baker*, (C. C. A.) 115 Fed. Rep. 297, an infringer who had been enjoined and compelled to change his labels was held entitled to protection against a subsequent infringer upon his rights.

**4. Alaska Packers' Assoc. v. Alaska Imp. Co.**, 60 Fed. Rep. 103.

**5. Seabury v. Grosvenor**, 14 Blatchf. (U. S.) 262.

**6. What May Be Trademark** — *General Rule* — *United States*.—*Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51; *Shaw Stocking Co. v. Mack*, 12 Fed. Rep. 707. See *J. & P. Baltz Brewing Co. v. Kaiserbrauerei*, (C. C. A.) 74 Fed. Rep. 222.

*Iowa*.—*Shaver v. Shaver*, 54 Iowa 208, 37 n. Rep. 194.

*Louisiana*.—*Handy v. Commander*, 49 La. Ann. 1119.

*New York*.—*Popham v. Cole*, 66 N. Y. 69, 23 Am. Rep. 22; *Potter v. McPherson*, 21 Hun (N. Y.) 559; *Godillot v. Hazard*, 44 N. Y. Super. Ct. 427; *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1.

*Rhode Island*.—*Barrows v. Knight*, 6 R. I. 434, 78 Am. Dec. 452.

A name or mark which would practically confer a monopoly in dealing in a certain class of articles cannot be appropriated as a trademark. *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. Rep. 651.

of words can be appropriated as a valid trademark which, from the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose.<sup>1</sup> Such words, which may not be monopolized as technical trademarks, may by use acquire a secondary meaning, as designating the goods of a particular person, which will entitle him to protection against their use by another upon the ground of unfair competition.<sup>2</sup> The use of descriptive and geographical terms furnishes familiar illustrations of this principle.<sup>3</sup>

**b. ARBITRARY OR FANCIFUL WORDS OR PHRASES.**—Words or phrases which are purely arbitrary or fanciful as applied to the goods in question may constitute a valid technical trademark.<sup>4</sup> Words and phrases of this class are those which do not, by their usual meaning, denote origin, ownership, quality, materials, or grade, but which by mere application and association with a particular class of goods have come to indicate ownership or origin.<sup>5</sup> The word “Star” as applied to shirts and other furnishing goods,<sup>6</sup> “Ideal” as applied to fountain pens,<sup>7</sup> “Pride”<sup>8</sup> or “Elk” as applied to cigars,<sup>9</sup> and other similar words or phrases,<sup>10</sup> are illustrations of this class of

In *Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589, Price & S. T. M. Cas. 438, Rapallo, J., said: “Trademarks are of two kinds. They may consist of pictures or symbols, or a peculiar form and fashion of label, or simply of a word or words, which, in whatever form printed or represented, continue to be the distinguishing mark of the manufacturer who has appropriated it or them, and the name by which his products are known and dealt in.”

**1. What May Not Be Appropriated as Trade Mark.**—*Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 666; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51; *Larrabee v. Lewis*, 67 Ga. 562, 44 Am. Rep. 735; *Cooke, etc., Co. v. Miller*, 169 N. Y. 475; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Babbitt v. Brown*, 68 Hun (N. Y.) 515.

**2. Protection Against Use in Secondary Sense.**—*Draper v. Skerrett*, 116 Fed. Rep. 206; *Hansen v. Siegel-Cooper Co.*, 106 Fed. Rep. 691.

3. See *infra*, this section, *o. Descriptive Words and Marks*, also *g. Geographical Terms*.

**4. Arbitrary or Fanciful Words and Phrases.**—*Hutchinson v. Blumberg*, 51 Fed. Rep. 829; *Frost v. Rindskopf*, 42 Fed. Rep. 408; *Waterman v. Shipman*, 130 N. Y. 301; *Selchow v. Baker*, 93 N. Y. 59, 45 Am. Rep. 169; *Schendel v. Silver*, 63 Hun (N. Y.) 330; *Falk v. American West Indies Trading Co.*, 71 N. Y. App. Div. 320; *Feder v. Brundo*, 8 Ohio Dec. 179, 5 Ohio N. P. 275. See also cases cited more specifically throughout this section.

Arbitrary terms, such as “Tin Tag” or “Wood Tag,” branded upon or given to goods by the manufacturer or seller, to distinguish them, may constitute valid trademarks, but the person so using them would have no right to the exclusive use of tin or wood as a material to designate the goods. *Lorillard v. Pride*, 28 Fed. Rep. 434.

The phrase “What Is It?” as applied to candy, was held not an arbitrary name and not a good trademark. *Oakes v. St. Louis Candy Co.*, 146 Mo. 391.

“*Emollioborum*” was held not a fancy word. *In re Talbot*, 8 Reports 149.

5. See generally the cases cited in this section.

6. “Star” Shirts.—*Hutchinson v. Blumberg*, 51 Fed. Rep. 829.

7. “Ideal” Fountain Pens.—*Waterman v. Shipman*, 130 N. Y. 301, distinguished in *Cooke, etc., Co. v. Miller*, 169 N. Y. 475, wherein it was held that the word “Favorite” as applied to letter files was descriptive and not arbitrary or fanciful.

8. “Pride” Cigars.—*Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589.

9. “Elk” Cigars.—*Lichtenstein v. Goldsmith*, 37 Fed. Rep. 359.

**10. Illustrations of Arbitrary or Fanciful Words or Phrases Sustained as Trademarks.**—“Alderney” as applied to oleomargarine, *Lauferty v. Wheeler*, (C. Pl. Spec. T.) 63 How. Pr. (N. Y.) 488. “Anchor” as applied to wire, *Edelston v. Edelston*, 9 Jur. N. S. 479, 7 L. T. N. S. 768. “Balm of Thousand Flowers,” *Petridge v. Merchant*, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 156; but see *Petridge v. Wells*, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 144. “Cashmere Bouquet” as applied to soap, *Colgate v. Adams*, 88 Fed. Rep. 899. “Charter Oak” as applied to stoves, *Filley v. Fassett*, 44 Mo. 168, 100 Am. Dec. 275. “Cough Cherries” as applied to a confection, *Stoughton v. Woodard*, 39 Fed. Rep. 902. “Epicure” as applied to packed salmon, *George v. Smith*, 52 Fed. Rep. 830. “Eureka” as applied to fertilizers, *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes (U. S.) 115. “Eureka” as applied to shirts, *Ford v. Foster*, L. R. 7 Ch. 611. “Excelsior” as applied to manufactured articles of various kinds, *Braham v. Bustard*, 1 Hem. & M. 447; *Volger v. Force*, 63 N. Y. App. Div. 122; *Shepard v. Stuart*, 13 Phila. (Pa.) 117, 36 Leg. Int. (Pa.) 234. “Home” as applied to sewing machines, *New Home Sewing Mach. Co. v. Bloomingtondale*, 59 Fed. Rep. 284. “Hoosier” as applied to grain drills, *Julian v. Hoosier Drill Co.*, 78 Ind. 408. “Hunyadi” as applied to medicinal waters, *Saxlehner v. Eisner, etc., Co.*, 179 U. S. 19, reversing 91 Fed. Rep. 536, 63 U. S. App. 145. “Kaiser” as applied to beer, *J. & P. Baltz Brewing Co. v. Kaiserbrauerei*, (C. C. A.) 74 Fed. Rep. 222. “Knickerbocker” as applied to shoes, *Burt v. Tucker*, 178 Mass. 493, 86 Am. St. Rep. 499. “La Favorite” as applied to flour, *Menendez v. Holt*, 128 U. S.



trademarks.<sup>1</sup> Descriptive words are the converse of arbitrary or fanciful words. Accordingly, cases where a claim of trademark has been disallowed because the word or phrase claimed was not arbitrary or fanciful have been treated in connection with descriptive words or phrases.<sup>2</sup>

c. NEWLY COINED OR INVENTED WORDS. — Newly coined or invented words may constitute valid technical trademarks.<sup>3</sup> The principle is the same as in the case of arbitrary or fanciful words.<sup>4</sup> The words "Celluloid" as applied to a manufactured product,<sup>5</sup> "Valvoline" as applied to lubricating oils,<sup>6</sup> "Electro-Silicon" as applied to a substance for polishing,<sup>7</sup> "Sapolio" as applied to a scouring soap,<sup>8</sup> "Cuticura" as applied to a toilet soap,<sup>9</sup> "Uneda" as applied to biscuit,<sup>10</sup> are good illustrations of invented or newly coined words sustained as trademarks.<sup>11</sup>

514; *Holt v. Menendez*, 23 Fed. Rep. 869. "Magnetic Balm" as applied to medicine, *Smith v. Sixbury*, 25 Hun (N. Y.) 232. "Nickel" as applied to the goods of a general merchant which are not as a rule sold for a nickel, *Duke v. Cleaver*, 19 Tex. Civ. App. 218. "Nickel In" as applied to cigars, *Schendel v. Silver*, 63 Hun (N. Y.) 330. "Omega" as applied to oil, *Omega Oil Co. v. Weschler*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 441. "Parabola" as applied to needles, *Roberts v. Sheldon*, 8 Biss. (U. S.) 398. "Pittsburg Leader" as applied to cigars, *Zeugschmidt v. Hantman*, 28 Pittsb. Leg. J. N. S. (Pa.) 463. "Queen" as applied to shoes, *Thomas G. Plant Co. v. May Co.*, (C. C. A.) 105 Fed. Rep. 378, *distinguishing* *Beadleston v. Cooke Brew. Co.*, 74 Fed. Rep. 229, wherein it was held, on the facts, that "Imperial" was descriptive of quality and hence not a valid trademark. "Royal" as applied to baking powder, *Raymond v. Royal Baking-Powder Co.*, 85 Fed. Rep. 231, 55 U. S. App. 575, *affirming* 70 Fed. Rep. 376. "Sliced Animals" and "Sliced Birds" as applied to a manufactured product, *Selchow v. Baker*, 93 N. Y. 59, 45 Am. Rep. 169. "Sunlight" as applied to soap, *Lever v. Pasfield*, 88 Fed. Rep. 484. "Swan Down" as applied to complexion powder, *Tetlow v. Tappan*, 85 Fed. Rep. 774. "Syrup of Figs" as applied to a medicine, *Improved Fig Syrup Co. v. California Fig Syrup Co.*, (C. C. A.) 54 Fed. Rep. 175; but see *infra*, this section, o. *Descriptive Words and Marks*. "Tin Tag" or "Wood Tag" may constitute a valid trademark, *Lorillard v. Pride*, 28 Fed. Rep. 434. "Turin," "Sef-ton," "Leopold," or "Liverpool," as applied to cloth, *Hirst v. Denham*, L. R. 14 Eq. 542. "Vienna," as applied to bread, *Fleischmann v. Schuckmann*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 92. "Yankee," as applied to shaving-soap, *Williams v. Adams*, 8 Biss. (U. S.) 452.

1. **Other Illustrations.** — *Lever v. Smith*, 112 Fed. Rep. 998; *Noel v. Ellis*, 89 Fed. Rep. 978; *Adams v. Heisel*, 31 Fed. Rep. 279; *Dr. Dadirrian, etc., Co. v. Hauenstein*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 23; *Falk v. American West Indies Trading Co.*, 71 N. Y. App. Div. 320; *Listman Mill Co. v. William Listman Milling Co.*, 88 Wis. 334, 43 Am. St. Rep. 907. See *Medlar, etc., Shoe Co. v. Delsarte Mfg. Co.*, (N. J. 1900) 46 Atl. Rep. 1089.

2. See *infra*, this section, o. *Descriptive Words and Marks*.

3. **Newly Coined or Invented Words.** — *In re Densham*, (1895) 2 Ch. 176; *Sterling Remedy*

*Co. v. Eureka Chemical, etc., Co.*, (C. C. A.) 80 Fed. Rep. 105; *Selchow v. Baker*, 93 N. Y. 59, 45 Am. Rep. 169. But see *In re Meyerstein*, 43 Ch. D. 604; *In re Talbot*, 8 Reports 149. See generally the cases cited more specifically throughout this section.

**Words Held Not Valid Trademarks Within Rule.** — "Somatose," as applied to a pharmaceutical product made from meats, was held not an invented word. *In re Farbenfabriken*, (1894), 1 Ch. 645, 7 Reports 439. "Emollioborum," as applied to a preparation for softening leather and rendering it waterproof, was held not an invented word. *In re Talbot*, 8 Reports 149. A geographical name turned into an adjective by adding a common suffix is not an invented word. *In re Salt*, (1894) 3 Ch. 166, 8 Reports 682. "Pancreopepsine," being a mere compound of existing words descriptive of the ingredients of a medicine, does not constitute a good trademark. *Searle, etc., Co. v. Warner*, (C. C. A.) 112 Fed. Rep. 676.

4. See the subdivision immediately preceding.

5. **"Celluloid."** — *Celluloid Mfg. Co. v. Read*, 47 Fed. Rep. 712; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94.

6. **"Valvoline."** — *Leonard v. White's Golden Lubricator Co.*, 38 Fed. Rep. 922.

7. **"Electro-Silicon."** — *Electro-Silicon Co. v. Hazard*, 29 Hun (N. Y.) 369; *Electro-Silicon Co. v. Levy*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 469; *Electro-Silicon Co. v. Trask*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 189.

8. **"Sapolio."** — *Enoch Morgan's Sons' Co. v. Schwachhofer*, (Supm. Ct. Spec. T.) 55 How. Pr. (N. Y.) 37.

9. **"Cuticura."** — *Potter Drug, etc., Corp. v. Pasfield Soap Co.*, 106 Fed. Rep. 914, 46 C. C. A. 40.

10. **"Uneda."** — *National Biscuit Co. v. Baker*, 95 Fed. Rep. 135.

*Contra.* — *In re "Uneda" Trade-Mark*, (1901) 1 Ch. 550, 70 L. J. Ch. 318, holding that the mere misspelling of three common words put into one is not an "invented word."

11. **Invented Words Sustained as Trademarks — Illustrations.** — "Bromo-Caffein" as applied to a medicine, *Kesbey v. Brooklyn Chemical Works*, 142 N. Y. 467, 40 Am. St. Rep. 623. "Cocaine" as applied to hair-oil, *Burnett v. Phalon*, 3 Keyes (N. Y.) 594. "Ferro-Phosphorated" as applied to an elixir of Calisaya bark, *Caswell v. Davis*, (C. Pl. Spec. T.) 35 How. Pr. (N. Y.) 76. "Momaja" as applied to a blend of coffees, *American Grocery Co. v. Sloan*, 68 Fed. Rep. 539. "No-To-Bac" as

*d.* FICTITIOUS, HISTORICAL, OR CELEBRATED NAMES. — A trademark may consist of a fictitious or celebrated name, as that of a famous person or thing, or some character or thing of history, fiction, or fancy.<sup>1</sup> Such names thus used are in truth arbitrary or fancy names.<sup>2</sup> Where, however, the name of a historical or celebrated person is also a geographical name, such name is not a good trademark,<sup>3</sup> because, as is seen in another section, geographical names cannot be monopolized by any one as trademarks, though they will receive a measure of protection as trade names, under the doctrine of unfair competition.<sup>4</sup>

*e.* DEVICES, SYMBOLS, OR PICTURES. — Devices or symbols are the most usual forms of trademarks. Any device or symbol may be protected as a trademark which is arbitrary in its character and selection, and does not, by its inherent character, necessarily describe the goods upon which it is employed, nor contain any misrepresentation of fact with reference to the goods, their origin, character, qualities, or contents. Trademarks of this class usually consist of devices or symbols in combination with words or names.<sup>5</sup>

applied to a medicine for the cure of the tobacco habit, *Sterling Remedy Co. v. Eureka Chemical, etc., Co.*, 80 Fed. Rep. 105, 46 U. S. App. 709. "Yusea" as applied to an incandescent gas mantle, *Welsbach Light Co. v. Adam*, 107 Fed. Rep. 463.

**1. Fictitious, Historical, and Celebrated Names** — *Ex p.* Pace, 15 Pat. Off. Gaz. 909 ("Bayard").

**Illustrations of Trademarks Sustained.** — "Roger Williams" as applied to cotton cloth, *Barrows v. Knight*, 6 R. I. 434, 78 Am. Dec. 452. "Bismarck" as applied to paper collars, *Mes-serole v. Tynberg*, (C. P. Spec. T.) 4 Abb. Pr. N. S. (N. Y.) 410, 36 How. Pr. (N. Y.) 14. "Pharaoh's Serpents" as applied to fireworks, *Barnett v. Leuchars*, 13 L. T. N. S. 495, 14 W. R. 166. "Hygeia" as applied to distilled water, etc., *Hygeia Distilled Water Co. v. Hygeia Ice Co.*, 72 Conn. 646; *Hygeia Distilled Water Co. v. Hygeia Ice Co.*, 70 Conn. 516. "Coal Oil Johnny" as applied to soap, *Petrolia Mfg. Co. v. Bell, etc.*, Soap Co., 97 Fed. Rep. 781. "Cyclops" as a trade name for a machine works, *Hainque v. Cyclops Iron Works*, 136 Cal. 351. Other examples are: "Dave Jones" and "Magnolia" as applied to whiskey, *Kidd v. Mills*, 5 Pat. Off. Gaz. 337; "Charter Oak" as applied to stoves, *Filley v. Child*, 16 Blatchf. (U. S.) 376; "Long Jack" as applied to tobacco, *Carroll v. Ertheiler*, Cox Manual T. M. Cas. 669, 21 Alb. L. J. 503. See also *Martha Washington Creamery Buttered Flour Co. v. Martien*, 37 Fed. Rep. 797, 44 Fed. Rep. 473.

**2. Sustained as Arbitrary or Fancy Names.** — *Barrows v. Knight*, 6 R. I. 434, 78 Am. Dec. 452. See generally *supra*, this section, *Arbitrary or Fanciful Words or Phrases*.

**3. Names Both Historical and Geographical.** — *Ex p.* Oliver, 18 Pat. Off. Gaz. 923, wherein "Raleigh," as applied to manufactured tobacco, was refused registration as a trademark.

**4. See *infra*, this section, *Geographical Terms*.**

**5. Devices, Symbols, or Pictures Valid Trade-Marks — England.** — *In re Australian Wine Importers*, 41 Ch. D. 278; *In re James*, 33 Ch. D. 392, reversing 31 Ch. D. 340; *In re Hudson*, 32 Ch. D. 311; *In re Rotherham*, 14 Ch. D. 585; *Harrison v. Taylor*, 11 Jur. N. S. 408,

12 L. T. N. S. 339; *Seixo v. Provezende*, L. R. 1 Ch. 195; *Edelsten v. Edelsten*, 1 DeG. J. & S. 185.

*United States.* — *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51; *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311; *Merriam v. Famous Shoe, etc., Co.*, 47 Fed. Rep. 411; *Lichtenstein v. Goldsmith*, 37 Fed. Rep. 359; *Adams v. Heisel*, 31 Fed. Rep. 279; *Anheuser-Busch Brewing Assoc. v. Clarke*, 26 Fed. Rep. 410; *Shaw Stocking Co. v. Mack*, 12 Fed. Rep. 707; *Ex p.* Straiton, 18 Pat. Off. Gaz. 923; *In re Pratt*, 10 Pat. Off. Gaz. 866.

*Georgia.* — *Foster v. Blood Balm Co.*, 77 Ga. 216.

*New York.* — *Colman v. Crump*, 70 N. Y. 573; *Cook v. Starkweather*, (N. Y. Super. Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 392; *Hege-man v. O'Byrne*, 9 Daly (N. Y.) 264; *Potter v. McPherson*, 21 Hun (N. Y.) 559. See *Enoch Morgan's Sons Co. v. Troxell*, 89 N. Y. 292, 42 Am. Rep. 294.

See *Ruhrstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30.

"The Original Form of Trademark was probably the representation of some animal, or other natural object, or mathematical figure, as the hall mark of the lion or leopard's head, the freemasons' square and compasses, or the government broad arrow. \* \* \* Such marks are still frequently employed, and this clause specially includes them. To this class belong the marks of an anchor, an eagle, a lion, an elephant, a cross, a pyramid, a bell, a hand, a cock, a rising sun, or a triangle. A crest is just as capable of becoming a trademark as any other arbitrary device." *Sebastian on Trade Marks* (2d ed. 1884), p. 37. See *Edelsten v. Edelsten*, 1 DeG. J. & S. 185; *Standish v. Whitwell*, 14 W. R. 512; *Henderson v. Jorss*, *Sebastian's Dig.* 198; *Cartier v. West-head*, *Sebastian's Dig.* 199; *Cartier v. Carlile*, 31 Beav. 292; *Cartier v. May*, *Sebastian's Dig.* 200; *Bass v. Dawber*, 19 L. T. N. S. 626; *Bell v. Bell*, *Sebastian's Dig.* 514; *Allsopp v. Walker*, *Sebastian's Dig.* 545; *Steinthal v. Samson*, *Sebastian's Dig.* 546; *In re Walkden Aerated Waters Co.*, *Sebastian's Dig.* 558; *In re Worthington*, 14 Ch. D. 8; *Morse v. Wor-*

Portraits of celebrities, either alone or in combination with names and other devices, may constitute trademarks.<sup>1</sup> Where one has used devices, symbols, or pictures in his business, but for some reason has not or cannot acquire a technical, exclusive trademark right therein, he is nevertheless entitled to protection against unfair competition, and another person will not be permitted so to use such devices, symbols, or pictures as to pass off his goods as being the goods of the former trader.<sup>2</sup>

*f. NUMERALS.* — Numerals, if employed arbitrarily to indicate ownership or origin, and not grade or quality, will be sustained as valid trademarks;<sup>3</sup> and this is true though by use the number may to some extent have come to indicate a particular grade or quality of goods.<sup>4</sup> If, however, the number was originally adopted and used for the purpose of indicating grade or quality merely, no subsequent acceptance of the mark by the public as an indication of origin or ownership will entitle the number to protection as a trademark.<sup>5</sup>

rell, 10 Phila. (Pa.) 168, 31 Leg. Int. (Pa.) 380.

**Illustrations.** — A label containing a marine picture with a small six-pointed star and the words "Star of Hope," is a valid trademark for a brand of tobacco, *In re Dexter*, (1893) 2 Ch. 262. The device of a star in combination with the word "Star" is a good trademark as applied to underwear, *Hutchinson v. Blumberg*, 51 Fed. Rep. 829. The picture of a book, watch, or shoe has been held not a good trademark for a bookseller, watchmaker, or shoemaker, respectively, because not sufficiently arbitrary, but on the contrary clearly descriptive, *Merriam v. Famous Shoe, etc., Co.*, 47 Fed. Rep. 411; but this seems doubtful, for one picture of a book may differ radically from another picture of a book, and consequently may be distinctive. A picture of a boy suffering from cramps is a good trademark for a medicine designed to cure cramps, *L. H. Harris Drug Co. v. Stucky*, 46 Fed. Rep. 624. The Masonic symbol of a square and compass cannot be a good trademark, since it has acquired a special significance, and its use in any other sense would be deceptive, *In re Thomas*, 14 Pat. Off. Gaz. 821, holding that the Masons have no monopoly in their symbols. A triangle, plain, inclosed by an oval with the words "Bass & Co.'s Pale Ale," forms a valid trademark, *In re Worthington*, 14 Ch. D. 8. The coat of arms of the city of Paris, in combination with other marks, words, or devices, constitutes a good trademark, *Godillot v. Hazard*, 44 N. Y. Super. Ct. 427. An intermixture of colors in the selvage edge is a good trademark for worsted stuffs, *Mitchell v. Henry*, 15 Ch. D. 181. A red cross is a good trademark for absorbent cotton, *Johnson v. Brunor*, 107 Fed. Rep. 466.

**Descriptive Words or Marks.** — See *infra*, this section.

**Collocation or Combination of Words and Symbols.** — See *infra*, this section.

**Effect of Misrepresentation.** — See *supra*, this section.

1. **Portraits.** — *Ex p. Pace*, 15 Pat. Off. Gaz. 909.

2. **Unfair Competition.** — *Knott v. Morgan*, 2 Keen 213; *Lorillard v. Wight*, 15 Fed. Rep. 383.

In *Lorillard v. Wight*, 15 Fed. Rep. 383, it was held that the plaintiff had no exclusive

right to use tin tags upon tobacco, but the defendant was enjoined from using tags of similar color and size upon tobacco sold by him, upon the ground of unfair competition.

3. **Numerals Constitute Valid Trademarks.** — *Shaw Stocking Co. v. Mack*, 12 Fed. Rep. 707; *Ex p. Dawes*, 1 Pat. Off. Gaz. 27; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402, 95 Am. Dec. 270; *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 325, 37 Am. Rep. 362; *India Rubber Co. v. Rubber Comb, etc., Co.*, 45 N. Y. Super. Ct. 258; *Gillott v. Esterbrook*, 48 N. Y. 374, 8 Am. Rep. 553; *Collins v. Reynolds Card Mfg. Co.*, (Supm. Ct. Spec. T.) 7 Abb. N. Cas. (N. Y.) 17; *American Solid Leather Button Co. v. Anthony*, 15 R. I. 338, 2 Am. St. Rep. 898.

The distinction between the English and American cases concerning numerals as trademarks is not very decided. On the whole, the English courts may be said to be more cautious in allowing their use than the American. No case appears to be reported in which they have admitted a numeral standing alone to be a technical trademark, although they have upheld their validity when used in connection with other devices, and have interfered to prevent infringement on the ground of unfair competition. *Ransome v. Bentall*, 3 L. J. Ch. 161.

4. **Numerals Secondarily Indicating Grade or Quality.** — *Ransome v. Graham*, 47 L. T. N. S. 218; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 31 Fed. Rep. 776; *Burton v. Stratton*, 12 Fed. Rep. 696; *India Rubber Co. v. Rubber Comb, etc., Co.*, 45 N. Y. Super. Ct. 258; *American Solid Leather Button Co. v. Anthony*, 15 R. I. 338, 2 Am. St. Rep. 898. See *Gillott v. Esterbrook*, 47 Barb. (N. Y.) 455, 48 N. Y. 374, 8 Am. Rep. 553.

5. **Numerals Primarily Used to Indicate Grade or Quality.** — *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51; *Kinney v. Allen*, 1 Hughes (U. S.) 106; *Vacuum Oil Co. v. Climax Refining Co.*, (C. C. A.) 120 Fed. Rep. 254; *Smith, etc., Mfg. Co. v. Smith*, 89 Fed. Rep. 486; *Deering Harvester Co. v. Whitman, etc., Mfg. Co.*, 86 Fed. Rep. 764, *affirmed* (C. C. A.) 91 Fed. Rep. 376; *Humphreys Homeopathic Medicine Co. v. Hilton*, 60 Fed. Rep. 756; *Shaw Stocking Co. v. Mack*, 12 Fed. Rep. 707; *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125; *Avery v. Meikle*, 81 Ky. 73; *Amoskeag Mfg. Co. v. Spear*, 2



Numerals are common property and cannot be exclusively appropriated by one person so as to prevent their ordinary and legitimate use by others,<sup>1</sup> and it is an ordinary and legitimate use to indicate grade or quality by numerals, and all the world may do so.<sup>2</sup> But under the doctrine of unfair competition, although in the particular case the numerals used may not constitute a valid trademark, because used to indicate grade or quality or for some other reason, yet where such numerals by use have come to indicate to the trade origin and ownership, a rival trader will not be permitted so to use them as to pass off his goods as those of his rival, thereby deceiving the public and defrauding the honest trader out of the benefits of his good will and reputation.<sup>3</sup> Numerals in combination with letters or other devices, or printed in a distinctive color or form, constitute a very common form of valid trademark.<sup>4</sup>

g. LETTERS AND INITIALS. — Letters may be sustained as trademarks, upon the same principle and subject to the same conditions as numerals. They are valid trademarks where arbitrarily selected to indicate origin or ownership, but not when used to indicate grade or quality.<sup>5</sup> Letters in com-

Sandf. (N. Y.) 599. See *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537; *Gillott v. Kettle*, 3 Duer (N. Y.) 624.

In *Carver v. Bowker*, British and Foreign Journal of Commerce and Trade Marks 252, Cox Manual of Trade Mark Cases 581, the plaintiff, a shipper of cotton goods, stamped them, among other things, with the numbers "109," "406," "409," etc., respectively. It was held by Little, V. C., that the number "109" was in common use and descriptive of quality, and that the other numbers, although not in common use, could not be exclusively appropriated.

In *American Solid Leather Button Co. v. Anthony*, 15 R. I. 338, the complainant, a manufacturer of buttons and nails, distinguished certain styles which he made by certain numerals arbitrarily chosen. These were held to be valid trademarks. The court, by Stiness, J., said: "A person may have different symbols for different grades of goods, which in the same way will indicate both quality and origin with respect to the goods so marked. A manufacturer may adopt such symbols, not simply to mark a style or quality, but his style and his quality as well. He is entitled to have his style and his quality protected from misrepresentation, and to have the benefit of any favorable reputation they may have gained."

1. **Ordinary and Legitimate Use of Numerals.** — *Shaw Stocking Co. v. Mack*, 12 Fed. Rep. 707.

2. *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125, citing *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599.

3. **Unfair Competition.** — *Ransome v. Bentall*, 3 L. J. Ch. 161; *Dawes v. Davies*, Codd. Dig. 260; *Kinney v. Basch*, (N. Y. 1877) 16 Am. L. Reg. N. S. 596; *Avery v. Meikle*, 81 Ky. 73; *Glen, etc., Mfg. Co. v. Hall*, 6 Lans. (N. Y.) 158, 61 N. Y. 226, 19 Am. Rep. 278. See *Gillott v. Kettle*, 3 Duer (N. Y.) 624.

In *Humphreys Specific Homeopathic Medicine Co. v. Wenz*, 14 Fed. Rep. 250, the plaintiff had for a long period manufactured and sold a series of homeopathic specific medicines, labeled with a series of numbers running from "1" to "35," each number being applied to a medicine for a particular disease or class of diseases. It appeared that the remedies were

frequently purchased by the public by the numbers alone. It was held that the plaintiff could be protected in the use of the serial numbers as applied to "Homeopathic Specifics," and a preliminary injunction was granted.

In *Kinney v. Allen*, 1 Hughes (U. S.) 106, the plaintiff, a manufacturer of cigarettes, placed upon boxes, etc., containing them, the symbol "½," printed in large red characters. The defendant sold other cigarettes with a similarly printed "½" as a trademark. A limited injunction was granted to restrain the defendant from using the symbol in that form, but not the symbol itself, on the ground that the symbol was not absolutely arbitrary, it being originally used to indicate that cigarettes stamped with it were composed of two kinds of tobacco in equal proportions. See also, to same effect as to the same mark, *Kinney v. Basch*, (N. Y. 1877) 16 Am. L. Reg. N. S. 596.

4. **Numerals in Combination with Other Devices.** — *Ransome v. Bentall*, 3 L. J. Ch. 161; *Kinney v. Allen*, 1 Hughes (U. S.) 106; *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 325, 37 Am. Rep. 362; *Gillott v. Esterbrook*, 47 Barb. (N. Y.) 455, 48 N. Y. 374, 8 Am. Rep. 553. See also *infra*, this section, *Letters and Initials; Collocation of Words and Symbols*.

5. **Letters May Constitute Valid Trademark** — *England*. — *Motley v. Downman*, 3 Myl. & C. 1; *Millington v. Fox*, 3 Myl. & C. 338; *Ransome v. Graham*, 47 L. T. N. S. 218.

*Canada*. — *Provident Chemical Works v. Canada Chemical Mfg. Co.*, 4 Ont. L. Rep. 545, 2 Ont. L. Rep. 182.

*United States*. — *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 31 Fed. Rep. 776; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51; *Deering Harvester Co. v. Whitman, etc., Mfg. Co.*, 86 Fed. Rep. 764, *affirmed* (C. C. A.) 91 Fed. Rep. 376; *Stevens Linen Works v. Don*, 121 Fed. Rep. 171; *Vacuum Oil Co. v. Climax Refining Co.*, (C. C. A.) 120 Fed. Rep. 254; *Noel v. Ellis*, 89 Fed. Rep. 978; *Giron v. Gartner*, 47 Fed. Rep. 467; *Shaw Stocking Co. v. Mack*, 12 Fed. Rep. 707.

*Illinois*. — *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125.

*Massachusetts*. — *Frank v. Sleeper*, 150 Mass. 583.

bination with figures or other devices, or printed in a distinctive manner, are a very common form of valid trademark.<sup>1</sup> Letters of the alphabet, however, like numerals, are common property and cannot be exclusively appropriated by any one as a trademark so as to prevent their use in a usual and legitimate way by others,<sup>2</sup> as, for instance, to indicate grade or quality, a purpose for which letters are very commonly used.<sup>3</sup> So rival traders of either the same or different names, but of the same initials, have each an equal right to use their own initials in their business.<sup>4</sup> But this rule is subject to the qualification, under the doctrine of unfair competition, that a person will not be permitted to use even his own initials in such a manner as to deceive the public and defraud a rival trader.<sup>5</sup>

*h. COLOR.* — The mere color of an article, label, wrapper, capsule, or package cannot be exclusively appropriated as a technical trademark, because all colors are *publici juris* and any one may use them.<sup>6</sup> But the use of the same

*New York.* — *Godillot v. Harris*, 81 N. Y. 263; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599.

*Pennsylvania.* — *Ferguson v. Davol Mills*, 2 Brews. (Pa.) 314.

The letters "I X L," as applied to a general merchandise auction store, do not constitute a valid trademark by themselves, having long been in prior use. *Lichtenstein v. Mellis*, 8 Oregon 464, 34 Am. Rep. 592.

Arabic and Turkish letters may constitute valid trademarks. *In re Rotherham*, 14 Ch. D. 585.

**1. Letters in Combination with Other Devices.** — *Moet v. Pickering*, 6 Ch. D. 770, 8 Ch. D. 372; *Bury v. Bedford*, 4 De G. J. & S. 352; *Cartier v. Carlile*, 8 Jur. N. S. 183; *Van Hoboken v. Mohns*, 112 Fed. Rep. 528; *Foster v. Blood Balm Co.*, 77 Ga. 216; *Cook v. Starkweather*, (N. Y. Super. Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 392. See also *infra*, this section, *Collocation of Words and Symbols*.

The letters "B. B. H." surmounted by a crown, the letters being initials of the partnership firm, and applied to iron manufactured, constitute a valid trademark. *Hall v. Barrows*, 4 De G. J. & S. 150. See also *In re Barrows*, 5 Ch. D. 364.

In *Ransome v. Bentall*, 3 L. J. Ch. 161, the combination "H. H. 6," the numeral being used only to denote the size of plowshares, was held a valid trademark.

**2. Ordinary and Legitimate Use of Letters.** — *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51; *Vacuum Oil Co. v. Climax Refining Co.*, (C. C. A.) 120 Fed. Rep. 254; *Shaw Stocking Co. v. Mack*, 12 Fed. Rep. 707.

**3.** *Shaw Stocking Co. v. Mack*, 12 Fed. Rep. 707.

In *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, the complainants used the letters "A. C. A.," applying them to the highest grade of ticking which they manufactured. It was held that the letters denoted quality only and formed no part of a valid trademark. The same principle applies to figures. *Field, J.*, said: "Letters or figures which, by the custom of traders, or the declaration of the manufacturer of the goods to which they are attached, are only used to denote quality, are incapable of exclusive appropriation; but are open to use by any one, like the adjectives of the language." But see opinion of *Clifford, J.*, *dissenting*.

**4.** See *infra*, this section, *Personal Names; Corporate Names*.

**5. Unfair Competition by Use of Letters or Initials.** — *Stevens Linen Works v. Don*, 121 Fed. Rep. 171; *Avery v. Meikle*, 81 Ky. 73; *Provident Chemical Works v. Canada Chemical Mfg. Co.*, 2 Ont. L. Rep. 182.

Where the plaintiff used his name by means of a monogram composed of his initials, a rival trader of different name but the same initials cannot use his initials in a similar monogram. *Godillot v. American Grocery Co.*, 71 Fed. Rep. 873.

**6. Mere Color Not a Valid Trademark** — *United States*. — *Coats v. Merrick Thread Co.*, 149 U. S. 562, *affirming* 36 Fed. Rep. 324; *Lalance, etc., Mfg. Co. v. National Enameling, etc., Co.*, 109 Fed. Rep. 317; *Von Mumm v. Witteman*, (C. C. A.) 91 Fed. Rep. 126, *affirming* 85 Fed. Rep. 966; *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 71 Fed. Rep. 295; *Putnam Nail Co. v. Bennett*, 43 Fed. Rep. 800; *Fleischmann v. Starkey*, 25 Fed. Rep. 127; *Sawyer v. Horn*, 4 Hughes (U. S.) 239; *Mumm v. Kirk*, 40 Fed. Rep. 589; *Ex p. Landreth*, 31 Pat. Off. Gaz. 1441.

*Illinois.* — *Ball v. Siegel*, 116 Ill. 137, 56 Am. Rep. 767.

*Massachusetts.* — *New England Awl, etc., Co. v. Marlborough Awl, etc., Co.*, 168 Mass. 154, 60 Am. St. Rep. 377.

*New York.* — *Fischer v. Blank*, 138 N. Y. 244; *Babbitt v. Brown*, 68 Hun (N. Y.) 515; *Fleischmann v. Newman*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 642; *Faber v. Faber*, 49 Barb. (N. Y.) 357; *Omega Oil Co. v. Weschler*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 441.

*Pennsylvania.* — *Putnam Nail Co. v. Dulaney*, 140 Pa. St. 205, 23 Am. St. Rep. 228.

*Rhode Island.* — *Cady v. Schultz*, 19 R. I. 193, 61 Am. St. Rep. 763.

In *In re Hanson*, 37 Ch. D. 112, *Kay, J.*, said: "It is the plain intention of the act that, where the distinction of the mark depends upon color, that will not do. You may register a mark, which is otherwise distinctive, in color, and that gives you the right to use it in any color you like, but you cannot register a mark of which the only distinction is the use of a color, because practically, under the terms of the act, that would give you a monopoly of all the colors of the rainbow."

color by a rival trader is often strong evidence of an intention to deceive and a likelihood of deception. Color is one of the most marked indicia of a package, label, or dress of an article, and when other elements combine with the color, to make up an imitation of an article of established reputation, the likelihood of deception is great, and the courts are not slow to enjoin the acts of the defendant as constituting unfair competition even if not an infringement of trademark.<sup>1</sup>

i. FORM OR SIZE. — The form or size alone of an article, package, or label can rarely, if ever, be protected as a technical trademark.<sup>2</sup> If the form is

1. **Unfair Competition by Using Color to Deceive** — *England*. — *Croft v. Day*, 7 Beav. 84.

*United States*. — *McLean v. Fleming*, 96 U. S. 255; *Sawyer v. Horn*, 4 Hughes (U. S.) 239; *Bauer v. La Société, etc.*, (C. C. A.) 120 Fed. Rep. 74; *Enoch Morgan's Sons Co. v. Whittier-Coburn Co.*, 118 Fed. Rep. 657; *Keuffel, etc., Co. v. H. S. Crocker Co.*, 118 Fed. Rep. 187; *Sterling Remedy Co. v. Spermine Medical Co.*, 112 Fed. Rep. 1000, 50 C. C. A. 657; *Lalance, etc., Mfg. Co. v. National Enameling, etc., Co.*, 109 Fed. Rep. 317; *Actien-gesellschaft Vereinigte Ultramarine Fabriken v. Amberg*, 102 Fed. Rep. 551; *Frank v. Frank Chickory Co.*, 95 Fed. Rep. 818; *Von Mumm v. Witteman*, (C. C. A.) 91 Fed. Rep. 126; *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 71 Fed. Rep. 295; *Genesee Salt Co. v. Burnap*, 67 Fed. Rep. 534; *Von Mumm v. Frash*, 56 Fed. Rep. 830; *Putnam Nail Co. v. Bennett*, 43 Fed. Rep. 800; *Carbolic Soap Co. v. Thompson*, 25 Fed. Rep. 625; *Lorillard v. Wight*, 15 Fed. Rep. 383; *Frese v. Bachof*, 13 Pat. Off. Gaz. 635. See *Mumm v. Kirk*, 40 Fed. Rep. 589.

*Illinois*. — *Nokes v. Mueller*, 72 Ill. App. 431. *Massachusetts*. — *New England Awl, etc., Co. v. Marlborough Awl, etc., Co.*, 168 Mass. 154, 60 Am. St. Rep. 377; *Hildreth v. D. S. McDonald Co.*, 164 Mass. 16, 49 Am. St. Rep. 440.

*New York*. — *Enoch Morgan's Sons Co. v. Schwachhofer*, (Supm. Ct. Spec. T.) 55 How. Pr. (N. Y.) 37; *Williams v. Spence*, (N. Y. Super. Ct. Spec. T.) 25 How. Pr. (N. Y.) 366; *New York Cab Co. v. Mooney*, (Supm. Ct. Spec. T.) 15 Abb. N. Cas. (N. Y.) 152; *Lea v. Wolf*, (Supm. Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 389; *Reckitt v. Kellogg*, 28 N. Y. App. Div. 111; *Babbitt v. Brown*, 68 Hun (N. Y.) 515; *Fischer v. Blank*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 65; *Williams v. Johnson*, 2 Bosw. (N. Y.) 1; *Lockwood v. Bostwick*, 2 Daly (N. Y.) 521.

See generally *infra*, this title, *Infringement and Unfair Competition*.

While it is true in the abstract that every one has a right to use white paper, yet no one has a right to use it in such a way as to imitate another's labels, and thereby appropriate the good will of his business. *Garrett v. Garrett*, (C. C. A.) 78 Fed. Rep. 472.

2. **Form Not a Valid Trademark** — *England*. — *In re James*, 33 Ch. D. 392; *Woollam v. Ratcliff*, 1 Hem. & M. 259.

*United States*. — *Harrington v. Libby*, 14 Blatchf. (U. S.) 128, Price & S. T. M. Cas. 25; *Frese v. Bachof*, 13 Blatchf. (U. S.) 234; *Moor-man v. Hoge*, 2 Sawy. (U. S.) 78; *Keuffel, etc., Co. v. H. S. Crocker Co.*, 118 Fed. Rep. 187; *Coats v. Merrick Thread Co.*, 36 Fed. Rep. 324,

*affirmed* 149 U. S. 562; *Sawyer v. Horn*, 4 Hughes (U. S.) 239; *De Long Hook, etc., Co. v. Francis Hook, etc., Co.*, 118 Fed. Rep. 938; *Lalance, etc., Mfg. Co. v. National Enameling, etc., Co.*, 109 Fed. Rep. 317; *Pfeiffer v. Wilde*, 102 Fed. Rep. 658; *Von Mumm v. Witteman*, (C. C. A.) 91 Fed. Rep. 126, *affirming* 85 Fed. Rep. 966; *Sterling Remedy Co. v. Eureka Chemical, etc., Co.*, (C. C. A.) 80 Fed. Rep. 105; *Merriam v. Texas Siftings Pub. Co.*, 49 Fed. Rep. 944; *Evans v. Von Laer*, 32 Fed. Rep. 153; *Adams v. Heisel*, 31 Fed. Rep. 279; *Davis v. Davis*, 27 Fed. Rep. 490; *Wilcox, etc., Sewing Mach. Co. v. Gibbens Frame*, 17 Fed. Rep. 623; *Ex p. Landreth*, 31 Pat. Off. Gaz. 1441; *In re Kane*, 9 Pat. Off. Gaz. 105; *In re Gordon*, 12 Pat. Off. Gaz. 517. See *McLean v. Fleming*, 96 U. S. 245.

*Georgia*. — *Ellis v. Zeilin*, 42 Ga. 91.

*Illinois*. — *Ball v. Segel*, 116 Ill. 137, 56 Am. Rep. 767.

*New York*. — *Fischer v. Blank*, 138 N. Y. 245; *Enoch Morgan's Sons Co. v. Troxell*, 89 N. Y. 292, 42 Am. Rep. 294; *Enoch Morgan's Sons Co. v. Troxell*, (Supm. Ct. Spec. T.) 57 How. Pr. (N. Y.) 121; *Clinton Metallic Paint Co. v. New York Metallic Paint Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 66; *Babbitt v. Brown*, 68 Hun (N. Y.) 515.

*Pennsylvania*. — *Brown v. Seidel*, 153 Pa. St. 60; *Hoyt v. Hoyt*, 143 Pa. St. 623, 24 Am. St. Rep. 575.

*Rhode Island*. — *Cady v. Schultz*, 19 R. I. 193, 61 Am. St. Rep. 763.

But see *Spieker v. Lasch*, 102 Cal. 38.

The device of a "drum" for holding collars, with nothing more to identify it, does not constitute a valid trademark. *White v. Schlect*, 14 Phila. (Pa.) 88, 37 Leg. Int. (Pa.) 298.

In *Dausman, etc., Tobacco Co. v. Ruffner*, 15 Pat. Off. Gaz. 559, *Blodgett, J.*, said: "Any manufacturer of goods which are sold by the piece, such as cloths for instance, must have the right by marks or lines to indicate where to cut, in order to remove each yard, or part of a yard, or other specific quantity. So in regard to liquids put up, for instance, in glass bottles or similar packages, lines might be drawn, showing the half, etc.; and no manufacturer, by registering a trademark upon a package of that kind, could prevent another manufacturer from thus showing how a measured portion of the contents of his package might be withdrawn."

**Picture of Package.** — While barrels, boxes, etc., although of peculiar size or shape, do not constitute good trademarks, a pictorial representation of them may constitute a good trademark. *Clinton Metallic Paint Co. v. New York Metallic Paint Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 66.



novel or peculiar enough to be protected for itself alone, it should be made the subject of a patent,<sup>1</sup> and if it is not patentable any one may use it.<sup>2</sup> But the form of an article or package, like the color and other indicia, is to some extent arbitrary, because the vendor might have adopted almost any form for the packing of his goods, and having adopted and adhered to one particular form until it has become well known to the public, he will be protected in it as far as the court can go without creating unlawful monopolies or appropriating public property to private use without legal grant. Such form cannot be used by another for the purpose of carrying on unfair competition.<sup>3</sup>

*j.* SUBSTANCE. — The substance out of which an article is manufactured, or in which it is packed, cannot be protected as a trademark.<sup>4</sup>

*k.* ARTICLES ATTACHED TO MANUFACTURED PRODUCTS. — An article attached to a manufactured product may be a valid trademark, the same as any other sign or symbol, provided it complies with the definitions relative to those subjects.<sup>5</sup> Indeed, as has been seen, trademarks must be in some

1. **Form Subject of Patent.** — *Hoyt v. Hoyt*, 143 Pa. St. 623, 24 Am. St. Rep. 575. See *Coats v. Merrick Thread Co.*, 36 Fed. Rep. 324, affirmed 149 U. S. 562.

As to design patents, see the title PATENTS, vol. 22, p. 260.

2. *Sawyer v. Horn*, 4 Hughes (U. S.) 239; *In re Gordon*, 12 Pat. Off. Gaz. 517; *Cooke, etc., Co. v. Miller*, 169 N. Y. 477.

3. **Unfair Competition** — *England*. — *Woollam v. Ratcliff*, 1 Hem. & M. 259.

*United States*. — *McLean v. Fleming*, 96 U. S. 245; *Frese v. Bachof*, 14 Blatchf. (U. S.) 432; *Sawyer v. Horn*, 4 Hughes (U. S.) 239; *Bauer v. La Société, etc.*, (C. C. A.) 120 Fed. Rep. 74; *Keuffel, etc., Co. v. H. S. Crocker Co.*, 118 Fed. Rep. 187; *Enoch Morgan's Sons Co. v. Whittier-Coburn Co.*, 118 Fed. Rep. 657; *Sterling Remedy Co. v. Spermine Medical Co.*, (C. C. A.) 112 Fed. Rep. 1000; *Pfeiffer v. Wilde*, 102 Fed. Rep. 658; *Franck v. Frank Chicory Co.*, 95 Fed. Rep. 818; *Genesee Salt Co. v. Burnap*, 67 Fed. Rep. 534; *Moxie Nerve Food Co. v. Beach*, 33 Fed. Rep. 248; *Moxie Nerve Food Co. v. Baumbach*, 32 Fed. Rep. 205; *Carbolice Soap Co. v. Thompson*, 25 Fed. Rep. 625; *Lorillard v. Wight*, 15 Fed. Rep. 383; *Frese v. Bachof*, 13 Pat. Off. Gaz. 635.

*Massachusetts*. — *New England Awl, etc., Co. v. Marlborough Awl, etc., Co.*, 168 Mass. 154, 60 Am. St. Rep. 377.

*New York*. — *Fischer v. Blank*, 138 N. Y. 244; *Williams v. Spence*, (N. Y. Super. Ct. Spec. T.) 25 How. Pr. (N. Y.) 366; *Reckitt v. Kellogg*, 28 N. Y. App. Div. 111; *Williams v. Johnson*, 2 Bosw. (N. Y.) 1; *Lockwood v. Bostwick*, 2 Daly (N. Y.) 521; *Babbitt v. Brown*, 68 Hun (N. Y.) 515; *Fischer v. Blank*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 65.

*Pennsylvania*. — *Clark, etc., Co. v. Scott*, 4 Lack. Leg. N. (Pa.) 159.

*Rhode Island*. — *Alexander v. Morse*, 14 R. I. 153, 51 Am. Rep. 369.

*Tennessee*. — *C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84.

In *Cook v. Starkweather*, (N. Y. Super. Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 392, *Monell, J.*, said: "The package, case, or vessel in which the commodity is put, if prepared in a peculiar or novel manner, although in itself perhaps not a trademark, may very properly be a very important part of it; and where

a peculiar device is applied to a box or barrel which has been especially prepared to receive and give prominence to the design, such specially prepared box or barrel constitutes a part of the trademark, and may participate in the protection which will be given to the trademark itself."

4. **Substance Not Subject of a Trademark.** — *Harrington v. Libby*, 14 Blatchf. (U. S.) 128; *Lorillard v. Wight*, 15 Fed. Rep. 383; *Davis v. Davis*, 27 Fed. Rep. 490; *In re Kane*, 9 Pat. Off. Gaz. 105; *Faber v. Faber*, 49 Barb. (N. Y.) 357; *Cooke, etc., Co. v. Miller*, 169 N. Y. 477.

There can be no trademark in a piece of tin, regardless of its color, shape, or inscriptions, used as a tag on tobacco, although by the use of such device said tobacco may have acquired a reputation in the market as "Tin Tag Tobacco." *Lorillard v. Pride*, 28 Fed. Rep. 434, *Blodgett, J.*, observing: "It seems to me it would be as reasonable to assume that the complainants could have adopted paper or wood, or a piece of cloth or leather, as a badge or *indicia* of their goods, as that they could have taken a piece of tin. \* \* \* A person may appropriate any word, figure, or emblem as a trademark, but that does not give an exclusive right to the use of the well-known material substances upon which the word, figure, or emblem may be impressed or engraved."

5. **Articles Attached to Goods.** — In *Ex p. Straiton*, Price & S. T. M. Cas. 366, 18 Pat. Off. Gaz. 923, *Marble, Comr.*, said: "Applicants in this case seek to register as a trademark for cigars 'a waved band or ribbon of rectilinear form longer than it is wide, which is fastened to the two ends of a cigar box, and so placed with reference to the cigars within the box as to be below some of said cigars and above the remaining cigars.'" This was registered as a valid trademark.

The plaintiffs, since 1855, had rolled their carpets upon a hollow stick, which stick, when put into the centre of their rolls of carpet, they claimed to be their trademark. The stick consisted of two pieces, ground on the inside, so that when the two pieces were put together they formed a shell with a rectangular opening, and with the corners of the outside rounded off so that the ends of the stock or shell formed an octagonal ring. This ring was both visible

manner attached to the goods.<sup>1</sup>

**7. DISTINGUISHING MARK SERVING USEFUL FUNCTION.** — A mark or device serving a useful function in the connection in which used cannot be appropriated as a trademark.<sup>2</sup> All things or methods useful in manufacturing or preparing or packing goods for market, which are not patented, are free and open to the public to use, and cannot be monopolized by any one under the guise of a trademark. To allow such a practice would soon result in the adoption of common forms of packing and marking as private trademarks, which would greatly hamper trade and inconvenience the public without yielding any corresponding benefit.<sup>3</sup> Of course, the adoption of another's peculiar method of packing goods may be evidence to establish unfair competition as showing an intent that the goods so packed shall be mistaken for those of the former trader.<sup>4</sup>

**m. FOREIGN WORDS, PHRASES, OR LETTERS.** — Foreign words, phrases, or letters may be a distinctive device and hence a valid trademark.<sup>5</sup> But a mere transliteration into English of a foreign generic word is not a good trademark.<sup>6</sup>

and tangible in each end of each roll of carpet. It was held "that said stick, as claimed by plaintiffs, was a good and valid trademark; that they were entitled to its exclusive use." *Lowell Mfg. Co. v. Larned, Codd. Dig. 341.*

1. See *supra*, this section, *Application to Goods*.

**2. Useful Device Not a Valid Trademark.** — *In re Gordon*, 12 Pat. Off. Gaz. 517; *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337; *Putnam Nail Co. v. Dulaney*, 140 Pa. St. 205, 23 Am. St. Rep. 228.

In *Dausman, etc., Tobacco Co. v. Ruffner*, 15 Pat. Off. Gaz. 559, the court said: "One of the principles running through the law of trademarks is that there need be no utility attached to the trademark, that is, it shall have no useful purpose in connection with the goods further than to show the origin or manufacture."

**Galvanized Iron Hoops**, placed on a liquor barrel of dark color, were refused registration as a trademark, as not an original appropriation, and not sufficiently distinctive. *In re Kane*, 9 Pat. Off. Gaz. 105.

**3. Reason for Rule.** — *Harrington v. Libby*, 14 Blatchf. (U. S.) 128; *Colgan v. Danheiser*, 35 Fed. Rep. 150; *Adams v. Heisel*, 31 Fed. Rep. 279; *Enoch Morgan's Sons Co. v. Troxell*, 89 N. Y. 292, 42 Am. Rep. 294, reversing 23 Hun (N. Y.) 632. See also cases cited in preceding note.

**The Size, or Shape, or Mode of Construction of a Box, Barrel, Bottle, or Package** in which goods may be put, is not a trademark; nor is the mechanical arrangement of bottles in boxes in which they are packed by the manufacturer capable of protection as such. *Hoyt v. Hoyt*, 143 Pa. St. 623, 24 Am. St. Rep. 575. In this case *Williams, J.*, said: "As a general proposition, it may be said that one may imitate what is excellent in the processes and business methods of his neighbor as freely and as safely as he may imitate what is good in his moral character, as long as he infringes no right secured to him by statute, and does not fraudulently personate him or simulate his products."

There can be no trademark in any method of arranging various packages of merchandise in the receptacle containing them. *Davis v. Davis*, 27 Fed. Rep. 490.

That form or size cannot constitute a trademark, see *supra*, this section, *Form or Size*.

**4. Unfair Competition.** — *Moorman v. Hoge*, 2 Sawy. (U. S.) 78. See *Colgan v. Danheiser*, 35 Fed. Rep. 150. And see generally *infra*, this title, *Infringement and Unfair Competition*.

See also *Enoch Morgan's Sons' Co. v. Schwachofer*, (Supm. Ct. Spec. T.) 5 Abb. N. Cas. (N. Y.) 265, where the court says that "the plaintiffs cannot have an exclusive right to use tinfoil or ultramarine blue-colored paper in putting up their article, as such paper is much used for ordinary commercial purposes." This case was, however, decided against the defendants on the ground of unfair competition.

The plaintiffs, carpet manufacturers, rolled their carpets upon peculiarly formed sticks, made in two pieces, and with the ends shaped into octagonal rings, which were visible in the centre of the roll when made up. This stick had been registered as their trademark. The defendants began to use similar sticks for the same purpose. There was evidence that the plaintiffs' carpets were known to the public by these projecting octagonal rings. An injunction was granted. *Lowell Mfg. Co. v. Larned, Codd. Dig. 341.*

**5. Foreign Words or Letters.** — *Menendez v. Holt*, 128 U. S. 514; *Holt v. Menendez*, 23 Fed. Rep. 869.

In *In re Rotherham*, 14 Ch. D. 585, it was held that Arabic and Turkish letters, comprising words or names, are valid trademarks, being to the English subject a "distinctive device."

In *Gout v. Aleploglu*, 6 Beav. 69, note, the plaintiff, long a manufacturer of watches for the Turkish and Levantine market, marked them with his name, a sprig, etc., and the Turkish word *Pessendede* (meaning "warranted"). This was held to be a valid trademark, and an injunction was granted restraining the defendant from the use thereof.

**A Compound Composed of Foreign Words Conveying No Meaning** to any one in any language may constitute a valid trademark. *In re Densham*, (1895) 2 Ch. 176.

**6. Transliteration of Foreign Words.** — *Dadirian v. Yacubian*, (C. C. A.) 98 Fed. Rep. 872, affirming decree, 90 Fed. Rep. 812.

*n.* COLLOCATION OF WORDS AND SYMBOLS. — A peculiar collocation of words which, although descriptive in their meaning, are arbitrary in their selection and arrangement, and are not the only words which could be employed to describe the article to which they are applied, may be protected as a trademark.<sup>1</sup> It is not always clear, nor often very material, in this class of cases, whether protection is afforded upon the ground of technical trademark or upon the ground of unfair competition. It is so easy to avoid any similarity, that its mere existence is almost conclusive proof of a fraudulent intent, and hence of unfair competition. At all events, a deceptive imitation will be enjoined.<sup>2</sup> Each case of this class will depend upon its own facts, for the reason that it will only be some peculiarity of selection, arrangement, or

**Contra.** — *Dadirrian v. Theodorian*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 300.

**1. Collocation of Words and Symbols.** — *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51; *McLean v. Fleming*, 96 U. S. 254; *Improved Fig Syrup Co. v. California Fig Syrup Co.*, (C. C. A.) 54 Fed. Rep. 175; *Frost v. Rindskopf*, 42 Fed. Rep. 408; *Stoughton v. Woodard*, 39 Fed. Rep. 902; *In re Glines*, 8 Pat. Off. Gaz. 435; *Williams v. Spence*, (N. Y. Super. Ct. Spec. T.) 25 How. Pr. (N. Y.) 366; *Rawlinson v. Brainard, etc., Co.*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 287; *Davis v. Kennedy*, 13 Grant Ch. (U. C.) 523.

In *Pratt Mfg. Co. v. Astral Refining Co.*, 27 Fed. Rep. 492, the plaintiffs, whose trademark was "Pratt's Astral Oil," sued to restrain the defendants from using the words "Standard White Astral Oil." An injunction was refused. *Acheson, J.*, said: "In the first place I strongly incline to the opinion that the word 'Astral' was without the range of lawful appropriation as a trademark for refined petroleum, by reason of the fact that long before it was employed by Charles Pratt, the appellation had been given to an oil-burning lamp well known and in common use. \* \* \* Then, in the second place, the appropriation of the word 'Astral' in one combination of words does not preclude its use in all other combinations. \* \* \* See *Desmond's Appeal*, 13 W. N. C. (Pa.) 303; *Desmond's Appeal*, 103 Pa. St. 126, 49 Am. Rep. 118, *Price & S. T. M. Cas.* 794. The plaintiff's trademark consists, not of the word 'Astral' alone, nor yet of the two words 'Astral Oil.' The prefix 'Pratt's' is the distinguishing word in the plaintiff's combination, and in truth is indispensable."

In *Selchow v. Baker*, 93 N. Y. 59, 45 Am. Rep. 169, "Sliced Animals," the name of a toy puzzle, consisting of pictures of animals, etc., was upheld as a valid trademark.

**2. Combinations Protected Against Imitations.** — *Davis v. Harbord*, 15 App. Cas. 316, 60 L. J. Ch. 16, 63 L. T. N. S. 389; *Lalance, etc., Mfg. Co. v. National Enameling, etc., Co.*, 109 Fed. Rep. 317; *Fischer v. Blank*, 138 N. Y. 244, *affirming* (Supm. Ct. Gen. T.) 19 N. Y. Supp. 65; *Kassel v. Jeuda*, 61 N. Y. App. Div. 613; *Ransom v. Ball*, 4 Silv. Sup. (N. Y.) 217; *Williams v. Johnson*, 2 Bosw. (N. Y.) 1; *Davis v. Kendall*, 2 R. I. 566.

In *Pierce v. Guittard*, 68 Cal. 68, 58 Am. Rep. 1, "German Sweet Chocolate" was held to be infringed by "Sweet German Chocolate." The court declined to pass on the question of

the validity of the words as a technical trademark.

**The Following Combinations of Words Have Been Protected:** "Cream Baking Powder," *Price Baking-Powder Co. v. Fyfe*, 45 Fed. Rep. 799. "Priestley's Silk Warp Henrietta," *Priestley v. Adams*, 59 N. Y. 380. "Pirie's Parchment Bank," a particular kind of paper, *In re Coodall*, 42 Ch. D. 566, 38 W. R. 189. "Hostetter's Celebrated Stomach Bitters," *Myers v. Theller*, 38 Fed. Rep. 607. "The Baeder Flint Paper Company, New York," *Baeder v. Baeder*, 52 Hun (N. Y.) 170. "Akron Dental Rubber," *Keller v. B. F. Goodrich Co.*, 117 Ind. 556, 10 Am. St. Rep. 88. "Prince's Metallic Paint," *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 51 Hun (N. Y.) 443. "La Favorita," a brand of flour, *Menendez v. Holt*, 128 U. S. 514. "Black Diamond," name of a scythestone, *A. F. Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. Rep. 896. "Johnson's Anodyne Liniment," *Jennings v. Johnson*, 37 Fed. Rep. 364. "Moxie Nerve Food," *Moxie Nerve Food Co. v. Beach*, 33 Fed. Rep. 248; see *Moxie Nerve Food Co. v. Baumbach*, 32 Fed. Rep. 205. "Maryland Club Whisky," *Cahn v. Gottschalk*, 14 Daly (N. Y.) 542. "Union Made Cigars," *Allen v. McCarthy*, 37 Minn. 349. "A. N. Hoxie's Mineral Soap," "A. N. Hoxie's Pumice Soap," *Hoxie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149. "S. N. Pike's Magnolia Whisky, Cincinnati, Ohio," *Kidd v. Johnson*, 100 U. S. 617. "Charter Oak," trademark for a stove, *Filley v. Child*, 16 Blatchf. (U. S.) 376. "Pond Lily Wash," name of a washing fluid, *Wright v. Simpson*, 15 Pat. Off. Gaz. 968. "Roberts' Parabola Needles," *Roberts v. Sheldon*, 8 Biss. (U. S.) 398, 18 Pat. Off. Gaz. 1277. "Dr. C. McLane's Celebrated Liver Pills," *McLean v. Fleming*, 96 U. S. 245. "Vanity Fair," for cigarettes, *In re Kimball*, 11 Pat. Off. Gaz. 1109. "Lactopeptine," a medicine, infringed by "Lacto-pepsine," *Carnrick v. Morson*, L. J. Notes Cases (1877) 71. "Bethesda Mineral Water," *Dunbar v. Glenn*, 42 Wis. 118, 24 Am. Rep. 395. "Apollinaris Water," *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242. "Licensed Victuallers' Relish," name of a sauce, *Cotton v. Gillard*, 44 L. J. Ch. 90. "The Rising Sun Stove Polish," not infringed by "The Rising Moon Stove Polish," both valid, *Morse v. Worrell*, 10 Phila. (Pa.) 168, 9 Am. L. Rev. 368, *Codd. Dig.* 242. "Grenade Syrup," made from the juice of the pomegranate, *Rillet v. Carlier*, 61 Barb. (N. Y.) 435. "Sweet Opoponax of Mexico," name



sound, which will cause the courts to depart from the usual rule which denies protection to descriptive words.<sup>1</sup> Mere length in a collocation of words not peculiarly arranged, and purely descriptive, does not make it a valid trademark.<sup>2</sup> But if any one or more of the words used be arbitrary, it will support the use of other words which are either geographical or descriptive, and the combination as a whole will constitute a valid trademark or trade name.<sup>3</sup> A combination of words, or of words and devices or symbols, is a very common form of valid trademark, and the combination may be sustained though the elements taken separately are not capable of exclusive appropriation.<sup>4</sup> Upon the other hand, the appropriation of a word in one combination does not prevent its being used in other combinations not likely to deceive. In other words, the combination is the thing protected.<sup>5</sup>

**o. DESCRIPTIVE WORDS AND MARKS**—(1) *In General*.—It is a fundamental rule that terms merely descriptive of the goods or business to which they are applied cannot be exclusively appropriated as trademarks or trade names.<sup>6</sup> The reason is that no one is entitled to monopolize the adjectives of

of a perfume, *Smith v. Woodruff*, 48 Barb. (N. Y.) 438. "Stephens' Blue Black Writing Fluid," *Stephens v. Peel*, 16 L. T. N. S. 145. "Pharaoh's Serpents," name of fireworks, *Barnett v. Leuchars*, 13 L. T. N. S. 495. "Bell's Life in London and Sporting Chronicle," name of a paper, *Clement v. Maddick*, 5 Jur. N. S. 592, 33 L. T. N. S. 117, 1 Giff 98. "Taylor's Persian Thread," *Taylor v. Taylor*, 2 Eq. Rep. 290, 23 L. J. Ch. 255, 22 L. T. N. S. 271. "The graduated, grooveless, drill-eyed, ground down," applied to a new style of needle, *Shrimpton v. Laight*, 18 Beav. 164. "Dunn's Fruit Salt Baking Powder" was held to be no infringement of "Eno's Fruit Salt," an effervescing drink; both were allowed registration, *In re Dunn*, 41 Ch. D. 439, 63 L. T. N. S. 6, 39 W. R. 161, 15 App. Cas. 253.

1. *Fischer v. Blank*, 138 N. Y. 245; *Caswell v. Davis*, 58 N. Y. 223, 17 Am. Rep. 233; *Babbitt v. Brown*, 68 Hun (N. Y.) 515; *Keasbey v. Brooklyn Chemical Works*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 696, *affirming* (Supm. Ct. Gen. T.) 16 N. Y. Supp. 318; *Gessler v. Grieb*, 80 Wis. 21, 27 Am. St. Rep. 20. See generally *infra*, this section, *Descriptive Words and Marks*.

2. **Mere Length of Collocation**.—*Gilman v. Hunnewell*, 122 Mass. 139.

3. **Combinations in Part Arbitrary**.—*Alleghany Fertilizer Co. v. Woodside*, 1 Hughes (U. S.) 115.

*In Braham v. Bustard*, 1 Hem. & M. 447, 11 W. R. 1061, 9 L. T. N. S. 109, "The Excelsior White Soap" was protected as a valid trademark, *Wood, V. C.*, saying: "If, in the case, the plaintiff had sought protection for the name 'White Soft Soap' only, the same principle would have been applied (*i. e.*, protection would have been refused). \* \* \* But here the plaintiff put the word 'Excelsior' before the 'White Soft Soap,' and it was not an unimportant circumstance that the plaintiffs did not simply called their article 'Excelsior White Soft Soap,' but 'The Excelsior White Soft Soap.'"

Although there can be no exclusive right in the commercial name of an article, as "Borax Soap," yet, when it is coupled with other distinctive features, the whole may be so appro-

priated. *Dreydoppel v. Young*, 14 Phila. (Pa.) 226, 37 Leg. Int. (Pa.) 397.

4. **Combination of Common Elements Protected**—*England*.—*In re Hudson*, 32 Ch. D. 311; *In re Barrow*, 5 Ch. D. 353; *Bury v. Bedford*, 4 De G. J. & S. 352; *Ransome v. Bentall*, 3 L. J. Ch. 161; *Gout v. Aleploglu*, 6 Beav. 69, note; *Spottiswoode v. Clarke*, 2 Phil. 154, 1 Coop. t. Cot. 254, 10 Jur. 1043, 8 L. T. N. S. 230.

*United States*.—*Lalance*, etc., Mfg. Co. v. National Enameling, etc., Co., 109 Fed. Rep. 317; *Kerry v. Toupin*, 60 Fed. Rep. 272; *Hutchinson v. Blumberg*, 51 Fed. Rep. 829; *Frost v. Rindskopf*, 42 Fed. Rep. 408; *Lichtenstein v. Goldsmith*, 37 Fed. Rep. 359; *Adams v. Heisel*, 31 Fed. Rep. 279.

*California*.—*Spieker v. Lash*, 102 Cal. 38.

*Connecticut*.—*Meriden Britannia Co. v. Parker*, 39 Conn. 450, 12 Am. Rep. 401.

*Massachusetts*.—*Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 325, 37 Am. Rep. 362; *New England Awl, etc., Co. v. Marlborough Awl, etc., Co.*, 168 Mass. 154, 60 Am. St. Rep. 377.

*New York*.—*Fischer v. Blank*, 138 N. Y. 244; *T. B. Dunn Co. v. Trix Mfg. Co.*, 50 N. Y. App. Div. 75; *Electro-Silicon Co. v. Hazard*, 29 Hun (N. Y.) 369; *Volger v. Force*, 63 N. Y. App. Div. 122; *Rawlinson v. Brainard, etc., Co.*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 287; *Clinton Metallic Paint Co. v. New York Metallic Paint Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 66; *Cook v. Starkweather*, (N. Y. Super. Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 302; *Godillot v. Hazard*, 44 N. Y. Super. Ct. 427.

For further illustrations of this principle, see *supra*, this section, *Devices, Symbols, or Pictures; Numerals; Letters and Initials*.

"Mere numbers are never the objects of a trademark where they are employed to indicate quality, but they may be where they stand for origin or proprietorship in combination with words and other numerals." *Humphreys' Specific Homeopathic Medicine Co. v. Wenz*, 14 Fed. Rep. 250.

5. **Combination Only Protected**.—*Pratt Mfg. Co. v. Astral Refining Co.*, 27 Fed. Rep. 492; *Desmond's Appeal*, 103 Pa. St. 126, 49 Am. Rep. 118.

6. **No Exclusive Right in Descriptive Words**—*England*.—*Cheavin v. Walker*, 5 Ch. D. 850,

the language. Every one is entitled truly to describe his goods, and may use

46 L. J. Ch. 265, 686, 25 L. T. N. S. 757; Cellular Clothing Co. v. Maxton, (1899) A. C. 326, 68 L. J. P. C. 72, 80 L. T. N. S. 809; Parsons v. Gillespie, (1898) A. C. 239, 67 L. J. P. C. 21; Raggett v. Findlater, L. R. 17 Eq. 29; *In re* Paine, 61 L. J. Ch. 365, 66 L. T. N. S. 642; *In re* Meyerstein, 43 Ch. D. 604; *In re* Talbot, 8 Reports 149; *In re* Price's Patent Candle Co., 27 Ch. D. 681; *In re* Palmer, 24 Ch. D. 504; *In re* Hanson, 37 Ch. D. 112.

*United States.*—Columbia Mill Co. v. Alcorn, 150 U. S. 460; Brown Chemical Co. v. Meyer, 139 U. S. 542; Corbin v. Gould, 133 U. S. 308; Stachelberg v. Ponce, 128 U. S. 686; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598; Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51; Delaware, etc., Canal Co. v. Clark, 13 Wall. (U. S.) 311; Computing Scale Co. v. Standard Computing Scale Co., (C. C. A.) 118 Fed. Rep. 965; Searle, etc., Co. v. Warner, (C. C. A.) 112 Fed. Rep. 676; Fuller v. Huff, 99 Fed. Rep. 439; New York Asbestos Mfg. Co. v. Anblur Asbestos Air-Cell Covering Co., 99 Fed. Rep. 85; Continental Ins. Co. v. Continental Fire Assoc., 96 Fed. Rep. 846; Ginter v. Kinney Tobacco Co., 12 Fed. Rep. 782.

*Connecticut.*—Hygeia Distilled Water Co. v. Hygeia Ice Co., 70 Conn. 516.

*Georgia.*—Larrabee v. Lewis, 67 Ga. 561, 44 Am. Rep. 735.

*Illinois.*—Bolander v. Peterson, 136 Ill. 215. *Massachusetts.*—Thomson v. Winchester, 19 Pick. (Mass.) 214, 31 Am. Dec. 135.

*Michigan.*—Gray v. Koch, 2 Mich. N. P. 119.

*New York.*—Waterman v. Shipman, 130 N. Y. 301; Koehler v. Sanders, 122 N. Y. 65, 48 Hun (N. Y.) 48; Godillot v. Hazard, (N. Y. Super. Ct. Spec. T.) 49 How. Pr. (N. Y.) 5; Wolfe v. Goulard, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 64; Keasbey v. Brooklyn Chemical Works, 67 Hun (N. Y.) 648, 21 N. Y. Supp. 696; Town v. Stetson, 3 Daly (N. Y.) 53.

*Rhode Island.*—Cady v. Schultz, 19 R. I. 193, 61 Am. St. Rep. 763.

*Wisconsin.*—Gessler v. Grieb, 80 Wis. 21, 27 Am. St. Rep. 20.

See also cases cited more specifically *infra*, this title.

**Words Held Descriptive.**—In *Choynski v. Cohen*, 39 Cal. 501, 2 Am. Rep. 476, the phrase "The Antiquarian Book Store" was held to be merely descriptive of the class of books sold, and not entitled to protection.

There is no exclusive right to the words "civil service" used as part of a trade name. *Civil Service Supply Assoc. v. Dean*, 13 Ch. D. 512.

There is no exclusive right in the term "station" as part of a hotel name, it being a mere descriptive title. *Charleson v. Campbell* Sc. Sess. Cas. (4th ser.) iv. 149, 14 Scot. L. Rep. 104.

In *Colonial L. Assur. Co. v. Home, etc., Assur. Co.*, 33 Beav. 548, 33 L. J. Ch. 741, 10 Jur. N. S. 967, 10 L. T. N. S. 448, 12 W. R. 783, 4 New Reports 129, the word "colonial" was refused protection as part of a trade name,

it being merely descriptive of the kind of business carried on.

"The true test, it appears to me, must be not whether the words are exhaustively descriptive of the article designated, but whether in themselves, and as they are commonly used by those who understand their meaning, they are reasonably indicative and descriptive of the thing intended." *Rumford Chemical Works v. Muth*, 35 Fed. Rep. 524.

**Trademarks Held Not Descriptive—England.**—*In re* Densham, (1895) 2 Ch. 176, 12 Reports 283.

*Canada.*—*Davis v. Kennedy*, 13 Grant Ch. (U. C.) 523.

*United States.*—*Saxlehner v. Eisner, etc., Co.*, 179 U. S. 19, reversing (C. C. A.) 91 Fed. Rep. 536; *Ludington Novelty Co. v. Leonard*, 119 Fed. Rep. 937; *Tetlow v. Tappan*, 85 Fed. Rep. 774; *J. & P. Baltz Brewing Co. v. Kaiserbrauerei*, (C. C. A.) 74 Fed. Rep. 222; *Royal Baking Powder Co. v. Raymond*, 70 Fed. Rep. 376; *N. K. Fairbank Co. v. Central Lard Co.*, 64 Fed. Rep. 133; *In re* Glines, 8 Pat. Off. Gaz. 435; *Improved Fig Syrup Co. v. California Fig Syrup Co.*, (C. C. A.) 54 Fed. Rep. 175.

*Connecticut.*—*Hygeia Distilled Water Co. v. Hygeia Ice Co.*, 72 Conn. 646.

*Missouri.*—*Filley v. Fassett*, 44 Mo. 168, 100 Am. Dec. 275.

*New York.*—*Fetridge v. Merchant*, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 156; *Fleischmann v. Schuckmann*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 92; *Williams v. Spence*, (N. Y. Super. Ct. Spec. T.) 25 How. Pr. (N. Y.) 366; *Stern v. Barrett Chemical Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 609, reversing (N. Y. City Ct. Gen. T.) 28 Misc. (N. Y.) 429; *Electro-Silicon Co. v. Hazard*, 29 Hun (N. Y.) 369; *Barrett Chemical Co. v. Stern*, 56 N. Y. App. Div. 143.

*Texas.*—*Duke v. Cleaver*, 19 Tex. Civ. App. 218.

For other illustrations of words held not descriptive, see *supra*, this section, *Arbitrary or Fanciful Words or Phrases*, and *Newly Coined or Invented Words*.

**Picture or Drawing of Article to Which Applied.**

—In *In re* James, 33 Ch. D. 392, a black dome as a trademark for black lead was sustained. (Note the distinction taken between the American and English cases.) *Lindley, L. J.*, said: "As regards the American decisions, I quite concur in the observations made by Lord Justice Cotton. I cannot see why, according to English law, a fish should not be a distinctive mark of a fishing-line, though I can understand that a picture of a fish may not be a distinctive mark of that particular kind of fish. Why a pig should not be, according to English law, a distinctive mark for lard, or something made out of a pig, I do not know. Supposing you tanned pigskin into leather, I do not know why a pig should not be a good trademark for tanned pig's hide." The court in this case overruled the decision below by *Pearson, J.*, in which he said: "Curiously enough, though it has not arisen here, the question has been several times before the American courts, whether a man can have as a trademark a drawing of



the common and appropriate terms to do so.<sup>1</sup> Descriptive terms, however, by long and exclusive user by one individual, may acquire in the minds of the public a secondary significance, and come to mean the goods of that particular person. Where this is the case, although another person may be entitled to use the same terms in their primary sense, yet he cannot use them in such a manner as to state a falsehood in their secondary sense. In other words, upon the ground of unfair competition a man may be enjoined from using even descriptive terms in such a manner as to pass off his goods for those of his rival.<sup>2</sup>

(2) *Quality and Character.* — Words or names which simply indicate the quality or character of the goods to which they refer are, as a rule, words which others may employ for the same purpose with equal truth, and hence cannot be exclusively appropriated by any one as a trademark.<sup>3</sup> The fact that

the article sold, and they have decided that he cannot, because it is the common property of all the world." See *In re James*, 31 Ch. D. 340.

**Quære:** Can the figure of a pig be a valid trademark for "prime leaf lard"? The objection is that it is descriptive and might with equal truth be employed to represent any other products of the pig put up for sale. *Popham v. Cole*, 66 N. Y. 69, 23 Am. Rep. 22.

A fish is not a valid trademark for fishing-lines, because descriptive. *In re Pratt*, 10 Pat. Off. Gaz. 866. *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311, is cited as conclusive.

A picture of a book is not a valid trademark for a publisher of books. *Merriam v. Famous Shoe, etc., Co.*, 47 Fed. Rep. 411.

A "representation of a barrel consisting of light and dark wood, the staves being alternately composed of each color," cannot be registered as a trademark for flour packed in barrels similar to that represented in the picture, because in each application it is descriptive, not, indeed, of the quality of the flour itself separated from its package, and, therefore, not in marketable form, but of the marketable commodity, the barrel of flour. But when applied to sacks of flour, or to barrels of flour having staves all of one color, it is an arbitrary symbol and is registrable as a trademark. *Ex p. Halliday*, 16 Pat. Off. Gaz. 500.

**1. Reason for Rule.** — *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94; *Cooke, etc., Co. v. Miller*, 169 N. Y. 477; *Helmhold v. Henry T. Helmhold Mfg. Co.*, (Supm. Ct.) 53 How. Pr. (N. Y.) 453; *Clinton Metallic Paint Co. v. New York Metallic Paint Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 66; *Marshall v. Pinkham*, 52 Wis. 572, 38 Am. Rep. 756.

The term "Desiccated Codfish" is descriptive of the article sold, and cannot be protected. *Town v. Stetson*, (C. Pl. Spec. T.) 5 Abb. Pr. N. S. (N. Y.) 218, 3 Daly (N. Y.) 53.

**2. Secondary Meaning of Descriptive Terms — Unfair Competition** — *England.* — *Cellular Clothing Co. v. Maxton*, (1890) A. C. 326, 68 L. J. P. C. 72, 80 L. T. N. S. 809; *Parsons v. Gillespie*, (1898) A. C. 239, 67 L. J. P. C. 21; *Reddaway v. Banham*, (1896) A. C. 199; *Davis v. Harbord*, 15 A. C. 316, 60 L. J. Ch. 16, 63 L. T. N. S. 380.

*Canada.* — *Gillett v. Lumsden*, 4 Ont. L. Rep.

300; *Provident Chemical Works v. Canada Chemical Mfg. Co.*, 2 Ont. L. Rep. 182.

*United States.* — *U. S. v. Roche*, 1 McCrary (U. S.) 385; *Globe-Wernicke Co. v. Brown*, 121 Fed. Rep. 185; *Computing Scale Co. v. Standard Computing Scale Co.*, (C. C. A.) 118 Fed. Rep. 965; *Sterling Remedy Co. v. Spermini Medical Co.*, (C. C. A.) 112 Fed. Rep. 1000; *Sterling Remedy Co. v. Gorey*, 110 Fed. Rep. 372; *Hostetter Co. v. Martinoni*, 110 Fed. Rep. 525; *Singer Mfg. Co. v. Hipple*, 109 Fed. Rep. 152; *Shaver v. Heller, etc., Co.*, (C. C. A.) 108 Fed. Rep. 821, *affirming* 102 Fed. Rep. 882; *Wells, etc., Co. v. Siegel*, 106 Fed. Rep. 77; *Hansen v. Siegel-Cooper Co.*, 106 Fed. Rep. 691; *Williams v. Mitchell*, (C. C. A.) 106 Fed. Rep. 168; *Fuller v. Huff*, (C. C. A.) 104 Fed. Rep. 141, 99 Fed. Rep. 439; *Searle, etc., Co. v. Warner*, (C. C. A.) 112 Fed. Rep. 674; *Dadirrian v. Yacubian*, (C. C. A.) 98 Fed. Rep. 872, *affirming* 90 Fed. Rep. 812; *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. Rep. 651.

*New York.* — *Stokes v. Allen*, 56 Hun (N. Y.) 526; *Williams v. Johnson*, 2 Bosw. (N. Y.) 1. See *Petridge v. Merchant*, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 156.

The same principle applies to the use of geographical terms. See *infra*, this section, *Geographical Terms*.

**3. Terms Indicating Quality or Character Not Valid Trademarks** — *England.* — *In re Meyerstein*, 43 Ch. D. 604; *In re Brandreth*, 9 Ch. D. 618, 47 L. J. Ch. 816, 27 W. R. 281; *Burgess v. Burgess*, 3 DeG. M. & G. 896; *Raggett v. Findlater*, L. R. 17 Eq. 39, 43 L. J. Ch. 64, 29 L. T. N. S. 448; *In re Farbenfabriken*, 7 Reports 439, (1894) 1 Ch. 645; *Perry v. Truefitt*, 6 Beav. 66, 1 L. T. N. S. 384. See *In re Leonard*, 26 Ch. D. 288. See also *In re Horsburgh*, 53 L. J. Ch. 237.

*Canada.* — *Gillett v. Lumsden*, 4 Ont. L. Rep. 300; *Provident Chemical Works v. Canada Chemical Mfg. Co.*, 2 Ont. L. Rep. 182; *Partlo v. Todd*, 17 Can. Sup. Ct. 196.

*United States.* — *Columbia Mill Co. v. Alcorn*, 150 U. S. 460; *Brown Chemical Co. v. Meyer*, 139 U. S. 540; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598; *Computing Scale Co. v. Standard Computing Scale Co.*, (C. C. A.) 118 Fed. Rep. 965; *Draper v. Skerrett*, 116 Fed. Rep. 206; *Shaver v. Heller, etc., Co.*, (C. C. A.) 108 Fed. Rep. 821, *affirming* 102 Fed.



such terms are not truthfully descriptive of the character or quality of the

Rep. 882; *Brennan v. Emery-Bird-Thayer Dry-Goods Co.*, 99 Fed. Rep. 971, (C. C. A.) 108 Fed. Rep. 624; *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. Rep. 651; *Lamont v. Leedy*, 88 Fed. Rep. 73; *Von Mumm v. Wittemann*, 85 Fed. Rep. 966; *Bennett v. McKinley*, (C. C. A.) 65 Fed. Rep. 505; *Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co.*, 65 Fed. Rep. 424; *N. K. Fairbank Co. v. Central Lard Co.*, 64 Fed. Rep. 133; *Indurated Fibre Co. v. Amoskeag Indurated Fibre Ware Co.*, 37 Fed. Rep. 695; *Rumford Chemical Works v. Muth*, 35 Fed. Rep. 524; *Colgan v. Danheiser*, 35 Fed. Rep. 150; *Humphreys' Specific Homeopathic Medicine Co. v. Wenz*, 14 Fed. Rep. 250; *Ginter v. Kinney Tobacco Co.*, 12 Fed. Rep. 782; *Ex p. Kipling*, 24 Pat. Off. Gaz. 899; *Ex p. Strasburger*, 20 Pat. Off. Gaz. 155.

*Alabama*.—*Scott v. Standard Oil Co.*, 106 Ala. 475.

*California*.—*Burke v. Cassin*, 45 Cal. 467, 13 Am. Rep. 204.

*District of Columbia*.—*U. S. v. Duell*, 17 App. Cas. (D. C.) 471.

*Illinois*.—*Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 127, *affirming* 51 Ill. App. 231.

*Missouri*.—*Trask Fish Co. v. Wooster*, 28 Mo. App. 408.

*New Jersey*.—*Medlar, etc., Shoe Co. v. Dil-sarte Mfg. Co.*, (N. J. 1900) 46 Atl. Rep. 1089.

*New York*.—*Cooke, etc., Co. v. Miller*, 169 N. Y. 475, *affirming* 53 N. Y. App. Div. 120; *Fischer v. Blank*, 138 N. Y. 245; *Caswell v. Davis*, 58 N. Y. 223, 17 Am. Rep. 233; *Gillott v. Esterbrook*, 47 Barb. (N. Y.) 455, 48 N. Y. 374, 8 Am. Rep. 553; *Town v. Stetson*, (C. Pl. Spec. T.) 5 Abb. Pr. N. S. (N. Y.) 218, 3 Daly (N. Y.) 53; *Bininger v. Wattles*, (C. Pl. Spec. T.) 28 How. Pr. (N. Y.) 206; *Smith v. Sixbury*, 25 Hun (N. Y.) 232; *Corwin v. Daly*, 7 Bosw. (N. Y.) 222; *Clinton Metallic Paint Co. v. New York Metallic Paint Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 66; *Cahn v. Hoffman House*, (C. Pl. Eq. T.) 7 Misc. (N. Y.) 461; *Godillot v. Hazard*, 44 N. Y. Super. Ct. 427; *New York Asbestos Mfg. Co. v. New York Fireproof Covering Co.*, (Supm. Ct. Spec. T.) 62 N. Y. Supp. 339; *Keasbey v. Brooklyn Chemical Works*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 696.

*Ohio*.—*Feder v. Brundo*, 8 Ohio Dec. 179, 5 Ohio N. P. 275.

*Pennsylvania*.—*Phalon v. Wright*, 5 Phila. (Pa.) 464, 2 Leg. Int. (Pa.) 116.

**Illustrations.**—The words "Selected Shore Mackerel" are purely descriptive, and invalid as a trademark, *Trask Fish Co. v. Wooster*, 28 Mo. App. 408. "Liquid Glue," applied to the article so called, is descriptive and not a valid trademark, *Russia Cement Co. v. Le Page*, 147 Mass. 206, 9 Am. St. Rep. 685. The term "Snowflake," as applied to bread or crackers, is descriptive and not a valid trademark, *Larabee v. Lewis*, 67 Ga. 562, 44 Am. Rep. 735; but this seems doubtful as the word is at most suggestive; see *infra*, this section, *Suggestive Names*. The term "Crack-proof," applied to

rubber goods, is descriptive of quality and not registrable, *In re Goodyear Rubber Co.*, 11 Pat. Off. Gaz. 1062. The symbol "½" in red, on cigarettes, indicates, although it does not express, the idea of two kinds of tobacco being used in the cigarette—"half and half"—and is not protectible, *Kinney v. Allen*, 1 Hughes (U. S.) 106. The words "Club House," as a brand for gin, are invalid as a trademark; they express quality, *Corwin v. Daly*, 7 Bosw. (N. Y.) 222. The same is true of "Club Whiskey," *Cahn v. Hoffman House*, (C. Pl. Eq. T.) 7 Misc. (N. Y.) 461. An exclusive right cannot be acquired in such words as "Pictorial" or "Illustrated," *Spottiswoode v. Clarke*, 2 Phil. 154, 1 Coop. t. Cot. 254, 10 Jur. 1043, 3 L. T. N. S. 271. In *Stoughton v. Woodard*, 39 Fed. Rep. 902, "Cough Cherries" applied to confections was upheld as a valid trademark. "Queen Quality," as applied to shoes, is not descriptive, *Thomas G. Plant Co. v. May Co.* (C. C. A.) 105 Fed. Rep. 375. In this case the court said: "It is insisted in behalf of the appellee that the designation 'Queen' is essentially one which signifies quality, and cannot, therefore, be appropriated by one individual as a trade name to the exclusion of others who have an equal right to use terms which denote a superior value or quality in their goods. But the decisive weight of authority supports the right of an individual to adopt a specific name of this character to distinguish his goods from those of others. Thus, the use of the words 'Kaiser,' 'King,' 'Monarch,' 'Royal,' 'Victor,' 'King Bee,' 'Pillsbury's Best,' has been in those several instances judicially sanctioned as a lawful appropriation.

*J. & P. Baltz Brewing Co. v. Kaiserbrauerei*, 39 U. S. App. 229, 74 Fed. Rep. 222; *Raymond v. Royal Baking-Powder Co.*, 55 U. S. App. 575, 85 Fed. Rep. 231; *Sarrazin v. W. R. Irby Cigar, etc., Co.*, 35 C. C. A. 496, 93 Fed. Rep. 624; *Pillsbury v. Pillsbury-Washburn Flour-Mills Co.*, 24 U. S. App. 395, 64 Fed. Rep. 841. It is true that in the case of *Beadleston v. Cooke Brewing Co.*, 46 U. S. App. 755, 74 Fed. Rep. 229, according to the syllabus, the word 'Imperial' was, in the circumstances of that case, held to be so far a designation of quality as to be incapable of exclusive appropriation. It must be admitted that at first blush such ruling seems not in harmony with the other cases upon the subject. But the conclusion was based upon references showing the extensive public use of the word to denote great excellence, and it was thought the peculiar manner in which the word was associated with others in branding the complainant's goods indicated that in its context the word signified quality rather than the manufacturer. One of the judges dissented from the view that the word was not capable of appropriation, though not agreeing with the result in that case. But the same court, in the case of *Raymond v. Royal Baking Powder Co.*, 55 U. S. App. 575, 85 Fed. Rep. 231, subsequently held that the word 'Royal' had been lawfully appropriated as the trade name for manufacturing and selling baking powder, and the court distinguishes its decision in the case of *Beadleston v. Cooke Brew-*

goods to which they are applied does not make them a valid trademark.<sup>1</sup> Clearness and accuracy of description are not necessary in order to invalidate the alleged trademark.<sup>2</sup> Whether or not a given word is descriptive of character or quality is a question for the court.<sup>3</sup>

(3) *Grade or Class*. — The marks, letters, numbers, or words by which the grade, quality, or class of a manufactured article is designated cannot alone be protected as a trademark, notwithstanding the fact that the symbols indicating grade may by long use have come also to indicate ownership and origin. If the symbols do actually indicate grade and were adopted for that purpose alone, they do not constitute a technical trademark.<sup>4</sup>

(4) *Excellence and Popularity*. — Words or marks merely indicating superior excellence, popularity, or universality in use, such as "best," "favorite," etc., cannot be exclusively appropriated as a trademark.<sup>5</sup>

ing Co., 46 U. S. App. 755, 74 Fed. Rep. 229, upon grounds which harmonize that case with the current of decisions by emphasizing the fact that in that case the word 'Imperial' was used in such association with other words as to negative the idea that it was not meant mainly to designate quality."

1. *Truth of Description*. — *Schmidt v. Brieg*, 100 Cal. 672.

2. *Clearness and Accuracy of Description*. — *Lamont v. Leedy*, 88 Fed. Rep. 72.

3. *Descriptiveness a Question for Court*. — *Hygeia Distilled Water Co. v. Hygeia Ice Co.*, 70 Conn. 516.

In order to be descriptive a word must afford information as to the general characteristics or composition of the article. *Stern v. Barrett Chemical Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 609.

A word which is not itself descriptive will not be rendered such merely because descriptive words in foreign languages led to its invention and adoption. *In re Densham*, (1895) 2 Ch. 176, 12 Reports 283.

4. *Marks Indicating Grade or Class Not Valid Trademarks* — *United States*. — *Columbia Mill Co. v. Alcorn*, 150 U. S. 460; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537; *Corbin v. Gould*, 133 U. S. 308; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 55; *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. Rep. 657; *Raymond v. Royal Baking-Powder Co.*, (C. C. A.) 85 Fed. Rep. 231; *Beadleston v. Cooke Brewing Co.*, (C. C. A.) 74 Fed. Rep. 229; *In re Eagle Pencil Co.*, 10 Pat. Off. Gaz. 981. See *J. & P. Baltz Brewing Co. v. Kaiserbrauerei*, (C. C. A.) 74 Fed. Rep. 222. See also *Stachelberg v. Ponce*, 128 U. S. 686. But see *Russia Cement Co. v. Katzenstein*, 109 Fed. Rep. 314.

*Illinois*. — *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125.

*Kentucky*. — *Avery v. Meikle*, 81 Ky. 73.

*New York*. — *Caswell v. Davis*, 58 N. Y. 223, 17 Am. Rep. 233; *Stokes v. Landgraff*, 17 Barb. (N. Y.) 608; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599.

See also *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 325, 37 Am. Rep. 362.

See also generally *infra*, this title, *Original Acquisition of Right—Adoption and User*.

In *Royal Baking Powder Co. v. Sherrell*, 93 N. Y. 331, 45 Am. Rep. 229, *reversing* (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 17, the plain-

tiff used the term "Royal" to designate the best grade of his flavoring extracts. *Rapallo, J.*, said: "Letters or figures which, by the custom of traders or the declaration of the manufacturers, are only used to denote quality, are incapable of exclusive appropriation, but are open to use by any one, like the adjectives of the language."

It is proper to register a series of marks which differ from each other only by combining in different modes a mark common to them all and peculiar to the trader, with words merely indicative of the quality of the goods marked, or symbols common to the trade. *In re Barrows*, 5 Ch. D. 353.

In *Ransome v. Graham*, 47 L. T. N. S. 218, it was held that where a manufacturer places on his goods a series of combinations of letters as trademarks, each of which serves to indicate to purchasers, first, that the goods are manufactured by the person using the mark, and second, the quality of the goods as compared with the goods respectively bearing the other marks in the series, the marks, being exclusively used by the manufacturer, are valid trademarks, notwithstanding that they are indicative of the quality of the goods to which they are applied.

**Numerals and Letters**, when used to designate grade or quality, are descriptive and not valid trademarks. See *supra*, this section, *Numerals; Letters and Initials*.

5. **Terms Claiming Excellence or Popularity Not Valid Trademarks**. — *In re Van Duzer*, 34 Ch. D. 623; *Proctor, etc., Co. v. Globe Refining Co.*, (C. C. A.) 92 Fed. Rep. 357; *Cooke, etc., Co. v. Miller*, 169 N. Y. 475, 53 N. Y. App. Div. 120; *Gillott v. Esterbrook*, 48 N. Y. 374, 8 Am. Rep. 553; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Babbitt v. Brown*, 68 Hun (N. Y.) 515. See also *Beard v. Turner*, 13 L. T. N. S. 746; *Lichtenstein v. Mellis*, 8 Oregon 464, 34 Am. Rep. 592. But see *Thomas G. Plant Co. v. May Co.*, (C. C. A.) 105 Fed. Rep. 375.

In *Braham v. Bustard*, 1 Hem. & M. 447, 9 L. T. N. S. 199, 11 W. R. 1061, *Wood, V. C.*, said he could not hold that the name "Excelsior" merely described a quality, so that, like "superfine," it had become common property.

The words "Gold Medal" applied to saleratus indicate excellence, and are not a valid trademark. *Taylor v. Gillies*, 59 N. Y. 331, 17 Am. Rep. 333.

(5) *Process of Manufacture.* — Words indicating a process of manufacture cannot be protected as a trademark, apart from other words indicating ownership and origin, if the process is known and is public property. If the process is secret, but is known by a name, then the name necessarily indicates ownership and origin, and will be protected; or if the process is patented and the patent held as a monopoly by the owner or owners, then words indicating the patented process or goods made under it will be protected, because any use of them by another would be a false statement, unless the user were an infringer, and in any case the use of such words by one not an owner or licensee under the patent would be enjoined as a fraud upon the owner of the patent and upon the public, and an unlawful interference with the exclusive rights granted to the patentee by his patent.<sup>1</sup>

(6) *Purpose or Use.* — Words which describe, in ordinary language, the purpose, use, or function of an article, cannot be protected as a trademark; but they often form strong evidence of an intention to deceive, and of a likelihood of deception, and hence frequently play an important part in making out a case of unlawful competition in business.<sup>2</sup>

There can be no trademark in the words "Trademark Best Soap." *Babbitt v. Brown*, 68 Hun (N. Y.) 515. Compare *Mrs. G. B. Miller & Co. Tobacco Manufactory v. Commerce*, 45 N. J. L. 18, 46 Am. Rep. 750.

The words "La Favorita" as applied to particularly selected and classified flour are sustained as a valid trademark, *Fuller, C. J.*, saying: "The brand did not indicate by whom the flour was manufactured, but it did indicate the origin of its selection and classification. It was equivalent to the signature of Holt & Co. to a certificate that the flour was the genuine article which had been determined by them to possess a certain degree of excellence. \* \* \* The case clearly does not fall within the rule announced in *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51." *Menendez v. Holt*, 128 U. S. 514.

In *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599, *Duer, J.*, said: "As the plaintiffs could not have acquired, by their prior occupation, an exclusive right in the use of the words 'first quality' or 'superfine,' they cannot have acquired a right by similar means to an exclusive use of any letters, marks, or other signs, which are merely a substitute for the words, and intended to convey the same meaning." See *In re Barrows*, 5 Ch. D. 353.

In *Waterman v. Shipman*, 130 N. Y. 301, the court held that the word "Ideal" as applied to fountain pens was not generic or descriptive of the article, its qualities, ingredients, grade, or characteristics, but was an arbitrary or fanciful name, and therefore a valid trademark. *Distinguished* in *Cooke, etc., Co. v. Miller*, 169 N. Y. 475, holding that the word "Favorite" is not a valid trademark. "Perfection" as applied to mattresses is a valid trademark. *Kyle v. Perfection Mattress Co.*, 127 Ala. 39, 85 Am. St. Rep. 78.

In *Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589, the court held that the word "Pride" as applied to cigars was an arbitrary word, and not descriptive of the article, and could lawfully be appropriated as a trademark.

1. *Process of Manufacture.* — *Wheeler, etc., Mfg. Co. v. Shakespeare*, 39 L. J. Ch. 36; *Linoleum Mfg. Co. v. Nairn*, 7 Ch. D. 834, 47 L. J.

Ch. 430, 38 L. T. N. S. 448; *Liebig's Extract of Meat Co. v. Hanbury*, 17 L. T. N. S. 298; *Partlo v. Todd*, 17 Can. Sup. Ct. 196; *Good-year's India Rubber Glove Mfg. Co. v. Good-year Rubber Co.*, 128 U. S. 598; *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337; *Osgood v. Rockwood*, 11 Blatchf. (U. S.) 310; *Singer Mfg. Co. v. Larsen*, 8 Biss. (U. S.) 151; *Liebig's Extract of Meat Co. v. Walker*, 115 Fed. Rep. 822; *Indurated Fibre Co. v. Amoskeag Indurated Fibre Ware Co.*, 37 Fed. Rep. 695; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94, doubted in *Hiram Holt Co. v. Wadsworth*, 41 Fed. Rep. 34; *Leclanché Battery Co. v. Western Electric Co.*, 21 Fed. Rep. 538. See also *infra*, this section, *Name of Patented Article*.

2. *Terms Descriptive of Purpose or Use* — *England.* — *In re Van Duzer*, 34 Ch. D. 623.

*United States.* — *Computing Scale Co. v. Standard Computing Scale Co.*, (C. C. A.) 118 Fed. Rep. 965; *Air-Brush Mfg. Co. v. Thayer*, 84 Fed. Rep. 640; *L. H. Harris Drug Co. v. Stucky*, 46 Fed. Rep. 625; *Humphreys' Specific Homeopathic Medicine Co. v. Wenz*, 14 Fed. Rep. 250; *In re Roach*, 10 Pat. Off. Gaz. 333; *In re Lawrence*, 10 Pat. Off. Gaz. 163. But see *Stoughton v. Woodard*, 39 Fed. Rep. 902.

*California.* — *Spieker v. Lash*, 102 Cal. 38; *Falkinburg v. Lucy*, 35 Cal. 52, 95 Am. Dec. 76. *Massachusetts.* — *Gilman v. Hunnewell*, 122 Mass. 139.

*New York.* — *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1; *Ayer v. Rushton*, 7 Daly (N. Y.) 9. Compare *Barrett Chemical Co. v. Stern*, 56 N. Y. App. Div. 143.

*Tennessee.* — *C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84.

*Wisconsin.* — *Gessler v. Grieb*, 80 Wis. 21, 27 Am. St. Rep. 20.

There can be no trademark in the phrase "Magic Headache Cure." *Gessler v. Grieb*, 80 Wis. 21, 27 Am. St. Rep. 20.

The words "Puddine," "Rose," and "Vanilla," applied with reference to uncooked ingredients for pudding, cannot be protected. *Clotworthy v. Schepp*, 42 Fed. Rep. 62.

The words "Microbe Killer," applied to a preparation for destroying microbes, are de-



(7) *Ingredients*. — Words merely descriptive of the ingredients of which the article is composed do not constitute a valid trademark.<sup>1</sup> Upon this ground the name of an article consisting of a compound of the names of its ingredients has often been refused protection,<sup>2</sup> though it seems that these decisions might have proceeded upon the broader ground that the generic name of an article cannot be a trademark.<sup>3</sup> Nevertheless, it has been held that a coined arbitrary word, though based upon the name of an ingredient, and suggestive thereof, may constitute a good trademark, even though used as the name of a new article or compound. Otherwise, it is certainly good.<sup>4</sup> Unfair compe-

scriptive, and not a valid trademark. *Alff v. Radam*, 77 Tex. 530, 19 Am. St. Rep. 792. See also *Radam v. Capital Microbe Destroyer Co.*, 81 Tex. 122, 26 Am. St. Rep. 783.

Registration was refused "Parson's Purgative Pills, P. P. P.," and "Johnson's American Anodyne Liniment, Established A. D. 1810," on the ground of descriptiveness, although the letters themselves, if used alone, might have acquired an arbitrary signification and been registrable. *In re Johnson*, 2 Pat. Off. Gaz. 315.

In *Davis v. Kennedy*, 13 Grant. Ch. (U. C.) 523, the name "Pain-Killer" was protected as being fancy and sufficiently arbitrary. In *Davis v. Harbord*, 15 App. Cas. 316, it was held by two lords justices that the term was not special and distinctive within the Act of 1875, § 10. See also *Davis v. Kendall*, 2 R. I. 566, wherein the exclusive right to the name was sustained.

In *L. H. Harris Drug Co. v. Stucky*, 46 Fed. Rep. 624, where there was a picture of a boy suffering from cramps, with words "Cramp Cure," it was held that the picture constituted a valid trademark, but the words were descriptive.

1. *Words Descriptive of Ingredients* — *England*. — *In re Hudson*, 32 Ch. D. 311.

*Canada*. — *Asbestos*, etc., *Co. v. William Slater Co.*, 10 Quebec K. B. 165; *Asbestos*, etc., *Co. v. William Slater Co.*, 18 Quebec Super. Ct. 360; *Provident Chemical Works v. Canada Chemical Mfg. Co.*, 2 Ont. L. Rep. 182.

*United States*. — *Brown Chemical Co. v. Meyer*, 139 U. S. 540; *Brennan v. Emery-Bird-Thayer Dry Goods Co.*, (C. C. A.) 108 Fed. Rep. 624; *American Washboard Co. v. Saginaw Mfg. Co.*, (C. C. A.) 103 Fed. Rep. 281; *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. Rep. 651; *California Fig Syrup Co. v. Stearns*, 67 Fed. Rep. 1008; *Indurated Fibre Co. v. Amoskeag Indurated Fibre Ware Co.*, 37 Fed. Rep. 695; *Brown Chemical Co. v. Myer*, 31 Fed. Rep. 453; *Ginter v. Kinney Tobacco Co.*, 12 Fed. Rep. 782. *Compare* *Improved Fig Syrup Co. v. California Fig Syrup Co.*, (C. C. A.) 54 Fed. Rep. 175.

*California*. — *Schmidt v. Brieg*, 100 Cal. 672.

*Minnesota*. — *J. R. Watkins Medical Co. v. Sands*, 83 Minn. 326.

*New York*. — *Van Beil v. Prescott*, 82 N. Y. 630; *Caswell v. Davis*, 58 N. Y. 223, 17 Am. Rep. 233; *Clinton Metallic Paint Co. v. New York Metallic Paint Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 66; *Electro-Silicon Co. v. Hazard*, 29 Hun. (N. Y.) 369; *Keasbey v. Brooklyn Chemical Works*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 696, *affirming* 16 N. Y. Supp. 318.

*Ohio*. — *Feder v. Brundo*, 8 Ohio Dec. 179, 5 Ohio N. P. 275.

2. *Names Compounded from Names of Ingredients*. — *Brown Chemical Co. v. Meyer*, 139 U. S. 540, *affirming* 31 Fed. Rep. 453; *Searle*, etc., *Co. v. Warner*, (C. C. A.) 112 Fed. Rep. 674; *Sterling Remedy Co. v. Gorey*, 110 Fed. Rep. 372; *California Fig Syrup Co. v. Stearns*, (C. C. A.) 73 Fed. Rep. 812; *Brown Chemical Co. v. Stearns*, 37 Fed. Rep. 360; *Rumford Chemical Works v. Muth*, 35 Fed. Rep. 524; *Carbolic Soap Co. v. Thompson*, 25 Fed. Rep. 625; *Caswell v. Davis*, 58 N. Y. 223, 17 Am. Rep. 233; *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1; *Ayer v. Rushton*, 7 Daly (N. Y.) 9; *Helmbold v. Henry T. Helmbold Mfg. Co.*, (Supm. Ct.) 53 How. Pr. (N. Y.) 453. But see *Keasbey v. Brooklyn Chemical Works*, 142 N. Y. 467, *reversing* (Supm. Ct. Gen. T.) 21 N. Y. Supp. 696.

In *Burgess v. Burgess*, 3 De G. M. & G. 896, it was held that the words "Essence of Anchovies," applied to a fish sauce, correctly described the article, and could not be a valid trademark.

3. See *infra*, this section, *Name of Thing to Which Applied*.

4. *Coined Arbitrary but Suggestive Names*. — *American Grocery Co. v. Sloan*, 68 Fed. Rep. 539; *Burnett v. Phalon*, 9 Bosw. (N. Y.) 193, *affirmed* (Ct. App.) 5 Abb. Pr. N. S. (N. Y.) 212. See *Lockwood v. Bostwick*, 2 Daly (N. Y.) 521. See also *infra*, this section, *Name of Thing to Which Applied*.

In *Battle v. Finlay*, 45 Fed. Rep. 796, the word "Bromidia," coined and applied arbitrarily to a medicinal preparation, which nevertheless contained bromide of potassium, was held entitled to protection as a valid trademark. The court said: "The word is an arbitrary word, descriptive of nothing unless it is of the complainants' goods, and that only for the reason that the complainants have introduced them to the public under such arbitrary name."

In *Browne v. Freeman*, 12 W. R. 305, 4 New Reports 476, it was strongly intimated that the word "Chlorodyne," applied to a new medicine by its inventor, was capable of protection. See also *Browne v. Freeman*, W. N. (1873) 178.

In *Electro-Silicon Co. v. Levy*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 460, the court said: "The plaintiff can have no exclusive right to the use of the word 'silicon,' which is one in common use, and is reasonably, in so far as the substance of this powder is concerned, descriptive." But the combination "Electro-Silicon" as applied to a polishing powder was held by the same court to be valid in *Electro-*

tion, however, will always be restrained, and if words, although descriptive of ingredients, have come to indicate origin or ownership, another person may be required to use them in such a way as not to cause unnecessary confusion and pass off his goods as those of his rival.<sup>1</sup>

(8) *Generic Names*. — Words which were not originally or of their own meaning descriptive terms, but which, by use, association, and acceptance, have come to be the generic name for a particular kind or class of goods, and indicate that only, and not origin or ownership, are not valid trademarks.<sup>2</sup> The names of patented articles are a familiar illustration of generic names which cannot be monopolized as trademarks.<sup>3</sup> It has been held that a word which at the time of its adoption was a valid trademark does not cease to be such and become generic merely because it has become so generally known that it has been adopted by the public as the ordinary appellation of the article.<sup>4</sup> But even if the word was originally a good trademark or an exclusive trade name, if it has been permitted to lose its distinctiveness and become merely a generic name, all trademark rights therein are lost.<sup>5</sup> It seems that the question should be made to turn upon the point of abandonment.<sup>6</sup> Whether a name has acquired a generic meaning indicative of kind, quality, or class of goods, and has therefore become *publici juris*, is a question of fact.<sup>7</sup>

*p. SUGGESTIVE NAMES*. — Names which merely to some extent suggest the character, quality, or ingredients of an article, or some supposed advantage to be derived from using it, or some effect to be produced by its use, or the locality of its origin, have been ordinarily upheld as valid trademarks,<sup>8</sup> not-

Silicon Co. v. Trask, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 189, and the subsequent case of Electro-Silicon Co. v. Hazard, 29 Hun (N. Y.) 369.

1. *Unfair Competition*. — Sterling Remedy Co. v. Gorey, 110 Fed. Rep. 372. See Burnett v. Phalon, 9 Bosw. (N. Y.) 193, *affirmed* (Ct. App.) 5 Abb. Pr. N. S. (N. Y.) 212, which was decided upon the ground of trademark, though it seems to be a clear case of unfair competition.

2. *Names Become Generic*. — *In re Arbenz*, 35 Ch. D. 248; Liebig's Extract of Meat Co. v. Walker, 115 Fed. Rep. 822; Searle, etc., Co. v. Warner, (C. C. A.) 112 Fed. Rep. 675; Watkins v. Landon, 52 Minn. 389, 38 Am. St. Rep. 560; Thornton v. Crowley, 47 N. Y. Super. Ct. 527. But see Celluloid Mfg. Co. v. Cellonite Mfg. Co., 32 Fed. Rep. 94. See also generally *infra*, this section, *Name of Thing to Which Applied*.

The Word "Julienne," a name applied to an article composed of vegetables for soup, is not protectible when used with reference to a specific kind of that article, it being merely descriptive. Godillot v. Hazard, (N. Y. Super. Ct. Spec. T.) 49 How. Pr. (N. Y.) 5.

3. See *infra*, this section, *Name of Patented Article*.

4. *Trademarks Becoming Generic*. — Selchow v. Baker, 93 N. Y. 59, 45 Am. Rep. 169; Celluloid Mfg. Co. v. Cellonite Mfg. Co., 32 Fed. Rep. 94; Celluloid Mfg. Co. v. Read, 47 Fed. Rep. 712. See also Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537; Burton v. Stratton, 12 Fed. Rep. 696.

"Otherwise a trademark as soon as it should become valuable enough to be generic would expire." *Ex p.* Consolidated Fruit Jar Co., 16 Pat. Off. Gaz. 679.

5. *Loss of Distinctiveness*. — Ford v. Foster, L. R. 7 Ch. 611, 27 L. T. N. S. 220; Canham v.

Jones, 2 Ves. & B. 218; Singleton v. Bolton, 3 Dougl. 293, 26 E. C. L. 114; Liebig's Extract of Meat Co. v. Walker, 115 Fed. Rep. 822; Sherwood v. Andrews, 5 Am. L. Reg. N. S. 588; C. F. Simmons Medicine Co. v. Mansfield Drug Co., 93 Tenn. 84; Marshall v. Pinkham, 52 Wis. 572, 38 Am. Rep. 756. But see Fleischmann v. Schuckmann, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 92. See generally *infra*, this title, *Loss or Termination of Right*.

In Liebig's Extract of Meat Co. v. Hanbury, 17 L. T. N. S. 298, the phrase "Liebig's Extract of Meat" was refused protection on the ground that for some time it had been commonly used as descriptive of an article made in a particular way. There was no patent, and the inventor did not seem to care to preserve the right of property in his name. See also *In re Anderson*, 26 Ch. D. 409.

6. *Abandonment as a Test*. — See Powell v. Birmingham Vinegar Brewery Co., (1896) 2 Ch. 73. See *infra*, this title, *Loss or Termination of Right — Abandonment*.

7. *Question of Fact*. — Noera v. H. A. Williams Mfg. Co., 158 Mass. 110. See Coats v. Merrick Thread Co., 36 Fed. Rep. 324, 149 U. S. 562.

8. *Suggestive Names — England*. — *In re Densham*, (1895) 2 Ch. 176, 12 Reports 283; O'Rourke v. Central City Soap Co., Price & S. T. M. Cas. 1043.

*United States*. — Menendez v. Holt, 128 U. S. 514; Globe-Wernicke Co. v. Brown, 121 Fed. Rep. 185; Pennsylvania Salt Mfg. Co. v. Myers, 79 Fed. Rep. 87; Royal Baking Powder Co. v. Raymond, 70 Fed. Rep. 376; American Fibre Chamois Co. v. De Lee, 67 Fed. Rep. 329; Frost v. Rindskopf, 42 Fed. Rep. 408; Hiram Holt Co. v. Wadsworth, 41 Fed. Rep. 34; Stoughton v. Woodard, 39 Fed. Rep. 902; *Ex p.* Heyman, 18 Pat. Off. Gaz. 922.

withstanding the objection that such names were descriptive or geographical.<sup>1</sup>

*g. GEOGRAPHICAL TERMS*—(1) *In General*.—It is well settled that a geographical term, by which is meant a term denoting locality, cannot be exclusively appropriated as a trademark or trade name, because such a term is generic or descriptive, and any one who can do so truthfully is entitled to use it.<sup>2</sup> Geographical terms may, however, by long and exclusive user, acquire a secondary significance as denoting the goods or business of the particular trader who has so used them, and under such circumstances a subsequent trader will not be permitted to use such terms in a manner that will be likely to deceive the public, and pass off his goods or business as being the goods or business of his rival,<sup>3</sup> for this would constitute unfair competition.

*Connecticut*.—Hygeia Distilled Water Co. v. Hygeia Ice Co., 70 Conn. 516, 72 Conn. 646.

*Louisiana*.—Funke v. Dreyfus, 34 La. Ann. 80, 44 Am. Rep. 413.

*New York*.—Rawlinson v. Brainard, etc., Co., (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 287; Caswell v. Davis, (C. Pl. Spec. T.) 35 How. Pr. (N. Y.) 76; Stern v. Barrett Chemical Co., (Supm. Ct. App. T.) 29 Misc. (N. Y.) 609, reversing (N. Y. City Ct. Gen. T.) 28 Misc. (N. Y.) 429.

*Pennsylvania*.—Fulton v. Sellers, 4 Brews. (Pa.) 42.

*Rhode Island*.—Davis v. Kendall, 2 R. I. 566.

1. See *supra*, this section, *Descriptive Words and Marks*, and *infra*, this section, *Geographical Terms*.

2. **Geographical Terms Not Valid Trademarks**—*England*.—M'Andrew v. Bassett, 4 DeG. J. & S. 380; Wolfe v. Hart, 4 Vict. L. R. Eq. 125.

*United States*.—Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U. S. 666; Saxlehner v. Eisner, etc., Co., 179 U. S. 19, reversing (C. C. A.) 91 Fed. Rep. 536; Castner v. Coffman, 178 U. S. 168, affirming (C. C. A.) 87 Fed. Rep. 457; Columbia Mill Co. v. Alcorn, 150 U. S. 460; Delaware, etc., Canal Co. v. Clark, 13 Wall. (U. S.) 327; Allen B. Wrisley Co. v. Iowa Soap Co., (C. C. A.) 122 Fed. Rep. 796; Bauer v. La Société, etc., (C. C. A.) 120 Fed. Rep. 74; Draper v. Skerrett, 116 Fed. Rep. 206; Weyman v. Soderberg, 108 Fed. Rep. 63; Shaver v. Heller, etc., Co., (C. C. A.) 108 Fed. Rep. 821, affirming 102 Fed. Rep. 882; Continental Ins. Co. v. Continental Fire Assoc., 96 Fed. Rep. 846; Illinois Watch-Case Co. v. Elgin Nat. Watch Co., (C. C. A.) 94 Fed. Rep. 667, reversing 89 Fed. Rep. 487; Lamont v. Leedy, 88 Fed. Rep. 73; Coffman v. Castner, (C. C. A.) 87 Fed. Rep. 457; Pillsbury-Washburn Flour Mills Co. v. Eagle, (C. C. A.) 86 Fed. Rep. 608; Hoyt v. J. T. Lovett Co. (C. C. A.) 71 Fed. Rep. 173; Genesee Salt Co. v. Burnap, 67 Fed. Rep. 534; New York, etc., Cement Co. v. Copley Cement Co., 44 Fed. Rep. 277; Evans v. Von Laer, 32 Fed. Rep. 153; Pratt Mfg. Co. v. Astral Refining Co., 27 Fed. Rep. 492; Anheuser-Busch Brewing Assoc. v. Piza, 24 Fed. Rep. 149; *Ex p.* Oliver, 18 Pat. Off. Gaz. 923. But see Bauer v. Siegert, (C. C. A.) 120 Fed. Rep. 81; Atwater v. Castner, (C. C. A.) 88 Fed. Rep. 642.

*California*.—Burke v. Cassin, 45 Cal. 467, 13 Am. Rep. 204.

*Illinois*.—Elgin Butter Co. v. Elgin Creamery Co., 155 Ill. 127, affirming 51 Ill. App. 231.

*Missouri*.—American Brewing Co. v. St. Louis Brewing Co., 47 Mo. App. 14.

*New York*.—Lea v. Wolf, (Supm. Ct. Gen. T.) 15 Abb. Pr. N. S. (N. Y.) 5; Wolfe v. Goulard, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 64; Gabriel v. Sicilian Asphalt Paving Co., 44 N. Y. App. Div. 633, affirming (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 534; Siegert v. Abbott, 72 Hun (N. Y.) 243; Clinton Metallic Paint Co. v. New York Metallic Paint Co., (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 66.

*Pennsylvania*.—Glendon Iron Co. v. Uhler, 75 Pa. St. 467, 15 Am. Rep. 599.

*South Carolina*.—Telephone Mfg. Co. v. Sumter Telephone Mfg. Co., 63 S. Car. 313.

"Columbia" is a geographical name which cannot be appropriated as an exclusive trademark. Columbia Mill Co. v. Alcorn, 150 U. S. 460; Morgan Envelope Co. v. Walton, (C. C. A.) 86 Fed. Rep. 605.

"Columbia" used as the name of a hotel is a fanciful name and not geographical. Whitfield v. Loveless, 64 Pat. Off. Gaz. 442.

3. **Unfair Competition—Geographical Terms Which Have Acquired Secondary Meaning**—

*England*.—Wotherspoon v. Currie, L. R. 5 H. L. 508; Montgomery v. Thompson, 64 L. T. N. S. 749; Lee v. Haley, L. R. 5 Ch. 161; Seixó v. Provezende, L. R. 1 Ch. 192; M'Andrew v. Bassett, 4 DeG. J. & S. 380; Taylor v. Taylor, 23 L. J. Ch. 255; Hine v. Lart, 10 Jur. 106; Radde v. Norman, L. R. 14 Eq. 348; Apollinaris Co. v. Norrish, 33 L. T. N. S. 242; Powell v. McNulty, Sebastian's Dig. 526; Siegert v. Findlater, 7 Ch. D. 801; Davis v. Tylor, M. R. April 24, 1879; Hirst v. Denham, L. R. 14 Eq. 542; Cocks v. Chandler, L. R. 11 Eq. 446; Bulloch v. Gray, 19 Journ. of Jurisp. 218.

*United States*.—Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U. S. 676; American Waltham Watch Co. v. Sandman, 96 Fed. Rep. 330; Anheuser-Busch Brewing Assoc. v. Piza, 24 Fed. Rep. 149; Evans v. Von Laer, 32 Fed. Rep. 153; Southern White Lead Co. v. Cary, 25 Fed. Rep. 125; Whitfield v. Loveless, 64 Pat. Off. Gaz. 442.

*Massachusetts*.—American Waltham Watch Co. v. U. S. Watch Co., 173 Mass. 85, 73 Am. St. Rep. 263.

*New York*.—Newman v. Alvord, 51 N. Y. 189, 10 Am. Rep. 588; Lea v. Wolf, (Supm. Ct. Gen. T.) 15 Abb. Pr. N. S. (N. Y.) 5; Brooklyn White Lead Co. v. Masury, 25 Barb. (N. Y.) 416.

*Pennsylvania*.—Glendon Iron Co. v. Uhler, 75 Pa. St. 467, 15 Am. Rep. 599.



What use of geographical terms will amount to unfair competition is subsequently considered.<sup>1</sup> An exclusive property interest in the name used to commit the wrong is not essential to relief.<sup>2</sup> In some cases geographical names have been protected upon the ground of trademark, but these cases must be supported, if at all, upon the ground of unfair competition. Some of them were clearly not cases of trademarks.<sup>3</sup>

(2) *Geographical Word Not Used in Geographical Sense.* — A geographical term used in a purely fanciful sense by a nonresident of a locality, and in such a manner as to be innocent of misrepresentation as to origin, may be upheld and protected as a trademark, on the same principle that fictitious names are protected.<sup>4</sup>

7. NAME OF THING TO WHICH APPLIED — (1) *In General.* — Obviously the generic name of an article cannot be exclusively appropriated<sup>5</sup> as a trade-

1. See *infra*, this title, *Infringement and Unfair Competition* — *Use of Geographical Terms.*

2. *Exclusive Property Interest Unnecessary.* — *Lee v. Haley*, L. R. 5 Ch. 161; *Pabst Brewing Co. v. Ekers*, 20 Quebec Super. Ct. 23; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 676; *Shaver v. Heller, etc., Co.*, (C. C. A.) 108 Fed. Rep. 821, *affirming* 102 Fed. Rep. 882; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, (C. C. A.) 86 Fed. Rep. 608. But see *New York, etc., Cement Co. v. Copley Cement Co.*, 44 Fed. Rep. 277.

In *M'Andrew v. Bassett*, 10 Jur. N. S. 492, 550, 10 L. T. N. S. 65, 442, the plaintiffs, manufacturers of licorice, stamped it with the word "Anatolia." It was held a valid trademark, because, by use and occupation, the word had come to indicate ownership and origin of the manufactured goods in complainant, in addition to the geographical location of the place where the licorice was grown. See the comments on this case in the opinion of Strong, J., in *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 326.

3. *Geographical Names Treated as Trademarks.* — *Radde v. Norman*, L. R. 14 Eq. 348; *Elgin Nat. Watch Co. v. Illinois Watch-Case Co.*, 89 Fed. Rep. 487; *Southern White Lead Co. v. Coit*, 39 Fed. Rep. 492; *Newman v. Alvord*, 51 N. Y. 180, 10 Am. Rep. 588; *Drake Medicine Co. v. Glessner*, 68 Ohio St. 337.

4. *Geographical Words Used in Fanciful or Arbitrary Sense.* — *Colgate v. Adams*, 88 Fed. Rep. 890; *Baker v. Baker*, 77 Fed. Rep. 181; *Whitfield v. Loveless*, 64 Pat. Off. Gaz. 442; *Fleischmann v. Schuckmann*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 92; *Drake Medicine Co. v. Glessner*, 68 Ohio St. 337. But see *Clinton Metallic Paint Co. v. New York Metallic Paint Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 66.

In *Fleischmann v. Schuckmann*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 92, Price & S. T. M. Cas. 541, Van Vorst, J., in speaking of "Vienna bread," said: "The plaintiff and his assignor were the first to use it here or elsewhere to distinguish a manufacture of bread. As a mark for bread it is purely arbitrary, and it is in no manner descriptive either of the ingredients or quality of the article. \* \* \* By the use of the word 'Vienna' in that connection, no deception is practiced, because the place of its manufacture is given, and it is known that bread cannot be imported from abroad for use here." See also the fol-

lowing cases, where geographical terms, used in a fanciful sense, have been upheld as valid trademarks: *Messerole v. Tynberg*, (C. Pl. Spec. T.) 4 Abb. Pr. N. S. (N. Y.) 410; *Hirst v. Denham*, L. R. 14 Eq. 542 ("Liverpool" for cloth made at Huddersfield, England); *In re Cornwall*, 12 Pat. Off. Gaz. 312 ("Dublin Soap" made in U. S.); *In re Green*, 8 Pat. Off. Gaz. 729 ("German Soap" made in U. S.); *Bulloch v. Gray*, 19 Journ. of Jurisp. 218 ("Loch Katrine Distillery"); *Siebert v. Findlater*, 7 Ch. D. 801 ("Angostura Bitters"); *A. F. Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. Rep. 896 ("Green Mountain," "Wilmington Lake," "Indian Pond," scythestones). See also *supra*, this section, *Fictitious, Historical, or Celebrated Names.*

5. *Name of Article Not a Trademark* — *England.* — *Ford v. Foster*, L. R. 7 Ch. 611; *Siebert v. Findlater*, 7 Ch. D. 801; *In re Leonard*, 26 Ch. D. 288; *Linoleum Mfg. Co. v. Nairn*, 7 Ch. D. 834, 47 L. J. Ch. 430; *Cocks v. Chandler*, L. R. 11 Eq. 447; *Young v. Macrae*, 9 Jur. N. S. 322; *In re Magnolia Metal Co.*, (1897) 2 Ch. 371; *Reddaway v. Banham*, (1895) 1 Q. B. 286; *Formalin Hygienic Co.'s Application*, 17 R. P. C. 486.

*United States.* — *Holzappel's Compositions Co. v. Rahtjen's American Composition Co.*, 183 U. S. 1, *reversing* (C. C. A.) 101 Fed. Rep. 257; *Alleghany Fertilizer Co. v. Woodside* 1 Hughes (U. S.) 115; *Horlick's Food Co. v. Elgin Milking Co.*, (C. C. A.) 120 Fed. Rep. 264; *Liebig's Extract of Meat Co. v. Walker*, 115 Fed. Rep. 822; *Rahtjen's American Composition Co. v. Halzapfel's Compositions Co.*, 97 Fed. Rep. 949; *Centaur Co. v. Marshall*, 92 Fed. Rep. 605; *Centaur Co. v. Robinson*, 91 Fed. Rep. 890; *Centaur Co. v. Heinsfurter*, (C. C. A.) 84 Fed. Rep. 955; *Air-Brush Mfg. Co. v. Thayer*, 84 Fed. Rep. 640; *Dadirrian v. Gullian*, 79 Fed. Rep. 784; *Dadirrian v. Yacubian*, 72 Fed. Rep. 1010, 90 Fed. Rep. 812, *affirmed* (C. C. A.) 98 Fed. Rep. 879; *Leclanche Battery Co. v. Western Electric Co.*, 23 Fed. Rep. 276; *Ginter v. Kinney Tobacco Co.*, 12 Fed. Rep. 782.

*Massachusetts.* — *Thomson v. Winchester*, 19 Pick. (Mass.) 214, 31 Am. Dec. 135.

*Michigan.* — *Lamb Knit-Goods Co. v. Lamb Glove, etc., Co.*, 120 Mich. 159.

*Minnesota.* — *Watkins v. Landon*, 52 Minn. 389, 38 Am. St. Rep. 560; *J. R. Watkins Medical Co. v. Sands*, 83 Minn. 326.

*New York.* — *Gillott v. Esterbrook*, 47 Barb.

mark for that article, because such name is essentially descriptive.<sup>1</sup> But where by use the name of an article has acquired a secondary meaning as identifying the goods of a particular person, no other person will be permitted to use that name in such a manner as to pass off his preparation or manufacture of the article as being that of the former.<sup>2</sup> Under such circumstances, the subsequent user of the name will be required to accompany it with affirmative precautions sufficient to render any deception or confusion improbable, and if he does so his use of the word will not constitute a cause of action.<sup>3</sup> Distinctive names first applied by the plaintiff to a new product introduced by him have been often protected, and frequently declared to be valid trademarks. But it is believed that these decisions must be supported, if at all, upon the principle of unfair competition in trade rather than upon the ground of technical trademark.<sup>4</sup> When any article or substance is first produced, it must necessarily be given a name by which it may be known, and this name, being the only appellation by which it can be distinguished, becomes *publici juris* whenever the article itself is *publici juris*. A person entitled to make and sell an article must necessarily be entitled to call it by the only name by which it is known.<sup>5</sup> Of course, an arbitrary name applied by the plaintiff to dis-

(N. Y.) 455, 48 N. Y. 374, 8 Am. Rep. 553; *Godillot v. Hazard*, (N. Y. Super. Ct. Spec. T.) 49 How. Pr. (N. Y.) 5; *Fetridge v. Wells*, (Super. Ct. Spec. T.) 13 How. Pr. (N. Y.) 385; *Thornton v. Crowley*, 47 N. Y. Super. Ct. 527; *Godillot v. Hazard*, 44 N. Y. Super. Ct. 427. But see *Fetridge v. Merchant*, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 156; *Fleischmann v. Schuckmann*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 92; *Caswell v. Davis*, (C. Pl. Spec. T.) 35 How. Pr. (N. Y.) 76; *Dr. Dadirrian, etc., Co. v. Hauenstein*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 23; *Dadirrian v. Theodorion*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 300.

*Pennsylvania*.—*Phalon v. Wright*, 5 Phila. (Pa.) 464, 21 Leg. Int. (Pa.) 116.

*Tennessee*.—*C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84.

*Wisconsin*.—*Marshall v. Pinkham*, 52 Wis. 572, 38 Am. Rep. 756.

In *Edelsten v. Vick*, 11 Hare 78, Wood, V. C., said: "There being no property in a mere name, it may be open to the use of all persons dealing in the article which it describes. Thus, a maker of pins may say, 'I, John Smith, manufacture and sell Tayler's Solid Headed Pins,' and the court would not in such a case grant an injunction to restrain the use of that name." See also *Singer Mfg. Co. v. Wilson*, 2 Ch. D. 448.

1. See *supra*, this section, *Descriptive Words and Marks*. See also *Holzapfel's Compositions Co. v. Rahtjen's American Composition Co.*, 183 U. S. 1; *Fuller v. Huff*, 99 Fed. Rep. 439.

2. **Unfair Competition.**—*Powell v. Birmingham Vinegar Brewery Co.*, (1894) 3 Ch. 449, 13 Reports 153, *affirmed* 13 Reports 164, note; *Powell v. Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54, *affirmed* (1897) A. C. 710, 66 L. J. Ch. 763; *Hansen v. Siegel-Cooper Co.*, 106 Fed. Rep. 691; *Centaur Co. v. Robinson*, 91 Fed. Rep. 890; *Dadirrian v. Yacubian*, 72 Fed. Rep. 1010. But see *Dover Stamping Co. v. Fellows*, 163 Mass. 191, 47 Am. St. Rep. 448.

3. **Affirmative Precautions Against Confusion.**—*B. B. Hill Mfg. Co. v. Sawyer Boss Mfg. Co.*, 112 Fed. Rep. 144, *affirmed* (C. C. A.) 118 Fed.

Rep. 1014; *Centaur Co. v. Marshall*, 92 Fed. Rep. 605, (C. C. A.) 97 Fed. Rep. 785; *Centaur Co. v. Robinson*, 91 Fed. Rep. 890; *Dadirrian v. Yacubian*, 72 Fed. Rep. 1010.

4. **Distinctive Names Applied to New Products**—*England*.—*Powell v. Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 79; *Cochrane v. Macnish*, (1896) A. C. 225; *Braham v. Bustard*, 1 Hem. & M. 447.

*United States*.—*Ludington Novelty Co. v. Leonard*, 119 Fed. Rep. 937; *Searle, etc., Co. v. Warner*, (C. C. A.) 112 Fed. Rep. 676 (*Pancreopepsine*); *Centaur Co. v. Robinson*, 91 Fed. Rep. 890 (*Castoria*); *N. K. Fairbank Co. v. Central Lard Co.*, 64 Fed. Rep. 133 (*Cottolene*); *Improved Fig Syrup Co. v. California Fig Syrup Co.*, (C. C. A.) 54 Fed. Rep. 175; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94.

*Massachusetts*.—*Thomson v. Winchester*, 19 Pick. (Mass.) 214, 31 Am. Dec. 135.

*New York*.—*Kesbey v. Brooklyn Chemical Works*, 142 N. Y. 467, *reversing* (Supm. Ct. Gen. T.) 21 N. Y. Supp. 696 (*Bromo-Caffeine*); *Electro-Silicon Co. v. Levy*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 469; *Electro-Silicon Co. v. Trask*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 189; *Caswell v. Davis*, (C. Pl. Spec. T.) 35 How. Pr. (N. Y.) 76; *Electro-Silicon Co. v. Hazard*, 29 Hun (N. Y.) 369. See *Gillott v. Esterbrook*, 48 N. Y. 374, 8 Am. Rep. 553.

*Ohio*.—*Lloyd v. Merrill Chemical Co.*, 11 Ohio Dec. (Reprint) 236, 25 Cinc. L. Bul. 319.

*Rhode Island*.—*Davis v. Kendall*, 2 R. I. 566.

"Syrup of Figs" has been sustained as a valid trademark upon the ground that it was formulated by the manufacturer from words of no prior association and applied to a new artificial product. *Improved Fig Syrup Co. v. California Fig Syrup Co.*, (C. C. A.) 54 Fed. Rep. 175. *Contra*, *California Fig Syrup Co. v. Stearns*, 67 Fed. Rep. 1008.

5. **Name of Article Publici Juris**—*England*.—*Waterman v. Ayres*, 39 Ch. D. 29; *In re Leonard*, 26 Ch. D. 288; *James v. James*, 41 L. J. Ch. 353; *Young v. Macrae*, 9 Jur. N. S. 322;



nate his manufacture of an article which has a generic name may be a valid trademark, no matter how widely known it may become under such arbitrary name.<sup>1</sup>

(2) *Name of Patented Article* — (a) *Before Expiration of Patent*. — While the name of a patented article is not a valid trademark, during the existence of the patent no one can use the name of such article for a different article so as to pass it off for the patented article, as this would constitute unfair competition.<sup>2</sup> But if the identical article can be made in some other way, it may be called by its name notwithstanding the existence of the patent.<sup>3</sup>

(b) *After Expiration of Patent* — *General Doctrine*. — Where a patented article becomes known by a particular name, although an arbitrary one suitable for use as a trademark, or the name of the inventor, such name becomes *publici juris* upon the expiration of the patent, and any one who makes and sells the patented article may call it by that name,<sup>4</sup> because such name is generic and

Liebig's Extract of Meat Co. v. Hanbury, 17 L. T. N. S. 298; Singleton v. Bolton, 3 Dougl. 293, 26 E. C. L. 114; Canham v. Jones, 2 Ves. & B. 218.

*United States*. — Leclanché Battery Co. v. Western Electric Co., 23 Fed. Rep. 276; Leclanché Battery Co. v. Western Electric Co., 21 Fed. Rep. 538; Hostetter v. Fries, 17 Fed. Rep. 620. But see Celluloid Mfg. Co. v. Cellonite Mfg. Co., 32 Fed. Rep. 94, the authority of which was doubted in Hiram Holt Co. v. Wadsworth, 41 Fed. Rep. 34.

*Massachusetts*. — Dover Stamping Co. v. Fellows, 163 Mass. 191, 47 Am. St. Rep. 448.

*Minnesota*. — Watkins v. Landon, 52 Minn. 389, 38 Am. St. Rep. 560.

*New York*. — Petridge v. Wells, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 144, 13 How. Pr. (N. Y.) 385.

*Wisconsin*. — Marshall v. Pinkham, 52 Wis. 572, 38 Am. Rep. 756.

"Lieutenant James' Horse Blister" was the name given by the inventor to an unpatented production. It was held that his assignees after his death had no right to its exclusive use. James v. James, L. R. 13 Eq. 421, 41 L. J. Ch. 353, 26 L. T. N. S. 568, 20 W. R. 434. See the criticism of this case in Thorley's Cattle Food Co. v. Massam, 14 Ch. D. 763, 42 L. T. N. S. 851.

The Words "Angostura Bitters" had become the term by which a certain medicinal preparation was generally known. It was held that they could not be exclusively appropriated, in case the secret of the manufacture of the article should become known, there being no patent right. Siegert v. Findlater, 7 Ch. D. 801, 26 W. R. 459. The term "Angostura" is also geographical. See also Siegert v. Abbott, 61 Md. 276, 48 Am. Rep. 101.

"Thomsonian Medicines." — In Thomson v. Winchester, 19 Pick. (Mass.) 214, 31 Am. Dec. 135, the plaintiff, an inventor of certain medicines, gave them the name of "Thomsonian Medicines," by which term alone they became generally known. The words having acquired a generic meaning, and the medicines not having been patented, it was held that the name could not be protected.

The Name of a Patented Article, after the expiration of the patent, does not constitute a valid trademark. See *infra*, this section.

1. *Arbitrary Name in Addition to Generic Name*. — Barnett v. Lenchars, 13 L. T. N. S. 495, 14

W. R. 166; Hirst v. Denham, L. R. 14 Eq. 542; Provident Chemical Works v. Canada Chemical Mfg. Co., 4 Ont. L. Rep. 545; American Fibre Chamois Co. v. De Lee, 67 Fed. Rep. 329; Celluloid Mfg. Co. v. Read, 47 Fed. Rep. 712; Alleghany Fertilizer Co. v. Woodside, 1 Hughes (U. S.) 115; Kyle v. Perfection Mattress Co., 127 Ala. 39, 85 Am. St. Rep. 78; Fleischmann v. Schuckmann, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 92; Dr. Dadirian, etc., Co. v. Hauenstein, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 23.

In Selchow v. Baker, 93 N. Y. 59, 45 Am. Rep. 169, Rapallo, J., after reviewing many cases on the subject, concludes as follows: "Our conclusion is, that where a manufacturer has invented a new name [as 'Sliced Animals,' 'Sliced Birds,' 'Sliced Objects'], consisting either of a new word, or a word or words in common use which he has applied for the first time to his own manufacture, or to an article manufactured for him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients, or characteristics, but is arbitrary or fanciful, and is not used merely to denote grade or quality, he is entitled to be protected in the use of that name, notwithstanding that it has become so generally known that it has been adopted by the public as the ordinary appellation of the article." This leading case has been approved in Celluloid Mfg. Co. v. Cellonite Mfg. Co., 32 Fed. Rep. 94, in the opinion by Mr. Justice Bradley, and also in Celluloid Mfg. Co. v. Read, 47 Fed. Rep. 712, in the opinion by Mr. Justice Shipman.

2. *Name of Patented Article Protected*. — Powell v. Birmingham Vinegar Brewery Co., (1894) 3 Ch. 449; Johnson v. Seaman, (C. C. A.) 108 Fed. Rep. 951, reversing 106 Fed. Rep. 915; Leclanché Battery Co. v. Western Electric Co., 21 Fed. Rep. 538; Penberthy Injector Co. v. Lee, 120 Mich. 174; Jaffe v. Evans, 70 N. Y. App. Div. 189.

3. *Use on Article Made Without Infringement*. — Young v. Macrae, 9 Jur. N. S. 322. See Lamb Knit-Goods Co. v. Lamb Glove, etc., Co., 120 Mich. 159. Compare Kyle v. Perfection Mattress Co., 127 Ala. 39, 85 Am. St. Rep. 78.

4. *Name Becomes Publici Juris on Expiration of Patent* — *England*. — In re Horsburgh, 53 L. J. Ch. 237, note; Linoleum Mfg. Co. v. Nairn,



descriptive.<sup>1</sup> No exclusive right in such name can be acquired by subsequent use.<sup>2</sup> This doctrine applies to cases where articles are falsely represented as being made under a patent, or where the patent is invalid.<sup>3</sup> It is always a question of fact arising upon the evidence in each case whether the name in question has come to be the name of the article, and not a mark or sign indicating the manufacturer. Unless the former is the case, the doctrine under discussion has no application.<sup>4</sup>

**Unfair Competition.** — The original proprietor of the patented article is, however, entitled to protection against unfair competition, and a subsequent dealer putting the same article upon the market must clearly identify his goods, and not engage in unfair competition, nor do anything which will unnecessarily increase the confusion and deceive the public into the belief that his goods are those of his rival.<sup>5</sup> The only justification a rival trader has for using the

7 Ch. D. 834, 47 L. J. Ch. 430, 38 L. T. N. S. 448, 26 W. R. 463; *Cheavin v. Walker*, 5 Ch. D. 850, 46 L. J. Ch. 686, 25 L. T. N. S. 757, 36 L. T. N. S. 938; *Singer Mfg. Co. v. Loog*, 8 App. Cas. 15, 48 L. T. N. S. 3; *Wheeler, etc., Mfg. Co. v. Shakespear*, 39 L. J. Ch. 36; *Condy v. Mitchell*, 37 L. T. N. S. 766; *In re Ralph*, 25 Ch. D. 194; *Powell v. Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54, *affirmed* (1897) A. C. 710; *Singer Mfg. Co. v. Wilson*, 2 Ch. D. 448; *Young v. Macrae*, 9 Jur. N. S. 322.

**United States.** — *Holzappel's Compositions Co. v. Rahtjen's American Composition Co.*, 183 U. S. 1, *reversing* (C. C. A.) 101 Fed. Rep. 257; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; *Coats v. Merrick Thread Co.*, 149 U. S. 572, *affirming* 36 Fed. Rep. 324; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598; *Filley v. Child*, 16 Blatchf. (U. S.) 376; *Fairbanks v. Jacobus*, 14 Blatchf. (U. S.) 337; *Singer Mfg. Co. v. Larsen*, 8 Biss. (U. S.) 151; *B. B. Hill Mfg. Co. v. Sawyer Boss Mfg. Co.*, (C. C. A.) 118 Fed. Rep. 1014, *affirming* 112 Fed. Rep. 144; *Singer Mfg. Co. v. Hipple*, 109 Fed. Rep. 152; *Rahtjen's American Composition Co. v. Holzappel's Compositions Co.*, 97 Fed. Rep. 949; *Centaur Co. v. Marshall*, 92 Fed. Rep. 605; *Centaur Co. v. Neathery*, (C. C. A.) 91 Fed. Rep. 891; *Centaur Co. v. Killenberger*, 87 Fed. Rep. 725; *Centaur Co. v. Heinsfurter*, (C. C. A.) 84 Fed. Rep. 955; *Frost v. Rindskopf*, 42 Fed. Rep. 408; *Hiram Holt Co. v. Wadsworth*, 41 Fed. Rep. 34; *Singer Mfg. Co. v. June Mfg. Co.*, 41 Fed. Rep. 208; *Gally v. Colt's Patent Fire-Arms Mfg. Co.*, 30 Fed. Rep. 118; *Leclanche Battery Co. v. Western Electric Co.*, 23 Fed. Rep. 276; *Wilcox, etc., Sewing Mach. Co. v. Gibbens Frame*, 17 Fed. Rep. 623; *Gray v. Taper-Sleeve Pulley Works*, 16 Fed. Rep. 436; *Singer Mfg. Co. v. Riley*, 11 Fed. Rep. 706; *Singer Mfg. Co. v. Stanage*, 6 Fed. Rep. 279; *In re Consolidated Fruit Jar Co.*, 14 Pat. Off. Gaz. 269; *Tucker Mfg. Co. v. Boyington*, 9 Pat. Off. Gaz. 455. But see *Ex p. Consolidated Fruit Jar Co.*, 16 Pat. Off. Gaz. 679. *Contra*, *Celluloid Mfg. Co. v. Celloline Mfg. Co.*, 32 Fed. Rep. 94.

**Massachusetts.** — *Dover Stamping Co. v. Fellows*, 163 Mass. 191, 47 Am. St. Rep. 448.

**New York.** — *Selchow v. Baker*, 93 N. Y. 66, 45 Am. Rep. 169; *Jaffe v. Evans*, 70 N. Y. App. Div. 186; *Wilcox, etc., Sewing-Mach. Co. v. Kruse-Murphy Mfg. Co.*, (N. Y. 1890) 23 N. E. Rep. 1146, *affirming* 14 Daly (N. Y.)

116; *St. Louis Stamping Co. v. Piper*, (Supm. Ct. Spec. T.) 12 Misc. (N. Y.) 270.

**Ohio.** — *Brill v. Singer Mfg. Co.*, 41 Ohio St. 127, 52 Am. Rep. 74.

**Rhode Island.** — *Armington v. Palmer*, 21 R. I. 109, 79 Am. St. Rep. 786.

In *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, Field, J., said: "But the name of 'Goodyear Rubber Company' is not one capable of exclusive appropriation. 'Goodyear Rubber' are terms descriptive of well-known classes of goods produced by the process known as Goodyear's invention. Names which are thus descriptive of a class of goods cannot be exclusively appropriated by any one." See the earlier cases of *Goodyear Rubber Co. v. Goodyear's Rubber Mfg. Co.*, 30 Pat. Off. Gaz. 97, *Price & S. T. M. Cas.* 920, and *Goodyear Rubber Co. v. Day*, 22 Fed. Rep. 44.

**A Design Which Has Been Protected by a Design Patent** becomes *publici juris* after expiration of the patent. *Coats v. Merrick Thread Co.*, 149 U. S. 562.

**1. Name Is Generic and Descriptive.** — *Holzappel's Compositions Co. v. Rahtjen's American Composition Co.*, 183 U. S. 12; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 674; *Singer Mfg. Co. v. Larsen*, 8 Biss. (U. S.) 151; *Centaur Co. v. Heinsfurter*, (C. C. A.) 84 Fed. Rep. 955.

**2. Subsequent Use.** — *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; *Centaur Co. v. Heinsfurter*, (C. C. A.) 84 Fed. Rep. 955; *Jaffe v. Evans*, 70 N. Y. App. Div. 180.

**3. Article Not in Fact Patented.** — *Horlick's Food Co. v. Elgin Milkine Co.*, (C. C. A.) 120 Fed. Rep. 264; *Centaur Co. v. Marshall*, 92 Fed. Rep. 605; *Lorillard v. Pride*, 36 Pat. Off. Gaz. 1150; *Consolidated Fruit Jar Co. v. Dorflinger*, (Pa. 1874) 2 Am. L. T. Rep. N. S. 511; *Selchow v. Baker*, 93 N. Y. 66, 45 Am. Rep. 169. But see *Sawyer v. Kellogg*, 7 Fed. Rep. 720.

**4. Question of Fact.** — *Condy v. Mitchell*, 37 L. T. N. S. 766; *Singer Mach. Manufacturers v. Wilson*, 3 App. Cas. 376.

**5. Unfair Competition.** — *England.* — *Powell v. Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 72; *Linoleum Mfg. Co. v. Nairn*, 7 Ch. D. 834.

*Canada.* — *Singer Mfg. Co. v. Charlebois*, 16 Quebec Super. Ct. 167.

**United States.** — *Holzappel's Compositions Co. v. Rahtjen's American Composition Co.*,

name is that it is truthfully descriptive and hence *publici juris*. Therefore he has no right to apply the name of a patented article, the patent for which has expired, to another and substantially different article. This would *ipso facto* constitute unfair competition.<sup>1</sup>

**Distinctive Labels or Marks** which have long been used upon patented articles do not become free to the world on the expiration of the patent,<sup>2</sup> and trademarks which antedated the patent remain valid and exclusive notwithstanding the expiration of the patent.<sup>3</sup>

**Acquisition of Trademark During Life of Patent.** — There seems to be no reason why a valid trademark for a patented article cannot be acquired during the life of the patent which will survive its expiration, provided it is so used as not to become the name of the article.<sup>4</sup> But a contrary view has been taken, and the point cannot be regarded as definitely settled by the decisions.<sup>5</sup>

(3) *Name of Secret Preparation.* — The name of a secret preparation is governed by the same rule as that of a patented article. So long as the secret remains undiscovered, another may be enjoined from using the name to pass off a different preparation. But if the secret is discovered, another may make and sell the same article under the same name.<sup>6</sup>

s. **NAME OF PUBLICATION** — (1) *Books.* — It has been said that the title of a book constitutes a good trademark, and protection has been afforded upon that ground against copying or imitation.<sup>7</sup> But the weight of authority and the better opinion seem to be that the name of a book is not a technical

183 U. S. 13; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 674; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; *Fillee v. Child*, 16 Blatchf. (U. S.) 376; *B. B. Hill Mfg. Co. v. Sawyer-Boss Mfg. Co.*, (C. C. A.) 118 Fed. Rep. 1014, *affirming* 112 Fed. Rep. 144; *Singer Mfg. Co. v. Hipple*, 109 Fed. Rep. 152; *Centaur Co. v. Robinson*, 91 Fed. Rep. 800; *Centaur Co. v. Neathery*, (C. C. A.) 91 Fed. Rep. 900.

*New York.* — *Jaffe v. Evans*, 70 N. Y. App. Div. 189.

*Rhode Island.* — *Armington v. Palmer*, 21 R. I. 109, 79 Am. St. Rep. 886.

1. **Application of Name to Different Article.** — *Powell v. Birmingham Vinegar Brewery Co.*, (1894) 3 Ch. 449, (1896) 2 Ch. 82; *Singer Mfg. Co. v. Hipple*, 109 Fed. Rep. 152; *Jaffe v. Evans*, 70 N. Y. App. Div. 191.

2. **Distinctive Labels or Marks.** — *Centaur Co. v. Neathery*, (C. C. A.) 91 Fed. Rep. 891; *Centaur Co. v. Killenberger*, 87 Fed. Rep. 725. See *Sawyer v. Kellogg*, 7 Fed. Rep. 720; *Ex p. Consolidated Fruit Jar Co.*, 16 Pat. Off. Gaz. 679. Compare *Wilcox, etc., Sewing-Mach. Co. v. Gibbens Frame*, 17 Fed. Rep. 623.

3. **Trademarks Antedating Patent.** — *Batcheller v. Thomson*, (C. C. A.) 93 Fed. Rep. 660, *reversing* 86 Fed. Rep. 630.

4. **Acquisition of Trademark During Life of Patent.** — *Ex p. Consolidated Fruit Jar Co.*, 16 Pat. Off. Gaz. 679; *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1. See *Linoleum Mfg. Co. v. Nairn*, 7 Ch. D. 834; *In re Palmer*, 24 Ch. D. 504; *Singer Mach. Manufacturers v. Wilson*, 3 App. Cas. 376; *Osgood v. Rockwood*, 11 Blatchf. (U. S.) 310; *B. B. Hill Mfg. Co. v. Sawyer-Boss Mfg. Co.*, (C. C. A.) 118 Fed. Rep. 1014; *Centaur Co. v. Killenberger*, 87 Fed. Rep. 725; *In re Consolidated Fruit Jar Co.*, 14 Pat. Off. Gaz. 269.

*In Coats v. Merrick Thread Co.*, 149 U. S.

572, *affirming* 36 Fed. Rep. 324, the court seems to have left this question open.

One Weymouth invented and took out a patent for a certain kind of hay knife. The patent was assigned to Holt, who, after some time, adopted the trademark "Lightning" for the knife. The knives became known to the trade as "Weymouth's Patent" and "Lightning" hay-knives. It was held that the word "Lightning" was a valid trademark during the life and after the expiration of the patent, but the words "Weymouth's Patent," after the expiration of the patent, could not be exclusively appropriated. *Hiram Holt Co. v. Wadsworth*, 41 Fed. Rep. 34.

5. **Contrary View.** — *Wilcox, etc., Sewing-Mach. Co. v. Gibbens Frame*, 17 Fed. Rep. 623; *Singer Mfg. Co. v. Riley*, 11 Fed. Rep. 706; *Brill v. Singer Mfg. Co.*, 41 Ohio St. 127, 52 Am. Rep. 74. And see *Singer Mfg. Co. v. June Mfg. Co.*, 41 Fed. Rep. 208; *Singer Mfg. Co. v. Stanage*, 6 Fed. Rep. 279.

6. **Secret Preparation.** — *Powell v. Birmingham Vinegar Brewery Co.*, (1894) 3 Ch. 449.

7. **Title of Book Viewed as Trademark.** — *Browne, Trademarks*, § 118; *Social Register Assoc. v. Howard*, 60 Fed. Rep. 270; *Dayton v. Wilkes*, (Super. Ct. Spec. T.) 17 How. Pr. (N. Y.) 510; *Potter v. McPherson*, 21 Hun (N. Y.) 559. See *Dicks v. Yates*, 18 Ch. D. 76; *Mack v. Petter*, L. R. 14 Eq. 431; *Harper v. Holman*, 84 Fed. Rep. 222.

In *Robertson v. Berry*, 50 Md. 591, 33 Am. Rep. 328, *Miller, J.*, said: "A publisher or author has, either in the title of his work or in the application of his name to the work, or in the particular marks which designate it, a species of property similar to that which a trader has in his trademark, and may, like a trader, claim the protection of a court of equity against such a use or imitation of the name, marks, or designation, as is likely, in

trademark, because the title of a book is essentially and necessarily descriptive of that particular book.<sup>1</sup> Any one who is entitled to publish that book, either because of expiration of copyright or because it has never been copyrighted, may call it by its proper name by which alone it is known.<sup>2</sup> The proprietor of a book, however, is entitled to protection against unfair competition, and injunction will lie to prevent the use or imitation of the title of a book in such a manner as to deceive the public and pass off another and different book as and for the book generally known by that title.<sup>3</sup> Thus it would seem that the expiration of copyright upon a book with a certain title does not authorize any one to adopt such title and apply it to a substantially different book in order to compete unfairly with a copyrighted book of a similar title.<sup>4</sup> So no one is entitled to pass off the original, obsolete edition of a book upon which the copyright has expired as being the same as a late, up-to-date copyright edition of the same book.<sup>5</sup> Of course, common words appropriately used in a descriptive sense cannot be monopolized, but may be used by others upon different publications provided the element of unfair competition is absent.<sup>6</sup> The author's name, whether his real name or a *nom de plume*, does not constitute a trademark.<sup>7</sup>

(2) *Periodicals*. — The name of a periodical publication has been thought

the opinion of the court, to be a cause of damage to him in respect of that property."

1. **Title Not a Trademark.** — *Merriam v. Texas Siftings Pub. Co.*, 49 Fed. Rep. 944; *Black v. Ehrich*, 44 Fed. Rep. 793; *Merriam v. Holloway Pub. Co.*, 43 Fed. Rep. 450; *Mark Twain Case*, 14 Fed. Rep. 728. See *Osgood v. Allen, Holmes (U. S.)* 185.

2. *Merriam v. Texas Siftings Pub. Co.*, 49 Fed. Rep. 944; *Merriam v. Famous Shoe, etc., Co.*, 47 Fed. Rep. 411; *Mark Twain Case*, 14 Fed. Rep. 728.

In *Jollie v. Jaques*, 1 Blatchf. (U. S.) 627, Nelson, J., said: "The title or name is an appendage to the book or piece of music for which the copyright is taken out, and if the latter fails to be protected, the title goes with it, as certainly as the principal carries with it the incident."

3. **Unfair Competition** — *England*. — *Weldon v. Dicks*, 10 Ch. D. 247, 39 L. T. N. S. 467; *Metzler v. Wood*, 8 Ch. D. 608; *Chappell v. Davidson*, 2 Kay & J. 123; *Chappell v. Sheard*, 2 Kay & J. 117; *Spottiswoode v. Clarke*, 2 Phil. 154, 10 Jur. 1043; *Mack v. Petter*, L. R. 14 Eq. 431, 41 L. J. Ch. 781.

*United States*. — *Harper v. Lare*, (C. C. A.) 103 Fed. Rep. 203; *Oxford University v. Wilmore-Andrews Pub. Co.*, 101 Fed. Rep. 443; *Lare v. Harper*, (C. C. A.) 86 Fed. Rep. 481; *Merriam v. Texas Siftings Pub. Co.*, 49 Fed. Rep. 944; *Black v. Ehrich*, 44 Fed. Rep. 793; *Estes v. Worthington*, 31 Fed. Rep. 154; *Estes v. Leslie*, 27 Fed. Rep. 22, 29 Fed. Rep. 91; *Estes v. Williams*, 21 Fed. Rep. 189.

*Maryland*. — *Robertson v. Berry*, 50 Md. 591, 33 Am. Rep. 328.

*New York*. — *Potter v. McPherson*, 21 Hun (N. Y.) 559; *Talcott v. Moore*, 6 Hun (N. Y.) 106. See *Munro v. Tousey*, 129 N. Y. 38.

4. **Application of Name to Different Book.** — No case presenting this precise point seems to have been yet decided, but the precise principle has been declared and followed in patent cases. See *supra*, this section, *Name of Patented Article* — *After Expiration of Patent*. And

see *Singer Mfg. Co. v. Hipple*, 109 Fed. Rep. 152; *Estes v. Williams*, 21 Fed. Rep. 189.

5. **Passing Off Obsolete Edition.** — *Merriam v. Texas Siftings Pub. Co.*, 49 Fed. Rep. 944; *Merriam v. Famous Shoe, etc., Co.*, 47 Fed. Rep. 411; *Merriam v. Holloway Pub. Co.*, 43 Fed. Rep. 450.

6. **Common Words of Description.** — *Spottiswoode v. Clarke*, 2 Phil. 154, 1 Coop. t. Cot. 254, 10 Jur. 1043; *Munro v. Smith*, 55 Hun (N. Y.) 419.

7. **Name of Author.** — *Mark Twain Case*, 14 Fed. Rep. 728. See *England v. New York Pub. Co.*, 8 Daly (N. Y.) 375.

"Mark Twain" agreed with a publisher to allow him to publish one of his essays in a book of selections, and sent him a number from which to select, which had been published but not copyrighted. The publisher brought out all of the essays, and also another, alleging in the advertisement and title-page that all were by "Mark Twain," which was the *nom de plume* of the plaintiff. An injunction was granted restraining the defendant from using the name "Mark Twain" in any manner other than as provided by the agreement. *Clemens v. Such, Codd. Dig.* 312.

The author of a law book sold the copyright thereof to his publisher, and edited a second edition, but refused to edit a third; whereupon the publisher put out a third edition bearing the name of the author as if he had edited it; this edition contained errors which were prejudicial to the author. An injunction was granted to restrain the publisher from issuing the third edition with any statement which would lead the public to suppose that it was edited by the author. *Archbold v. Sweet*, 1 M. & Rob. 162, *per Tenterden, C. J.*

A publisher advertised for sale certain poems, which were represented to be by Lord Byron. An application for injunction was made by friends of Lord Byron, who was abroad. It was granted because the publisher would not swear that the poems were by Lord Byron. *Byron v. Johnston*, 2 Meriv. 29.



to stand upon a footing somewhat different from the title of a book, and it has often been said to constitute a valid technical trademark.<sup>1</sup> But however this may be, the name of a periodical publication is at least a trade name, in which one may have an exclusive property right, and which at all events will be protected against use or imitation tending to deceive and amounting to unfair competition.<sup>2</sup>

(3) *Dramatic Productions.* — The name of a drama or other theatrical production, not published as a book, cannot, of course, constitute a trademark, but it is a trade name, and will be protected against unauthorized use or imitation amounting to unfair competition.<sup>3</sup>

4. *PERSONAL NAMES.* — It has frequently been said that the name of an individual may constitute a valid trademark.<sup>4</sup> But such statements are inaccurate. The name of an individual does not constitute a valid technical trademark<sup>5</sup> because, as between persons of the same or similar names, each has an

1. *Name of Periodical Viewed as Trademark.* — Browne, *Trademarks*, § 115; Hopkins, *Unfair Trade*, § 56; Clement *v.* Maddick, 1 Giff. 98; Joseph Dixon Crucible Co. *v.* Guggenheim, 2 Brews. (Pa.) 321. And see Stephens *v.* De Couto, 7 Robt. (N. Y.) 343.

2. *Unfair Competition* — *England.* — Edmonds *v.* Benbow, Sebastian's Dig. 33; *In re Edinburgh Correspondent Newspaper*, Ct. of Sess. Cas. (1st ser. new ed.) 407 note; Borthwick *v.* Evening Post, 37 Ch. D. 449; Kelly *v.* Hutton, L. R. 3 Ch. 708; Hogg *v.* Kirby, 8 Ves. Jr. 215; Ingram *v.* Stiff, 5 Jur. N. S. 947; Prowett *v.* Mortimer, 2 Jur. N. S. 414, 27 L. T. N. S. 132; Bradbury *v.* Beeton, 21 L. T. N. S. 323; Corns *v.* Griffiths, W. N. (1873) 93; Clowes *v.* Hogg, W. N. (1870) 268, W. N. (1871) 40; Walter *v.* Head, 25 Sol. J. 742; Clement *v.* Maddick, 1 Giff. 98.

*United States.* — Gannett *v.* Ruppert, 119 Fed. Rep. 221; Investor Pub. Co. *v.* Dobinson, 72 Fed. Rep. 603.

*New York.* — Munro *v.* Tousey, 129 N. Y. 38; New York Polyclinic Medical School, etc., *v.* King, (Supm. Ct. Tr. T.) 27 Misc. (N. Y.) 250; American Grocer Pub. Assoc. *v.* Grocer Pub. Co., 25 Hun (N. Y.) 398; W. J. Johnston Co. *v.* Electric Age Pub. Co., (Supm. Ct. Gen. T.) 14 N. Y. Supp. 803; Forney *v.* Engineering News Pub. Co., (Supm. Ct. Gen. T.) 10 N. Y. Supp. 814; American Grocer Pub. Assoc. *v.* Grocer Pub. Co., (Supm. Ct. Gen. T.) 51 How. Pr. (N. Y.) 402; Snowden *v.* Noah, Hopk. (N. Y.) 347, 14 Am. Dec. 547; Stephens *v.* DeConto, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. N. S. (N. Y.) 47; Matsell *v.* Flanagan, (C. Pl. Spec. T.) 2 Abb. Pr. N. S. (N. Y.) 459; Bell *v.* Locke, 8 Paige (N. Y.) 75, 34 Am. Dec. 371; England *v.* New York Pub. Co., 8 Daly (N. Y.) 375; Commercial Advertiser Assoc. *v.* Haynes, 26 N. Y. App. Div. 279.

*Oregon.* — Duniway Pub. Co. *v.* Northwest Printing, etc., Co., 11 Oregon 322.

*What Constitutes Unfair Competition.* — See *infra*, this title, *Infringement and Unfair Competition*.

3. *Name of Dramatic Production Protected.* — Investor Pub. Co. *v.* Dobinson, 82 Fed. Rep. 56; Thomas *v.* Lennon, 14 Fed. Rep. 840; Hopkins Amusement Co. *v.* Frohman, 202 Ill. 541, 103 Ill. App. 613; Frohman *v.* Payton, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 275; Hier *v.* Abraham, 82 N. Y. 519, 37 Am. Rep.

589; Shook *v.* Wood, 10 Phila. (Pa.) 373, 32 Leg. Int. (Pa.) 264. Compare Frohman *v.* Miller, (N. Y. Super. Ct. Spec. T.) 8 Misc. (N. Y.) 379.

4. *View that Name of Person May Constitute a Trademark* — *England.* — Hall *v.* Barrows, 4 DeG. J. & S. 150; Leather Cloth Co. *v.* American Leather Cloth Co., 4 DeG. J. & S. 137; Ainsworth *v.* Walmsley, L. R. 1 Eq. 518; Rodgers *v.* Nowill, 5 C. B. 109, 57 E. C. L. 109; Millington *v.* Fox, 3 Myl. & C. 338.

*United States.* — McLean *v.* Fleming, 96 U. S. 245; Baker *v.* Baker, 77 Fed. Rep. 181. See International Silver Co. *v.* Simeon L. & George H. Rogers Co., 110 Fed. Rep. 955.

*California.* — Spieker *v.* Lash, 102 Cal. 38; Burke *v.* Cassin, 45 Cal. 467, 13 Am. Rep. 204.

*Florida.* — El Modello Cigar Mfg. Co. *v.* Gato, 25 Fla. 886, 23 Am. St. Rep. 537.

*Illinois.* — Candee *v.* Deere, 54 Ill. 439, 5 Am. Rep. 125; Imperial Mfg. Co. *v.* Schwartz, 105 Ill. App. 525.

*Missouri.* — Skinner *v.* Oakes, 10 Mo. App. 45.

*New York.* — Howe *v.* Howe Mach. Co., 50 Barb. (N. Y.) 236; Gaines *v.* Leslie, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 20; Hegeman *v.* Hegeman, 8 Daly (N. Y.) 1. See Scheer *v.* American Ice Co., (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 351.

*Ohio.* — Drake Medicine Co. *v.* Glessner, 68 Ohio St. 337.

*Pennsylvania.* — Ayer *v.* Hall, 3 Brews. (Pa.) 509; Ferguson *v.* Davol Mills, 2 Brews. (Pa.) 314; Standinger *v.* Standinger, 19 Leg. Int. (Pa.) 85. See Fulton *v.* Sellers, 4 Brews. (Pa.) 42.

See Noera *v.* H. A. Williams Mfg. Co., 158 Mass. 110; Fish Bros. Wagon Co. *v.* La Belle Wagon Works, 82 Wis. 546, 33 Am. St. Rep. 72.

5. *Personal Names Not Valid Trademarks.* — Brown Chemical Co. *v.* Meyer, 139 U. S. 540; Sterling Remedy Co. *v.* Spermine Medical Co., (C. C. A.) 112 Fed. Rep. 1003; Williams Rogers Mfg. Co. *v.* Simpson, 54 Conn. 527; J. R. Watkins Medical Co. *v.* Sands, 83 Minn. 326; Meneely *v.* Meneely, 62 N. Y. 427, 20 Am. Rep. 489; Pratt's Appeal, 117 Pa. St. 417, 2 Am. St. Rep. 676. See Liebig's Extract of Meat Co. *v.* Walker, 115 Fed. Rep. 822; C. F. Simmons Medicine Co. *v.* Mansfield Drug Co., 93 Tenn. 84.

equal right to use his own name in his own business,<sup>1</sup> and trademarks, being property rights, are necessarily exclusive.<sup>2</sup> Every one, however, is entitled to protection against unfair competition, and no one is entitled so to use even his own name as to pass off his goods or business as the goods or business of another, thereby robbing the latter of the benefits of his good will and reputation and working a fraud upon the public. In other words, personal names used in business will be protected as trade names though not as trademarks, and such protection is afforded not upon the principles applicable to trademarks, but upon the principle of unfair competition.<sup>3</sup> This is probably all that the cases mean when they speak of a trademark in personal names.<sup>4</sup> A personal name in combination with other words or devices may, however, constitute a good trademark.<sup>5</sup> So celebrated names, arbitrarily used, may constitute valid trademarks.<sup>6</sup> A person may enjoin the unauthorized use of his name in the business of another.<sup>7</sup> But the use of the name and likeness of a deceased person upon a label will not be enjoined, provided such use does not constitute a libel and no question of unfair competition is involved.<sup>8</sup> Of course, one who has by contract given another a right to trade under his name will not be permitted thereafter so to use his name as to infringe upon the rights granted.<sup>9</sup>

*u. CORPORATE NAMES.* — The name of a corporation is not a valid trademark as applied to the goods of such corporation,<sup>10</sup> although a contrary opinion has been sometimes expressed.<sup>11</sup> But such name will be protected as a trade

1. See *infra*, this title, *Infringement and Unfair Competition—Use of Personal or Corporate Names*.

2. See *infra*, this title, *Extent of Right—Exclusiveness*. See also *supra*, this title, *Definition and Nature of Subject*.

3. For a Full Discussion of this subject, see *infra*, this title, *Infringement and Unfair Competition—Use of Personal or Corporate Names*. See also *Swift v. Groff*, 114 Fed. Rep. 605.

4. See for example *Imperial Mfg. Co. v. Schwartz*, 105 Ill. App. 525.

5. Names in Combination with Words or Devices. — *Gout v. Aleploglu*, 6 Beav. 69, note; *Fulton v. Sellers*, 4 Brews. (Pa.) 42. See *Drake Medicine Co. v. Glessner*, 68 Ohio St. 337. But see *Stirling Silk Mfg. Co. v. Sterling Silk Co.*, 59 N. J. Eq. 394. See also *supra*, this section, *Collocation of Words and Symbols*.

6. See *supra*, this section, *Fictitious, Historical, or Celebrated Names*.

7. Unauthorized Use of Another's Name. — *Bagby, etc., Co. v. Rivers*, 87 Md. 400, 67 Am. St. Rep. 357; *Scheer v. American Ice Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 351; *Armington v. Palmer*, 21 R. I. 109, 79 Am. St. Rep. 786. See *Scott v. Scott*, 16 L. T. N. S. 143; *Kathreiner's Malzkaffee Fabriken, etc., v. Pastor Kneipp Medicine Co.*, (C. C. A.) 82 Fed. Rep. 321; *Hallett v. Cumston*, 110 Mass. 29. But see *Du Boulay v. Du Boulay*, L. R. 2 P. C. 430; *Olin v. Bate*, 98 Ill. 53, 38 Am. Rep. 78. Compare *Edison v. Hawthorne*, (C. C. A.) 108 Fed. Rep. 839, affirming 106 Fed. Rep. 172; *Love v. Latimer*, 32 Ont. 231.

In *Clark v. Freeman*, 11 Beav. 112, the plaintiff, Sir James Clark, was a very eminent physician, practicing in London, and physician in ordinary to Her Majesty. He had devoted especial attention to the treatment of consumptive diseases. The defendant, Freeman, a chemist and druggist in the neighborhood of

London, offered for sale and extensively advertised certain pills, which he called "Sir J. Clarke's Consumption Pills." An injunction was refused by the master of the rolls, Lord Langdale.

8. *Atkinson v. Doherty*, 121 Mich. 372, 80 Am. St. Rep. 507, citing *Corliss v. E. W. Walker Co.*, 57 Fed. Rep. 434, 64 Fed. Rep. 280; *Murray v. Gast Lithographic, etc., Co.*, (C. Pl. Spec. T.) 31 Abb. N. Cas. (N. Y.) 266, 8 Misc. (N. Y.) 36; *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 30 Am. St. Rep. 183; and *distinguishing Prince Albert v. Strange*, 1 Macn. & G. 25; *Tuck v. Priestner*, 19 Q. B. D. 639; *Pollard v. Photographic Co.*, 40 Ch. D. 345. And see the title *PRIVACY, RIGHT OF*, vol. 22, p. 1311.

9. Contract Right to Use Name. — *Spieker v. Lash*, 102 Cal. 38; *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215, 52 Am. Rep. 811. See also *infra*, this title, *Assignment, Transfer, and License*.

10. Corporate Names Not Valid Trademarks. — See *Hopkins*, *Unfair Trade*, § 54.

11. Contrary View. — *Newby v. Oregon Cent. R. Co.*, *Deady* (U. S.) 609; *Investor Pub. Co. v. Dobinson*, 72 Fed. Rep. 603; *India Rubber Co. v. Rubber Comb, etc., Co.*, 45 N. Y. Super. Ct. 258.

The corporate name "The Oregon Central Railway Company" is a valid trademark. *Newby v. Oregon Cent. R. Co.*, *Deady* (U. S.) 609. *Deady, J.*, said: "The corporate name of a corporation is a trademark from the necessity of the thing, and upon every consideration of private justice and public policy, deserves the same consideration and protection from a court of equity. Under the law, the corporate name is a necessary element of the corporation's existence: without it a corporation cannot exist." See *London, etc., Law Assur. Soc. v. London, etc., Joint-Stock L. Ins. Co.*, 11 Jur. 938.

name against unfair competition.<sup>1</sup>

*v. NAMES OF MINERAL SPRINGS.* — The names of mineral springs as applied to the waters or salts have uniformly been protected, either upon the ground of trademark or more often upon the ground of unfair competition. No one is entitled to apply the name of a well-known mineral spring to waters or salts not from that spring and sell them in competition with the genuine waters or salts in such a manner as to deceive the public.<sup>2</sup> The same principle applies to minerals.<sup>3</sup> Artificial mineral waters or salts may be called by the name of the spring whose waters or salts are imitated, but only upon condition that the facts are plainly stated and that there are no circumstances calculated to deceive buyers into thinking that the artificial product is the genuine natural product. Any deception or misrepresentation, express or implied, constitutes unfair competition.<sup>4</sup>

**1. Unfair Competition.** — See *infra*, this title, *Infringement and Unfair Competition — Use of Personal or Corporate Names*. See also *Holmes v. Holmes, etc., Mfg. Co.*, 37 Conn. 278, 9 Am. Rep. 324.

**2. Names of Mineral Springs.** — Browne on Trademarks, § 191.

*England.* — *Wheeler v. Johnston*, 3 L. R. Ir. 284; *In re Apollinaris Co.*, (1891) 1 Ch. 1, 61 L. J. Ch. 625.

*United States.* — *Actien-Gesellschaft Apollinaris Brunnen v. Somborn*, 14 Blatchf. (U. S.) 380; *La Republique Francaise v. Saratoga Vichy Spring Co.*, 99 Fed. Rep. 733; *Carlsbad v. Kutnow*, (C. C. A.) 71 Fed. Rep. 167, *affirming* 68 Fed. Rep. 794; *La Republique Francaise v. Schultz*, 57 Fed. Rep. 37; 94 Fed. Rep. 500; *Hill v. Lockwood*, 32 Fed. Rep. 389; *Luyties v. Hollendeer*, 30 Fed. Rep. 632; *Apollinaris Co. v. Scherer*, 27 Fed. Rep. 18; *Apollinaris Co. v. Edwards*, Seton (4th ed.) 237.

*Kentucky.* — *Northcutt v. Turney*, 101 Ky. 314; *Parkland Hills Blue Lick Water Co. v. Hawkins*, 95 Ky. 502, 44 Am. St. Rep. 254.

*New York.* — *Congress, etc., Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 291, 6 Am. Rep. 82, *reversing* 57 Barb. (N. Y.) 526.

But see *Grand Hotel Co. v. Wilson*, 5 Ont. L. Rep. 141, *reversing* 2 Ont. L. Rep. 322.

The owner of a peculiar natural product (as the water of a mineral spring), which has acquired reputation, etc., in the market, is entitled, like the manufacturer of artificial products, to have his original trademark protected. The name "Bethesda," applied to a mineral spring and the waters thereof, is a proper trademark and capable of protection against one who owns another spring within twelve hundred feet of that of the plaintiff, although the water has the same constituents and properties, the name "Bethesda" not being a geographical designation of any district within or near which either of said springs is located. *Dunbar v. Glenn*, 42 Wis. 118, 24 Am. Rep. 395.

The words "Geyser Spring" were refused registration as a trademark for Saratoga mineral water, on the ground that "geyser" is a familiar geological term and has a meaning well known to the public, and is therefore generic

and descriptive. *Ex p. Batcheller, Browne on Trade-Marks*, § 276.

**3. Mines and Minerals.** — *Radde v. Norman*, L. R. 14 Eq. 348, 41 L. J. Ch. 525, 26 L. T. N. S. 788, 20 W. R. 766; *Braham v. Beachim*, 7 Ch. D. 848, 47 L. J. Ch. 348, 38 L. T. N. S. 640, 26 W. R. 654.

**4. Artificial Mineral Waters or Salts.** — *La Republique Francaise v. Saratoga Vichy Springs Co.*, (C. C. A.) 107 Fed. Rep. 459; *La Republique Francaise v. Schultz*, 94 Fed. Rep. 500, (C. C. A.) 102 Fed. Rep. 153; *Carlsbad v. Schultz*, 78 Fed. Rep. 469.

Where the city of Carlsbad, Bohemia, sole owner of the mineral springs there, for fifty years has sold the salts therefrom as "Carlsbad Salts," etc., other parties will be restrained from using these words for similar artificial production, even with the word "Artificial" prefixed. *Carlsbad v. Thackeray*, 57 Fed. Rep. 18. *Compare Carlsbad v. Schultz*, 78 Fed. Rep. 469.

The plaintiffs having the exclusive right of selling "Apollinaris Water" in Great Britain, the defendants made and sold an artificial mineral water under the name and description of "London Apollinaris Water, possessing all the properties of the natural water." An injunction was granted to restrain the defendants' use of the words "London Apollinaris Water," or any other name of which the word "Apollinaris" so forms a part as to be calculated to mislead the public into purchasing the artificial for the real water of that name. *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242.

In *Carlsbad v. Kutnow*, 68 Fed. Rep. 794, the use of the word "Carlsbad" was restrained at the suit of the plaintiff, the German city, which had for years evaporated the salts of Carlsbad Springs and sold them under the name of "Carlsbad Sprudel Salts." The defendant, a firm of New York druggists, put up similar salts and called them "Improved Effervescent Carlsbad Powder." Although the genuine Carlsbad salts are not effervescent, and the word "Improved" was relied upon as implying that the salts were different from those sold under the name of "Carlsbad" alone, the defendants were enjoined from using the word "Carlsbad" in any form. This decision was affirmed by the Circuit Court of Appeals. *Carlsbad v. Kutnow*, (C. C. A.) 71 Fed. Rep. 167.



*iv.* ILLUSTRATIONS IN BOOKS. — Illustrations in books or stories do not constitute trademarks, and must be protected by copyright, if at all.<sup>1</sup>

*x.* TRADE NAME AS APPLIED TO BUSINESS STAND — SIGNS. — It is very well established that a trade name or sign, which is not technically a trademark, will receive protection from the courts against its use or imitation by another in such a way as to mislead customers as to the identity of the business.<sup>2</sup> The use or imitation of another's trade name or sign is merely one method of stealing another's good will and reputation. It is an instance of unfair competition.<sup>3</sup> Merely descriptive names and signs will not be pro-

**1. Illustrations in Books.** — *Munro v. Smith*, 55 Hun (N. Y.) 419.

**2. Name of Business Stand and Signs Protected** — *England.* — *Croft v. Day*, 7 Beav. 84; *Boulnois v. Peake*, 13 Ch. D. 513, note; *Hookham v. Pottage*, L. R. 8 Ch. 91; *Lee v. Haley*, L. R. 5 Ch. 155; *Burgess v. Burgess*, 3 De G. M. & G. 896; *Hudson v. Osborne*, 39 L. J. Ch. 79; *Glenney v. Smith*, 11 Jur. N. S. 964, 13 L. T. N. S. 11, 13 W. R. 1032; *Hoby v. Grosvenor Library Co.*, 28 W. R. 386; *Dence v. Mason*, W. N. (1877) 23. See *Williams v. Osborne*, 13 L. T. N. S. 498.

*Canada.* — *Walker v. Alley*, 13 Grant Ch. (U. C.) 366.

*United States.* — *Block v. Standard Distilling, etc.*, Co., 95 Fed. Rep. 978.

*California.* — *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271, 82 Am. St. Rep. 346; *Weinstock v. Marks*, 109 Cal. 529, 50 Am. St. Rep. 57; *Woodward v. Lazar*, 21 Cal. 449, 82 Am. Dec. 751.

*Illinois.* — *Nokes v. Mueller*, 72 Ill. App. 431; *Mossler v. Jacobs*, 66 Ill. App. 571.

*Kentucky.* — *Dewitt v. Mathey*, (Ky. 1896) 35 S. W. Rep. 1113. Compare *Armstrong v. Kleinbans*, 82 Ky. 303, 56 Am. Rep. 894.

*Massachusetts.* — *Viano v. Baccigalupo*, 183 Mass. 160; *Samuels v. Spitzer*, 177 Mass. 226.

*Minnesota.* — *Rickard v. Caton College Co.*, 88 Minn. 243.

*Missouri.* — *Sanders v. Jacob*, 20 Mo. App. 96.

*Nebraska.* — *Miskell v. Prokop*, 58 Neb. 628. *New York.* — *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278; *Kinsley v. Jacoby*, (Supm. Ct. Spec. T.) 28 Abb. N. Cas. (N. Y.) 451; *Peterson v. Humphrey*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 394; *Church v. Kresner*, 26 N. Y. App. Div. 349; *Arnheim v. Arnheim*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 399; *International Soc. v. International Soc.*, (Supm. Ct. Spec. T.) 59 N. Y. Supp. 785; *Cohn v. Reynolds*, (Supm. Ct. Spec. T.) 58 N. Y. Supp. 1138, *affirmed* 26 Misc. (N. Y.) 473; *De Youngs v. Jung*, (C. Pl. Spec. T.) 25 N. Y. Supp. 479, *affirmed* 7 Misc. (N. Y.) 56; *McCardel v. Peck*, (Supm. Ct. Gen. T.) 28 How. Pr. (N. Y.) 120; *Howard v. Henriques*, 3 Sandf. (N. Y.) 725.

*Ohio.* — *Brass, etc., Works Co. v. Payne*, 50 Ohio St. 115; *Lippman v. Martin*, 8 Ohio Dec. 485, 5 Ohio N. P. 120; *Christy v. Groves*, 2 Ohio Dec. 384, 3 Ohio N. P. 293.

*Pennsylvania.* — *Goodwin v. Hamilton*, 19 Pa. Co. Ct. 652, 6 Pa. Dist. 705; *Sapp v. New York Dental Parlors*, 4 Lack. Leg. N. (Pa.) 114; *Colton v. Thomas*, 2 Brews. (Pa.) 308.

*Rhode Island.* — *Cady v. Schultz*, 19 R. I. 193, 61 Am. St. Rep. 763.

*Tennessee.* — *Fite v. Dorman*, (Tenn. 1900) 57 S. W. Rep. 129.

In *Lichtenstein v. Mellis*, 8 Oregon 464, 34 Am. Rep. 592, the plaintiff, who had designated his place of business as "IXL General Merchandise Auction Store," sued to restrain the defendant from using on his sign "Great IXL Auction Co." An injunction was denied.

**Names and Marks on Cabs and Coaches.** — In *Marsh v. Billings*, 7 Cush. (Mass.) 322, 54 Am. Dec. 723, the plaintiffs and the proprietor of the Revere House made a contract for the conveyance of persons between the railroad station and the hotel, whereby the plaintiffs were authorized to put on their coaches and the hats of their hackmen "Revere House." A similar arrangement had existed between the hotel proprietor and the defendants, but had terminated by mutual consent. The defendants still continued the use of "Revere House" on their coaches, etc., and called "Revere House" at the station. At the suit of the plaintiffs an injunction was granted restraining the defendants from these misrepresentations. See also *Ricker v. Portland, etc., R. Co.*, 90 Me. 395; *Goodwin v. Hamilton*, 19 Pa. Co. Ct. 652, 6 Pa. Dist. 705.

In *Knott v. Morgan*, 2 Keen 213, an injunction was granted to restrain the defendant from running an omnibus having upon it such names, words, and devices as to form a colorable imitation of the words, names, and devices on the omnibuses of the plaintiff. Among the devices referred to was a star and garter painted on the side of the plaintiff's omnibus, as also the peculiarity of the livery and caps of the coachmen. In this case relief was granted, although it did not appear that the plaintiff had an exclusive right to the words in question. In this it goes further than *Stone v. Carlan*, 13 Monthly L. Rep. 360, and *Marsh v. Billings*, 7 Cush. (Mass.) 322, 54 Am. Dec. 723, where there was an exclusive right to the names of the hotels "Irving Hotel" and "Revere House," out of which flowed the exclusive right to use the name on coaches, badges, etc.

**3. Unfair Competition.** — *Lee v. Haley*, L. R. 5 Ch. 155; *Croft v. Day*, 7 Beav. 84; *Churton v. Douglas*, Johns. Ch. (Eng.) 174; *Hazard v. Caswell*, (Supm. Ct. Spec. T.) 57 How. Pr. (N. Y.) 1. See *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278. See generally *infra*, this title, *Infringement and Unfair Competition*.

"Practically the same law prevails to prevent the use of the name of a place of business, and in these and similar instances it is only necessary for the plaintiff to prove that the defendant's conduct is of such a nature

tected in the absence of fraud<sup>1</sup> or a natural and probable tendency to deceive.<sup>2</sup> Sometimes the right to use a trade name depends upon the locality where the business is conducted, a rival not being permitted to use the same name in the same locality, while he might be permitted to use it in a different locality where it would do no harm.<sup>3</sup> Trade names applied to business stands, which are arbitrary or personal, become the personal property of the first adopter and may be transferred by him from one location to another, or sold with his business independent of the location where it is conducted;<sup>4</sup> but if the name is local — that is, derives its origin from any local peculiarity or purpose or use of a particular building — it becomes an inseparable part of the building, and will pass with a sale or lease of it, and cannot be severed from the building even by its first adopter and user.<sup>5</sup>

**IV. EXTENT OF RIGHT — 1. Exclusiveness.** — Trademarks being property rights are necessarily exclusive.<sup>6</sup>

**Trade Names** may or may not be exclusive. If the name is arbitrary or fanciful, and such as might be a valid trademark if applied to goods sent into the

as to be calculated to deceive the public into believing that the defendant's business is the same business as that of the plaintiff." Slater on Copyright and Trade-Marks, 271.

**1. Descriptive Names and Signs.** — Civil Service Supply Assoc. v. Dean, 13 Ch. D. 512; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598; Eggers v. Hink, 63 Cal. 445, 49 Am. Rep. 96; Choynski v. Cohen, 39 Cal. 501, 2 Am. Rep. 476; Armstrong v. Kleinhans, 82 Ky. 303, 56 Am. Rep. 894; Ricker v. Portland, etc., R. Co., 90 Me. 395; Gray v. Koch, 2 Mich. N. P. 119; Cady v. Schultz, 19 R. I. 193, 61 Am. St. Rep. 763. See also generally *supra*, this section, *Descriptive Words and Marks*.

**2.** See Viano v. Baccigalupo, 183 Mass. 160. See generally *infra*, this title, *Infringement and Unfair Competition*.

**3. Locality as Affecting Right to Use Name or Sign.** — Lee v. Haley, L. R. 5 Ch. 155; Viano v. Baccigalupo, 183 Mass. 160; Miskell v. Prokop, 58 Neb. 628; International Soc. v. International Soc., (Supm. Ct. Spec. T.) 59 N. Y. Supp. 785; Church v. Kresner, 26 N. Y. App. Div. 349; De Youngs v. Jung, (C. Pl. Spec. T.) 25 N. Y. Supp. 479, *affirmed* 7 Misc. (N. Y.) 56; Lippman v. Martin, 8 Ohio Dec. 485, 5 Ohio N. P. 120.

**4. Trade Names Independent of Locality.** — Woodward v. Lazar, 21 Cal. 449, 82 Am. Dec. 751; Dewitt v. Mathey, (Ky. 1896) 35 S. W. Rep. 1113; Cady v. Schultz, 19 R. I. 193, 61 Am. St. Rep. 763; Mossop v. Mason, 18 Grant Ch. (U. C.) 453.

**5. Local Trade Names.** — Llewellyn v. Rutherford, L. R. 10 C. P. 456; Crawshay v. Collins, 15 Ves. Jr. 224; Fullwood v. Fullwood, 9 Ch. D. 176; Chissum v. Dewes, 5 Russ. 30; King v. Midland R. Co., 17 W. R. 113; Redlon v. Barker, 4 Kan. 445, 96 Am. Dec. 180; Booth v. Janett, (C. Pl. Spec. T.) 52 How. Pr. (N. Y.) 169; Musselman's Appeal, 62 Pa. St. 83, 1 Am. Rep. 382. See also Elliot's Appeal, 60 Pa. St. 161. See also *infra*, this title, *Assignment, Transfer, and License*.

In Hudson v. Osborne, 39 L. J. Ch. 79, the defendant, proprietor of the "Osborne House" in Ludgate Hill, London, became insolvent and his business was sold to the plaintiff. The defendant subsequently opened a new place but

a few doors distant from his former one, calling it "Osborne House." An injunction was granted.

In Armstrong v. Kleinhans, 82 Ky. 303, 56 Am. Rep. 894, the plaintiff leased a building with a tower, and used it as a clothing store, designating it, with the consent of the landlord, who paid half the expense of the sign, "Tower Palace." The plaintiff subsequently removed his business to another store, transferring the sign, without consent of the landlord, to the new house. The landlord continued the use of the name, and leased to the defendant, who used the store under the name of "Tower Palace" as a clothing establishment. An injunction was refused. In distinguishing this case from Woodward v. Lazar, 21 Cal. 448, 82 Am. Dec. 751, Lewis, J., said: "But conceding the correctness of the conclusion of the court in that case, it does not sustain the claim of appellant. There the name of the hotel was not applicable to or descriptive of a particular building, but was arbitrary, and applied to the business carried on first in the building upon the leased premises and afterwards in both of the buildings. Here the name 'Tower Palace' was intended to describe and designate the place, and not the particular business nor the person carrying it on. It never was used as a trademark by appellant, but simply to indicate the particular place on Market street where he did business, and consequently he never acquired the exclusive right to use the name, except as applicable to and while he occupied that building."

**6. Trademarks Are Exclusive Property Rights** — *England.* — Singer Mfg. Co. v. Wilson, 2 Ch. D. 441; Singer Mfg. Co. v. Kimball, 10 Scott L. Rep. 173; Hirst v. Denham, L. R. 14 Eq. 542.

*United States.* — Columbia Mill Co. v. Alcorn, 150 U. S. 460; Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51; McLean v. Fleming, 96 U. S. 245.

*District of Columbia.* — U. S. v. Duell, 17 App. Cas. (D. C.) 475.

*Louisiana.* — Handy v. Commander, 49 La. Ann. 1110; Insurance Oil Tank Co. v. Scott, 33 La. Ann. 946, 39 Am. Rep. 286.

*New York.* — Hier v. Abrahams, 82 N. Y. 524, 37 Am. Rep. 589; American Grocer Pub,

market, an exclusive right thereto may be acquired. But if the name is one which others may use with equal truth, such as personal, geographical, generic, or descriptive names, no one can acquire an exclusive right therein. The first user with whom such names have become identified is merely entitled to protection against the use by others of such names in such a manner as to constitute unfair competition.<sup>1</sup>

**2. Limit as to Class of Goods or Business.** — No general right to a trademark or trade name apart from its particular application exists. The right is merely a prior right to use such mark or name in connection with the particular goods or business to which it is applied and which it has come to indicate. Other persons may, without wrong, use the identical mark or name in connection with a different kind of goods or business.<sup>2</sup> But the right extends to other goods or business of the same general class as that in which it has been applied. When one has acquired a trademark in connection with particular goods, no one else will be permitted to use such trademark upon goods which, while different, belong to the same general class.<sup>3</sup> There are two reasons for this rule. The first is that if a second trader were to adopt and use the mark of another within the same class of goods, he would thereby acquire exclusive rights to the mark as applied to his particular variety of goods, and if the first user of the mark should subsequently desire to add that particular variety of goods to his general line within the class, he would be unable to use his own trademark upon his own goods.<sup>4</sup> Another reason is that the public cannot

*Assoc. v. Grocer Pub. Co.*, 25 Hun (N. Y.) 398; *Dr. Dadirrian, etc., Co. v. Hauenstein*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 23; *Burnett v. Phalon*, 3 Keyes (N. Y.) 594; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599. But see *Clinton Metallic Paint Co. v. New York Metallic Paint Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 66, wherein it is held that a trademark may, but need not, be wholly exclusive.

See also *supra*, this title, *Definition and Nature of Subject — Trademarks; Historical Development and Present Status of Subject*.

**1. Trade Names Not Necessarily Exclusive.** — *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 904; *Amoskeag Mfg. Co. v. Garner*, (Supm. Ct. Spec. T.) 54 How. Pr. (N. Y.) 299. See generally *supra*, this title, *What Protected as Trademark or Trade Name — Particular Words, Names, Marks, or Symbols*.

**2. Right Limited to Class of Goods or Business** — *England*. — *In re Jelley*, 51 L. J. Ch. 639; *Ainsworth v. Walmesley*, L. R. 1 Eq. 518, 35 L. J. Ch. 352; *Edwards v. Dennis*, 30 Ch. D. 454; *Anglo Swiss Condensed Milk Co. v. Metcalf*, 31 Ch. D. 454; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 538; *Singer Mfg. Co. v. Wilson*, 2 Ch. D. 441, *per Jessel*, M. R.

*United States*. — *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 57; *Smith v. Reynolds*, 13 Blatchf. (U. S.) 458; *Osgood v. Rockwood*, 11 Blatchf. (U. S.) 310; *George v. Smith*, 52 Fed. Rep. 830; *Celluloid Mfg. Co. v. Read*, 47 Fed. Rep. 712.

*California*. — *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271, 82 Am. St. Rep. 346.

*New York*. — *Colman v. Crump*, 70 N. Y. 573; *Amoskeag Mfg. Co. v. Garner*, (Supm. Ct. Spec. T.) 54 How. Pr. (N. Y.) 299.

In *In re Hargreaves*, 11 Ch. D. 669, there being four trademarks, each consisting of the

device of an anchor, registered for different varieties of goods in the same general class, the court refused the application to register a fifth for still another kind of goods in the same general class.

"A trademark only confers on the person whose mark it is a right to say, 'Do not imitate my mark in connection with goods like mine so that yours may be mistaken for mine.' There is no exclusive right to the mark except in connection with such goods and to prevent deception or mistake." *Powell v. Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 68.

**3. Right Extends to Whole of General Class.** — *Anglo-Swiss Condensed Milk Co. v. Metcalf*, 31 Ch. D. 454; *Collins Co. v. Oliver Ames, etc., Corp.*, 20 Blatchf. (U. S.) 542; *Church, etc., Co. v. Russ*, 99 Fed. Rep. 276; *G. G. White Co. v. Miller*, 50 Fed. Rep. 277; *Carroll v. Ertheiler*, 1 Fed. Rep. 688; *Burt v. Tucker*, 178 Mass. 493, 86 Am. St. Rep. 499; *Amoskeag Mfg. Co. v. Garner*, (Supm. Ct. Spec. T.) 54 How. Pr. (N. Y.) 299; *Wamsutta Mills v. Allen*, 12 Phila. (Pa.) 535, 35 Leg. Int. (Pa.) 410. See *George v. Smith*, 52 Fed. Rep. 830. But see *Hargreave v. Freeman*, (1891) 3 Ch. 39; *Medlar, etc., Shoe Co. v. Delsarte Mfg. Co.*, (N. J. 1900) 46 Atl. Rep. 1089. United States Revised Statutes, § 4939, as to registration of trademarks, recognizes this rule.

**4. Reason for Rule.** — *Collins Co. v. Oliver Ames, etc., Corp.*, 20 Blatchf. (U. S.) 542. But see remarks of *Cotton, L. J.*, in *Edwards v. Dennis*, 30 Ch. D. 454.

In *In re Jelley*, 51 L. J. Ch. 639, the application of petitioners, who had been using a certain trademark for several kinds of iron, to register it for the whole class of iron, was refused. *Jessel, M. R.*, said: "Although the applicants contend that they have used this mark for twenty-five years in the market, these particular goods have not been known by it.



know how many varieties of the same class of goods the owner of the mark makes and sells under the mark, and if they should see that mark upon other goods of the same class they would be deceived and the owner of the mark might be injured in his reputation because of the quality of goods over which he has no control.<sup>1</sup> What are the limits of the class is a question arising upon the evidence in each case.<sup>2</sup>

**3. Limit as to Time.** — There is no limit to the life of a trademark. It may be perpetual. The right to a trademark, however, may be lost or terminated in various ways.<sup>3</sup>

**4. Territorial Extent.** — It is frequently said that the right of property in a trademark is not limited in its enjoyment by territorial bounds as in the case of patents and copyrights.<sup>4</sup> But such statements are incorrect. Trademark rights rest either upon statutes or common law, and neither the statute nor common law of a country has any force beyond its borders.<sup>5</sup> The right of property in a trade mark or name is confined to the boundaries of the country under whose laws it was acquired. A particular word or mark may at the same time be a valid trademark in one country and not in others;<sup>6</sup> or it may be the trademark of one person in one country, and of a different person in

That point was argued by a man who had used a mark for whiskey which he thought he could extend to beer, though it was very like All-sopp's mark, but I did not think so. \* \* \* The applicants say that if they are allowed to use this mark in respect to certain goods, it is hard upon them that they should not be allowed to use it for the whole of their trade; but if they are going to sell goods which they never sold before, the answer is that they can adopt a new mark upon them."

1. *Amoskeag Mfg. Co. v. Garner*, (Supm. Ct. Spec. T.) 54 How. Pr. (N. Y.) 299; *Wamsutta Mills v. Allen*, 12 Phila. (Pa.) 535, 35 Leg. Int. (Pa.) 410. See *Edwards v. Dennis*, 30 Ch. D. 454, *per* Cotton, L. J.; *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311.

**2. Illustrations of Goods in Same or Different Classes.** — "Straight" and "blended" whiskeys belong to the same class of goods, *G. G. White Co. v. Miller*, 50 Fed. Rep. 277. Whiskey and beer are not in the same class, *In re Jelley*, 51 L. J. Ch. 639, *per* Jessel, M. R. Smoking tobacco for use in pipes and cigarettes are in the same class, *Carroll v. Ertheiler*, 1 Fed. Rep. 688, 21 Alb. L. J. 503. Axes, hatchets, and digging tools, such as picks, hoes, and shovels, belong to the same class, *Collins Co. v. Oliver Ames, etc., Corp.*, 20 Blatchf. (U. S.) 542. Muslin, and shirts made of muslin, belong to the same class, *Wamsutta Mills v. Allen*, 12 Phila. (Pa.) 535, 35 Leg. Int. (Pa.) 410. Baking powder is in the same class with baking soda and saleratus, *Church, etc., Co. v. Russ*, 99 Fed. Rep. 276. A retail shoe business is not in the same class as a wholesale shoe business, *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271, 82 Am. St. Rep. 346; but *compare* *Burt v. Tucker*, 178 Mass. 493, 86 Am. St. Rep. 499. The use of the name of the plaintiff's hotel as a trademark for the defendant's cigars may be enjoined, *Kinsley v. Jacoby*, (Supm. Ct. Spec. T.) 28 Abb. N. Cas. (N. Y.) 451. Not all canned goods belong to the same class; thus one who has a trademark for canned fruits cannot apply such mark to canned salmon where another has previously

applied such mark to canned salmon, *George v. Smith*, 52 Fed. Rep. 830. The plaintiffs, whose trademark for condensed milk was "Milk-Maid," sued to restrain the defendant from using the same mark for similar articles; the court determined that the registration of the defendant's trademark must be confined to substances other than condensed milk, chocolate and milk, and essence of coffee, allowing it for butter, butterine, and eggs, *Anglo-Swiss Condensed Milk Co. v. Metcalf*, 31 Ch. D. 454.

In *La Société, etc. v. Baxter*, 14 Blatchf. (U. S.) 261, Blatchford, J., said: "The fact that the defendants sell a paint composed of a white oxide of zinc ground in oil, and represent it as containing white oxide of zinc made by the plaintiffs, when it does not contain white oxide of zinc made by the plaintiffs, is no violation of any trademark of the plaintiffs. \* \* \* So flour is intended to be made into bread. But if a baker should falsely stamp his bread with the mark of a particular brand of flour, the maker of such brand, if having a trademark therefor, could not claim that the baker had violated his trademark. And so of any other raw material which enters as an ingredient into a compound or article of manufacture."

**3.** See *infra*, this title, *Loss or Termination of Right*.

**4. Territorial Bounds of Trademark Rights.** — *Derringer v. Plate*, 29 Cal. 293, 87 Am. Dec. 170. See *Hopkins on Unfair Trade*, § 10.

**5. Rights Limited by Boundary of Country Where Acquired.** — *Vacuum Oil Co. v. Eagle Oil Co.*, 122 Fed. Rep. 105. See *Richter v. Reynolds*, (C. C. A.) 59 Fed. Rep. 577.

**6. Trademarks Valid in One Country and Not in Others.** — *Saxlehner v. Eisner, etc., Co.*, 179 U. S. 19, *reversing* (C. C. A.) 91 Fed. Rep. 536; *Kaiserbrauerei v. J. & P. Baltz Brewing Co.*, 71 Fed. Rep. 695; *Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutillier*, (N. Y. Super. Ct. Spec. T.) 5 Misc. (N. Y.) 78. See *National Starch Mfg. Co. v. Munn's Patent Maizena, etc., Co.*, 6 Reports 462, (1894) A. C. 275.

another country.<sup>1</sup> Aliens may maintain actions for infringement of trademark committed in this country, provided they have acquired a trademark in this country by user in this country.<sup>2</sup> But a trademark acquired in this country will not support an action for acts committed wholly in a foreign country, for this would be to extend the laws of this country beyond its borders.<sup>3</sup> An action will lie, however, where the right was acquired in this country, and the wrongful transactions emanated from here, though they were carried out in foreign countries. In such a suit the boundaries of the dealing and not of countries constitute the limits of investigation.<sup>4</sup> Treaties between various countries have to some extent made provision for the protection of the trademark rights of their respective citizens.<sup>5</sup>

**5. Goods Not Protected.** — A trademark confers no exclusive right to make or sell the kind of goods denoted by the mark. Unless a person has a patent for his goods, similar goods may be made and sold by any one.<sup>6</sup>

**V. ORIGINAL ACQUISITION OF RIGHT — 1. Who May Acquire.** — A person claiming a trademark must have some connection with the goods to which the mark is applied, which connection is indicated by the use of the mark.<sup>7</sup> Any persons, including corporations,<sup>8</sup> who are connected with particular goods in any of the following capacities, may acquire a trademark to indicate that connection: viz., manufacturers,<sup>9</sup> workmen,<sup>10</sup> selectors,<sup>11</sup>

**1. Marks Belonging to Different Persons in Different Countries.** — *Kathreiner's Malzkaffee Fabriken, etc., v. Pastor Kneipp Medicine Co.,* (C. C. A.) 82 Fed. Rep. 321.

As between a foreigner who first used and registered a trademark in a foreign country, and a resident who first used the same mark in the United States, the resident has the paramount right to the trademark in the United States. *Richter v. Anchor Remedy Co.,* 52 Fed. Rep. 455, *affirmed* (C. C. A. 59 Fed. Rep. 577).

The owner of a valid, registered trademark in England may be an infringer by using such trademark in the United States, a resident having previously acquired a trademark in the United States in the same words. *Carlsbad v. Kutnow,* 68 Fed. Rep. 794, *affirmed* (C. C. A.) 71 Fed. Rep. 167.

**2. Aliens May Acquire Trademark.** — *Collins Co. v. Reeves,* 28 L. J. Ch. 56; *Taylor v. Carpenter,* 3 Story (U. S.) 458; *Derringer v. Plate,* 29 Cal. 296, 87 Am. Dec. 170; *Taylor v. Carpenter,* 11 Paige (N. Y.) 292, 42 Am. Dec. 114, *affirming* 2 Sandf. Ch. (N. Y.) 603. See *State v. Gibbs,* 56 Mo. 133.

A foreign manufacturer has a remedy by suit in England for an injunction and account of profits, against a manufacturer there who has committed a fraud upon him by using his trademark for the purpose of inducing the public to believe that the goods so marked were manufactured by the foreigner. This relief is founded upon the personal injury caused to the plaintiff by the defendant's fraud, and exists although the plaintiff resides and carries on his business in another country, and has no establishment and does not even sell his goods in England. *Collins Co. v. Brown,* 3 Kay & J. 423.

**3. Infringement Wholly in Foreign Country.** — *Vacuum Oil Co. v. Eagle Oil Co.,* 122 Fed. Rep. 105.

A trademark acquired in one state will support an action for an unauthorized use of such trademark in another state. *Derringer v. Plate,* 29 Cal. 296, 87 Am. Dec. 170.

**4.** *Wyckoff v. Howe Scale Co.,* 110 Fed. Rep. 520.

**5.** See *infra*, X. 4. *Treaties with Foreign Nations.*

**The International Convention for the Protection of Industrial Property** may be found in *Hopkins on Unfair Trade*, p. 374, and in *Paul on Trademarks*.

**6. Goods Not Protected by Trademark.** — *Powell v. Birmingham Vinegar Brewery Co.,* (1896) 2 Ch. 68; *Dennison Mfg. Co. v. Thomas Mfg. Co.,* 94 Fed. Rep. 651; *Putnam Nail Co. v. Pannett,* 43 Fed. Rep. 800; *Globe-Wernicke Co. v. Fred Macey Co.,* (C. C. A.) 119 Fed. Rep. 696; *Fairbanks v. Jacobus,* 14 Blatchf. (U. S.) 337, *Price & S. T. M. Cas.* 20; *Putnam Nail Co. v. Dulaney,* 140 Pa. St. 205, 23 Am. St. Rep. 228. See also *Putnam Nail Co. v. Bennett,* 43 Fed. Rep. 800.

**7. Connection with Goods Essential.** — See *McLean v. Fleming,* 96 U. S. 245; *Hoyt v. J. T. Lovett Co.,* (C. C. A.) 71 Fed. Rep. 173. See also *supra*, this title, *Definition and Nature of Subject — Trademarks.*

**8. Corporations.** — *Insurance Oil Tank Co. v. Scott,* 33 La. Ann. 946, 39 Am. Rep. 286; *New York Belting, etc., Co. v. Goodyear Rubber Hose, etc., Co.,* 20 Pa. Co. Ct. 493, 7 Pa. Dist. 76.

**9. Manufacturers.** — *McLean v. Fleming,* 96 U. S. 245; *Atlantic Milling Co. v. Robinson,* 20 Fed. Rep. 217; *Amoskeag Mfg. Co. v. Spear,* 2 Sandf. (N. Y.) 599; *Partridge v. Menck,* 2 Barb. Ch. (N. Y.) 101, 47 Am. Dec. 281; *Volger v. Force,* 63 N. Y. App. Div. 122.

**10. Workmen.** — *Schmalz v. Wooley,* 57 N. J. Eq. 303, 73 Am. St. Rep. 637, *reversing* 56 N. J. Eq. 649.

A trademark may indicate the bleacher of goods manufactured by another. *In re Sykes,* 43 L. T. N. S. 626.

A trademark may be acquired by those who do not manufacture, but simply print cloths manufactured by others. *Amoskeag Mfg. Co. v. Garner,* 55 Barb. (N. Y.) 151, 6 Abb. Pr. N. S. (N. Y.) 265.

**Trade Union Labels.** — See *infra*, this section.

**11. Selectors.** — *Levy v. Waitt,* 56 Fed. Rep.

sellers,<sup>1</sup> shippers,<sup>2</sup> exporters,<sup>3</sup> importers,<sup>4</sup> commission merchants,<sup>5</sup> carriers,<sup>6</sup> and perhaps other persons dealing or trading in like capacities.

**Trade Unions** have been protected in the use of union labels designed to indicate that the goods were manufactured by members of the union, upon the ground that such labels constitute trademarks,<sup>7</sup> but a contrary view has been taken in some cases.<sup>8</sup>

**Authors.** — It is not settled by decision whether or not authors may acquire trademarks in connection with their published works.<sup>9</sup>

**Aliens** may acquire trademarks and will be protected therein to the same extent as citizens or residents.<sup>10</sup>

**Trademarks.** — Any person or corporation will be protected in the use of a trade name in connection with a business carried on under that name.<sup>11</sup>

1016, (C. C. A.) 61 Fed. Rep. 1008; *A. F. Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. Rep. 896; *Holt v. Menendez*, 23 Fed. Rep. 869; *Menendez v. Holt*, 128 U. S. 514.

A trademark may be acquired to indicate that the goods have been selected and approved by one who had a reputation for so doing. *Hirsch v. Jonas*, 3 Ch. D. 584.

1. **Sellers.** — *Ford v. Foster*, L. R. 7 Ch. 611; *McLean v. Fleming*, 96 U. S. 245; *Saxlehner v. Graef*, 81 Fed. Rep. 704; *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946, 39 Am. Rep. 286; *Godillot v. Hazard*, (N. Y. Super. Ct. Spec. T.) 49 How. Pr. (N. Y.) 5, *affirmed* in *Godillot v. Harris*, 81 N. Y. 263; *Société des Huiles, etc., v. Rorke*, (Supm. Ct. Gen. T.) 31 N. Y. Supp. 51, *affirmed* 5 N. Y. App. Div. 175; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Partridge v. Menck*, 2 Barb. Ch. (N. Y.) 101, 47 Am. Dec. 281.

In *Walton v. Crowley*, 3 Blatchf. (U. S.) 440, Betts, J., said: "The person for whom goods are manufactured has the same legal right to affix and maintain a special trademark as the manufacturer himself." See also *Levy v. Waite*, 56 Fed. Rep. 1016; *Zeugschmidt v. Hantman*, 28 Pittsb. Leg. J. N. S. (Pa.) 463.

A merchant may adopt a trademark to designate goods "manufactured for him, and under his direction, and sold by him." *Conrad v. Joseph Uhrig Brewing Co.*, 8 Mo. App. 277.

In *Lichtenstein v. Goldsmith*, 37 Fed. Rep. 359, it was said that the fact that the owner of a trademark for cigars allows boxes of cigars to be labeled with the names of the dealers to whom they are sent, does not amount to deception which invalidates the trademark.

The state of South Carolina was denied registration of a trademark for liquors sold in Canada by a state commissioner, such sales not being authorized by the Dispensary Act. *Seymour v. South Carolina*, 2 App. Cas. (D. C.) 240.

2. **Shippers.** — *Winsor v. Clyde*, 9 Phila. (Pa.) 513, 29 Leg. Int. (Pa.) 172.

3. **Exporters.** — *Robinson v. Finlay*, 9 Ch. D. 487; *Brower v. Boulton*, (C. C. A.) 58 Fed. Rep. 888.

4. **Importers.** — *In re Australian Wine Importers*, 41 Ch. D. 278; *Saxlehner v. Graef*, 81 Fed. Rep. 704; *Godillot v. Hazard*, 44 N. Y. Super. Ct. 427.

5. **Commission Merchants.** — *Brower v. Boulton*, (C. C. A.) 58 Fed. Rep. 888.

6. **Carriers.** — *Knott v. Morgan*, 2 Keen 213.

See also *New York Cab Co. v. Mooney*, (Supm. Ct. Spec. T.) 15 Abb. N. Cas. (N. Y.) 152.

7. **Trade Unions.** — *Hetterman v. Powers*, 102 Ky. 133, 80 Am. St. Rep. 348; *Schmalz v. Wooley*, 57 N. J. Eq. 303, 73 Am. St. Rep. 637, *reversing* 56 N. J. Eq. 649; *People v. Fisher*, 50 Hun (N. Y.) 552, *following* *Strasser v. Moonelis*, 55 N. Y. Super. Ct. 197. See *Tracy v. Banker*, 170 Mass. 266.

8. *Veener v. Brayton*, 152 Mass. 101; *Cigar-Makers' Protective Union v. Conhaim*, 40 Minn. 243, 12 Am. St. Rep. 726; *Schneider v. Williams*, 44 N. J. Eq. 391; *McVey v. Brendel*, 144 Pa. St. 235, 27 Am. St. Rep. 625. See also *State v. Hagen*, 6 Ind. App. 167.

In *Allen v. McCarthy*, 37 Minn. 349, the court was equally divided on the question. See also *Bloete v. Simon*, (N. Y. Super. Ct. Spec. T.) 19 Abb. N. Cas. (N. Y.) 88, and *Carson v. Ury*, 39 Fed. Rep. 777, where it was held that although such a label is not a technical trademark, yet where special damage is shown and the imitation is fraudulent, equity will grant relief.

9. **Authors.** — In *Kipling v. Putnam*, (C. C. A.) 120 Fed. Rep. 631, conceding that an author might acquire a trademark, it was held that the particular mark claimed had not been so used as to constitute a trademark within ordinary rules.

10. **Aliens.** — *Collins Co. v. Brown*, 3 Kay & J. 423; *Taylor v. Carpenter*, 3 Story (U. S.) 458; *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170. See *supra*, this title, *Extent of Right — Territorial Extent*.

11. **Trademarks.** — *New York Cab Co. v. Mooney*, (Supm. Ct. Spec. T.) 15 Abb. N. Cas. (N. Y.) 152; *Winsor v. Clyde*, 9 Phila. (Pa.) 513, 29 Leg. Int. (Pa.) 172. But see *New York Belting, etc., Co. v. Goodyear Rubber Hose, etc., Co.*, 7 Pa. Dist. 76.

An organization or establishment formed for the purpose of amusement, as well as one formed for the purpose of trade, can acquire a trade name, and will be protected in its use; *e. g.*, "Christy's Minstrels." *Christy v. Murphy*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 77.

**Names and Marks on Cabs and Omnibuses.** — An agreement by the proprietor of a hotel to permit another to place the name of the hotel upon his coaches, is a valid contract; and both proprietor and his licensee may claim the protection of the court for any violation of his individual rights by a third person. *Deiz v.*



**2. Mode of Acquisition.** — Trademarks and trade names are acquired by mere adoption and user as such.<sup>1</sup> Statutory provisions for the registration of trademarks, as a general rule, apply only to words, marks, or symbols which have already become trademarks by adoption and user. The purpose of registry is merely to facilitate the remedy. Registration confers no new rights.<sup>2</sup>

**3. Adoption and User** — *a. IN GENERAL.* — A trademark or trade name is acquired by mere adoption and user as such in accordance with the limitations more specifically stated hereafter.<sup>3</sup> In the case of a trademark, the word or mark must be one capable of exclusive appropriation.<sup>4</sup> A trademark put upon goods by a middleman belongs to him and not to the manufacturer upon whose goods the mark is put.<sup>5</sup>

*b. NECESSITY FOR ACTUAL USER.* — A trademark can be acquired only by actual user of the mark in the market.<sup>6</sup> A mere intent to use particular terms or marks as a trademark, however clearly manifested, is insufficient in the absence of actual user.<sup>7</sup>

*c. PRIORITY OF ADOPTION AND USER.* — The exclusive right to a trademark or trade name belongs to the one who was the first to appropriate and use it as such in connection with goods of the class in question,<sup>8</sup> and not to

Lamb, 6 Robt. (N. Y.) 537. See also Knott v. Morgan, 2 Kean 213; Marsh v. Billings, 7 Cush. (Mass.) 322, 54 Am. Dec. 723; Stone v. Carlan, 13 Monthly L. Rep. 360.

1. See *infra*, this section, *Adoption and User*.

2. **Registration of Trademarks.** — See *infra*, this title, *Statutory Regulation*. See also Oakes v. St. Louis Candy Co., 146 Mo. 391.

3. **Trademark Acquired by Mere User** — *England.* — Hirst v. Denham, L. R. 14 Eq. 542.

*United States.* — Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51, *per* Clifford, J.; Leidersdorf v. Flint, 8 Biss. (U. S.) 327; Alleghany Fertilizer Co. v. Woodside, 1 Hughes (U. S.) 115; Royal Baking Powder Co. v. Raymond, 70 Fed. Rep. 382.

*California.* — Falkinburg v. Lucy, 35 Cal. 52, 95 Am. Dec. 76.

*Iowa.* — Shaver v. Shaver, 54 Iowa 208, 37 Am. Rep. 194.

*Louisiana.* — Handy v. Commander, 49 La. Ann. 1119.

*Maryland.* — Robertson v. Berry, 50 Md. 599, 33 Am. Rep. 328.

*Massachusetts.* — Burt v. Tucker, 178 Mass. 493, 86 Am. St. Rep. 499.

*Minnesota.* — Cigar-Makers' Protective Union v. Conhaim, 40 Minn. 243, 12 Am. St. Rep. 726.

*New York.* — Gaines v. Leslie, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 20; Burnett v. Phalon, 3 Keyes (N. Y.) 594.

See also the subsections immediately following.

**4. Exclusive Appropriation.** — New York, etc., Cement Co. v. Copley Cement Co., 44 Fed. Rep. 277; Amoskeag Mfg. Co. v. Spear, 2 Sandf. (N. Y.) 599. See *supra*, III. 2. *Particular Words, Names, Marks, or Symbols.*

**5. Use by Middleman on Other Goods.** — Brower v. Boulton, (C. C. A.) 58 Fed. Rep. 888; Levy v. Waitt, 56 Fed. Rep. 1016; Société des Huiles, etc., v. Rorke, (N. Y. 1899) 52 N. E. Rep. 1126; Société des Huiles, etc. v. Rorke, 82 Hun (N. Y.) 611, 31 N. Y. Supp. 51, 5 N. Y. App. Div. 175; Zeugschmidt v. Hantman, 28 Pittsb. Leg. L. N. S. (Pa.) 463.

**6. Actual User Necessary** — *England.* — Lawson v. London Bank, 18 C. B. 84, 86 E. C. L. 84, 25 L. J. C. Pl. 188; *In re Batt*, (1898) 2 Ch. 432, 67 L. J. Ch. 576.

*United States.* — Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51; Trade-Mark Cases, 100 U. S. 82; Filkins v. Blackman, 13 Blatchf. (U. S.) 440; Walton v. Crowley, 3 Blatchf. (U. S.) 440; Blackwell v. Dibrell, 3 Hughes (U. S.) 151; Macmahon Pharmaceutical Co. v. Denver Chemical Mfg. Co., (C. C. A.) 113 Fed. Rep. 468; Royal Baking Powder Co. v. Raymond, 70 Fed. Rep. 378; Shaw Stocking Co. v. Mack, 12 Fed. Rep. 707.

*Kentucky.* — Avery v. Meikle, 81 Ky. 73.

*New York.* — People v. Fisher, 50 Hun (N. Y.) 552.

**7. Intent to Use Insufficient.** — Maxwell v. Hogg, L. R. 2 Ch. 307, 36 L. J. Ch. 433; American Washboard Co. v. Saginaw Mfg. Co., (C. C. A.) 103 Fed. Rep. 281; Royal Baking Powder Co. v. Raymond, 70 Fed. Rep. 381; George v. Smith, 52 Fed. Rep. 830; Candee v. Deere, 54 Ill. 439, 5 Am. Rep. 125.

**8. Priority in Use Confers Superior Right** — *England.* — Pinet v. Maison Louis Pinet, (1898) 1 Ch. 179, 67 L. J. Ch. 41.

*Canada.* — Pabst Brewing Co. v. Ekers, 21 Quebec Super. Ct. 545.

*United States.* — Columbia Mill Co. v. Alcorn, 150 U. S. 460; Coats v. Merrick Thread Co., 149 U. S. 569; Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51; McLean v. Fleming, 96 U. S. 245; Actiengesellschaft Vereinigte Ultramarine Fabriken v. Amberg, 102 Fed. Rep. 551; Lamont v. Leedy, 88 Fed. Rep. 73; Tetlow v. Tappan, 85 Fed. Rep. 775; Kathrein's Malzkaffee Fabriken, etc., v. Pastor Kneipp Medicine Co., (C. C. A.) 82 Fed. Rep. 321; Hoyt v. J. T. Lovett Co., (C. C. A.) 71 Fed. Rep. 173; Whitfield v. Loveless, 64 Pat. Off. Gaz. 442. But see Levy v. Waitt, (C. C. A.) 61 Fed. Rep. 1008, 56 Fed. Rep. 1016.

*Colorado.* — Hyman v. Solis Cigar Co., 4 Colo. App. 475.

*District of Columbia.* — U. S. v. Duell, 17 App. Cas. (D. C.) 475.

the one who first designed, invented, or suggested it.<sup>1</sup> Absolute priority in the sense of novelty or invention is not necessary. Priority in the application of the mark to a particular class of goods is sufficient.<sup>2</sup> Notwithstanding the prior use of a mark in connection with one class of goods, another person may acquire a trademark therein as applied to a different class of goods.<sup>3</sup> So where a mark has been used by one person, but such use has been abandoned, a subsequent user may appropriate such mark as a trademark for his goods, and such trademark will be valid even as against the former user.<sup>4</sup> But words and marks in prior and common use by others in the trade cannot be exclusively appropriated by a subsequent trader as a trademark for his goods.<sup>5</sup>

*d. LENGTH OF USER.* — It is not necessary that the word or mark should

*Louisiana.* — *Handy v. Commander*, 49 La. Ann. 1119.

*Minnesota.* — *J. R. Watkins Medical Co. v. Sands*, 83 Minn. 326.

*Missouri.* — *St. Louis Carbonating, etc., Co. v. Eclipse Carbonating Co.*, 58 Mo. App. 411.

*New York.* — *Rawlinson v. Brainard*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 287; *Wagner v. Daly*, 67 Hun (N. Y.) 477; *Dr. Dadirrian, etc., Co. v. Hauenstein*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 23; *Royal Baking Powder Co. v. Sherrill*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 17; *Wolfe v. Goulard*, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 64.

*Pennsylvania.* — *Zeugschmidt v. Hantman*, 28 Pittsb. Leg. J. N. S. (Pa.) 463.

But see *Old Times Distillery Co. v. Casey*, 104 Ky. 616, 84 Am. St. Rep. 480.

**1. Designer or Inventor.** — *Welsbach Light Co. v. Adam*, 107 Fed. Rep. 463; *George v. Smith*, 52 Fed. Rep. 830; *Swift v. Peters*, 11 Pat. Off. Gaz. 1110.

**2. Novelty or Invention Unnecessary.** — *United States.* — *McLean v. Fleming*, 96 U. S. 245; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537; *Trade Mark Cases*, 100 U. S. 82; *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 322; *Leidersdorf v. Flint*, 8 Biss. (U. S.) 327; *Tetlow v. Tappan*, 85 Fed. Rep. 774; *Gray v. Taper-Sleeve Pulley Works*, 16 Fed. Rep. 436.

*Georgia.* — *Foster v. Blood Balm Co.*, 77 Ga. 216.

*Illinois.* — *William J. Moxley Co. v. Braun*, etc., Co., 93 Ill. App. 183.

*Louisiana.* — *Handy v. Commander*, 49 La. Ann. 1119.

*New York.* — *Messerole v. Tynberg*, (C. Pl. Spec. T.) 4 Abb. Pr. N. S. (N. Y.) 410, 36 How. Pr. (N. Y.) 14; *Dr. Dadirrian, etc., Co. v. Hauenstein*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 23; *Rawlinson v. Brainard*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 287; *Hegeman v. O'Byrne*, 9 Daly (N. Y.) 264.

But see *Lichtenstein v. Mellis*, 8 Oregon 465, 34 Am. Rep. 592.

**3. Use on Different Classes of Goods.** — *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, *per* Clifford, J.; *Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co.*, (C. C. A.) 113 Fed. Rep. 468; *George v. Smith*, 52 Fed. Rep. 830. See also *supra*, this title, *Extent of Right*.

**4. Abandoned Trademarks.** — *Daniel v. Whitehouse*, (1898) 1 Ch. 685; *Menendez v. Holt*, 128 U. S. 514; *Raymond v. Royal Baking Powder Co.*, (C. C. A.) 85 Fed. Rep. 231,

*affirming* 70 Fed. Rep. 376; *Royal Baking Powder Co. v. Raymond*, 70 Fed. Rep. 381; *Brower v. Boulton*, 53 Fed. Rep. 389, *affirmed* (C. C. A.) 58 Fed. Rep. 888; *Symonds v. Greene*, 28 Fed. Rep. 834; *O'Rourke v. Central City Soap Co.*, 26 Fed. Rep. 576; *Gray v. Taper-Sleeve Pulley Works*, 16 Fed. Rep. 436; *Blakwell v. Dibrell*, 14 Pat. Off. Gaz. 633; *Julian v. Hoosier Drill Co.*, 78 Ind. 408; *Church v. Kresner*, 26 N. Y. App. Div. 349. See *Corbin v. Gould*, 133 U. S. 308.

But a person may not appropriate a trademark belonging to another, without his consent, and subsequently acquire a good title thereto by the abandonment thereof by the first proprietor. *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217; *Gray v. Taper-Sleeve Pulley Works*, 16 Fed. Rep. 436; *Mouson v. Boehm*, 26 Ch. D. 398.

Where two firms have used the same trademark for similar goods concurrently for some time, but one of them has discontinued the user, and the name has come to be known in the trade as denoting goods made by the other, the firm which has discontinued the user will be restrained from resuming it. *Daniel v. Whitehouse*, (1898) 1 Ch. 685, 67 L. J. Ch. 262.

**5. Words and Marks in Prior Use.** — *England.* — *Hirst v. Denham*, L. R. 14 Eq. 542; *Beard v. Turner*, 13 L. T. N. S. 746.

*Canada.* — *Partlo v. Todd*, 17 Can. Sup. Ct. 196.

*United States.* — *Columbia Mill Co. v. Alcorn*, 150 U. S. 460; *Corbin v. Gould*, 133 U. S. 308; *Liggett, etc., Tobacco Co. v. Finzer*, 128 U. S. 182; *Stachelberg v. Ponce*, 128 U. S. 686; *McLean v. Fleming*, 96 U. S. 245; *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311; *Liebig's Extract of Meat Co. v. Walker*, 115 Fed. Rep. 822; *Searle, etc., Co. v. Warner*, (C. C. A.) 112 Fed. Rep. 674; *Liebig's Extract of Meat Co. v. Libby*, 103 Fed. Rep. 87; *Lamont v. Leedy*, 88 Fed. Rep. 72; *Shaw Stocking Co. v. Mack*, 12 Fed. Rep. 707.

*California.* — *Castle v. Siegfried*, 103 Cal. 71.

*District of Columbia.* — *U. S. v. Duell*, 17 App. Cas. (D. C.) 475.

*New York.* — *Caswell v. Davis*, 58 N. Y. 223, 17 Am. Rep. 233; *Wolfe v. Goulard*, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 64; *Rawlinson v. Brainard*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 287.

*Oregon.* — *Lichtenstein v. Mellis*, 8 Oregon 464, 34 Am. Rep. 592.

have been used for any definite or considerable length of time. A single actual use with intent to continue such use *eo instanti* confers a right to such word or mark as a trademark.<sup>1</sup> It is sufficient if the article with the mark upon it has actually become a vendible article in the market, with intent upon the part of the proprietor to continue its production and sale.<sup>2</sup> It is not necessary that the goods should have acquired a reputation for quality under that mark,<sup>3</sup> or that any ascertained person should have learned the significance of the mark.<sup>4</sup> The rule is stated in many cases that the use must have been general, continuous, and exclusive, and applied to goods and used in trade under such circumstances of publicity and length of use as to show an intention to adopt the mark as a trademark for specific goods, and to have become known as the distinguishing mark for such goods.<sup>5</sup> It is believed, however, that these cases really mean no more than that such use is necessary to maintain the right to a trademark, and prevent others from acquiring rights therein upon the theory of abandonment by the first user.<sup>6</sup> A mere casual, intermittent, or experimental use may be insufficient to show an intention to adopt the mark as a trademark for a specific article.<sup>7</sup>

*c.* **USE TO INDICATE ORIGIN OR OWNERSHIP.** — The word or mark claimed as a trademark must have been used originally for the purpose of indicating origin or ownership. If it was used primarily to indicate grade or class, or for any other purpose, no exclusive trademark rights will be acquired, though such mark has also come to mean, in a secondary sense, origin or ownership.<sup>8</sup>

**1. Length of User Immaterial.** — *Cope v. Evans*, L. R. 18 Eq. 143; *Maxwell v. Hogg*, L. R. 2 Ch. 307, 36 L. J. Ch. 433; *Hall v. Barrows*, 4 DeG. J. & S. 150, 32 L. J. Ch. 548; *M'Andrew v. Bassett*, 4 DeG. J. & S. 380; *Whitfield v. Loveless*, 64 Pat. Off. Gaz. 442; *Swift v. Peters*, 11 Pat. Off. Gaz. 1110; *Shaver v. Shaver*, 54 Iowa 208, 37 Am. Rep. 194. See also *Orr-Ewing v. Grant*, 2 Hyde 185. See *Kohler Mfg. Co. v. Beeshore*, (C. C. A.) 59 Fed. Rep. 572, *affirming* 53 Fed. Rep. 262. But see *Wheeler v. Johnston*, 3 L. R. Ir. 284; *Menendez v. Holt*, 128 U. S. 514.

The text writers are unanimous in support of the rule stated in the text. See *Browne on Trademarks*, § 52; *Hopkins on Unfair Trade, Trademarks, etc.*, § 18; *Kerly on Trademarks, etc.*, pp. 32-34.

**2. Use on Vendible Article in Market.** — *Kathreiner's Malzkaffee Fabriken, etc., v. Pastor Kneipp Medicine Co.*, (C. C. A.) 82 Fed. Rep. 321; *Swift v. Peters*, 11 Pat. Off. Gaz. 1110. But see *Brower v. Boulton*, (C. C. A.) 58 Fed. Rep. 888.

**3. Reputation for Quality.** — *Maxwell v. Hogg*, L. R. 2 Ch. 314; *Hall v. Barrows*, 4 DeG. J. & S. 150, 32 L. J. Ch. 548; *M'Andrew v. Bassett*, 4 DeG. J. & S. 380, 33 L. J. Ch. 566; *Swift v. Peters*, 11 Pat. Off. Gaz. 1110. But see *Wheeler v. Johnston*, 3 L. R. Ir. 284.

In *Colgan v. Danheiser*, 35 Fed. Rep. 150, no relief was granted, it not appearing that the complainants had first established a reputation for their device before the defendants simulated it. See also *Robertson v. Berry*, 50 Md. 599, 33 Am. Rep. 328.

**4. Knowledge of Significance of Mark.** — *Hall v. Barrows*, 4 DeG. J. & S. 150, 32 L. J. Ch. 548; *McAndrews v. Bassett*, 10 Jur. N. S. 492, 33 L. J. Ch. 561; *Cope v. Evans*, L. R. 18 Eq. 143.

**5. Continuous, Exclusive, and Public Use.** — *Wheeler v. Johnston*, 3 L. R. Ir. 284; *Kipling*

*v. Putnam*, (C. C. A.) 120 Fed. Rep. 631; *Macmahon Pharmacal Co. v. Denver Chemical Mfg. Co.*, (C. C. A.) 113 Fed. Rep. 468; *Actiengesellschaft Vereinigte Ultramarine Fabriken v. Amberg*, 102 Fed. Rep. 551; *Levy v. Waitt*, (C. C. A.) 61 Fed. Rep. 1008; *Richter v. Reynolds*, (C. C. A.) 59 Fed. Rep. 577; *Brower v. Boulton*, 53 Fed. Rep. 389, *affirmed* (C. C. A.) 58 Fed. Rep. 888; *Kohler Mfg. Co. v. Beeshore*, 53 Fed. Rep. 262; *Colgan v. Danheiser*, 35 Fed. Rep. 150; *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440; *Sheppard v. Stuart*, 13 Phila. (Pa.) 117, 36 Leg. Int. (Pa.) 234. See *Purser v. Brain*, 17 L. J. Ch. 141; *Edelsten v. Vick*, 11 Hare 78; *Atwater v. Castner*, (C. C. A.) 88 Fed. Rep. 612; *Alleghany Fertilizer Co. v. Woodside*, 1 Hughes (U. S.) 115.

In *Trade-Mark Cases*, 100 U. S. 82, *Miller, J.*, said: "The trademark recognized by the common law is generally the growth of a considerable period of use rather than a sudden invention. \* \* \* The exclusive right to it grows out of its use and not its mere adoption."

**6.** This distinction is very clearly stated by the Master of the Rolls, in *Hall v. Barrows*, 4 DeG. J. & S. 150, 32 L. J. Ch. 548. And see *Seltzer v. Powell*, 8 Phila. (Pa.) 296, *per Paxson, J.*

**7. Casual, Intermittent, or Experimental Use.** — *Menendez v. Holt*, 128 U. S. 514; *Kohler Mfg. Co. v. Beeshore*, 59 Fed. Rep. 572, *affirming* 53 Fed. Rep. 262.

**8. Use to Indicate Origin or Ownership** — *United States*. — *Columbia Mill Co. v. Alcorn*, 150 U. S. 460; *Thomas G. Plant Co. v. May Co.*, (C. C. A.) 105 Fed. Rep. 377; *Deering Harvester Co. v. Whitman, etc., Mfg. Co.*, 86 Fed. Rep. 764, (C. C. A.) 91 Fed. Rep. 376; *Lamont v. Leedy*, 88 Fed. Rep. 73; *Beadleston v. Cooke Brewing Co.*, (C. C. A.) 74 Fed. Rep. 220; *Burton v. Stratton*, 12 Fed. Rep. 696.

*California*. — *Falkenburg v. Lucy*, 35 Cal. 52, 95 Am. Dec. 76.



The word must have been used as a trademark.<sup>1</sup> A mere illustration in a book is not a trademark.<sup>2</sup>

**VI. LOSS OR TERMINATION OF RIGHT — 1. Abandonment.** — The title to a trademark or trade name acquired by adoption and user may be lost by an abandonment of such use.<sup>3</sup> What will amount to an abandonment is a question which must always be decided by the facts of each particular case; but the general rule is that the mark will never be held to have been abandoned, unless a clear intention can be gathered from the acts of the former owner to give it up and to abandon his title to it.<sup>4</sup> Adoption of a new mark may amount to an abandonment of the old one, but not necessarily.<sup>5</sup> A mere temporary suspension of the use of the mark does not constitute abandon-

*Connecticut.* — Boardman *v.* Meriden Britannia Co., 35 Conn. 402, 95 Am. Dec. 270.

*District of Columbia.* — U. S. *v.* Duell, 17 App. Cas. (D. C.) 475.

*Massachusetts.* — Lawrence Mfg. Co. *v.* Lowell Hosiery Mills, 129 Mass. 325, 37 Am. Rep. 362.

*New York.* — Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. (N. Y.) 599.

*Pennsylvania.* — Ferguson *v.* Davol Mills, 7 Phila. (Pa.) 253.

See also upon this subject *supra*, III. 2. *f. Numerals*; *g. Letters and Initials*; *o. 3. Grade or Class.*

1. **Use as a Trademark.** — Powell *v.* Birmingham Vinegar Brewery Co., (1894) A. C. 8.

2. **Illustration in Book.** — Munro *v.* Smith, 55 Hun (N. Y.) 419.

3. **Right Lost by Abandonment of Use.** — Menendez *v.* Holt, 128 U. S. 514; Blackwell *v.* Dibrell, 3 Hughes (U. S.) 151; Brower *v.* Boulton, 53 Fed. Rep. 389; Symonds *v.* Greene, 28 Fed. Rep. 834; O'Rourke *v.* Central City Soap Co., 26 Fed. Rep. 576; Atlantic Milling Co. *v.* Robinson, 20 Fed. Rep. 217; Blackwell *v.* Dibrell, 14 Pat. Off. Gaz. 633; Caswell *v.* Davis, 58 N. Y. 223, 17 Am. Rep. 233; Perkins *v.* Heert, 5 N. Y. App. Div. 335; Hegemen *v.* Hegemen, 8 Daly (N. Y.) 1.

4. **Question of Fact — Intention to Abandon.** — *England.* — Mouson *v.* Boehm, 26 Ch. D. 398, 28 Sol. J. 361.

*United States.* — Saxlehner *v.* Eisner, etc., Co., 179 U. S. 19; Blackwell *v.* Dibrell, 3 Hughes (U. S.) 151; Williams *v.* Adams, 8 Biss. (U. S.) 452; Actiengesellschaft, etc., *v.* Amberg, (C. C. A.) 109 Fed. Rep. 151; Saxlehner *v.* Eisner, etc., Co., (C. C. A.) 91 Fed. Rep. 536; Singer Mfg. Co. *v.* June Mfg. Co., 163 U. S. 169. See Collins Co. *v.* Oliver Ames, etc., Corp., 20 Blatchf. (U. S.) 542; Taylor *v.* Carpenter, 3 Story (U. S.) 458; Brower *v.* Boulton, 53 Fed. Rep. 389; Burton *v.* Stratton, 12 Fed. Rep. 696.

*California.* — Nolan Bros. Shoe Co. *v.* Nolan, 131 Cal. 271, 82 Am. St. Rep. 346; Judson *v.* Malloy, 40 Cal. 299.

*Connecticut.* — Moore *v.* Stevenson, 27 Conn.

14. *Indiana.* — Julian *v.* Hoosier Drill Co., 78 Ind. 408.

*Maine.* — Livermore *v.* White, 74 Me. 452, 43 Am. Rep. 600.

*Massachusetts.* — Burt *v.* Tucker, 178 Mass. 493, 86 Am. St. Rep. 499.

*Missouri.* — Hickman *v.* Link, 116 Mo. 123.

*New York.* — Hegeman *v.* Hegeman, 8 Daly (N. Y.) 1; Dr. Dadirrian, etc., Co. *v.* Hauenstein, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 23. See Colman *v.* Crump, 70 N. Y. 579.

*Pennsylvania.* — See Pratt's Appeal, 117 Pa. St. 401, 2 Am. St. Rep. 676; Sheppard *v.* Stuart, 13 Phila. (Pa.) 117, 36 Leg. Int. (Pa.) 234.

In Browne *v.* Freeman, 12 W. R. 305, 4 New Reports, 476, the plaintiff, who was the inventor of a medicine which he called "chlorodyne," moved for an injunction to prevent the defendant from using the same word on a preparation of his own make; the plaintiff having previously dismissed a bill, with costs, which he had filed against the defendant for the same purpose. The court said that such dismissal of the previous bill was an abandonment of the exclusive right to the trademark.

**A License to Another to Use a Trademark** is not an abandonment and not even evidence of abandonment. Sheppard *v.* Stuart, 13 Phila. (Pa.) 117, 36 Leg. Int. (Pa.) 234.

**Infringements.** — The abandonment of a trademark is not made out by showing numerous infringements in which the owners of such trademark have not acquiesced. Williams *v.* Adams, 8 Biss. (U. S.) 452.

**Registration** of a trademark is an abandonment of the features not included in the registry. Pittsburgh Crushed Steel Co. *v.* Diamond Steel Co., 85 Fed. Rep. 637. See generally *infra*, this title. *Statutory Regulation — Federal Statutes — Operation and Effect.*

5. **Adoption of New Mark.** — See Montreal Lithographing Co. *v.* Sabiston, (1899) A. C. 610, 68 L. J. P. C. 121; Saxlehner *v.* Eisner, etc., Co., 88 Fed. Rep. 61; Lea *v.* Millar, Seton (4th ed.) 242; Dr. Dadirrian, etc., Co. *v.* Hauenstein, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 23. See also Nolan Bros. Shoe Co. *v.* Nolan, 131 Cal. 271, 82 Am. St. Rep. 346.

The adoption of a new label only slightly different from the former one will be regarded as an amendment rather than an abandonment of the old label. Perkins *v.* Heert, 5 N. Y. App. Div. 335.

The fact that the plaintiff has discontinued the use of his trademark for three years, and adopted another, will not deprive him of his right of action against one who uses the original mark on the article in question, thus falsely representing it to be of the plaintiff's manufacture. Lemoine *v.* Gauton, 2 E. D. Smith (N. Y.) 343.

ment.<sup>1</sup> But a long-continued disuse may be sufficient to show an abandonment.<sup>2</sup> The burden of proving abandonment is upon the party holding the affirmative of the issue,<sup>3</sup> and abandonment, being in the nature of a forfeiture, must be strictly proved.<sup>4</sup>

**2. Acquiescence, Laches, and Delay.** — In England the rule is somewhat strictly applied that the proprietor of a trademark forfeits his right to relief against infringement by laches and acquiescence in the use of his mark by another.<sup>5</sup>

In the United States the rule is not so strictly applied, the general rule being that acquiescence or delay in asserting a trademark right against an infringer amounts only to a license at will which can be terminated at any time by a suit for an injunction. If the title of the plaintiff is clear and the infringement plain, an injunction will be granted.<sup>6</sup>

**1. Temporary Suspension of Use.** — *Mouson v. Boehm*, 26 Ch. D. 398; *Julian v. Hoosier Drill Co.*, 78 Ind. 408; *Burt v. Tucker*, 178 Mass. 493, 86 Am. St. Rep. 499; *Tomah Bank v. Warren*, 94 Wis. 151; *Gillett v. Lumsden*, 4 Ont. L. Rep. 300.

**2. Long Disuse.** — *Royal Baking Powder Co. v. Raymond*, 70 Fed. Rep. 376.

**3. Burden of Proof.** — *Julian v. Hoosier Drill Co.*, 78 Ind. 408.

**4. Strict Proof Required.** — *Julian v. Hoosier Drill Co.*, 78 Ind. 408.

**5. Laches and Acquiescence — English Rule.** — *Beard v. Turner*, 13 L. T. N. S. 746; *Powell v. Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 79; *Estcourt v. Estcourt Hop Essence Co.*, L. R. 10 Ch. 276, 31 L. T. N. S. 567; *Chappell v. Sheard*, 2 Kay & J. 117, 1 Jur. N. S. 996, 3 W. R. 646; *Lee v. Haley*, L. R. 5 Ch. 155, 21 L. T. N. S. 546, 18 W. R. 242; *Rodgers v. Rodgers*, 31 L. T. N. S. 285; *Lazenby v. White*, 41 L. J. Ch. 354. See also *Farina v. Gebhardt*, *Sebastian's Dig.* 118; *Flavel v. Harrison*, 10 Hare 467, 22 L. J. Ch. 866. But see *Ford v. Foster*, L. R. 7 Ch. 611, 27 L. T. N. S. 219, 41 L. J. Ch. 682; *Harrison v. Taylor*, 11 Jur. N. S. 408, 12 L. T. N. S. 339; *Fullwood v. Fullwood*, 9 Ch. D. 176, 47 L. J. Ch. 459, holding that mere delay would not bar relief.

In *In re Heaton*, 27 Ch. D. 570, Kay, J., said: "Where persons come and object, in whatever form, to the use of a trademark which has been used for a great number of years, it does not follow as a matter of course that the use for a great number of years is an absolute bar to obtaining an injunction; but most certainly it throws on those who object to the use the onus of proving that it was originally a fraudulent use, and that it is calculated to deceive; and very much stronger evidence is required in such a case where there has been a long user than would be required in another case."

**Acquiescence in Violation of Injunction.** — In *Rodgers v. Nowill*, 17 Jur. 109, 171, 1 W. R. 122, 3 DeG. M. & G. 614, an injunction having been granted, restraining the defendant from the use of a trademark containing the words "J. Rogers & Sons," he formed, in 1848, a partnership with his father (who was named John Rogers), and brother, and used the same firm name. In 1853, the plaintiff moved for committal for breach of injunction. *Stuart V. C.*, refused the motion, but without costs, on the ground (among others) of acquiescence by the plaintiffs for five years. This holding was reversed on ap-

peal. *Turner, L. J.*, said: "On the question of acquiescence, I think that in a case of this description, where there has been an injunction granted by this court, there must, in order to deprive the party who has obtained the injunction of the right to move for committal upon the breach of it, be a case made out almost amounting to such a license to the party enjoined to do the act enjoined against as would entitle him to maintain a bill against others for doing that act. The party enjoined must, I think, show such acquiescence as would be sufficient to create new right in him." See also *Taylor v. Carpenter*, 3 Story (U. S.) 458.

**6. American Rule — United States.** — *Saxlehner v. Eisner*, etc., 179 U. S. 19, reversing (C. C. A.) 91 Fed. Rep. 536; *Saxlehner v. Nielsen*, 179 U. S. 43, reversing (C. C. A.) 91 Fed. Rep. 1004; *Menendez v. Holt*, 128 U. S. 514; *McLean v. Fleming*, 96 U. S. 245; *Williams v. Adams*, 8 Biss. (U. S.) 452; *Taylor v. Carpenter*, 2 Woodb. & M. (U. S.) 1, 3 Story (U. S.) 458; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. Rep. 357; *Rahtjen's American Composition Co. v. Holzappel's Composition Co.*, (C. C. A.) 101 Fed. Rep. 257; *Low v. Fels*, 35 Fed. Rep. 361. See *La Republique Francaise v. Schultz*, (C. C. A.) 102 Fed. Rep. 153; *Rodgers v. Philp*, 1 Pat. Off. Gaz. 29. But see *Prince's Metallic Paint Co. v. Prince Mfg. Co.*, (C. C. A.) 57 Fed. Rep. 938.

*California.* — *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271, 82 Am. St. Rep. 346.

*Florida.* — *El Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 23 Am. St. Rep. 537.

*Indiana.* — *Julian v. Hoosier Drill Co.*, 78 Ind. 408.

*Kentucky.* — *Northcutt v. Turney*, 101 Ky. 314. But see *Old Times Distillery Co. v. Casey*, 104 Ky. 616, 84 Am. St. Rep. 480.

*Louisiana.* — *Wolfe v. Barnett*, 24 La. Ann. 97, 13 Am. Rep. 111.

*Missouri.* — *Sanders v. Jacob*, 20 Mo. App. 96.

*New York.* — *Amoskeag Mfg. Co. v. Garner*, (Supm. Ct. Spec. T.) 54 How. Pr. (N. Y.) 297, reversing 6 Abb. Pr. N. S. (N. Y.) 265; *McCardel v. Peck*, (Supm. Ct. Gen. T.) 28 How. Pr. (N. Y.) 120; *Gillott v. Esterbrook*, 47 Barb. (N. Y.) 455, affirmed 48 N. Y. 374, 8 Am. Rep. 553; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Cahn v. Gottschalk*, 14 Daly (N. Y.) 542; *Stetson v. Brennen*, 21 N. Y. App. Div. 552; *Munro v. Tousey*, (Supm. Ct. Gen. T.) 36 N. Y. St. Rep. 520.

Fraud upon the Part of the Defendant is a material consideration. The courts are reluctant to grant an injunction where the defendant's use of the mark was innocent in its inception and there has been long delay upon the part of the plaintiff.<sup>1</sup>

**A Recovery for Damages and Past Profits** will be denied when there is laches, even though an injunction be granted against the continuance of the wrong.<sup>2</sup> Acquiescence with knowledge of the infringement is necessary to bar a right to damages and profits.<sup>3</sup>

**A Preliminary Injunction**, however, may be properly denied upon the sole ground of laches.<sup>4</sup>

**Laches Resulting in Loss of Distinctiveness.**—Laches continued in the face of infringements until the mark has lost its distinctiveness in the market will, of course, bar all relief, for the exclusive right to the mark is then at an end.<sup>5</sup>

**The Burden of Proving Laches and Acquiescence** is upon the defendant.<sup>6</sup>

*North Carolina.*—Blackwell's Durham Tobacco Co. v. McElwee, 100 N. Car. 150.

See Sheppard v. Stuart, 13 Phila. (Pa.) 117, 36 Leg. Int. (Pa.) 234. But see Tygert-Allen Fertilizer Co. v. J. E. Tygert Co., 191 Pa. St. 336.

In *Sawyer v. Kellogg*, 9 Fed. Rep. 601, Nixon, D. J., said: "In England the rule is stringent in trademark cases, that lack of diligence in suing deprives the complainant in equity of the right either to an injunction or an account. Our courts are more liberal in this respect. A long lapse of time will not deprive the owner of a trademark of an injunction against an infringer, but a reasonable diligence is required of a complainant in asserting his rights, if he would hold a wrongdoer to an account for profits and damages. This rule, however, applies only to those cases where there has been an acquiescence after a knowledge of the infringement is brought home to the complainant." See *White v. Schlect*, 14 Phila. (Pa.) 88, 37 Leg. Int. (Pa.) 208, Price & S. T. M. Cas. 404; *Filley v. Child*, 16 Blatchf. (U. S.) 376.

Acquiescence in the use of the name in one business does not authorize the defendant to use it in another business. *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271, 82 Am. St. Rep. 346.

A moderate delay on the part of the plaintiff in prosecuting an infringement of his trademark or trade name, or such a delay as will enable him to obtain evidence, is no bar to his success. *Cave v. Myers*, Seton (4th ed.) 238; *Lee v. Haley*, L. R. 5 Ch. 155, 21 L. T. N. S. 546, 39 L. J. Ch. 284.

The unauthorized use by other parties of the plaintiff's trademark is no justification of the defendant's acts of infringement; on the contrary, such circumstance is, under the authorities, one of aggravation. *Funke v. Dreyfus*, 34 La. Ann. 80, 44 Am. Rep. 413. See also *Filley v. Fassett*, 44 Mo. 168, 100 Am. Dec. 275; *Gillott v. Esterbrook*, 47 Barb. (N. Y.) 455, affirmed 48 N. Y. 374, 8 Am. Rep. 553.

In *Cartier v. May*, Sebastian's Dig. 200, a motion to commit for breach of injunction was refused on the ground of the plaintiff's delay for fifteen months; but the injunction was enlarged to cover new fraud, and costs were given.

Where the plaintiff has acquiesced for a long

number of years in the use by the defendant of the plaintiff's alleged trademark, "Lackawanna coal," to designate coal mined by the defendants from the Lackawanna valley, he will be held to have licensed the defendant to use the same, and will be estopped from enjoining him from using it for such purpose. *Delaware, etc., Canal Co. v. Clark*, 7 Blatchf. (U. S.) 112.

**1. Fraudulent Use by Defendant.**—*Rodgers v. Rodgers*, 31 L. T. N. S. 285; *La Republique Francaise v. Schultz*, 94 Fed. Rep. 500; *Sanders v. Jacob*, 20 Mo. App. 96.

**2. Damages and Profits.**—*Ford v. Foster*, L. R. 7 Ch. 611, 27 L. T. N. S. 219; *Beard v. Turner*, 13 L. T. N. S. 746; *Harrison v. Taylor*, 11 Jur. N. S. 408, 12 L. T. N. S. 339; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. Rep. 357; *Low v. Fels*, 35 Fed. Rep. 361; *Sawyer v. Kellogg*, 9 Fed. Rep. 601; *McLean v. Fleming*, 96 U. S. 245; *Manhattan Medicine Co. v. Wood*, 4 Cliff. (U. S.) 461; *Amoskeag Mfg. Co. v. Garner*, (Supm. Ct. Spec. T.) 54 How. Pr. (N. Y.) 297, reversing 6 Abb. Pr. N. S. (N. Y.) 265; *Cahn v. Gottschalk*, 14 Daly (N. Y.) 542; *Blackwell's Durham Tobacco Co. v. McElwee*, 100 N. Car. 150; *Lloyd v. Merrill Chemical Co.*, 11 Ohio Dec. (Reprint) 236, 25 Cinc. L. Bul. 319.

A delay of one year will not deprive the plaintiff of his right to an accounting of profits. *C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84.

Two years' delay will not deprive the plaintiff of the right to recover damages, where he had prosecuted other infringers, and the defendant had in consequence thereof changed his labels. *Schmidt v. Brieg*, 100 Cal. 672.

In *Drummond Tobacco Co. v. Addison Tinsley Tobacco Co.*, 52 Mo. App. 10, a decree for an accounting of profits was denied, but without prejudice to the right to sue at law for damages.

**3. Sawyer v. Kellogg**, 9 Fed. Rep. 601.

**4. Preliminary Injunction.**—*Isaacson v. Thompson*, 41 L. J. Ch. 101, 20 W. R. 196; *Estes v. Worthington*, 22 Fed. Rep. 822. See *Bovill v. Crate*, L. R. 1 Eq. 388.

**5. Loss of Distinctiveness.**—*Saxlehner v. Eisner, etc.*, Co., 179 U. S. 19, reversing (C. C. A.) 91 Fed. Rep. 536. See *infra*, VI. 3. *Loss of Distinctiveness*.

**6. Burden of Proof.**—*Chappell v. Sheard*, 2 Kay & J. 117.



**3. Loss of Distinctiveness.** — The exclusive right to an originally valid trademark is lost if such mark for any reason loses its distinctiveness and no longer indicates origin or ownership.<sup>1</sup> Repeated use upon the goods of others will cause a mark to lose its original significance as indicating a connection with the plaintiff, and the mark will become *publici juris*.<sup>2</sup> Extensive piracy by a single individual will not have this effect,<sup>3</sup> nor will a few scattering infringements by several persons even though not prosecuted.<sup>4</sup> Permitting a limited use by another is not sufficient to defeat the owner's right to prevent others from using his trademark.<sup>5</sup>

**4. Separation from Good Will.** — A trademark being a mere device to secure to one the benefits of the good will attaching to his business, it cannot exist apart from such good will. Accordingly, when the business and good will become extinct, the trademark dies also.<sup>6</sup>

**5. Estoppel.** — The plaintiff may be estopped by his own conduct from asking relief, where to grant it would be inequitable.<sup>7</sup>

**VII. ASSIGNMENT, TRANSFER, AND LICENSE — 1. Assignability — a. GENERAL DOCTRINE.** — The primary function of a trademark, as has been seen, is to indicate origin and ownership, and unless this is truthfully done the trademark becomes a means of fraud upon the public, and will not be protected. It follows that trademarks cannot be assigned except for use in the same way and for the same purpose as that for which the trademark was originally adopted. The trademark must always tell the truth, and always tell the same truth. It can have but one meaning, and it must always truthfully represent that meaning to the public. The meaning of the trademark to the public will determine the question how far such trademark is assignable.<sup>8</sup>

**b. PERSONAL TRADEMARKS.** — If a trademark means to the public that the personal care and skill of a particular individual were exercised in the manufacture, selection, or production of the goods upon which it is used, it cannot be assigned, because it can never be truthfully used by another.<sup>9</sup>

Acquiescence in the infringement of a trademark is not established by proof of the publication, during a period of ten years, of advertisements which, although they sometimes infringed, yet did not do so uniformly or continuously. *Kinahan v. Bolton*, 15 Ir. Ch. 75.

**1. Loss of Distinctiveness.** — *Lazenby v. White*, 41 L. J. Ch. 354; *Ford v. Foster*, L. R. 7 Ch. 628; *National Starch Mfg. Co. v. Munn's Patent Maizena, etc., Co.*, (1894) A. C. 275; *Powell v. Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 79; *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1. But see *Volger v. Force*, 63 N. Y. App. Div. 122. See also *supra*, III. 2. *o. Descriptive Words and Marks — Generic Names; Name of Thing to Which Applied.*

**The Test** whether or not the mark has become *publici juris* is whether the use of it by other persons is still calculated to deceive the public. *Ford v. Foster*, L. R. 7 Ch. 628.

**2. Use by Others.** — *National Starch Mfg. Co. v. Munn's Patent Maizena, etc., Co.*, (1894) A. C. 275; *Ripley v. Bandey*, 14 R. P. C. 591; *Saxlehner v. Eisner, etc.*, (1894) 179 U. S. 19, *reversing* (C. C. A.) 91 Fed. Rep. 536; *In re Atkinson*, 13 Pat. Off. Gaz. 229; *Sherwood v. Andrews*, 5 Am. L. Reg. N. S. 588. But see *Cleveland Stone Co. v. Wallace*, 52 Fed. Rep. 431.

**3. Piracy by Single Individual.** — *Ford v. Foster*, L. R. 7 Ch. 625.

**4. Scattering Infringements.** — *Kinahan v. Bolton*, 15 Ir. Ch. 75; *Rowland v. Michell*, 13 R. P. C. 457; 14 R. P. C. 37.

**5. Limited Permitted Use.** — *Tetlow v. Tappan*, 85 Fed. Rep. 774; *Scheuer v. Muller*, (C. C. A.) 74 Fed. Rep. 225; *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 896; *Noera v. H. A. Williams Mfg. Co.*, 158 Mass. 110.

**6. Separation from Good Will.** — *Royal Baking Powder Co. v. Raymond*, 70 Fed. Rep. 376; *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217.

**Qualification of Rule.** — See *Royal Baking Powder Co. v. Raymond*, 70 Fed. Rep. 380.

**7. Estoppel.** — *Clark Thread Co. v. Armitage*, (C. C. A.) 74 Fed. Rep. 936, *affirming* 67 Fed. Rep. 896; *Prince's Metallic Paint Co. v. Prince Mfg. Co.*, (C. C. A.) 57 Fed. Rep. 938; *Le Page Co. v. Russia Cement Co.*, (C. C. A.) 51 Fed. Rep. 941; *Northcutt v. Turney*, 101 Ky. 314; *Schrier v. Friedberg*, 9 Pa. Dist. 435. See *Sheppard v. Stuart*, 13 Phila. (Pa.) 117, 36 Leg. Int. (Pa.) 234.

**8. General Doctrine as to Assignability.** — *Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co.*, 113 Fed. Rep. 468, 51 C. C. A. 302.

"The right to the use of a trademark cannot be so enjoyed by an assignee that he shall have the right to affix the mark to goods differing in character or species from the article to which it was originally attached." *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440.

**9. Personal Trademarks Not Assignable** — *England*. — *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137, 11 H. L. Cas. 523, *per* Lord Kingsdown; *Hall v. Barrows*, 4 DeG. J. & S. 150.

*c. IMPERSONAL TRADEMARKS* — (1) *Assignable*. — If the trademark is of a general nature and means that the goods are of the same character and quality as have been theretofore produced by a particular person, firm, or corporation, where the element of personal skill does not enter, but only that of honesty and fair dealing, the mark may be assigned together with the business and the right to make the article or articles to which the mark has been applied.<sup>1</sup>

(2) *Not Assignable Apart from Good Will or Article*. — But even a trademark which has been used to designate the origin and ownership of a particular article, or the products of a particular establishment or business, and which is not personal in its nature, cannot be applied to any other article of different origin without falsely stating the origin of that article. Hence it is held that a trademark cannot be assigned except in connection with the particular business in which it has been used, and for continued use upon the same article or class of articles which it was first applied to and used upon by its original adopter.<sup>2</sup> If the name or mark means that the goods are the product of a

*United States*. — *Alaska Packers' Assoc. v. Alaska Imp. Co.*, 60 Fed. Rep. 103; *Hill v. Lockwood*, 32 Fed. Rep. 389.

*Kentucky*. — *Mattingly v. Stone*, (Ky. 1889) 12 S. W. Rep. 467.

*Massachusetts*. — *Messer v. The Fadettes*, 168 Mass. 140, 60 Am. St. Rep. 371; *Hoxie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149; *Warren v. Warren Thread Co.*, 134 Mass. 247.

*Missouri*. — *Skinner v. Oakes*, 10 Mo. App. 45.

*New York*. — *Merry v. Hoopes*, 111 N. Y. 415; *Samuel v. Berger*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 88; *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1; *Matter of Swezey*, (C. Pl. Spec. T.) 62 How. Pr. (N. Y.) 215; *Kinney Tobacco Co. v. Maller*, 53 Hun (N. Y.) 340. See *Kennedy v. Dr. David Kennedy Corp.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 480.

*Texas*. — *Mayer v. Flanagan*, 12 Tex. Civ. App. 405.

*Wisconsin*. — *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546, 33 Am. St. Rep. 72.

See *supra*, III. 1. *e.* (2) *Particular Misrepresentations* — *As to Maker* — *Assignees*.

The trademark is inseparable from the particular thing which gives it its value. *Matter of Swezey*, (C. Pl. Spec. T.) 62 How. Pr. (N. Y.) 215.

**The Name of an Orchestra** is personal and not assignable. *Messer v. The Fadettes*, 168 Mass. 140, 60 Am. St. Rep. 371.

#### 1. Impersonal Trademark Assignable — *England*.

— *Ainsworth v. Walmsley*, L. R. 1 Eq. 518, 35 L. J. Ch. 352; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523; *Hall v. Barrows*, 10 Jur. N. S. 55, 4 De G. J. & S. 150; *Croft v. Day*, 7 Beav. 84; *Longman v. Tripp*, 2 B. & P. N. R. 67; *Ex p. Foss*, 2 De G. & J. 230; *Edelsten v. Vick*, 11 Hare 78, 23 Eng. L. & Eq. 51; *Cox's Manual of Trademark Cases*, 292.

*Canada*. — *Gegg v. Bassett*, 3 Ont. L. Rep. 263.

*United States*. — *Kidd v. Johnson*, 100 U. S. 617; *Walton v. Crowley*, 3 Blatchf. (U. S.) 440; *Petrolia Mfg. Co. v. Bell*, etc., *Soap Co.*, 97 Fed. Rep. 781; *Sarrazin v. W. R. Irby Cigar, etc., Co.*, (C. C. A.) 93 Fed. Rep. 624; *Batcheller v. Thomson*, (C. C. A.) 93 Fed. Rep. 660, *reversing* 86 Fed. Rep. 630; *Fish Bros. Wagon*

*Co. v. Fish Bros. Mfg. Co.*, 87 Fed. Rep. 203; *P. Lorillard Co. v. Peper*, 65 Fed. Rep. 597; *Oakes v. Tonsmierre*, 49 Fed. Rep. 447, 4 Woods (U. S.) 547; *Jennings v. Johnson*, 37 Fed. Rep. 364; *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217; *Morgan v. Rogers*, 26 Pat. Off. Gaz. 1113.

*Indiana*. — *Julian v. Hoosier Drill Co.*, 78 Ind. 408; *Sohl v. Geisendorf, Wils. (Ind.)* 60.

*Maine*. — *Symonds v. Jones*, 82 Me. 302, 17 Am. St. Rep. 485.

*Maryland*. — *Witthaus v. Braun*, 44 Md. 303, 22 Am. Rep. 44.

*Massachusetts*. — *Warren v. Warren Thread Co.*, 134 Mass. 247; *Gilman v. Hunnewell*, 122 Mass. 139; *Sohier v. Johnson*, 111 Mass. 238; *Emerson v. Badger*, 101 Mass. 82; *Marsh v. Billings*, 7 Cush. (Mass.) 322, 54 Am. Dec. 723.

*Missouri*. — *Skinner v. Oakes*, 10 Mo. App. 45.

*New York*. — *Huwer v. Dannenhoffer*, 82 N. Y. 499; *Congress, etc., Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 291, 6 Am. Rep. 82, 57 Barb. (N. Y.) 526; *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1; *Matter of Swezey*, (C. Pl. Spec. T.) 62 How. Pr. (N. Y.) 215; *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278.

*Ohio*. — *Christy v. Groves*, 2 Ohio Dec. 384, 3 Ohio N. P. 293.

*Pennsylvania*. — *Fulton v. Sellers*, 4 Brews. (Pa.) 42; *Rowley v. Houghton*, 2 Brews. (Pa.) 303; *Joseph Dixon Crucible Co. v. Guggenheim*, 2 Brews. (Pa.) 321.

*Rhode Island*. — *Carmichel v. Latimer*, 11 R. I. 395, 23 Am. Rep. 481.

*Virginia*. — *Tennant v. Dunlop*, 97 Va. 235.

*Wisconsin*. — *Tomah Bank v. Warren*, 94 Wis. 151.

**2. Not Assignable Apart from Good Will or Article** — *England*. — *Cotton v. Gillard*, 44 L. J. Ch. 90; *Robertson v. Quiddington*, 28 Beav. 529; *Singer Mfg. Co. v. Long*, 8 App. Cas. 17; *Croft v. Day*, 7 Beav. 84; *Edelsten v. Vick*, 11 Hare 78, 23 Eng. L. & Eq. 51.

*Canada*. — *Gegg v. Bassett*, 3 Ont. L. Rep. 263.

*United States*. — *Brown Chemical Co. v. Meyer*, 139 U. S. 540; *Kidd v. Johnson*, 100 U. S. 620; *Macmahon Pharmaceutical Co. v. Denver Chemical Mfg. Co.*, 113 Fed. Rep. 468, 51 C. C. A. 302; *Batcheller v. Thomson*, (C. C.

particular establishment or spring, into which the location enters as an essential element, then the mark can only be assigned together with the particular establishment, spring, or other local business;<sup>1</sup> but if not local, the trademark may be assigned to be used in a different locality by the assignee.<sup>2</sup> There is no such thing as a right in gross to any particular name or mark. The sole right which may exist, and which may be assigned, is a right to use such name or mark in a particular connection to signify a particular fact. An attempted assignment in gross is void.<sup>3</sup>

*d. PERSONAL NAMES.* — Trademarks or trade names composed in whole or in part of the names of individuals who are in some way connected with the business may or may not be assignable. If the mark is purely personal, in the sense already discussed, it cannot, of course, be assigned.<sup>4</sup> Where, however, the proper name has been so used as to lose its personal nature, and has become only a designation of a particular establishment, character of goods, or business, it may be assigned in connection with an assignment of the establishment, the right to make the particular character of goods, or the business,<sup>5</sup> and a contract, express or implied, upon the part of the assignor

A.) 93 Fed. Rep. 660; *Jennings v. Johnson*, 37 Fed. Rep. 364; *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217; *McVeagh v. Valencia Cigar Factory*, 32 Pat. Off. Gaz. 1124.

*Indiana.* — *Julian v. Hoosier Drill Co.*, 78 Ind. 408.

*Maryland.* — *Witthaus v. Braun*, 44 Md. 303, 22 Am. Rep. 44.

*Massachusetts.* — *Chadwick v. Covell*, 151 Mass. 190, 21 Am. St. Rep. 442; *Hoxie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149; *Warren v. Warren Thread Co.*, 134 Mass. 247; *Sohier v. Johnson*, 111 Mass. 238; *Marsh v. Billings*, 7 Cush. (Mass.) 322, 54 Am. Dec. 723.

*New York.* — Congress, etc., *Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 302, 6 Am. Rep. 82; *Howe v. Searing*, (N. Y. Super. Ct. Gen. T.) 10 Abb. Pr. (N. Y.) 264; *Samuel v. Berger*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 88; *Partridge v. Menck*, 2 Barb. Ch. (N. Y.) 101, 47 Am. Dec. 281; *Weston v. Ketcham*, (N. Y. Super. Ct. Spec. T.) 51 How. Pr. (N. Y.) 455.

*Pennsylvania.* — *Joseph Dixon Crucible Co. v. Guggenheim*, 2 Brews. (Pa.) 321; *Rowley v. Houghton*, 2 Brews. (Pa.) 303.

**Trademarks May Be Sold Separately from the Tangible Property and book accounts.** *Tennant v. Dunlop*, 97 Va. 235.

**1. Local Trademarks.** — *Ainsworth v. Walmsley*, L. R. 1 Eq. 518; *Kidd v. Johnson*, 100 U. S. 617; *Pepper v. Labrot*, 8 Fed. Rep. 29; *Dant v. Head*, 90 Ky. 255, 29 Am. St. Rep. 369; *Warren v. Warren Thread Co.*, 134 Mass. 247; Congress, etc., *Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 291, 6 Am. Rep. 82; *Kinney Tobacco Co. v. Maller*, 53 Hun (N. Y.) 340. *Compare Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278. See also as to the right to transfer a trade name from one location to another, *supra*, III. 2. *x. Trade Name as Applied to Business Stand — Signs.*

**2. Trademarks Not Local.** — *Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co.*, (C. C. A.) 95 Fed. Rep. 457.

**3. Assignment in Gross Not Valid.** — *Cotton v. Gillard*, 44 L. J. Ch. 90; *Thorneloe v. Hill*,

(1894) 1 Ch. 569, 8 Reports 718; *McVeagh v. Valencia Cigar Factory*, 32 Pat. Off. Gaz. 1124; *Morgan v. Rogers*, 26 Pat. Off. Gaz. 1113; *The Fair v. Morales*, 82 Ill. App. 499; *Weston v. Ketcham*, (N. Y. Super. Ct. Spec. T.) 51 How. Pr. (N. Y.) 455; *Colladay v. Baird*, 4 Phila. (Pa.) 139, 17 Leg. Int. (Pa.) 365; *Rowley v. Houghton*, 2 Brews. (Pa.) 303.

"As a mere abstract right, having no reference to any particular person or property, it is conceded that it cannot exist, and so cannot pass by an assignment or descend to a man's legal representatives." *Joseph Dixon Crucible Co. v. Guggenheim*, 2 Brews. (Pa.) 321.

**4. Personal Names.** — See *supra*, III. 2. *t. Personal Names.*

In *Skinner v. Oakes*, 10 Mo. App. 45, *Thompson, J.*, said: "But where the trademark consists of a name, how far it is capable of assignment is a more difficult question. We think that the answer to this question depends upon the effect which the use of the name in each particular instance is shown to have upon the minds of the public. If it leads the public to believe that the particular goods are, in fact, made by the person whose name is thus stamped upon them, or in whose name they are advertised, whereas they are, in fact, made by another person, then such a use of the name will not be protected by the courts; for to do so would be to protect the perpetration of a fraud upon the public."

The mere fact that a trademark is composed in part of the owner's name and portrait does not make it an unassignable personal trademark. *Dr. S. A. Richmond Nervine Co. v. Richmond*, 159 U. S. 293.

**5. Personal Significance Lost by Use — England.** — *Edelsten v. Vick*, 11 Hare 78, 23 Eng. L. & Eq. 51; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523, 4 De G. J. & S. 137; *Hall v. Barrows*, 4 De G. J. & S. 150; *Bury v. Bedford*, 4 De G. J. & S. 370.

*United States.* — *Dr. S. A. Richmond Nervine Co. v. Richmond*, 159 U. S. 293; *Brown Chemical Co. v. Meyer*, 139 U. S. 540; *Kidd v. Johnson*, 100 U. S. 617; *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440; *Oakes v. Tonsmierre*, 49 Fed. Rep. 447; *Jennings v. Johnson*, 37 Fed.



not to use such name, even though his own name, upon a similar article or in a similar business is valid and will be enforced.<sup>1</sup>

**2. What Constitutes Assignment or Transfer** — *a.* IN GENERAL. — No particular formalities are required to transfer the right to a trademark. Any writing or act of the parties from which the intention to assign an assignable trademark can be gathered will suffice to pass title.<sup>2</sup>

*b.* NECESSITY OF EXPRESS MENTION — (1) *Trademarks.* — It is not necessary that the trademark should be expressly named in the instrument or transaction in order to pass the title. The right to use a trademark will, by operation of law, pass to an assignee of the business and good will as an incident thereto, except in the case of personal trademarks which are not assignable.<sup>3</sup> Where a trademark or name indicates some particular place of origin of

Rep. 364, *distinguishing* Manhattan Medicine Co. v. Wood, 108 U. S. 218; Burton v. Stratton, 12 Fed. Rep. 696.

Kentucky. — Dant v. Head, 90 Ky. 255, 29 Am. St. Rep. 369.

Massachusetts. — Noera v. H. A. Williams Mfg. Co., 158 Mass. 110; Russia Cement Co. v. Le Page, 147 Mass. 209, 9 Am. St. Rep. 685; Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149. See also Warren v. Warren Thread Co., 134 Mass. 247; Sohier v. Johnson, 111 Mass. 238.

Missouri. — Skinner v. Oakes, 10 Mo. App. 45; Probasco v. Bouyon, 1 Mo. App. 241.

New York. — Kennedy v. Dr. David Kennedy Corp., (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 480; Hegeman v. Hegeman, 8 Daly (N. Y.) 1.

Ohio. — Drake Medicine Co. v. Glessner, 68 Ohio St. 337.

Rhode Island. — Carmichel v. Latimer, 11 R. I. 395, 23 Am. Rep. 481.

Wisconsin. — Fish Bros. Wagon Co. v. La Belle Wagon Works, 82 Wis. 546, 33 Am. St. Rep. 72.

**Retaining Old Firm Name.** — See the title PARTNERSHIP, vol. 22, p. 2.

**1. Contract Regulating Use of Name.** — Chattanooga Medicine Co. v. Thedford, 58 Fed. Rep. 347; Spieker v. Lash, 102 Cal. 38; Russia Cement Co. v. Le Page, 147 Mass. 206, 9 Am. St. Rep. 685; Probasco v. Bouyon, 1 Mo. App. 241. See Noera v. H. A. Williams Mfg. Co., 158 Mass. 110. See also Le Page Co. v. Russia Cement Co., (C. C. A.) 51 Fed. Rep. 941. See also *infra*, this section, *Construction, Operation, and Effect*.

**2. No Formalities Required.** — Dr. S. A. Richmond Nervine Co. v. Richmond, 159 U. S. 293; Allegretti v. Allegretti Chocolate-Cream Co., 177 Ill. 129, *affirming* 76 Ill. App. 581; Lippincott v. Hubbard, 28 Pittsb. Leg. J. N. S. (Pa.) 303.

**3. Express Mention Unnecessary** — *England.* — Banks v. Gibson, 34 Beav. 566; Bury v. Bedford, 33 L. J. Ch. 465; Churton v. Douglas, Johns. Ch. (Eng.) 174, 28 L. J. Ch. 841; Shipwright v. Clements, 19 W. R. 599; Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. Cas. 523; Hall v. Barrows, 10 Jur. N. S. 56.

Canada. — Mossop v. Mason, 18 Grant Ch. (U. C.) 453.

United States. — Kidd v. Johnson, 100 U. S. 617; Filkins v. Blackman, 13 Blatchf. (U. S.) 440; Sarrazin v. W. R. Irby Cigar, etc., Co.,

(C. C. A.) 93 Fed. Rep. 624; Royal Baking Powder Co. v. Raymond, 70 Fed. Rep. 380; Atlantic Milling Co. v. Robinson, 20 Fed. Rep. 217; Pepper v. Labrot, 8 Fed. Rep. 29.

Illinois. — Allegretti v. Allegretti Chocolate Cream Co., 177 Ill. 129; Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 40 Ill. App. 430.

Maryland. — Witthaus v. Braun, 44 Md. 303, 22 Am. Rep. 44.

Massachusetts. — Hoxie v. Chaney, 143 Mass. 592, 58 Am. Rep. 149; Warren v. Warren Thread Co., 134 Mass. 247; Sohier v. Johnson, 111 Mass. 238.

Michigan. — Myers v. Kalamazoo Buggy Co., 54 Mich. 215, 52 Am. Rep. 811.

New York. — Merry v. Hoopes, 111 N. Y. 415; Glen, etc., Mfg. Co. v. Hall, 61 N. Y. 232, 19 Am. Rep. 278; Congress, etc., Spring Co. v. High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82; Hazard v. Caswell, (Supm. Ct. Spec. T.) 57 How. Pr. (N. Y.) 1; Booth v. Jarrett, (C. Pl. Spec. T.) 52 How. Pr. (N. Y.) 169; Prince Mfg. Co. v. Prince's Metallic Paint Co., 60 Hun (N. Y.) 583, 15 N. Y. Supp. 249; Hegeman v. Hegeman, 8 Daly (N. Y.) 1; Milliken v. Dart, 26 Hun (N. Y.) 24.

Pennsylvania. — Fulton v. Sellers, 4 Brews. (Pa.) 42; Joseph Dixon Crucible Co. v. Guggenheim, 2 Brews. (Pa.) 321.

Tennessee. — Robinson v. Storm, 103 Tenn. 40.

Wisconsin. — Tomah Bank v. Warren, 94 Wis. 151.

In Joseph Dixon Crucible Co. v. Guggenheim, 2 Brews. (Pa.) 321, Paxton, J., said: "The true rule to be deduced from these cases would appear to be this: That the property or right to a trademark may pass by an assignment, or by operation of law, to any one who takes, at the same time, the right to manufacture or sell the particular merchandise to which said trademark has been attached. As a mere abstract right, having no reference to any particular person or property, it is conceded that it cannot exist, and so cannot pass by an assignment, or descend to a man's legal representatives." See Cooper v. Hood, 26 Beav. 293; Bury v. Bedford, 33 L. J. Ch. 465; Edelman v. Vick, 11 Hare 78, 23 Eng. L. & Eq. 51; Marsh v. Billings, 7 Cush. (Mass.) 322, 54 Am. Dec. 723; Howe v. Searing, (N. Y. Super. Ct. Gen. T.) 10 Abb. Pr. (N. Y.) 264; Samuel v. Berger, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 88, 24 Barb. (N. Y.) 163; Partridge v. Menck, 2 Barb. Ch. (N. Y.) 101, 47 Am. Dec. 281.

the article to which it is attached, as a particular factory, theatre, hotel, mine, or mineral spring, it is inseparable from that place and passes with a sale of the place.<sup>1</sup> The sale of a factory, however, will not operate to convey its trade name or the trademarks used upon goods made therein, unless the trademarks necessarily designate the particular factory as the place of origin, and the factory is associated in the mind of the public with the trademark, so that the trademark would be untruthful if applied to goods made elsewhere. Except in such a case, the business may be removed elsewhere and a sale of the factory will not affect the ownership of the trademarks.<sup>2</sup> A sale of a stock of goods, the good will of the business not being included, does not operate to transfer a right to use the trade name of the seller.<sup>3</sup> Of course, a trademark may pass under some general terms of description sufficiently broad to include it.<sup>4</sup>

(2) *Personal Names.* — A distinction must be noted between technical trademarks and the proper names of individuals; the former will, as a general rule, pass with the business and good will, but an exclusive right to use the latter will not without express contract.<sup>5</sup>

**1. Local Trademarks and Trade Names — England.** — *Hudson v. Osborne*, 39 L. J. Ch. 79; *Edelsten v. Vick*, 11 Hare 78, 23 Eng. L. & Eq. 51; *Hall v. Barrows*, 4 De G. J. & S. 157; *Motley v. Downman*, 3 Myl. & C. 1; *Croft v. Day*, 7 Beav. 84.

*Canada.* — *Mossop v. Mason*, 18 Grant Ch. (U. C.) 453.

*United States.* — *Kidd v. Johnson*, 100 U. S. 617; *Prince's Metallic Paint Co. v. Prince Mfg. Co.*, 57 Fed. Rep. 938, 17 U. S. App. 145; *Hill v. Lockwood*, 32 Fed. Rep. 389; *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 218; *Pepper v. Labrot*, 8 Fed. Rep. 29.

*Indiana.* — *Julian v. Hoosier Drill Co.*, 78 Ind. 408.

*Massachusetts.* — *Marsh v. Billings*, 7 Cush. (Mass.) 322, 54 Am. Dec. 723.

*New York.* — *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 229, 19 Am. Rep. 278; *Congress, etc., Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 291, 6 Am. Rep. 82; *Matter of Swezey*, (C. Pl. Spec. T.) 62 How. Pr. (N. Y.) 219; *Booth v. Jarrett*, (C. Pl. Spec. T.) 52 How. Pr. (N. Y.) 169; *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1; *Howe v. Searing*, (N. Y. Super. Ct. Gen. T.) 10 Abb. Pr. (N. Y.) 264.

*Pennsylvania.* — *Joseph Dixon Crucible Co. v. Guggenheim*, 2 Brews. (Pa.) 321.

*Rhode Island.* — *Carmichel v. Latimer*, 11 R. I. 407, 23 Am. Rep. 481.

**2. When Trademark Will Not Pass upon Sale of Factory.** — *Sohier v. Johnson*, 111 Mass. 238; *Huwer v. Dannenhoffer*, 82 N. Y. 499, *distinguishing* Congress, etc., Spring Co. v. High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82; *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278; *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, (Supm. Ct. Spec. T.) 20 N. Y. Supp. 462; *Armington v. Palmer*, 21 R. I. 109, 79 Am. Ct. Rep. 786. See also *Tennant v. Dunlop*, 97 Va. 235.

**3. Sale of Stock of Goods Without Good Will.** — *Christy v. Groves*, 2 Ohio Dec. 384, 3 Ohio N. P. 293; *Reeves v. Denicke*, (N. Y. Super. Ct. Spec. T.) 12 Abb. Pr. (N. Y.) 92, *disapproving* *Peterson v. Humphrey*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 394, and *following* *Howe v. Searing*, 6 Bosw. (N. Y.) 354.

**4. General Terms of Description.** — See *Peck v. Peck Bros. Co.*, (C. C. A.) 113 Fed. Rep. 301.

In *Morgan v. Rogers*, 26 Pat. Off. Gaz. 1113, Price & S. T. M. Cas. 878, Colt, J., said: "If a trademark is an asset, as it is, there is no reason why it should not pass under the term 'assets' in an instrument which conveys the entire partnership property. To hold that the trademark is not included in this mortgage is to say that the most valuable part of the partnership property is not covered by the words 'assets and effects of every kind and nature.'" But *compare* *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 142 Ill. 494.

**5. Express Contract Required as to Personal Names.** — *Scott v. Rowland*, 20 W. R. 508; *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 142 Ill. 494; *Levy v. Walker*, 10 Ch. D. 436; *Mattingly v. Stone*, (Ky. 1889) 12 S. W. Rep. 467; *Cutter v. Gudebrod Bros. Co.*, 44 N. Y. App. Div. 605, 36 N. Y. App. Div. 362; *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, (Supm. Ct. Spec. T.) 20 N. Y. Supp. 462; *Howe v. Searing*, (N. Y. Super. Ct. Gen. T.) 10 How. Pr. (N. Y.) 14; *Bellows v. Bellows*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 482; *Helmbold v. H. T. Helmbold Mfg. Co.*, (N. Y.) 17 Am. L. Reg. N. S. 169. But see *Hudson v. Osborne*, 39 L. J. Ch. 79; *Thyme v. Shove*, 45 Ch. D. 577; *Burkhardt v. A. E. Burkhardt Fur, etc.*, Co., 9 Ohio Dec. 84, 4 Ohio N. P. 358.

In *Frazer v. Frazer Lubricator Co.*, 121 Ill. 147, 2 Am. St. Rep. 73, Mulkey, J., said: "The principle seems to be well settled, that where a party sells out an established business, and with it his own name, to be used in connection with such business, he cannot afterwards resume it in carrying on the same business. *Gillis v. Hall*, R. Cox, 596; *Witt v. Corcoran*, 2 Ch. D. 69; *Churton v. Douglas, Johns. Ch.* (Eng.) 174; *Ayer v. Hall*, 3 Brews. (Pa.) 509; *Probasco v. Bouyon*, 1 Mo. App. 241; *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440."

The purchaser of the property and good will of a firm acquires the right to describe himself as the successor of such firm, even though the firm name contains the individual name of one of the partners. *Chesterman v. Seeley*, 18 Pa. Co. Ct. 631.

**3. Construction, Operation, and Effect.** — Contracts with respect to the use of trademarks and trade names are construed in accordance with the usual rules applicable to all contracts.<sup>1</sup> Successors or assignees are entitled to the same rights as the original proprietor.<sup>2</sup> The assignor of an assignable trademark will not be permitted to use it thereafter in competition with his assignee or the latter's successors.<sup>3</sup> A contract between claimants of conflicting trademarks as to the form each shall use in accordance with the contract is valid and binding upon such parties and their assignees and successors.<sup>4</sup>

**4. Insolvency, Bankruptcy, and Assignment for Benefit of Creditors.** — A general assignment for the benefit of creditors, of all the assets of a trademark owner, or such a transfer in insolvency or bankruptcy proceedings, will operate to transfer the trademarks, provided they are not of such a personal nature as to be inseparably attached to the owner and necessarily indicate his personality and skill, and provided, also, that the business which comes into the hands of the assignee can be sold as a going business, so that the trademark may be used by the purchaser to indicate to the public the same facts as formerly. But the trademark cannot be sold as an absolute right disassociated from any particular business or goods.<sup>5</sup> Neither is the bankrupt deprived of

**1. Construction in General.** — See *Batcheller v. Thomson*, (C. C. A.) 93 Fed. Rep. 660, *reversing* 86 Fed. Rep. 630; *Miller v. Billington*, 6 Pa. Dist. 335.

A contract restricting one's right to use his own name will not be extended by construction beyond its clear import. *Chattanooga Medicine Co. v. Thedford*, 58 Fed. Rep. 347. See also *Tygert-Allen Fertilizer Co. v. J. E. Tygert Co.*, 7 Pa. Dist. 430.

**2. Rights of Successors or Assignees.** — *Walton v. Crowley*, 3 Blatchf. (U. S.) 440; *Peck v. Peck Bros. Co.*, (C. C. A.) 113 Fed. Rep. 291; *Kentucky Distilleries, etc., Co. v. Wathen*, 110 Fed. Rep. 643; *International Silver Co. v. Simeon L. & George H. Rogers Co.*, 110 Fed. Rep. 955; *Cuervo v. Landauer*, 63 Fed. Rep. 1003; *Kinney Tobacco Co. v. Maller*, 53 Hun (N. Y.) 340; *Merry v. Hoopes*, 111 N. Y. 415; *Cutter v. Gudebrod Bros. Co.*, 44 N. Y. App. Div. 605.

The purchaser of the right to use the firm name has no right to use it in such a way as to subject a person whose name is part of the firm name to a partnership liability. *Chesterman v. Seeley*, 18 Pa. Co. Ct. 631, 5 Pa. Dist. 757.

**3. Rights of Assignor** — *United States*. — *Peck v. Peck Bros. Co.* (C. C. A.) 113 Fed. Rep. 301; *Chattanooga Medicine Co. v. Thedford*, 66 Fed. Rep. 544, 30 U. S. App. 35, *reversing* 58 Fed. Rep. 347; *Le Page Co. v. Russia Cement Co.*, 51 Fed. Rep. 941, 5 U. S. App. 112; *Oakes v. Tonsmierre*, 49 Fed. Rep. 447.

*Alabama*. — *Kyle v. Perfection Mattress Co.*, 127 Ala. 39, 85 Am. St. Rep. 78.

*California*. — *Spieker v. Lash*, 102 Cal. 38.

*Illinois*. — *Frazer v. Frazer Lubricator Co.*, 121 Ill. 147, 2 Am. St. Rep. 73.

*Maine*. — *Symonds v. Jones*, 82 Me. 302, 17 Am. St. Rep. 485.

*Massachusetts*. — *Russia Cement Co. v. Le Page*, 147 Mass. 206, 9 Am. St. Rep. 685.

*Wisconsin*. — *Listman Mill Co. v. William Listman Milling Co.*, 88 Wis. 334, 43 Am. St. Rep. 907; *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546, 33 Am. St. Rep. 72.

See also *Love v. Latimer*, 32 Ont. 231.

The assignor may subsequently acquire a new trademark in which the assignee will have no interest, notwithstanding the assignor engaged in the same business in violation of his contract. *Burch v. Toledo Plow Co.*, 8 Ohio Cir. Dec. 201, 15 Ohio Cir. Ct. 482.

**4. Contract Adjusting Conflicting Claims.** — *Waukesha Hygeia Mineral Springs Co. v. Hygeia Sparkling Distilled Water Co.*, (C. C. A.) 63 Fed. Rep. 438, 24 U. S. App. 162.

**5. Insolvency, Bankruptcy, and Assignments for Benefit of Creditors** — *England*. — *Hudson v. Osborne*, 39 L. J. Ch. 79; *Bury v. Bedford*, 33 L. J. Ch. 465; *In re Wellcome*, 32 Ch. D. 213; *Edelsten v. Vick*, 11 Hare 78, 23 Eng. L. & Eq. 51; *Hall v. Barrows*, 4 De G. J. & S. 157; *Motley v. Downman*, 3 Myl. & C. 1; *Longman v. Tripp*, 2 B. & P. N. R. 67.

*United States*. — *Dr. S. A. Richmond Nervine Co. v. Richmond*, 159 U. S. 293; *Menendez v. Holt*, 128 U. S. 514; *Kidd v. Johnson*, 100 U. S. 617; *Sarrazin v. W. R. Irby Cigar, etc., Co.*, (C. C. A.) 93 Fed. Rep. 624; *Morgan v. Rogers*, 19 Fed. Rep. 596; *Pepper v. Labrot*, 8 Fed. Rep. 29.

*Maryland*. — *Witthaus v. Braun*, 44 Md. 303, 22 Am. Rep. 44.

*Massachusetts*. — *Hoxie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149; *Warren v. Warren Thread Co.*, 134 Mass. 247.

*New York*. — *Matter of Swezey*, (C. Pl. Spec. T.) 62 How. Pr. (N. Y.) 215. But see *Cutter v. Gudebrod Bros. Co.*, 36 N. Y. App. Div. 362.

*Ohio*. — *Burkhardt v. A. E. Burkhardt Fur, etc., Co.*, 9 Ohio Dec. 84, 4 Ohio N. P. 358.

*Wisconsin*. — *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546, 33 Am. St. Rep. 72; *Tomah Bank v. Warren*, 94 Wis. 151.

The right to sell property assigned for the benefit of creditors passed to the assignee, though a trade name thereon did not, but the right is limited to the property in existence. *Cutter v. Gudebrod Bros. Co.*, 44 N. Y. App. Div. 605.



the right to engage in the same business under his own name.<sup>1</sup>

**5. Attachment and Execution.** — A trademark cannot be seized and sold upon execution or attachment, apart from the business or article with which it has been used.<sup>2</sup>

**6. Succession by Inheritance.** — A trademark may pass by inheritance to the heirs at law of the original owner, provided they are his successors in business. The legal successor in business in any case will take the trademark, whether by survivorship among partners, or by transfer or succession of the business by any legal method. The executors of a deceased owner will also succeed to the right to employ the trademarks, provided they continue to conduct the business formerly carried on by the owner of the marks, and in winding up the estate they may sell the business and transfer the marks with it, provided the marks are not of a personal nature, and are susceptible of being used by the successor without misrepresentation.<sup>3</sup>

**7. License.** — As a general rule, a valid license cannot be granted for the use of a trademark. This rule is based upon the principle that a trademark must indicate the ownership and origin of the goods, and having once become associated with the product of an individual or a person, to permit the use of the same mark by several persons, even by authority of the owner, would be to authorize a fraud and deception upon the public by representing goods made by the licensee as emanating from the original adopter of the mark. This rule, however, is not without exceptions. Thus, the manufacturer of a patented article, upon which a trademark is employed, in selling the patented article, gives an implied license to all subsequent purchasers to deal in the article itself and to sell it under the same trademark. In all cases where the good will of a business is purchased, and the trade names or trademarks are of a nature indicating the personality of the original founder of the business, the use of the marks by the purchaser will always be by the license of the original founder, and unless this is expressly made irrevocable by contract, it may be terminated at the will of the original founder of the business whose name is used in connection with it.<sup>4</sup>

**1. Right to Engage in Business under Own Name.** — *Crutwell v. Lye*, 17 Ves. Jr. 336; *Cutter v. Gudebrod Bros. Co.*, 44 N. Y. App. Div. 605; *Bellows v. Bellows*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 482; *Helmhold v. Henry T. Helmhold Mfg. Co.*, (Supm. Ct.) 53 How. Pr. (N. Y.) 453.

**2. Attachment or Execution.** — *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, (Supm. Ct. Spec. T.) 20 N. Y. Supp. 462; *Gegg v. Bassett*, 3 Ont. L. Rep. 263; *Milliken v. Dart*, 26 Hun (N. Y.) 24. See *Hegeman v. Hegeman*, 8 Daly (N. Y.) 6.

**3. Descent and Distribution.** — *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1; *Bingham School v. Gray*, 122 N. Car. 699.

In *Hewer v. Dannanoffner, Price & S. T. M. Cas.* 433, 82 N. Y. 499, Earl, J., said: "A trademark is a species of property which may be sold or transmitted by death with the business in which it has been used. *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137, 11 H. L. Cas. 523; *Glen, etc., Mfg. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278."

In *Skinner v. Oakes*, 10 Mo. App. 45, Thompson, J., said: "A point is made in behalf of the defendant, Annie Oakes, that before the plaintiffs acquired the alleged right to use the name of Oakes in the manufacture of candies, she, by marrying with Oakes, had acquired a right to use his name in the same connection,

of which the plaintiffs cannot lawfully deprive her. There is nothing in this point except novelty. Peter Oakes could not confer upon Annie McLaughlin, by marrying her, any higher rights in the use of his own name than he himself had. A son cannot acquire from his father the right to use his father's name as a trademark, if the father had parted with the right by contract (*Filkins v. Blackman*, 13 Blatchf. (U. S.) 440), and we do not see how a wife could stand in a better position as to the name of her husband."

**4. Licenses.** — See generally *Batcheller v. Thomson*, (C. C. A.) 93 Fed. Rep. 660, reversing *Batcheller v. Thomson*, 86 Fed. Rep. 630.

Where a distiller sells his business and agrees that his name may be employed in connection therewith for a short period, the purchaser may, during such period, employ the name of the founder, but the license is terminable at the will of the founder. *Mattingly v. Stone*, (Ky. 1890) 14 S. W. Rep. 47.

A license to use another's name in business cannot be revoked after the licensee has rendered such name valuable. *Harris v. Brown*, 202 Pa. St. 16, 90 Am. St. Rep. 610.

Where a license for the use of patents, coupled with a trademark, includes a keeping of accurate accounts and the rendering of statements at specified periods, the fulfillment of

**VIII. PARTNERSHIPS — 1. Trademark of Individual Entering Firm — Rights of Firm.** — The rights of a firm in the trademarks of a member, which were held and employed by him before entering the firm, will, in great measure, be controlled by agreement. In the absence of express agreement, the rights of the firm in such a case will amount to nothing more than a license, revocable by the retirement from the firm of the owner of the marks.<sup>1</sup>

**2. Rights of Members of Firm in Trademarks of Firm.** — The trademarks adopted by the firm to designate the origin and ownership of its goods are partnership assets, and all the members are entitled to their use, and are interested in their value, in proportion to their interest in the firm.<sup>2</sup>

**3. Rights of Retiring Partner.** — Where the trademarks or trade names of a partnership consist of technical trademarks or trade names other than the name of the retiring partner, and the retiring partner, either by express agreement or acquiescence, permits the continued use of the trademarks by the firm, he will be held to have abandoned all rights in them; but where the trademark or name consists of the personal name of the retiring partner, nothing short of an express agreement will deprive him of the right to use his own name in connection with a similar business, and as a general rule he can enjoin his former partners from the further use of his name in any manner which might involve him in liability for the debts or contracts of the firm or might deceive the public.<sup>3</sup>

**4. Rights of Partners Buying Others Out.** — A partner who has sold out his interest in a firm to other partners will be restrained from carrying on the same business under any name so nearly like that of his former firm as to be likely to deceive purchasers and interfere with the business of his former partners, unless the name under which the firm did business happened to be the personal name of the retiring partner, in which case he could not, in the absence of an express agreement to the contrary, be restrained from using his

these terms becomes a condition precedent to the existence of the license, and on breach the license is terminable. *Martha Washington Creamery Buttered Flour Co. v. Martien*, 44 Fed. Rep. 473.

A dealer in sewing machines, who has purchased old machines bearing the trademark of the manufacturer, will not be restrained from selling them with the same mark. *Singer Mfg. Co. v. Bent*, 41 Fed. Rep. 214. See *Singer Mfg. Co. v. June Mfg. Co.*, 41 Fed. Rep. 208.

**1. Trademark of Individual Entering Firm.** — *Kidd v. Johnson*, 100 U. S. 617; *Greacen v. Bell*, 115 Fed. Rep. 553; *Batcheller v. Thomson*, (C. C. A.) 93 Fed. Rep. 660, *reversing* 86 Fed. Rep. 630.

In *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440, *Shipman, J.*, said: "When a partnership is formed in regard to the manufacture of the article to which the trademark is properly applied, 'the trademark of one partner, in the absence of special regulations, becomes part of the partnership property.' *Bury v. Bedford*, 10 Jur. N. S. 503."

In *Bury v. Bedford*, 4 De G. J. & S. 352, *Turner, L. J.*, said: "This part of the case \* \* \* rests, as it seems to me, upon the simple question whether, upon the formation of a partnership with a person entitled to the benefit of a trademark, the trademark does not, in the absence of express provision in relation to it, become an asset of the partnership; and in my judgment it does, for the whole trade is carried into the partnership, and the trademark

is but an element of the trade." This case is followed on this point in *Sohier v. Johnson*, 111 Mass. 238.

**2. Trademarks of Firm — Rights of Members.** — *Taylor v. Bothin*, 5 Sawy. (U. S.) 584.

**3. Rights of Retiring Partners.** — *Gray v. Smith*, 43 Ch. D. 208, *distinguishing* *Levy v. Walker*, 10 Ch. D. 436; *Iowa Seed Co. v. Dorr*, 70 Iowa 481, 59 Am. Rep. 446; *Ward v. Ward*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 913; *Comstock v. White*, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 421.

A junior partner retiring from a firm retains no interest in a trademark used by the firm, and originated by its senior member, particularly when the weight of evidence indicates that he released all rights to the brand. *Menendez v. Holt*, 128 U. S. 514, *affirming* 23 Fed. Rep. 869.

Where one partner retires from a firm, and the other members of the firm, with the consent of the retiring member, continue the business under the old firm name, they will be held to have succeeded to the business of the old firm, and the trademarks and trade name of the old firm. Where the facts show that the remaining partners took the legal statutory steps to perpetuate the old business as to successors, and the retiring partner permits them to carry it on as such under the old name, for two years, without objection, admitting them in sundry receipts to be "successors to the old firm," he will not be now heard to gainsay it. *Hazard v. Caswell*, (Supm. Ct. Spec. T.) 57 How. Pr. (N. Y.) 1.

own name, and he might even be able to restrain his former partners from using it, if by doing so they would make him responsible for their debts or deceive the public.<sup>1</sup>

**5. Rights of Partners on Dissolution.** — On the dissolution of a partnership, technical trademarks, being the assets of a firm and also indivisible, must either be sold with the business as entireties, or all partners may use them with equal right, subject to the exception, however, that on dissolution the partners revert to their individual rights and responsibilities, and each partner, in the absence of any agreement to the contrary, has an absolute right to control the use of his own name, and prevent its use by another, even although during the partnership it may have been the name under which the partnership did business.<sup>2</sup>

**6. Rights of Creditors in Trademarks of Firm.** — The creditors of a firm, if it be insolvent, may sell the good will of the business and also the trademarks, to satisfy their claims; but the interest of an individual member of a solvent firm in its trademarks cannot be attached in any way, except so far as his interest in the firm is concerned.<sup>3</sup>

**7. Rights of Surviving Partners in Firm Trademarks and Name of Deceased.** — Trademarks, like good will, are an asset of the firm, and when a firm is dissolved by the death of a member they do not survive to the survivor, but must be sold and accounted for in the distribution of the assets. The name of the deceased, which may be the trademark of the firm, may be used by the survivor or successors, if proper consideration has been given therefor in the settlement of the firm's affairs, and a representative of the estate cannot

**1. Rights of Partners Buying Others Out.** — *Churton v. Douglas*, Johns. Ch. (Eng.) 174, 28 L. J. Ch. 841, 5 Jur. N. S. 887, 33 L. T. N. S. 57, 7 W. R. 365; *Witt v. Corcoran*, 2 Ch. D. 69, 45 L. J. Ch. 603, Seton (4th ed.) 257, 34 L. T. N. S. 350, 24 W. R. 501; *Bond v. Milbourn*, 20 W. R. 197; *Batcheller v. Thomson*, 86 Fed. Rep. 630; *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215, 52 Am. Rep. 811; *Brass, etc., Works Co. v. Payne*, 50 Ohio St. 115. See *McGowan Bros. Pump, etc., Co. v. McGowan*, 2 Cinc. Super. Ct. 313.

The remaining partner is not entitled, upon dissolution, and under a contract which permits him to take over the shares of the retiring partners at a valuation, to use the names of the retiring partners. *Dickson v. McMaster*, 18 Ir. Jur. 202.

Two women, C. and W., carried on a partnership business under the firm name of "C. & W." C. married L., and afterwards proceedings were had to wind up the partnership, and by decree the partnership business, good will, etc., was ordered to be sold to the plaintiff or defendant, whichever should be the highest bidder. W. was the purchaser, and carried on the business under the old name. On appeal, the court said, reversing the court below, that the assignment of the good will and business included the exclusive right to the name of the old firm. *Levy v. Walker*, 10 Ch. D. 436.

In *Jennings v. Johnson*, 37 Fed. Rep. 364, it was held that the plaintiff, who had been a member of the firm which had prepared the article, and who had purchased the business, had a right to state on his labels that the article was prepared by the old firm.

**2. Rights After Dissolution.** — *Banks v. Gibson*, 34 Beav. 566; *Condy v. Mitchell*, 37 L. T.

N. S. 268, 26 W. R. 269; *Scott v. Rowland*, 26 L. T. N. S. 391, 20 W. R. 508; *Robinson v. Finlay*, 9 Ch. D. 487; *Hoffman v. Duncan*, Seton (4th ed.) 256; *Young v. Jones*, 3 Hughes (U. S.) 274; *Horton Mfg. Co. v. Horton Mfg. Co.*, 18 Fed. Rep. 816; *Holmes v. Holmes, etc., Mfg. Co.*, 37 Conn. 278, 9 Am. Rep. 324; *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 43 Am. St. Rep. 769; *Caswell v. Hazard*, 121 N. Y. 484, 18 Am. St. Rep. 833; *Huwer v. Dannenhoffer*, 82 N. Y. 499; *Slater v. Slater*, 78 N. Y. App. Div. 454; *Weston v. Ketcham*, 39 N. Y. Super. Ct. 54; *Wright v. Simpson*, 15 Pat. Off. Gaz. 968, reversing 15 Pat. Off. Gaz. 248. See *Viano v. Baccigalupo*, 183 Mass. 160. But see *Baldwin v. Von Micheroux*, 83 Hun (N. Y.) 43, affirming (Supm. Ct. Spec. T.) 5 Misc. (N. Y.) 386.

Upon the dissolution of a partnership, the trademark vests in both partners, and a party claiming under a grant from one only has not an exclusive right to such mark, and, therefore, under the statute, cannot register it. *Armistead v. Blackwell*, 1 Pat. Off. Gaz. 603.

An injunction will lie at the suit of one partner against his former copartner, restraining the continuance of the use of the signs containing the old firm name, without sufficient alterations or additions to give distinct notice of a change in the firm. *Peterson v. Humphrey*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 394.

**3. Rights of Creditors.** — In *Taylor v. Bemis*, 4 Biss. (U. S.) 406, the sale by execution creditors of a partner's interest in a firm name or trademark was refused, on the ground that such interest was merely a right to a part of it, and that the right was too shadowy and intangible to be of any value apart from the partnership business.



restrain the surviving partners from so doing. This rule is based upon the ground that the former bearer of the name, being dead, can no longer be held responsible for the firm's debts or injured by the use of his name.<sup>1</sup>

**8. Firm Names and Good Will.**—These subjects have been elsewhere considered in this work.<sup>2</sup>

## IX. INFRINGEMENT AND UNFAIR COMPETITION—1. General Principles—

**a. INFRINGEMENT OF TRADEMARK.**—The wrong called infringement of trademark or trade name consists in the unauthorized use or imitation of another's trademark or trade name in connection with similar goods.<sup>3</sup> Whether or not an imitation which is not an exact copy constitutes an infringement, depends upon whether the resemblance is sufficiently close to deceive purchasers and so pass off the goods of one man as being those of another.<sup>4</sup> But this is the test in all cases of unfair competition, even

**1. Rights of Surviving Partners.**—Hall v. Barrows, 9 Jur. N. S. 483, 32 L. J. Ch. 548, 8 L. T. N. S. 227, 33 L. J. Ch. 204; Wedderburn v. Wedderburn, 22 Beav. 84, 25 L. J. Ch. 710, 2 Jur. N. S. 674, 28 L. T. N. S. 4; Macdonald v. Richardson, 1 Giff. 81, 5 Jur. N. S. 9; Webster v. Webster, 3 Swanst. 490; Young v. Jones, 3 Hughes (U. S.) 274; Howe v. Searing, 6 Bosw. (N. Y.) 354, 10 Abb. Pr. (N. Y.) 264; Dougherty v. Van Nostrand, Hoffm. (N. Y.) 68, *disapproving* Hammond v. Douglas, 5 Ves. Jr. 539; Phelan v. Collender, 6 Hun (N. Y.) 244.

Two of the defendants who had been in business with J. G. Loring before his decease, under the firm name of "J. G. Loring & Co.," after his death took in the remaining two defendants as partners, and continued to use the name of the old firm both as a trade name and trademark. Suit was brought by the executors of J. G. Loring for an injunction to restrain the defendants from so doing. It was decided that the defendants had acquired by user a right to use the name as a trademark; but that the representatives of J. G. Loring, under the *Massachusetts* statute (Gen. Stat., c. 56), could restrain the use of the name as a trade name. *Bowman v. Floyd*, 3 Allen (Mass.) 76, 80 Am. Dec. 55. See also *Rogers v. Taintor*, 97 Mass. 291.

Although the personal representatives of a deceased partner may have a right jointly with the survivor to the use of a trademark of the firm ("a trademark being in the nature of a personal chattel"), still the surviving partner alone has sufficient interest to entitle him to fill a bill for injunction against an infringer. *Hine v. Lart*, 10 Jur. 106, 7 L. T. N. S. 41.

In *Robertson v. Quiddington*, 28 Beav. 529, the court said: "The case of *Lewis v. Langdon*, 7 Sim. 421, also appears to me to establish very clearly that the firm's name (whatever its value may be) survives to the surviving partner." And in *Lewis v. Langdon*, 7 Sim. 421, Vice-chancellor Shadwell said: "I cannot but think, when two partners carry on a business in partnership together, under a given name, that, during the partnership, it is the joint right of them both to carry on the business under that name, and that upon the death of one of them the right which they before had jointly becomes the separate right of the survivor."

In *Hammond v. Douglas*, 5 Ves. Jr. 539, it was held that the good will of a trade carried

on in partnership, without articles, survives and is not partnership stock. In *Crawshay v. Collins*, 15 Ves. Jr. 218, Eldon, L. C., expressed doubt of the decision in *Hammond v. Douglas*, 5 Ves. Jr. 539, on the point that the good will of a partnership survived.

The good will of a medical partnership survives to the surviving partner. *Farn v. Pearce*, 3 Madd. 74.

**2.** See the titles *PARTNERSHIP*, vol. 22, p. 2; *GOODWILL*, vol. 14, p. 1085.

**3. Infringement of Trademark.**—*Bass v. Dawber*, 19 L. T. N. S. 626; *McAndrew v. Bassett*, 10 Jur. N. S. 492, 33 L. J. Ch. 561, 10 L. T. N. S. 65; *Upmann v. Forester*, 24 Ch. D. 231; *Singer Mfg. Co. v. Kimball*, Ct. Sess. Cas. (3d ser.) xi. 267, 10 Scott L. Rep. 173; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51; *Dela-ware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311; *Osgood v. Rockwood*, 11 Blatchf. (U. S.) 314; *Kinney v. Allen*, 1 Hughes (U. S.) 106; *Bass v. Feigenspan*, 96 Fed. Rep. 206; *Geo. T. Stagg Co. v. Taylor*, 95 Ky. 651; *Low v. Hart*, 90 N. Y. 457; *Gillott v. Esterbrook*, 48 N. Y. 374, 8 Am. Rep. 553. See also *infra*, this section, *Use of Mark on Different Goods or in Different Connection*.

The language of Rev. Stat. U. S., § 4942, is: "Any person who shall reproduce \* \* \* any recorded trademark, and affix the same to goods of substantially the same descriptive properties, \* \* \* shall be liable to an action."

**Affixation Necessary.**—A strict technical trademark in a name is not infringed by merely calling a similar article by that name, without affixing it to such article. *Air-Brush Mfg. Co. v. Thayer*, 84 Fed. Rep. 640.

**Selling Labels Similar to the Plaintiff's** to be used by the purchaser upon goods to palm them off as the plaintiff's constitutes infringement. *Hennessy v. Herrmann*, 89 Fed. Rep. 669.

**Where the Defendant Acted under Orders Coming from the Plaintiff**, given for the purpose of creating a cause of action, injunction will not lie, for such use was not unauthorized. *Stetson v. Brennen*, 21 N. Y. App. Div. 552.

Thus, where the defendant merely executed a special order given by detectives acting for the plaintiff, he is not guilty of infringement. *Liebig's Extract of Meat Co. v. Libby*, 103 Fed. Rep. 87.

**4. Imitations—Test of Infringement.**—*Leather Cloth Co. v. American Leather Cloth Co.*, 1

where the right to the exclusive use of a technical trademark is not involved. Accordingly it is unnecessary to distinguish between this class of cases and cases of unfair competition.<sup>1</sup>

*b. UNFAIR COMPETITION.* — Unfair competition may be defined as passing off, or attempting to pass off, upon the public the goods or business of one man as being the goods or business of another.<sup>2</sup> Any conduct tending to produce this effect constitutes unfair competition and may be enjoined.<sup>3</sup> The means employed are wholly immaterial. The plaintiff need not show a proprietary interest in the names or symbols employed by the defendant to work the deception.<sup>4</sup> Nothing less than conduct tending to pass off one man's

Hem. & M. 271, 4 De G. J. & S. 137, 11 H. L. Cas. 529; Liggett, etc., Tobacco Co. v. Hynes, 20 Fed. Rep. 883; Nicholson v. Wm. A. Stickney Cigar Co., 158 Mo. 158; Colman v. Crump, 70 N. Y. 573; Thornton v. Crowley, 47 N. Y. Super. Ct. 527; Blackwell v. Wright, 73 N. Car. 310.

The essence of the wrong of infringement of trademark consists in the sale of the goods of one manufacturer or vendor for those of another by means of such trademark. William J. Moxley Co. v. Braun, etc., Co., 93 Ill. App. 183.

1. See *infra*, this section, *Test of Infringement or Unfair Competition*.

2. **Unfair Competition Defined.** — C. F. Simmons Medicine Co. v. Mansfield Drug Co., 93 Tenn. 84. See also *supra*, this title, *Definition and Nature of Subject—Unfair Competition*.

3. **Conduct Constituting Unfair Competition—England.** — Levy v. Walker, 10 Ch. D. 436, 39 L. T. N. S. 654, 48 L. J. Ch. 273; Franks v. Weaver, 10 Beav. 297; Perry v. Truefitt, 6 Beav. 66; Mack v. Petter, L. R. 14 Eq. 431, 41 L. J. Ch. 781; Singer Mfg. Co. v. Loog, 8 App. Cas. 15; Mitchell v. Henry, 15 Ch. D. 181; Boulnois v. Peake, 13 Ch. D. 513, note; Lee v. Haley, L. R. 5 Ch. 155; Metzler v. Wood, 8 Ch. D. 606, 47 L. J. Ch. 625, 38 L. T. N. S. 541; Singer Mfg. Co. v. Wilson, 2 Ch. D. 434, 45 L. J. Ch. 491, 3 App. Cas. 376.

**Canada.** — Grand Hotel Co. v. Wilson, 2 Ont. L. Rep. 323, 5 Ont. L. Rep. 141.

**United States.** — Saxlehner v. Eisner, etc., Co., 179 U. S. 19; Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598; Amoskeag Mfg. Co. v. Trainer, 101 U. S. 55; McLean v. Fleming, 96 U. S. 245; Sawyer v. Horn, 4 Hughes (U. S.) 239; Globe-Wernicke Co. v. Brown, (C. C. A.) 121 Fed. Rep. 90; Samuel v. Hostetter Co., (C. C. A.) 118 Fed. Rep. 257; Lever v. Smith, 112 Fed. Rep. 998; Sterling Remedy Co. v. Spermine Medical Co., (C. C. A.) 112 Fed. Rep. 1003; Hostetter Co. v. Martinoni, 110 Fed. Rep. 524; Hostetter Co. v. William Schneider Wholesale Wine, etc., Co., 107 Fed. Rep. 705; Weber Medical Tea Co. v. Kirschstein, 101 Fed. Rep. 580; Charles E. Hires Co. v. Consumers' Co., (C. C. A.) 100 Fed. Rep. 800; Centaur Co. v. Marshall, (C. C. A.) 97 Fed. Rep. 785; Proctor, etc., Co. v. Globe Refining Co., (C. C. A.) 92 Fed. Rep. 357; Elgin Nat. Watch Co. v. Illinois Watch-Case Co., 89 Fed. Rep. 487; Saxlehner v. Eisner, etc., Co., 88 Fed. Rep. 61; Hostetter Co. v. Sommers, 84 Fed. Rep. 333; Hilson Co. v. Foster, 80 Fed. Rep. 896; Put-

nam Nail Co. v. Bennett, 43 Fed. Rep. 800; Wilcox, etc., Sewing Mach. Co. v. Gibbens Frame, 17 Fed. Rep. 623; Frese v. Bachof, 13 Pat. Off. Gaz. 635.

**California.** — Hainque v. Cyclops Iron Works, 136 Cal. 351.

**Connecticut.** — Williams v. Brooks, 50 Conn. 278, 47 Am. Rep. 642; Meriden Britannia Co. v. Parker, 39 Conn. 450, 12 Am. Rep. 401.

**Georgia.** — Foster v. Blood Balm Co., 77 Ga. 216.

**Illinois.** — Imperial Mfg. Co. v. Schwartz, 105 Ill. App. 525.

**Massachusetts.** — Viano v. Baccigalupo, 183 Mass. 160; Marsh v. Billings, 7 Cush. (Mass.) 322, 54 Am. Dec. 723.

**Missouri.** — McCann v. Anthony, 21 Mo. App. 83; Skinner v. Oakes, 10 Mo. App. 45.

**New York.** — Electro-Siicon Co. v. Levy, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 469; Enoch Morgan's Sons Co. v. Schwachofer, (Supm. Ct. Spec. T.) 5 Abb. N. Cas. (N. Y.) 265; Coats v. Holbrook, 2 Sandf. Ch. (N. Y.) 586, 3 N. Y. Leg. Obs. 404; Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutilier, (N. Y. Super. Ct. Spec. T.) 5 Misc. (N. Y.) 78; Fischer v. Blank, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 65, 138 N. Y. 245; Johnson v. Hitchcock, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 680; India Rubber Co. v. Rubber Comb, etc., Co., 45 N. Y. Super. Ct. 258.

**Pennsylvania.** — Hoyt v. Hoyt, 143 Pa. St. 623, 24 Am. St. Rep. 575; Hires v. Hires, 6 Pa. Dist. 285.

See generally cases cited *infra* in succeeding subsections of this article, all of which support the text.

4. **No Proprietary Right in Name or Symbol Necessary—England.** — Croft v. Day, 7 Beav. 88; Perry v. Truefitt, 6 Beav. 66, 1 L. T. N. S. 384; Cash v. Cash, 84 L. T. N. S. 349; Lee v. Haley, L. R. 5 Ch. 155; M'Andrew v. Bassett, 10 Jur. N. S. 492, 10 L. T. N. S. 65.

**United States.** — Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U. S. 676; Shaver v. Heller, etc., Co., (C. C. A.) 108 Fed. Rep. 821, *affirming* 102 Fed. Rep. 882; Heller, etc., Co. v. Shaver, 102 Fed. Rep. 882; Centaur Co. v. Robinson, 91 Fed. Rep. 800; Pillsbury-Washburn Flour Mills Co. v. Eagle, (C. C. A.) 86 Fed. Rep. 608; Buck's Stove, etc., Co. v. Kiechle, 76 Fed. Rep. 758; Cleveland Stone Co. v. Wallace, 52 Fed. Rep. 431. But see New York, etc., Cement Co. v. Copley Cement Co., 44 Fed. Rep. 277.

**California.** — Schmidt v. Brieg, 100 Cal. 672.

**Illinois.** — The Fair v. Morales, 82 Ill. App. 499.

merchandise or business as that of another will constitute unfair competition.<sup>1</sup>

c. TEST OF INFRINGEMENT OR UNFAIR COMPETITION. — An exact copy of another's trademark, or name, or the dress of his goods, is not necessary to constitute infringement or unfair competition. Similarity, not identity, is the test.<sup>2</sup> There is some little confusion in the cases as to the standard to be applied, but the general rule seems to be that infringement or unfair competition exists whenever the resemblance is so close that ordinary purchasers, buying with ordinary caution, are likely to be misled.<sup>3</sup> The resemblance need

*Kentucky.* — *Avery v. Meikle*, 81 Ky. 73.

*Missouri.* — *St. Louis Carbonating, etc., Co. v. Eclipse Carbonating Co.*, 58 Mo. App. 411; *American Brewing Co. v. St. Louis Brewing Co.*, 47 Mo. App. 14; *Trask Fish Co. v. Wooster*, 28 Mo. App. 408; *Conrad v. Joseph Uhrig Brewing Co.*, 8 Mo. App. 277.

*New York.* — *Kinney Tobacco Co. v. Maller*, 53 Hun (N. Y.) 340; *Volger v. Force*, 63 N. Y. App. Div. 122; *Johnson v. Hitchcock*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 680.

*Pennsylvania.* — *Lafean v. Weeks*, 177 Pa. St. 412.

*Texas.* — *Goodman v. Bohls*, 3 Tex. Civ. App. 183; *Alff v. Radam*, 77 Tex. 530, 19 Am. St. Rep. 792; *Goodman v. Bohls*, 3 Tex. Civ. App. 183.

See also *infra*, this section, *Use of Labels, Marks, Packages, and Dress of Goods; Use of Descriptive Terms or Generic Names; Use of Personal or Corporate Names; Use of Geographical Terms.*

In *Coats v. Merrick Thread Co.*, 36 Fed. Rep. 324, 149 U. S. 562, the plaintiffs sold thread with black and gold labels, on which was stamped the phrase "Best six cord," and embossed the number of the thread on the spool. The use of the words "Best six cord" on the defendant's spools was relied on, among other things, to establish unfair competition, but the general appearance of the labels was sufficiently dissimilar, and the injunction was refused. Brown, J., said: "Irrespective of the technical question of trademark, the defendants have no right to dress their goods up in such a manner as to deceive an intending purchaser and induce him to believe he is buying those of the plaintiffs. Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression that they were buying those of their rivals."

*Citing Perry v. Truett*, 6 Beav. 66; *Croft v. Day*, 7 Beav. 84; *Lee v. Haley*, L. R. 5 Ch. 155; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Johnston v. Orr Ewing*, 7 App. Cas. 219; *Thompson v. Montgomery*, 41 Ch. D. 35; *McLean v. Fleming*, 96 U. S. 245; *Boardman v. Meriden Britannia Co.*, 35 Conn. 402, 95 Am. Dec. 270; *Gilman v. Hunnewell*, 122 Mass. 139; *Taylor v. Carpenter*, 2 Sandf. Ch. (N. Y.) 603, 11 Paige (N. Y.) 292, 42 Am. Dec. 114; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599.

**Oral Representations** made by a dealer tending to pass off one man's goods for those of an-

other may be enjoined. *Weber Medical Tea Co. v. Kirschstein*, 101 Fed. Rep. 580.

**1. Conduct Not Amounting to Unfair Competition.** — *American Washboard Co. v. Saginaw Mfg. Co.*, (C. C. A.) 103 Fed. Rep. 281; *Vitascope Co. v. U. S. Phonograph Co.*, 83 Fed. Rep. 30; *Ricker v. Portland, etc., R. Co.*, 90 Me. 395; *Fite v. Dorman*, (Tenn. 1900) 57 S. W. Rep. 129.

An employee engaged in the manufacture and sale of a patented article may take out a patent for a similar article and sell it in competition with the old article without being chargeable with unfair competition. *American Coat Pad Co. v. Phoenix Pad Co.*, (C. C. A.) 113 Fed. Rep. 629.

**2. Similarity, Not Identity, Test of Infringement**

— *United States.* — *McLean v. Fleming*, 96 U. S. 245; *Saxlehner v. Eisner, etc., Co.*, 179 U. S. 19, reversing (C. C. A.) 91 Fed. Rep. 536; *Walton v. Crowley*, 3 Blatchf. (U. S.) 440; *National Biscuit Co. v. Swick*, 121 Fed. Rep. 1007; *Thomas G. Plant Co. v. May Co.*, (C. C. A.) 105 Fed. Rep. 379; *N. K. Fairbank Co. v. Luckel*, (C. C. A.) 102 Fed. Rep. 327; *Centauro Co. v. Killenberger*, 87 Fed. Rep. 725; *Tetlow v. Tappan*, 85 Fed. Rep. 775; *Hilson Co. v. Foster*, 80 Fed. Rep. 896; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94; *Liggett, etc., Tobacco Co. v. Hynes*, 20 Fed. Rep. 883; *Rodgers v. Philp*, 1 Pat. Off. Gaz. 29.

*Colorado.* — *Solis Cigar Co. v. Pozo*, 16 Colo. 388, 25 Am. St. Rep. 279.

*Connecticut.* — *Bradley v. Norton*, 33 Conn. 157, 87 Am. Dec. 200.

*Illinois.* — *Frazer v. Frazer Lubricator Co.*, 18 Ill. App. 450.

*Iowa.* — *Shaver v. Shaver*, 54 Iowa 208, 37 Am. Rep. 194.

*Kentucky.* — *Rains v. White*, 107 Ky. 114.

*Missouri.* — *Liggett, etc., Tobacco Co. v. Sam Reid Tobacco Co.*, 104 Mo. 53, 24 Am. St. Rep. 313; *Filley v. Fassett*, 44 Mo. 168, 100 Am. Dec. 275; *McCann v. Anthony*, 21 Mo. App. 83. *New York.* — *Vulcan v. Myers*, 58 Hun (N. Y.) 161; *Monopol Tobacco Works v. Gensior*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 87.

**3. Probable Deception of Ordinary Purchasers —**

*England.* — *Borthwick v. Evening Post*, 37 Ch. D. 449; *Shrimpton v. Lait*, 18 Beav. 164; *Cope v. Evans*, L. R. 18 Eq. 138, 30 L. T. N. S. 292, 22 W. R. 453; *Bradbury v. Beeton*, 21 L. T. N. S. 323; *Anglo-Swiss Condensed Milk Co. v. Swiss Condensed Milk Co.*, W. N. (1871) 163, L. J. Notes Cases, 154; *Leather Cloth Co. v. American Leather Cloth Co.*, 1 Hem. & M. 271, 4 De G. J. & S. 137, 11 H. L. Cas. 529; *Seixo v. Proveze*, L. R. 1 Ch. 192, 12 Jur. N. S. 215, 14 L. T. N. S. 314.



not be sufficient to deceive experts or persons specially familiar with the trademark or goods involved;<sup>1</sup> nor such as would deceive persons seeing the two trademarks or articles placed side by side.<sup>2</sup> A similarity sufficient to make it likely that unwary purchasers will be deceived, has been deemed sufficient.<sup>3</sup>

*United States.*—Amoskeag Mfg. Co. v. Trainer, 101 U. S. 63; McLean v. Fleming, 96 U. S. 256; Coffeen v. Brunton, 4 McLean (U. S.) 516, 5 McLean (U. S.) 256; Walton v. Crowley, 3 Blatchf. (U. S.) 440; Allen B. Wrisley Co. v. Iowa Soap Co., (C. C. A.) 122 Fed. Rep. 796; Postum Cereal Co. v. American Health Food Co., (C. C. A.) 119 Fed. Rep. 848, affirming 109 Fed. Rep. 898; Gannett v. Rupert, 119 Fed. Rep. 221; De Long Hook, etc., Co. v. Francis Hook, etc., Co., 118 Fed. Rep. 938; Keuffel, etc., Co. v. H. S. Crocker Co., 118 Fed. Rep. 187; Van Hoboken Co. v. Mohns, 112 Fed. Rep. 530; Allan B. Wrisley Co. v. Iowa Soap Co., 104 Fed. Rep. 548; N. K. Fairbank Co. v. Luckel, (C. C. A.) 102 Fed. Rep. 327; Pfeiffer v. Wilde, 102 Fed. Rep. 658; Paris Medicine Co. v. W. H. Hill Co., (C. C. A.) 102 Fed. Rep. 148; Centaur Co. v. Neathery, (C. C. A.) 91 Fed. Rep. 899; Centaur Co. v. Hughes Bros. Mfg. Co., (C. C. A.) 91 Fed. Rep. 901; Van Camp Packing Co. v. Cruikshanks Bros. Co. (C. C. A.) 90 Fed. Rep. 814; Kann v. Diamond Steel Co., (C. C. A.) 89 Fed. Rep. 706; Bass v. Henry Zeltner Brewing Co., 87 Fed. Rep. 468; Lare v. Harper, (C. C. A.) 86 Fed. Rep. 481; Von Mumm v. Wittemann, 85 Fed. Rep. 966; Sterling Remedy Co. v. Eureka Chemical, etc., Co., (C. C. A.) 80 Fed. Rep. 105; N. K. Fairbank Co. v. R. W. Bell Mfg. Co., (C. C. A.) 77 Fed. Rep. 869; Improved Fig Syrup Co. v. California Fig Syrup Co., (C. C. A.) 54 Fed. Rep. 175; Myers v. Theller, 38 Fed. Rep. 607; Glen Cove Mfg. Co. v. Ludeling, 22 Fed. Rep. 823; Liggett, etc., Tobacco Co. v. Hynes, 20 Fed. Rep. 883; Hostetter v. Adams, 10 Fed. Rep. 838.

*California.*—Sperry v. Percival Milling Co., 81 Cal. 252.

*Illinois.*—Frazier v. Frazier Lubricator Co., 18 Ill. App. 450.

*Maryland.*—Robertson v. Berry, 50 Md. 595, 33 Am. Rep. 328.

*Missouri.*—Liggett, etc., Tobacco Co. v. Sam Reid Tobacco Co., 104 Mo. 53, 24 Am. St. Rep. 313; Drummond Tobacco Co. v. Addison Tinsley Tobacco Co., 52 Mo. App. 10.

*Nebraska.*—Miskell v. Prokop, 58 Neb. 628.

*New York.*—Fischer v. Blank, 138 N. Y. 244; Fleischmann v. Schuckmann, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 92; Williams v. Johnson, 2 Bosw. (N. Y.) 1; Tuerk Hydraulic Power Co. v. Tuerk, 92 Hun (N. Y.) 65; Tallcot v. Moore, 6 Hun (N. Y.) 106; Dunlap v. Young, 68 N. Y. App. Div. 137; Anargyros v. Egyptian Amasis Cigarette Co., 54 N. Y. App. Div. 345; Ft. Stanwix Canning Co. v. William McKinley Canning Co., 49 N. Y. App. Div. 566; Day v. Webster, 23 N. Y. App. Div. 601; W. J. Johnston Co. v. Electric Age Pub. Co., (Supm. Ct. Gen. T.) 14 N. Y. Supp. 803; Munro v. Smith, 59 Hun (N. Y.) 624, 13 N. Y. Supp. 708; Foster v. Webster Piano Co., (Supm. Ct. Gen. T.) 13 N. Y. Supp. 338.

*Ohio.*—Reeder v. Brodt, 6 Ohio Dec. 248; Cigar Maker's International Union v. Burkhardt, 9 Ohio Dec. 459, 6 Ohio N. P. 342; Brown Bros. Co. v. Bucher, etc., Co., 9 Ohio Dec. 362, 6 Ohio N. P. 379.

*Pennsylvania.*—Wiest Co. v. Weeks Co., 7 Kulp (Pa.) 505; Clark, etc., Co. v. Scott, 4 Lack. Leg. N. (Pa.) 159.

*Tennessee.*—Robinson v. Storm, 103 Tenn. 40.

*Texas.*—Goodman v. Bohls, 3 Tex. Civ. App. 183.

See also *infra*, this section, *Actual Deception Unnecessary.*

**Regard Must Be Had to the Class of Persons Who Purchase the Particular Article** for consumption, and to the circumstances ordinarily attending its purchase. N. K. Fairbank Co. v. R. W. Bell Mfg. Co., (C. C. A.) 77 Fed. Rep. 869.

**Character and Price of Article.**—See Morse v. Worrell, 10 Phila. (Pa.) 168, 31 Leg. Int. (Pa.) 380, Codd Dig. 242.

**1. Deception of Experts Not the Test.**—Shrimpton v. Laight, 18 Beav. 164; Sykes v. Sykes, 3 B. & C. 541, 10 E. C. L. 176; Powell v. Birmingham Vinegar Brewery Co., (1896) 2 Ch. 68; Amoskeag Mfg. Co. v. Trainer, 101 U. S. 64; R. Heinisch's Sons Co. v. Boker, 86 Fed. Rep. 765; Clark Thread Co. v. Armitage, 67 Fed. Rep. 902. See also *infra*, this section, *Deception of Ultimate but Not Immediate Purchaser.*

**2. Comparison of Marks Side by Side Not the Test.**—*England.*—Seixo v. Provezende, L. R. 1 Ch. 192, 12 Jur. N. S. 215.

*Canada.*—Whitney v. Hickling, 5 Grant Ch. (U. C.) 605.

*United States.*—Sterling Remedy Co. v. Gorey, 110 Fed. Rep. 372; Paris Medicine Co. v. W. H. Hill Co., (C. C. A.) 102 Fed. Rep. 148; Stuart v. F. G. Stewart Co., (C. C. A.) 91 Fed. Rep. 243, reversing 85 Fed. Rep. 778; Centaur Co. v. Killenberger, 87 Fed. Rep. 726; Glen Cove Mfg. Co. v. Ludeling, 22 Fed. Rep. 823; Liggett, etc., Tobacco Co. v. Hynes, 20 Fed. Rep. 883.

*Indiana.*—Sohe v. Geisendorf, Wils. (Ind.) 60.

*New York.*—Cook v. Starkweather, (N. Y. Super. Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 392; Potter v. McPherson, 21 Hun (N. Y.) 559; Monopol Tobacco Works v. Gensior, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 87; Lockwood v. Bostwick, 2 Daly (N. Y.) 521.

*Pennsylvania.*—Pratt's Appeal, 117 Pa. St. 401, 2 Am. St. Rep. 676.

**3. Deception of Unwary Purchasers.**—*England.*—Glenny v. Smith, 2 Drew. & Sm. 476, 11 Jur. N. S. 964, 13 L. T. N. S. 11; Singer Mfg. Co. v. Wilson, 2 Ch. D. 448, 45 L. J. Ch. 491, 34 L. T. N. S. 858, 3 App. Cas. 376; Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. Cas. 523; Sen Sen Co. v. Britten, (1899) 1 Ch. 692, 68 L. J. Ch. 250. But see Bradbury v. Beeton, 21 L. T. N. S. 323.

A few cases seem to require a greater degree of resemblance,<sup>1</sup> and the rule has been stated that it must appear that the ordinary mass of purchasers, paying that attention which such persons usually do, would probably be deceived,<sup>2</sup> and that the similarity must amount to a false representation that the goods to which the simulated mark is attached are the goods of the one who first appropriated and used the mark simulated.<sup>3</sup> If deception is improbable or impossible, no infringement or unfair competition is shown.<sup>4</sup>

*Canada.*—*Davis v. Reid*, 17 Grant Ch. (U. C.) 69.

*United States.*—*Centaur Co. v. Robinson*, 91 Fed. Rep. 891. See *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 63, *per* Clifford, J., *citing* *Wotherspoon v. Currie*, L. R. 5 H. L. 519. But see *Coats v. Merrick Thread Co.*, 149 U. S. 562; *Allen B. Wrisley Co. v. Iowa Soap Co.*, (C. C. A.) 122 Fed. Rep. 796; *Centaur Co. v. Marshall*, (C. C. A.) 97 Fed. Rep. 785; *Mumm v. Kirk*, 40 Fed. Rep. 589.

*Illinois.*—*Mossler v. Jacobs*, 66 Ill. App. 571.

*Missouri.*—*Drummond Tobacco Co. v. Addison Tinsley Tobacco Co.*, 52 Mo. App. 10; *McCann v. Anthony*, 21 Mo. App. 83.

*New York.*—*Brooklyn White Lead Co. v. Masury*, 25 Barb. (N. Y.) 416; *Colman v. Crump*, 70 N. Y. 573; *Kinney Tobacco Co. v. Maller*, 53 Hun (N. Y.) 340; *Reckitt v. Kellogg*, 28 N. Y. App. Div. 111; *Brown v. Mercer*, 37 N. Y. Super. Ct. 265. See *Thornton v. Crowley*, 47 N. Y. Super. Ct. 527.

*Pennsylvania.*—*Colton v. Thomas*, 7 Phila. (Pa.) 257, *criticising* *Partridge v. Menck*, 2 Sandf. Ch. (N. Y.) 622. But see *Brown v. Seidel*, 153 Pa. St. 60, 31 W. N. C. (Pa.) 519.

"The fact that careful buyers who scrutinize closely are not deceived, only shows that the injury is less in degree, not that there is no injury." *Frazer v. Frazer Lubricator Co.*, 18 Ill. App. 450.

A similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law. *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94.

Purchasers of small, cheap, and common articles are not expected to be critically observant. *Fleischmann v. Schuckmann*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 92.

The fact that the goods are of a class purchased by persons who are easily deceived is a circumstance to be considered. *Reckitt v. Kellogg*, 28 N. Y. App. Div. 111; *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 902.

The intelligence or want of intelligence of the purchaser cannot be considered. *Wolfe v. Hart*, 4 Vict. L. R. Eq. 125.

**1. Stricter Rule Sometimes Applied.**—*Allen B. Wrisley Co. v. Iowa Soap Co.*, (C. C. A.) 122 Fed. Rep. 796; *Ball v. Siegel*, 116 Ill. 137, 56 Am. Rep. 767; *Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589; *Popham v. Cole*, 66 N. Y. 69, 23 Am. Rep. 22; *Thornton v. Crowley*, 47 N. Y. Super. Ct. 527; *Stokes v. Allen*, 56 Hun (N. Y.) 526; *Heinz v. Lutz*, 146 Pa. St. 592. And see *Civil Service Supply Assoc. v. Dean*, 13 Ch. D. 512.

"The court will hold any imitation colorable which requires a careful inspection to distinguish its marks and appearance from those of the manufacture imitated. It is certainly not

bound to interfere where ordinary attention will enable a purchaser to discriminate." *Merrimack Mfg. Co. v. Garner*, (C. Pl. Gen. T.) 2 Abb. Pr. (N. Y.) 318, 4 E. D. Smith (N. Y.) 387, *quoting* *Partridge v. Menck*, 2 Sandf. Ch. (N. Y.) 622.

**2. Probable Deception of General Mass of Purchasers.**—*Partridge v. Menck*, 2 Sandf. Ch. (N. Y.) 622, 2 Barb. Ch. (N. Y.) 101, 47 Am. Dec. 281; *Tallcot v. Moore*, 6 Hun (N. Y.) 106; *Rowley v. Houghton*, 2 Brews. (Pa.) 303, 7 Phila. (Pa.) 39. But compare *Colton v. Thomas*, 2 Brews. (Pa.) 308.

In *Gilman v. Hunnewell*, 122 Mass. 148, Gray, C. J., said: "All the authorities agree that the court will not restrain a defendant from the use of a label, on the ground that it infringes the plaintiff's trademark, unless the form of the printed words, the words themselves, and the figures, lines, and devices are so similar that any person, with such reasonable care and observation as the public generally are capable of using and may be expected to exercise, would mistake the one for the other."

In *Solis Cigar Co. v. Pozo*, 16 Colo. 388, 25 Am. St. Rep. 279, Bissell, C., said: "It is always essential to show that the imitation is of a character to escape the ordinary care and caution used in the purchase of the articles protected."

**3. Similarity Must Amount to Misrepresentation.**—*Coats v. Merrick Thread Co.*, 149 U. S. 562; *Delaware, etc., Canal Co. v. Clark*, 13 Wall. (U. S.) 311; *Candee v. Deere*, 54 Ill. 439, 5 Am. Rep. 125; *Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589; *Popham v. Cole*, 66 N. Y. 69, 23 Am. Rep. 22; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 607; *Heinz v. Lutz*, 146 Pa. St. 592; *Joseph Dixon Crucible Co. v. Guggenheim*, 7 Phila. (Pa.) 408. See *Read v. Richardson*, 45 L. T. N. S. 54, *per* Jessel, M. R.; *Hogg v. Kirby*, 8 Ves. Jr. 215; *Frese v. Bachof*, 14 Blatchf. (U. S.) 432.

**4. Deception Improbable or Impossible—England.**—*Lever v. Bedingfield*, 80 L. T. N. S. 100; *Borthwick v. Evening Post*, 37 Ch. D. 449; *Bradbury v. Beeton*, 21 L. T. N. S. 323; *London, etc., Law Assur. Soc. v. London, etc., Joint-Stock L. Ins. Co.*, 11 Jur. 938, 17 L. J. Ch. 37.

*United States.*—*Holzappel's Compositions Co. v. Rahtjen's American Composition Co.*, 183 U. S. 11; *Liggett, etc., Tobacco Co. v. Finzer*, 128 U. S. 182; *Allen B. Wrisley Co. v. Iowa Soap Co.*, (C. C. A.) 122 Fed. Rep. 796; *B. B. Hill Mfg. Co. v. Sawyer-Boss Mfg. Co.*, (C. C. A.) 118 Fed. Rep. 1014, *affirming* 112 Fed. Rep. 144; *Wells v. Ceylon Perfume Co.*, 105 Fed. Rep. 621; *Harper v. Lare*, (C. C. A.) 103 Fed. Rep. 203; *Potter Drug, etc., Corp. v. Pasfield Soap Co.*, 102 Fed. Rep. 490; *La*

*d. QUESTION OF FACT.* — The existence of infringement or unfair competition as dependent upon the sufficiency of the resemblance between the goods of the respective parties is a question of fact to be determined upon the evidence in each particular case.<sup>1</sup> Various cases and illustrations wherein the similarity was held sufficient,<sup>2</sup> and also wherein the similarity was held insuffi-

*Republique Francaise v. Saratoga Vichy Spring Co.*, 99 Fed. Rep. 733; *Centaur Co. v. Marshall*, (C. C. A.) 97 Fed. Rep. 785; *Kroppf v. Furst*, 94 Fed. Rep. 150; *Centaur Co. v. Marshall*, 92 Fed. Rep. 605; *Kann v. Diamond Steel Co.*, (C. C. A.) 89 Fed. Rep. 706; *N. K. Fairbank Co. v. Luckel*, 88 Fed. Rep. 694; *Bass v. Henry Zeltner Brewing Co.*, 87 Fed. Rep. 468; *Lare v. Harper*, (C. C. A.) 86 Fed. Rep. 481; *Investor Pub. Co. v. Dobinson*, 82 Fed. Rep. 56; *Sterling Remedy Co. v. Eureka Chemical, etc., Co.*, (C. C. A.) 80 Fed. Rep. 105; *Dadiriian v. Yacubian*, 72 Fed. Rep. 1010; *Mumm v. Kirk*, 40 Fed. Rep. 589; *Philadelphia Novelty Mfg. Co. v. Blakesley Novelty Co.*, 40 Fed. Rep. 588; *Dawes v. Davies*, Codd. Dig. 260. But see *Bass v. Feigenspan*, 96 Fed. Rep. 206.

*Missouri.* — *Drummond Tobacco Co. v. Addisontinsley Tobacco Co.*, 52 Mo. App. 10.

*New York.* — *Hurricane Patent Lantern Co. v. Miller*, (Supm. Ct. Spec. T.) 56 How. Pr. (N. Y.) 234; *Stephens v. De Conto*, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. N. S. (N. Y.) 47; 7 Robt. (N. Y.) 343; *Commercial Advertiser Assoc. v. Haynes*, 26 N. Y. App. Div. 279; *Potter v. McPherson*, 21 Hun (N. Y.) 559; *Bell v. Locke*, 8 Paige (N. Y.) 75; 34 Am. Dec. 371; *Tallcot v. Moore*, 6 Hun (N. Y.) 106; *Foster v. Webster Piano Co.*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 338.

*North Carolina.* — *Blackwell v. Wright*, 73 N. Car. 310.

*Texas.* — *Alff v. Radam*, 77 Tex. 530, 19 Am. St. Rep. 792.

**1. Infringement and Unfair Competition Questions of Fact.** — *Payton v. Snelling*, (1901) A. C. 308, 70 L. J. Ch. 644; *Kentucky Distilleries, etc., Co. v. Wathen*, 110 Fed. Rep. 642; *Kroppf v. Furst*, 94 Fed. Rep. 150; *P. Lorillard Co. v. Peper*, (C. C. A.) 86 Fed. Rep. 956; *Coats v. Merrick Thread Co.*, 36 Fed. Rep. 324, *affirmed* 149 U. S. 562; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94; *Fischer v. Blank*, 138 N. Y. 245.

**2. Similarity Sufficient to Constitute Infringement or Unfair Competition — Illustrations — England.** — *Sanitas Co. v. Condy*, 56 L. T. N. S. 621; *Clowes v. Hogg*, W. N. (1870) 268, L. J. Notes Cases 267, W. N. (1871) 40; *Corns v. Griffiths*, W. N. (1873) 93; *Pemberton* (2d ed.) 308; *Edmonds v. Benbow*, Seton (3d ed.) 905, (4th ed.) 238; *Ingram v. Stiff*, 5 Jur. N. S. 947; *Lee v. Haley*, L. R. 5 Ch. 155; *North Cheshire, etc., Brewery Co. v. Manchester Brewery Co.*, (1899) A. C. 83, 68 L. J. Ch. 74; *Metzler v. Wood*, 8 Ch. D. 608, 47 L. J. Ch. 625; *Chappell v. Davidson*, 2 Kay & J. 123; *Chappell v. Sheard*, 2 Kay & J. 117; *Radde v. Norman*, L. R. 14 Eq. 348, 41 L. J. Ch. 525; *Mack v. Petter*, L. R. 14 Eq. 431; *Stephens v. Peel*, 16 L. T. N. S. 145; *Clement v. Maddick*, 1 Giff. 98, 5 Jur. N. S. 592; *Ford v. Foster*, L. R. 7 Ch. 611, 27 L. T. N. S. 219, 20 W. R. 311; *Reed v. O'Meara*, 21 L. R. Ir.

216; *Guardian Fire, etc., Assur. Co. v. Guardian, etc., Ins. Co.*, 50 L. J. Ch. 253; *Accident Ins. Co. v. Accident, etc., Ins. Co.*, 54 L. J. Ch. 104.

*United States.* — *McLean v. Fleming*, 96 U. S. 245; *Actien-Gesellschaft Apollinaris Brunnen v. Somborn*, 14 Blatchf. (U. S.) 380; *Enoch Morgan's Sons Co. v. Whittier-Coburn Co.*, 118 Fed. Rep. 657; *Sterling Remedy Co. v. Spermine Medical Co.*, (C. C. A.) 112 Fed. Rep. 1000; *Welsbach Light Co. v. Adam*, 107 Fed. Rep. 463; *Little v. Kellam*, 100 Fed. Rep. 353; *Bass v. Feigenspan*, 96 Fed. Rep. 206; *Noel v. Ellis*, 89 Fed. Rep. 978; *Lever v. Pasfield*, 88 Fed. Rep. 484; *Baker v. Baker*, 77 Fed. Rep. 181; *Potter Drug, etc., Corp. v. Miller*, 75 Fed. Rep. 656; *American Grocery Co. v. Sloan*, 68 Fed. Rep. 539; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.*, (C. C. A.) 64 Fed. Rep. 841; *N. K. Fairbank Co. v. Central Lard Co.*, 64 Fed. Rep. 133; *New Home Sewing Mach. Co. v. Bloomingdale*, 59 Fed. Rep. 284; *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.*, (C. C. A.) 58 Fed. Rep. 884; *Carlsbad v. Thackeray*, 57 Fed. Rep. 18; *Improved Fig Syrup Co. v. California Fig Syrup Co.*, (C. C. A.) 54 Fed. Rep. 175; *Hohner v. Gratz*, 52 Fed. Rep. 871; *Hutchinson v. Blumberg*, 51 Fed. Rep. 829; *Hutchinson v. Covert*, 51 Fed. Rep. 832; *California Fig Syrup Co. v. Improved Fig Syrup Co.*, 51 Fed. Rep. 296; *Giron v. Gartner*, 47 Fed. Rep. 467; *Estes v. Worthington*, 31 Fed. Rep. 154; *Estes v. Leslie*, 27 Fed. Rep. 22, 29 Fed. Rep. 91; *Estes v. Williams*, 21 Fed. Rep. 189; *Sawyer v. Kellogg*, 7 Fed. Rep. 720.

*California.* — *Weinstock v. Marks*, 109 Cal. 529, 50 Am. St. Rep. 57; *Pierce v. Guittard*, 68 Cal. 68, 58 Am. Rep. 1.

*Florida.* — *El Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 23 Am. St. Rep. 537.

*Illinois.* — *Rubel v. Allegretti Chocolate Cream Co.*, 76 Ill. App. 581; *Mossier v. Jacobs*, 66 Ill. App. 571.

*Massachusetts.* — *Viano v. Baccigalupo*, 183 Mass. 160; *Samuels v. Spitzer*, 177 Mass. 226.

*Missouri.* — *Sanders v. Jacob*, 20 Mo. App. 96; *McCartney v. Garnhart*, 45 Mo. 593, 100 Am. Dec. 397.

*New Jersey.* — *Stirling Silk Mfg. Co. v. Sterling Silk Co.*, 59 N. J. Eq. 394; *Van Horn v. Coogan*, 52 N. J. Eq. 380.

*New York.* — *Vulcan v. Myers*, 139 N. Y. 364; *Dunlap v. Young*, 68 N. Y. App. Div. 137; *Volger v. Force*, 63 N. Y. App. Div. 122; *Barrett Chemical Co. v. Stern*, 56 N. Y. App. Div. 143; *Ft. Stanwix Canning Co. v. William McKinley Canning Co.*, 49 N. Y. App. Div. 566; *Electro-Silicon Co. v. Trask*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 189; *Burnett v. Phalon*, 9 Bosw. (N. Y.) 193, 3 Keyes (N. Y.) 594, 5 Abb. Pr. N. S. (N. Y.) 212; *Cook v. Starkweather*, (N. Y. Super. Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 392; *Matsell v. Flana-*



cient,<sup>1</sup> to constitute infringement or unfair competition are collected below in the notes. Similarity in the main distinguishing features will usually be suffi-

gan, (C. Pl. Spec. T.) 2 Abb. Pr. N. S. (N. Y.) 459; Tuerk Hydraulic Power Co. v. Tuerk, 92 Hun (N. Y.) 65; American Grocer Pub. Assoc. v. Grocer Pub. Co., 25 Hun (N. Y.) 398; Potter v. McPherson, 21 Hun (N. Y.) 559; American Novelty, etc., Co. v. Manufacturing Electrical Novelty Co., (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 450; Crawford v. Laus, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 248; De Youngs v. Jung, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 56, *affirming* 25 N. Y. Supp. 479; Gaines v. Leslie, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 20; Howard v. Henriques, 3 Sandf. (N. Y.) 725; Siegert v. Abbott, 72 Hun (N. Y.) 243; India Rubber Co. v. Rubber Comb, etc., Co., 45 N. Y. Super. Ct. 258. See also Stone v. Carlan, 13 Monthly L. Rep. 360.

*Ohio*.—Drake Medicine Co. v. Glessner, 68 Ohio St. 337.

*Pennsylvania*.—Arthur v. Howard, 19 Pa. Co. Ct. 81.

*Wisconsin*.—Oppermann v. Waterman, 94 Wis. 583.

"Improved Fig Syrup" infringes "Syrup of Figs," Improved Fig Syrup Co. v. California Fig Syrup Co., (C. C. A.) 54 Fed. Rep. 175; "Noxie" infringes "Moxie," Moxie Nerve Food Co. v. Beach, 33 Fed. Rep. 248; "Cellonite" infringes "Celluloid," Celluloid Mfg. Co. v. Cellonite Mfg. Co., 32 Fed. Rep. 94; "The Grocer" infringes "The American Grocer," as applied to a periodical, American Grocer Pub. Assoc. v. Grocer Pub. Co., 25 Hun (N. Y.) 398; "The Heroine" infringes "The Hero" similarly used, Rowley v. Houghton, 2 Brews. (Pa.) 303, 7 Phila. (Pa.) 39; "Iwanta" infringes "Unceda" as applied to biscuit, National Biscuit Co. v. Baker, 95 Fed. Rep. 135; "Junket Capsules" infringes "Junket Tablets," Hansen v. Siegel-Cooper Co., 106 Fed. Rep. 691; "Clark's N-E-W" infringes "Clark's O. N. T." as applied to thread, Clark Thread Co. v. Armitage, (C. C. A.) 74 Fed. Rep. 936.

#### 1. Similarity Deemed Not Sufficient to Constitute Infringement or Unfair Competition — Illustrations

—*England*.—Merchant Banking Co. v. Merchants' Joint Stock Bank, 9 Ch. D. 560, 47 L. J. Ch. 828; Cowen v. Hulton, 46 L. T. N. S. 897; Bradbury v. Beeton, 21 L. T. N. S. 323; Woolham v. Ratcliff, 1 Hem. & M. 259; Farina v. Cathery, L. J. Notes Cases 134; Charleson v. Campbell, Sc. Sess. Cas. (4th ser.) iv. 149, 14 Scott L. Rep. 104; Spottiswoode v. Clarke, 2 Phil. 154, 1 Coop. t. Cot. 254, 10 Jur. 1043, 8 L. T. N. S. 230, 271.

*United States*.—Liggett, etc., Tobacco Co. v. Finzer, 128 U. S. 182; Osgood v. Allen, Holmes (U. S.) 185; Wyckoff v. Howe Scale Co., (C. C. A.) 122 Fed. Rep. 348, *reversing* 110 Fed. Rep. 520; Vacuum Oil Co. v. Climax Refining Co., (C. C. A.) 120 Fed. Rep. 254; Postum Cereal Co. v. American Health Food Co., (C. C. A.) 119 Fed. Rep. 848, *affirming* 109 Fed. Rep. 898; Gannett v. Ruppert, 119 Fed. Rep. 221; La Republique Francaise v. Schultz, 115 Fed. Rep. 196; Kentucky Distilleries, etc., Co. v. Wathen, 110 Fed. Rep. 641;

Postum Cereal Co. v. American Health Food Co., 109 Fed. Rep. 898; Potter Drug, etc., Corp. v. Pasfield Soap Co., (C. C. A.) 106 Fed. Rep. 914, 102 Fed. Rep. 490; La Republique Francaise v. Saratoga Vichy Spring Co., 99 Fed. Rep. 733; Fuller v. Huff, 99 Fed. Rep. 439; La Republique Francaise v. Schultz, 94 Fed. Rep. 500; Allen B. Wrisley Co. v. Geo. E. Rouse Soap Co., 87 Fed. Rep. 589; P. Lorillard Co. v. Peper, (C. C. A.) 86 Fed. Rep. 956; Pittsburgh Crushed Steel Co. v. Diamond Steel Co., 85 Fed. Rep. 637; Stuart v. F. G. Stewart Co., 83 Fed. Rep. 778; Sterling Remedy Co. v. Eureka Chemical, etc., Co., (C. C. A.) 80 Fed. Rep. 105; Johnson v. Bauer, 79 Fed. Rep. 954; J. C. Hubinger Bros. Co. v. Eddy, 74 Fed. Rep. 551; Burt v. Smith, (C. C. A.) 71 Fed. Rep. 161; Kohler Mfg. Co. v. Beeshore, 53 Fed. Rep. 262, (C. C. A.) 59 Fed. Rep. 572; Evans v. Von Laer, 32 Fed. Rep. 153.

*California*.—Castle v. Siegfried, 103 Cal. 71; Schmidt v. Welch, (Cal. 1893) 35 Pac. Rep. 626; Falkinburg v. Lucy, 35 Cal. 52, 95 Am. Dec. 76.

*Illinois*.—N. K. Fairbank Co. v. Swift, 64 Ill. App. 477.

*Missouri*.—Nicholson v. Wm. A. Stickney Cigar Co., 158 Mo. 158; Oakes v. St. Louis Candy Co., 146 Mo. 391.

*New York*.—Brown v. Doscher, 147 N. Y. 647, *affirming* 73 Hun (N. Y.) 107; Enoch Morgan's Sons Co. v. Troxell, 89 N. Y. 292, 42 Am. Rep. 294; Stephens v. De Conto, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. N. S. (N. Y.) 47, 7 Robt. (N. Y.) 343; Boessneck v. Iselin, 83 N. Y. App. Div. 290; T. B. Dunn Co. v. Trix Mfg. Co., 50 N. Y. App. Div. 75; Commercial Advertiser Assoc. v. Haynes, 26 N. Y. App. Div. 279; Brown v. Doscher, 73 Hun (N. Y.) 107; Stokes v. Allen, 56 Hun (N. Y.) 526; Lavanburg v. Pfeiffer, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 577, 31 Misc. (N. Y.) 600; Frohman v. Miller, (N. Y. Super. Ct. Spec. T.) 8 Misc. (N. Y.) 379; Cahn v. Hoffman House, (C. Pl. Eq. T.) 7 Misc. (N. Y.) 461; Bell v. Locke, 8 Paige (N. Y.) 75, 34 Am. Dec. 371; Snowden v. Noah, Hopk. (N. Y.) 347, 14 Am. Dec. 547; Stern v. Barrett Chemical Co., (N. Y. City Ct. Gen. T.) 28 Misc. (N. Y.) 429; Babbitt v. Brown, 68 Hun (N. Y.) 515; W. J. Johnston Co. v. Electric Age Pub. Co., (Supm. Ct. Gen. T.) 14 N. Y. Supp. 803; Foster v. Webster Piano Co., (Supm. Ct. Gen. T.) 13 N. Y. Supp. 338; Forney v. Engineering News Pub. Co., (Supm. Ct. Gen. T.) 10 N. Y. Supp. 814.

*Ohio*.—Cincinnati Vici Shoe Co. v. Cincinnati Shoe Co., 9 Ohio Dec. 579, 7 Ohio N. P. 135.

*Oregon*.—Duniway Pub. Co. v. Northwest Printing, etc., Co., 11 Oregon 322; Lichtenstein v. Mellis, 8 Oregon 464, 34 Am. Rep. 592.

"P. T. Butler's Trademark Best Soap" does not infringe "B. T. Babbitt's Trademark Best Soap," Babbitt v. Brown, 68 Hun (N. Y.) 515; "Webster" does not infringe "Weber" as applied to pianos, Foster v. Webster Piano Co., (Supm. Ct. Gen. T.) 13 N. Y. Supp. 338;

cient to constitute infringement or unfair competition.<sup>1</sup> But a cumulation of resemblances or differences has also an important bearing in the determination of the question. Similarity in a great number of points may constitute unfair competition although in no one alone it would do so,<sup>2</sup> and although there may be differences in other points.<sup>3</sup> Form, size, color, and any other circumstance of similarity or dissimilarity should be considered in determining whether there is such similarity as constitutes infringement or unfair competition.<sup>4</sup> The

"The Electrical Age" does not infringe "The Electrical World," used as the titles for periodicals, *W. J. Johnston Co. v. Electric Age Pub. Co.*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 803; "Evening Post" does not infringe "Morning Post" as applied to newspapers, *Borthwick v. Evening Post*, 37 Ch. D. 449; "Tempest" does not infringe "Hurricane," as applied to lamps, *Hurricane Patent Lantern Co. v. Miller*, (Supm. Ct. Spec. T.) 56 How. Pr. (N. Y.) 234.

1. **Similarity in Main Distinguishing Feature** — *England*. — *Read v. Richardson*, 45 L. T. N. S. 54; *Apollinaris Co. v. Norrish*, 33 L. T. N. S. 242; *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 22 L. T. N. S. 260, 42 L. J. Ch. 130, 23 L. T. N. S. 443, 27 L. T. N. S. 393; *Edelston v. Edelston*, 9 Jur. N. S. 479, 7 L. T. N. S. 768; *Orr Ewing v. Johnston*, 13 Ch. D. 434, 7 App. Cas. 219; *Blackwell v. Crabb*, 36 L. J. Ch. 504; *Singer Mfg. Co. v. Wilson*, 2 Ch. D. 443.

*United States*. — *Saxlehner v. Eisner*, etc., Co., 179 U. S. 19, *reversing* (C. C. A.) 91 Fed. Rep. 536; *Kentucky Distilleries, etc., Co. v. Wathen*, 110 Fed. Rep. 644; *International Silver Co. v. Simeon L. & George H. Rogers Co.*, 110 Fed. Rep. 955; *N. K. Fairbank Co. v. Luckel*, (C. C. A.) 102 Fed. Rep. 327; *Johnson v. Bauer*, (C. C. A.) 82 Fed. Rep. 662, *reversing* 79 Fed. Rep. 954; *Cook, etc., Co. v. Koss*, 73 Fed. Rep. 203; *Hutchinson v. Blumberg*, 51 Fed. Rep. 829; *G. G. White Co. v. Miller*, 50 Fed. Rep. 277; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94; *Sawyer Crystal Blue Co. v. Hubbard*, 32 Fed. Rep. 389. *Compare De Long Hook, etc., Co. v. Francis Hook, etc., Co.*, 118 Fed. Rep. 938.

*Connecticut*. — *Boardman v. Meriden Britannia Co.*, 35 Conn. 402, 95 Am. Dec. 270.

*Indiana*. — *Keller v. B. F. Goodrich Co.*, 117 Ind. 556, 10 Am. St. Rep. 88.

*Missouri*. — *American Brewing Co. v. St. Louis Brewing Co.*, 47 Mo. App. 14; *Filley v. Fassett*, 44 Mo. 168, 100 Am. Dec. 275.

*New York*. — *Williams v. Spence*, (N. Y.) Super. Ct. Spec. T.) 25 How. Pr. (N. Y.) 366; *Barrett Chemical Co. v. Stern*, 56 N. Y. App. Div. 143; *Hegeman v. O'Byrne*, 9 Daly (N. Y.) 264; *Dunlap v. Young*, 68 N. Y. App. Div. 138; *Kassel v. Jeuda*, 61 N. Y. App. Div. 613.

*Pennsylvania*. — *Pratt's Appeal*, 117 Pa. St. 401, 2 Am. St. Rep. 676.

"Whatever words or descriptions he used on his labels, he should not have used the one word which would prove injurious to the plaintiffs." *Per Malins, V. C.*, in *Wotherspoon v. Currie*, 22 L. T. N. S. 260.

2. **Cumulation of Resemblances or Differences** — *England*. — *Lever v. Goodwin*, 36 Ch. D. 1; *Schweitzer v. Atkins*, 37 L. J. Ch. 847, 19 L. T. N. S. 6, 16 W. R. 1080; *Wolfe v. Hart*, 4 Vict. L. R. Eq. 125.

*United States*. — *Frese v. Bachof*, 14 Blatchf. (U. S.) 432; *Moorman v. Hoge*, 2 Sawy. (U. S.) 78; *Sterling Remedy Co. v. Spermine Medical Co.*, (C. C. A.) 112 Fed. Rep. 1000; *Lalance, etc., Mfg. Co. v. National Enameling, etc., Co.*, 109 Fed. Rep. 317; *Centaur Co. v. Neathery*, (C. C. A.) 91 Fed. Rep. 899; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94; *Glen Cove Mfg. Co. v. Ludeling*, 22 Fed. Rep. 823.

*California*. — *Pierce v. Guittard*, 68 Cal. 68, 58 Am. Rep. 1.

*New Jersey*. — *Wirtz v. Eagle Bottling Co.*, 50 N. J. Eq. 164.

*New York*. — *Fischer v. Blank*, 138 N. Y. 244; *Williams v. Spence*, (N. Y. Super. Ct. Spec. T.) 25 How. Pr. (N. Y.) 366; *Ft. Stanwix Canning Co. v. William McKinley Canning Co.*, 49 N. Y. App. Div. 566; *Monopol Tobacco Works v. Gensior*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 87; *Jerome v. Johnson*, (Supm. Ct. Spec. T.) 59 N. Y. Supp. 859.

*Ohio*. — *Cigar Makers' International Union v. Burkhardt*, 9 Ohio Dec. 459, 6 Ohio N. P. 342.

In *Rodgers v. Nowill*, 6 Hare 325, 5 C. B. 109, 57 E. C. L. 109, 17 L. J. C. Pl. 52, 11 Jur. 1039, 10 L. T. N. S. 88, an action was directed to be brought, the court saying: "The court will consider, whether, taking all the names together, it is or not apparent that there is such a deceptive quality as is likely to produce the injury complained of."

3. **Immaterial Variations**. — *Wellman, etc., Tobacco Co. v. Ware Tobacco-Works*, 46 Fed. Rep. 289; *Sawyer Crystal Blue Co. v. Hubbard*, 32 Fed. Rep. 389; *Hostetter v. Adams*, 10 Fed. Rep. 838; *Frazier v. Frazier Lubricator Co.*, 18 Ill. App. 450; *Godillot v. Hazard*, (N. Y. Super. Ct. Spec. T.) 49 How. Pr. (N. Y.) 5, 81 N. Y. 263; *Brown v. Mercer*, 37 N. Y. Super. Ct. 265; *Feder v. Brundo*, 8 Ohio Dec. 179, 5 Ohio N. P. 275; *Davis v. Kendall*, 2 R. I. 566.

"A variation must be regarded as immaterial which it requires a close inspection to detect." *Fetridge v. Wells*, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 144. See also *Merrimack Mfg. Co. v. Garner*, (C. Pl. Gen. T.) 2 Abb. Pr. (N. Y.) 318.

4. **Circumstances to Be Considered** — *England*. — *Massam v. Thorley's Cattle Food Co.*, 14 Ch. D. 748; *Croft v. Day*, 7 Beav. 84; *Edelsten v. Vick*, 11 Hare 78, 1 Eq. R. 413; *Walter v. Emmott*, 54 L. J. Ch. 1059.

*United States*. — *Hostetter v. Vowinkle*, + *Dill*, (U. S.) 329; *Enoch Morgan's Sons Co. v. Whittier-Coburn Co.*, 118 Fed. Rep. 657; *Daviss County Distilling Co. v. Martinoni*, 117 Fed. Rep. 186; *Kostering v. Seattle Brewing, etc., Co.*, (C. C. A.) 116 Fed. Rep. 620; *Wellman, etc., Tobacco Co. v. Ware Tobacco-Works*,

general effect upon the eye is often given controlling effect.<sup>1</sup> The packages and labels must be considered as a whole.<sup>2</sup>

*e.* ACTUAL DECEPTION UNNECESSARY. — It is unnecessary to show that any one has been actually deceived by the similarity.<sup>3</sup> The similarity will be enjoined if its natural and probable tendency is to deceive and mislead.<sup>4</sup>

46 Fed. Rep. 289; *Myers v. Theller*, 38 Fed. Rep. 607; *Carbolic Soap Co. v. Thompson*, 25 Fed. Rep. 625. But see *N. K. Fairbank Co. v. Luckel*, (C. C. A.) 102 Fed. Rep. 327.

*Illinois*. — *Frazer v. Frazer Lubricator Co.*, 18 Ill. App. 450.

*Missouri*. — *Conrad v. Joseph Uhrig Brewing Co.*, 8 Mo. App. 277.

*New Jersey*. — *Wirtz v. Eagle Bottling Co.*, 50 N. J. Eq. 164.

*New York*. — *Lea v. Wolf*, (Supm. Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 389, 15 Abb. Pr. N. S. (N. Y.) 1; *Electro-Silicon Co. v. Trask*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 189; *Bininger v. Wattles*, (C. Pl. Spec. T.) 28 How. Pr. (N. Y.) 206; *Potter v. McPherson*, 21 Hun (N. Y.) 559; *Williams v. Johnson*, 2 Bosw. (N. Y.) 1; *Lockwood v. Bostwick*, 2 Daly (N. Y.) 521; *Brown v. Mercer*, 37 N. Y. Super. Ct. 265.

*Ohio*. — *Brown Bros. Co. v. Bucher, etc., Co.*, 9 Ohio Dec. 362, 6 Ohio N. P. 379.

See *supra*, this section, *Test of Infringement or Unfair Competition*, and *supra*, III. 2. *Particular Words, Names, Marks, or Symbols*.

1. **General Effect upon the Eye.** — *Harper v. Wright, etc., Lamp Mfg. Co.*, (1896) 1 Ch. 142; *Edelsten v. Vick*, 11 Hare 78; *National Biscuit Co. v. Swick*, 121 Fed. Rep. 1007; *Royal Baking Powder Co. v. Davis*, 26 Fed. Rep. 293; *Hostetter v. Adams*, 10 Fed. Rep. 838; *Fischer v. Blank*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 65, 138 N. Y. 245.

2. **Consideration as a Whole.** — *P. Lorillard Co. v. Peper*, (C. C. A.) 86 Fed. Rep. 956.

3. **Actual Deception Unnecessary** — *England*. — *Reddaway v. Bentham Hemp-Spinning Co.*, (1892) 2 Q. B. 639; *Johnston v. Orr-Ewing*, 7 App. Cas. 219; *Walter v. Emmott*, 54 L. J. Ch. 1059; *Blöfeld v. Payne*, 4 B. & Ad. 410, 24 E. C. L. 87.

*United States*. — *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 63, *per* Clifford, J.; *Samuel v. Hostetter Co.*, (C. C. A.) 118 Fed. Rep. 257; *Kentucky Distilleries, etc., Co. v. Wathen*, 110 Fed. Rep. 645; *Fuller v. Huff*, (C. C. A.) 104 Fed. Rep. 141; *Collinsplatt v. Finlayson*, 88 Fed. Rep. 693; *Cuervo v. Landauer*, 63 Fed. Rep. 1003; *Von Mumm v. Frash*, 56 Fed. Rep. 830.

*Illinois*. — *Eckhart v. Consolidated Milling Co.*, 72 Ill. App. 70.

*Missouri*. — *Liggett, etc., Tobacco Co. v. Sam Reid Tobacco Co.*, 104 Mo. 53, 24 Am. St. Rep. 313; *Filley v. Fassett*, 44 Mo. 168, 100 Am. Dec. 275; *Williamson Corset, etc., Co. v. Western Corset Co.*, 70 Mo. App. 424; *Drummond Tobacco Co. v. Addison Tinsley Tobacco Co.*, 52 Mo. App. 10.

*New York*. — *Vulcan v. Myers*, 130 N. Y. 364; *Roy Watch Case Co. v. Camm-Roy Watch Case Co.*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 45; *McLoughlin v. Singer*, 33 N. Y. App. Div. 185.

*Pennsylvania*. — *Shaw v. Pilling*, 175 Pa. St. 78.

*Rhode Island*. — *Armington v. Palmer*, 21 R. I. 109, 79 Am. St. Rep. 786.

*Wisconsin*. — *Tomah Bank v. Warren*, 94 Wis. 151.

4. **Probable Deception Sufficient** — *England*. — *Payton v. Snelling*, (1901) A. C. 308, 70 L. J. Ch. 644, 85 L. T. N. S. 287; *Manchester Brewery Co. v. North Cheshire, etc., Brewery Co.*, (1898) 1 Ch. 539, 67 L. J. Ch. 351, 78 L. T. N. S. 537; *Cope v. Evans*, L. R. 18 Eq. 138, 30 L. T. N. S. 292; *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 22 L. T. N. S. 260, 18 W. R. 562, 942, 42 L. J. Ch. 130, 23 L. T. N. S. 443, 27 L. T. N. S. 393; *Lever v. Goodwin*, 36 Ch. D. 1; *Rodgers v. Nowill*, 6 Hare 325, 5 C. B. 109, 57 E. C. L. 109; *Accident Ins. Co. v. Accident, etc., Ins. Co.*, 54 L. J. Ch. 104; *Johnston v. Orr-Ewing*, 7 App. Cas. 219; *Welch v. Knott*, 4 Kay & J. 747, 4 Jur. N. S. 330.

*Canada*. — *Whitney v. Hickling*, 5 Grant Ch. (U. C.) 605.

*United States*. — *McLean v. Fleming*, 96 U. S. 245; *Walton v. Crowley*, 3 Blatchf. (U. S.) 440; *Allen B. Wrisley Co. v. Iowa Soap Co.*, (C. C. A.) 122 Fed. Rep. 796; *Bauer v. La Société, etc.*, (C. C. A.) 120 Fed. Rep. 74; *Van Hoboken v. Mohns*, 112 Fed. Rep. 528; *Kentucky Distilleries, etc., Co. v. Wathen*, 110 Fed. Rep. 644; *Lalance, etc., Mfg. Co. v. National Enameling, etc., Co.*, 109 Fed. Rep. 317; *Hansen v. Siegel-Cooper Co.*, 106 Fed. Rep. 690; *Fuller v. Huff*, (C. C. A.) 104 Fed. Rep. 141; *Little v. Kellam*, 100 Fed. Rep. 353; *Thomas G. Plant Co. v. May Co.*, 100 Fed. Rep. 72; *Collinsplatt v. Finlayson*, 88 Fed. Rep. 693; *Centauro Co. v. Killenberger*, 87 Fed. Rep. 725; *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, (C. C. A.) 77 Fed. Rep. 869; *Cuervo v. Owl Cigar Co.*, 68 Fed. Rep. 541; *Jennings v. Johnson*, 37 Fed. Rep. 364; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94; *Royal Baking Powder Co. v. Davis*, 26 Fed. Rep. 293; *Southern White Lead Co. v. Cary*, 25 Fed. Rep. 125; *Humphreys' Specific Homeopathic Medicine Co. v. Wenz*, 14 Fed. Rep. 250; *Rodgers v. Philp*, 1 Pat. Off. Gaz. 29.

*Connecticut*. — *Bradley v. Norton*, 33 Conn. 157, 87 Am. Dec. 200.

*Georgia*. — *Foster v. Blood Balm Co.*, 77 Ga. 216.

*Illinois*. — *Eckhart v. Consolidated Milling Co.*, 72 Ill. App. 70.

*Iowa*. — *Shaver v. Shaver*, 54 Iowa 208, 37 Am. Rep. 194.

*Kentucky*. — *Rains v. White*, 107 Ky. 114.

*Massachusetts*. — *Samuels v. Spitzer*, 177 Mass. 226.

*Michigan*. — *Penberthy Injector Co. v. Lee*, 120 Mich. 174.

*Missouri*. — *Liggett, etc., Tobacco Co. v. Sam Reid Tobacco Co.*, 104 Mo. 53, 24 Am. St. Rep. 313; *Filley v. Fassett*, 44 Mo. 168, 100



Proof of actual deception is important, however, as showing that the similarity is, in fact, sufficiently great to deceive the public and injure the plaintiff. It substitutes certainty for probability, and in close cases the presence or absence of such proof may be sufficient to turn the scales one way or the other.<sup>1</sup>

*f. FRAUDULENT INTENT — Technical Trademarks.* — It is well settled that in the case of technical trademarks an infringement will be restrained irrespective of the question of intention on the part of the defendant.<sup>2</sup> This is sometimes

Am. Dec. 275; *Sanders v. Jacob*, 20 Mo. App. 96.

*New Jersey.* — *Stirling Silk Mfg. Co. v. Sterling Silk Co.*, 59 N. J. Eq. 394.

*New York.* — *Vulcan v. Myers*, 139 N. Y. 364; *Colman v. Crump*, 70 N. Y. 573; *Brooklyn White Lead Co. v. Masury*, 25 Barb. (N. Y.) 416; *Godillot v. Hazard*, (N. Y. Super. Ct. Spec. T.) 49 How. Pr. (N. Y.) 5, 81 N. Y. 263; *Tuerk Hydraulic Power Co. v. Tuerk*, 92 Hun (N. Y.) 65; *Vulcan v. Myers*, 58 Hun (N. Y.) 161; *Potter v. McPherson*, 21 Hun (N. Y.) 559; *Commercial Advertising Assoc. v. Haynes*, 26 N. Y. App. Div. 279; *Bolen, etc., Mfg. Co. v. Jonassch*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 99; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Thornton v. Crowley*, 47 N. Y. Super. Ct. 527; *Falk v. American West Indies Trading Co.*, 71 N. Y. App. Div. 320.

*Pennsylvania.* — *Shaw v. Pilling*, 175 Pa. St. 78; *Dreydoppel v. Young*, 14 Phila. (Pa.) 226, 37 Leg. Int. (Pa.) 397; *Day v. Walls*, 12 Phila. (Pa.) 274, 34 Leg. Int. (Pa.) 418; *Colton v. Thomas*, 7 Phila. (Pa.) 257, 2 Brews. (Pa.) 308; *Hires v. Hires*, 6 Pa. Dist. 285; *Shepp v. Jones*, 3 Pa. Dist. 539; *Clark, etc., Co. v. Scott*, 4 Lack. Leg. N. (Pa.) 159.

*Wisconsin.* — *Listman Mill Co. v. William Listman Milling Co.*, 88 Wis. 334, 43 Am. St. Rep. 907.

See also *supra*, this section, *Test of Infringement or Unfair Competition*.

**1. Actual Deception an Important Consideration** — *England.* — *Borthwick v. Evening Post*, 37 Ch. D. 449; *Boulnois v. Peake*, 13 Ch. D. 513, note; *Lee v. Haley*, L. R. 5 Ch. 155; *Lever v. Beddingfield*, 80 L. T. N. S. 100; *Cowen v. Hulton*, 46 L. T. N. S. 897.

*Canada.* — *Pabst Brewing Co. v. Ekers*, 21 Quebec Super. Ct. 545.

*United States.* — *National Biscuit Co. v. Swick*, 121 Fed. Rep. 1007; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. Rep. 357; *Stevens Linen Works v. Don*, 121 Fed. Rep. 171; *Kipling v. Putnam*, (C. C. A.) 120 Fed. Rep. 631; *Postum Cereal Co. v. American Health Food Co.*, (C. C. A.) 119 Fed. Rep. 848, *affirming* 109 Fed. Rep. 898; *Gannett v. Ruppert*, 119 Fed. Rep. 221; *Davies County Distilling Co. v. Martinoni*, 117 Fed. Rep. 186; *Peck v. Peck Bros. Co.*, (C. C. A.) 113 Fed. Rep. 301; *Halstead v. Houston*, 111 Fed. Rep. 376; *Pfeiffer v. Wilde*, (C. C. A.) 107 Fed. Rep. 456; *N. K. Fairbank Co. v. Luckel*, (C. C. A.) 102 Fed. Rep. 327; *Continental Ins. Co. v. Continental Fire Assoc.*, 96 Fed. Rep. 846; *Kroppf v. Furst*, 94 Fed. Rep. 150; *Centaur Co. v. Marshall*, 92 Fed. Rep. 605; *Van Camp Packing Co. v. Cruickshanks Bros. Co.*, (C. C. A.) 90 Fed. Rep. 814; *Kann v. Diamond Steel Co.*, (C. C. A.) 89 Fed. Rep.

706; *Investor Pub. Co. v. Dobinson*, 82 Fed. Rep. 56; *Putnam Nail Co. v. Ausable Horse-nail Co.*, 53 Fed. Rep. 390; *Cleveland Stone Co. v. Wallace*, 52 Fed. Rep. 431; *Jennings v. Johnson*, 37 Fed. Rep. 364. See *Osgood v. Allen, Holmes* (U. S.) 185. But see *P. Lorillard Co. v. Peper*, (C. C. A.) 86 Fed. Rep. 956.

*Massachusetts.* — *Viano v. Baccigalupo*, 183 Mass. 160.

*Missouri.* — *Drummond Tobacco Co. v. Addison Tinsley Tobacco Co.*, 52 Mo. App. 10; *Sanders v. Jacob*, 20 Mo. App. 96.

*New York.* — *De Long v. De Long Hook, etc., Co.*, 89 Hun (N. Y.) 399; *Babbitt v. Brown*, 68 Hun (N. Y.) 515; *Hildreth v. McCaul*, 70 N. Y. App. Div. 162; *American Novelty, etc., Co. v. Manufacturing Electrical Novelty Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 450; *Commercial Advertising Assoc. v. Haynes*, 26 N. Y. App. Div. 279; *Brown v. Mercer*, 37 N. Y. Super. Ct. 265.

*Pennsylvania.* — *Arthur v. Howard*, 19 Pa. Co. Ct. 81.

*Wisconsin.* — *Oppermann v. Waterman*, 04 Wis. 583.

**2. Intent Immaterial in Trademark Cases** — *England.* — *Singer Mfg. Co. v. Loog*, 18 Ch. D. 395; *Orr Ewing v. Johnston*, 13 Ch. D. 434, 7 App. Cas. 219; *Singer Mfg. Co. v. Wilson*, 2 Ch. D. 434, 45 L. J. Ch. 491; *Wotherspoon v. Currie*, L. R. 5 H. L. 512; *Woollam v. Ratcliff*, 1 Hem. & M. 259; *Clement v. Maddick*, 1 Giff. 98, 5 Jur. N. S. 592, 33 L. T. N. S. 117; *Dixon v. Fawcus*, 3 El. & El. 537, 107 E. C. L. 537, 7 Jur. N. S. 895; *Welch v. Knott*, 4 Kay & J. 747, 4 Jur. N. S. 330; *Singer Mach. Manufacturers v. Wilson*, 3 App. Cas. 376; *Moet v. Couston*, 33 Beav. 578, 10 L. T. N. S. 395; *Cope v. Evans*, L. R. 18 Eq. 143; *Clark, etc., Co. v. Scott*, 4 Lack. Leg. N. (Pa.) 159; *Millington v. Fox*, 3 Myl. & C. 338.

*United States.* — *Saxlehner v. Siegel-Cooper Co.*, 179 U. S. 42; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 63, *per* Clifford, J.; *McLean v. Fleming*, 96 U. S. 245; *Welsbach Light Co. v. Adam*, 107 Fed. Rep. 463; *Manitowoc Pea-Packing Co. v. Numsen*, (C. C. A.) 93 Fed. Rep. 196; *Cuervo v. Landauer*, 63 Fed. Rep. 1003; *Liggett, etc., Tobacco Co. v. Hynes*, 20 Fed. Rep. 883.

*Florida.* — *El Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 23 Am. St. Rep. 537.

*Illinois.* — *Eckhart v. Consolidated Milling Co.*, 72 Ill. App. 70.

*Maryland.* — *Stonebraker v. Stonebraker*, 33 Md. 268.

*Massachusetts.* — *Viano v. Baccigalupo*, 183 Mass. 160.

*Missouri.* — *Liggett, etc., Tobacco Co. v. Sam Reid Tobacco Co.*, 104 Mo. 53, 24 Am. St.

placed upon the ground that the essence of the wrong lies in the injury to the property right of the plaintiff in the trademark.<sup>1</sup>

**Unfair Competition.** — In cases of unfair competition, however, not involving the infringement of any technical trademark or exclusive property interest of the plaintiff in the words or marks used, it is frequently said that a fraudulent intention on the part of the defendant to pass off his goods or business as the goods or business of the plaintiff is of the essence of the cause of action;<sup>2</sup> though it is also held that such intent will be presumed from a similarity close enough to cause actual or probable deception or damage, upon the principle that persons are held to have intended the natural and probable consequences of their acts.<sup>3</sup> The better view, however, is that there is no distinction in this respect

Rep. 313; *Filley v. Fassett*, 44 Mo. 168, 100 Am. Dec. 275; *McCann v. Anthony*, 21 Mo. App. 83.

*New Jersey.* — *Mrs. G. B. Miller & Co. Tobacco Manufactory v. Commerce*, 45 N. J. L. 18, 46 Am. Rep. 750.

*New York.* — *Vulcan v. Myers*, 139 N. Y. 364; *Colman v. Crump*, 70 N. Y. 573; *Falk v. American West Indies Trading Co.*, 71 N. Y. App. Div. 320; *Electro-Silicon Co. v. Hazard*, 29 Hun (N. Y.) 369; *American Grocer Pub. Assoc. v. Grocer Pub. Co.*, 25 Hun (N. Y.) 398.

*North Carolina.* — *Blackwell v. Wright*, 73 N. Car. 313.

*Pennsylvania.* — *Shaw v. Pilling*, 175 Pa. St. 78; *Brown v. Seidel*, 153 Pa. St. 60, *per* Mitchell, J.; *Pratt's Appeal*, 117 Pa. St. 401, 2 Am. St. Rep. 676.

*Rhode Island.* — *Cady v. Schultz*, 19 R. I. 193, 61 Am. St. Rep. 763.

Relief will be granted even against a person who merely has in his possession a quantity of goods bearing a spurious trademark, and intends not to part with them, but use them for his own consumption. *Upmann v. Forester*, 24 Ch. D. 231.

**1. Reason for Rule.** — *Clement v. Maddick*, 1 Giff. 98, 5 Jur. N. S. 592, 33 L. T. N. S. 117; *De Youngs v. Jung*, (C. Pl. Spec. T.) 25 N. Y. Supp. 479, 7 Misc. (N. Y.) 56; C. F. Simmons Medicine Co. v. Mansfield Drug Co., 93 Tenn. 84.

In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, the court said: "The jurisdiction to restrain the use of a trademark rests upon the ground of the plaintiff's property in it and of the defendant's unlawful use thereof. *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69, 19 Am. Rep. 310. If the absolute right belonging to the plaintiff, then, if an infringement were clearly shown, the fraudulent intent would be inferred and \* \* \* the further violation of the right of property would nevertheless be restrained. *McLean v. Fleming*, 96 U. S. 245; *Menendez v. Holt*, 128 U. S. 514."

**2. Unfair Competition — Fraudulent Intent Held Necessary** — *England.* — *Cheavin v. Walker*, 5 Ch. D. 850, 46 L. J. Ch. 686, 36 L. T. N. S. 938; *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 22 L. T. N. S. 260, 42 L. J. Ch. 130, 23 L. T. N. S. 443, 27 L. T. N. S. 393, *per* Chelmsford, L. J.; *Turton v. Turton*, 42 Ch. D. 128; *Blanchard v. Hill*, 2 Atk. 484.

*Canada.* — *Boston Rubber Shoe Co. v. Boston Rubber Co.*, 7 Can. Exch. 187.

*United States.* — *Baker v. Baker*, (C. C. A.) 115 Fed. Rep. 297; *Hostetter Co. v. Conron*, 111 Fed. Rep. 738; *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry-Goods Co.*, (C. C. A.) 104 Fed. Rep. 243, 92 Fed. Rep. 774; *Brennan v. Emery-Bird-Thayer Dry-Goods Co.*, 99 Fed. Rep. 971; *Illinois Watch-Case Co. v. Elgin Nat. Watch Co.*, (C. C. A.) 94 Fed. Rep. 667; *Stuart v. F. G. Stewart Co.*, (C. C. A.) 91 Fed. Rep. 243, *reversing* 85 Fed. Rep. 778; *Lamont v. Leedy*, 88 Fed. Rep. 72; *Cleveland Stone Co. v. Wallace*, 52 Fed. Rep. 431; *Ex p. Farnum*, 18 Pat. Off. Gaz. 412.

*Connecticut.* — *William Rogers Mfg. Co. v. Simpson*, 54 Conn. 527; *Rogers v. Rogers*, 53 Conn. 121, 55 Am. Rep. 78.

*Massachusetts.* — *Gilman v. Hunnewell*, 122 Mass. 139; *Hallett v. Cumston*, 110 Mass. 29.

*New York.* — *Decker v. Decker*, (Supm. Ct.) 52 How. Pr. (N. Y.) 218; *Day v. Webster*, 23 N. Y. App. Div. 601; *Gaines v. Leslie*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 20.

*Pennsylvania.* — *Brown v. Seidel*, 153 Pa. St. 60, *per* Mitchell, J.

*Rhode Island.* — *Carmichel v. Latimer*, 11 R. I. 395, 23 Am. Rep. 481.

*Tennessee.* — *C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84.

See also *Ricker v. Portland, etc., R. Co.*, 90 Me. 395.

**In an Action at Law**, fraud is of the essence of the injury and must be proved. *Crawshay v. Thompson*, 4 M. & G. 357, 43 E. C. L. 189, 5 Scott N. R. 562, 11 L. J. C. Pl. 301.

**3. Intent Presumed from Similarity.** — *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537; *Lalance, etc., Mfg. Co. v. National Enameling, etc., Co.*, 109 Fed. Rep. 317; *R. Heinisch's Sons Co. v. Boker*, 86 Fed. Rep. 765; *Cleveland Stone Co. v. Wallace*, 52 Fed. Rep. 431; *Liggett, etc., Tobacco Co. v. Hynes*, 20 Fed. Rep. 883; *Bolen, etc., Mfg. Co. v. Jonasch*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 99; *Brown v. Seidel*, 153 Pa. St. 60, *per* Mitchell, J. See *Draper v. Skerrett*, 116 Fed. Rep. 206.

"If a plaintiff has the absolute right to the use of a particular word or words as a trademark, then if an infringement is shown, the wrongful or fraudulent intent is presumed, and although allowed to be rebutted in exemption of damages, the further violation of the right of property will nevertheless be restrained. But where an alleged trademark is not in itself a good trademark, yet the use of the word has come to denote the particular manufacturer or vendor, relief against unfair competition or

between cases of infringement of trademark and cases of unfair competition. In either case the injury to the plaintiff, and hence the essence of the wrong, consists in the violation of his property interest in his good will and reputation, rather than of any property interest in any particular words or marks as such. If the defendant's conduct results in depriving the plaintiff of the full benefits of his good will and reputation, the wrong and injury are complete irrespective of any question as to the defendant's intent or motive. Accordingly, if the name, marks, or dress of goods adopted by the defendant are sufficiently similar to those adopted by the plaintiff, to cause deception and confusion, proof of an actual fraudulent intent is unnecessary.<sup>1</sup> Even if the resemblance is accidental and not intentional, the plaintiff is entitled to protection against its injurious results to his trade.<sup>2</sup> And a subsequent use of the name or style persisted in with knowledge of the facts would clearly be a fraudulent use.<sup>3</sup> The reasons given in many cases for not requiring proof of fraudulent intent in the case of technical trademarks apply equally well to cases of unfair competition.<sup>4</sup>

**Effect of Fraudulent Intent.** — Proof of an actual fraudulent intent is, however, an important element in this class of cases, and its presence or absence will often be decisive in close cases. Equity will enjoin an actual attempt to pass off one man's goods or business as the goods or business of another. Accordingly, whenever there is an actual fraudulent intent upon the part of the defendant so to pass off his goods or business, and means have been adopted to carry that intent into effect, an injunction will be granted without any very close scrutiny as to the sufficiency of the means adopted to produce the result intended.<sup>5</sup> The absence of any evidence of an intention to deceive is often

perfidious dealing will be awarded by requiring the use of the word by another to be confined to its primary sense by such limitations as will prevent misapprehension on the question of origin. In the latter class of cases such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of." *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 674, citing *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; *Coats v. Merrick Thread Co.*, 149 U. S. 562; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537.

**1. Actual Fraudulent Intent Unnecessary** — *England*. — *Powell v. Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 79; *Reddaway v. Bentham Hemp-Spinning Co.*, (1892) 2 Q. B. 639; *Guardian Fire, etc., Assur. Co. v. Guardian, etc., Ins. Co.*, 50 L. J. Ch. 253; *Wotherpoon v. Currie*, L. R. 5 H. L. 508, 22 L. T. N. S. 260, 42 L. J. Ch. 130, 23 L. T. N. S. 443, 27 L. T. N. S. 393; *Singer Mach. Manufacturers v. Wilson*, 3 App. Cas. 389, 47 L. J. Ch. 481; *Welch v. Knott*, 4 Kay & J. 747, 4 Jur. N. S. 330; *Millington v. Fox*, 3 Myl. & C. 338.

*United States*. — *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. Rep. 357; *Enoch Morgan's Sons Co. v. Whittier-Coburn Co.*, 118 Fed. Rep. 657; *Sterling Remedy Co. v. Spermine Medical Co.*, (C. C. A.) 112 Fed. Rep. 1000; *Halstead v. Houston*, 111 Fed. Rep. 376; *N. K. Fairbank Co. v. Luckel*, (C. C. A.) 102 Fed. Rep. 327; *Coffeen v. Brunton*, 4 McLean (U. S.) 516; *Le Page Co. v. Russia Cement Co.*, 51 Fed. Rep. 941, 5 U. S. App. 112. See *Gannett v. Ruppert*, 119 Fed. Rep. 221.

*Massachusetts*. — *Viano v. Baccigalupo*, 183 Mass. 160. See also *New England Awl, etc., Co. v. Marlborough Awl, etc., Co.*, 168 Mass. 154, 60 Am. St. Rep. 377.

*Missouri*. — *McCann v. Anthony*, 21 Mo. App. 83; *Sanders v. Jacob*, 20 Mo. App. 96.

*New York*. — *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 43 Am. St. Rep. 769, reversing 71 Hun (N. Y.) 101; *Amoskeag Mfg. Co. v. Garner*, (Supm. Ct. Spec. T.) 54 How. Pr. (N. Y.) 299; *Roy Watch Case Co. v. Camm-Roy Watch-Case Co.*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 45; *Clinton Metallic Paint Co. v. New York Metallic Paint Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 66.

*Pennsylvania*. — *Colton v. Thomas*, 2 Brews. (Pa.) 308; *Clark, etc., Co. v. Scott*, 4 Lack. Leg. N. (Pa.) 159.

*Rhode Island*. — *Armington v. Palmer*, 21 R. I. 109, 79 Am. St. Rep. 786.

See Kerly, *Trademarks*, p. 13 *et seq.*, wherein the *English* cases are reviewed.

**2.** *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Dreydoppel v. Young*, 14 Phila. (Pa.) 226, 37 Leg. Int. (Pa.) 397. See *Johnston v. Orr Ewing*, 7 App. Cas. 219.

**3.** *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599.

**4. Reasoning in Trademark Cases Applicable to Unfair Competition.** — See *Singer Mach. Manufacturers v. Wilson*, 3 App. Cas. 376. See generally the trademark cases, cited *supra*, this section.

**5. Actual Fraud Presents Clear Case for Relief** — *England*. — *Reddaway v. Banham*, (1896) A. C. 199, (1895) 1 Q. B. 286; *Lee v. Haley*, L. R. 5 Ch. 155; *Massam v. Thorley's Cattle Food Co.*, 14 Ch. D. 748. But see *Lever v. Beddingfield*, 80 L. T. N. S. 100.



alluded to in denying an injunction where the similarity complained of is not sufficient to cause any confusion or deception.<sup>1</sup> Even in the case of techni-

*Canada.*—Vive Camera Co. v. Hogg, 18 Quebec Super. Ct. 1.

*United States.*—Royal Baking Powder Co. v. Royal, (C. C. A.) 122 Fed. Rep. 337; Bauer v. La Societe, etc., (C. C. A.) 120 Fed. Rep. 74; Gannett v. Ruppert, 119 Fed. Rep. 221; Computing Scale Co. v. Standard Computing Scale Co., (C. C. A.) 118 Fed. Rep. 965; Enoch Morgan's Sons Co. v. Whittier-Coburn Co., 118 Fed. Rep. 657; Swift v. Groff, 114 Fed. Rep. 605; International Silver Co. v. Wm. G. Rogers Co., 113 Fed. Rep. 526; Peck v. Peck Bros. Co., (C. C. A.) 113 Fed. Rep. 302; Sterling Remedy Co. v. Spermin Medical Co., (C. C. A.) 112 Fed. Rep. 1000; Lalance, etc., Mfg. Co. v. National Enameling, etc., Co., 109 Fed. Rep. 317; Thomas G. Plant Co. v. May Co., 100 Fed. Rep. 72, (C. C. A.) 105 Fed. Rep. 375; Charles E. Hires Co. v. Consumers' Co., (C. C. A.) 100 Fed. Rep. 809; Continental Ins. Co. v. Continental Fire Assoc., 96 Fed. Rep. 846; Draper v. Skerrett, 94 Fed. Rep. 912; Centaur Co. v. Robinson, 91 Fed. Rep. 891; Burnett v. Hahn, 88 Fed. Rep. 694; Collinsplatt v. Finlayson, 88 Fed. Rep. 693; Saxlehner v. Neilsen, (C. C. A.) 91 Fed. Rep. 1004, *modifying* decree 88 Fed. Rep. 71; Centaur Co. v. Killenberger, 87 Fed. Rep. 725; R. Heinisch's Sons Co. v. Boker, 86 Fed. Rep. 765; Von Mumm v. Wittemann, 85 Fed. Rep. 966; Hostetter Co. v. Sommers, 84 Fed. Rep. 333; Pennsylvania Salt Mfg. Co. v. Myers, 79 Fed. Rep. 87; N. K. Fairbank Co. v. R. W. Bell Mfg. Co., (C. C. A.) 77 Fed. Rep. 869, *reversing* 71 Fed. Rep. 295; Buck's Stove, etc., Co. v. Kiechle, 76 Fed. Rep. 758; Clark Thread Co. v. Armitage, (C. C. A.) 74 Fed. Rep. 936; Meyer v. Dr. B. L. Bull Vegetable Medicine Co., (C. C. A.) 58 Fed. Rep. 884; Von Mumm v. Frash, 56 Fed. Rep. 830; Putnam Nail Co. v. Bennett, 43 Fed. Rep. 800; Brown Chemical Co. v. Stearns, 37 Fed. Rep. 360; Southern White Lead Co. v. Cary, 25 Fed. Rep. 125; Landreth v. Landreth, 22 Fed. Rep. 41; Sawyer v. Horn, 1 Fed. Rep. 24; Taylor v. Carpenter, 3 Story (U. S.) 458; Kinney v. Basch, 16 Am. L. Reg. N. S. 506. See also Taylor v. Carpenter, 2 Woodb. & M. (U. S.) 1. But see Von Mumm v. Wittemann, 85 Fed. Rep. 966.

*California.*—Schmidt v. Brieg, 100 Cal. 672.

*Florida.*—El Modello Cigar Mfg. Co. v. Gato, 25 Fla. 886, 23 Am. St. Rep. 537.

*Georgia.*—Whitley Grocery Co. v. McCaw Mfg. Co., 105 Ga. 839.

*Illinois.*—Allegretti v. Allegretti Chocolate Cream Co., 177 Ill. 129, *affirming* Rubel v. Allegretti Chocolate Cream Co., 76 Ill. App. 581; O'Kane v. West End Dry Goods Store, 72 Ill. App. 297.

*Massachusetts.*—Samuels v. Spitzer, 177 Mass. 226.

*Missouri.*—Drummond Tobacco Co. v. Addison Tinsury Tobacco Co., 52 Mo. App. 10; Sanders v. Jacob, 20 Mo. App. 96.

*New York.*—Tuerk Hydraulic Power Co. v. Tuerk, 92 Hun (N. Y.) 65; Gebbie v. Stiitt, 82

Hun (N. Y.) 93; Kassel v. Jeuda, 61 N. Y. App. Div. 613; Dunlap v. Young, 68 N. Y. App. Div. 138; Reckitt v. Kellogg, 28 N. Y. App. Div. 111; Charles S. Higgins Co. v. Amalga Soap Co., (Brooklyn City Ct. Gen. T.) 10 Misc. (N. Y.) 268; Cook v. Starkweather, (N. Y. Super. Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 392; Fetridge v. Merchant, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 156; Amoskeag Mfg. Co. v. Spear, 2 Sandf. (N. Y.) 599. See also Taylor v. Carpenter, 2 Sandf. Ch. (N. Y.) 603, *affirmed* 11 Paige (N. Y.) 292, 42 Am. Dec. 114. But see Tallcot v. Moore, 6 Hun (N. Y.) 106; Cox's Manual of Trademark Cases 478.

*Pennsylvania.*—Hires v. Hires, 6 Pa. Dist. 285; Shepp v. Jones, 3 Pa. Dist. 539.

*Tennessee.*—C. F. Simmons Medicine Co. v. Mansfield Drug Co., 93 Tenn. 84.

*Texas.*—Alff v. Radam, 77 Tex. 530, 19 Am. St. Rep. 792.

In *Duniway Pub. Co. v. Northwest Printing, etc.*, Co., 11 Oregon 322, it was held that the title "The Northwest News" was no piracy of the title "The New Northwest." No fraud was alleged. Waldo, J., said: "But in such case [*i. e.*, absence of fraud] the title of the defendant's paper must so closely simulate that of the plaintiff's that an infringement may be declared by the court as matter of law, or else the simulation must be proven as a fact."

In *Woolam v. Ratcliff*, 1 Hem. & M. 259, Wood, V. C., said: "In this case the plaintiff has a peculiar mode of making up his goods. This is not precisely a trademark." Later he said: "There is the express direction to the defendant to imitate the plaintiff's bundle. This is, of course, always an element of suspicion, but I cannot treat it as conclusive."

**But a Mere Intention to Deceive Is Insufficient** to support an injunction where the similarity between the two marks is not close enough to make deception probable. *Centaur Co. v. Marshall* (C. C. A.) 97 Fed. Rep. 785; *Kann v. Diamond Steel Co.*, (C. C. A.) 89 Fed. Rep. 706; *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, (C. C. A.) 77 Fed. Rep. 869; *Tallcot v. Moore*, 6 Hun (N. Y.) 106.

**1. Absence of Fraudulent Intent—England.**—*Cowen v. Hulton*, 46 L. T. N. S. 897; *Merchant Banking Co. v. Merchants' Joint Stock Bank*, 9 Ch. D. 560, 47 L. J. Ch. 828.

*United States.*—*Stevens Linen Works v. Don*, 121 Fed. Rep. 171; *Kipling v. Putnam*, (C. C. A.) 120 Fed. Rep. 631; *Gannett v. Ruppert*, 119 Fed. Rep. 221; *Daviess County Distilling Co. v. Martinoni*, 117 Fed. Rep. 186; *Harper v. Lare*, (C. C. A.) 103 Fed. Rep. 203; *La Republique Francaise v. Schultz*, 94 Fed. Rep. 500; *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 71 Fed. Rep. 295; *Putnam Nail Co. v. Ausable Horseshoe Co.*, 53 Fed. Rep. 300.

*New York.*—*Boessneck v. Iselin*, 83 N. Y. App. Div. 290; *T. B. Dunn Co. v. Trix Mfg. Co.*, 50 N. Y. App. Div. 75; *Lavanburg v. Pfeiffer*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 690; *Snowden v. Noah, Hopk.* (N. Y.) 347, 14 Am. Dec. 547.

cal trademarks the presence or absence of a fraudulent intent may affect the relief granted.<sup>1</sup>

**Proof of Fraudulent Intent.** — Mere similarity is not, as a matter of law, conclusive evidence of an intention to deceive.<sup>2</sup> An intention to deceive may, however, be inferred, as a matter of fact, from similarity. Form, color, and general appearance may be considered. The greater the number of points of similarity, the stronger is the inference of an intentional imitation with intent to deceive.<sup>3</sup> A change from a different mark or label to one more closely resembling that of the plaintiff is strong evidence of a fraudulent intent.<sup>4</sup> The existence of a fraudulent intent is a question for the jury.<sup>5</sup>

**g. RELATIVE MERITS OF GOODS.** — It is immaterial, so far as the plaintiff's right to relief is concerned, that the defendant's goods are of equal or superior intrinsic merit. The defendant has no right to make use of the plaintiff's good will and reputation, or of the plaintiff's advertising, to sell even a superior article. Such conduct injures the plaintiff by depriving him of sales which he otherwise would have made.<sup>6</sup> But if the defendant's goods are of inferior quality the plaintiff's right to relief is strengthened, for not only is he deprived of the sale which the defendant has been thus enabled to make, but the reputation of the plaintiff's goods will be damaged, and he will be deprived of probable future sales.<sup>7</sup>

**1. Intent May Affect Relief Granted.** — See *Bass v. Dawber*, 19 L. T. N. S. 626.

A person innocently selling goods bearing the spurious trademark of another is not, in equity, liable to account for the profits made thereby, but the owner of the trademark is entitled to an injunction. *Moët v. Couston*, 33 Beav. 578, 10 L. T. N. S. 395, 4 New Reports 86.

**2. Similarity Not Conclusive of Fraudulent Intent.** — *Walter v. Emmott*, 54 L. J. Ch. 1059; *Orr Ewing v. Johnston*, 13 Ch. D. 434, 7 App. Cas. 219; *P. Lorillard Co. v. Peper*, (C. C. A.) 86 Fed. Rep. 956.

**3. Intent Inferred from Similarity** — *England*. — *Lever v. Goodwin*, 36 Ch. D. 1; *Taylor v. Taylor*, 2 Eq. Rep. 290, 23 L. J. Ch. 255, 22 L. T. N. S. 271.

*United States*. — *Moorman v. Hoge*, 2 Sawy. (U. S.) 78; *Bauer v. Siegert*, (C. C. A.) 120 Fed. Rep. 81; *Keuffel, etc., Co. v. H. S. Crocker Co.*, 118 Fed. Rep. 187; *Liebig's Extract of Meat Co. v. Walker*, 115 Fed. Rep. 822; *Peck v. Peck Bros. Co.*, (C. C. A.) 113 Fed. Rep. 298; *Kentucky Distilleries, etc., Co. v. Wathen*, 110 Fed. Rep. 641; *Sterling Remedy Co. v. Gorey*, 110 Fed. Rep. 372; *Liebig's Extract of Meat Co. v. Libby*, 103 Fed. Rep. 87; *Paris Medicine Co. v. W. H. Hill Co.*, (C. C. A.) 102 Fed. Rep. 148; *Thomas G. Plant Co. v. May Co.*, 100 Fed. Rep. 72; *Centaur Co. v. Hughes Bros. Mfg. Co.*, (C. C. A.) 91 Fed. Rep. 901; *Centaur Co. v. Neathery*, (C. C. A.) 91 Fed. Rep. 898; *Stuart v. F. G. Stewart Co.*, (C. C. A.) 91 Fed. Rep. 243; *Centaur Co. v. Robinson*, 91 Fed. Rep. 891; *R. Heinisch's Sons Co. v. Boker*, 86 Fed. Rep. 765; *Hilson Co. v. Foster*, 80 Fed. Rep. 806; *Walker v. Mikolas*, 79 Fed. Rep. 955; *Burt v. Smith*, (C. C. A.) 71 Fed. Rep. 161; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.*, (C. C. A.) 64 Fed. Rep. 841; *Humphreys' Specific Homeopathic Medicine Co. v. Wenz*, 14 Fed. Rep. 250. See *Kinney v. Basch*, 16 Am. L. Reg. N. S. 506.

*Connecticut*. — *Boardman v. Meriden Britannia Co.*, 35 Conn. 402, 95 Am. Dec. 270.

*New Jersey*. — *Centaur Co. v. Link*, 62 N. J. Eq. 147.

*New York*. — *Enoch Morgan's Sons Co. v. Troxell*, 89 N. Y. 292, 42 Am. Rep. 294, 11 Abb. N. Cas. (N. Y.) 86; *Electro-Silicon Co. v. Trask*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 189; *Fleischmann v. Schuckmann*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 92; *Lea v. Wolf*, (Supm. Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 389, 15 Abb. Pr. N. S. (N. Y.) 1, 46 How. Pr. (N. Y.) 157; *Fetridge v. Wells*, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 144; *De Long v. De Long Hook, etc., Co.*, 89 Hun (N. Y.) 399; *Babbitt v. Brown*, 68 Hun (N. Y.) 515; *American Novelty, etc., Co. v. Manufacturing Electrical Novelty Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 450; *Lockwood v. Bostwick*, 2 Daly (N. Y.) 521; *McLoughlin v. Singer*, 33 N. Y. App. Div. 185; *Fischer v. Blank*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 65.

*Pennsylvania*. — *Brown v. Seidel*, 153 Pa. St. 60.

**4. Change of Mark or Label.** — *P. Lorillard Co. v. Peper*, (C. C. A.) 86 Fed. Rep. 956; *Scheuer v. Muller*, (C. C. A.) 74 Fed. Rep. 225; *Frazier v. Dowling*, (Ky. 1897) 39 S. W. Rep. 45.

**5. Question for Jury.** — *Shaw v. Pilling*, 175 Pa. St. 78.

**6. Equal or Superior Merit of Defendant's Goods.** — *Edelsten v. Edelsten*, 1 De G. J. & S. 185, 9 Jur. N. S. 479; *Hosetetter Co. v. Martinoni*, 110 Fed. Rep. 524; *Carlsbad v. Thackeray*, 57 Fed. Rep. 18; *Cleveland Stone Co. v. Wallace*, 52 Fed. Rep. 431; *McLean v. Fleming*, 96 U. S. 245; *Cutter v. Gudebrod Bros. Co.*, 36 N. Y. App. Div. 362. But see *Castle v. Siegfried*, 103 Cal. 71.

**7. Inferior Quality of Defendant's Goods.** — *Van Hoboken v. Mohns*, 112 Fed. Rep. 528; *Burnett v. Hahn*, 88 Fed. Rep. 694; *Carlsbad v. Tibbetts*, 51 Fed. Rep. 852; *Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutillier*, (N. Y. Super. Ct. Spec. T.) 5 Misc. (N. Y.) 78; *Wamsutta Mills v. Allen*, 12 Phila. (Pa.) 535, 35 Leg. Int. (Pa.) 410; *Vive Camera Co. v. Hogg*, 18 Quebec Supr. Ct. 1.

*h.* DUTY TO AVOID UNNECESSARY CONFUSION. — A dealer coming into a field already occupied by a rival of established reputation must do nothing which will unnecessarily create or increase confusion between his goods or business and the goods or business of his rival. Owing to the nature of the goods dealt in, or the common use of terms which are *publici juris*, some confusion may be inevitable. But anything done which unnecessarily increases this confusion and damage to the established trader constitutes unfair competition.<sup>1</sup> The imitation of another's labels, marks, packages, and dress of goods is a violation of this rule.<sup>2</sup> The unnecessary adoption of a confusing name, label, or dress of goods constitutes unfair competition.<sup>3</sup> Any artifice, device, or peculiarity of arrangement adopted by the defendant which tends to increase the probability of deception, and which is not necessary for any useful or proper purpose, will be enjoined.<sup>4</sup>

*i.* AFFIRMATIVE PRECAUTIONS AGAINST CONFUSION. — Conceding that a subsequent trader has an equal right with his rival to use particular words, names, or marks, yet if he does so he must adopt affirmative precautions

**1. Unnecessary Confusion Constitutes Unfair Competition.** — *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 42 L. J. Ch. 130; *Royal Baking Powder Co. v. Royal*, (C. C. A.) 122 Fed. Rep. 337; *Sterling Remedy Co. v. Spermine Medical Co.*, (C. C. A.) 112 Fed. Rep. 1003; *Sterling Remedy Co. v. Gorey*, 110 Fed. Rep. 372; *Paris Medicine Co. v. W. H. Hill Co.*, (C. C. A.) 102 Fed. Rep. 148; *Wm. Rogers Mfg. Co. v. Rogers*, 84 Fed. Rep. 639; *Hoff v. Tarrant*, 71 Fed. Rep. 163; *Hildreth v. McCaul*, 70 N. Y. App. Div. 162.

**Use of Own Name.** — While one may have the right to use his own name honestly in his own business, for the purpose of advertising, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business, firm, or establishment, or the article produced, and thus work injury beyond that which results from mere similarity of names. *Brown Chemical Co. v. Meyer*, 139 U. S. 540; *Peck v. Peck Bros. Co.*, (C. C. A.) 113 Fed. Rep. 298. See also *infra*, this section, *Use of Personal or Corporate Names*.

**2. Imitation of Labels, Marks, or Dress of Goods.** — *Liebig's Extract of Meat Co. v. Libby*, 103 Fed. Rep. 87; *Centaur Co. v. Neathery*, (C. C. A.) 91 Fed. Rep. 891; *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, (C. C. A.) 77 Fed. Rep. 869; *Hainque v. Cyclops Iron Works*, 136 Cal. 351. See *infra*, this section, *Use of Labels, Marks, Packages, and Dress of Goods*.

**3. Unnecessary Adoption of Confusing Name or Dress of Goods — England.** — *Seixo v. Provezende*, L. R. 1 Ch. 195; *Edelsten v. Edelsten*, 1 De G. J. & S. 185.

*United States.* — *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. Rep. 357; *Swift v. Groff*, 114 Fed. Rep. 605; *International Silver Co. v. Wm. G. Rogers Co.*, 113 Fed. Rep. 526; *Peck v. Peck Bros. Co.*, (C. C. A.) 113 Fed. Rep. 302; *Lever v. Smith*, 112 Fed. Rep. 999; *International Silver Co. v. Simeon L. & George H. Rogers Co.*, 110 Fed. Rep. 955; *Wyckoff v. Howe Scale Co.*, 110 Fed. Rep. 523; *Lalance, etc., Mfg. Co. v. National Enameling, etc., Co.*, 109 Fed. Rep. 317; *Thomas G. Plant Co. v. May Co.*, (C. C. A.) 105 Fed. Rep. 375; *Fuller v. Huff*, (C. C. A.)

104 Fed. Rep. 141; *R. Heinisch's Sons Co. v. Boker*, 86 Fed. Rep. 765; *Hohner v. Gratz*, 52 Fed. Rep. 871; *Sawyer v. Kellogg*, 7 Fed. Rep. 720.

*California.* — *Hainque v. Cyclops Iron Works*, 136 Cal. 351. See *Baker v. Baker*, (C. C. A.) 115 Fed. Rep. 297.

*New York.* — *Charles S. Higgins Co. v. Amalga Soap Co.*, (Brooklyn City Ct. Gen. T.) 10 Misc. (N. Y.) 268.

*Rhode Island.* — *Armington v. Palmer*, 21 R. I. 109, 79 Am. St. Rep. 786.

See also *infra*, this section, *Corporate Names*.

**4. Artifice Tending to Deceive — England.** — *Metzler v. Wood*, 8 Ch. D. 608, 47 L. J. Ch. 625, 38 L. T. N. S. 541.

*United States.* — *Peck v. Peck Bros. Co.*, (C. C. A.) 113 Fed. Rep. 298; *Lever v. Smith*, 112 Fed. Rep. 998; *Postum Cereal Co. v. American Health Food Co.*, 109 Fed. Rep. 898; *Potter Drug, etc., Corp. v. Miller*, 75 Fed. Rep. 656; *Klotz v. Hecht*, 73 Fed. Rep. 822; *Giron v. Gartner*, 47 Fed. Rep. 467; *Glen Cove Mfg. Co. v. Ludeling*, 22 Fed. Rep. 823. But see *Waukesha Hygeia Mineral Springs Co. v. Hygeia Sparkling Distilled Water Co.*, (C. C. A.) 63 Fed. Rep. 443.

*Indiana.* — *Keller v. B. F. Goodrich Co.*, 117 Ind. 556, 10 Am. St. Rep. 88.

*New York.* — *Hildreth v. McCaul*, 70 N. Y. App. Div. 162; *De Youngs v. Jung*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 56.

*Pennsylvania.* — *Colton v. Thomas*, 7 Phila. (Pa.) 257, 2 Brews. (Pa.) 308; *Clark, etc., Co. v. Scott*, 4 Lack. Leg. N. (Pa.) 159.

"The misspelling of the word is, to say the least, as suspicious a circumstance as can be conceived." *Radde v. Norman*, L. R. 14 Eq. 348, 41 L. J. Ch. 525.

The plaintiffs were manufacturers of blacking, which they sold in bottles labeled with the words, "Manufactured by Day & Martin." The defendant sold blacking in similar bottles with similar labels, except that for the words "Manufactured by Day & Martin" were substituted the words "Equal to Day & Martin's," the words "equal to" being in very small type. An injunction was granted. *Day v. Binning*, Coop. Pr. Cas. 489, 1 Leg. Obs. 205.



sufficient to make confusion and deception improbable.<sup>1</sup>

*j.* EACH PARTY INSERTING OWN NAME. — Where otherwise the similarity between the plaintiff's and the defendant's labels, marks, or dress of goods is sufficient to constitute infringement or unfair competition, the mere fact that the defendant has substituted his own name in place of the plaintiff's will not alone constitute a defense. That is not sufficient to destroy the effect of the imitation in other respects.<sup>2</sup>

**A Fortiori**, it is not sufficient where it is so printed as probably not to attract observation.<sup>3</sup> It is, however, a circumstance of difference to be considered in connection with all other points of similarity or difference.<sup>4</sup>

*k.* NO FALSITY PERMITTED. — Where the similarity and resulting confusion are caused by any false statement or suggestion made by the defendant in connection with his goods or business, a clear case for injunction is presented. No falsity will be permitted.<sup>5</sup>

*l.* DECEPTION OF ULTIMATE BUT NOT IMMEDIATE PURCHASER. — It is immaterial that the retail dealer or immediate purchaser of the goods is not deceived or likely to be deceived as to the identity of the goods. Unfair

**1. Affirmative Precautions Necessary** — *England*. — *Reddaway v. Banham*, (1896) A. C. 199; *Powell v. Birmingham Vinegar Brewery Co.*, (1894) 3 Ch. 449, (1896) 2 Ch. 54; *Singer Mfg. Co. v. Wilson*, 2 Ch. D. 434, 45 L. J. Ch. 491, 34 L. T. N. S. 858; *Orr-Ewing v. Johnston*, 13 Ch. D. 434, 7 App. Cas. 219.

*Canada*. — *Provident Chemical Works v. Canada Chemical Mfg. Co.*, 2 Ont. L. Rep. 188.

*United States*. — *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665; *Coats v. Merrick Thread Co.*, 149 U. S. 562; *Royal Baking Powder Co. v. Royal*, (C. C. A.) 122 Fed. Rep. 337; *Keuffel, etc., Co. v. H. S. Crocker Co.*, 118 Fed. Rep. 187; *Sterling Remedy Co. v. Spermine Medical Co.*, (C. C. A.) 112 Fed. Rep. 1003; *Wyckoff v. Howe Scale Co.*, 110 Fed. Rep. 520; *Centauro Co. v. Marshall*, (C. C. A.) 97 Fed. Rep. 785; *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. Rep. 659; *Centauro Co. v. Neathery*, (C. C. A.) 91 Fed. Rep. 900; *Dadrian v. Yacubian*, 72 Fed. Rep. 1010, (C. C. A.) 98 Fed. Rep. 872, *affirming* 90 Fed. Rep. 812; *Hoff v. Tarrant*, 71 Fed. Rep. 163. See *Baker v. Baker*, (C. C. A.) 115 Fed. Rep. 297. But see *Halstead v. John C. Winston Co.*, 111 Fed. Rep. 35.

*Massachusetts*. — *Flagg Mfg. Co. v. Holway*, 178 Mass. 83.

*New York*. — *Gillott v. Esterbrook*, 47 Barb. (N. Y.) 455, 48 N. Y. 374, 8 Am. Rep. 553.

**2. Insertion of Defendant's Name Not Per Se a Defense** — *England*. — *Henderson v. Jorss, Seton* (4th ed.) 236; *Powell v. Birmingham Vinegar Brewery Co.*, (1894) 3 Ch. 449, (1896) 2 Ch. 82; *Harrison v. Taylor*, 11 Jur. N. S. 408, 12 L. T. N. S. 339.

*United States*. — *Singer Mfg. Co. v. Bent*, 163 U. S. 205; *Menendez v. Holt*, 128 U. S. 521; *Shaver v. Heller, etc., Co.*, (C. C. A.) 108 Fed. Rep. 821, *affirming* 102 Fed. Rep. 882; *Pennsylvania Salt Mfg. Co. v. Myers*, 79 Fed. Rep. 87; *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, (C. C. A.) 77 Fed. Rep. 869, *reversing* 71 Fed. Rep. 295; *Tarrant v. Hoff*, (C. C. A.) 76 Fed. Rep. 959, *affirming* 71 Fed. Rep. 163; *N. K. Fairbank Co. v. Central Lard Co.*, 64 Fed. Rep. 133; *Hohner v. Gratz*, 52

Fed. Rep. 871; *Lorillard v. Wight*, 15 Fed. Rep. 383. See also *Saxlehner v. Eisner, etc., Co.*, 179 U. S. 19, *reversing* 91 Fed. Rep. 536.

*Connecticut*. — *Boardman v. Meriden Britannia Co.*, 35 Conn. 402, 95 Am. Dec. 270.

*New York*. — *Lea v. Wolf*, (Supm. Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 389, 15 Abb. Pr. N. S. (N. Y.) 1; *Gillott v. Esterbrook*, 47 Barb. (N. Y.) 455; *Dunlap v. Young*, 68 N. Y. App. D. 137.

But *compare* *Davis v. Kendall*, 2 R. I. 566.

Two things are required for the accomplishment of a fraud: first, there must be such a general resemblance of the forms, words, symbols, and accompaniments as to mislead the public; second, sufficient distinctive individuality must be preserved, so as to procure for the person himself the benefit of that deception which the general resemblance is calculated to produce. *Croft v. Day*, 7 Beav. 88.

**3. Artifice to Prevent Observation of Name.** — *Centauro Co. v. Neathery*, (C. C. A.) 91 Fed. Rep. 898; *Fetridge v. Wells*, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 144; *Clark, etc., Co. v. Scott*, 4 Lack. Leg. N. (Pa.) 159.

**4. A Circumstance to Be Considered.** — *Coats v. Merrick Thread Co.*, 149 U. S. 562; *Allan B. Wrisley Co. v. Iowa Soap Co.*, (C. C. A.) 122 Fed. Rep. 796; *Daviess County Distilling Co. v. Martinoni*, 117 Fed. Rep. 186; *B. B. Hill Mfg. Co. v. Sawyer-Boss Mfg. Co.*, 112 Fed. Rep. 144, *affirmed*, without opinion, (C. C. A.) 118 Fed. Rep. 1014; *Allan B. Wrisley Co. v. Iowa Soap Co.*, 104 Fed. Rep. 548; *Proctor, etc., Co. v. Globe Refining Co.*, (C. C. A.) 92 Fed. Rep. 357; *Sterling Remedy Co. v. Eureka Chemical, etc., Co.*, 70 Fed. Rep. 704; *Oakes v. St. Louis Candy Co.*, 146 Mo. 391.

**5. No Falsity Permitted.** — *Bauer v. Siegert*, (C. C. A.) 120 Fed. Rep. 81; *Bauer v. Order of Carthusian Monks*, (C. C. A.) 120 Fed. Rep. 78; *Liebig's Extract of Meat Co. v. Walker*, 115 Fed. Rep. 822; *Peck v. Peck Bros. Co.*, (C. C. A.) 113 Fed. Rep. 302; *Liebig's Extract of Meat Co. v. Libby*, 103 Fed. Rep. 87; *La Republique Franchise v. Schultz*, (C. C. A.) 102 Fed. Rep. 153; *Scheuer v. Muller*, (C. C. A.) 74 Fed. Rep. 225; *Klotz v. Hecht*, 73 Fed. Rep. 822; *Von Mumm v. Frash*, 56 Fed. Rep.

competition is shown if the goods are so dressed out, marked, or labeled as to enable the retailer to deceive the ultimate purchaser and make it likely that such purchaser will be deceived.<sup>1</sup>

*m. DAMNUM ABSQUE INJURIA.* — Where the marks, names, or *indicia* used by the plaintiff are things in which he has no exclusive property right, and which the defendant may use with equal right, it is frequently said that if the defendant exercises this right, any confusion or damage necessarily caused thereby is *damnum absque injuria*, for which no action will lie.<sup>2</sup> It seems, however, that if such words or marks, though primarily *publici juris*, have by use become identified with the plaintiff and have acquired a secondary meaning as indicating his business or his goods, another trader has no right to use such words or marks unless accompanied with sufficient precautions to prevent confusion, and if it is impossible to adopt sufficient precautions, then he cannot use such words or marks at all. The fact that such words would be true in their primary sense is no reason for permitting the defendant to use them when they would be untrue and injurious in their secondary sense. The cases would be rare where sufficient precautions to prevent confusion could not be adopted, if honestly sought; but one such case has arisen.<sup>3</sup>

830; Glen, etc., Mfg. Co. v. Hall, 6 Lans. (N. Y.) 158, 61 N. Y. 226, 19 Am. Rep. 278; Brooklyn White Lead Co. v. Masury, 25 Barb. (N. Y.) 416; Société des Huiles, etc., v. Rorke, 82 Hun (N. Y.) 611, 31 N. Y. Supp. 51; Ft. Stanwix Canning Co. v. William McKinley Canning Co., 49 N. Y. App. Div. 566; American Novelty, etc., Co. v. Manufacturing Electrical Novelty Co., (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 450.

**1. Deception of Ultimate Purchaser by Retailer** — *England.* — Powell v. Birmingham Vinegar Brewery Co., (1896) 2 Ch. 79; Rose v. Loftus, 47 L. J. Ch. 576, 38 L. T. N. S. 409; Lever v. Goodwin, 36 Ch. D. 1; Orr Ewing v. Johnston, 13 Ch. D. 434, 7 App. Cas. 219; Sykes v. Sykes, 3 B. & C. 541, 10 E. C. L. 176; Hennessy v. White, 6 Wyatt, W. & A.B. Eq. 216. See Ford v. Foster, L. R. 7 Ch. 611. But see Payton v. Snelling, (1901) A. C. 308, 70 L. J. Ch. 644.

*United States.* — Amoskeag Mfg. Co. v. Trainer, 101 U. S. 63, per Clifford, J.; Royal Baking Powder Co. v. Royal, (C. C. A.) 122 Fed. Rep. 337; Enoch Morgan's Sons Co. v. Whittier-Coburn Co., 118 Fed. Rep. 657; Hostetter Co. v. Conron, 111 Fed. Rep. 737; Hansen v. Siegel-Cooper Co., 106 Fed. Rep. 690; N. K. Fairbank Co. v. Luckel, (C. C. A.) 102 Fed. Rep. 327; Little v. Kellam, 100 Fed. Rep. 353; Von Mumm v. Wittemann, 85 Fed. Rep. 966; Hostetter Co. v. Sommers, 84 Fed. Rep. 333; Pennsylvania Salt Mfg. Co. v. Myers, 79 Fed. Rep. 87; Garrett v. Garrett, (C. C. A.) 78 Fed. Rep. 472; N. K. Fairbank Co. v. R. W. Bell Mfg. Co., (C. C. A.) 77 Fed. Rep. 869; Hostetter Co. v. Becker, 73 Fed. Rep. 297; Clark Thread Co. v. Armitage, 67 Fed. Rep. 902; Von Mumm v. Frash, 56 Fed. Rep. 830; Improved Fig Syrup Co. v. California Fig Syrup Co., (C. C. A.) 54 Fed. Rep. 175; Southern White Lead Co. v. Cary, 25 Fed. Rep. 125. But see Wm. Rogers Mfg. Co. v. Rogers, 84 Fed. Rep. 639; Rogers v. Wm. Rogers Mfg. Co., (C. C. A.) 70 Fed. Rep. 1019; Hostetter Co. v. Van Vorst, 62 Fed. Rep. 600.

*Massachusetts.* — New England Awl, etc., Co.

v. Marlborough Awl, etc., Co., 168 Mass. 154, 60 Am. St. Rep. 377.

*Missouri.* — Williamson Corset, etc., Co. v. Western Corset Co., 70 Mo. App. 424.

*New Jersey.* — Stirling Silk Mfg. Co. v. Stirling Silk Co., 59 N. J. Eq. 394.

*New York.* — Anargyros v. Egyptian Amasis Cigarette Co., 54 N. Y. App. Div. 345; Clark v. Clark, 25 Barb. (N. Y.) 76. See Brown v. Mercer, 37 N. Y. Super. Ct. 265.

**The Open Sale of an Imitation Article as Such** does not constitute unfair competition. Hostetter Co. v. Van Vorst, 62 Fed. Rep. 600.

**2. Damnum Absque Injuria.** — Delaware, etc., Canal Co. v. Clark, 13 Wall. (U. S.) 311; Brown Chemical Co. v. Meyer, 139 U. S. 540, affirming 31 Fed. Rep. 453; New York, etc., Cement Co. v. Copley Cement Co., 44 Fed. Rep. 277, 45 Fed. Rep. 212; Avery v. Meikle, 81 Ky. 73; Enoch Morgan's Sons Co. v. Troxell, 89 N. Y. 292, 42 Am. Rep. 294, reversing 23 Hun (N. Y.) 632; Amoskeag Mfg. Co. v. Spear, 2 Sandf. (N. Y.) 599. See generally *supra*, this title, *What Protected as Trademark or Trade Name* — *Particular Words, Names, Marks, or Symbols*. And see *infra*, this section, *Use of Personal or Corporate Names; Use of Geographical Terms*.

It will be observed that the above cases are all comparatively old cases. It is doubtful if all of them could be sustained in view of the recent development of the law of unfair competition.

**3. Cash v. Cash, 84 L. T. N. S. 349.** In this case the doctrine of unfair competition was pushed further than in any other case. The plaintiff's goods were known as "Cash's Frillings." The defendant was enjoined from selling frillings under the name of Cash upon the ground that "it was impossible for the defendant, trading under his own name of Cash, to sell 'frillings' without their being known as 'Cash's Frillings.'"

The whole trend of the modern decisions is in this direction. See especially *infra*, this section, *Use of Descriptive Terms or Generic Names; Use of Personal or Corporate Names; Use of Geographical Terms*.

**2. Use of Labels, Marks, Packages, and Dress of Goods.** — Irrespective of any question of technical trademark, or the existence of any exclusive proprietary interest in the labels, marks, form of packages, and general dress of his goods, a trader is entitled to protection against the use or imitation by a rival trader of such labels, marks, form of package, or dress of goods in such a manner as to deceive purchasers and pass off his goods as those of his rival.<sup>1</sup>

**1. Unfair Competition by Dress of Goods** — *England.* — *Sen Sen Co. v. Britten*, (1899) 1 Ch. 692, 68 L. J. Ch. 250, 80 L. T. N. S. 278, 47 W. R. 358; *Schweitzer v. Atkins*, 37 L. J. Ch. 847, 19 L. T. N. S. 6; *Lever v. Goodwin*, 36 Ch. D. 1; *Bass v. Dawber*, 19 L. T. N. S. 626; *Shrimpton v. Laight*, 18 Beav. 164; *Hirst v. Denham*, L. R. 14 Eq. 542, 41 L. J. Ch. 752, 27 L. T. N. S. 56; *Frank v. Weaver*, 10 Beav. 297; *Massam v. Thorley's Cattle Food Co.*, 14 Ch. D. 748; *Edelsten v. Vick*, 11 Hare 78, 1 Eq. R. 413, 18 Jur. 7; *Singer Mfg. Co. v. Loog*, 8 App. Cas. 15; *Croft v. Day*, 7 Beav. 84; *Knott v. Morgan*, 2 Kent 213; *Siebert v. Findlater*, 7 Ch. D. 801; *Blofeld v. Payne*, 4 B. & Ad. 410, 24 E. C. L. 87; *Wolfe v. Hart*, 4 Vict. L. R. Eq. 125, 134; *Seixo v. Provezende*, L. R. 1 Ch. 192, 12 Jur. N. S. 215, 14 L. T. N. S. 314.

*United States.* — *Coats v. Merrick Thread Co.*, 149 U. S. 562, 36 Fed. Rep. 324; *McLean v. Fleming*, 96 U. S. 245; *Frese v. Bachof*, 14 Blatchf. (U. S.) 432, 13 Blatchf. (U. S.) 234; *Walton v. Crowley*, 3 Blatchf. (U. S.) 440; *Sawyer v. Horn*, 4 Hughes (U. S.) 239; *Moorman v. Hoge*, 2 Sawy. (U. S.) 78; *Hostetter v. Vowinkle*, 1 Dill. (U. S.) 329; *Royal Baking Powder Co. v. Royal*, (C. C. A.) 122 Fed. Rep. 337; *Globe-Wernicke Co. v. Brown*, (C. C. A.) 121 Fed. Rep. 90; *Bauer v. Siebert*, (C. C. A.) 120 Fed. Rep. 81; *Bauer v. La Société*, etc., (C. C. A.) 120 Fed. Rep. 74; *Bauer v. Order of Carthusian Monks*, (C. C. A.) 120 Fed. Rep. 78; *Keuffel*, etc., *Co. v. H. S. Crocker Co.*, 118 Fed. Rep. 187; *Enoch Morgan's Sons Co. v. Whittier Coburn Co.*, 118 Fed. Rep. 657; *Koster v. Seattle Brewing*, etc., *Co.*, (C. C. A.) 116 Fed. Rep. 620; *Draper v. Skerrett*, 116 Fed. Rep. 206, 94 Fed. Rep. 912; *Liebig's Extract of Meat Co. v. Walker*, 115 Fed. Rep. 822, 103 Fed. Rep. 87; *Sterling Remedy Co. v. Spermine Medical Co.*, 112 Fed. Rep. 1000, 50 C. C. A. 657; *Kentucky Distilleries*, etc., *Co. v. Wathen*, 110 Fed. Rep. 645; *Sterling Remedy Co. v. Gorey*, 110 Fed. Rep. 372; *Lalance*, etc., *Mfg. Co. v. National Enameling*, etc., *Co.*, 109 Fed. Rep. 317; *Postum Cereal Co. v. American Health Food Co.*, 109 Fed. Rep. 898; *Johnson v. Brunor*, 107 Fed. Rep. 466; *Pfeiffer v. Wilde*, 107 Fed. Rep. 456, 46 C. C. A. 415; *Hansen v. Siegel-Cooper Co.*, 106 Fed. Rep. 690; *Potter Drug*, etc., *Corp. v. Pasfield Soap Co.*, 106 Fed. Rep. 914, 46 C. C. A. 40; *Charles E. Hires Co. v. Consumers'* *Co.*, 100 Fed. Rep. 809, 41 C. C. A. 71; *Centaur Co. v. Marshall*, 97 Fed. Rep. 785, 38 C. C. A. 413; *Franck v. Frank Chicory Co.*, 95 Fed. Rep. 818; *National Biscuit Co. v. Baker*, 95 Fed. Rep. 135; *California Fig-Syrup Co. v. Worden*, 95 Fed. Rep. 132; *Proctor*, etc., *Co. v. Globe Refining Co.*, (C. C. A.) 92 Fed. Rep. 357; *Centaur Co. v. Marshall*, 92 Fed. Rep. 605; *Centaur Co. v. Robinson*, 91 Fed. Rep. 890;

*Centaur Co. v. Neathery*, (C. C. A.) 91 Fed. Rep. 899; *Von Mumm v. Witteman*, (C. C. A.) 91 Fed. Rep. 126, 85 Fed. Rep. 966; *Noel v. Ellis*, 89 Fed. Rep. 978; *Centaur Co. v. Killenberger*, 87 Fed. Rep. 725; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, (C. C. A.) 86 Fed. Rep. 608; *Walker v. Hockstaeder*, 85 Fed. Rep. 776; *Johnson v. Bauer*, 82 Fed. Rep. 662, 53 U. S. App. 437, reversing 79 Fed. Rep. 954; *Saxlehner v. Graef*, 81 Fed. Rep. 704; *C. F. Simmons Medicine Co. v. Simmons*, 81 Fed. Rep. 163; *Pennsylvania Salt Mfg. Co. v. Myers*, 79 Fed. Rep. 87; *Walker v. Mikolas*, 79 Fed. Rep. 955; *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 77 Fed. Rep. 869, 45 U. S. App. 190, reversing 71 Fed. Rep. 295; *Buck's Stove*, etc., *Co. v. Kiechle*, 76 Fed. Rep. 758; *Cook*, etc., *Co. v. Ross*, 73 Fed. Rep. 203; *Klotz v. Hecht*, 73 Fed. Rep. 822; *Sterling Remedy Co. v. Eureka Chemical*, etc., *Co.*, 70 Fed. Rep. 704; *Chattanooga Medicine Co. v. Thedford*, 66 Fed. Rep. 544, 30 U. S. App. 35, reversing 58 Fed. Rep. 347; *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.*, 58 Fed. Rep. 884, 18 U. S. App. 372; *Von Mumm v. Frash*, 56 Fed. Rep. 830; *Improved Fig Syrup Co. v. California Fig Syrup Co.*, (C. C. A.) 54 Fed. Rep. 175; *Hutchinson v. Blumberg*, 51 Fed. Rep. 829; *California Fig Syrup Co. v. Improved Fig Syrup Co.*, 51 Fed. Rep. 296; *Wellman*, etc., *Tobacco Co. v. Ware Tobacco-Works*, 46 Fed. Rep. 289; *Putnam Nail Co. v. Bennett*, 43 Fed. Rep. 800; *Myers v. Theller*, 38 Fed. Rep. 607; *Brown Chemical Co. v. Stearns*, 37 Fed. Rep. 360; *Jennings v. Johnson*, 37 Fed. Rep. 364; *Moxie Nerve Food Co. v. Baumbach*, 32 Fed. Rep. 205; *Sawyer Crystal Blue Co. v. Hubbard*, 32 Fed. Rep. 389; *Royal Baking Powder Co. v. Davis*, 26 Fed. Rep. 293; *Carbolic Soap Co. v. Thompson*, 25 Fed. Rep. 625; *Burton v. Stratton*, 12 Fed. Rep. 696; *Hostetter v. Adams*, 10 Fed. Rep. 838; *Sawyer v. Kellogg*, 7 Fed. Rep. 720; *Joseph Dixon Crucible Co. v. Benham*, 4 Fed. Rep. 527; *Sawyer v. Horn*, 1 Fed. Rep. 24.

*California.* — *Schmidt v. Brieg*, 100 Cal. 672; *Pierce v. Guittard*, 68 Cal. 68, 58 Am. Rep. 1; *Burke v. Cassin*, 45 Cal. 467, 13 Am. Rep. 204.

*Georgia.* — *Thedford Medicine Co. v. Curry*, 96 Ga. 89; *Foster v. Blood Balm Co.*, 77 Ga. 216. See *Ellis v. Zeilin*, 42 Ga. 91.

*Illinois.* — *Ball v. Siegel*, 116 Ill. 137, 56 Am. Rep. 767; *Frazer v. Frazer Lubricator Co.*, 18 Ill. App. 450.

*Kentucky.* — *Avery v. Meikle*, 81 Ky. 73.

*Maryland.* — *Parlett v. Guggenheimer*, 67 Md. 542, 1 Am. St. Rep. 416.

*Massachusetts.* — *Hildreth v. D. S. McDonald Co.*, 164 Mass. 16, 49 Am. St. Rep. 440.

*Missouri.* — *McCartney v. Garnhart*, 45 Mo. 593, 100 Am. Dec. 397; *Conrad v. Joseph Uhrig Brewing Co.*, 8 Mo. App. 277.

*New Jersey.* — *Centaur Co. v. Link*, 62 N.



**3. Use of Descriptive Terms or Generic Names.** — Descriptive terms and generic names are *publici juris*, and any one may use them truthfully. But if they have become identified in the mind of the public with the goods or business of a particular trader, a subsequent trader using them in connection with similar goods must not do so in a manner calculated to deceive the public and pass off his goods for those of his rival.<sup>1</sup>

**4. Use of Personal or Corporate Names** — *a. IN GENERAL.* — Every person is entitled to use his own name in his own business, and if damage results thereby to another of the same or similar name engaged in the same business, such damage is *damnum absque injuria*.<sup>2</sup> But this rule is subject to the qualification that a man must use his own name honestly and not as a means of

J. Eq. 147; Stirling Silk Mfg. Co. v. Sterling Silk Co., 59 N. J. Eq. 394; Wirtz v. Eagle Bottling Co., 50 N. J. Eq. 164.

*New York.* — Fischer v. Blank, 138 N. Y. 244; Volger v. Force, 63 N. Y. App. Div. 122; Kassel v. Jeuda, 61 N. Y. App. Div. 613; Anargyros v. Egyptian Amasis Cigarette Co., 54 N. Y. App. Div. 345; T. B. Dunn Co. v. Trix Mfg. Co., 50 N. Y. App. Div. 75; Reckitt v. Kellogg, 28 N. Y. App. Div. 111; Fischer v. Blank, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 65; Ransom v. Ball, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 238; Johnson v. Hitchcock, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 680; Brown v. Mercer, 37 N. Y. Super. Ct. 265; Lea v. Wolf, (Supm. Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 389, 15 Abb. Pr. N. S. (N. Y.) 1, 46 How. Pr. (N. Y.) 157; Fetridge v. Wells, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 144; Williams v. Johnson, 2 Bosw. (N. Y.) 1; Lockwood v. Bostwick, 2 Daly (N. Y.) 521; Fleischmann v. Schuckmann, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 92; Electro-Silicon Co. v. Trask, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 189; Enoch Morgan's Sons Co. v. Schwachhofer, (Supm. Ct. Spec. T.) 55 How. Pr. (N. Y.) 37, 5 Abb. N. Cas. (N. Y.) 265; Bininger v. Wattles, (C. Pl. Spec. T.) 28 How. Pr. (N. Y.) 206; Williams v. Spence, (N. Y. Super. Ct. Spec. T.) 25 How. Pr. (N. Y.) 366; Potter v. McPherson, 21 Hun (N. Y.) 559. But see Enoch Morgan's Sons Co. v. Troxell, 89 N. Y. 292, 42 Am. Rep. 294.

*Pennsylvania.* — Arthur v. Howard, 19 Pa. Co. Ct. 81; Dreydoppel v. Young, 14 Phila. (Pa.) 226, 37 Leg. Int. (Pa.) 397; Clark, etc., Co. v. Scott, 4 Lack. Leg. N. (Pa.) 159. But see Brown v. Seidel, 153 Pa. St. 60.

*Rhode Island.* — Alexander v. Morse, 14 R. I. 153, 51 Am. Rep. 369; Davis v. Kendall, 2 R. I. 566.

*Tennessee.* — C. F. Simmons Medicine Co. v. Mansfield Drug Co., 93 Tenn. 84.

*Texas.* — Goodman v. Bohls, 3 Tex. Civ. App. 183.

*Wisconsin.* — Oppermann v. Waterman, 94 Wis. 583.

See also *supra*, this section, *Question of Fact*.

In Colgan v. Danheiser, 35 Fed. Rep. 150, where the complainant put up and labeled his chewing gum in a particular way, he was held not entitled to an injunction to restrain the defendant from doing likewise, in the absence of clear proof that he had first established a reputation for his goods by this means, and that the defendant had attempted to supplant him in the market by the unlawful use of such device.

**1. Descriptive Terms and Generic Names** — *England.* — Reddaway v. Banham, (1896) A. C. 199, reversing (1895) 1 Q. B. 286; Croft v. Day, 7 Beav. 88; Lee v. Haley, L. R. 5 Ch. 161; Massam v. Thorley's Cattle Food Co., 14 Ch. D. 748; Knott v. Morgan, 2 Keen 213.

*Canada.* — Provident Chemical Works v. Canada Chemical Mfg. Co., 2 Ont. L. Rep. 182.

*United States.* — Kinney v. Allen, 1 Hughes (U. S.) 106; Draper v. Skerrett, 116 Fed. Rep. 206; Sterling Remedy Co. v. Spermine Medical Co., (C. C. A.) 112 Fed. Rep. 1003; Heller, etc., Co. v. Shaver, 102 Fed. Rep. 882; Dadirian v. Yacubian, (C. C. A.) 98 Fed. Rep. 872, affirming 90 Fed. Rep. 812; Centaur Co. v. Robinson, 91 Fed. Rep. 890; Noel v. Ellis, 89 Fed. Rep. 978; Von Mumm v. Frash, 56 Fed. Rep. 830; Landreth v. Landreth, 22 Fed. Rep. 41. But see Potter Drug, etc., Corp. v. Pasfield Soap Co., 102 Fed. Rep. 490.

*Indiana.* — Keller v. B. F. Goodrich Co., 117 Ind. 556, 10 Am. St. Rep. 88.

*Kentucky.* — Avery v. Meikle, 81 Ky. 73.

*New York.* — New York Cab Co. v. Mooney, (Supm. Ct. Spec. T.) 15 Abb. N. Cas. (N. Y.) 152; Stokes v. Allen, 56 Hun (N. Y.) 526; Kinney Tobacco Co. v. Maller, 53 Hun (N. Y.) 340; Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutilier, (N. Y. Super. Ct. Spec. T.) 5 Misc. (N. Y.) 78.

Where the defendant uses the generic name of an article previously known as the plaintiff's, but with a label substantially different, he will be enjoined from using thereon the words "New Label," as this might mislead old customers of the plaintiff. Centaur Co. v. Marshall, 92 Fed. Rep. 605.

**2. Use of One's Own Name** — *Damnum Absque Injuria* — *England.* — Valentine's Meat-Juice Co. v. Valentine Extract Co., 48 W. R. 127; Saunders v. Sun L. Assur. Co., (1894) 1 Ch. 537, 8 Reports 125; James v. James, L. R. 13 Eq. 421; Powell v. Birmingham Vinegar Brewery Co., (1896) 2 Ch. 79; Turton v. Turton, 42 Ch. D. 128; Burgess v. Burgess, 3 De G. M. & G. 896.

*United States.* — Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169; Brown Chemical Co. v. Myer, 31 Fed. Rep. 453, 139 U. S. 540; Royal Baking Powder Co. v. Royal, (C. C. A.) 122 Fed. Rep. 337; Chickering v. Chickering, (C. C. A.) 120 Fed. Rep. 69; Wyckoff v. Howe Scale Co., 110 Fed. Rep. 520; Stuart v. F. G. Stewart Co., 85 Fed. Rep. 778; Allegretti Chocolate Cream Co. v. Keller, 85 Fed. Rep. 643; Wm. Rogers Mfg. Co. v. Rogers, 84 Fed. Rep. 639; Duryea v. National Starch Mfg. Co.,

pirating upon the good will and reputation of a rival by passing off his goods or business as the goods or business of his rival.<sup>1</sup> If the defendant cannot use his own name in his business without inevitably representing his goods as being those of another, then he cannot use his name at all.<sup>2</sup> The manifest tendency of the decisions at the present time is to extend greatly the limitations upon one's supposed right to use his own name in his business, and

(C. C. A.) 79 Fed. Rep. 651; *American Cereal Co. v. Eli Pettijohn Cereal Co.*, 72 Fed. Rep. 903; *Rogers v. Wm. Rogers Mfg. Co.*, (C. C. A.) 70 Fed. Rep. 1019; *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 901; *William Rogers Mfg. Co. v. R. W. Rogers Co.*, 66 Fed. Rep. 56.  
*Connecticut*. — *William Rogers Mfg. Co. v. Simpson*, 54 Conn. 527; *Rogers v. Rogers*, 53 Conn. 121, 55 Am. Rep. 78.

*Massachusetts*. — *Russia Cement Co. v. Le Page*, 147 Mass. 208, 9 Am. St. Rep. 685; *Gilman v. Hunnewell*, 122 Mass. 139.

*Michigan*. — *Penberthy Injector Co. v. Lee*, 120 Mich. 174.

*New York*. — *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489; *Decker v. Decker*, (Supm. Ct.) 52 How. Pr. (N. Y.) 218; *Faber v. Faber*, 49 Barb. (N. Y.) 357; *Clark v. Clark*, 25 Barb. (N. Y.) 76; *Charles S. Higgins Co. v. Higgins Soap Co.*, 71 Hun (N. Y.) 101; *De Long v. De Long Hook, etc.*, Co., 7 N. Y. App. Div. 33; *England v. New York Pub. Co.*, 8 Daly (N. Y.) 375; *Falk v. American West Indies Trading Co.*, 71 N. Y. App. Div. 320; *De Long v. De Long Hook, etc.*, Co., (Supm. Ct. Spec. T.) 10 Misc. (N. Y.) 577; *Ward v. Ward*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 913.

*Pennsylvania*. — *Tygart-Allen Fertilizer Co. v. J. E. Tygart Co.*, 7 Pa. Dist. 430; *Clark, etc.*, Co. v. Scott, 4 Lack. Leg. N. (Pa.) 159.

*Rhode Island*. — *Hanson v. Halkyard*, 22 R. I. 102; *Carmichel v. Latimer*, 11 R. I. 395, 23 Am. Rep. 481.

*Tennessee*. — *Robinson v. Storm*, 103 Tenn. 40.

**Descendants of the Original Trader** who made the family name a trade name have no special or superior right to use such name. *Wyckoff v. Howe Scale Co.*, 110 Fed. Rep. 520.

**1. Unfair Competition by Use of One's Own Name** — *England*. — *Powell v. Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 79; *Burgess v. Burgess*, 3 De G. M. & G. 905; *Valentine Meat Juice Co. v. Valentine Extract Co.*, 83 L. T. N. S. 271; *Levy v. Walker*, 10 Ch. D. 447; *Croft v. Day*, 7 Beav. 84; *Cash v. Cash*, 82 L. T. N. S. 655; *Millington v. Fox*, 3 Myl. & C. 338; *Massam v. Thorley's Cattle Food Co.*, 14 Ch. D. 748, 42 L. T. N. S. 851; *Schweitzer v. Atkins*, 19 L. T. N. S. 6; *Holloway v. Holloway*, 13 Beav. 209.

*United States*. — *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; *Brown Chemical Co. v. Meyer*, 139 U. S. 540; *McLean v. Fleming*, 96 U. S. 245; *Wm. G. Rogers Co. v. International Silver Co.*, (C. C. A.) 118 Fed. Rep. 133; *International Silver Co. v. Wm. G. Rogers Co.*, 113 Fed. Rep. 526; *Peck v. Peck Bros. Co.*, (C. C. A.) 113 Fed. Rep. 298; *Lever v. Smith*, 112 Fed. Rep. 998; *Wyckoff v. Howe Scale Co.*, 110 Fed. Rep. 520, (C. C. A.) 122 Fed. Rep. 348; *Stuart v. F. G. Stewart Co.*, (C. C. A.) 91 Fed. Rep. 243, reversing 85 Fed.

Rep. 778; *Centaur Co. v. Robinson*, 91 Fed. Rep. 890; *Baker v. Sanders*, (C. C. A.) 80 Fed. Rep. 895; *Duryea v. National Starch Mfg. Co.*, (C. C. A.) 79 Fed. Rep. 651; *Baker v. Baker*, 77 Fed. Rep. 181, 87 Fed. Rep. 209; *Clark Thread Co. v. Armitage*, (C. C. A.) 74 Fed. Rep. 936, 67 Fed. Rep. 901; *Godillot v. American Grocery Co.*, 71 Fed. Rep. 873; *Meyer v. Dr. B. L. Bull Vegetable Medicine Co.*, (C. C. A.) 58 Fed. Rep. 884; *Jennings v. Johnson*, 37 Fed. Rep. 364; *Landreth v. Landreth*, 22 Fed. Rep. 41.

*Florida*. — *El Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 23 Am. St. Rep. 537.

*Illinois*. — *Imperial Mfg. Co. v. Schwartz*, 105 Ill. App. 525; *Allegretti Chocolate Cream Co. v. Rubel*, 86 Ill. App. 600, affirmed 177 Ill. 129.

*Iowa*. — *Shaver v. Shaver*, 54 Iowa 208, 37 Am. Rep. 194.

*Kentucky*. — *Frazier v. Dowling*, (Ky. 1897) 39 S. W. Rep. 45; *Rock Springs Distillery Co. v. Monarch*, (Ky. 1893) 22 S. W. Rep. 1028.

*Maine*. — *Symonds v. Jones*, 82 Me. 302, 17 Am. St. Rep. 485.

*Maryland*. — *Stonebraker v. Stonebraker*, 33 Md. 252.

*Massachusetts*. — *Russia Cement Co. v. Le Page*, 147 Mass. 206, 9 Am. St. Rep. 685; *Hoxie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149; *Basset v. Percival*, 5 Allen (Mass.) 345.

*Michigan*. — *Penberthy Injector Co. v. Lee*, 120 Mich. 174.

*New York*. — *Falk v. American West Indies Trading Co.*, 71 N. Y. App. Div. 320; *Devlin v. Devlin*, 69 N. Y. 212, 25 Am. Rep. 173; *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489; *Howe v. Howe Mach. Co.*, 50 Barb. (N. Y.) 236; *Tuerk Hydraulic Power Co. v. Tuerk*, 92 Hun (N. Y.) 65; *De Long v. De Long Hook, etc.*, Co., 89 Hun (N. Y.) 399, affirming 10 Misc. (N. Y.) 577; *Charles S. Higgins Co. v. Higgins Soap Co.*, 71 Hun (N. Y.) 101; *Hildreth v. McCaul*, 70 N. Y. App. Div. 162; *Charles S. Higgins Co. v. Amalg Soap Co.*, (Brooklyn City Ct. Gen. T.) 10 Misc. (N. Y.) 268.

*Ohio*. — *Drake Medicine Co. v. Glessner*, 68 Ohio St. 337.

*Tennessee*. — *Robinson v. Storm*, 103 Tenn. 40.

The second comer into the market cannot, by extensive advertising, acquire a right to enjoin a prior user of the same name from selling similar goods under that name. *American Cereal Co. v. Eli Pettijohn Cereal Co.*, 72 Fed. Rep. 903.

**2.** *Cash v. Cash*, 84 L. T. N. S. 349. This case goes further than any other case which has been found. See also *Valentine Meat Juice Co. v. Valentine Extract Co.*, 83 L. T. N. S. 271.

many of the earlier decisions upon this point, it is believed, could not now be supported.

*b. DECEPTIVE ARTIFICES.* — The use of any deceptive artifice calculated to increase the necessary confusion caused by similarity of names, such as imitation of labels, manner of dressing out goods, misleading advertisements, false statements, and the like, constitutes unfair competition.<sup>1</sup>

*c. AFFIRMATIVE DUTY TO DIFFERENTIATE.* — Where a personal name has become identified with particular goods or a particular business so as to denote, in a secondary sense, such goods or business, a person of the same or a similar name subsequently engaging in the same business or dealing in the same goods must adopt affirmative precautions to prevent unnecessary confusion.<sup>2</sup> Under such circumstances, the use of such a name by another person of the same name, unaccompanied by any precaution or indication of difference in itself amounts to a deceptive artifice or misrepresentation, and constitutes unfair competition.<sup>3</sup> Where a personal name has been so used as to become the "short name" for the goods, by which they are known to and called for by the public, another person of the same name dealing in the same class of goods, although he is entitled to use his name in the business, cannot use it in such a manner that the "short name" for his goods will be the same as that of his rival's goods.<sup>4</sup> So the use of one's own name in such a manner as unnecessarily to cause greater confusion than would naturally result from

**1. Deceptive Artifice in Connection with Name** — *England.* — *Holloway v. Holloway*, 13 Beav. 209; *Croft v. Day*, 7 Beav. 84; *Dence v. Mason*, W. N. (1877) 23. See *Turton v. Turton*, 42 Ch. D. 128.

*United States.* — *Brown Chemical Co. v. Meyer*, 139 U. S. 540; *Royal Baking Powder Co. v. Royal*, (C. C. A.) 122 Fed. Rep. 337; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. Rep. 357; *Chickering v. Chickering*, (C. C. A.) 120 Fed. Rep. 69; *Peck v. Peck Bros. Co.*, (C. C. A.) 113 Fed. Rep. 296; *Lever v. Smith*, 112 Fed. Rep. 998; *International Silver Co. v. Simeon L. & George H. Rogers Co.*, 110 Fed. Rep. 955; *Baker v. Baker*, 77 Fed. Rep. 181, 87 Fed. Rep. 210; *R. Heinisch's Sons Co. v. Boker*, 86 Fed. Rep. 765; *Allegretti Chocolate Cream Co. v. Keller*, 85 Fed. Rep. 643; *Stuart v. F. G. Stewart Co.*, 85 Fed. Rep. 778; *Clark Thread Co. v. Armistage*, 67 Fed. Rep. 901; *Hohner v. Gratz*, 52 Fed. Rep. 871; *Jennings v. Johnson*, 37 Fed. Rep. 364; *Landreth v. Landreth*, 22 Fed. Rep. 41.

*California.* — *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271, 82 Am. St. Rep. 346.

*Massachusetts.* — *Russia Cement Co. v. Le Page*, 147 Mass. 208, 9 Am. St. Rep. 685.

*Missouri.* — *Williamson Corset, etc., Co. v. Western Corset Co.*, 70 Mo. App. 424.

*New York.* — *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462, 43 Am. St. Rep. 769; *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489; *Tuerk Hydraulic Power Co. v. Tuerk*, 92 Hun (N. Y.) 65; *De Long v. De Long Hook, etc., Co.*, 89 Hun (N. Y.) 399; *Falk v. American West Indies Trading Co.*, 71 N. Y. App. Div. 320; *Hildreth v. McCaul*, 70 N. Y. App. Div. 162; *Bininger v. Wattles*, (C. Pl. Spec. T.) 28 How. Pr. (N. Y.) 206.

*Ohio.* — *Drake Medicine Co. v. Glessner*, 68 Ohio St. 337.

*Pennsylvania.* — *Clark, etc., Co. v. Scott*, 4 Lack. Leg. N. (Pa.) 159.

*Rhode Island.* — *Harson v. Halkyard*, 22 R. I. 102.

In *Taylor v. Taylor*, 10 Hare 475, 23 Eng. L. & Eq. 281, the plaintiffs were manufacturers of thread which was marked "Taylor's Persian thread." The defendant began to mark his thread "Taylor's Persian thread," and otherwise to imitate the plaintiff's trademark. An injunction was granted.

**2. Affirmative Precautions Necessary to Avoid Unfair Competition.** — *Valentine Meat Juice Co. v. Valentine Extract Co.*, 83 L. T. N. S. 271; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; *Royal Baking Powder Co. v. Royal*, (C. C. A.) 122 Fed. Rep. 337; *Baker v. Baker*, 87 Fed. Rep. 210; *Baker v. Sanders*, (C. C. A.) 80 Fed. Rep. 889; *Allegretti v. Allegretti Chocolate Cream Co.*, 177 Ill. 129, *affirming* 76 Ill. App. 581; *Penberthy Injector Co. v. Lee*, 120 Mich. 174; *Fite v. Dorman*, (Tenn. 1900) 57 S. W. Rep. 129.

**3. Singer Mfg. Co. v. June Mfg. Co.**, 163 U. S. 169; *Stuart v. F. G. Stewart Co.*, (C. C. A.) 91 Fed. Rep. 243, *reversing* 85 Fed. Rep. 778; *Tarrant v. Hoff*, (C. C. A.) 76 Fed. Rep. 959.

**4. "Short Name" for Goods.** — *Valentine Meat Juice Co. v. Valentine Extract Co.*, 83 L. T. N. S. 259; *Cash v. Cash*, 84 L. T. N. S. 349; *Schweitzer v. Atkins*, 19 L. T. N. S. 6; *Lever v. Smith*, 112 Fed. Rep. 998; *Stuart v. F. G. Stewart Co.*, (C. C. A.) 91 Fed. Rep. 243, *reversing* 85 Fed. Rep. 778; *Baker v. Baker*, 87 Fed. Rep. 212; *Baker v. Sanders*, (C. C. A.) 80 Fed. Rep. 889; *Clark Thread Co. v. Armistage*, (C. C. A.) 74 Fed. Rep. 936, *affirming* 67 Fed. Rep. 896; *McLean v. Fleming*, 96 U. S. 245; *Allegretti Chocolate Cream Co. v. Rubel*, 86 Ill. App. 600; *Shaver v. Shaver*, 54 Iowa 208, 37 Am. Rep. 194. See also *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. Rep. 357. But see *Burgess v. Burgess*, 3 De G. M. & G. 896; *Brown Chemical Co. v. Meyer*, 139 U. S. 540; *Frazer v. Frazer*



the mere identity or similarity of names, is improper and ground for an injunction.<sup>1</sup>

*d. STRANGER'S NAME USED BY AGREEMENT.* — Where the defendant's only right or excuse for using a name similar to the plaintiff's rests upon an agreement with a third person of that name, apparently made for the purpose of deceiving purchasers, an injunction will be granted upon the ground of unfair competition.<sup>2</sup> The case of a corporation using a name composed in part of the names of some of its stockholders is a common illustration of this class of cases.<sup>3</sup>

*e. UNAUTHORIZED OR UNNECESSARY USE OF RIVAL'S NAME.* — Almost any unauthorized use of the name of a rival will be enjoined.<sup>4</sup> The unnecessary adoption or imitation of another's trade name without any apparent reason or appropriateness will be enjoined as constituting unfair competition.<sup>5</sup>

*f. CORPORATE NAMES.* — Since corporate names are matters of choice, when a name is selected substantially similar to an established trade name in the same line of business, the inference of an intent to deceive is easily drawn, and an injunction will usually be granted upon the ground of unfair competition.<sup>6</sup> But a person entitled to use his own name in his own business has

Lubricator Co., 121 Ill. 147, 2 Am. St. Rep. 73.

An illustration of a proper use of one's own goods in such a case is found in *Duryea v. National Starch Mfg. Co.*, (C. C. A.) 79 Fed. Rep. 651. In this case goods had become known as "Duryea's starch." Subsequently, men named Duryea put starch upon the market and sold it as "starch prepared by Duryea & Co." This was held to be a proper use by them of their own name. To the same effect see *National Starch Mfg. Co. v. Duryea*, (C. C. A.) 101 Fed. Rep. 117.

**1. Unnecessary Confusion Caused by Mode of Use.** — *Saunders v. Sun L. Assur. Co.*, (1894) 1 Ch. 537; *Chickering v. Chickering*, (C. C. A.) 120 Fed. Rep. 69; *Godillot v. American Grocery Co.*, 71 Fed. Rep. 873. See also *Wm. Rogers Mfg. Co. v. Rogers*, 84 Fed. Rep. 639.

**2. Stranger's Name Used by Agreement** — *England.* — *Shrimpton v. Laight*, 18 Beav. 164; *Croft v. Day*, 7 Beav. 84; *Massam v. Thorley's Cattle Food Co.*, 14 Ch. D. 748, 6 Ch. D. 574; *Melachrino v. Melachrino Egyptian Cigarette Co.*, 4 R. P. C. 215. See also *Southorn v. Reynolds*, 12 L. T. N. S. 75.

*United States.* — *International Silver Co. Simeon L. & George H. Rogers Co.*, 110 Fed. Rep. 955; *R. Heinisch's Sons Co. v. Boker*, 86 Fed. Rep. 765; *Garrett v. Garrett*, (C. C. A.) 78 Fed. Rep. 472; *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, (C. C. A.) 70 Fed. Rep. 1017; *Sawyer v. Kellogg*, 7 Fed. Rep. 720.

*Connecticut.* — *Meriden Britannia Co. v. Parker*, 39 Conn. 450, 12 Am. Rep. 401.

*Florida.* — *El Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 23 Am. St. Rep. 537.

*Maryland.* — *Stonebraker v. Stonebraker*, 33 Md. 252.

*New York.* — *Falk v. American West Indies Trading Co.*, 71 N. Y. App. Div. 320; *S. Howes Co. v. Howes Grain Cleaner Co.*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 83; *Charles S. Higgins Co. v. Amalga Soap Co.*, (Brooklyn City Ct. Gen. T.) 10 Misc. (N. Y.) 268.

But see *Hallett v. Cumston*, 110 Mass. 29.

**3.** See *infra*, this section, *Corporate Names*.

**4. Use of Rival's Name.** — *Rodgers v. Nowill*, 5 C. B. 109, 57 E. C. L. 109; *Fullwood v. Fullwood*, 9 Ch. D. 176; *Hookham v. Pottage*, L. R. 8 Ch. 91; *Burke v. Cassin*, 45 Cal. 467, 13 Am. Rep. 204; *Wolfe v. Barnett*, 24 La. Ann. 97, 13 Am. Rep. 111; *Bininger v. Wattles*, (C. Pl. Spec. T.) 28 How. Pr. (N. Y.) 206; *Peterson v. Humphrey*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 394. But see *Clark v. Freeman*, 11 Beav. 112.

**5. Unnecessary Adoption or Imitation of Rival's Trade Name.** — *Lee v. Haley*, L. R. 5 Ch. 155; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. Rep. 357; *Swift v. Groff*, 114 Fed. Rep. 605; *Peck v. Peck Bros. Co.*, (C. C. A.) 113 Fed. Rep. 296; *International Silver Co. v. Simeon L. & George H. Rogers Co.*, 110 Fed. Rep. 960; *Wyckoff v. Howe Scale Co.*, 110 Fed. Rep. 520; *Hohner v. Gratz*, 52 Fed. Rep. 871; *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271, 82 Am. St. Rep. 346; *Falk v. American West Indies Trading Co.*, 71 N. Y. App. Div. 320; *Hildreth v. McCaul*, 70 N. Y. App. Div. 162. See *Lever v. Smith*, 112 Fed. Rep. 999; *Frazier v. Dowling*, (Ky. 1897) 39 S. W. Rep. 45.

**6. Unfair Competition in Use of Corporate Names** — *England.* — *Massam v. Thorley's Cattle Food Co.*, 14 Ch. D. 748, 6 Ch. D. 574.

*United States.* — *Wyckoff v. Howe Scale Co.*, (C. C. A.) 122 Fed. Rep. 348, *reversing* 110 Fed. Rep. 520; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. Rep. 357; *Chickering v. Chickering*, (C. C. A.) 120 Fed. Rep. 69; *Wm. G. Rogers Co. v. International Silver Co.*, (C. C. A.) 118 Fed. Rep. 133; *International Silver Co. v. Wm. G. Rogers Co.*, 113 Fed. Rep. 526; *Peck v. Peck Bros. Co.*, (C. C. A.) 113 Fed. Rep. 291; *International Silver Co. v. Simeon L. & George H. Rogers Co.*, 110 Fed. Rep. 955; *Garrett v. Garrett*, (C. C. A.) 78 Fed. Rep. 472; *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, (C. C. A.) 70 Fed. Rep. 1017; *Clark Thread Co. v. Armitage*, 67 Fed. Rep. 904, (C. C. A.) 74 Fed. Rep. 936; *Rogers Mfg. Co. v. R. W. Rogers Co.*, 66 Fed. Rep. 56; *Le Page Co. v. Russia Cement Co.*, (C. C. A.) 51

an equal right to use it in a business in which others are associated with him, as in a partnership or a corporation, and if such corporate or partnership name is not selected unnecessarily or for the purpose of unfair competition, an injunction will not be granted.<sup>1</sup> The right of a corporation to the use of its name is no greater than nor different in principle from that of an individual.<sup>2</sup> A corporation may be enjoined from operating under a name so similar to the name of another corporation or unincorporated company or society, in the same line of business, that confusion or injury results.<sup>3</sup> Priority in the use of the name gives a superior right thereto.<sup>4</sup> In many states statutes exist forbidding the use by a corporation of a name or style the same as that of a previously existing corporation or so closely resembling it as to be calculated to deceive.<sup>5</sup>

**5. Use of Geographical Terms — a. IN GENERAL.** — While any one is entitled to use a geographical term truthfully in connection with his business,<sup>6</sup> no one is entitled to do so in such a manner as to cause his goods or business to be mistaken for the goods or business of another with which such term has been previously associated, and which it has come to indicate in a secondary sense.<sup>7</sup>

Fed. Rep. 941; Celluloid Mfg. Co. v. Read, 47 Fed. Rep. 712; Celluloid Mfg. Co. v. Cellonite Mfg. Co., 32 Fed. Rep. 94; U. S. v. Roche, 1 McCrary (U. S.) 385.

*Illinois.* — Van Auken Co. v. Van Auken Steam Specialty Co., 57 Ill. App. 240.

*Kentucky.* — Frazier v. Dowling, (Ky. 1897) 39 S. W. Rep. 45.

*Michigan.* — Penberthy Injector Co. v. Lee, 120 Mich. 174.

*Missouri.* — Williamson Corset, etc., Co. v. Western Corset Co., 70 Mo. App. 424; Plant Seed Co. v. Michel Plant, etc., Co., 23 Mo. App. 579.

*New York.* — Tuerk Hydraulic Power Co. v. Tuerk, 92 Hun (N. Y.) 65; Schmid v. De Grauw, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 693; S. Howes Co. v. Howes Grain Cleaner Co., (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 83; De Long v. De Long-Hook, etc., Co., (Supm. Ct. Spec. T.) 10 Misc. (N. Y.) 577, 89 Hun (N. Y.) 399.

*Ohio.* — Thayer Carpet Cleaning, etc., Co., v. George A. Thayer Co., 9 Ohio Dec. 288, 6 Ohio N. P. 300.

But see Boston Rubber Shoe Co. v. Boston Rubber Co., 7 Can. Exch. 187.

**1.** Dence v. Mason, W. N. (1877) 23; Baker v. Baker, (C. C. A.) 115 Fed. Rep. 297; Monarch v. Rosenfeld, (Ky. 1897) 39 S. W. Rep. 236; Geo. T. Stagg Co. v. Taylor, 95 Ky. 651; Hildreth v. McCaul, 70 N. Y. App. Div. 162; Fite v. Dorman, (Tenn. 1900) 57 S. W. Rep. 129. See Stonebraker v. Stonebraker, 33 Md. 252.

**2. Right of Corporation to Use Corporate Name.** — Celluloid Mfg. Co. v. Cellonite Mfg. Co., 32 Fed. Rep. 94; Hainque v. Cyclops Iron Works, 136 Cal. 351; Imperial Mfg. Co. v. Schwartz, 105 Ill. App. 525.

**3. Injunction Against Use of Conflicting Name — England.** — National Folding Box, etc., Co. v. National Folding Box Co., 13 Reports 60. But see Saunders v. Sun L. Assur. Co., (1894) 1 Ch. 537, 8 Reports 125.

*United States.* — Bissell Chilled Plow Works v. T. M. Bissell Plow Co., 121 Fed. Rep. 357; Peck v. Peck Bros. Co., (C. C. A.) 113 Fed. Rep. 296; Celluloid Mfg. Co. v. Cellonite Mfg.

Co., 32 Fed. Rep. 94; William Rogers Mfg. Co. v. Rogers, etc., Mfg. Co., 11 Fed. Rep. 495. But see Continental Ins. Co. v. Continental Fire Assoc., (C. C. A.) 101 Fed. Rep. 255; Investor Pub. Co. v. Dobinson, 82 Fed. Rep. 56, 72 Fed. Rep. 603.

*Connecticut.* — Holmes v. Holmes, etc., Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324.

*New Jersey.* — St. Patrick's Alliance v. Byrne, 59 N. J. Eq. 26.

*New York.* — Chas. S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 43 Am. St. Rep. 769, reversing 71 Hun (N. Y.) 101; India Rubber Co. v. Rubber Comb, etc., Co., 45 N. Y. Super. Ct. 258; Schmid v. De Grauw, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 693; Farmers' L. & T. Co. v. Farmers' L. & T. Co., (Supm. Ct.) 21 Abb. N. Cas. (N. Y.) 104.

*Ohio.* — Thayer Carpet Cleaning, etc., Co. v. George A. Thayer Co., 9 Ohio Dec. 288, 6 Ohio N. P. 300.

*Rhode Island.* — Aiello v. Montecarlo, 21 R. I. 496; Armington v. Palmer, 21 R. I. 109, 79 Am. St. Rep. 786.

See New York Belting, etc., Co. v. Goodyear Rubber Hose, etc., Co., 7 Pa. Dist. 76. But see German Hanoverian, etc., Coach Horse Assoc. v. Oldenberg Coach Horse Assoc., 46 Ill. App. 281; Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 142 Ill. 494.

**4. Priority of Right.** — S. Howes Co. v. Howes Grain Cleaner Co., 19 N. Y. App. Div. 625; High Ct., etc., v. Insurance Com'r, 98 Wis. 94. See generally *supra*, this section.

**5. Statutory Regulation of Corporate Names.** — Society of War of 1812 v. Society of War of 1812, 46 N. Y. App. Div. 569. See generally the title CORPORATIONS (PRIVATE), vol. 7, p. 620.

**6.** See *supra*, this title, III. 2. q. *Geographical Terms.*

**7. Geographical Term with Secondary Meaning — Unfair Competition — England.** — Montgomery v. Thompson, (1891) A. C. 217, 64 L. T. N. S. 749; Taylor v. Taylor, 23 L. J. Ch. 255; Bulloch v. Gray, 19 Journ. of Juris. 218; Hirst v. Denham, L. R. 14 Eq. 542; Cocks v. Chandler, L. R. 11 Eq. 446; Siegert v. Findlater, 7 Ch. D. 801; Hine v. Lart, 10

*b. AFFIRMATIVE DUTY TO DIFFERENTIATE.* — Where a geographical term has come to mean, in a secondary sense, the goods or business of a particular trader, a subsequent trader must accompany his use of the same term with such distinguishing characteristics as will prevent his goods from being mistaken for those of his rival.<sup>1</sup> If the term is used in such a manner that no actual or probable confusion or deception results, no one can complain.<sup>2</sup> Even though the term may be used, the use in such a manner as to cause unnecessary confusion constitutes unfair competition and will be enjoined.<sup>3</sup> If a geographical term has become the "short name" by which the public generally call for a particular trader's goods, a rival trader engaging in the same line of business cannot use such term in such a way that the "short name" of his goods will be the same as that of his rival's goods.<sup>4</sup>

*c. DECEPTIVE ARTIFICES OR FALSEHOODS.* — Where the subsequent user of a geographical name accompanies it with any falsehood or artifice calculated to deceive and pass off his goods as those of his rival, he is guilty of unfair competition and may be enjoined.<sup>5</sup> Residents of a place who are using the name of such place in their business may enjoin nonresidents from using such name where such use is calculated to deceive the public and injure the plaintiff.<sup>6</sup> It is not improper, however, to use the name of the place from

Jur. 106; *Southern v. Reynolds*, 12 L. T. N. S. 75; *Radde v. Norman*, L. R. 14 Eq. 348; *Apollinaris Co. v. Edwards, Seton* (4th ed.) 237; *Davis v. Taylor*, M. R. April 24, 1879; *Andrew v. Bassett*, 4 De G. J. & S. 380; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Seixo v. Provezende*, L. R. 1 Ch. 192.

*United States.* — *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 89 Fed. Rep. 487; *Bauer v. La Société, etc.*, (C. C. A.) 120 Fed. Rep. 74; *Shaver v. Heller, etc.*, Co., (C. C. A.) 108 Fed. Rep. 821; *Heller, etc., Co. v. Shaver*, 102 Fed. Rep. 882; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, (C. C. A.) 86 Fed. Rep. 608; *A. F. Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. Rep. 896; *Southern White Lead Co. v. Cary*, 25 Fed. Rep. 125; *Anheuser-Busch Brewing Co. v. Piza*, 24 Fed. Rep. 149. *Compare* *New York, etc., Cement Co. v. Copley Cement Co.*, 44 Fed. Rep. 277; *Evans v. Von Laer*, 32 Fed. Rep. 153.

*Illinois.* — *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 127, *affirming* 51 Ill. App. 231; *Candee v. Deere*, 54 Ill. 456, 10 Am. L. Reg. N. S. 694.

*Missouri.* — *American Brewing Co. v. St. Louis Brewing Co.*, 47 Mo. App. 14.

*New York.* — *Newmann v. Alvord*, 51 N. Y. 189, 10 Am. Rep. 588; *Lea v. Wolf*, (Supm. Ct. Gen. T.) 15 Abb. Pr. N. S. (N. Y.) 5; *Brooklyn White Lead Co. v. Masury*, 25 Barb. (N. Y.) 416; *Wolfe v. Goulard*, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 64; *Gebbie v. Stitt*, 82 Hun (N. Y.) 93.

• **1. Affirmative Duty to Differentiate.** — *Powell v. Birmingham Vinegar Brewery Co.*, (1894) 3 Ch. 449; *American Waltham Watch Co. v. Sandman*, 96 Fed. Rep. 330; *Anheuser-Busch Brewing Assoc. v. Fred Miller Brewing Co.*, 87 Fed. Rep. 864; *American Waltham Watch Co. v. U. S. Watch Co.*, 173 Mass. 85, 73 Am. St. Rep. 263.

**2. Deception Improbable.** — *Weyman v. Soderberg*, 108 Fed. Rep. 63; *Continental Ins. Co.*

*v. Continental F. Ins. Assoc.*, 101 Fed. Rep. 255, 41 C. C. A. 326, 96 Fed. Rep. 846; *Pabst Brewing Co. v. Ekers*, 21 Quebec Super. Ct. 545.

**3. Unnecessary Confusion Constitutes Unfair Competition.** — *Genesee Salt Co. v. Burnap*, (C. C. A.) 73 Fed. Rep. 818, 67 Fed. Rep. 534; *American Brewing Co. v. St. Louis Brewing Co.*, 47 Mo. App. 14.

**4. "Short Name" for Goods.** — *Montgomery v. Thompson*, (1891) A. C. 217, 64 L. T. N. S. 749 ("Stone Ale"); *Powell v. Birmingham Vinegar Brewery Co.*, (1894) 3 Ch. 449, 13 R. Jan. 305 ("Yorkshire Relish"); *Wotherspoon v. Currie*, L. R. 5 H. L. 508 ("Glenfield Starch"); *Shaver v. Heller, etc., Co.*, (C. C. A.) 108 Fed. Rep. 821, *affirming* 102 Fed. Rep. 882 ("American Ball Blue"); *Oxford University v. Wilmore-Andrews Pub. Co.*, 101 Fed. Rep. 443 ("Oxford Bibles").

**5. Deceptive Artifice or Falsehood.** — *Collins-platt v. Finlayson*, 88 Fed. Rep. 693; *Southern White Lead Co. v. Cary*, 25 Fed. Rep. 125; *American Brewing Co. v. St. Louis Brewing Co.*, 47 Mo. App. 14; *Clinton Metallic Paint Co. v. New York Metallic Paint Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 66.

**6. Rights of Residents and Nonresidents.** — *England.* — *Southorn v. Reynolds*, 12 L. T. N. S. 75.

*Canada.* — *Pabst Brewing Co. v. Ekers*, 20 Quebec Super. Ct. 20.

*United States.* — *California Fruit Cannery Assoc. v. Myer*, 104 Fed. Rep. 82; *Oxford University v. Wilmore-Andrews Pub. Co.*, 101 Fed. Rep. 443; *Pillsbury-Washburn Flour-Mills Co. v. Eagle*, (C. C. A.) 86 Fed. Rep. 608; *Gage-Downs Co. v. Featherbone Corset Co.*, 83 Fed. Rep. 213. But see *New York, etc., Cement Co. v. Copley Cement Co.*, 44 Fed. Rep. 271, 45 Fed. Rep. 212.

*Illinois.* — *Elgin Butter Co. v. Elgin Creamery Co.*, 155 Ill. 127.

*Ohio.* — *Harvey v. Lamoureux*, 7 Ohio Dec. 455, 5 Ohio N. P. 473.



which the ingredients of an article were derived although the article was manufactured in another place.<sup>1</sup>

**6. Sale of Goods under Another Person's Wrappers and Labels or in Stamped Bottles.** — The refilling of labeled or stamped bottles with spurious goods of the same class, and selling them as and for genuine goods, is a common method of infringement, and when proven will always be promptly enjoined.<sup>2</sup>

**7. Sale of Inferior for Superior Goods of Same Manufacturer.** — It is a palpable fraud for a dealer so to bottle or prepare for sale the inferior goods of a manufacturer as to be able to pass them to the public as goods of a superior quality. Both the manufacturer and the public are injured by such action. The manufacturer's reputation for his best goods is seriously injured, and the public are induced to buy an inferior article believing it to be a superior one. Such conduct constitutes unfair competition and will be enjoined.<sup>3</sup>

**8. Use of Mark on Different Goods or in Different Connection.** — As has been seen, the right to the exclusive use of a trademark or trade name is confined to use upon the same class of goods or in the same class of business. Accordingly, the use by another of such mark or name, but in a wholly different connection, does not constitute either infringement or unfair competition.<sup>4</sup>

**9. Use on Genuine Goods.** — Any one who deals in another's goods may use or sell them with the latter's trademark upon them, for in such case there is no deception. The mark truthfully indicates origin or ownership.<sup>5</sup>

**10. Infringement of Device by Name and Vice Versa.** — A trademark consisting of a figure or device is not infringed by the use of a word or name descriptive of such device, or *vice versa*, unless the goods have become known under that name, in which case the trademark is infringed.<sup>6</sup>

1. *Gabriel v. Sicilian Asphalt Paving Co.*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 534.

2. **Refilling Labeled or Stamped Bottles, etc.** — *England*. — *Rose v. Loftus*, 47 L. J. Ch. 576, 38 L. T. N. S. 409; *Richards v. Williamson*, 30 L. T. N. S. 746, 22 W. R. 765; *Allen v. Richards*, 26 Sol. J. 658; *Barnett v. Leuchars*, 13 L. T. N. S. 495, 14 W. R. 166; *Hostetter v. Anderson*, 1 *Webb, A.B. & W. Eq.* 7, 1 *Australian Jur.* 4; *Rose v. Henley, Sebastian's Dig.* 551. But see *Welch v. Knott*, 4 *Kay & J.* 747, 4 *Jur. N. S.* 330.

*United States*. — *Bauer v. Siegert*, (C. C. A.) 120 Fed. Rep. 81; *Samuel v. Hostetter Co.*, (C. C. A.) 118 Fed. Rep. 257; *Van Hoboken v. Mohns*, 112 Fed. Rep. 528; *Hostetter Co. v. Conron*, 111 Fed. Rep. 737; *Hostetter Co. v. Martinoni*, 110 Fed. Rep. 524; *Hostetter Co. v. William Schneider Wholesale Wine, etc., Co.*, 107 Fed. Rep. 705; *Pontefact v. Isenberger*, 106 Fed. Rep. 499; *Hostetter Co. v. Comerford*, 97 Fed. Rep. 585. But see *Hostetter Co. v. Brunn*, 107 Fed. Rep. 707.

*New York*. — *Ricker v. Leigh*, 74 N. Y. App. Div. 138.

3. **Sale of Inferior for Superior Goods of Same Manufacturer.** — *Hennessy v. White*, 6 *Wyatt, W. & A.B. Eq.* 216; *Russia Cement Co. v. Katzenstein*, 109 Fed. Rep. 314; *Gillott v. Kettle*, 3 *Duer* (N. Y.) 624. See also *Krauss v. Jos. R. Peebles' Sons Co.*, 58 Fed. Rep. 585.

4. **Use on Different Goods or in Different Connection.** — *Singer Mfg. Co. v. Wilson*, 2 *Ch. D.* 441; *Osgood v. Rockwood*, 11 *Blatchf. (U. S.)* 314; *Kinney v. Allen*, 1 *Hughes (U. S.)* 106; *Wells v. Ceylon Perfume Co.*, 105 Fed. Rep. 621; *Bass v. Feigenspan*, 96 Fed. Rep. 206. But see *Omega Oil Co. v. Weschler*,

(Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 441. But compare *Elgin Nat. Watch Co. v. Illinois Watch-Case Co.*, 89 Fed. Rep. 487. See *supra*, this title, *Extent of Right—Limit as to Class of Goods or Business*.

Any reasonable doubt should be resolved against the defendant. *Bass v. Feigenspan*, 96 Fed. Rep. 206.

The proprietor of the "Poland Springs" and of a hotel of the same name cannot enjoin a railway company from naming its station at that point "Poland Springs." *Ricker v. Portland, etc., R. Co.*, 90 *Me.* 395.

5. **Use on Genuine Goods.** — *Farina v. Silverlock*, 1 *Kay & J.* 509, 6 *De G. M. & G.* 214; *Kipling v. Putnam*, (C. C. A.) 120 Fed. Rep. 631; *Gorham Mfg. Co. v. Emery-Bird-Thayer Dry-Goods Co.*, 92 Fed. Rep. 774; *Apollinaris Co. v. Scherer*, 27 Fed. Rep. 18; *Vitascope Co. v. U. S. Phonograph Co.*, 83 Fed. Rep. 30; *Hoyt v. J. T. Lovett Co.*, 71 Fed. Rep. 173, 39 *U. S. App.* 1; *Samuel v. Berger*, 24 *Barb. (N. Y.)* 163; *Swezy v. McBair*, (N. Y. 1899) 53 *N. E. Rep.* 1132, *affirming* 89 *Hun (N. Y.)* 155. But see *General Electric Co. v. Re-New Lamp Co.*, 121 Fed. Rep. 164.

6. **Bulk and Bottled Goods.** — Where a distiller has different marks or labels for his bulk goods and bottled goods, a purchaser of bulk whiskey may not bottle it himself, and place thereon the marks or labels used by the distiller for his bottled goods. *Krauss v. Jos. R. Peebles' Sons Co.*, 58 Fed. Rep. 585.

6. **Devices and Names.** — *Johnson v. Bruno*, 107 Fed. Rep. 466; *Pittsburgh Crushed-Steel Co. v. Diamond Steel Co.*, 85 Fed. Rep. 637; *Morgan Envelope Co. v. Walton*, 82 Fed. Rep. 469.

**11. Substitution of Different Trademark.** — A dealer may legally remove the trademarks from articles made by another and purchased by himself, and place his own trademarks thereon.<sup>1</sup>

**12. Circulars and Advertisements.** — Circulars and advertisements calculated to deceive the public and pass off the defendant's goods or business as the goods or business of the plaintiff may be enjoined as constituting unfair competition.<sup>2</sup>

**13. Representation as "Successor," "Original," etc.** — A false representation, actual or implied, that the defendant is the successor to the good will and business of the plaintiff constitutes unfair competition and will be enjoined.<sup>3</sup> The lawful successor to the business and good will may enjoin another from falsely claiming to be such successor.<sup>4</sup> A person entitled to represent himself as "successor to" a person of a particular name will not be permitted to do so in such a manner as to deceive the public into thinking that his business is that of another. Any artifice calculated to produce this result, such as the use of different sizes of type, etc., will be condemned as unfair competition.<sup>5</sup>

**14. Representation as "Sole Proprietor," "Only Genuine," etc.** — Where two

**1. Removal and Substitution of Marks.** — *Johnson v. Raylton*, 7 Q. B. D. 438. See also *Chapleau v. Laporte*, Quebec 18 Super. Ct. 14.

Sebastian says in this connection: "The maker's mark has already performed its function when the goods are sold, and when it is removed from the goods the maker ceases to be responsible for the guaranty implied by its presence on them. The purchaser, by substituting his own mark, undertakes the responsibility for the quality of the goods, which are in effect selected and guaranteed by him." *Sebastian on Trade-Marks*, p. 130, citing *Hirsch v. Jonas*, 3 Ch. D. 584.

**2. Circulars and Advertisements.** — *Baker v. Baker*, (C. C. A.) 115 Fed. Rep. 297; *Halstead v. Houston*, 111 Fed. Rep. 376; *Samuels v. Spitzer*, 177 Mass. 226; *Van Horn v. Coogan*, 52 N. J. Eq. 380; *American Novelty, etc., Co. v. Manufacturing Electrical Novelty Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 450; *Dr. Jaeger's Sanitary Woolen System Co. v. La Boutillier*, (N. Y. Super. Ct. Spec. T.) 5 Misc. (N. Y.) 78; *Johnson v. Hitchcock*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 680; *Williams v. Spence*, (N. Y. Super. Ct. Spec. T.) 25 How. Pr. (N. Y.) 366; *Tuerk Hydraulic Power Co. v. Tuerk*, 92 Hun (N. Y.) 65. See *Frohm v. Miller*, (N. Y. Super. Ct. Spec. T.) 8 Misc. (N. Y.) 379. But see *Halstead v. Winston Co.*, 111 Fed. Rep. 35; *Schradsky v. Appel Clothing Co.*, 10 Colo. App. 195.

In *Singer Mfg. Co. v. Loog*, 8 App. Cas. 15, the defendant declared in his invoices, price lists, etc., that his machines were made on the "Singer System;" he also put on some machines a label with the words "Singer Machines." An injunction was granted as to the label, but refused as to the invoices, price lists, etc., on the ground that they were not calculated to deceive by representing the defendant's machine to have been manufactured by the plaintiffs.

The use of the complainant's circulars by a competitor will be enjoined. *Noel v. Ellis*, 89 Fed. Rep. 978.

**3. False Representation as Successor.** — *Prowett v. Mortimer*, 2 Jur. N. S. 414, 27 L. T. N. S. 132, 4 W. R. 519; *Scott v. Scott*, 16 L. T. N. S. 143; *Churton v. Douglas*, Johns. Ch. (Eng.) 174; *Hookham v. Pottage*, L. R. 8 Ch. 91; *Hogg v. Kirby*, 8 Ves. Jr. 215; *International Silver Co. v. Simeon L. & George H. Rogers Co.*, 110 Fed. Rep. 959; *American Novelty, etc., Co. v. Manufacturing Electrical Novelty Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 450; *Armington v. Palmer*, 21 R. I. 109, 79 Am. St. Rep. 786; *Fite v. Dorman*, (Tenn. 1900) 57 S. W. Rep. 129.

In *Hogg v. Kirby*, 8 Ves. Jr. 215, the plaintiff was the proprietor of "The Wonderful Magazine." The defendant brought out a publication, very similar in appearance, under the same name, with the addition of the words "New Series Improved." An injunction was granted.

**4. Fullwood v. Fullwood**, 9 Ch. D. 176, 47 L. J. Ch. 459, 38 L. T. N. S. 380, 26 W. R. 435; *Churton v. Douglas*, Johns. Ch. (Eng.) 174, 28 L. J. Ch. 841; *Hegeman v. Hegeman*, 8 Daly (N. Y.) 1; *Hazard v. Caswell*, (Supm. Ct. Spec. T.) 57 How. Pr. (N. Y.) 1; *Chesterman v. Seeley*, 18 Pa. Ct. 631, 5 Pa. Dist. 757.

**Representation as "Original."** — The original inventor of a new manufacture, and persons claiming under him, are alone entitled to designate such manufacture as "the original;" and if he or they have been in the habit of so doing, an injunction will be granted to restrain another manufacturer from applying the designation to his goods. *Cocks v. Chandler*, L. R. 11 Eq. 446.

In *Lazenby v. White*, Sebastian's Dig. 344, the plaintiffs were successors in business of the inventor of "Harvey's Sauce" (that name having become generic), and the defendant began to sell a sauce under the name of "The Original Lazenby's Harvey Sauce." An injunction was granted. See also *Lazenby v. White*, L. R. 6 Ch. 89, 19 W. R. 291.

**5. Nolan Bros. Shoe Co. v. Nolan**, 131 Cal. 271, 82 Am. St. Rep. 346.

or more persons are equally entitled to deal in a proprietary article, it is unfair for one of them to advertise himself as "sole proprietor" and he may be enjoined from so doing.<sup>1</sup> So no one will be permitted to advertise that his goods are the "only genuine" goods of a particular name, where others are equally entitled to deal in those goods and use that name.<sup>2</sup>

**15. Representation as "Formerly with," etc.** — A person engaging in business upon his own account may truthfully state and advertise the fact that he was "formerly with" another person in the same line of business.<sup>3</sup> But he will not be permitted to exercise this right in such a manner as to pass off his goods or business as those of the person with whom he was formerly connected. Any artifice or device in the arrangement or printing of the names, such as the use of different sizes of type, etc., calculated to deceive the public and pass off the goods or business as those of the original trader will be enjoined as unfair competition.<sup>4</sup>

**X. STATUTORY REGULATION — 1. Federal Statutes — a. CONSTITUTIONALITY.** — The earlier acts of Congress in regard to trademarks have been declared unconstitutional because not based upon the commerce clause of the Constitution, which is the only clause which seems broad enough to confer the power upon Congress to legislate upon the subject of trademarks.<sup>5</sup> The Act of March 3, 1881, which is the present law, was drawn under the commerce clause of the Constitution and has been generally considered as constitutional.<sup>6</sup>

**b. PROVISIONS OF ACT.** — The present act provides that the owner of existing trademarks used in commerce with foreign nations or with the Indian tribes may register such trademarks in the patent office by complying with the requirement of the act.<sup>7</sup> Registration is made *prima facie* evidence of ownership,<sup>8</sup> and it is provided that every infringer shall be liable to an action on the case for damages or he may be restrained by injunction.<sup>9</sup> Jurisdiction for both purposes is given to the federal courts without regard to the citizen-

1. "Sole Proprietor." — *International Silver Co. v. Simeon L. & George H. Rogers Co.*, 110 Fed. Rep. 955; *McAllister v. Stumpp, etc., Co.*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 438.

2. "Only Genuine." — *James v. James, L. R.* 13 Eq. 421; *Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co.*, 87 Fed. Rep. 203.

3. "Formerly with." — *Williams v. Osborne*, 13 L. T. N. S. 498; *Foot v. Lea*, 13 Ir. Eq. 484; *Hookham v. Pottage*, L. R. 8 Ch. 91; *Holbrook v. Nesbitt*, 163 Mass. 120; *Sanders v. Bond*, 47 Mo. App. 363; *Newark Coal Co. v. Spangler*, 54 N. J. Eq. 354; *Ward v. Ward*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 913; *Peterson v. Humphrey*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 394.

4. **Deceptive Artifice.** — *Glenny v. Smith*, 11 Jur. N. S. 964, 2 Drew & Sm. 476, 13 L. T. N. S. 11, 13 W. R. 1032, 6 New Reports 363; *Hookham v. Pottage*, L. R. 8 Ch. 91; *Klotz v. Hecht*, 73 Fed. Rep. 822; *Woodward v. Lazar*, 21 Cal. 449, 82 Am. Dec. 751; *Holbrook v. Nesbitt*, 163 Mass. 120; *Colton v. Thomas*, 2 Brews. (Pa.) 308. See also *Dence v. Mason*, W. N. (1877) 23.

5. **Constitutional Power of Congress.** — *Trade Mark Cases*, 100 U. S. 82; *U. S. v. Koch*, 40 Fed. Rep. 250.

6. **Act of March 3, 1881.** — See *South Carolina v. Seymour*, 153 U. S. 353; *Hennessy v. Braunschweiger*, 89 Fed. Rep. 664; *L. H. Harris Drug Co. v. Stucky*, 46 Fed. Rep. 624.

In *Illinois Watch-Case Co. v. Elgin Nat. Watch Co.*, (C. C. A.) 94 Fed. Rep. 667, reversing 89 Fed. Rep. 487, it was held that the

constitutionality of this act was so doubtful that the court would not exercise jurisdiction between citizens of the same state. Upon appeal, the Supreme Court refused to consider this question because not necessary to a determination of the case. See *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 666.

7. **Provisions of Present Statute.** — *Sorg v. Welsh*, 16 Pat. Off. Gaz. 910, Price & S. T. M. Cas. 220; *In re Bush*, 10 Pat. Off. Gaz. 164; *In re Boehm*, 8 Pat. Off. Gaz. 319; U. S. v. Duell, 17 App. Cas. (D. C.) 471.

8. **Registration Prima Facie Evidence of Ownership.** — *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 666; *Welsbach Light Co. v. Adam*, 107 Fed. Rep. 463; *Hennessy v. Braunschweiger*, 89 Fed. Rep. 664; *Brower v. Boulton*, (C. C. A.) 58 Fed. Rep. 888; *Glen Cove Mfg. Co. v. Ludeling*, 22 Fed. Rep. 824; U. S. v. Duell, 17 App. Cas. (D. C.) 478.

Even in a suit for infringement of a common law trademark, used only in domestic commerce, registration is evidence of what was really claimed. *Richter v. Reynolds*, (C. C. A.) 59 Fed. Rep. 577, following *Kohler Mfg. Co. v. Beshore*, 53 Fed. Rep. 262.

An action for infringement will not lie against one who used the mark prior to the date claimed by the applicant in his application for registry as the date of his first use of the mark. *Hyman v. Solis Cigar Co.*, 4 Colo. App. 475.

9. **Injunction and Damages.** — *U. S. v. Duell*, 17 App. Cas. (D. C.) 478.



ship of the parties.<sup>1</sup> A later statute provides that "no article of imported merchandise which shall copy or simulate the name or trademark of any domestic manufacture or manufacturer shall be admitted to entry at any custom house of the United States," and to enforce such prohibition domestic trademarks may be registered with the secretary of the treasury, and foreign goods are required to be marked with the country of origin.<sup>2</sup>

c. OPERATION AND EFFECT. — Registration under the statute confers no new rights to the mark claimed or any greater rights than already exist at common law without registration.<sup>3</sup> It is therefore of little value and is little used except for the purpose of creating a permanent record of the date of the adoption and use of the trademark, and to give jurisdiction to the federal courts in cases where all the parties are citizens of the same state,<sup>4</sup> or to enable treaty stipulations to be carried out.<sup>5</sup> Common-law rights remain unaffected; the statute expressly providing that "nothing in this chapter shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trademark might have had if the provisions of this chapter had not been enacted."<sup>6</sup>

d. WHAT MAY BE REGISTERED. — Only valid existing common-law trademarks belonging to the applicant are entitled to registration under the statute.<sup>7</sup> What constitutes such a trademark has already been considered at length in this title.<sup>8</sup> The trademarks which may be registered under the act are further limited to such marks as are used in commerce with foreign nations or

1. Jurisdiction of Federal Courts. — U. S. v. Duell, 17 App. Cas. (D. C.) 478. See ENCYC. PL. AND PR., vol. 21, p. 751.

2. Marks on Imported Goods. — Act of Oct. 1, 1890, c. 1244, §§ 6, 7.

3. Registration Creates No New Rights. — *Sarrazin v. W. R. Irby Cigar, etc., Co.*, (C. C. A.) 93 Fed. Rep. 624; *Hennessy v. Braunschweiger*, 89 Fed. Rep. 664; *Brower v. Boulton*, (C. C. A.) 58 Fed. Rep. 388; *Brower v. Boulton*, 53 Fed. Rep. 389; *Kohler Mfg. Co. v. Beshore*, 53 Fed. Rep. 262; *U. S. v. Braun*, 39 Fed. Rep. 775; *Smith v. Reynolds*, 13 Blatchf. (U. S.) 458; *Oakes v. St. Louis Candy Co.*, 146 Mo. 391. See also *Gaines v. Leslie*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 20.

Transfer of Registered Trademarks. — Registered trademarks may be transferred without the formalities required by the patent laws. *Sarrazin v. W. R. Irby Cigar, etc., Co.*, (C. C. A.) 93 Fed. Rep. 624.

A contract between persons using similar trademarks providing for the form which each shall use is not entitled to record in the patent office as a transfer of the right to use a trademark. *Waukesha Hygeia Mineral Springs Co. v. Hygeia Sparkling Distilled Water Co.*, (C. C. A.) 63 Fed. Rep. 438.

4. Value and Use of Registration. — *Hennessy v. Braunschweiger*, 89 Fed. Rep. 668; *Glen Cove Mfg. Co. v. Ludeling*, 22 Fed. Rep. 824. But see *Illinois Watch-case Co. v. Elgin Nat. Watch Co.*, (C. C. A.) 94 Fed. Rep. 667.

5. *U. S. v. Duell*, 17 App. Cas. (D. C.) 479, citing *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 666.

6. Effect on Common-law Rights. — U. S. Rev. Stat., § 4945; *Hennessy v. Braunschweiger*, 89 Fed. Rep. 661. See also *Gaines v. Leslie*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 20.

Registration as Evidence of Abandonment. — A registration with a claim more limited than the established common-law right may operate as an abandonment of the matters not claimed. *Richter v. Reynolds*, (C. C. A.) 59 Fed. Rep. 577; *Richter v. Anchor Remedy Co.*, 52 Fed. Rep. 455. See also *Pittsburgh Crushed-Steel Co. v. Diamond Steel Co.*, 85 Fed. Rep. 637; *Kohler Mfg. Co. v. Beeshore*, (C. C. A.) 59 Fed. Rep. 572; *Geo. T. Stagg Co. v. Taylor*, 95 Ky. 651.

As to the Rights of Foreigners in Great Britain, see *Collins Co. v. Brown*, 3 Kay & J. 423; *Collins Co. v. Cowen*, 3 Kay & J. 428, 5 W. R. 676; *Pisani v. Lawson*, 6 Bing. N. Cas. 90, 37 E. C. L. 293; and in the *United States*, see *Taylor v. Carpenter*, 2 Woodb. & M. (U. S.) 1; 3d Act of Treaty with England 1794; *Brown v. Maryland*, 12 Wheat. (U. S.) 447; *Taylor v. Carpenter*, 3 Story (U. S.) 458; *Fils v. Sarrazin*, 15 Fed. Rep. 489.

7. Valid Common-law Trademarks Only Entitled to Registry. — U. S. Rev. Stat., § 4939; *Ludington Novelty Co. v. Leonard*, 119 Fed. Rep. 937; *Brower v. Boulton*, 53 Fed. Rep. 389; *Ex p. Frieberg*, 20 Pat. Off. Gaz. 1164, Price & S. T. M. Cas. 554; *Ex p. Farnum*, 18 Pat. Off. Gaz. 412; *Ex p. Pace*, 15 Pat. Off. Gaz. 909; *In re Richardson*, 3 Pat. Off. Gaz. 120; *Ex p. Dawes*, 1 Pat. Off. Gaz. 27; *U. S. v. Duell*, 17 App. Cas. (D. C.) 471; *Seymour v. South Carolina*, 2 App. Cas. (D. C.) 240; *Chase v. Mayo*, 121 Mass. 343. See *Einstein v. Sawhill*, 2 App. Cas. (D. C.) 10.

Judicial Functions of Commissioners. — See *Seymour v. South Carolina*, 2 App. Cas. (D. C.) 240; *U. S. v. Duell*, 17 App. Cas. (D. C.) 473.

8. What Constitutes a Trademark. — See *supra*, this title, *What Protected as Trademark or Trade Name; Original Acquisition of Right; Loss or Termination of Right*.

the Indian tribes. No trademark used solely in interstate commerce or in commerce wholly within a state is entitled to registration.<sup>1</sup>

**2. State Statutes.**—The absence of satisfactory federal legislation relative to trademarks, and particularly of a criminal remedy for infringement of a trademark registered under the *United States* statutes, has led the states to adopt trademark laws of greater or less scope and value. The provisions of these statutes differ in many particulars; some are limited to citizens or those doing business in the particular state; some require registration, some do not; some provide a criminal remedy, some do not. The cases under these statutes are collected in the notes.<sup>2</sup> The states have general constitutional power to enact statutes regulating trademarks, though particular state statutes have been sometimes held unconstitutional for various reasons.<sup>3</sup>

**1. Registration as Notice.**—Persons not engaged in commerce with foreign nations or Indian tribes are not charged with notice of a trademark by registration. *Brennan v. Emery-Bird-Thayer Dry-Goods Co.*, 99 Fed. Rep. 971.

**2. State Statutes**—*Alabama*.—Acts Ala. No. 319, p. 700, Feb. 14, 1891, §§ 1-6.

*Arizona*.—Rev. Stat. Ariz. (1887), p. 717; Penal Code, §§ 574-579.

*Arkansas*.—Dig. Stat. Ark., §§ 6447-6455.

*California*.—Codes and Stat. Cal., Supp. 1877-78, 1880, c. vii., art. iii., §§ 3196-3199, 5655 (Civil Code, div. second, part 1, tit. 1), 5991, 6772, 13350-13354; Act March 31, 1891, c. 194, p. 217, §§ 1-6; *Hainque v. Cyclops Iron Works*, 136 Cal. 351; *Schmidt v. Brieg*, 100 Cal. 672; *Schmidt v. McEwen*, (Cal. 1893) 35 Pac. Rep. 854.

*Colorado*.—Act April 13, 1891; Laws 1891, pp. 46, 396-398.

*Connecticut*.—Gen. Stat. Conn. (1888), §§ 3956-3965.

*Florida*.—Rev. Stat. Fla. (1892), §§ 2481, 2482.

*Georgia*.—Code Ga. (1882), § 3181; *Comer v. State*, 103 Ga. 69.

*Illinois*.—Act May 8, 1891; Laws 1891, p. 202.

*Indiana*.—Rev. Stat. Ind. (annot. ed. 1888), vol. 2, c. 99, §§ 6522-6524; Rev. Stat. Ind. (Supp. Jan. 1, 1892), vol. 3, c. 99, p. 848, §§ 8812-8823; *State v. Wright*, 159 Ind. 394; *State v. Hagen*, 6 Ind. App. 167.

*Iowa*.—Act March 26, 1892; Laws 1892, c. 36, p. 63; *Beebe v. Tolerton*, etc., Co., 117 Iowa 593.

*Kansas*.—Act March 11, 1891; Laws 1891, c. 213, pp. 363-365.

*Kentucky*.—Gen. Stat. Ky., c. 29, Act xxii., p. 444, §§ 1-4, pp. 493, 494, 496; Acts 1889-90, p. 99, c. 823, April 16, 1890, §§ 1-4; *Geo. T. Stagg Co. v. Taylor*, 95 Ky. 651.

*Maine*.—Act March 28, 1893; Laws 1893, c. 276, p. 330.

*Maryland*.—Laws Md. (1892), c. 262, p. 354, amending §§ 201-206 of article 27 of Code Pub. Gen. Laws (1888); Laws 1892, c. 357, p. 500, §§ 1-6.

*Massachusetts*.—*Com. v. Rozen*, 176 Mass. 129; *Tracy v. Banker*, 170 Mass. 266; *Dover Stamping Co. v. Fellows*, 163 Mass. 191, 47 Am. St. Rep. 448.

*Michigan*.—Act April 24, 1891; Pub. Acts 1891, pp. 39-41.

*Minnesota*.—Act April 17, 1893; Gen. Laws 1893, c. 24, pp. 126-128,

*Mississippi*.—Annot. Code Miss. (1892), §§ 1306-1308.

*Missouri*.—Act March 20, 1893, Laws 1893, p. 260, etc.; Act March 31, 1893, Laws 1893, pp. 256-259; *State v. Niesman*, 101 Mo. App. 507; *State v. Bishop*, 128 Mo. 373, 49 Am. St. Rep. 569.

*Nebraska*.—Act March 31, 1891; Consol. Stat., §§ 2083-2087.

*Nevada*.—Gen. Stat. Nev. (1885), §§ 4919-4930.

*New Jersey*.—Revision (1799-1877), Supp. 1877-86, § 186, p. 259; App. A, p. 1336, §§ 1-3; Act March 23, 1892; *Schmalz v. Wooley*, 56 N. J. Eq. 649.

*New Mexico*.—Gen. Laws N. Mex. (1882), p. 306.

*New York*.—*People v. Hilfman*, 61 N. Y. App. Div. 541; *People v. Krivitzky*, 168 N. Y. 182, 60 N. Y. App. Div. 307; *Higgins v. Dakin*, 86 Hun (N. Y.) 461; *Pound v. Molyneaux*, (Supm. Ct. Gen. T.) 24 N. Y. Supp. 592; *People v. Cannon*, 139 N. Y. 32, 36 Am. St. Rep. 668; *People v. Bartholf*, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 782; *People v. Elfenbein*, 65 Hun (N. Y.) 434; *Bulena v. Newman*, (Buffalo Super. Ct. Gen. T.) 10 Misc. (N. Y.) 460.

*North Carolina*.—Code N. Car. (1883), § 1040.

*Ohio*.—Rev. Stat. Ohio (1892), §§ 7069, 7072, 7073, 7096, 7098, 7120, 7121; *Cigar Makers' Protective Union v. Lindner*, 3 Ohio Dec. 244, 2 Ohio N. P. 114.

*Oregon*.—Hill's Annot. Laws Oregon (1887), §§ 4192-4199.

*Pennsylvania*.—*Com. v. Norton*, 16 Pa. Super. Ct. 423.

*South Dakota*.—Act March 7, 1890; Session Laws 1890, c. 153, p. 321.

*Tennessee*.—Code Tenn. (1884), § 5626.

*Utah*.—Comp. Laws Utah (1888), §§ 4551-4555.

*Vermont*.—Rev. Laws Vt. (1880), §§ 4163, 4164.

*Virginia*.—Acts of Assembly 1889-90, p. 53, c. 71, as amended by Act Feb. 12, 1892; Acts of Assembly 1891, Laws 1891-92, c. 204, p. 326, §§ 1-7.

*Washington*.—Act Feb. 21, 1891; Laws 1891, c. 16, pp. 29, 30.

*Wisconsin*.—Act April 16, 1891; Laws 1891, c. 280, p. 353; Sanb. & B. Annot. Stat. Wis. (1889), §§ 4463, 4464, 4470a, 1-4.

**3. Constitutionality of State Statutes.**—*Ruhrstrat v. People*, 185 Ill. 133, 76 Am. St. Rep. 30; *White v. Wagar*, 83 Ill. App. 592; *Vogt v. People*, 59 Ill. App. 684; *State v. Berlinsheimer*,

**3. English Statutes.** — In England the whole subject of trademarks is regulated by elaborate statutory provisions.<sup>1</sup> Registration is made a condition precedent to the maintenance of a suit for infringement.<sup>2</sup> But unregistered trademarks receive a large measure of protection under the doctrine of unfair competition which is unaffected by the statutes.<sup>3</sup>

**4. Treaties with Foreign Nations.** — Many treaties have been made from time to time between the United States and foreign countries for the protection of the trademark rights of the citizens of each country in the other. In 1887 an international convention was entered into by the United States and various other nations regulating this subject and abrogating all previous treaties entered into between these countries.<sup>4</sup>

**XI. REMEDIES AND PROCEDURE** — **1. Form of Remedy, Pleading and Practice.** — This subject is beyond the scope of this title, and has been elsewhere fully treated.<sup>5</sup>

**2. Damages and Profits.** — The *English* rule for estimating profits and damages in trademark cases is to give the plaintiff his election to seek either profits or damages.<sup>6</sup> If he takes profits, he can recover such an amount as would appear as the profit of a whole business, when calculated as a business man would estimate the profit of any mercantile or manufacturing business, allowing all reasonable and proper deductions; the amount to be recovered will be the whole profits of the defendant's business in the infringing article.<sup>7</sup> If the plaintiff elects to take damages, it lies with him to show by distinct evidence the actual damage which he has suffered. The courts will not presume that the plaintiff would have made all the sales made by the defendant, but if the plaintiff's sales have fallen off approximately to the same extent as the defendant's have increased in the same region, this will be sufficient to entitle the plaintiff to recover this loss.<sup>8</sup> In the *United States* the rule is even more liberal; where a trademark is proven to have been infringed, the owner is entitled to recover the entire profit realized by the defendant on the sale of the article bearing the infringing mark, or upon his work in connection therewith; but the defendant is only accountable for sales actually made or for work actually done for an infringer. Where a lawful and an unlawful business

62 Mo. App. 168; *Schmalz v. Wooley*, 56 N. J. Eq. 649; *Cigar Makers' Protective Union v. Lindner*, 3 Ohio Dec. 244, 2 Ohio N. P. 114; *Com. v. Morton*, 23 Pa. Co. Ct. 386; *Com. v. Norton*, 9 Pa. Dist. 132.

**1. English Statutes.** — See *In re Uneeda Trade-Mark*, (1901) 1 Ch. 550, 70 L. J. Ch. 318, 84 L. T. N. S. 259; *Re Faulder*, 83 L. T. N. S. 726; *Batt v. Dunnett*, (1899) A. C. 428, 68 L. J. Ch. 557, 81 L. T. N. S. 94; *Re Ripley*, 78 L. T. N. S. 367; *In re Batt*, (1898) 2 Ch. 432, 67 L. J. Ch. 576, 79 L. T. N. S. 206; *In re Salt*, (1894) 3 Ch. 166, 8 Reports 682; *In re Colman*, (1894) 2 Ch. 115, 8 Reports 208; *In re Talbot*, 8 Reports 149; *In re La Société, etc.*, (1894) 2 Ch. 26, 7 Reports 183; *In re Farbenfabriken*, (1894) 1 Ch. 645, 7 Reports 439; *De Kuyper v. Van Dulken*, 24 Can. Sup. Ct. 114. See Patents, Designs, and Trademarks Act of 1883, as amended by Act of 1888; Merchandise Marks Act of Aug. 23, 1887, 50 & 51 Vict., c. 28; Merchandise Marks Act of May 11, 1891, 54 Vict., c. 15.

For a full collection of English statutes, rules, forms, and precedents, see Kerly on Trademarks.

**2.** Kerly on Trademarks, pp. 8, 9.

**3.** Kerly on Trademarks, p. 12; *Thompson v. Montgomery*, 41 Ch. D. 35, (1891) A. C. 217.

**4. International Conventions and Treaties.** — Trademark Record, Aug. 16, 1893; 26 U. S. Stat. at Large, art. 6, p. 1376 *et seq.*; 39 Pat. Off. Gaz. 960; *J. & P. Baltz Brewing Co. v. Kaiserbrauerei*, (C. C. A.) 74 Fed. Rep. 222; *Kerry v. Toupin*, 60 Fed. Rep. 272; *Richter v. Reynolds*, (C. C. A.) 59 Fed. Rep. 577; *La Republique Francaise v. Schultz*, 57 Fed. Rep. 37. See also Hopkins, Unfair Trade, p. 374; Paul on Trademarks, pp. 838, 841.

A full collection of treaties between the United States and other countries will be found in Paul on Trademarks, p. 826 *et seq.*

**5.** See the ENCYC. OF PL. AND PR., vol. 21, p. 751.

**6. English Rule as to Damages and Profits.** — *Lever v. Goodwin*, 36 Ch. D. 1, 4 R. P. C. 492, 57 L. T. N. S. 583; *Leather Cloth Co. v. Hirschfield*, L. R. 1 Eq. 299, 13 L. T. N. S. 427.

*Edelsten v. Edelsten*, 1 De G. J. & S. 185, 10 L. T. N. S. 780.

**8.** *Tonge v. Ward*, 21 L. T. N. S. 480; *Leather Cloth Co. v. Hirschfield*, L. R. 1 Eq. 299, 13 L. T. N. S. 427. See also *Rodgers v. Nowill*, 5 C. B. 109, 57 E. C. L. 111, 17 L. J. C. Pl. 52, 11 Jur. 1039, 6 Hare 325, 10 L. T. N. S. 88; *Blofeld v. Payne*, 4 B. & Ad. 410, 24 E. C. L. 87.



are so mixed that the actual expense of conducting the unlawful business cannot be ascertained, the expenses of the general business will not be allowed as deductions.<sup>1</sup> The plaintiff may also recover such actual damages to himself as he is able to prove by legal evidence. He is not limited to the profits made by the defendant.<sup>2</sup> The rule is the same in cases of unfair competition as in cases of infringement of technical trademarks.<sup>3</sup> Nominal damages are recoverable whenever infringement is shown and no actual damages are proved.<sup>4</sup> Exemplary or vindictive damages cannot be recovered,<sup>5</sup> certainly not in a suit in equity for an injunction and accounting.<sup>6</sup> If the plaintiff has been guilty of laches in bringing suit, he may have an injunction, but cannot have an account for profits or damages from infringement prior to the filing of his bill.<sup>7</sup>

**TRADE NAME.** — See the titles *GOODWILL*, vol. 14, p. 1085; *NAME*, vol. 21, p. 305; *TRADEMARKS, TRADE NAMES, AND UNFAIR COMPETITION*, *ante*.

**TRADER.** (See also the titles *HAWKERS AND PEDDLERS*, vol. 15, p. 290; *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*, vol. 21, p. 795.) — A trader

**1. American Rule — Profits.** — *N. K. Fairbank Co. v. Windsor*, 118 Fed. Rep. 96; *Societe Anonyme v. Western Distilling Co.*, 46 Fed. Rep. 921; *Benkert v. Feder*, 34 Fed. Rep. 534; *Atlantic Milling Co. v. Rowland*, 27 Fed. Rep. 24; *Sawyer v. Kellogg*, 9 Fed. Rep. 601; *Graham v. Plate*, 40 Cal. 593, 6 Am. Rep. 639; *El Modelo Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 23 Am. St. Rep. 537; *Stonebraker v. Stonebraker*, 33 Md. 269; *Clark Thread Co. v. William Clark Co.*, 55 N. J. Eq. 658. See also *Enoch Morgan's Sons Co. v. Troxell*, (Supm. Ct. Spec. T.) 57 How. Pr. (N. Y.) 121. But see *Beebe v. Tolerton, etc., Co.*, 117 Iowa 593; *Clark Thread Co. v. William Clark Co.*, 56 N. J. Eq. 789. *Compare Petz v. Eichele*, 62 Mo. 179.

An accounting for profits may be granted only when an injunction is or could have been granted. *Clark Thread Co. v. William Clark Co.*, 55 N. J. Eq. 658.

**2. Damages — United States.** — *Williams v. Mitchell*, (C. C. A.) 106 Fed. Rep. 168; *Hennessy v. Wilmerding-Loewe Co.*, 103 Fed. Rep. 90; *Benkert v. Feder*, 34 Fed. Rep. 534; *Atlantic Milling Co. v. Rowland*, 27 Fed. Rep. 24, *Price & S. T. M. Cas.* 1063; *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217, *Price & S. T. M. Cas.* 904; *Sawyer v. Kellogg*, 9 Fed. Rep. 601; *Hostetter v. Vowinkle*, 1 Dill. (U. S.) 329.

*California.* — *Graham v. Plate*, 40 Cal. 593, 6 Am. Rep. 639.

*Florida.* — *El Modelo Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 23 Am. St. Rep. 537.

*Indiana.* — *Julian v. Hoosier Drill Co.*, 78 Ind. 408.

*Iowa.* — *Beebe v. Tolerton, etc., Co.*, 117 Iowa 593.

*Massachusetts.* — *Marsh v. Billings*, 7 Cush. (Mass.) 332, 54 Am. Dec. 723.

*Missouri.* — *Addington v. Cullinane*, 28 Mo. App. 241; *Conrad v. Joseph Uhrig Brewing Co.*, 8 Mo. App. 279. See also *Peltz v. Eichele*, 62 Mo. 179.

*Pennsylvania.* — *Shaw v. Pilling*, 175 Pa. St. 78.

*Rhode Island.* — *Buchanan v. Carpenter*, 19 R. I. 337.

Loss of profits is a proper element of damage

to be considered. *Hostetter v. Vowinkle*, 1 Dill. (U. S.) 329.

A falling off in the plaintiff's trade may be shown as evidence of damage, but it is for the jury to say whether it was caused by the defendant's infringement. *Shaw v. Pilling*, 175 Pa. St. 78.

The rule is much the same as in patent cases. *Brown on Trademarks*, §§ 505, 507; 3 *Sutherland on Damages*, pp. 630, 631; *Addington v. Cullinane*, 28 Mo. App. 241. See also the title *PATENTS*, vol. 22, p. 260.

**3. Same Rules Applicable to Unfair Competition.** — *N. K. Fairbank Co. v. Windsor*, 118 Fed. Rep. 96.

**4. Nominal Damages.** — *Blofeld v. Payne*, 4 B. & Ad. 410, 24 E. C. L. 87; *Baker v. Baker*, (C. C. A.) 115 Fed. Rep. 297; *El Modelo Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 23 Am. St. Rep. 537; *Thomson v. Winchester*, 19 Pick. (Mass.) 216, 31 Am. Dec. 135.

**5. Exemplary Damages.** — *Taylor v. Carpenter*, 2 Woodb. & M. (U. S.) 21, 11 Paige (N. Y.) 292, 42 Am. Dec. 114, 2 Sandf. Ch. (N. Y.) 603.

**6. Hennessy v. Wilmerding-Loewe Co.**, 103 Fed. Rep. 90.

**7. Effect of Laches — England.** — *Ford v. Foster*, L. R. 7 Ch. 616, 27 L. T. N. S. 220, 41 L. J. Ch. 682.

*United States.* — *Menendez v. Holt*, 128 U. S. 514; *McLean v. Fleming*, 96 U. S. 257; *N. K. Fairbank Co. v. Luckel*, 106 Fed. Rep. 498, (C. C. A.) 116 Fed. Rep. 332; *La Republique Francaise v. Schultz*, (C. C. A.) 102 Fed. Rep. 153; *Low v. Fels*, 35 Fed. Rep. 361; *Holt v. Menendez*, 23 Fed. Rep. 869, 32 Pat. Off. Gaz. 136, *Price & S. T. M. Cas.* 986; *Sawyer v. Kellogg*, 9 Fed. Rep. 601. See also *Le Page Co. v. Russia Cement Co.*, (C. C. A.) 51 Fed. Rep. 941.

*California.* — *Schmidt v. Brieg*, 100 Cal. 672. *Missouri.* — *Drummond Tobacco Co. v. Addisn Tinsley Tobacco Co.*, 52 Mo. App. 10.

*New York.* — *Weed v. Peterson*, (Supm. Ct.) 12 Abb. Pr. N. S. (N. Y.) 178; *S. Howes Co. v. Howes Grain Cleaner Co.*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 83.

*Tennessee.* — *C. F. Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84.

is one engaged in trade or commerce; one who makes a business of buying and selling; a merchant.<sup>1</sup>

**TRADE, RESTRAINT OF.** — See the title *RESTRAINT OF TRADE*, vol. 24, p. 841.

**TRADE SECRETS.** (See also the titles *GOOD WILL*, vol. 14, p. 1085; *MASTER AND SERVANT*, vol. 20, p. 48; *PATENTS*, vol. 22, p. 260; *TRADEMARKS*, *TRADE NAMES*, AND *UNFAIR COMPETITION*, *ante.*) — In a number of cases it has been held that the disclosure of trade secrets, knowledge of which has been obtained through a confidential relationship with their owner, such as that of master and servant, or corporation and officer, or which were obtained under a contract to keep them secret, may be enjoined.<sup>2</sup> And in some cases involving trade secrets the courts have held

1. *Morris v. Clifton Forge Grocery Co.*, 46 W. Va. 200, quoting *Webst. Dict.* See also *State v. Chadbourn*, 80 N. Car. 481.

A "*trader*" is 'one who buys and sells goods;' 'one who makes it his business to buy merchandise, goods, and chattels, and sells the same for the purpose of making a profit.'" *In re Minnesota, etc.*, Constr. Co., (Ariz. 1900) 60 Pac. Rep. 884.

**Includes Both Buying and Selling.** — In *In re New York, etc.*, Water Co., 98 Fed. Rep. 713, it was said: "In *Bouv. Law Dict.* a *trader* is defined as 'one who makes it his business to buy merchandise or goods and chattels and to sell the same for the purpose of making a profit.' Black, *Law Dict.*, says: 'One whose business is to buy and sell merchandise or any class of goods deriving a profit from his dealings;' and the weight of authority seems to be that the proper description of the business of a *trader* includes both buying and selling, either goods or merchandise, or other goods ordinarily the subject of traffic. *Per Lord Ellenborough*, in *Sutton v. Wheeley*, 7 East 442; *Thompson, C. J.*, in *Wakeman v. Hoyt*, 5 Law Rep. 309, 28 Fed. Cas. No. 17,051; *Lowell, J.*, in *In re Chandler*, 1 Lowell (U. S.) 478, 4 Nat. Bankr. Reg. 213, 5 Fed. Cas. No. 2,591; *Re Smith*, 2 Lowell (U. S.) 69, 22 Fed. Cas. No. 12,981; *Love v. Love*, 21 Pittsb. Leg. J. N. S. (Pa.) 101, 15 Fed. Cas. No. 8,549." See also *In re Tontine Surety Co.*, 116 Fed. Rep. 401.

**Quantity.** — In *In re San Gabriel Sanatorium Co.*, 95 Fed. Rep. 271, it was said: "*Trader* is thus defined: 'One who makes it his business to buy merchandise or goods and chattels, and to sell the same for the purpose of making a profit. The *quantum* of dealing is immaterial when the intention to deal generally exists.'" See also *Matter of Odell*, 9 Ben. (U. S.) 209, 18 Fed. Cas. No. 10,426.

**Exemption.** — Where a stock of goods is set apart as an exemption, and the head of a family, without an order of court, continues to carry on a mercantile business, and sells the goods and buys other goods with the proceeds and still others on credit extended by merchants who have notice of the exemption, such head of a family is not and cannot be, as such, a *trader*, within the meaning of the *Insolvent Traders Act* (2 Code Ga. 1895, §§ 2716-2722), so as to authorize a court of equity to seize, sell, and administer the assets of the estate under that act. *Powers v. Rosenblatt*, 113 Ga. 559.

**Injunction and Receiver — Georgia.** — See *Hobbs v. Sheffield*, 87 Ga. 455; *Comer v. Coates*, 69 Ga. 491; *Blanchard v. Vansyckle*, 70 Ga. 278; *Coates v. Allen*, 71 Ga. 787; *Scott v. Jones*, 74 Ga. 762; *Kimbrell v. Walters*, 86 Ga. 99.

**Trader and Manufacturer Distinguished** — In *State v. Chadbourn*, 80 N. Car. 479, it was held that one who carried on the business of buying timber and converting it into lumber for sale was a manufacturer and not a *trader*, as a *trader* is one who sells goods substantially in the form in which they are bought, and who has not converted them into another form of property by his skill and labor. See also *TRADESMAN, post.*

**Printer and Publisher.** — In *Gimingham v. Laing*, 2 Rose 472, 2 Marsh. 236, it was held that a publisher of a newspaper buying the whole daily impression from the proprietors, reselling it at a profit and bearing the loss on those that remained unsold, was a *trader*. See *TRADING, post.*

**Insolvency and Bankruptcy.** — See the title *INSOLVENCY AND BANKRUPTCY*, vol. 16, pp. 655, 666.

**Itinerant Trader.** — See *ITINERANT*, vol. 17, p. 578.

**2. Injunction.** — *Tabor v. Hoffman*, 41 Hun (N. Y.) 5, *affirming* 118 N. Y. 30; *Little v. Gallus*, 4 N. Y. App. Div. 569; *Cincinnati Bell Foundry Co. v. Dodds*, 10 Ohio Dec. (Reprint) 154, 19 Cinc. L. Bul. 84; *Fralich v. Despar*, 165 Pa. St. 24; *Merryweather v. Moore*, (1892) 2 Ch. 518; *Albert v. Strange*, 2 De G. & Sm. 652, 1 Macn. & G. 25; *Robb v. Green*, (1895) 2 Q. B. 315; *Lamb v. Evans*, (1892) 3 Ch. 462, (1893) 1 Ch. 218; *Pollard v. Photographic Co.*, 40 Ch. D. 345; *Tipping v. Clarke*, 2 Hare 383; *Exchange Tel. Co. v. Central News Co.*, (1897) 2 Ch. 48. And see the title *MASTER AND SERVANT*, vol. 20, p. 49. And so the principle has been applied to a partnership. *Morison v. Moat*, 9 Hare 241; *Roberts v. McKee*, 29 Ga. 161.

**Injunction Denied.** — In *New York Chemical Co. v. Halleck*, (C. Pl. Spec. T.) 15 N. Y. Supp. 517, an injunction was denied on the ground that the complainant had not fulfilled his contract with the defendant.

In *Nessle v. Reese*, 49 Barb. (N. Y.) 374, where the gist of the action was the alleged use by the defendants of a secret process of enameling, which R., one of them, had covenanted with the plaintiffs not to divulge, and the exclusive right to use which the plaintiffs

the hearings *in camera* where a public hearing would have worked great injury to one of the parties.<sup>1</sup> For other matters relating to trade secrets see the note below.<sup>2</sup>

**TRADESMAN.** — See note 3.

**TRADE UNIONS.** (See also the title LABOR COMBINATIONS, vol. 18, p. 81.) — A combination of workmen of the same trade or of several allied trades for the purpose of securing by united action the most favorable conditions as regards wages, hours of labor, etc., for its members, every member contributing a stated sum, to be used primarily for the support of those members who seek to enforce their demands by striking, and also as a benefit fund.<sup>4</sup>

claimed to have acquired from R. by purchase, it was held that there was no ground for the exercise of the equitable jurisdiction of the court, unless it was established that the defendants, some or one of them, were using the same secret to which the covenants related, or that they threatened or intended to make the secret known, contrary to the stipulations of R.

In *Deming v. Chapman*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 382, in an action to compel the defendant to keep secret a certain invention, in pursuance of a written agreement between the parties, an injunction restraining the defendant from divulging or teaching the secret, art, and invention of such matter, was held not the proper remedy, especially where the defendant insisted that he had not divulged the thing mentioned in the agreement, but something else. The court said: "The plaintiff must allege that the defendant has revealed the prohibited secret. The defendant, admitting that he has revealed something, denies that it is the thing mentioned in his agreement. A question of identity arises for the court to determine; and how is the identity of two given things to be investigated, if we are not permitted to inquire what the given things are? But the moment the investigation takes place, the secret vanishes — its exclusiveness is gone; and with the exclusiveness of the subject of the action, the action itself disappears. (See the cases of *Newbery v. James*, 2 Meriv. 446, and *Williams v. Williams*, 3 Meriv. 160.) An injunction, therefore, if any, is not the appropriate remedy; it is obviously inefficient in practice and incapable of enforcement."

1. **Hearing in Camera.** — *Badische Anilin, etc.*, *Fabrik v. Levinstein*, 24 Ch. D. 156; *Mellor v. Thompson*, 31 Ch. D. 35. Compare *Edison, etc., Co. v. Woodhouse*, (1886) 3 R. P. C. 172; *Benedictus v. Sullivan*, (1894) 12 R. P. C. 29.

2. **Restraint of Trade.** — As to restrictions upon the use of trade secrets, see the title RESTRAINT OF TRADE, vol. 14, p. 849. And see *Fowle v. Park*, 131 U. S. 88; *Vickery v. Welch*, 19 Pick. (Mass.) 523; *Jarvis v. Peck, Hoffm.* (N. Y.) 479, 10 Paige (N. Y.) 118; *Alcock v. Giberton*, 5 Duer (N. Y.) 76; *Hard v. Seeley*, 47 Barb. (N. Y.) 428; *Tode v. Gross*, 127 N. Y. 480, *affirming* 51 Hun (N. Y.) 644.

**Specific Performance.** — *Barnes v. McAllister*, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 534, was an action for the specific performance of a contract to compel the defendant to manufacture and sell to the plaintiffs, exclusively, a particular article. The court said: "It would be impossible for a court of equity to ascer-

tain whether the most essential provisions of this contract, on both sides, have been complied with, under a decree of specific performance, should such a decree be pronounced. The compounding of this ointment is a secret, known only to the defendant; whether the defendant combines the proper ingredients, or what these ingredients are which constitute the valuable qualities of the article, or in what proportion they are to be combined, neither the court, nor any referee, whom the court might name, would be able to decide."

3. **Tradesman — Manufacturer.** — See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 105, note 1. And see *TRADE*, *ante*.

**Buying and Selling.** — The term *tradesman* means a person carrying on a trade — buying and selling. *Palmer v. Snow*, (1900) 1 Q. B. 727.

A **Traveling Salesman** selling furniture on commission for a manufacturer was held not to be a *tradesman* as that term was used in a statute giving a preference for wages. *Witmer v. Miller*, 12 Pa. Co. Ct. 363, 2 Pa. Dist. 239.

**Barber.** — In *Palmer v. Snow*, (1900) 1 Q. B. 725, it was held that a barber who shaved customers on Sunday was not a "*tradesman*, artificer, workman, laborer, or other person whatsoever," within the meaning of 29 Car. II., c. 7, § 1. See also the title SUNDAYS AND HOLIDAYS, vol. 27, p. 386.

4. **Trade Union.** — Century Dictionary.

**Responsibility of the Union.** — That a union, though not incorporated, may sue and be sued and is responsible for its acts like a corporation, see *Taff Vale R. Co. v. Amalgamated Soc.*, (1901) A. C. 426; *Quinn v. Leatham*, (1901) A. C. 495. And see *Taff Vale R. Co. v. Amalgamated Soc.*, 6 Law Notes 194; *F. R. Patch Mfg. Co. v. Union*, (Vt.) 7 Law Notes 23.

**Trade Unions — Right to Bind Individual Members.** — In *Burnetta v. Marceline Coal Co.*, (Mo. 1904) 79 S. W. Rep. 139, it was said: "The Miners' Union is not an organization for the purpose of conducting any business enterprise, but is purely one for the protection of labor against the unjust exactions of capital. The members of the union do not labor in coal mines for the organization, but each member works for himself, and whatever compensation he receives is for the benefit of himself and his family. That the Miners' Union, as an organization, cannot make a contract for its individual members in respect to the performance of work and the payment for it, in our opinion, is too clear for discussion. *Richmond v. Judy*, 6 Mo. App. 465. While it may



**TRADING.** — See note 1.

be true that a labor organization may have rules requiring the employer to designate certain pay days, and, if you employ a member of the organization, or even one who is not a member, and by agreement his services are to be paid on the designated pay days, as established by the rules, it could well be insisted that the contract fixes the time of payment, that is upon the theory that the individual so contracts, and by no means upon account of his being a member of the organization which has undertaken to contract for him. A contract on the part of an individual that he will perform certain work under the rules of an organization is not to be inferred from the simple fact that he is a member of the organization. Persons work for themselves, and are free and independent. Agreements imposing conditions can only be enforced when the entire proposition has been stated, and by them freely accepted." In that case it was held that the union could not bind a member as to the day of payment or as to the manner of performance of labor which he contracted to perform.

**1. Trading Corporation.** — "A *trading* corporation is a commercial corporation." *Adams v. Boston, etc., R. Co., Holmes (U. S.) 35, 1 Fed. Cas. No. 47.*

**Trading Company.** — The term "*trading* company" has been held to refer to a public company and not to include a private partnership. *Jones v. Ogle, L. R. 8 Ch. 192; In re Griffith, 12 Ch. D. 655.*

**Printer and Publisher.** — In *Pinkerton v. Ross, 33 U. C. Q. B. 508*, it was held that the busi-

ness of printing and publishing a newspaper constituted the partners employed in it a partnership for *trading* purposes. See also *Re Cooper, 1 Dor. & Mac. 102*, and see the title TRADEMARKS, etc., *ante*.

**English Merchant Shipping Act.** — The clause "ships *trading* from any port in Great Britain within the London district \* \* \* to \* \* \* any port in Europe north and east of Brest," in the English Merchant Shipping Act of 1894, includes a ship pursuing a voyage for the purpose of a *trading* adventure, though not actually carrying goods. See *The Steamship Edenbridge v. Green, (1897) A. C. 336; The Rutland, (1896) P. 281; Courtney v. Cole, 19 Q. B. D. 447.*

**Trading Ships.** — The words "*trading* ships" or "ships *trading*" have been held to apply to ships carrying cargo as contradistinguished from ships not carrying cargo — for instance, as distinguished from yachts, men-of-war, etc. *The Rutland, (1896) P. 285.*

**Trading Inwards — Trading Outwards.** — See *Mersey Docks, etc., Board v. Henderson, 13 App. Cas. 595, 19 Q. B. D. 123.*

**Trading Voyage.** — In *Brown v. Jones, 2 Gall. (U. S.) 482, 4 Fed. Cas. No. 2,017*, it was said: "The voyage described in the shipping articles was to the Pacific, Indian, and Chinese oceans, 'on a *trading* voyage,' which seems pointed to a commerce by buying and selling on account of the original owners and shippers, and not to the intermediate transportation of cargoes on freight. The latter employment is usually denominated a 'freighting' and not a *trading* voyage."

# TRADING STAMPS.

## I. MEANING OF TERM, 442.

## II. CONSTITUTIONALITY OF PROHIBITORY STATUTES, 442.

## III. TAXATION OF PRIVILEGE, 443.

### CROSS-REFERENCES.

See *GIFT ENTERPRISE*, vol. 14, p. 1005. See also the titles *GAMBLING CONTRACTS*, vol. 14, p. 602; *GAMING*, vol. 14, p. 681; *LOTTERIES*, vol. 19, p. 590; *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*, vol. 21, p. 770.

**I. MEANING OF TERM.** — Trading stamps, within the meaning of statutes and decisions regulating the subject, are tickets, coupons, or similar devices, which a merchant gives, without extra charge, to a customer, in connection with and on account of his purchase, and which are redeemable in some article or articles of value, either by the merchant himself or by a third party who has contracted with the merchant so to do.<sup>1</sup>

**II. CONSTITUTIONALITY OF PROHIBITORY STATUTES.** — The decisions are practically unanimous in holding that a statute which makes it unlawful for the vendor of goods to give away to the purchaser, at the same time and as a part of the same transaction, any stamp, coupon, or other device which will entitle him to receive from the vendor himself or from any other person or corporation a certain well-defined additional article, is an unwarranted interference with individual liberty, and violates the Fourteenth Amendment to the Constitution of the United States, and similar personal rights clauses in the state constitutions. The article procurable by the stamps being definite and certain, the transaction contains no element of chance, does not offend the public morals of the community, and consequently is not prohibitable in the proper exercise of the police powers of the state.<sup>2</sup> It can make no difference whether the stamps are redeemable by the selling merchant or a third party,<sup>3</sup> the third party being, in effect, no more than the agent of the merchant from whom the original purchase was made.<sup>4</sup>

1. See *infra*, the cases cited under this title.  
**Operation of Trading Stamp Scheme.** — In the greater number of trading stamp schemes which have been the subject of litigation, it seems that the stamps are sold to the merchants at a certain sum per hundred by a person or corporation whose business it is to furnish them. Only certain merchants, by preconcerted agreement, may purchase these stamps, and in consideration of the purchase thereof it is the duty of the trading stamp company to distribute to the homes of the community books explaining the trading stamp scheme, giving the names of the merchants from whom the stamps may be had, and containing space in which the stamps are to be pasted and thus collected. The merchants give the stamps to their customers in quantities according to the amount of goods purchased, and with the stamps, when a certain number has been collected, the holder may obtain from the trading stamp company his choice of cer-

tain articles, to which his number of stamps may entitle him according to the offer previously made. See *infra*, the cases cited under this title.

**2. Prohibitory Statutes Unconstitutional.** — *State v. Dalton*, 22 R. I. 77, 84 Am. St. Rep. 818; *State v. Shugart*, (Ala. 1903) 35 So. Rep. 28; *Long v. State*, 74 Md. 565, 28 Am. St. Rep. 268; *Com. v. Sisson*, 178 Mass. 578; *People v. Dycker*, 72 N. Y. App. Div. 308; *State v. Dodge*, (Vt. 1904) 56 Atl. Rep. 983; *Young v. Com.*, 101 Va. 853. See also *Com. v. Emerson*, 165 Mass. 146; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465.

**3. Immaterial Whether Redemption by Merchant or Third Party.** — *State v. Dodge*, (Vt. 1904) 56 Atl. Rep. 983; *Young v. Com.*, 101 Va. 853; *State v. Hawkins*, 95 Md. 133, 93 Am. St. Rep. 328.

**4.** *People v. Dycker*, 72 N. Y. App. Div. 308.

**A Contrary View** is taken of the trading stamp enterprise by a *District of Columbia* case, which holds that such an enterprise is demoralizing to business and generally illegitimate, and that it is competent for Congress to prohibit the same by legislative act. This decision is approved in the federal case cited in the note.<sup>1</sup>

**Stamps Redeemable in Things Unknown or Uncertain.** — Where the stamps given by the vendor of goods to the purchaser thereof are redeemable in an article or thing which is uncertain, undetermined, or unknown to the purchaser of the goods at the time of the purchase, there is present an element of chance which appeals to the gambling instinct, and the prohibition of such a transaction is clearly a valid exercise of legislative power.<sup>2</sup> If the tickets or coupons by which unknown articles are to be drawn are distributed without consideration, there can be no infraction of law,<sup>3</sup> but a stamp given in connection with the purchase of goods is based upon a consideration.<sup>4</sup>

**III. TAXATION OF PRIVILEGE.** — The two decisions so far handed down involving the right of the state or a municipality to tax as a privilege the use of trading stamps are not to be reconciled. In one instance it is held that the trading stamp device is as legitimate a method of attracting customers as any other form of advertisement, and does not make the business of merchants using it essentially different from that of other merchants, and that a municipal ordinance which, under the guise of a revenue measure, is an evident attempt to put an end to the issue and redemption of trading stamps, by levying a discriminating and excessive tax upon those dealers who use such stamps, is oppressive, prohibitory, unreasonable, and void.<sup>5</sup> On the other hand it has been held, in a case where the tax imposed was heavier than in the foregoing case, and was clearly designed to be prohibitory, that, as the trading stamp business might be prohibited outright by the legislature, the legislative method of dealing with the same was final and beyond judicial inquiry.<sup>6</sup>

**TRADITION.** — See note 7.

**TRAFFIC — TRAFFICKER.** (See also **COMMERCE**, vol. 6, p. 217; **TRADE**, *ante*, p. 338; and see the titles **CARRIERS OF GOODS**, vol. 5, p. 154; **CARRIERS OF PASSENGERS**, vol. 5, p. 474; **INTERSTATE COMMERCE**, vol. 17, p. 34.) — The word "traffic" has always had a well-understood meaning in the popular sense. It is the passing of goods or commodities from one person to another for an equivalent in goods or money; and a trafficker is one who traffics — a

1. **Contrary View.** — *Lansburgh v. District of Columbia*, 11 App. Cas. (D. C.) 512, 56 Alb. L. J. 488; *Humes v. Ft. Smith*, 93 Fed. Rep. 857.

2. **Stamps Redeemable in Things Unknown or Uncertain.** — *State v. Hawkins*, 95 Md. 133, 93 Am. St. Rep. 328. This rule is also announced *obiter dictum* in *State v. Dalton*, 22 R. I. 77, 84 Am. St. Rep. 818.

3. **Coupons Distributed Without Consideration.** — *Yellow-Stone Kit v. State*, 88 Ala. 196, 16 Am. St. Rep. 38.

4. **Purchase of Goods Sufficient Consideration for Stamp.** — *State v. Hawkins*, 95 Md. 133, 93 Am. St. Rep. 328.

5. *Ex p. McKenna*, 126 Cal. 429.

6. *Humes v. Ft. Smith*, 93 Fed. Rep. 857.

7. **Tradition.** (See also the title **PEDIGREE**, vol. 22, p. 640.) — In *In re Hurlburt*, 68 Vt. 377, it was said: "It will be observed that some of the authorities speak of 'repute,' 'reputation,' and *tradition* as convertible terms when applied to cases of pedigree. Now, *tradition* is knowledge, belief, or practices

transmitted orally from father to son, or from ancestors to posterity. When these authorities speak of 'repute,' 'reputation,' or *tradition* in matters of pedigree, we think they mean such declarations and statements respecting the pedigree as have come down from generation to generation from deceased relatives in such a way that even though it cannot be said or determined which of the deceased relatives originally made them, or was personally cognizant of the facts therein stated, yet it appears that such declarations and statements were made as family history, *ante litem motam*, by a deceased person connected by blood or marriage with the person whose pedigree is to be established."

**Tradition or Delivery.** — Under a *Louisiana* statute, "the *tradition* or delivery is the transferring of the thing sold into the power and possession of the buyer." Rev. Civ. Code La. (1900), art. 2477; *McCloskey v. Central Bank*, 16 La. Ann. 285; *Mazoue v. Caze*, 18 La. Ann. 34.



trader; a merchant.<sup>1</sup> To traffic is to pass goods and commodities from one person to another for an equivalent in goods or money.<sup>2</sup>

**TRAIL.** — See note 3.

**TRAIN.** — See note 4.

**1. Traffic.** — Senior *v.* Ratterman, 44 Ohio St. 673. See also Clifford *v.* State, 29 Wis. 329.

In Curtin *v.* Atkinson, 36 Neb. 115, the court said: "The word *traffic* is defined by Bouvier thus: 'Commerce, trade, sale, or exchange; or merchandise, bills, money, and the like.' Webster defines it thus: 'Commerce, either by barter or by buying and selling; trade. This word, like "trade," comprehends every species of dealing in the exchange or passing of goods or merchandise from hand to hand for an equivalent, unless the business of retailing may be excepted. It signifies appropriately foreign trade, but is not limited to that.' We find the definition in the Century Dictionary substantially the same as the last above." See also Williams *v.* Fears, 110 Ga. 584.

**Instruction.** — In a prosecution for keeping open a liquor saloon for *traffic* on Sunday, the trial court charged the jurors that if they believed that the defendant kept open for the purpose of *traffic* on Sunday they should convict him, and further told the jurors that the term *traffic*, as employed, had its usual and commonly accepted meaning. The appellate court said: "Mr. Webster defines the word *traffic* to mean 'to sell; to buy; to trade; to pass goods and commodities from one person to another for an equivalent in goods or money.' This is a word the meaning of which is so well understood that it was not necessary for the court to further define it." Levine *v.* State, 35 Tex. Crim. 647.

**The Business of Procuring Labor Contracts** to be performed in another state has been held not to be *traffic*. See Williams *v.* Fears, 110 Ga. 584.

**Traffic — English Railway and Canal Traffic Act of 1854.** — See West *v.* London, etc., R. Co., L. R. 5 C. P. 622.

**Traffic Arising and Terminating on Railway.** — In Distington Iron Co. *v.* London, etc., R. Co., 6 R. & Can. T. Cas. 108, it was held that the expression "*traffic* arising and terminating on the railway" in the English Railway and Canal Traffic Act of 1854, § 2, meant *traffic* that did not pass over any other railway.

**2. Kansas *v.* Vindquest,** 36 Mo. App. 588, quoting Webst. Dict.

**Trafficking in Intoxicating Liquors.** — In Jung Brewing Co. *v.* Talbot, 59 Ohio St. 511, it was held that a manufacturer of intoxicating liquors who carried on the business of selling them elsewhere than at the manufactory was engaged in *trafficking* in intoxicating liquors. See also the title INTOXICATING LIQUORS, vol. 17, p. 189; and see Reymann Brewing Co. *v.* Brister, 179 U. S. 445; People *v.* Chase, 41 N. Y. App. Div. 12.

**3. Trail.** — In U. S. *v.* Andrews, 179 U. S. 99, it was said: "The finding of the court below that the property of the claimant was taken and carried away while he was traveling in the Indian reservation of the Chisom *trail*,

the same being an established *trail*, *en route* from Texas to a market in Kansas, is equivalent to a finding that the *trail* was a lawfully established *trail* permitted by the laws of the United States. We understand that by the use in the finding of the word *trail* in connection with the balance of the finding is meant a way, road, or path suitable for the purpose of driving cattle over or along on their way to a market."

**4. Engine.** — An engine with tender, moving reversely, is a "*train* of cars," within a statute requiring that whenever any *train* of cars is moving reversely in any city, town, or village, the locomotive being in the rear, the company shall station on the last car of the *train* a person who shall warn those standing on or crossing the track of such railway of the approach of such *train*. Hollinger *v.* Canadian Pac. R. Co., 21 Ont. 713, 12 Can. L. T. 169. In this case it was said that "a car is a wheeled vehicle or conveyance, including carriages, chariots, carts, wagons, trucks, etc., and a locomotive is a car carrying the motive power, and a tender is a car carrying the water and fuel for the locomotive, and shackled together they form a *train* of cars; a *train* signifying that which is drawn along. \* \* \* If a locomotive and tender cannot be called a *train* of cars, neither can a locomotive and tender with one box platform or passenger car attached be called a *train* of cars." See also Casey *v.* Canadian Pac. R. Co., 15 Ont. 574.

**Same — English Employers' Liability Act.** — The English Employers' Liability Act of 1880 enacted that an employee should be entitled to compensation for injuries by reason of the negligence of any persons in the service of any employer who had "charge or control of any \* \* \* locomotive engine or *train* upon a railway." In construing this provision Halsbury, L. C., in McCord *v.* Cammell, (1896) A. C. 64, said: "I should think, speaking in a general way, that the legislature meant that a locomotive engine by itself, or anything that was drawn along a railway, or was in the course of being drawn along a railway by that locomotive engine should be included in 'a *train*.' I doubt very much whether it would depend upon the number of carriages or the number of vehicles going upon wheels which the locomotive was taking along the railway. I should think the legislature intended a very wide scope to be given to the use of these words." See also Cox *v.* Great Western R. Co., 9 Q. B. D. 106.

**Locomotive Attached.** — In Caron *v.* Boston, etc., R. Co., 164 Mass. 527, it was said: "The word *train*, as used in the railroad act (Pub. Stat., c. 112), generally signifies cars in motion. Usually the power would be furnished by a locomotive. But whether a number of cars coupled together and in motion, and forming one connected whole, do or do not constitute a *train* does not depend, we think,

**TRAIN DISPATCHER.** — See note 1.

**TRAMPS.** (See also the title VAGRANCY.) — The word "tramp" indicates a foot traveler; a trampler; often used in a bad sense for a vagrant, or wandering vagabond; an idle fellow; itinerant beggar; vagrant; vagabond.<sup>2</sup>

**TRAMWAY.** (See also the title STREET RAILWAYS, vol. 27, p. 3.) — See note 3.

**TRANQUILLITY.** — See note 4.

**TRANSACT.** — See note 5.

**Transacted and Carried.** — See ENGAGE, vol. 11, p. 33.

upon whether a locomotive engine is attached to them at the time, and they are moved by the power thus supplied."

**An Engine and One or More Cars** were held, in *Dacey v. Old Colony R. Co.*, 153 Mass. 112, and *Shea v. New York, etc., R. Co.*, 173 Mass. 178, to constitute a *train*.

**Railroad Train.** — In *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N. Car. 648, the owner of land contracted to sell to one S. timber of a certain size and to allow the latter's *train*, tramroad, wagons, and employees to enter on the land and remove the timber so cut. S. assigned his contract to the defendant corporation, with which one P. contracted to build the road and cut the timber on the land through which the road would run and to deliver the timber to the company at the railroad. In an action against the railroad company for damages done to the land by P. it was held that the word *train* must be interpreted to mean a "railroad *train*."

1. **Train Dispatcher.** — See the title FELLOW SERVANTS, vol. 12, p. 967. See also *Smith v. Wabash, etc., R. Co.*, 92 Mo. 359.

2. **Tramp.** — *Savannah, etc., R. Co. v. Boyle*, 115 Ga. 836, quoting *Webst. Dict.*; *Standard Dict.* The court said: "Because a man is a *tramp*, he is not necessarily dangerous. The idea conveyed to the mind by the word is that simply of an idle, worthless fellow, who wanders about the country seeking to secure a living without toil. Simply because these men were negro *tramps* it was not to be inferred, even by an extremely prudent person, that they were characters so dangerous as to make it altogether unsafe for any person to be lodged in the same car with them."

**Tramps** are "persons who rove about from place to place begging, and all vagrants living without visible means of support who stroll over the country without lawful occasion." *People v. Deacons*, 109 N. Y. 380.

"**Tramp**" and "**Vagrant**" Distinguished under Iowa Laws. — After quoting the definition of *tramps* and vagrants as given in the Iowa Statutes, in *Des Moines v. Polk County*, 107 Iowa 533, the court said: "It will be seen that while all *tramps* are vagrants, all vagrants are not *tramps*; as a person under sixteen years old may be a vagrant but not a *tramp*. To be a *tramp* one must be physically able to perform manual labor, while one unable to do so may be a vagrant. There are other distinctions."

3. **Tramway.** — The word *tramway* was held, in *London St. Tramways Co. v. London County Council*, (1894) A. C. 489, affirming (1894) 2 Q. B. 189, to mean the structure and

not to include the statutory powers conferred on the company.

4. **Tranquillity.** — In *In re Powers*, 25 Vt. 268, Redfield, C. J., said: "It seems to me that 'public and domestic *tranquillity*' mean nothing more than the public peace."

5. **Transact Business.** — The term "*transact business*" is equivalent to "carry on business." *Territory v. Harris*, 8 Mont. 144. See *CARRY*, vol. 5, p. 724.

**Same — Lease.** — A banking act provided that an association, until authorized by the comptroller, was not to *transact* any business whatever, whether pertaining or not to the business of banking, except such as was incidental and necessarily preliminary to its organization. It was held that to take a lease was to *transact* business within the meaning of the statute, and that a lease for a term of years, at a large rent, of offices to be occupied by the bank, however necessary it might be for the *transacting* or even for the commencing of the banking business by the corporation whose organization had been completed, was in no sense incidental or preliminary to the organization of the corporation. *McCormick v. Market Nat. Bank*, 165 U. S. 538.

But where a *New York* statute prohibited any one from *transacting* business in the name of a partner not interested in a firm, it was held that the leasing of part of the premises of a firm engaged in the millinery and straw goods business was not a "*transacting* of business" within the statute. The court said: "They were not real estate agents or brokers in any sense. They were in the millinery and straw goods business. The leasing of a part of their premises was not an ordinary incident of their business; it was done merely because it happened to be vacant." *Sparrow v. Kohn*, 109 Pa. St. 359, 58 Am. Rep. 726.

**Same — Negotiable Paper.** — An authority to *transact* all business has been held not to authorize an attorney to negotiate bills received in payment, nor to indorse them in his own name. *Hogg v. Snaith*, 1 Taunt. 347; *Ward v. Shew*, 9 Bing. 608, 23 E. C. L. 396.

The purchase of a single note has been held not to be "*transacting* business" as that term was used in an *Oregon* statute regulating the *transaction* of business by a foreign banking corporation. *Commercial Bank v. Sherman*, 28 Oregon 573.

**Actually Transacted in Court.** — An act of Congress recognized the rights of a clerk of court to a *per diem* compensation "when the court is opened by the judge for business, or business is actually *transacted* in court." In

**TRANSACTION.** — A "transaction" has been defined as "a matter or affair, either completed or in the course of completion; <sup>1</sup> a negotiation or dealing." <sup>2</sup>

**Transactions with Deceased Person.** — It has been provided in a number of states that a party to an action interested in the event shall not be examined as a witness in his own behalf in an action against the representatives of a deceased person concerning a personal transaction or communication between the witness and the deceased person. The term "transaction," as used in this connection, has been held to embrace every variety of affairs that may be the subject of negotiations, actions, or contracts between the parties. <sup>3</sup>

construing this provision in *U. S. v. Finnell*, 185 U. S. 242, the court said: "It is said that no business could be lawfully *transacted* 'in court' unless the judge was personally present. \* \* \* There are many things that may be legally done by a clerk pursuant to the written order of a judge sent to him, and which, being done, may be fairly held to constitute business 'actually *transacted* in court.'"

**1. Transaction.** — Story, etc., Commercial Co. v. Story, 100 Cal. 30, quoting Cent. Dict.

In *Garwood v. Schlichenmaier*, 25 Tex. Civ. App. 177, it was said: "Webster defines *transaction* as follows: '(1) The doing or performing of any business; management of any affair; performance. (2) That which is done; an affair; as the *transaction* of the exchange.'" See also *Krehl v. Great Central Gas Consumers' Co.*, L. R. 5 Exch. 289; *Holliday v. McKinne*, 22 Fla. 153; *Cunningham v. Speagle*, 106 Ky. 278.

"**Transaction Is a General Word.**" — *Krehl v. Great Central Gas Consumers' Co.*, L. R. 5 Exch. 294, per Cleasby, B.

**Transaction in Sense of Compromise.** — See *Shiff v. Shiff*, 20 La. Ann. 274.

**Protected Transaction — English Bankruptcy Act.** — See *Young v. Hope*, 2 Exch. 105; *Hope v. Hayley*, 5 El. & Bl. 830, 85 E. C. L. 830; *Krehl v. Great Central Gas Consumers' Co.*, L. R. 5 Exch. 289.

**Transaction — Sales.** — In *In re Thomas*, (1900) 1 Ch. 454, it was held that on a sale by auction in lots of property held under one title, each sale of one or more lots to a different purchaser formed a separate *transaction* within the meaning of a rule regulating the remuneration of solicitors.

**2. Brewin v. Short**, 5 El. & Bl. 227, 85 E. C. L. 227; *Bowman v. Malcolm*, 11 M. & W. 833.

**Torts.** — See the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM, vol. 25, p. 590.

**Counterclaim.** — See the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM, vol. 25, p. 589.

**Joinder of Actions.** (See also the title ACTIONS, 1 ENCYC. OF PL. AND PR. 108.) — In *Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co.*, 63 Conn. 560, it was said: "As the word is employed in American codes of pleading and in our own Practice Act, a *transaction* is something which has taken place whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves

are altered." See also *Harris v. Avery*, 5 Kan. 146; *Anderson v. Hill*, 53 Barb. (N. Y.) 238; *Lamming v. Galusha*, 135 N. Y. 239; *Cheatham v. Bobbitt*, 118 N. Car. 343.

In *Scarborough v. Smith*, 18 Kan. 399, it was said: "The word *transactions*, as used in said section, probably means whatever may be done by one person which affects another's rights, and out of which a cause of action may arise."

A statute permitted the joinder of causes of action arising out of the same *transaction*. It was held that the failure of officers of a corporation to file a report required by law was a *transaction* within this provision. *Davis v. Mills*, 83 Fed. Rep. 983.

**Mutuality.** — The term *transaction* implies mutuality; something done by both in concert, in which each takes some part. *Sullivan v. Latimer*, 38 S. Car. 158; *Rookhart v. Dean*, 21 S. Car. 597; *Brown v. Moore*, 26 S. Car. 160; *Hughey v. Eichelberger*, 11 S. Car. 49.

**3. Transaction with Deceased Person.** (See also PERSONAL TRANSACTIONS OR COMMUNICATIONS, vol. 22, p. 758, and see the title WITNESSES.) — *Kroh v. Heins*, 48 Neb. 691; *Smith v. Perry*, 52 Neb. 738.

In *Belote v. O'Brian*, 20 Fla. 139, it was said: "The word *transaction* means 'the doing or performing any business, the management of an affair, the adjustment of a dispute between parties by mutual agreement.'"

"The words of exclusion are as comprehensive as language can express. *Transactions* and communications embrace every variety of affairs which can form the subject of negotiation, interviews, or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition, or language of another. The statute is a beneficial one, and ought not to be limited or narrowed by construction." *Riggs v. American Home Missionary Soc.*, 35 Hun (N. Y.) 661, quoting *Holcomb v. Holcomb*, 95 N. Y. 316.

"The language and intent of that section [Code Civ. Pro. N. Y., § 829] embraces every variety of affairs: all means of communication, oral, written, signs or gestures, direct or indirect, positive or negative, or evidence of facts, the plain inference from which is a personal *transaction* between the witness and the party deceased. If the deceased could contradict, explain, or qualify the testimony if living, it comes within the rule." *Van Vechten v. Van Vechten*, 65 Hun (N. Y.) 215. See also *Tooley v. Bacon*, 70 N. Y. 34; *Koehler v. Adler*, 91 N. Y. 657; *Holcomb v. Holcomb*, 95 N. Y. 316; *Mills v. Davis*, 113 N. Y. 243; *Nay*



**TRANSCRIPT.** (See also ENCYCLOPÆDIA OF PLEADING AND PRACTICE, titles APPEALS, vol. 2, p. 258; JUSTICES OF THE PEACE, vol. 12, p. 678; STIPULATIONS, vol. 20, p. 639).—A transcript is defined as a copy; a writing

*v. Curley*, 113 N. Y. 575; *Heyne v. Doerfler*, 124 N. Y. 505.

**Agency to Collect Money.**—In a suit against an executor to recover commissions on sums of money collected by the plaintiff for the executor's testator in his lifetime, after the establishment by proper proof of an agency to collect money for said testator, it was held to be competent for the plaintiff to testify as to the amount of money collected, and also, in the absence of an express agreement fixing the amount of compensation, as to what was a reasonable compensation for collecting such money. This would not be testifying to a *transaction* or communication with the deceased, nor prohibited by the statute. *Lewis v. Meginiss*, 30 Fla. 419.

**Conversations.**—When the mere fact that a party has had a conversation with the deceased person is a material question, it is not competent for such person to testify that he had the conversation. *Maverick v. Marvel*, 90 N. Y. 656.

**Death by Wrongful Act.**—In *Mayfield v. Savannah, etc., R. Co.*, 87 Ga. 377, it was said: "We think the act of the engineer is covered by the word *transaction* used in this section. The plaintiff was attempting to mount the pilot, the engineer put on the steam, causing the engine to jerk, and the plaintiff was injured. This was a *transaction* about which one party is forbidden to testify, the agent of the opposite party being dead."

**Fraudulent Conveyances.**—In *Tooley v. Bacon*, 70 N. Y. 34, the plaintiff was held to be incompetent to answer the question whether he put the property in dispute into the hands of the intestate with intent to defraud his creditors.

**Handwriting.**—In *Cunningham v. Speagle*, 106 Ky. 290, it was said: "It is, however, manifest from the pleadings in this case that the execution and attestation of the note in controversy was one and the same *transaction*, and clearly, according to plaintiff's own averments, a *transaction* or contract had with the decedent Rachel Cunningham; hence it follows that any statement of plaintiff as to the genuineness of the signature either of the obligor or the attesting witness was proof of a *transaction* had with a deceased person, and therefore clearly incompetent." *Compare Meazels v. Martin*, 93 Ky. 50.

And in *Holliday v. McKinne*, 22 Fla. 162, it was said: "It seems to us that the proof of signature to the bill was proving the very *transaction*, or proving both the acts and doings of the plaintiff and the defendant, which amounted to consummating the sale of the property by the defendant to this plaintiff. The sale of the property and the execution of the bill of sale was the *transaction*, and the proof of the bill of sale was proof of the *transaction*." See also the title HANDWRITING, vol. 15, p. 261.

**Letters.**—In *Montague v. Thomason*, 91 Tenn. 168, which was a suit against the makers

of a note found among the papers of the deceased payee, it was held that one of the makers was incompetent to testify that he received a letter from the payee which was lost, authorizing the renewal of the note sued on, and promising to return such note as satisfied on receipt of the renewal note. The court said: "A written *transaction* with or statement by a deceased person is no more a matter about which the adverse party may testify than a verbal *transaction* or statement." See also *Resseguie v. Mason*, 58 Barb. (N. Y.) 89.

Letters and copies of letters which passed between parties in the course of a business *transaction*, and which contain the contract, the result of the negotiations, not otherwise identified than by a witness who has a direct legal interest in the result of the suit, are incompetent as evidence in an action arising from the subject-matter of such contract, if one of the parties to such contract has died and one of the adverse parties to the action is the personal representative of the deceased. *Smith v. Perry*, 52 Neb. 738.

It has been held that an administrator was incompetent to testify that certain letters pertaining to the issue were found among the effects of the deceased and were genuine. *Van Vechten v. Van Vechten*, 65 Hun (N. Y.) 215.

In *Kroh v. Heins*, 48 Neb. 691, it was held that an interested party was prevented from testifying to the receipt by him of a letter written by the decedent, making a gift of his property, and to the contents thereof, since such a letter constituted a *transaction*.

But the *Minnesota* statute which applies to "admissions" and "conversations" has been held to exclude only oral admissions and conversations. *Chadwick v. Cornish*, 26 Minn. 28; *Hall v. Northwestern Endowment, etc., Assoc.*, 47 Minn. 85.

**Loan to Deceased in Fiduciary Capacity.**—Where the plaintiff claimed that he had made a loan by check to the defendant's intestate, and the defendant claimed that the check was given in the business of a corporation of which the deceased was president, and the plaintiff was treasurer, it was held that the question as to whether the check in question had anything to do with the affairs of the corporation was incompetent. The court said that the answer to the question would necessarily show what the *transaction* was. *Koehler v. Adler*, 91 N. Y. 657.

**Lost Instruments.**—In *Robinson v. James*, 29 W. Va. 224, it was held that it was incompetent for interested witnesses to prove the loss of an instrument after the death of the parties thereto.

**Marriage.**—In *Hopkins v. Bowers*, 111 N. Car. 175, it was held that an alleged widow who was a party to an action by the heirs at law was not competent to prove the fact of her marriage, or that she lived with the decedent as a wife when the marriage was in issue.

**Mental Capacity.**—Testimony as to the men-

made from and according to an original; a writing or composition consisting of the same words with the original; a copy of writing of any kind.<sup>1</sup>

**TRANSFER.** (See also the titles FIRE INSURANCE, vol. 13, p. 241; SALES, vol. 24, p. 1018; and see ALIENATE, ALIENATION, ETC., vol. 2, p. 60; TRANSFERABLE, *post*; VOLUNTARY TRANSFER.) — A transfer is the act by which the owner of a thing delivers it to another person, with intent of passing the rights he has in it to the latter.<sup>2</sup> The word is very comprehensive, and it embraces every transaction which passes over or conveys property to another.<sup>3</sup>

tal capacity of the deceased does not fall within the prohibition against testimony as to *transactions* with the deceased. *Ducker v. Whitson*, 112 N. Car. 44.

**Note.** — In *Parker v. Maxwell*, 51 Minn. 523, it was held that a survivor of two contracting parties is competent to testify to the fact that a note given for money loaned embraced a specified sum in excess of the money loaned.

**Physician.** — In an action by a physician against an administrator for services rendered to his decedent, the treatment and prescription given to the decedent by the physician have been held to be *transactions*. *Garwood v. Schlichenmaier*, 25 Tex. Civ. App. 176.

But in *Sullivan v. Latimer*, 38 S. Car. 158, it was held that a physician who presented a claim for medical services might testify as to the physical condition of the deceased within the period of the services rendered and the proportion of the physician's time which had been required in looking after the patient's health, as these were not *transactions* with the deceased.

**Reception of Instrument — Postmark.** — *Howard v. Zimpelman*, (Tex. 1890) 14 S. W. Rep. 59.

**Will.** — In *Goerke v. Goerke*, 80 Wis. 516, it was held that the proponent of a will, who was the chief beneficiary, and aided the testator in procuring the will to be drawn up and took part in its execution, was not competent to testify that the will was read and explained to the testator before he signed it. See also *Silverthorn's Will*, 68 Wis. 372.

**1. Transcript.** — *Waitman v. Bowles*, 3 Ind. Ter. 306, and *Matter of Evingson*, 2 N. Dak. 189, *quoting* *Webst. Dict.*; *Bouv. L. Dict.*

**A Transcript Is a Copy.** — *McCracken v. Graham*, 14 Pa. St. 210.

**Transcript of Judgment.** — "A *transcript* of a judgment is a copy of a judgment." *School Dist. v. Caldwell*, 16 Neb. 72.

A *transcript* is a certified copy of a judgment roll. *Farrell v. Oregon Gold-Min. Co.*, 31 Oregon 472.

**Necessity of Original.** — "There can be no *transcript* of that which never had a prior existence." *Matter of Evingson*, 2 N. Dak. 190.

In *State v. Board of Equalization*, 7 Nev. 95, it was said: "Now the word *transcript* at once suggests the idea of an original writing. The word not only in its popular but legal sense means a copy of something already reduced to writing. Worcester defines it as 'a writing made from or after an original; a copy.' Burrill defines it as 'a copy; particularly of a record.' Bouvier, 'a copy of an original writing or deed.'"

**Transcript on Appeal.** — In *Buckman v. Whitney*, 28 Cal. 557, it was said: "A *transcript* on appeal is a true copy of a record, or part of a record, actually existing in the court below."

**Habeas Corpus.** — A statute provided that where an appeal upon habeas corpus proceedings was tried before a judge on vacation, the *transcript* might be prepared by any person under the judge's direction, and certified by the judge. In construing this provision the court said: "Here, again, the question arises, what is meant by the *transcript*? We hold that it embraces the proceedings which have been reduced to writing and properly authenticated, and a *transcript* of the statement of facts, if such is desired." *Ex p. Malone*, 35 Tex. Crim. 299.

**"Transcript of Record" and "Record" Used Synonymously.** — *Price v. State*, 8 Gill (Md.) 302 *et seq.*

**Abstract.** — As to the use of the word *transcript* in the sense of abstract or condensation of the substance, see *McCracken v. Graham*, 14 Pa. St. 210.

**Exhibits.** — In *Waitman v. Bowles*, 3 Ind. Ter. 294, it was said: "Mr. Anderson, in his law dictionary, defines a *transcript* to be: 'First, a copy of an original record. Second, to copy, or copy officially. Whence, *transcripted*.' Mr. Bouvier defines a *transcript* to be a copy of an original writing or deed."

Exhibits which form no part of the cause have been held to be no part of the *transcript*. See *Tatum v. Massie*, 29 Oregon 140.

**Collateral Inheritance Tax.** — See *Matter of Bronson*, 150 N. Y. 1.

**2. Transfer.** — *Bouv. L. Dict.*, *quoted* in *Robertson v. Wilcox*, 36 Conn. 428, and *Ex p. Thomason*, 16 Neb. 240.

A *transfer* is "an act or transaction by which the property of one person is by him vested in another." *Pearre v. Hawkins*, 62 Tex. 437.

In *Innerness v. Mims*, 1 Ala. 669, it was said that "the term *transfer* means to convey or pass over the right of one person to another unless the general meaning is restrained or limited by something accompanying it."

**3. In re Barrow**, 98 Fed. Rep. 583.

**Transfer of Appropriation.** — In holding that the performance of prison labor on the highways was not a *transfer* from the appropriation for support of prisoners, the court said: "A *transfer* is an expenditure of money belonging to one appropriation on account of another appropriation, so that the appropriation to which such money is entitled fails to get the benefit of it, as, for instance, the expenditure of the appropriation for the extension of Queen street on Kinau street. \* \* \* The

performance of prison labor upon a 'public work,' for which there is an independent appropriation, cannot be termed a *transfer* of an appropriation, for the appropriation for the support of prisoners is thereby expended according to law; and if the object of a distinct appropriation which is a public work receives the benefit of such labor, that is also according to law and does not defeat the intention of the legislature as to such other appropriation, such intention being limited solely to the expenditure of a definite sum of money out of the treasury on account of such object." *Thurston v. Ross*, 8 Hawaii 130.

**Not Confined to Actual Transfer.**—The word *transfer* as used in Rule 54 of the Rules in Admiralty prescribed by the Supreme Court of the United States has been held to extend to cases in which what is required and done is tantamount to such *transfer*, and not to be confined to cases of actual *transfer*. *Providence, etc., Steamship Co. v. Hill Mfg. Co.*, 109 U. S. 600, cited in *In re Morrison*, 147 U. S. 35.

**Bill of Exchange.** (See also the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 246.)—In *Griffin v. Weatherby*, L. R. 3 Q. B. 761, it was said: "'*Transferred* or negotiated' I understand to mean 'passed away from the original holder to another person;' but the bill has never been out of the plaintiffs' possession; they have never dealt with it in any manner."

**Collateral Security — Stock.**—Where a statute provided that no *transfer* of stock should be valid as against any creditor of said sale until a certificate of *transfer* should have been filed for record, it was held that the word *transfer* did not embrace stock assigned as collateral security. *Deutschman v. Byrne*, 64 Ark. 111; *Batesville Telephone Co. v. Myer-Schmidt Grocer Co.*, 68 Ark. 115. See also *Fahrney v. Kelly*, 102 Fed. Rep. 406. See generally the title *STOCK AND STOCKHOLDERS*, vol. 26, p. 879.

**Collateral-inheritance Tax.**—In *Matter of Rogers*, 71 N. Y. App. Div. 465, it was said: "The word *transfer* in the statute is used advisedly and according to its ordinary legal signification, which is that the owner of a thing delivers it to another person with the intent of passing rights which he has to the latter." See also *Stellwagen v. Wayne Probate Judge*, 130 Mich. 166; *Matter of Vanderbilt*, 68 N. Y. App. Div. 27; *Matter of Plum*, (Surrogate Ct.) 37 Misc. (N. Y.) 466; *Matter of Cager*, 111 N. Y. 344; *Matter of Howe*, 112 N. Y. 100; *Matter of Hoffman*, 143 N. Y. 331; *Matter of Gould*, 156 N. Y. 423. And see the title *SUCCESSION TAXES*, vol. 27, p. 337.

**Transfer** means the passing of property without remainder, whether the actual possession or enjoyment follows immediately or at some future time. *Matter of Plum*, (Surrogate Ct.) 37 Misc. (N. Y.) 466, citing *Matter of Hoffman*, 143 N. Y. 331.

**Copyhold Estates.**—A testator devised to trustees, in trust for his son, all his freehold and copyhold lands, to be *transferred* to the son as soon as he should attain twenty-one years of age. In construing this devise *Holroyd, J.*, said: "It has been said that the

trustees are to *transfer* the estate, and that the seizin and possession of the legal estate is necessary in order to *transfer* it to the *cestui que trust* when he comes of age. But they are not to *transfer* the legal estate, but the copyhold lands. A surrender may be necessary to *transfer* the legal estate, but copyhold lands may be *transferred* without any surrender. I consider the words 'to be *transferred*' to mean that as soon as the son shall attain the age of twenty-one years, the copyhold lands are to be delivered up to him." *Doe v. Nicholls*, 1 B. & C. 344, 8 E. C. L. 148.

**Transfer and Convey.**—The language of a power was: "To sell, *transfer*, and release two certain mortgages executed by" K. The court said: "The words 'sell and *transfer*,' as there used, are of no broader signification than the words 'sell and convey' used with reference to a conveyance of real estate; and the latter employed as the operative words in a power to convey land do not carry authority to mortgage or otherwise dispose of the property." *Hawthurst v. Rathgeb*, 119 Cal. 533.

**Convey in Sense of Transfer.**—See *Johnson v. State*, 69 Ala. 593; *Lippman v. State*, 104 Ala. 61. See also *CONVEY — CONVEYANCE*, vol. 7, p. 484.

**Deposit in Bank.**—A deposit in bank by an insolvent depositor held a *transfer*, see *In re Stege*, (C. C. A.) 116 Fed. Rep. 342.

**Transfer and Dispose Distinguished.**—The word "dispose," when used in connection with property, has a broader signification than the word *transfer*. *Carpenter v. Pridgen*, 40 Tex. 34, cited in *Pearre v. Hawkins*, 62 Tex. 436. See also *DISPOSE*, vol. 9, p. 540.

**English Bills of Sale Act.**—Equitable sub-mortgage given by the transferee of a registered bill of sale held not a *transfer*, see *Ex p. Turquond*, 14 Q. B. D. 636.

**Foreclosure.**—The foreclosure of a mortgage of real estate, the title becoming absolute in the mortgagee by the failure to redeem, constitutes a *transfer* of the property, within the meaning of a statute providing that real estate of any taxpayer shall be liable for all his taxes for one year, and afterwards until a *transfer* thereof. *Waterbury Sav. Bank v. Lawler*, 46 Conn. 243.

**Fraudulent Sales and Conveyances.** (See also the title *FRAUDULENT SALES AND CONVEYANCES*, vol. 14, p. 261 *et seq.*)—The following instruction was refused: "By the expression '*transfer* his property for the purpose of defrauding his creditors,' as used in the charge, is meant every gift, conveyance, assignment, or *transfer* of, or charge upon, any estate, real or personal, which is not upon consideration deemed valuable in law, but made for the purpose of hindering or delaying his creditors in the collection of their debts, is, in contemplation of law, a *transfer* for the purpose of defrauding creditors, unless the debtor making such *transfer* has still remaining in his possession, within this state, property subject to execution sufficient to pay all his debts," and the court gave no instruction embracing its substance. This refusal was held to be error. *Matthews v. Boydston*, (Tex. Civ. App. 1895) 31 S. W. Rep. 810.

**Same — Transfer to Creditor or Wife.**—In *Croft v. Croft*, 17 Ont. Pr. 452, a judgment



**TRANSFERABLE.** (See also TRANSFER, *ante*, p. 448.) — See note 1.

debtor had made a *transfer* of his property, after the debt sued for was incurred, to a mortgagee of the land of his wife, which had the effect of giving a benefit to the wife by reducing the incumbrance. It was held that the judgment creditor was entitled to an order under Rule 928 for the examination of the wife as a person to whom the debtor had made a *transfer* of his property.

**Transfer of Freight, Passengers, or Express.**

Code Iowa (1873), § 1310, prohibited railroads terminating at or near the city of Council Bluffs, in the state of Iowa, and making connections with other roads, from making any *transfer* of freight, passengers, or express matter to or with any other railroad company at or near such terminus at any other place than in the state of Iowa. In construing this provision it was held that the term *transfer* referred to the act of removing freight, passengers, or express matter, and was intended to cover the removal of cars with their burdens from one road to another as well as the change of their burdens from the cars of one company to those of another. *Council Bluffs v. Kansas City, etc., R. Co.*, 45 Iowa 338.

**Transfer and Grant.** — The word *transfer* in a deed has been held to be equivalent in sense and effect to the word "grant." *Lambert v. Smith*, 9 Oregon 193.

**Mortgage.** — The term *transfer* may include a mortgage. *Posey v. McManis*, 28 Tex. Civ. App. 452.

**Payment or Extinguishment of Obligation.** — The payment of a debt by a bankrupt has been held to be a *transfer* of property. *Worden v. Columbus Electric Co.*, 3 Am. Bankr. Rep. 186, 96 Fed. Rep. 803; *Kimball v. E. A. Rosenham Co.*, (C. C. A.) 114 Fed. Rep. 87; *Boyd v. Lemon, etc., Co.*, (C. C. A.) 114 Fed. Rep. 649; *In re Metzger Toy, etc., Co.*, 114 Fed. Rep. 958; *In re Ed. W. Wright Lumber Co.*, 114 Fed. Rep. 1013; *Pirie v. Chicago Title, etc., Co.*, 182 U. S. 438; *Wilson v. Nelson*, 183 U. S. 191; *Landry v. Andrews*, 22 R. I. 597. Compare *Wilson v. City Bank*, 17 Wall. (U. S.) 473; *In re Ratliff*, 107 Fed. Rep. 81; *Wall v. Lakin*, 13 Met. (Mass.) 167. See also the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 662.

It has been held that where a testator by will forgives and extinguishes a debt due to him, this is a *transfer* of property within an inheritance tax act. *Matter of Tuigg*, 2 Connolly (N. Y.) 633; *Tyson's Appeal*, 10 Pa. St. 220.

A statute declared void the *transfer* of all choses in action, or other assets of a corporation seeking dissolution under the statute, made after the filing of the petition for dissolution thereof. It was held that this meant a passing over to another of an existing right to the thing *transferred*, which right should survive the *transfer*, and that the term *transfer* did not include the extinguishment or satisfaction of a chose in action, either by payment in full or by part payment. The court said: "There is no meaning of the word *transfer* which carries the idea of an act of extinction, or any other idea than that of the bearing over

of a right or title or property in a thing from one to another." *Sands v. Hill*, 55 N. Y. 22.

**Pledge.** — A pledge has been held not to be a *transfer* under the English Bills of Sale Act. See *Ex p. Hubbard*, 17 Q. B. D. 690.

**Remove and Transfer.** — See REMOVE — REMOVAL, vol. 24, p. 462.

**Transfer and Sale.** — A general authority in a stock note to "use, *transfer*, or hypothecate" the security does not authorize a sale by the pledgee before maturity of the note. *Ogden v. Lathrop*, 1 Sweeny (N. Y.) 643.

**Transfer and Subrogation Distinguished.** — *Roman v. Forstall*, 11 La. Ann. 717; *Bradford v. Richard*, 46 La. Ann. 1530.

**Transfer of Title — Fire Insurance.** — See the title FIRE INSURANCE, vol. 13, p. 341.

**Title or Possession.** — In *Ober v. Schenck*, 23 Utah 619, it was said: "The word *transfer* may mean either a conveyance of title or merely a delivery of possession; and if the construction of a written contract is questioned we must look to the document itself, to the entire transaction and the surrounding circumstances, to ascertain the true intent of the parties." In that case it was held that the term referred to a *transfer* of title and not to a mere *transfer* of possession.

The word *transfer* may apply either to the title or to the possession of property. *Matter of Fayerweather*, 143 N. Y. 114; *Matter of Plum, (Surrogate Ct.)* 37 Misc. (N. Y.) 466; *McLaughlin v. Wheeler*, 1 S. Dak. 523.

**Same — Real Property.** — A manufacturing company agreed, for a certain consideration, to *transfer* its works from one city to another. It was held that the words "*transfer* its works" did not mean that the identical plant and machinery of the company should be moved from the one city to the other, the court saying: "If one agrees to *transfer* to another a piece of real estate, rational interpretation will at once determine that a *transfer* of the title, not the body of the land, is intended." *Hanna v. South St. Joseph Land Co.*, 126 Mo. 15.

**Writing.** — In *Hartford F. Ins. Co. v. Amos*, 98 Ga. 533, it was said: "The words '*transferred* and assigned' do not necessarily mean that the *transfer* was in writing; and the defendant had a right to know whether the purpose was to allege and prove an assignment in writing or not; and to obtain this knowledge it filed this special demurrer."

**1. Not Transferable.** — The words "not *transferable*" were printed across the face of a receipt given by a bank to the assignor of the claimant for a sum of money deposited by the former with the bank at interest. It was held that although this prevented the instrument from being considered negotiable, it did not prevent the depositor from assigning the claim against the bank for the money deposited. *In re Commercial Bank*, 11 Manitoba 494.

A pension was declared by statute not to be *transferable*. In construing this provision, in *Gathercole v. Smith*, 17 Ch. D. 7, James, L. J., said: "Now '*transfer*' is one of the widest terms that can be used. It appears to me

**TRANSFER AGENT.**—See note 1.

**TRANSFER COMPANIES.**—See the titles *BAGGAGE*, vol. 3, p. 528; *CARRIERS OF GOODS*, vol. 5, p. 154; *COMMON CARRIERS*, vol. 6, p. 236, and the references there given; *CONNECTING CARRIERS (OF GOODS)*, vol. 6, p. 604.

**TRANSFORMER.**—See note 2.

**TRANSIENT.**—See note 3.

**TRANSIT.**—See note 4.

**TRANSITORY ACTIONS.**—See *LOCAL AND TRANSITORY ACTIONS*, vol. 19, p. 483.

**TRANSLATION.** (See also the title *COPYRIGHT*, vol. 7, pp. 534, 561, 569, 582.)—See note 5.

that every word was used by the legislature not only to prevent the incumbent from assigning himself, but for preventing any transfer by operation of law *in invitum*—not only to prevent a voluntary dealing by an incumbent with an annuity, but to prevent the annuity vesting in a trustee in bankruptcy, or being seized or attached under a garnishee order by an execution creditor, or otherwise transferred.”

**Transferable to or Vested in Assignee in Bankruptcy.**—Rev. Stat. U. S., § 5057, provides that “no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property *transferable* to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee.” It was held that the words “property or rights of property *transferable* to or vested in” an assignee mean property or rights of property of such kind and description as by the provisions of the bankrupt law would, if they belonged to the bankrupt, be transferred to or vested in the assignee. *Haven v. Place*, 28 Minn. 551.

**1. Transfer Agent.**—See *McClure v. Central Trust Co.*, 28 N. Y. App. Div. 433, *reversing* 165 N. Y. 108, and see generally the title *TICKETS AND FARES*, *ante*, p. 150.

**2. Transformer.**—See *Snell v. Clinton Electric Light, etc., Co.*, 196 Ill. 626.

**3. Transient Dealer.**—See *ITINERANT*, vol. 17, p. 578.

**Transient Merchant.** (See also the titles *HAWKERS AND PEDDLERS*, vol. 15, p. 290; *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*, vol. 21, p. 795.)—In *Twining v. Elgin*, 38 Ill. App. 361, it was said: “We understand that the terms ‘itinerant merchant’ and ‘*transient* vendor of merchandise,’ as used in the act last above referred to, mean and were intended to apply to those persons who for a short space of time locate in a city and make sale and delivery of their goods, as other merchants do, or those who carry or transport their goods from house to house, or place to place, and make sale and delivery of their goods in like manner as other merchants or salesmen do.”

**Transient Merchants, Steamboats, Etc.**—A charter of a city authorized the imposition of a tax on itinerant or *transient* merchants, steamboats, or other vessels remaining in the corporation less than a year. In construing this provision the court said: “The words ‘*transient*’ or ‘itinerant’ are not to be accepted in their broadest sense. If they were,

they would embrace every merchant traveling to or passing through the city on his business, though his actual locality was elsewhere, and every vessel that might touch at the city, though driven there by the stress of weather.” *Mobile v. Baldwin*, 57 Ala. 69.

**Transient Person—Depositions.**—In *Guyon v. Lewis*, 7 Wend. (N. Y.) 29, it was said: “In this case sufficient was shown to authorize the introduction of the deposition. The witness was a *transient* person, having no fixed habitation anywhere—a journeyman carpenter, who was seeking employment, and said at the time of his examination that he should shortly leave the state.”

**Transient Person—Paupers.** (See also the title *POOR AND POOR LAWS*, vol. 22, p. 944.)—In *Middlebury v. Waltham*, 6 Vt. 202, it was said: “Our learned brother, now of counsel for the defendant, in his definition of the word *transient* is not exactly correct. But as the error does not aid his cause, it could not have been intentional; it is noticeable only as a departure from his usual accuracy. He says: ‘The term *transient* denotes transition from place to place, and is applied to an intermediate stage between two termini.’ The word *transco*, from which *transient* is derived, means literally to go over—the participle of the verb *transiens* (going over), not stationary—but by no means implying by strict inference that there are any termini in the *transitio*. *Transco* but seems to be the opposite of *resideo*, which is to remain, to dwell, to continue; and a *transient* person does not exactly mean a person on a journey from one known place to another, but rather a wanderer ever on the tramp.” See also *Hartford v. Hartland*, 19 Vt. 392; *Middlebury v. Waltham*, 6 Vt. 202; *Jamaica v. Townshend*, 19 Vt. 267; *Royalton v. Bethel*, 10 Vt. 22; *Sharon v. Cabot*, 29 Vt. 394; *Barton v. Irasburgh*, 33 Vt. 159; *Harrington v. Alburgh*, 14 Vt. 137; *Pittsford v. Chittenden*, 44 Vt. 386; *Stamford v. Readsboro*, 46 Vt. 606; *New Haven v. Middlebury*, 63 Vt. 399.

**4. Stoppage in Transitu.**—As to the meaning of *transit*, as used in the doctrine of stoppage *in transitu*, see the title *STOPPAGE IN TRANSITU*, vol. 26, p. 1086; and see *Sutro v. Hoile*, 2 Neb. 195; *Harris v. Pratt*, 17 N. Y. 263.

**5. Translation.**—In *Lauri v. Renad*, (1892) 3 Ch. 402, it was held that, to be protected under the law of international copyright, a *translation* need not be absolutely literal; it is sufficient if it is a substantial *translation*.

**TRANSMIT, TRANSMISSION, ETC.** — To transmit is to send from one person to another.<sup>1</sup>

**TRANSMITTER.** — See note 2.

**TRANSMUTATION.** — The word “transmutation” is sometimes defined as “the change of one species into another; the change from one nature, form, or substance into another.”<sup>3</sup>

**TRANSPORT — TRANSPORTATION.** (See also the titles CARRIERS OF GOODS, vol. 5, p. 154; CARRIERS OF LIVE STOCK, vol. 5, p. 427; CARRIERS OF PASSENGERS, vol. 5, p. 474; INTERSTATE COMMERCE, vol. 17, p. 34; and see DEPORTATION, vol. 9, p. 277.) — To transport means to carry, bear, or convey from one place or country to another.<sup>4</sup>

1. *Dudley v. Western Union Tel. Co.*, 54 Mo. App. 391, *per* Ellison, J., *quoting* Webst. Dict.

**Transmitting Inheritance.** — A statute provided that bastards should be capable of *transmitting* inheritance on the part of the mother. Upon the meaning of *transmit* in this connection, Farker, J., said: “Much criticism has been expended on the word *transmit*, which I shall no further notice than to observe that in its first and original sense it means to send from one person or place to another.” In the same case, Tucker, P., said: “It is a word of two significations, and is in this passage, I conceive, used in both senses. It implies, in connection with inheritance, the *transmission* of an estate by descent, either from the bastard or through him. Nothing is more familiar than to speak of a person *transmitting* from himself. In that sense it means to convey, to transfer, to impart. I *transmit* money through the mail to Philadelphia. \* \* \* In like manner the word is used by lawyers to indicate not only the *transmission* through a person, but the *transmission* from him. Blackstone lays down the rules ‘whereby property is *transmitted* from one man to another,’ 2 Black. Com. 211.” *Garland v. Harrison*, 8 Leigh (Va.) 368. See also the title SUCCESSION, vol. 27, p. 327.

**Transmit to Their Children.** — In *Shannon v. Bonham*, 27 Ind. App. 373, it was said: “The provision that the share shall be *transmitted* to their children free from all incumbrances and debts ‘tends strongly to show the testator’s intention to limit him (them) to an estate for life.’ *Ridgeway v. Lanphear*, 99 Ind. 251; *Kilgore v. Kilgore*, 127 Ind. 276. The word *transmit* cannot be given its literal meaning, in view of the lack of literary skill and power of accurate expression shown by the entire instrument, when such meaning conflicts with the intention as otherwise gathered.”

**Transmit Returns.** (See also the title ELECTIONS, vol. 10, p. 552.) — In *Mackinnon v. Clark*, (1898) 2 Q. B. 251, a statute required candidates within a certain time after election to *transmit* to the returning officer a true return respecting election expenses. Upon the meaning of the word *transmit* in this connection, Smith, L. J., said: “The word *transmit* in this section in my judgment means the same thing as the word ‘send’ or ‘remit,’ and, for reasons I will presently give, it does not mean ‘lodge,’ as the plaintiff contends. The plaintiff’s construction of the word *transmit* brings about the extraordinary result that if the re-

turn is sent off, say a week before the expiration of the thirty-five days, and in ample time to reach its destination within the thirty-five days, yet the candidate is guilty of an illegal practice if the return happens to perish upon its way, and does not reach the returning officer within the prescribed time.”

**Telephone.** — In *Atty.-Gen. v. Edison Telephone Co.*, 6 Q. B. D. 258, it was held that a communication through a telephone was a communication *transmitted* by telegraph. Stephen, J., said: “A small question was raised on the word *transmitted*. When one person speaks to another it was said he ‘makes,’ but does not *transmit*, a communication. The answer is that when he speaks through a wire some miles long he sends what he says through the wire, or *transmits* it.”

**Transmission — Delivery.** (See also the title TELEGRAPHS AND TELEPHONES, vol. 27, p. 1023.) — In *Dudley v. Western Union Tel. Co.*, 54 Mo. App. 391, it was held that a penalty imposed for failure to *transmit* messages promptly did not apply to the delivery to the addressee, but merely to the *transmission* over the wire. See also *Brooks v. Western Union Tel. Co.*, 56 Ark. 224; *Horn v. Western Union Tel. Co.*, 88 Ga. 538; *Connell v. Western Union Tel. Co.*, 108 Mo. 459. *Compare* *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79; *Brashears v. Western Union Tel. Co.*, 45 Mo. App. 435.

2. **Transmitter — Telephone.** — See *State v. Halliday*, 61 Ohio St. 352.

3. *State v. Smith*, 51 Kan. 123.

4. **Transport.** — *State v. Pickett*, 47 S. Car. 103, in which case *transporting* was distinguished from “handling.”

**Transportation.** — “*Transportation* is the means by which commerce is carried on.” *Council Bluffs v. Kansas City, etc., R. Co.*, 45 Iowa 349.

In *Goucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, it was said: “*Transportation* implies the taking up of persons or property at some point and putting them down at another.”

**Driving Cattle.** — In *U. S. v. Sheldon*, 2 Wheat. (U. S.) 119, it was held that the driving of living fat oxen, etc., on foot was not a *transportation* thereof within the true intent and meaning of a statute prohibiting the *transportation* of articles of provision, etc., from the United States to Canada.

**Transportation and Delivery.** — The phrase “goods awaiting *transportation*” is not equivalent to the phrase “goods awaiting de-



**TRAP.** — See note 1.

**TRAVAIL.** (See also the title **BASTARDY**, vol. 3, p. 880.) — The period of pain and danger attending childbirth, before delivery.<sup>2</sup>

**TRAVEL—TRAVELER—TRAVELING.** (See also the titles **CARRYING WEAPONS**, vol. 5, p. 729; **COMMERCIAL TRAVELERS OR DRUMMERS**, vol. 6, p. 223; **DOMICIL**, vol. 10, p. 6; **HIGHWAYS**, vol. 15, p. 343; **INNS AND INN-KEEPERS**, vol. 16, p. 516; **SUNDAYS AND HOLIDAYS**, vol. 27, p. 386.) — The term "travel" has no precise or technical meaning when used without limitation. Its primary and general import is to pass from place to place, whether for business, pleasure, instruction, or health.<sup>3</sup> A traveler is one who travels

livery." *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 319.

The Towing of a Vessel out to sea by a steamer constitutes *transportation* of property. *White v. Steam-tug Mary Ann*, 6 Cal. 462.

**Slaves.** — A statute provided that it should not be lawful for any slave to be *transported* on any railroad, steamboat, etc., without a permission in writing from the owner of such slave. In construing this provision in *Wilson v. State*, 21 Md. 9, the court said: "*Transportation*, in the sense of the act, means asportation, a taking out of the possession of the owner without his privity and consent, without the *animus revertendi*."

**Transportation as Commerce.** — See *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

**Interstate Commerce.** — "The term *transportation* includes all instrumentalities of shipment or carriage." *Interstate Commerce Commission v. Brimson*, 154 U. S. 457.

**Being Transported Over Road.** — A through train between Denver and Chicago ran onto a sidetrack at an intermediate station to allow the passage of another through train from the east. A through passenger left his car, crossed the main track of the road to the depot, and went to a pump for a drink of water. He filled his cup from the pump, but before drinking heard the whistle of the incoming train, and started on a rapid run to regain his car. From the pump the track over which the incoming train was approaching could be seen for about one hundred feet, and three steps from the pump towards the track over which the train was approaching the track was visible for a mile or more. When the passenger reached the track the approaching train was about fifty feet distant from him, and running at a high rate of speed. The passenger attempted to pass in front of the train and was struck by the engine and killed. It was held that under the circumstances he was not a passenger "being *transported* over" the road, within the meaning of *Comp. Stat. Neb.* (1902), c. 72, § 3, and that the railroad was not liable for damages on account of his death, because of his own negligence. *Chicago, etc., R. Co. v. Sattler*, 64 Neb. 636.

**Transporting Prisoner.** — In *Sargent v. La Plata County*, 21 Colo. 171, it was said: "Item No. 2 in the third cause of action is for *transporting* a prisoner by the sheriff, whom the latter arrested and conveyed from the place of arrest to the court before trial was had. As we understand the contention of the county,

it is that any fee for *transporting* a prisoner cannot be allowed unless the prisoner has been convicted and then taken to the penitentiary. Such contention, however, we do not consider to be sustained by giving any such restrictive meaning to the word *transporting*. The fee is for the necessary 'conveying' of a prisoner, either before or after conviction, and the bill should have been allowed if all other statutory conditions of the liability of the county were present."

**Transportation for Crime.** — See *Bullock v. Dodds*, 2 B. & Ald. 258; *Copeland's Case*, J. Kel. 45; *Gough v. Davies*, 2 Kay & J. 623, note; *Fleming v. Smith*, 12 Ir. C. L. R. 404; *Watson's Case*, 9 Ad. & El. 731, 36 E. C. L. 255; *Matter of Parker*, 5 M. & W. 44; *Blake v. Barnett*, 8 Jur. N. S. 812.

**Transportation Company.** — In *Columbia Conduit Co. v. Com.*, 90 Pa. St. 308, it was held that a corporation engaged in the removal of petroleum from place to place by means of pipes was within the meaning of an act imposing a tax on *transportation* companies. The court said: "It is contended that this moving of petroleum by means of pipes is not *transporting*, and therefore that this is not a *transportation* company. The defendant's counsel contends that to *transport* is 'to carry,' and that this transit company does not carry, but the petroleum flows. We consider this too narrow a construction. If we look into the dictionary for the meaning of the word *transport*, Webster defines it 'to carry or convey from one place to another;' again, 'to remove from one place to another;' and throughout all of the derivations from the word *transport* we find the same part of the definition 'to remove.'"

1. **Trap.** (See also the title **NUISANCES**, vol. 21, p. 701.) — In *Moffatt v. Kenny*, 174 Mass. 315, it was said: "Of course the landowner is liable if he does him [a licensee] intentional injury, or wantonly or recklessly exposes him to danger. It has sometimes been said that he is liable for a *trap* upon his land. We are not aware of any decision which distinctly defines the word *trap* in this use. It would at least include any very dangerous construction or condition designedly arranged to do injury."

2. **Travail.** — *Dennett v. Kneeland*, 6 Me. 460; *Bacon v. Harrington*, 5 Pick. (Mass.) 63; *Drowne v. Stimpson*, 2 Mass. 441.

"**Accusation in Time of Travail.**" — *Scott v. Donovan*, 153 Mass. 378.

3. **Travel.** — *L. B. Price Co. v. Atlanta*, 105 Ga. 358, citing *Lockett v. State*, 47 Ala. 45.

in any way; one who makes a journey, or who goes from place to place.<sup>1</sup> Traveling is a passing from place to place; the act of performing a journey; and a traveler is a person who travels.<sup>2</sup>

**Travel to Serve.**—Where a statute allows compensation to an officer for *traveling* to serve a warrant, it has been held that the expression "*traveling* to serve" means *traveling* which results in a service. *Labette County v. Franklin*, 16 Kan. 450; *Ex p. Wyles*, 1 Den. (N. Y.) 658; *Northern Trust Co. v. Snyder*, 113 Wis. 516.

1. *Bain v. State*, 38 Tex. Crim. 636.

**Liberal Construction.**—In *Bain v. State*, 38 Tex. Crim. 636, it was said: "If the liberal definition is given to the word *traveler*, almost every person who goes from one place to another may be considered a *traveler*."

In *Kansas City v. Orr*, 62 Kan. 65, it was said: "In determining the duty and liability of the city, the terms *travel* and *traveler* are not to be given a narrow and restricted meaning, but should be held to embrace such legitimate uses as may be made by persons having occasion to pass over them while engaged in any of the duties of life."

**Distance Immaterial.**—In *Pullman Palace Car Co. v. Lowe*, 28 Neb. 246, it was said: "Webster defines a *traveler* as 'one who travels in any way.' Distance is not material. A townsman or neighbor may be a *traveler*."

**Drawbridge.**—A city was bound to keep a drawbridge in such repair that it would be safe and convenient for *travelers*. At a time when the wings of the drawbridge were raised in order that the vessel which the plaintiff was assisting to navigate might pass through, the plaintiff stepped upon the elevated wing when it was in no condition to be used for travel, in order that he might free the rigging of the vessel, and he was injured. It was held that he was not a *traveler*. *McDugall v. Salem*, 110 Mass. 21. See also the title *HIGHWAYS*, vol. 15, pp. 463, 464.

**Playing in Street.**—It has been held that a person who was using a highway simply for the purpose of playing was not a *traveler*. *Blodgett v. Boston*, 8 Allen (Mass.) 237. See also *Tighe v. Lowell*, 119 Mass. 472; *Stinson v. Gardiner*, 42 Me. 248. But if the person is using the highway not merely for the purpose of playing, but also for the purpose of getting home, he is a *traveler*. *Graham v. Boston*, 156 Mass. 75; *Gulline v. Lowell*, 144 Mass. 495; *Bliss v. South Hadley*, 145 Mass. 91; *Hunt v. Salem*, 121 Mass. 294.

In *Jackson v. Greenville*, 72 Miss. 220, an adult playing with a dog on the sidewalk was held not to be a *traveler*. After citing *Blodgett v. Boston*, 8 Allen (Mass.) 237, the court said: "Here, however, the offender against the rights of the public was an adult, and not a child of debatable discretion. Here, in addition, the play with the dog was not a mere incident to the general and proper use of the sidewalk by the appellant in passing along or over it."

**Person Going Home.**—In *Campbell v. State*, 28 Tex. App. 44, a person who was going from his temporary home to his permanent home in

another county was held to be a *traveler*. Compare *Blackwell v. State*, 34 Tex. Crim. 476.

**A Person Attending a Political Meeting** in his own county was held not to be a *traveler*, in *Brownlee v. State*, 35 Tex. Crim. 213.

**Recreation Seekers** carried upon a steamboat have been held not to be *travelers* when so carried on Sunday. *Reg. v. Tinning*, 11 U. C. Q. B. 636.

**A Spectator** watching a procession was held, in *Varney v. Manchester*, 58 N. H. 430, not to be a *traveler*.

**Temporarily Withdrawing from Highway.**—Where the performance of a *traveler's* business requires him temporarily to withdraw from the limits of the road, he does not cease to be a *traveler*. *Ward v. North Haven*, 43 Conn. 148.

In *Britton v. Cummington*, 107 Mass. 347, it was held that a person journeying on a highway did not necessarily forfeit his rights as a *traveler* while he stopped to pick berries by the wayside.

**How Long Character Must Last.**—In *Julia v. McKinney*, 3 Mo. 273, it was said: "How long the character of emigrant or *traveler* through the state may last cannot by any general rule be determined; but it seems that reason does require it should last so long as might be necessary, according to the common modes of *traveling*, to accomplish a transit through the state. If any accident should happen to the emigrant which in ordinary cases would make it reasonable and prudent for him to suspend his journey for a short time, we think he might do so without incurring a forfeiture if he resumed his journey as soon as he safely could." See also *Matter of Archy*, 9 Cal. 147; *Wilson v. Melvin*, 4 Mo. 592; *Ralph v. Duncan*, 3 Mo. 195, cited in *Wilson v. Melvin*, 4 Mo. 598.

**Bona Fide Traveler — English Inland Revenue Act of 1867.**—See *Killick v. Graham*, (1896) 2 Q. B. 201.

**Bona Fide Traveler — English Licensing Act of 1874.**—See *Cowap v. Atherton*, (1893) 1 Q. B. 49; *Penn v. Alexander*, (1893) 1 Q. B. 522.

2. *Matter of Archy*, 9 Cal. 164.

**Actual Traveling Expenses.**—In *State v. La Grave*, 23 Nev. 91, it was held that the hotel bills incurred by the superintendent of public instruction, while staying at a place for the purpose of visiting schools, were not a part of his *traveling* expenses. The court said: "*Travel*, in visiting a school, is going to and returning from the place where the school is situated. But after he arrives there he certainly is not, during his stay, *traveling*, consequently his expenses while there are not incurred in *traveling*. But to make the matter still more certain, and apparently for the purpose of insuring that no general expense of the trips should be included, it is provided that the *traveling* expenses must be 'actual.'"

**Concealed Weapons.** (See also the title *CARRYING WEAPONS*, vol. 5, p. 743.)—In *Lockett v.*

**TRAVELED PLACE.** (See also the title CROSSINGS, vol. 8, p. 411.) — See note 1.

**TRAVERSE.** (See also the title PLEAS AT LAW, 16 ENCYC. OF PL. AND PR. 539.) — In pleading, a denial by one side of matters of fact alleged by the other.<sup>2</sup>

State, 47 Ala. 45, it was held that a person who was a passenger and passing on a railway train a distance of twenty-eight miles to seek employment was a *traveler*. The court said: "The word *traveling* has no very precise or technical meaning when it is used without any limitation. Its primary and general import is to pass from place to place, whether for pleasure, instruction, business, or health. A person may *travel* to seek employment as well as to seek amusement, information, or health."

In *Gholson v. State*, 53 Ala. 519, it was held that the word *traveling*, as used in the statute against carrying concealed weapons, means something more than the mere passing from place to place. The *traveling* must be, as is the "setting out" mentioned in the statute, "on a journey," such as is without the ordinary habits, business, or duty of the person — to a distance from his home, and beyond the circle of his acquaintances.

**Traveling Peddler.** (See also the title HAWKERS AND PEDDLERS, vol. 15, p. 290.) — In *Martin v. Rosedale*, 130 Ind. 111, it was said: "It is impossible to conceive of a 'peddler,' in the ordinary acceptation of that term, disconnected from the idea of *traveling* from house to house for the purpose of vending some article of merchandise. \* \* \* We think the term '*traveling* peddler' was intended by those who passed the ordinance in question to apply to all who *traveled* from house to house in the town for the purpose of vending merchandise, without regard to their place of residence. To all such persons, whether they reside in the town or elsewhere, we think the ordinance applies."

**Traveling Salesman.** — A *traveling* salesman has been held not to be a clerk, laborer, or tradesman within an act giving preference to wages. *Witmer v. Miller*, 12 Pa. Co. Ct. 363.

In *L. B. Price Co. v. Atlanta*, 105 Ga. 367, it was said: "The term '*traveling* salesman' used in that act [Act Dec. 14, 1896] means to include only that class of persons engaged in selling goods, either by sample or otherwise, who travel on this business from city to city and from town to town, and whose business relations are connected with those who in such cities or towns are likewise engaged in business which contemplates a resale of the goods sold, or consumption in large quantities. The provisions of that act do not contemplate another and entirely different class of persons who, in a given town, city, or county, go from house to house in their effort to take orders for goods."

In *Kimmel v. Americus*, 105 Ga. 694, it was held that an agent of a firm or corporation who goes from town to town in the state exhibiting samples of goods, and taking orders on his employer or employers for such goods from consumers, was a *traveling* salesman. See also *Crawford v. Hawkinsville*, 110 Ga. 312.

**Traveling Vendor** — In *Pegues v. Ray*, 50

La. Ann. 577, it was said: "A *traveling* vendor, then, is one who carries about with him the articles of merchandise which he sells. That is to say, the identical merchandise he sells he has with him and delivers at the time of sale. His vocation is quite different from that of the drummer, who carries only samples of his wares as exhibits, and takes orders for the future delivery of merchandise of their kind and quality, or of similar kind and quality. The statute under consideration imposes no license on the drummer with his samples taking orders, while it does on the *traveling* vendor of certain kinds of goods."

**Traveled Part of Road.** — In *Daniels v. Clegg*, 28 Mich. 32, it was held that the *traveled* part of the road means that part that was wrought for *traveling* and is not confined to the most *traveled* wheel track. See also *Clark v. Com.*, 4 Pick. (Mass.) 125; *Com. v. Allen*, 11 Met. (Mass.) 403; *Winter v. Harris*, 23 R. I. 47.

**1. Traveled Place.** — In *Whitaker v. Boston*, etc., R. Co., 7 Gray (Mass.) 98, it was held that an open and *traveled* street in a city, though not so laid out and established by the municipal authorities as to make the city responsible for damages occasioned by defects therein, is a *traveled* place within the meaning of a statute providing that a railroad corporation shall maintain a signboard and other precautions at railroad crossings over highways and towns. See *Coakley v. Boston*, etc., R. Co., 159 Mass. 32.

But in *Cordell v. New York*, etc., R. Co., 64 N. Y. 535, it was held that until a highway which crosses a railroad track has been actually opened, or notice of its laying out has been served upon an officer of the corporation, the duty imposed by a general railroad act of giving notice of an approaching train does not attach.

The road or street must be *traveled* as well as public. *Byrne v. New York*, etc., R. Co., 94 N. Y. 12, *reversing* 28 Hun (N. Y.) 438. And so in *South Carolina*, under such a statute it was held that a *traveled place* meant a place where people had the legal right to cross, and not such a crossing as was not a public one and not recognized as such, although people were accustomed to use it. *Barber v. Richmond*, etc., R. Co., 34 S. Car. 444. See also *Hankinson v. Charlotte*, etc., R. Co., 41 S. Car. 20; *Risinger v. Southern R. Co.*, 59 S. Car. 429; *Hale v. Columbia*, etc., R. Co., 34 S. Car. 292.

In *Kirby v. Southern R. Co.*, 63 S. Car. 503, it was said that if a way "was a neighborhood road, and had been continuously used by the public for twenty years or more, the law would presume a grant or prescriptive right in the public to travel over the same, and it would be, in contemplation of the statute, a *traveled place*."

**2. Traverse.** — In *Turner v. Rosseau*, 21 Ga. 240, *Francis Rosseau*, being served with a sum-



## TRAWL. — See note 1.

mons of garnishment issued in a case of attachment sued out by James N. Turner against W. R. Rousseau, filed his answer denying that he had any of the effects of the absconding debtor in his hands, or that he was indebted to him, and the plaintiff by his counsel filed the following *traverse* to said answer: viz., "And now comes the plaintiff in attachment by his attorneys Tucker and Beall, and tenders issue and says, that said garnishee was indebted to said defendant at the time of the service of said summons; that he had money, accounts, notes, horses, lands, mules, cows, hogs, effects, deeds, evidences of debt, bonds for titles to lands, choses in action, in his possession belonging to said defendant, and of this he puts himself upon the country," etc. The attorney for the garnishee refused to join issue upon said *traverse*, and objected to the same as being too vague, indefinite, and without sufficient specification; the court sustained the objection, and, counsel for plaintiff declining to make any amendment thereto, or to tender any other or further issue, the court on motion discharged the garnishee from all further answer or liability in the premises; whereupon plaintiff's counsel excepted and assigned error. The court said: "Was the *traverse* sufficient? This is the only question. The court below, it seems, thought the *traverse* too general. The language of the attachment act is this: 'And where any person, in whose hands any debt or effects may be attached, shall deny owing any money to, or having in his hands any effects of, such debtor, it shall be lawful for the plaintiff to *traverse* such denial, and there-

upon an issue shall be made up and the same be tried by a jury,' etc. 2 Cobb's Dig. 70. All that the plaintiff has to do is to *traverse* the answer of the garnishee. To *traverse* is merely to deny. 1 Chitty Pl. 576, and note a. To *traverse* the answer of a garnishee is, therefore, merely to deny the truth of the answer, — is merely to say that the answer is not true. This the *traverse* in the present case does by necessary implication. It does somewhat more. It states, in a general way, wherein it is that the answer is not true. And, general as is this statement, it, after all, is not, perhaps, for any practical purposes, more general than many statements which, by a skilful use of the *videlicet*, the common law may be made to sustain. But the statute requires no more than a mere denial of the truth of the answer. If, therefore, the plaintiff makes this denial, it is the duty of the garnishee to take issue on the denial; and that he may do, no doubt, by simply saying that the answer is true. Thus, in a few words, may the 'issue' to which the statute refers 'be made up.' We think, therefore, that the judgment of the court below ought to be reversed."

1. Trawl or Trawl Net. (See also the title FISH AND FISHERIES, vol. 13, p. 577.) — An otter *trawl* which had no beam, but was used for fishing for sea fish as a *trawl* with a beam, was held to be within a statute which prohibited the use of any *trawl* or *trawl* net or net having a beam. Colbeck v. Ashfield, 67 L. J. Q. B. 333.

# TREASON.

BY JOHN T. PORTERFIELD.

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### CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, title *TREASON*, vol. 21, p. 776.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ALIENS*, vol. 2, p. 64; *ALLEGIANCE*, vol. 2, p. 148; *CITIZENSHIP*, vol. 6, p. 14; *CRIMINAL LAW*, vol. 8, p. 274; *EXTRADITION*, vol. 12, p. 590; *REPRIEVE*, vol. 24, p. 547; *RIOT*, vol. 24, p. 971; *UNLAWFUL ASSEMBLY*; *WAR*.

**I. DEFINITION.** — A breach of allegiance to a government committed by one under its protection is treason,<sup>1</sup> the greatest crime known to the law.<sup>2</sup>

1. **Treason Defined.** — Cranburne's Trial, 13 How. St. Tr. 227; Vaughan's Trial, 13 How. St. Tr. 526; *U. S. v. Wilterberger*, 5 Wheat. (U. S.) 76.

Treason is "nothing more than a criminal attempt to destroy the existence of the government." *Respublica v. Chapman*, 1 Dall. (Pa.) 53.

High treason, which by the very term denotes treachery or breach of faith, is a violation of the allegiance which is due from the subject to

the king as sovereign lord and superior magistrate of the state. 1 Hale P. C. 48; *U. S. v. Greiner*, 4 Phila. (Pa.) 396, 18 Leg. Int. (Pa.) 149, 26 Fed. Cas. No. 15,262.

**Who Is a Traitor.** — The joining with rebels in an act of rebellion or with enemies in acts of hostility, this will make a man a traitor. *U. S. v. Burr*, 25 Fed. Cas. No. 14,693.

2. **Treason the Greatest of All Crimes.** — *U. S. v. Hoxie*, 1 Paine (U. S.) 265; Charge to Grand Jury, 2 Curt. (U. S.) 630, 30 Fed. Cas. No.

**II. NATURE OF ALLEGIANCE.** — By Allegiance Is Meant that fidelity and obedience which the individual owes to the government in return for the protection he receives.<sup>1</sup>

**Compact.** — For the formation of the duty of allegiance a formal compact entered into between citizens or subjects and the government is not essential.<sup>2</sup>

**De Facto Government.** — If a *de facto* government is established by which the *de jure* government is entirely supplanted, the duty of allegiance which always exists between the governing and the governed is established,<sup>3</sup> and upon the restoration of the rightful or *de jure* government, prior adherence to this *de facto* government is not treason.<sup>4</sup>

**When a Government Is Changed,** those disaffected do not immediately owe allegiance to the new government, but should be allowed a reasonable time in which to leave the country.<sup>5</sup>

**III. WHO MAY COMMIT TREASON.** — Every citizen or subject of a country owes to the government of the country his support and loyalty<sup>6</sup> until he openly renounces his country and becomes a citizen or subject of another country.<sup>7</sup>

**Domiciled Alien.** — An alien who is domiciled within a country owes temporary allegiance to the government,<sup>8</sup> which is co-extensive with his residence under the protection of the government.<sup>9</sup> For a citizen or an alien while

18,269; Charge to Grand Jury, 1 Bond (U. S.) 609, 30 Fed. Cas. No. 18,272.

**In England There Were Formerly Two Kinds of Treason,** high and petit. Under high treason was embraced the crime that is generally known as treason; while under petit treason were embraced what are now distinct crimes, as where a servant killed his master, a wife killed her husband, or an ecclesiastical person killed his superior. All of these latter crimes were considered a breach of private allegiance. State v. Bilansky, 3 Minn. 246.

**1. Allegiance.** — Carlisle v. U. S., 16 Wall. (U. S.) 147. And see U. S. v. Greiner, 4 Phila. (Pa.) 396, 18 Leg. Int. (Pa.) 149, 26 Fed. Cas. No. 15,262.

**Different Kinds of Allegiance.** — See ALLEGIANCE, vol. 2, p. 148.

**2. Formal Compact Not Necessary.** — Respublica v. Chapman, 1 Dall. (Pa.) 53.

**The Vanquished Owe Allegiance to the Conquerors.** — See Hanauer v. Woodruff, 15 Wall. (U. S.) 439; U. S. v. Rice, 4 Wheat. (U. S.) 246; Thornton v. Smith, 8 Wall. (U. S.) 1.

**3. Allegiance to De Facto Government.** — Thornton v. Smith, 8 Wall. (U. S.) 1; Respublica v. Chapman, 1 Dall. (Pa.) 53.

**Confederate Government Never a True De Facto Government.** — Keppel v. Petersburg R. Co., Chase (U. S.) 167, 14 Fed. Cas. No. 7,722; Sprout v. U. S., 20 Wall. (U. S.) 459; Shortridge v. Macon, Chase (U. S.) 136; Thornton v. Smith, 8 Wall. (U. S.) 1.

**The Duration of Sovereignty by the Victor Is Coextensive with His Absolute Control of the Conquered Country.** — Fleming v. Page, 9 How. (U. S.) 603.

**4. Keppel v. Petersburg R. Co.,** Chase (U. S.) 167, 14 Fed. Cas. No. 7,722.

But in Vane's Case, J. Kel. 14, 6 How. St. Tr. 119, where the accused took no part in the execution of Charles the First, but subsequently had command of the army under Parliament, it was held that obedience to the *de facto* government would not excuse his

actions in pursuance of their commands. Judge Kelying, in this case, reported that Vane testified that what he did was by authority of Parliament, and that the king was then out of possession of the kingdom, and the Parliament was the only power regnant; therefore no treason could be committed against the king. But the judges resolved "that the King Charles the Second was *de facto* kept out of the exercise of the kingly office by traitors and rebels; yet he was king both *de facto* and *de jure*, and all the acts which were done to the keeping him out were high treason." In accordance with which instructions Vane was found guilty by the jury and afterwards suffered death. See this case criticised in Thornton v. Smith, 8 Wall. (U. S.) 1.

**5. Reasonable Time Allowed for Departure of Persons Dissatisfied with New Government.** — Respublica v. Chapman, 1 Dall. (Pa.) 53. In this case it was held that it was for the court and jury to determine what was such reasonable time.

**6. Every Citizen Owes His Support to His Country.** — U. S. v. Greathouse, 2 Abb. (U. S.) 364; Carlisle v. U. S., 16 Wall. (U. S.) 147; Charge to Grand Jury, 1 Sprague (U. S.) 602; Bouv. L. Dict., tit. Treason; Foster Crown L. 183. And see the section immediately preceding.

**Treason Against a State of the Union Can Be Committed Only by a Citizen of That State.** — Ea p. Quarrier, 2 W. Va. 569.

**7. A Citizen or Subject May Not During Time of War renounce his own government and become the subject of a country at war with his own state.** Rex v. Lynch, (1903) 1 K. B. 444, 88 L. T. N. S. 26. This is the case of Colonel Lynch who served in the Boer war against the British. See also Respublica v. Chapman, 1 Dall. (Pa.) 53.

**8. Aliens Owe Allegiance.** — See the title ALIENS, vol. 2, p. 64.

**9. Carlisle v. U. S.,** 16 Wall. (U. S.) 147; Charge to Grand Jury, 2 Wall. Jr. (C. C.) 134; U. S. v. Greathouse, 2 Abb. (U. S.) 364.

"Local allegiance is founded in the protection



such duty exists not to observe its requirements is treason.<sup>1</sup>

**IV. WHAT CONSTITUTES TREASON — 1. Treason Defined by Positive Law.** — All the present law of treason, in both *England* and *America*, is based upon the English Statute of Treasons, 25 Edw. III., st. 5, c. 5,<sup>2</sup> from the third and fourth sections of which the federal constitutional provisions in regard to treason are taken, which provide that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."<sup>3</sup> In the judicial interpretation of these sections incorporated into the Constitution, the American courts follow the construction put upon them by the English courts.<sup>4</sup> Since the crime of treason is fixed by the Constitution it is beyond the power of Congress in any way to extend its limits<sup>5</sup> or to abridge or restrict it, as by placing its essential elements in another category of crime.<sup>6</sup> In the construction in both England and America of legislative acts defining and punishing crimes, the presumption is that they are not aimed at the fixed crime of treason.<sup>7</sup>

**2. Treason Against United States and Against State Distinguished.** — Since each is a distinct government, sovereign in its nature, treason against the federal government and treason against a state government are distinct offenses.<sup>8</sup> The intention with which treason is committed determines the species of treason.<sup>9</sup>

a foreigner enjoyeth for his person, his family or effects, during his residence here; and it ceaseth whenever he withdraweth with his family and effects." Foster Crown L. 183.

**1. Nonobservance of Duty of Allegiance by Citizen or Alien Treason.** — Cranburne's Trial, 13 How. St. Tr. 227.

**2. Statute of Edward III.** — U. S. v. Burr, 25 Fed. Cas. No. 14,693.

**3. U. S. Const., art. III., § 3, cl. 1; Judge Curtis's Charge to Grand Jury,** 2 Curt. (U. S.) 630, 30 Fed. Cas. No. 18,269.

**Constructive Treason Not Recognized in United States.** — *Ex p. Bollman*, 4 Cranch (U. S.) 75.

**English Statute of Treason Not Applicable to American Colonists.** — See Bayard's Trial, in the province of New York, in 1702, reported in 14 How. St. Tr. 471, where it was held that the English statute of treason did not apply to the American colonists, but that treason in New York was punishable under the Act of Assembly of New York of 1691.

**4. English Precedents Followed in the United States.** — U. S. v. Hoxie, 1 Paine (U. S.) 265; Charge to Grand Jury, 2 Curt. (U. S.) 630, 30 Fed. Cas. No. 18,269; U. S. v. Greiner, 4 Phila. (Pa.) 396, 18 Leg. Int. (Pa.) 149, 26 Fed. Cas. No. 15,262; U. S. v. Fries, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126.

**English Precedents Authoritative as to the Levying of War.** — U. S. v. Greathouse, 2 Abb. (U. S.) 364; U. S. v. Hanway, 2 Wall. Jr. (C. C.) 200.

**5. Congress Cannot Extend the Limits of Treason.** — U. S. v. Greathouse, 2 Abb. (U. S.) 371.

**6. Congress Cannot Restrict the Limits of Treason.** — When the treasonable intent and overt act are proved, the description of crimes contained in the Sedition Act lose their character and become component parts of the greater crime of treason. U. S. v. Fries, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126.

**Where a Crime Contains Several, but Not All, of the Elements of Treason, as the acts punishable under the Alabama law on the subject of aid-**

ing a rebellion of slaves, passed in 1812, it may be indicted as a separate crime, since it does not fall within the definition of treason under the constitution of Alabama, which is similar to that of the United States. *State v. M'Donald*, 4 Port. (Ala.) 449.

**7. See Messenger's Trial,** 6 How. St. Tr. 879; *Case of Armes*, Popham 122.

**The Sedition Act** is not aimed at the offense of treason, but at substantive and independent offenses, and is to be so interpreted. Peters, J., in U. S. v. Fries, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126.

**Object of Treason — Felony Act** (11 and 12 Vict., 12, § 3). — See *Reg. v. Gallagher*, 15 Cox C. C. 291.

**8. Treason Against State and Federal Government Distinct Offenses.** — U. S. v. Bollman, 1 Cranch (C. C.) 373; *State v. M'Donald*, 4 Port. (Ala.) 449; *People v. Lynch*, 11 Johns. (N. Y.) 550; *Ex p. Quarrier*, 2 W. Va. 569; Charge to Grand Jury, 1 Story (U. S.) 614.

**If by the Same Act Treason** is committed against both governments, a traitor is liable to punishment by each sovereignty. *Ex p. Quarrier*, 2 W. Va. 569.

**The Levying of War by a Foreign Power Against the United States Is Not a Levying of War Against a State Government.** — *People v. Lynch*, 11 Johns. (N. Y.) 550.

**Levying War Against United States by Citizen of a State.** — For a citizen of a state to wage war against the United States, although the state is embraced in such warfare as a component part of the Union, is not treason against the state; but the latter offense can only be committed by acts done directly against the state government, as by invading her territory, attacking her citizens, or subverting her government. *Ex p. Quarrier*, 2 W. Va. 569.

**9. Intention.** — U. S. v. Bollman, 1 Cranch (C. C.) 373.

**Treason Against United States — Jurisdiction.** — Since the judicial power of the federal courts extends to all cases arising under the Constitution and laws of the United States, the juris-

**Treason Against the United States** is committed by invasion of the national sovereignty.<sup>1</sup> No injury, even extensive enough in point of locality to contemplate or threaten the opposition and destruction of the laws or government of any one of the United States, will amount to treason against the United States.<sup>2</sup>

**In Treason Against the State Government**, while the other elements of the assembling of a number of people and the exercising of unlawful force are necessary to the commission of the offense, the treasonable acts are directed against the state sovereignty, as an attempt to overthrow the state government or constitution.<sup>3</sup>

**3. Treasonable Acts Enumerated — a. IN GENERAL. — Treason Is Composed of Two Elements** — the intention, which is an act of the mind, and the overt act, which is its physical correlative or counterpart.<sup>4</sup> While the intention with which an act is done is recognized to be the true criterion by which to judge whether the offense is treason,<sup>5</sup> yet, as the law does not punish the hidden and concealed workings of the mind, there must be some treasonable act of which the law can take cognizance.<sup>6</sup>

**Mere Words**, whether spoken, written, or printed, are not in themselves treasonable.<sup>7</sup>

**b. LEVYING WAR — (1) What Is Levying War — (a) In General — Elements.** — The levying of war against a government has always been regarded as an act of treason.<sup>8</sup>

**Elements of Levying War — Combination.** — To commit this crime there must be a combination or association of people united by one common purpose in a conspiracy,<sup>9</sup> the design or plot of which must be directed against the gov-

ernment of the state courts does not extend to the offense of treason against the United States. *People v. Lynch*, 11 Johns. (N. Y.) 550.

**1. Treason An Invasion of National Sovereignty.** — *U. S. v. Hoxie*, 1 Paine (U. S.) 265.

**2. U. S. v. Bollman**, 1 Cranch (C. C.) 373.

**3. Treason Against State.** — Charge to Grand Jury, 1 Story (U. S.) 614; *People v. Lynch*, 11 Johns. (N. Y.) 550.

**State and Federal Provisions Similar.** — The provisions of the state constitutions in regard to treason are generally identical with the federal provisions relative thereto. *State v. McDonald*, 4 Port. (Ala.) 449; *Homestead Case*, 1 Pa. Dist. 785.

**4. Treason Composed of Intention and Overt Act.** — *U. S. v. Hanway*, 2 Wall, Jr. (C. C.) 169; Charge to Grand Jury, 1 Story (U. S.) 614; *Reg. v. Gallagher*, 15 Cox C. C. 291.

**5. Intent the Criterion.** — *Case of Armes*, Popham 123; *Foster Crown Law* 208; *Reg. v. Frost*, 9 C. & P. 129, 38 E. C. L. 70; *U. S. v. Bollman*, 1 Cranch (C. C.) 373; *U. S. v. Hoxie*, 1 Paine (U. S.) 265; *Fries's Case*, Whart. St. Tr. 610, 9 Fed. Cas. No. 5,127; *Homestead Case*, 1 Pa. Dist. 785.

The intention with which letters are written is the criterion for ascertaining whether the writing is an act of treason. *Rex v. Stone*, 6 T. R. 527.

**6. Overt Act Necessary.** — *Macdonald's Case*, *Foster Crown L.* 59; *O'Brien v. Reg.*, 3 Cox C. C. 122; *U. S. v. Greathouse*, 2 Abb. (U. S.) 364; *Ex p. Bollman*, 4 Cranch (U. S.) 75; *U. S. v. Pryor*, 3 Wash. (U. S.) 234; *Homestead Case*, 1 Pa. Dist. 785.

"For levying war or adhering to the king's

enemies, an overt act must be alleged and proved." *Foster Crown L.* 194.

**7. Mere Words Not Treasonable.** — Charge to Grand Jury, 5 Blatchf. (U. S.) 549, 30 Fed. Cas. No. 18,271; Charge to Grand Jury, 1 Bond (U. S.) 609, 30 Fed. Cas. No. 18,272; *State v. McDonald*, 4 Port. (Ala.) 449.

Bare words may make a heretic but not a traitor. *Chichester v. Philips*, T. Raym. 404.

**To Establish the Treasonable Intent They May Be Admitted in Evidence.** — *Chichester v. Philips*, T. Raym. 404; Charge to the Grand Jury, 5 Blatchf. (U. S.) 549, 30 Fed. Cas. No. 18,271; Charge to the Grand Jury, 1 Bond (U. S.) 609, 30 Fed. Cas. No. 18,272.

**But Little Weight Is to Be Attached to the Declaration of a Party.** — *Cook's Trial*, 13 How. St. Tr. 391.

**8. Levying War.** — *U. S. v. Greathouse*, 2 Abb. (U. S.) 364; *Ex p. Quarrier*, 2 W. Va. 569; *U. S. v. Burr*, 25 Fed. Cas. No. 14,693.

**Levying War Against United States on High Seas by Citizen, Piracy.** — By 1 U. S. Stat. at Large, 114, Act 1790, c. 9, § 9, it is enacted "that if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under color of any commission from any foreign prince or state, or on pretense of authority from any person, such offender shall, notwithstanding the pretense of any such authority, be deemed, adjudged, and taken to be a pirate, felon, and robber, and on being thereof convicted shall suffer death." Charge to Grand Jury, 2 Sprague (U. S.) 279, 30 Fed. Cas. No. 18,256.

**9. Conspiracy Necessary.** — *Reg. v. Frost*, 9 C. & P. 129, 38 E. C. L. 70; *U. S. v. Hoxie*, 1

ernment in its sovereign capacity.<sup>1</sup> And there must be a concourse or assemblage of people,<sup>2</sup> by whom unlawful force or violence in opposition to the authority of the government must be exercised.<sup>3</sup>

Although the Time of Formation of the Treasonable Design Is Immaterial,<sup>4</sup> preconcerted action,<sup>5</sup> to which a number of people are privy, is a necessary element to the formation of an intention to levy war.<sup>6</sup>

**Proof.** — The conspiracy may be proven either by declarations of individuals or it may be derived from the proceedings of meetings.<sup>7</sup>

**When Deed of One Is Act of All.** — If a number of people conspire to effect a treasonable design, the deed of one in pursuance of that design is the act of all.<sup>8</sup>

**An Overt Act is essential to the levying of war.<sup>9</sup>**

**Certain Degree of Force Necessary.** — This overt act, as would appear from the

Paine (U. S.) 265; Charge to Grand Jury, 2 Wall. Jr. (C. C.) 136.

In Charge to Grand Jury, 2 Curt. (U. S.) 630, 30 Fed. Cas. No. 18,269, Judge Curtis stated the elements of the offense to be: (1) A combination, or conspiracy, by which different individuals are united in one common purpose. (2) This purpose being to prevent the execution of some public law of the United States by force. (3) The actual use of force by such combination to prevent the execution of that law.

**A Party Is Liable Although Arrested** before the deed for acts of his co-conspirators. Reg. v. McCafferty, 10 Cox C. C. 603.

**1. Conspiracy Must Be Directed Against the Government.** — Reg. v. Frost, 9 C. & P. 129, 38 E. C. L. 70; U. S. v. Greathouse, 2 Abb. (U. S.) 364; U. S. v. Hoxie, 1 Paine (U. S.) 265; Charge to Grand Jury, 2 Wall. Jr. (C. C.) 134; Fries's Case, Whart. St. Tr. 610, 9 Fed. Cas. No. 5,127; Homestead Case, 1 Pa. Dist. 785.

**Treasonable Purpose Necessary.** — "It is settled that if a body of men be actually assembled for the purpose of effecting a treasonable purpose by force, that is levying war." Charge to Grand Jury, 1 Sprague (U. S.) 602.

**2. Concourse of People Necessary.** — Reg. v. Frost, 9 C. & P. 129, 38 E. C. L. 70; *Ex p.* Bollman, 4 Cranch (U. S.) 75; Freind's Trial, 13 How. St. Tr. 62; Charge to Grand Jury, 1 Story (U. S.) 614; Fries's Case, Whart. St. Tr. 610, 9 Fed. Cas. No. 5,127.

It is necessary that there should be an actual assemblage, and, therefore, the evidence should make the fact unequivocal. *Ex p.* Bollman, 4 Cranch (U. S.) 75; U. S. v. Hanway, 2 Wall. Jr. (C. C.) 203.

**Meeting of Small Number of Persons Held in England to Be a Treasonable Gathering.** — Reg. v. Gallagher, 15 Cox C. C. 291.

**Evidence of Capacity to Levy War.** — The requirement of an assembly of people is based upon the idea that there must be evidence of capacity and intention to carry out the crime before the offense becomes treason. U. S. v. Burr, 25 Fed. Cas. No. 14,693.

**3. Unlawful Force or Violence in Opposition to the Government Necessary.** — Reg. v. Frost, 9 C. & P. 129, 38 E. C. L. 70; Charge to Grand Jury, 2 Wall. Jr. (C. C.) 134; Fries's Case, Whart. St. Tr. 610, 9 Fed. Cas. No. 5,127.

**4. Treasonable Design May Be Formed Immediately Preceding Execution of Act.** — The parties

may act in pursuance of a preconcerted conspiracy; or they may assemble, conspire, and immediately thereafter act. Charge to Grand Jury, 2 Curt. (U. S.) 630, 30 Fed. Cas. No. 18,269.

**Time of Formation of Treasonable Intention Immaterial.** — Dammaree's Trial, 15 How. St. Tr. 523.

5, Reg. v. Esdaile, 1 F. & F. 213; U. S. v. Fries, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126.

**6. Number of People Must Be Privy to Formation of Intention to Levy War.** — U. S. v. Hanway, 2 Wall. Jr. (C. C.) 169; U. S. v. Fries, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126.

**If a Man Joins with an Assembly in the Perpetration of Acts which are treason, the treasonable intentions of the assemblage are presumed or imputed to be the cause of his conduct.** Fries's Case, Whart. St. Tr. 610, 9 Fed. Cas. No. 5,127.

**7. Proof of Conspiracy.** — U. S. v. Fries, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126; Charge to Grand Jury, 2 Wall. Jr. (C. C.) 134.

**The Concert of Purpose** may be deduced from the concerted action itself, or it may be inferred from facts occurring at the time, or afterwards, as well as before. Kane, J., on Charge to Grand Jury, 2 Wall. Jr. (C. C.) 136.

**In Case of Treason the Prosecution May Either Prove the conspiracy, after the establishment of which the acts of the co-conspirators are admissible in evidence to establish the overt act of treason, making all leagued in the conspiracy traitors; or conversely, the prosecution may prove the acts of different persons and thus show the existence of all and of an illegal union or consiracy.** Reg. v. Frost, 9 C. & P. 129, 38 E. C. L. 70.

**8. Trials of Twenty-nine Regicides.** 5 How. St. Tr. 1224; Reg. v. McCafferty, 10 Cox C. C. 603; Dammaree's Trial, 15 How. St. Tr. 609; Fries's Case, Whart. St. Tr. 610, 9 Fed. Cas. No. 5,127.

**9. Overt Act Necessary.** — Charge to Grand Jury, 2 Wall. Jr. (C. C.) 136; Judge Story's remarks, in Charge to Grand Jury, 1 Story (U. S.) 614.

**The Passage of Treasonable Ordinances, resolutions, or decrees by a convention, junto, or other assembly, although for the purpose of raising an army, is not a sufficient overt act of levying war.** Sprague's Charge to Grand Jury, 1 Sprague (U. S.) 602.



nature of the offense, is generally the actual employment of force by a collection of men; <sup>1</sup> but all preparatory arrangements having been completed, the state of complete preparedness by an assembled number of men to execute their treasonable designs is in contemplation of law an overt act of levying war. <sup>2</sup> The mere assembling of a body of people with a treasonable intention is not, however, an overt act of levying war, unless they are in a condition to carry out their treasonable design. <sup>3</sup> The quantum of force employed is immaterial. <sup>4</sup>

**Use of Arms Not Necessary in Levying War.** — Force is generally displayed by the use or employment of arms, or the forming of a body of men into military array, but the usual implements or equipment of war are not indispensably requisite. <sup>5</sup> There must, however, be in all cases some unequivocal act of resistance against the government's authority which in its nature shows determination to resort to the arbitration of war if necessary to resolve the disagreement. <sup>6</sup>

**Unequivocal Acts of War.** — The seizure of a fort or arsenal by a body of men, <sup>7</sup> the mere cruising of an armed vessel though no ships are encountered, <sup>8</sup> the marching of a body of men immediately to perform their treasonable design, <sup>9</sup> or moving from a particular to a general place of rendezvous <sup>10</sup> are all unequivocal acts of levying war.

**Territorial Extent.** — For the design to be treasonable, it is not necessary to

1. Messenger's Trial, 6 How. St. Tr. 879; U. S. v. Greathouse, 2 Abb. (U. S.) 364; U. S. v. Hoxie, 1 Paine (U. S.) 265. See also U. S. v. Burr, 25 Fed. Cas. No. 14,693.

2. Charge to Grand Jury, 1 Sprague (U. S.) 602, Sprague, J.; U. S. v. Burr, 25 Fed. Cas. No. 14,693.

3. Mere Assembling with Treasonable Intent Not Treason. — Charge to Grand Jury, 1 Story (U. S.) 614.

A Secret, Unarmed Meeting, although that meeting be of conspirators, and though it may be with a treasonable intent, is not actual levying of war. U. S. v. Burr, 25 Fed. Cas. No. 14,693.

4. Quantum of Force Employed Immaterial. — Hardy's Trial, 24 How. St. Tr. 202; U. S. v. Hanway, 2 Wall. Jr. (C. C.) 203, Grier, J.; Charge to Grand Jury, 5 Blatchf. (U. S.) 549, 30 Fed. Cas. No. 18,271, Nelson, J.

While There Must Be Some Actual Force Employed, it is entirely immaterial whether the force used is sufficient to effectuate the desired object. Fries's Case, Whart. St. Tr. 610, 9 Fed. Cas. No. 5,127.

The Employment of a Small Force would, however, furnish evidence that the intent was not to enter into a conflict with the government, the resources of which are generally powerful. U. S. v. Hoxie, 1 Paine (U. S.) 274.

5. Use of Military Weapons Not Indispensable. — Messenger's Trial, J. Kel. 70, 6 How. St. Tr. 879; Charge to Grand Jury, 1 Sprague (U. S.) 602, Sprague, J.; Fries's Case, Whart. St. Tr. 610, 9 Fed. Cas. No. 5,127; U. S. v. Burr, 25 Fed. Cas. No. 14,693; Charge to Grand Jury, 2 Curt. (U. S.) 630, 30 Fed. Cas. No. 18,269, Curtis, J.

See Foster Crown L. 208, citing the cases of Damaree and Purchase, where there was none of the pageantry of war and yet it was held to be a levying of war.

6. There Must Be Some Unequivocal Act of Resistance. — 1 Hawkins Pleas of the Crown 55;

U. S. v. Burr, 25 Fed. Cas. No. 14,693; Charge to Grand Jury, 2 Curt. (U. S.) 630, 30 Fed. Cas. No. 18,269, Curtis, J.

Where the Intention of the Parties Was to Suppress the Excise Laws, the act of going in armed bodies to the houses of excise officers and forcing them to resign was an act of treason. U. S. v. Vigol, 2 Dall. (Pa.) 346.

The Bare Enlistment of Men Not an Overt Act of Levying War. — Chief Justice Marshall, in *Ex p. Bollman*, 4 Cranch (U. S.) 75, citing *Hardwig's Case*, 2 Vent. 315.

7. Seizure of Fort by Body of Men. — Charge to Grand Jury, 1 Sprague (U. S.) 602; Charge to Grand Jury, 4 Blatchf. (U. S.) 518, 30 Fed. Cas. No. 18,270, Smalley, J.

Command of Governor of a State Held Not to Excuse the Seizure of a Federal Fort by Rebels. — U. S. v. Greiner, 4 Phila. (Pa.) 396, 18 Leg. Int. (Pa.) 149, 26 Fed. Cas. No. 15,262.

Holding Fort Against Government. — Levying War, etc., Foster Crown L. 208.

The Encountering Resistance Immaterial. — Stratton's Case, 21 How. St. Tr. 1283.

8. Cruising of Armed Vessel. — U. S. v. Greiner, 4 Phila. (Pa.) 396, 18 Leg. Int. (Pa.) 149, 26 Fed. Cas. No. 15,262. See also *Vaughan's Trial*, 13 How. St. Tr. 486.

Purchase of Armed Vessel Overt Act of War. — U. S. v. Greathouse, 2 Abb. (U. S.) 364.

9. Marching of Body of Men. — U. S. v. Fries, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126; U. S. v. Burr, 25 Fed. Cas. No. 14,692.

Chief Justice Holt, in *Vaughan's Trial*, 13 How. St. Tr. 531, says: "When men form themselves into a body and march rank and file with weapons offensive and defensive, this is levying of war with open force if the design be public."

10. The Traveling of Individuals to the Place of Rendezvous is, it seems, not a sufficient overt act; but the marching of a detachment of men to join the main body would be a levying of war. *Ex p. Bollman*, 4 Cranch (U. S.) 75.

intend to destroy the entire government, or to suppress its laws generally throughout the entire extent of its sovereignty or jurisdiction; <sup>1</sup> to compass the overthrow or suppression of the laws of the government in a particular locality is sufficient, <sup>2</sup> or even to coerce governmental conduct in state matters or acts of sovereignty. <sup>3</sup>

**Where Private Gain or the Like the Motive.** — But if, on the other hand, the intent was not to restrict or hinder the exercise, in its political capacity, of the sovereign power of the government, but to subserve some private purposes, such as individual profit, <sup>4</sup> the removal of a particular nuisance, <sup>5</sup> a private quarrel, <sup>6</sup> or the demonstration of the strength and number of a party in order to procure the liberation, or the mitigation of the punishment, of political prisoners, <sup>7</sup> the offense is not treason, although there may have been a large concurrence of people equipped with munitions of war, and violent deeds committed. <sup>8</sup>

**Levying War and Rioting Distinguished.** — The levying of war against a government, and rioting, are offenses frequently closely allied. <sup>9</sup> The true distinction consists in the purposed design or proposed effect of the unlawful actions. <sup>10</sup> In riots the object of the disturbance is to satisfy a particular grievance, <sup>11</sup> while in treason the intention is general and public in its nature, the purpose or plot being to resist the government. <sup>12</sup>

(b) **Interfering with Execution of Public Laws — Forcible Attempt at Repeal, Adoption, Etc., of Laws.** — It is an act of levying war against the government for an assembly of people by force to attempt to repeal, <sup>13</sup> or to coerce the adoption, <sup>14</sup> or to

1. *U. S. v. Greathouse*, 2 Abb. (U. S.) 364; *Charge to Grand Jury*, 1 Story (U. S.) 614; *Homestead Case*, 1 Pa. Dist. 785.

2. *U. S. v. Vigol*, 2 Dall. (Pa.) 346; *Homestead Case*, 1 Pa. Dist. 785.

**A Design to Overthrow the Federal Government in a Particular City Is a Treasonable Design.** — *Ex p. Bollman*, 4 Cranch (U. S.) 75.

**Immaterial Whether Resistance Is Offered to One or Several Laws.** — *U. S. v. Fries*, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126; *Charge to Grand Jury*, 2 Curt. (U. S.) 630, 30 Fed. Cas. No. 18,269.

3. **Intention to Coerce Conduct of Government.** — *Trial of Essex*, 1 How. St. Tr. 1334; *Trials of Twenty-nine Regicides*, 5 How. St. Tr. 993; *Case of Armes, Popham* 122; *Reg. v. Gallagher*, 15 Cox C. C. 291; *U. S. v. Greathouse*, 2 Abb. (U. S.) 366; *U. S. v. Burr*, 25 Fed. Cas. No. 14,693.

**In England to Attack an Archbishop for Advice as Privy Councilor to a Monarch Is an Act of Treason.** — *Bensted's Case*, Cro. Car. 583. See Judge Foster's account of this case, *Foster Crown L.*, c. 2, § 5, p. 211.

4. *Case of Armes, Popham* 121; *U. S. v. Hoxie*, 1 Paine (U. S.) 265.

5. *Dammaree's Trial*, 15 How. St. Tr. 609.

6. **Intent to Satisfy Private Quarrel.** — *Reg. v. Gallagher*, 15 Cox C. C. 291; *Foster Crown L.* 208; *Fries's Case*, Whart. St. Tr. 610, 9 Fed. Cas. No. 5,127; *U. S. v. Hanway*, 2 Wall. Jr. (C. C.) 139.

**No Degree of Violence, if the Object Is Personal Rivalship, will be treason against the federal government; such violence may be so extensive as to threaten the destruction of the government of one of the states.** *U. S. v. Bollman*, 1 Cranch (C. C.) 373.

7. **Armed Demonstration to Procure Liberation of Persons Not Treason.** — *Reg. v. Frost*, 9 C. & F. 129, 38 E. C. L. 70.

8. **A Whole Neighborhood of Debtors May Conspire Together to resist the sheriff and his officers, in executing process on their property, they may perpetrate their resistance by force of arms, may kill the officer and his assistants, and yet they will be liable only as felons, and not as traitors. Their insurrection is of a private, not a public nature; their object is to remedy a private, not a public grievance.** *U. S. v. Hanway*, 2 Wall. Jr. (C. C.) 205, by Grier, J.

9. **Levying War — Riots.** — *U. S. v. Hoxie*, 1 Paine (U. S.) 265. See the title *Riot*, vol. 24, p. 971.

10. **A Mere Mob Collected upon the Impulse of a Moment, without any definite object beyond the gratification of its passions, does not commit treason, although it destroys property and takes human life.** *Homestead Case*, 1 Pa. Dist. 785.

**"The Commission of Any Number of Felonies, Riots, or Other Misdemeanors cannot alter their nature, so as to make them amount to treason. And, on the other hand, if the intention and acts combined amount to treason, they cannot be sunk down to felony or riot."** *U. S. v. Hoxie*, 1 Paine (U. S.) 265; *U. S. v. Fries*, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126.

11. *U. S. v. Hanway*, 2 Wall. Jr. (C. C.) 202, Grier, J.; *U. S. v. Hoxie*, 1 Paine (U. S.) 265.

**Treason Is Distinguished from Riot by the Appearance of War.** — *U. S. v. Burr*, 25 Fed. Cas. No. 14,693.

12. 1 Hale P. C. 145.

13. **Forcible Attempt at Repeal of Laws.** — *Rex v. Gordon*, 2 Dougl. 590; *Trials of Twenty-nine Regicides*, 5 How. St. Tr. 993; *Freind's Trial*, 13 How. St. Tr. 61; *U. S. v. Greathouse*, 2 Abb. (U. S.) 364; *U. S. v. Fries*, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126; *U. S. v. Burr*, 25 Fed. Cas. No. 14,693.

14. **To Coerce Adoption of Law.** — *Case of Armes, Popham* 121; *U. S. v. Burr*, 25 Fed. Cas. No. 14,693.

oppose, delay, or prevent the execution, of a general public law, whether by means of intimidation or actual violence,<sup>1</sup> or for a body of men by force to endeavor to dismember the Union,<sup>2</sup> or to resist the administration of justice in the courts of the United States.<sup>3</sup>

**Resisting Law in Particular Locality.** — To constitute treasonable intention in the resistance of public laws, while the design must be to withstand the execution of the law generally and in all cases,<sup>4</sup> yet in its scope the design may be limited to defeating the execution of a law in a particular locality.<sup>5</sup>

(c) **Constructive Levying of War.** — It has been held in *England*, and it would seem on not unreasonable grounds, that such offenses on the one hand as the attempt of a number of people with force to reform religion by destroying all meeting-houses belonging to a particular religious sect,<sup>6</sup> or to pull down all enclosures,<sup>7</sup> are acts of war, since actual war is levied on those who are under the protection of the government, which in its purposes is framed for the protection of those owing it allegiance; and that such offenses, on the other hand, as the breaking open of prisons in general and the releasing of all prisoners,<sup>8</sup> and the abating of all of a certain kind of public nuisance, such as houses of ill fame,<sup>9</sup> are acts of levying of war, since there is arrogation of the sovereignty of the government, one of whose peculiar attributes it is to release prisoners, and to abate nuisances through the operation of its courts.<sup>10</sup> While in the *United States* there seem to have been no express decisions, in cases whose facts are similar, repudiating the English decisions, yet the embracing of this constructive levying of war within the constitutional definition of treason has been discountenanced by the federal judges.<sup>11</sup>

**1. Opposition to Public Law.** — Watt's Trial, 23 How. St. Tr. 1389; *U. S. v. Fries*, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126; Charge to Grand Jury, 2 Curt. (U. S.) 630, 30 Fed. Cas. No. 18,269, Curtis, J.; Charge to Grand Jury, 1 Story (U. S.) 614; *U. S. v. Bollman*, 1 Cranch (C. C.) 373; *People v. Lynch*, 11 Johns. (N. Y.) 550.

**Resistance to Enforcement of Provision of Federal Constitution.** — Charge to Grand Jury, 2 Wall. Jr. (C. C.) 134.

**Nature of Particular Law Immaterial.** — Dammaree's Trial, 15 How. St. Tr. 606; Watt's Trial, 23 How. St. Tr. 1389; Charge to Grand Jury, 2 Curt. (U. S.) 630, 30 Fed. Cas. No. 18,269, by Curtis, J.

**One of the Peculiar Prerogatives of Sovereignty Is Invaded** by resisting a public law. The power to make laws is vested in the government; the assumption by the people of this attribute of the government deprives the government of the principal object of its existence. Judge Sprague's Charge to Grand Jury, 1 Sprague (U. S.) 602.

**2. Forcible Attempt to Dismember Union an Act of Treason.** — *U. S. v. Hoxie*, 1 Paine (U. S.) 265; *U. S. v. Burr*, 25 Fed. Cas. No. 14,693.

**3. Resisting Administration of Justice.** — Charge to Grand Jury, 1 Story (U. S.) 614.

**4. Design Must Be to Resist the Law Generally.** — *U. S. v. Hanway*, 2 Wall. Jr. (C. C.) 139; Charge to Grand Jury, 1 Sprague (U. S.) 602; *Fries's Case*, Whart. St. Tr. 610, 9 Fed. Cas. No. 5,127.

**5. Fries's Case**, Whart. St. Tr. 610, 9 Fed. Cas. No. 5,127; *U. S. v. Hoxie*, 1 Paine (U. S.) 265.

If, for Instance, Process Is Issued under a United States Law Against an Individual, and he

should assemble and arm his friends to prevent an arrest, and forcible resistance is offered, he would not be guilty of treason; but if process is issued under a United States law, and people assemble to prevent any arrest under the law, and there is forcible resistance to the execution of the law, the offense is treason. Charge to Grand Jury, 2 Curt. (U. S.) 630, 30 Fed. Cas. No. 18,269, by Curtis, J.

**6. In England Church and State Are Closely Connected.** — Dammaree's Trial, 15 How. St. Tr. 522. See also dictum in Trials of Twenty-nine Regicides, 5 How. St. Tr. 993.

**7. Attempt to Pull Down All Enclosures.** — Foster Crown L. 208; Case of Armes, Popham 121; Dammaree's Trial, 15 How. St. Tr. 609.

**8. The Forcible Breaking Open of Prisons Generally.** — Foster Crown L. 208; Messenger's Trial, 6 How. St. Tr. 911; *U. S. v. Fries*, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126.

In Bensted's Case, Cro. Car. 583, it was held that the breaking of a prison wherein traitors are confined, and the allowing them to escape, is treason, although it was not known beforehand that traitors were confined therein.

**9. Forcible Abating of All Public Nuisances.** — Messenger's Trial, 6 How. St. Tr. 879; Dammaree's Trial, 15 How. St. Tr. 609.

The abating of a nuisance, in a particular case, by numbers, with force, may be a riot. Dammaree's Trial, 15 How. St. Tr. 606. And see the title RIOR, vol. 24, p. 971.

**10. Reason for Rule—Arrogation of Sovereignty.** — Messenger's Trial, J. Kel. 70, 6 How. St. Tr. 879; Dammaree's Trial, 15 How. St. Tr. 609; Freind's Trial, 13 How. St. Tr. 61.

**11. U. S. v. Burr**, 25 Fed. Cas. No. 14,693. In *U. S. v. Hanway*, 2 Wall. Jr. (C. C.) 201, Grier, J., said: "The better opinion there [in England] at present seems to be that the term



(2) *Conspiracy to Levy War.* — In *England* a conspiracy to levy war, which must in its nature generally be directed against the government of which the king is an integral and essential part,<sup>1</sup> is held to be treason, since it usually comes within the first section of the statute of Edw. III., which declares that compassing the death of the king or queen is high treason;<sup>2</sup> and this the English judges have held to embrace the compassing and designing to imprison or depose the king.<sup>3</sup> But in the *United States*, although a conspiracy to levy war is an essential element of the crime of levying war against the government,<sup>4</sup> yet such a conspiracy alone is not treason,<sup>5</sup> and is generally punishable as a separate offense.<sup>6</sup>

c. *ADHERING TO ENEMIES, ETC.* — (1) *In General.* — The adherence to the enemies of the government by those owing allegiance to it,<sup>7</sup> giving them aid and comfort, is the second and last species of treason defined by the Constitution.<sup>8</sup> This has always been regarded as an act of high treason.<sup>9</sup>

(2) *Who Are Enemies.* — The term "enemies," as used in the Constitution, according to its settled meaning at the time of the adoption of that instrument, applies only to the subjects of a foreign power in a state of open hostility to this country.<sup>10</sup> It does not include subjects in insurrection against their own government.<sup>11</sup>

The *Inhabitants of a Neutral Country* may, by participation in acts of hostility, become enemies,<sup>12</sup> but they are to be so regarded only while they are engaged in acts of hostility, or are actually connected with the enemy; upon the severing of their relations with the enemy whether forcibly, as by capture,

'levying war' should be confined to insurrections and rebellions for the purpose of overturning the government by force and arms. Many of the cases of constructive treason quoted by Foster, Hale, and other writers, would perhaps now be treated merely as aggravated riots or felonies."

1. *Conspiracy to Levy War — Treason in England.* — Hardy's Trial, 24 How. St. Tr. 202; Freind's Trial, 13 How. St. Tr. 61; Trials of Twenty-nine Regicides, 5 How. St. Tr. 984. And see Watt's Trial, 23 How. St. Tr. 1387.

2. *Conspiracy to Levy War Comes Within Compassing Death of King or Queen.* — Trials of Twenty-nine Regicides, 5 How. St. Tr. 984; Colledge's Trial, 8 How. St. Tr. 550; Reg. v. McCafferty, 10 Cox C. C. 603.

Chief Justice Holt, in Freind's Trial, 13 How. St. Tr. 1, declared that the only case where a war might be levied, the conspiracy to do which would not be treason, would be where there is an armed opposition by a number of people to the execution of a general law, or the reformation by a number of people, with force, of some nuisance or grievance without pursuing the methods of law.

All the *Remote Steps*, taken with a view to assist to bring about the actual attempt, are equally overt acts of compassing the death of the king. Hardy's Trial, 24 How. St. Tr. 202.

3. *Compassing or Designing to Depose or Imprison the King.* — Freind's Trial, 13 How. St. Tr. 61; Watt's Trial, 23 How. St. Tr. 1389.

The *Reason Given* by the English judges in Trial of Essex, 1 How. St. Tr. 1356, is "that in every rebellion the law intends as a consequent the compassing the death and deprivation of the king, as foreseeing that the rebel will never suffer the king to live or reign, who might punish or take revenge of his treason and rebellion."

4. See *Ex p. Bollman*, 4 Cranch (U. S.) 75; *U. S. v. Burr*, 25 Fed. Cas. No. 14,693.

5. *A Conspiracy to Levy War, Not Treason in America.* — *U. S. v. Mitchell*, 2 Dall. (Pa.) 348; Charge to Grand Jury, 1 Story (U. S.) 614; *U. S. v. Burr*, 25 Fed. Cas. No. 14,693; Charge to Grand Jury, 5 Blatchf. (U. S.) 549, 30 Fed. Cas. No. 18,271; Charge to Grand Jury, 1 Bond (U. S.) 609, 30 Fed. Cas. No. 18,272; Charge to Grand Jury, 1 Sprague (U. S.) 602.

6. Judge Smalley's Charge to Grand Jury, 4 Blatchf. (U. S.) 518, 30 Fed. Cas. No. 18,270; Judge Leavitt's Charge to Grand Jury, 1 Bond (U. S.) 609, 30 Fed. Cas. No. 18,272.

7. *Allegiance Must Be Owed.* — Vaughan's Trial, 13 How. St. Tr. 525.

*Citizens or Aliens May Commit the Offense.* — Sprague's Decisions, vol. 1, p. 607.

8. U. S. Const., art. III., § 3, cl. 1.

9. Vaughan's Trial, 13 How. St. Tr. 531.

10. *Enemy the Subject of Adverse Belligerent.* — *U. S. v. Greathouse*, 2 Abb. (U. S.) 364; Charge to Grand Jury, 5 Blatchf. (U. S.) 549, 30 Fed. Cas. No. 18,271. See the title *ALIENS*, vol. 2, p. 86.

11. *Rebel Not an Enemy.* — *U. S. v. Greathouse*, 2 Abb. (U. S.) 364.

*States in Actual Hostility* to a government, though no war be solemnly declared, are enemies within the meaning of the act. Foster Crown L. 208.

*American Civil War.* — The late war between states was a public war, and the adverse participants alien enemies. See the title *ALIENS*, vol. 2, p. 86.

12. *Inhabitants of Neutral Country.* — Vaughan's Trial, 13 How. St. Tr. 515.

*The Citizens or Subjects of an Allied Country* may become enemies by committing acts of hostility. Vaughan's Trial, 13 How. St. Tr. 503.

or voluntarily, as by withdrawal from the service, they again become entitled to the rights of subjects of a neutral power.<sup>1</sup>

(3) *What Is Adhering, Giving Aid and Comfort — Joining the Enemy.* — For a citizen or subject of a country to join the enemy during time of war is a flagrant instance of giving aid and comfort to the enemy,<sup>2</sup> which nothing can excuse except compulsion by the enemy under the fear of the infliction of immediate death.<sup>3</sup> The fear of any inferior personal injury, or of the destruction of personal property, will not excuse the joining of the enemy.<sup>4</sup> The compulsion must continue during the entire time of military service with the enemy.<sup>5</sup> The question whether there was this compulsion and whether an escape under the circumstances was practicable is a matter for the jury to decide.<sup>6</sup> The burden of proof in such cases rests on the accused to prove that he was coerced by such means and that he quitted the enemy's service as soon as possible.<sup>7</sup>

*What Is Aid and Comfort.* — In general, when war exists, aid and comfort are given to the enemies of the government by any act of a citizen or subject which clearly indicates a want of loyalty to the government, and sympathy with its enemies, and which, by fair construction, is directly in furtherance of their hostile designs.<sup>8</sup> Of this nature is the supplying, whether by gift, hire, or sale, of arms, ammunition, provisions, or other necessities of war, which materially assist the enemy in the prosecution of the war.<sup>9</sup> So, too, aid and comfort are given by the communication of advice to the enemies of the government, thereby furnishing them with valuable information as to their future actions or conduct,<sup>10</sup> even though letters containing the information are inter-

1. Vaughan's Trial, 13 How. St. Tr. 525; Sparenburgh v. Bannatyne, 1 B. & P. 163.

*Upon Capture* a neutral ceases to be an enemy. Vaughan's Trial, 13 How. St. Tr. 525; Sparenburgh v. Bannatyne, 1 B. & P. 163.

2. *Act of Joining the Enemy.* — Gordon's Case, 1 East P. C. 71; M'Growther's Case, 1 East P. C. 71; Foster Crown L. 13; U. S. v. Greiner, 4 Phila. (Pa.) 396, 18 Leg. Int. (Pa.) 149, 26 Fed. Cas. No. 15,262.

3. *Fear of Death Can Alone Excuse.* — Hawkins Pleas of the Crown 54; Republica v. M'Carty, 2 Dall. (Pa.) 86; U. S. v. Vigol, 2 Dall. (Pa.) 346.

*Obligations of Feudal Tenure* do not excuse vassals in adhering with their liege lords to enemies of the government. MacGrowther's Trial, 18 How. St. Tr. 394, 1 East P. C. 71.

*Order of Superior Officer Does Not Justify Subordinate in Committing Treason.* — Trial of Regicides, J. Kel. 13.

4. *Fear of Destruction of Property.* — MacGrowther's Trial, 18 How. St. Tr. 393; Republica v. M'Carty, 2 Dall. (Pa.) 86; U. S. v. Vigol, 2 Dall. (Pa.) 346; U. S. v. Greiner, 4 Phila. (Pa.) 396, 18 Leg. Int. (Pa.) 149, 26 Fed. Cas. No. 15,262.

5. *Fear Must Continue Through Entire Time of Military Service.* — Republica v. M'Carty, 2 Dall. (Pa.) 86; U. S. v. Greiner, 4 Phila. (Pa.) 396, 18 Leg. Int. (Pa.) 149, 26 Fed. Cas. No. 15,262.

6. *Question as to Practicability of Escape.* — Republica v. M'Carty, 2 Dall. (Pa.) 86; M'Growther's Case, Foster Crown L. 13, 1 East P. C. 71.

7. *Burden of Proof.* — U. S. v. Greiner, 1 East P. C. 70, 4 Phila. (Pa.) 396, 18 Leg. Int. (Pa.) 149, 26 Fed. Cas. No. 15,262.

8. *What Is Aid and Comfort in General.* — Charge to Grand Jury, 1 Bond (U. S.) 609, 30 Fed. Cas. No. 18,272.

*Overt Act Necessary.* — U. S. v. Pryor, 3 Wash. (U. S.) 237.

*The Harboring of a Traitor Is Treason.* — John Porterfield was convicted of treason for harboring in his house, and for providing necessities to, his brother Alexander, a declared traitor involved in Monmouth's rebellion. Porterfield's Trial, 10 How. St. Tr. 1051.

9. *Any Material Assistance to Enemies or Rebels Is Treason.* — Levying War, etc., Foster Crown L. 217; U. S. v. Pryor, 3 Wash. (U. S.) 234; U. S. v. Burr, 25 Fed. Cas. No. 14,693; Charge to Grand Jury, 1 Bond (U. S.) 609, 30 Fed. Cas. No. 18,272.

*Selling Goods to Enemies Which Assist Them in Carrying On War.* — Carlisle v. U. S., 16 Wall. (U. S.) 147; Sprott v. U. S., 20 Wall. (U. S.) 469.

*Commercial Intercourse Forbidden.* — Commercial intercourse with citizens of hostile states or between a loyal and a rebel citizen of the government is forbidden and may become an act of treason, although in the case of a rebel state it may be carried on with the loyal portion of the people in a disaffected district. Charge to Grand Jury, 5 Blatchf. (U. S.) 549, 30 Fed. Cas. No. 18,271.

10. *Communication of Advice to Enemies.* — Francia's Trial, 15 How. St. Tr. 991; Gregg's Trial, 14 How. St. Tr. 1376; Charge to Grand Jury, 1 Sprague (U. S.) 602; Charge to Grand Jury, 2 Sprague (U. S.) 285, 30 Fed. Cas. No. 18,277.

The communication of intelligence to the enemy by letter, telegraph, or otherwise, relating to the strength, movements, or position of the army, is an act of treason. Charge to

cepted,<sup>1</sup> or the idea of the invasion of the country by the enemy is discouraged or discountenanced by the adviser in his communication.<sup>2</sup>

**Active Engagement by a Citizen or Subject in Hostilities** is not essential to make out a case of giving aid and comfort to the enemies of his country.<sup>3</sup>

**To Deliver a Fort or Castle to the Enemy**, whether the procurement of such act is by bribery, or sympathy with the enemy, is a direct assistance to the enemy;<sup>4</sup> but it is otherwise when such an act is the result of cowardice or imprudence.<sup>5</sup>

**The Mere Cruising on an Armed Vessel Which Belongs to a Hostile Country**, although no other act of war is committed, is an overt act of giving aid and comfort to the enemy.<sup>6</sup>

**Motive Not Material.** — Since affording aid and comfort to the enemy by a citizen or subject necessarily involves a direct attack on his government, the motive with which the act is done is immaterial.<sup>7</sup>

**V. EVIDENCE IN TREASON TRIALS — 1. In General.** — Cases relating to the competency and admissibility of evidence will be found in the notes throughout this title.

**2. Evidence Required for Acts of Treason.** — Both in *England* and the *United States* the statutes require every conviction for treason to be based on the testimony of at least two witnesses.<sup>8</sup>

Grand Jury, 1 Bond (U. S.) 609, 30 Fed. Cas. No. 18,272.

**Disclosure of Diplomatic Secrets.** — In Gregg's Trial, 14 How. St. Tr. 1371, the defendant, a government clerk, was held to be guilty of treason in conveying to the French information in regard to proceedings in the House of Commons concerning the organization of the British forces, and the official letters of the British government to the rulers of foreign states.

**Punishment Prescribed in United States for Treasonable Communication.** — Charge to Grand Jury, 2 Sprague (U. S.) 292, 30 Fed. Cas. No. 18,274.

**Evidence — Circular Letters.** — Where a circular letter containing treasonable matter was offered in evidence and it was objected that the original should be produced, the court ruled that the only case in which such evidence was admissible was where the letter offered could have been proven to have been actually circulated at the time of insurrection. U. S. v. Mitchell, 2 Dall. (Pa.) 357, 26 Fed. Cas. No. 15,789.

**1. Intercepted Treasonable Letters.** — *Rex v. Hensley*, 1 Burr. 642; *Rex v. Stone*, 6 T. R. 527; *Foster Crown L.* 217; *Gregg's Trial*, 14 How. St. Tr. 1376.

**To What Extent Treasonable Papers in the Handwriting of the Prisoner's Clerk Are Admissible in Evidence.** — When a paper is found in the possession of a conspirator containing information, which information is proved to have been collected from other sources by the prisoner, and the handwriting is that of the prisoner's clerk, the paper is admissible as evidence; but if the information is not proved to have been collected by the prisoner, the mere fact that it is in the handwriting of his clerk will not admit it as evidence. *Rex v. Stone*, 6 T. R. 527.

**2. Letter Advising Against Invasion of Country May Be Treasonable.** — *Stone's Trial*, 25 How. St. Tr. 1155.

**3. Active Engagement in Hostilities Not Essential.** — *Vaughan's Trial*, 13 How. St. Tr. 531.

**4. Delivery of Fort.** — 1 Hale P. C. 168.

**5.** Such conduct is, however, liable to be punished by martial law. 1 Hale P. C. 169.

**6. Mere Cruising on Armed Vessel Act of Assistance.** — *Hawk*, P. C. 55; *Trial of Vaughan*, 13 How. St. Tr. 525.

**To Form One of a Boat Load of Armed Men**, who row from a ship to shore with hostile intentions, is an overt act of assistance to the enemy, although there is no other overt act done. U. S. v. Pryor, 3 Wash. (U. S.) 234.

**7. Motive Not Material.** — Charge to Grand Jury, 1 Bond (U. S.) 609, 30 Fed. Cas. No. 18,272; *Hanauer v. Doane*, 12 Wall. (U. S.) 342; *Vaughan's Trial*, 13 How. St. Tr. 530; *Sprott v. U. S.*, 20 Wall. (U. S.) 459; *Carlisle v. U. S.*, 16 Wall. (U. S.) 147; Charge to Grand Jury, 4 Blatchf. (U. S.) 518, 30 Fed. Cas. No. 18,270. See also *Gregg's Trial*, 14 How. St. Tr. 1371; U. S. v. Pryor, 3 Wash. 234.

**Proof of Good Character by the Prisoner.** — Treason being a crime peculiar in its nature, to which there is not attached the odium or disrepute connected with other felonies, evidence tending to show former good reputation, which is pertinent in ordinary crimes, such as burglary or arson, as tending to show the unlikeliness of the prisoner's commission of the offense, is not to be considered by the jury of much weight, since in treason the purest motives indulged in by the most honorable men are not inconsistent with the offense. *Dammaree's Trial*, 15 How. St. Tr. 604.

**8. Requirement of Two Witnesses in Treason Cases.** — *Chichester v. Philips*, T. Raym. 406; U. S. v. Fries, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126.

**The Reason for the Requirement of Two Witnesses** at the common law in treason trials is declared by the court in *Chichester v. Philips*, T. Raym. 404, to be that anciently all of the judges were ecclesiastics and required two witnesses to condemn for an act of heresy, which was at that time a species of treason, which construction was followed and adopted by parliament in the regulation of treason trials. U. S. v. Mitchell, 2 Dall. (Pa.) 348.



**Two Witnesses to Same Overt Act.** — In England it is not considered necessary that there should be two witnesses testifying to the commission of one overt act of treason,<sup>1</sup> but if two witnesses prove two several acts, which, although distinct and separate, relate in their nature to the establishment of the same species of treason, it is sufficient.<sup>2</sup>

In the United States, however, the Constitution expressly provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act of treason or on confession in open court.<sup>3</sup> But in the case of the levying of war, since the act is composed of many separate parts, one witness to two several component parts of the same act is a sufficient compliance with the Constitution.<sup>4</sup> These provisions are conditions precedent for the establishment of the prisoner's guilt, and until the overt act is proven by two witnesses,<sup>5</sup> or until there is confession made in open court,<sup>6</sup> corroborative or confirmatory evidence cannot be introduced.<sup>7</sup> But after the provisions of the Constitution are satisfied, corroborative evidence, such as a confession not made in open court, is admissible.<sup>8</sup>

**3. Proof of Treasonable Intention.** — Since both a treasonable intention and an overt act are requisite components of treason,<sup>9</sup> which crime must be proved by the prosecution in its entirety, to the satisfaction of the jury, to have been committed by the prisoner,<sup>10</sup> the treasonable intention or design must be established.<sup>11</sup>

**Two Witnesses Not Required to Show Intention.** — Since the Constitution only requires two witnesses to the same overt act, that the design or intention was treasonable may be established in other ways,<sup>12</sup> as by the declarations of a

**1. In England Two Witnesses to Same Overt Act Not Necessary.** — Sidney's Trial, 9 How. St. Tr. 889.

From the Time of Lord Strafford it has been settled that one witness to one overt act and another to another overt act of the same species of treason are two different witnesses within the statutes. Foster Crown L. 237.

**2. Two Witnesses to Two Several Acts of Same Species of Treason Sufficient.** — Reg. v. McCafferty, 10 Cox C. C. 603; Lowick's Trial, 13 How. St. Tr. 267; Parkyn's Trial, 13 How. St. Tr. 63; Sidney's Trial, 9 How. St. Tr. 889; Rex v. Jellias, 1 East P. C. 130.

In an indictment for compassing and imagining the death of a king, if there be one witness testifying that the prisoner bought a dagger and said he would kill the king, and another witness testifies that he said he would kill the king with a pistol, and having bought a pistol, stood waiting to kill the king, the requirement for the testimony of two witnesses is satisfied, since these are both overt acts of the same species of treason. Vaughan's Trial, 13 How. St. Tr. 503.

**3.** Const. U. S., art. III., § 3.

**4. Component Parts of Same Overt Act.** — U. S. v. Mitchell, 2 Dall. (Pa.) 348. See also U. S. v. Burr, 25 Fed. Cas. No. 14,693.

**5. Overt Act Must Be Proved by Two Witnesses.** — U. S. v. Burr, 25 Fed. Cas. No. 14,693; U. S. v. Greiner, 4 Phila. (Pa.) 396, 18 Leg. Int. (Pa.) 149, 26 Fed. Cas. No. 15,262; U. S. v. Fries, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126.

In Regard to Evidence of an Informer or Approver, while the belief of such evidence is, of course, a matter for the jury, yet the judges generally instruct them that there should be a certain amount of corroborative evidence, not necessarily confirmatory in every particular,

but enough on the whole to establish the truth of the informer's account. Reg. v. McCafferty, 10 Cox C. C. 603; Reg. v. Gallagher, 15 Cox C. C. 291; Russell's Trial, 9 How. St. Tr. 636; U. S. v. Greathouse, 2 Abb. (U. S.) 371; Fries's Case, Whart. St. Tr. 610, 9 Fed. Cas. No. 5,127.

**6. Confession in Open Court Required.** — U. S. v. Lee, 2 Cranch (C. C.) 104; U. S. v. Fries, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126; U. S. v. Burr, 25 Fed. Cas. No. 14,693; Respublica v. McCarty, 2 Dall. (Pa.) 86.

**Part of Res Gestæ.** — A declaration made at the time of commission of the offense is, of course, a part of the *res gestæ* and hence admissible in evidence to prove the act. Respublica v. McCarty, 2 Dall. (Pa.) 86.

**7.** U. S. v. Burr, 25 Fed. Cas. No. 14,693; U. S. v. Lee, 2 Cranch (C. C.) 104.

**8. After Two Witnesses Are Produced, Corroborative Evidence Admissible.** — U. S. v. Fries, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126.

**9. Treasonable Intention and Overt Act Component Parts of Treason.** — U. S. v. Mitchell, 2 Dall. (Pa.) 348.

**10. Prosecution Must Establish Entire Crime.** — Reg. v. Frost, 9 C. & P. 129, 38 E. C. L. 70; U. S. v. Fries, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126.

It is for the prosecution to make out both the act and the preconcert, and by omitting evidence of preconcert, they fail in their original case. It was an element of the original case, and this evidence of preconcert cannot be introduced as rebutting evidence. U. S. v. Hanway, 2 Wall. Jr. (C. C.) 169.

**11. Intention Must Be Shown to Be Treasonable.** — Reg. v. Frost, 9 C. & P. 129, 38 E. C. L. 70; U. S. v. Burr, 25 Fed. Cas. No. 14,693.

**12. Two Witnesses Not Required to Prove Intention.** — U. S. v. Fries, 3 Dall. (Pa.) 515, 9

party prior to or during the commission of a treasonable act,<sup>1</sup> or by the prisoner's conduct in other places,<sup>2</sup> or by a single fact or act.<sup>3</sup> In point of fact, since the intent or design is a hidden or obscure mental act, all evidence of its outward expression is admissible.<sup>4</sup>

**VI. NO ACCESSORIES IN TREASON.** — Treason is a crime of so high a nature that it does not admit of accessories, but all who are in any way concerned in it are principals.<sup>5</sup>

**VII. DEFENSES.** — As in other cases of persons charged with crimes, neither ignorance of the law<sup>6</sup> nor drunkenness will excuse an act of treason;<sup>7</sup> neither will insanity, provided there is ability to distinguish between right and wrong;<sup>8</sup> nor will infancy be a good defense, provided the age of discretion has been reached.<sup>9</sup>

**VIII. PUNISHMENT.** — The punishment for treason was, by the common law, proportioned according to the gravity of the offense.<sup>10</sup> There was an attainder of blood and a forfeiture of all property and honors.<sup>11</sup> This barbar-

Fed. Cas. No. 5,126; *U. S. v. Lee*, 2 Cranch (C. C.) 104.

**1. Declarations of a Party May Establish Treasonable Intention.** — Charge of Grand Jury, 2 Wall. Jr. (C. C.) 134; *U. S. v. Fries*, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126; Charge to Grand Jury, 5 Blatchf. (U. S.) 549, 30 Fed. Cas. No. 18,271.

**2. Prisoner's Conduct in Other Place Shows Intention.** — Reg. v. McCafferty, 10 Cox C. C. 603; *U. S. v. Fries*, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126.

The conduct of a prisoner at other places and times tends to show the intent with which the particular act was committed, and his act at those places may be introduced as evidence of a treasonable design, although the prisoner is not on trial for such offense and is not punishable therefor, since all the acts are caused by one general design. *U. S. v. Burr*, 25 Fed. Cas. No. 14,693.

**3. Nature of a Particular Act Frequently Supplies the Intention.** — Reg. v. Davitt, 11 Cox C. C. 676; *U. S. v. Fries*, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126.

In *Rex v. Gordon*, 2 Dougl. 590, evidence by the crown was introduced showing that Gordon incited the mob to tear down Catholic churches by such remarks as "The Scotch had no redress till they pull down mass houses." The crown then offered to introduce evidence that mass houses had been destroyed in Scotland. This evidence was objected to as not being relevant to the case by the defense, and, therefore, inadmissible; but the court ruled that this evidence was admissible because it would show what Gordon had referred to, and because it was a matter of fact which had an actual existence.

**4. Any Evidence Bearing on Intention Admissible.** — *Fries's Case*, Whart. St. Tr. 610, 9 Fed. Cas. No. 5,127.

A Treasonable Intention must, however, be unequivocally demonstrated. *State v. McDonald*, 4 Port. (Ala.) 449.

**Intent Presumed from Acts Done.** — *Homestead Case*, 1 Pa. Dist. 785.

**5. No Accessories in Treason.** — See generally the title ACCESSORIES, vol. 1, p. 260. See also the following cases: Reg. v. Meany, 10 Cox C. C. 506; Reg. v. McCafferty, 10 Cox C. C. 603; *Rex v. Stone*, 6 T. R. 527; *Trials of Twenty-*

*nine Regicides*, 5 How. St. Tr. 683; *Dammaree's Trial*, 15 How. St. Tr. 609; *U. S. v. Hanway*, 2 Wall. Jr. (C. C.) 195; Charge to Grand Jury, 2 Wall. Jr. (C. C.) 134; *U. S. v. Mitchell*, 2 Dall. (Pa.) 348; Charge to Grand Jury, 1 Sprague (U. S.) 602; *Fries's Case*, Whart. St. Tr. 610, 9 Fed. Cas. No. 5,127; *U. S. v. Great-house*, 2 Abb. (U. S.) 364; Charge to Grand Jury, 2 Sprague (U. S.) 292, 30 Fed. Cas. No. 18,274; Charge to Grand Jury, 2 Sprague (U. S.) 285, 30 Fed. Cas. No. 18,277; Charge to Grand Jury, 4 Blatchf. (U. S.) 518, 30 Fed. Cas. No. 18,270; Charge to Grand Jury, 1 Bond (U. S.) 609, 30 Fed. Cas. No. 18,272; Charge to Grand Jury, 2 Wall. Jr. (C. C.) 134; Charge to Grand Jury, 1 Bond (U. S.) 609, 30 Fed. Cas. No. 18,272; Charge to Grand Jury, 2 Curt. (U. S.) 630, 30 Fed. Cas. No. 18,269; *Homestead Case*, 1 Pa. Dist. 785.

**6. Ignorance of Law.** — *U. S. v. Fries*, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126. And see generally the title CRIMINAL LAW, vol. 8, p. 297.

**7. Drunkenness Not a Good Defense.** — *Dammaree's Trial*, 15 How. St. Tr. 609. And see the title INTOXICATION, vol. 17, p. 398.

**8. Defense of Insanity.** — Reg. v. Oxford, 9 C. & P. 525, 38 E. C. L. 208. And see the title INSANITY, vol. 16, p. 558.

**9. Defense of Infancy.** — *Den v. Banta*, 1 N. J. L. 308. See generally the title INFANTS, vol. 16, p. 255.

**10.** The punishment inflicted was hanging by the neck, cutting down before death, disembowelling, beheading, and then quartering. See *Trials of Twenty-nine Regicides*, 5 How. St. Tr. 947.

**11.** See *Sidney's Trial*, 9 How. St. Tr. 889.

**General Effect of Attainder.** — "If a man be attainted of treason or felony, although he be born within wedlock, he can be heir to no man, nor any man heir to him, *propter delictum*, for that by his attainder his blood is corrupted; and this corruption of blood is so high, as it cannot absolutely be salved and restored but by act of parliament." *Coke's Inst.*, p. 614.

The wife of a man attainted of high treason or petit treason shall not be received to demand dower unless it be in certain cases specially provided for. *Coke's Inst.*, p. 614.

**In United States Corruption of Blood Only During Life of Person Attainted.** — The U. S. Constitution, art. III., § 2, provides that Congress shall

ous treatment has been modified in modern times, though the death penalty is usually inflicted.<sup>1</sup> To incur punishment for treason there must be a regular conviction of the crime according to the common-law procedure.<sup>2</sup>

**Bail.** — Though the case is generally governed by circumstances, the court will not, as a rule, admit to bail a person who is charged with high treason.<sup>3</sup>

**IX. MISPRISION OF TREASON.** — Treason and misprision of treason are separate and distinct offenses.<sup>4</sup>

**Misprision of Treason Defined.** — Misprision of treason occurs where one who knows that treason has been committed does not, as soon as possible, impart such information to some state official.<sup>5</sup>

**Elements of Misprision.** — The knowledge which renders silence guilty must be of an offense in its entirety; both the design or plot and some of the parties must be known.<sup>6</sup> The disclosure to a state official must be full and free; information imparted in a vague manner,<sup>7</sup> or to one not in authority, will not excuse the offense.<sup>8</sup>

have power to declare the punishment of treason; but no attainer of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted. Confiscation Cases, 1 Woods (U. S.) 221. See Wells v. Martin, 2 Bay (S. Car.) 20.

1. The punishment for treason in the United States was prescribed in Act Cong. April 30, 1790, 1 U. S. Stat. at L., c. 9, p. 211, to be death. Charge to Grand Jury, 4 Blatchf. (U. S.) 518, 30 Fed. Cas. No. 18,270.

**A Debtor Is Not Released from Payment of his debt by a conviction of treason and a forfeiture of estate.** Dunham v. Drake, 1 N. J. L. 363; MacDonald v. Ramsay, Foster Crown L. 61. In this connection see Holditch v. Mist, 1 P. Wms. 695.

In Dunham v. Drake, 1 N. J. L. 363, notwithstanding that the act of the legislature provided that the estate, etc., forfeited for treason should be liable in the first place for the payment of all debts, a convicted traitor whose lands had been thus forfeited, was held liable for his unpaid debts, although his lands had been sold and the money paid into the public treasury without the plaintiffs putting in their claim.

For a like case see Holditch v. Mist, 1 P. Wms. 695, where, by Act of 7 Geo. IV., the property of one of the directors of the South Sea company had been vested in a trustee for the payment of his debts, and the court held that the debtor's liability to his creditors remained unaffected by the act, though he had been deprived of all his property.

**2. There Must Be a Regular Conviction of Treason.** — *Ex p. Quarrier*, 2 W. Va. 569.

**Difference Between an Attainted and a Convicted Person.** — "The difference between a man attainted and convicted is that a man is said convict before he hath judgment; as if a man be convict by confession, verdict, or recreancy. And when he hath his judgment upon the verdict, confession, or recreancy, or upon the outlawry, or abjuration, then is he said to be attaint. And thus is the law taken at this day notwithstanding some diversity of opinions in our books." Coke Inst., vol. 3, p. 604.

In Wells v. Martin, 2 Bay (S. Car.) 20, the widow obtained dower because her husband, although his lands had been confiscated by the legislative act for adhering to the British, had

not been sentenced, which is necessary in attainder. The widow's claim of dower was consequently ahead of a purchaser of the forfeited lands from the state.

**3. Treason Not Ordinarily Bailable.** — Charge to Grand Jury, 1 Bond (U. S.) 609, 30 Fed. Cas. No. 18,272; U. S. v. Stewart, 2 Dall. (Pa.) 343. And see the title BAIL AND RECOGNIZANCE, vol. 3, p. 657.

**4. Treason and Misprision of Treason Distinct Offences.** — Tonge's Trial, 6 How. St. Tr. 226; Trials of Twenty-nine Regicides, 5 How. St. Tr. 985; Francia's Trial, 15 How. St. Tr. 988; Charge to Grand Jury, 2 Sprague (U. S.) 292, 30 Fed. Cas. No. 18,274.

**5. Misprision of Treason Is the Concealment of Treason.** — Foster Crown L. 183; Francia's Trial, 15 How. St. Tr. 988; Charge to Grand Jury, 2 Sprague (U. S.) 292, 30 Fed. Cas. No. 18,274. But see Porterfield's Trial, 10 How. St. Tr. 1051. In this case John Porterfield was approached by Sir John Cochran, during the reign of Charles II., to furnish fifty pounds to aid the Duke of Argyle in his attempt against the crown. Porterfield declined to give the money, but since he did not impart the information to a state official he was held guilty of treason.

**Misprision of Treason Is Defined by Act Cong.** of April 30, 1790, as where "any person or persons having knowledge of the commission of any of the treasons aforesaid, shall conceal and not as soon as may be disclose and make known the same to the President of the United States, or some one of the judges thereof, or to the president or governor of a particular state, or some one of the judges or justices thereof." See also Rev. Stat. U. S. (2d ed.), § 5333.

**6. Knowledge to Be Guilty Must Be of an Entire Offense.** — Tonge's Trial, 6 How. St. Tr. 226; Trials of Twenty-nine Regicides, 5 How. St. Tr. 985.

**7. Information Must Not Be Imparted in a Vague Manner.** — Tonge's Trial, 6 How. St. Tr. 226; Trials of Twenty-nine Regicides, 5 How. St. Tr. 985.

**8. Disclosure Must Be Made to One in Authority.** — Tonge's Trial, 6 How. St. Tr. 226; Trials of Twenty-nine Regicides, 5 How. St. Tr. 985.

**In England the Communication of treasonable design or acts ought to be made to the secre-**



**When Misprision of Treason Becomes Treason.** — Misprision of treason, however, rises into the greater crime of treason if the party's approval of the design or assent thereto can be shown,<sup>1</sup> as if, after he obtained knowledge of such conspiracy, he met with the conspirators,<sup>2</sup> or took any part in furthering the design.<sup>3</sup>

**TREASURER.** — See the title PUBLIC OFFICERS, vol. 23, p. 314.

tary of state where it is desired to avoid the appearance of treason. *Francia's Trial*, 15 How. St. Tr. 991.

**1. Misprision Is a Bare Concealment of Treason.** — *Hardy's Trial*, 24 How. St. Tr. 210; *Tonge's Case*, J. Kel. 17, 6 How. St. Tr. 226; *U. S. v. Bollman*, 1 Cranch (C. C.) 373; *Trials of Twenty-nine Regicides*, 5 How. St. Tr. 985.

If a man is privy to a treasonable design, and contributes to carry it on, it is not then barely a misprision; but if he assents to the treason, or acts in carrying it on, it is high treason. *Francia's Trial*, 15 How. St. Tr. 988.

**To Receive Treasonable Letters** and to keep them for a long time without disclosure of their contents is evidence which goes to show assent to and participation in the crime of treason. *Francia's Trial*, 15 How. St. Tr. 991.

**2. Meeting with Conspirators After Obtaining Knowledge of Conspiracy, Treason.** — "It was agreed that the bare knowledge of treason and the concealment of it was not high treason, but misprision of treason. But in case anything be proved upon evidence, that the party liked or approved of it, then it is high treason; or if the party knew of the design, and after

such knowledge, met with the conspirators at their consultation, or if he went knowingly to their consultations several times, this is evidence of his approbation of the design and is high treason. *Tonge's Case*, J. Kel. 17." *Trials of Twenty-nine Regicides*, 5 How. St. Tr. 985.

**The Mere Countenancing or Sanctioning an Act of Treason Is Treason.** — Judge Kelyng refers, in *Tonge's Case*, J. Kel. 17, 6 How. St. Tr. 226, to the trial of Sir Edward Digby, one of the conspirators in Guy Fawkes Gunpowder Plot, who was convicted on his own confession, although he did not take any active part in the plot beyond merely meeting with the conspirators and concealing the crime. See his case reported in 2 How. St. Tr. 159.

But in the case of one falling into the company of conspirators, if the party met them accidentally or upon some indifferent occasion, bare concealment without express assent will be but misprision of treason. *High Treason*, *Foster Crown L.* 183.

**3. Any Part Taken in Furtherance of Design, Treason.** — *U. S. v. Bollman*, 1 Cranch (C. C.) 373; *U. S. v. Fries*, 3 Dall. (Pa.) 515, 9 Fed. Cas. No. 5,126.

# TREASURE TROVE.

## I. DEFINITION, 472.

## II. ELEMENTS, 472.

## III. RIGHT TO TREASURE TROVE, 473.

## IV. CONCEALMENT OF TREASURE TROVE AN INDICTABLE OFFENSE, 473.

### CROSS-REFERENCES.

See the titles *LOST PROPERTY*, vol. 19, p. 579; *WRECKS*.

**I. DEFINITION.** — This name is given to money or coin, gold, silver plate, or bullion which, having been hidden or concealed in the earth, or other private place, so long that its owner is unknown, has been discovered by accident.<sup>1</sup>

**II. ELEMENTS** — **Concealment.** — “Treasure trove is properly money supposed to have been hidden by some owner since deceased; the secret of the deposit having perished.”<sup>2</sup>

**Thing of Value.** — Treasure trove consists of money, gold, bullion, etc.<sup>3</sup>

**Unknown Owner.** — If the owner of the property is known, or if it can be ascertained who is the owner, the property is not treasure trove.<sup>4</sup>

**1. Definition.** — *Bouv. L. Dict.*; *Atty.-Gen. v. Moore*, (1893) 1 Ch. 676; and see the next section.

Treasure trove is defined as “where any money is found hid in the earth, but not lying upon the ground, and no man knows to whom it belongs.” *Livermore v. White*, 74 Me. 456, 43 Am. Rep. 600; *Sovern v. Yoran*, 16 Oregon 276, 8 Am. St. Rep. 293.

**2. Concealment.** — *Reg. v. Thurborn*, 1 Den. C. C. 396; 20 Vin. Abr. (2d ed.) 414.

The property must have been intentionally deposited in the place where found in concealment. *Sovern v. Yoran*, 16 Oregon 276, 8 Am. St. Rep. 293.

**A Hiding Is Necessary.** — *South Staffordshire Water Co. v. Sharman*, (1896) 2 Q. B. 44; *Atty.-Gen. v. British Museum*, (1903) 2 Ch. 598; *Livermore v. White*, 74 Me. 456, 43 Am. Rep. 600.

**Place of Concealment.** — If treasure trove be found in the sea or upon the earth it does not belong to the crown but to the finder if no owner appears. *McLaughlin v. Waite*, 5 Wend. (N. Y.) 404, 21 Am. Dec. 232.

But in *Huthmacher v. Harris*, 38 Pa. St. 491, 80 Am. Dec. 504, it is said: “And it is not necessary that the hiding should be in the ground, for we are told in 3 Inst. 132, that it is not ‘material whether it be of ancient time hidden in the ground, or in the roof, or walls, or other part of a castle, house, building, ruins, or otherwise.’”

**3. Thing of Value.** — *Reg. v. Toole*, 11 Cox C. C. 75, 16 W. R. 439; *Reg. v. Thomas*, L. & C. 313, 33 L. J. M. C. 22; *Maguire v. Longford*, 14 Ir. L. T. 103; *Livermore v. White*, 74 Me.

452, 43 Am. Rep. 602; *Sovern v. Yoran*, 16 Oregon 276, 8 Am. St. Rep. 293.

Gold ornaments were held to be treasure trove. *Atty.-Gen. v. British Museum*, (1903) 2 Ch. 598.

Where the owner of a tannery sold it and accidentally omitted to remove a few hides from the vats, which were found many years afterwards by a laborer, it was held that the hides did not constitute treasure trove. *Livermore v. White*, 74 Me. 456, 43 Am. Rep. 600.

**Paper Money.** — “Treasure trove, though commonly defined as gold or silver hidden in the ground, may, in our commercial day, be taken to include the paper representatives of gold and silver, especially when they are found hidden with both of these precious metals.” *Huthmacher v. Harris*, 38 Pa. St. 499, 80 Am. Dec. 502.

**Prehistoric Boat.** — A prehistoric boat embedded in the soil six feet below the surface was held not to be treasure trove. *Elwes v. Brigg Gas Co.*, 33 Ch. D. 562.

**4. Unknown Owner.** — *Maguire v. Longford*, 14 Ir. L. T. 103, and see *infra*, this title, *Right to Treasure Trove*.

In *Livermore v. White*, 74 Me. 456, 43 Am. Rep. 600, it is said: “Nor can this be deemed treasure trove, which is thus defined in Jacob’s Dictionary. It is ‘where any money is found hid in the earth, but not lying upon the ground, and no man knows to whom it belongs.’ Nothing is treasure trove but gold or silver. ‘It is not treasure trove if the owner can be known. Nor though the owner be dead; for his executor or administrator shall have it.’ Com. Dig., art. Waif, G. All the elements con-

**III. RIGHT TO TREASURE TROVE.** — At common law treasure trove belongs to the crown.<sup>1</sup> As between the discoverer and the crown, the crown's right to treasure trove is absolute, and the finder has no claim, but must give notice of the discovery to the proper officers.<sup>2</sup> As between the true owner of the property and the sovereign, the sovereign has no claim to treasure trove.<sup>3</sup>

**IV. CONCEALMENT OF TREASURE TROVE AN INDICTABLE OFFENSE.** — At common law the concealment of treasure trove was an indictable offense.<sup>4</sup>

**TREASURY.** — See note 5.

**TREAT.** — See note 6.

stituting treasure trove are wanting. Here was no hiding. Here was no secrecy. The owner was known. The deposit was not for concealment, but in the usual and ordinary mode of business." See also the title *LOST PROPERTY*, vol. 19, p. 579.

**1. Treasure Trove Belongs to the Crown.** — 1 Bl. Com. 308; 2 Bl. Com. 402; 20 Vin. Abr. (2d ed.) 413, § 5; Maguire v. Longford, 14 Ir. L. T. 103; Reg. v. Thomas, 9 Cox. C. C. 376, L. & C. 326, 33 L. J. M. C. 22; Reg. v. Toole, 11 Cox C. C. 75, 16 W. R. 439; Reg. v. Thurborn, 1 Den. C. C. 396; Atty.-Gen. v. Moore, (1893) 1 Ch. 676; Atty.-Gen. v. British Museum, (1903) 2 Ch. 598; Eads v. Brazelton, 22 Ark. 501, 79 Am. Dec. 88; Livermore v. White, 74 Me. 456, 43 Am. Rep. 600; McLaughlin v. Waite, 5 Wend. (N. Y.) 404, 21 Am. Dec. 232; Sovern v. Yoran, 16 Oregon 273, 8 Am. St. Rep. 293; Huthmacher v. Harris, 38 Pa. St. 491, 80 Am. Dec. 502.

**Louisiana.** — See Civ. Code La., arts. 553, 3423.

**Grant of Franchise.** — But the crown's right may be defeated by showing a grant of the franchise of treasure trove. Atty.-Gen. v. Moore, (1893) 1 Ch. 676.

**2.** 1 Bl. Com. 295; 4 Bl. Com. 121. And see the preceding note.

**3. Right of Owner.** — M'Kiernan v. Kernan, 4 Ir. Eq. 269; Maguire v. Longford, 14 Ir. L. T. 103; Sovern v. Yoran, 16 Oregon 269, 8 Am. St. Rep. 293; Warren v. Ulrich, 130 Pa. St. 414.

In Huthmacher v. Harris, 38 Pa. St. 491, 80 Am. Dec. 504, it was said: "The certain rule of the common law in regard to treasure trove, as laid down by Bracton, lib. 3, cap. 3, and as quoted in Viner's Abridgment, is, 'that he to whom the property is, shall have treasure trove; and if he dies before it be found, his executors shall have it, for nothing accrues to the king unless when no one knows who hid that treasure.'"

If the owner is known the property of course is not treasure trove. McLaughlin v. Waite, 5

Wend. (N. Y.) 405, 21 Am. Dec. 232; Livermore v. White, 74 Me. 452, 43 Am. Rep. 600; 1 Bl. Com. 308; 2 Bl. Com. 402.

When the owner is made known the property ceases to be treasure trove, and the crown has no rights as against the owner. Sovern v. Yoran, 16 Oregon 276, 8 Am. St. Rep. 293.

**Owner of the Soil.** — The owner of the soil upon which treasure trove is found has no claim thereto. Reg. v. Thomas, L. & C. 313, 33 L. J. M. C. 22.

**4. Concealment.** — 1 Bl. Com. 295; 4 Bl. Com. 121; 21 Alb. L. J. 260; Maguire v. Longford, 14 Ir. L. T. 103; Reg. v. Toole, 2 Ir. C. L. 36, 11 Cox C. C. 75; Reg. v. Thomas, L. & C. 326.

**Fraudulently.** — In an indictment for concealing treasure trove from the crown, it is not necessary to aver that the person concealed it fraudulently; the words "wrongfully, wilfully, and knowingly," are sufficient. Reg. v. Thomas, 9 Cox C. C. 376, 33 L. J. M. C. 22, 9 L. T. N. S. 488.

**Test of Inquest.** — In Reg. v. Toole, 11 Cox C. C. 75, it was held that *prima facie* the crown is entitled to treasure trove, and that it was not necessary that an inquest should be held.

**5. Treasury.** — In People v. McKinney, 10 Mich. 86, the word *treasury*, as used in a statute, was held not to be understood in a sense of locality, as descriptive of a particular building within which the treasurer kept his office or place of business; but whenever and wherever moneys were in the official custody of the treasurer or subject to his direction, they were to be considered as being in the state *treasury*.

**Treasury Note.** (See also *LEGAL TENDER*, vol. 18, p. 821.) — See New York Bank v. New York County, 7 Wall. (U. S.) 26; Ridenour v. McClurkin, 6 Blackf. (Ind.) 412; Montgomery County v. Elston, 32 Ind. 28.

**Treasury Certificate.** — See Ramsey v. Cox, 28 Ark. 368.

**6. Treat and View.** — See Goodwin v. Brind, L. R. 5 C. P. 299 note, 39 L. J. C. Pl. 122 note.



# TREATIES.

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**CROSS-REFERENCES.**

For matters of *PROCEDURE*, see the *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, vol. 21, p. 779.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see in this work the following titles: *ALIENS*, vol. 2, p. 85; *CHINESE EXCLUSION ACTS*, vol. 5, p. 1101; *CONSULS*, vol. 7, p. 17; *EXTRADITION*, vol. 12, p. 591 *et seq.*; *INDIANS*, vol. 16, p. 218; *INTERNATIONAL LAW*, vol. 16, p. 1142; *MINISTERS AND AMBASSADORS*, vol. 20, p. 794; *STATES*, vol. 26, p. 469; *TREATIES OF CESSION*, *post*; *WAR*.

**I. DEFINITION.** — A treaty is a contract between two or more sovereigns, in modern usage formally signed by commissioners properly authorized, and solemnly ratified by the supreme power of each of the contracting parties.<sup>1</sup>

**Stipulations.** — By the stipulations of a treaty are to be understood its language and apparent intention manifested in the instrument, with a refer-

1. **Definition.** — Cent. Dict. See also *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1; *Head Money Cases*, 112 U. S. 580; *Foster v. Neilson*, 2 Pet. (U. S.) 253; *Whitney v. Robertson*, 124 U. S. 190.

**Vattel's Definition** is that a treaty "is a pact made with a view to the public welfare, by the superior power, either for perpetuity or for a considerable time." Vattel *Law of Nations*, bk. 2, c. 12, § 152.

**Woolsey Defines Treaties** allowed under the law of nations as "unconstrained acts of independent powers placing them under an obligation to do something which is not wrong." Woolsey *Int. L.*, § 102. See also *Hall Int. L.* 339.

**A Treaty in Effect an Executory Agreement.** — *Welch v. Trotter*, 8 Jones L. (53 N. Car.) 197.

**Term Applies to Agreements with Indian Tribes.** — *Langford v. Monteith*, 1 Idaho 612.

**Treaty Distinguished from Agreement and Compact.** — *Holmes v. Jennison*, 14 Pet. (U. S.) 540.

**Preamble.** — The preamble does not form a part of the treaty, but, when it has been duly authenticated by the signatures of the contracting parties, its averments are to be regarded as truths admitted. *Little v. Watson*, 32 Me. 224. It may be employed in interpreting the treaty. *In re Tivnan*, 5 B. & S. 645, 117 E. C. L. 645, opinion of Crompton, J.

ence to the contracting parties, the subject-matter, and the persons on whom it is to operate.<sup>1</sup>

**II. POWER TO MAKE TREATIES** — 1. **In General.** — As a general rule every sovereign state whose powers have not been limited or modified by compacts with other states has the power to make treaties. But where a state is a subordinate member of a united federation, the extent of its right to make treaties is dependent upon the powers which it has retained or has conceded to the federation.<sup>2</sup>

**2. By Whom Exercised** — *a.* **IN GENERAL.** — The power is exercised by the constituted authorities of nations, or by persons especially deputed by them for that purpose. In the latter event, the acts of the persons so deputed are binding only so far as they are within the powers conferred.<sup>3</sup>

*b.* **IN THE UNITED STATES** — (1) *Constitutional Provision.* — The treaty-making power in the United States is vested in the President and Senate, by the Constitution, which provides that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur.<sup>4</sup>

(2) *Power of States.* — The general power to make treaties, such as treaties of alliance and confederation, is denied to the states.<sup>5</sup> This prohibition also extends to the several territories of the United States.<sup>6</sup>

**Power to Make Agreements.** — The Constitution also prohibits the states from entering into any agreement or compact with another state or a foreign country, without the consent of Congress.<sup>7</sup> This prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.<sup>8</sup> Furthermore, it is applicable to future agreements or compacts only, and has no bearing on those already in existence, except so far as their stipulations might affect subjects placed under the control of Congress.<sup>9</sup>

**1. Stipulations Defined.** — *U. S. v. Arredondo*, 6 Pet. (U. S.) 691.

**2. Power to Make.** — See Hall Int. L. 340; Woolsey Int. L., § 159; Vattel Law of Nations, bk. 2, c. 12, § 153; Wheaton Int. L., § 252.

**3. Who May Make.** — See Hall Int. L. 340; Woolsey Int. L., § 159; Vattel Law of Nations, bk. 2, c. 12, § 155 *et seq.*; Wheaton Int. L., § 252.

**4. Constitutional Provision.** — U. S. Const., art. 2, § 2. See also *In re Parrott*, 1 Fed. Rep. 481.

"The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective. The only government of this country, which other nations recognize or treat with, is the government of the Union." *Fong Yue Ting v. U. S.*, 149 U. S. 698.

**5. States Have No Treaty-making Power.** — No state shall enter into any treaty, alliance, or confederation. U. S. Const., art. 1, § 10; *Holmes v. Jennison*, 14 Pet. (U. S.) 540; *People v. Curtis*, 50 N. Y. 321, 10 Am. Rep. 483; *People v. Gerke*, 5 Cal. 381; *Droit d'Aubaine*, 8 Op. Atty-Gen. 411.

**6. Territories.** — *Downes v. Bidwell*, 182 U. S. 244.

**7. Agreements Between States.** — U. S. Const., art. 1, § 10, cl. 2. See also Story on Const., § 1403. And see the title STATES, vol. 26, p. 469.

**The Terms "Treaty," "Agreement," and "Compact,"** as employed in U. S. Const., art. 1, §

10, are not synonymous. By "treaty" is signified an instrument written and executed with the formalities customary among nations. *Holmes v. Jennison*, 14 Pet. (U. S.) 540.

**8. What Agreements Prohibited.** — *Wharton v. Wise*, 153 U. S. 155; *Virginia v. Tennessee*, 148 U. S. 503.

**9. Existing Agreements.** — *Wharton v. Wise*, 153 U. S. 155.

**Treaties Between the States, Prior to the Constitution.** — Compacts in the nature of treaties exist between several of the older states which were made prior to the Federal Constitution, and so far as they are not inconsistent therewith, remain in full force and effect. Such a compact exists between *Virginia* and *Maryland*, of date March 28, 1785, relating to the rights of the citizens of each state in respect to fishing and navigation in the Potomac river, and has comparatively recently received judicial exposition in *Ex p. Marsh*, 57 Fed. Rep. 719. See also *South Carolina v. Georgia*, 93 U. S. 4; *Wharton v. Wise*, 153 U. S. 155.

**The Prohibition in the Articles of Confederation** against any treaty, confederation, or alliance between the states without the consent of Congress was intended to prevent any union of two or more states having a tendency to weaken the union between the whole; they were not designed to prevent arrangements between adjoining states to facilitate the free intercourse of their citizens, or remove barriers to their welfare; and whatever their effect, such arrangements could not be the subject of complaint by the states making them until, at least, the con-



**3. Subjects of Treaties — a. IN GENERAL.** — In general, the whole range of international intercourse may be regulated by treaty.<sup>1</sup>

**b. IN THE UNITED STATES.** — The power of making treaties as granted by the Constitution is in terms unlimited, except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and that of the states.<sup>2</sup> It cannot be extended so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of one of the latter without its consent. With these exceptions, there is no limit to the questions which can be adjusted, touching any matter which is properly the subject of negotiation with another power.<sup>3</sup>

**Aliens.** — Many treaties have been entered into by the United States dealing with the property rights of aliens.<sup>4</sup> By treaty their disabilities to take real property by descent or devise may be removed,<sup>5</sup> and the distribution of the property of deceased aliens may be determined.<sup>6</sup>

**Commercial Relations.** — This power is frequently exercised in establishing commercial relations.<sup>7</sup>

**Extradition.** — The regulation of extradition, which is also a subject of treaty stipulation, has been fully discussed elsewhere in this work.<sup>8</sup>

**Powers of Consular Officers.** — The judicial powers in this country of consular representatives of foreign nations and of consuls of the United States in foreign countries are regulated by treaty.<sup>9</sup>

**Power to Take Private Property by Treaty.** — The provision of the United States Constitution prohibiting the taking of private property without just compensation does not prevent the operation of a treaty which will have such effect, but under the treaty-making power the government may, by the terms of a treaty, take private property without having made compensation therefor.<sup>10</sup>

**Treaties with Indians.** — Treaties made with Indian tribes are not distinguished from those made with foreign powers, and equally constitute a part of the supreme law of the land and a rule of action for the courts.<sup>11</sup> Elsewhere in this work will be found a discussion of these treaties and the rights arising under them.<sup>12</sup>

**III. RATIFICATION — 1. In General.** — After the terms are agreed upon the treaty is signed by plenipotentiaries or commissioners who are authorized agents of the contracting powers. The treaty must be ratified by the govern

gress of the confederation interposed objections. *Wharton v. Wise*, 153 U. S. 155.

**1. Subjects of Treaties.** — See *Vattel Law of Nations*, bk. 2, c. 12, § 169 *et seq.*

**Treaties, Properly So Called,** are those of friendship and alliance, commerce, and navigation. *Wheaton Int. L.*, § 275; *Woolsey Int. L.*, § 106.

**2. Power under Federal Constitution.** — *Holmes v. Jennison*, 14 Pet. (U. S.) 540; *In re Ross*, 140 U. S. 453; *People v. Gerke*, 5 Cal. 381. See also *U. S. v. Forty-three Gallons Whiskey*, 93 U. S. 196.

**3. Limitations on Power.** — *Geofroy v. Riggs*, 133 U. S. 258.

**4. Rights of Aliens.** — See the title *ALIENS*, vol. 2, p. 85.

**5. Removal of Property Disabilities.** — See the title *ALIENS*, vol. 2, p. 85. See also *U. S. v. Forty-three Gallons Whiskey*, 93 U. S. 188; *Carnal v. Banks*, 10 Wheat. (U. S.) 189; *Orr v. Hodgson*, 4 Wheat. (U. S.) 453; *In re Parrott*, 1 Fed. Rep. 502; *Bahuaud v. Bize*, 105 Fed. Rep. 485; *Droit d'Aubaine*, 8 Op. Atty.-Gen.

411; *People v. Gerke*, 5 Cal. 381; *Fox v. Southack*, 12 Mass. 143.

**6. Distribution of Aliens' Property.** — *Hauenstein v. Lynham*, 100 U. S. 483; *Chirac v. Chirac*, 2 Wheat. (U. S.) 259; *Frederickson v. Louisiana*, 23 How. (U. S.) 445; *Geofroy v. Riggs*, 133 U. S. 258; *Jost v. Jost*, 1 Mackey (D. C.) 487; *Kull v. Kull*, 37 Hun (N. Y.) 476.

**7. Commercial Treaties.** — *Taylor v. Morton*, 2 Curt. (U. S.) 454. See *infra*, this title, *Commercial Treaties*. See also the various treaties of the United States.

**8. Extradition.** — See the title *EXTRADITION*, vol. 12, p. 592 *et seq.*

**9. Judicial Powers of Consuls.** — See the title *CONSULS*, vol. 7, p. 17.

**10. Condemnation of Private Property.** — *Mead's Case*, 2 Ct. Cl. 224; *Little v. Watson*, 32 Me. 214. See also *infra*, this title, *Treaties of Peace*.

**11. Indian Treaties.** — *Leighton v. U. S.*, 29 Ct. Cl. 288.

**12.** See the title *INDIANS*, vol. 16, p. 218.

ments after the agreement and signature by the agents. The exchange of ratifications constitutes the delivery. Up to that time the treaty is inchoate and may never take effect.<sup>1</sup>

**2. In the United States.** — A treaty of the United States must, to be valid, not only be ratified by the Senate, but must also receive the sanction or approval of the President.<sup>2</sup>

**Ratification by Senate.** — The power of the Senate is limited to a ratification of such terms as have already been agreed upon between the President, acting for the United States, and the commissioners of the other contracting power. The Senate cannot, upon ratifying a treaty, introduce new terms into it which shall be obligatory upon the other power, although it may refuse its ratification, or make it conditional upon the adoption of amendments.<sup>3</sup>

**Consent of Congress to Agreement Between States.** — The consent of Congress to any agreement or compact between two or more states is sufficiently indicated, when it is not necessary that it should be given in advance, by the adoption or approval of proceedings taken under the agreement.<sup>4</sup>

**IV. WHEN TREATIES TAKE EFFECT — 1. As to Contracting Parties — a. IN GENERAL.** — The obligation of treaties, unless suspended by some condition or stipulation therein contained, commences, as to the contracting parties, with their execution by authorized agents of the contracting parties.<sup>5</sup> The subsequent ratification by the principals relates back to the period of signature.<sup>6</sup> Any act in contravention of the treaty stipulations, by either of the parties, between the time of the signing and the time of the ratification, is a fraud upon the other party, and can have no validity consistently with a recognition of the treaty itself.<sup>7</sup> Under this rule it has been held that after the signing of a treaty of cession, the ceding power has no authority to make a grant of land or franchises within the territory ceded.<sup>8</sup> Until the ratifications have been exchanged, there can be no application of the doctrine of relation.<sup>9</sup>

**Signature by Unauthorized Agent.** — Where the treaty is not signed by an agent empowered to execute the treaty absolutely, but is merely signed conditionally, nothing passes until there has been a proper ratification.<sup>10</sup>

**b. CONDITIONS IN TREATY FIXING TIME.** — The doctrine of relation has no application when a stipulation is contained in the treaty prescribing the

**1. Ratification.** — *Ex p. Ortiz*, 100 Fed. Rep. 955. See also *infra*, this title, *When Treaties Take Effect*.

**The Terms of a Treaty Are "Agreed Upon"** when the ministers come to an understanding as to the terms and reduce them to writing. The treaty is concluded when this agreement has received its last form by being signed and duly executed by the ministers. *Hylton v. Brown*, 1 Wash. (U. S.) 343.

**2. President's Approval Essential.** — *New York Indians v. U. S.*, 170 U. S. 1; *Shepard v. Northwestern L. Ins. Co.*, 40 Fed. Rep. 341. See *supra*, this title, *Power to Make Treaties — By Whom Exercised — In the United States*.

**3. Ratification by Senate.** — Fourteen Diamond Rings *v. U. S.*, 183 U. S. 176, concurring opinion of Brown, J.

**4. Consent of Congress.** — *Wharton v. Wise*, 153 U. S. 155. And see the title STATES, vol. 26, p. 469.

**5. When Effective.** — *U. S. v. Reynes*, 9 How. (U. S.) 127; *Davis v. Police Jury*, 9 How. (U. S.) 280; *U. S. v. Arredondo*, 6 Pet. (U. S.) 691; *Haver v. Yaker*, 9 Wall. (U. S.) 32; *U. S. v. D'Auterive*, 10 How. (U. S.) 609;

*Hylton v. Brown*, 1 Wash. (U. S.) 312; *Meade's Case*, 2 Ct. Cl. 224; *Bush v. U. S.*, 29 Ct. Cl. 144; *In re Metzger*, 5 N. Y. Leg. Obs. 83, 17 Fed. Cas. No. 9,511; *Ex p. Ortiz*, 100 Fed. Rep. 955; *Yeaker v. Yeaker*, 4 Met. (Ky.) 33, 81 Am. Dec. 530.

**6. Ratification Relates Back.** — *Davis v. Police Jury*, 9 How. (U. S.) 280; *U. S. v. Reynes*, 9 How. (U. S.) 127; *U. S. v. D'Auterive*, 10 How. (U. S.) 609; *Haver v. Yaker*, 9 Wall. (U. S.) 32; *U. S. v. Arredondo*, 6 Pet. (U. S.) 691; *Hylton v. Brown*, 1 Wash. (U. S.) 312; *Meade's Case*, 2 Ct. Cl. 224; *Ex p. Ortiz*, 100 Fed. Rep. 955; *Yeaker v. Yeaker*, 4 Met. (Ky.) 33, 81 Am. Dec. 530.

**7. U. S. v. D'Auterive, 10 How. (U. S.) 609.**

**8. Grants After Signature of Treaty of Cession Invalid.** — *Davis v. Police Jury*, 9 How. (U. S.) 280; *U. S. v. D'Auterive*, 10 How. (U. S.) 610; *U. S. v. Rillieux*, 14 How. (U. S.) 189; *U. S. v. Ducros*, 15 How. (U. S.) 38. And see the title TREATIES OF CESSION, *post*.

**9. Time When Doctrine of Relation Applies.** — *Ex p. Ortiz*, 100 Fed. Rep. 955.

**10. Unauthorized Agent.** — *Davis v. Police Jury*, 9 How. (U. S.) 280.

time when the treaty shall go into effect.<sup>1</sup> Also, where there is a stipulation prescribing the manner in which the treaty shall be ratified<sup>2</sup> or requiring the performance of certain acts as a condition precedent to the taking effect of the treaty,<sup>3</sup> these stipulations must be complied with before the treaty can go into effect.

**Intention Manifested in Treaty.** — The treaty may be regarded as taking effect at a time other than that at which it was signed where this is necessary to carry out the manifest intention of the parties.<sup>4</sup>

*c.* **JUDICIARY CANNOT FIX TIME.** — It is for the political department to determine whether the treaty went into effect from the date of its signature, or from the date of its ratification by the assent of the Senate, or at another time. Upon this question the judiciary can only pass incidentally and indirectly.<sup>5</sup>

**2. As to Rights of Individuals.** — In the *United States*, as, before a treaty can become the law of the land, it must be ratified in the manner prescribed by the Constitution,<sup>6</sup> before which the individual cannot become informed of its terms, it is held that the doctrine of relation has no application to the rights of individuals which were vested before the treaty was ratified. In so far as such rights are concerned, treaties are not considered as concluded until there has been an exchange of ratifications.<sup>7</sup>

**V. NATURE AND EFFECT — 1. In General.** — A treaty is in its essence not merely a rule prescribed by sovereigns for the conduct of their subjects,<sup>8</sup> but is also a contract, differing only from ordinary contracts in that it is an agreement between independent states instead of private parties, and, as such, it is as obligatory upon the contracting states as private contracts are upon individuals.<sup>9</sup>

**2. In the United States — a. IN GENERAL.** — In the United States a treaty is not regarded as being merely a contract between sovereign powers and governed by the law of nations. Under the provision of the Federal Constitution making it the supreme law of the land, as far as the treaty operates by its own force it is equivalent to an act of the legislature,<sup>10</sup> and the courts will take

**1. Time Fixed in Treaty.** — *Bush v. U. S.*, 29 Ct. Cl. 144; *Schaffer's Succession*, 13 La. Ann. 113.

**2. Conditions Precedent in Treaty.** — *Shepard v. Northwestern L. Ins. Co.*, 40 Fed. Rep. 341, holding that where the treaty provided it should go into effect when ratified by the President and Senate, it did not take effect until after the President had signed it, though it had been ratified by the Senate and accepted by the other party.

**3. Davis v. Police Jury**, 9 How. (U. S.) 280.

**4. Time Fixed by Intent of Parties.** — *In re Metzger*, 5 N. Y. Leg. Obs. 83, 17 Fed. Cas. No. 9,511.

**5. Time Fixed by Political Department.** — *In re Metzger*, 5 N. Y. Leg. Obs. 83, 17 Fed. Cas. No. 9,511.

**6. Time of Taking Effect as to Individuals.** — See *supra*, this title, *Power to Make Treaties — By Whom Exercised — In the United States.*

**Manner of Publication.** — By an Act July 31, 1876, par. 2, 1 Supp. Rev. Stat. U. S. 234, 589, it is provided that new treaties are to be published in a newspaper of the District of Columbia.

**7** *U. S. v. Arredondo*, 6 Pet. (U. S.) 691; *Haver v. Yaker*, 9 Wall. (U. S.) 32; *U. S. v. Sibbald*, 10 Pet. (U. S.) 313; *Ex p. Ortiz*, 100 Fed. Rep. 955; *Meade's Case*, 2 Ct. Cl. 224; *In re Metzger*, 5 N. Y. Leg. Obs. 83, 17 Fed.

Cas. No. 9,511; *Yeaker v. Yeaker*, 4 Met. (Ky.) 33, 81 Am. Dec. 530.

**8. Treaty a Contract.** — *Taylor v. Morton*, 2 Curt. (U. S.) 454.

**9.** *Taylor v. Morton*, 2 Curt. (U. S.) 454; *Foster v. Neilson*, 2 Pet. (U. S.) 253; *Fourteen Diamond Rings v. U. S.*, 183 U. S. 176, concurring opinion of Brown, J.; *In re Ah Lung*, 18 Fed. Rep. 28. See also *Vattel Law of Nations*, bk. 2, c. 12; 1 Kent Com. 174.

**The Treaties Made by the Crown of Great Britain** with other nations are not, in the courts of that country, considered as a part of the law of the land; but the rights and duties growing out of those treaties are looked upon in that country as matters confided wholly, for their execution and enforcement, to the executive branch of the government. See *U. S. v. Rauscher*, 119 U. S. 407; *In re Metzger*, 5 N. Y. Leg. Obs. 83, 17 Fed. Cas. No. 9,511.

**10. Nature of Treaties in United States — United States.** — *Foster v. Neilson*, 2 Pet. (U. S.) 253; *Strother v. Lucas*, 12 Pet. (U. S.) 410; *U. S. v. Rauscher*, 119 U. S. 407; *U. S. v. Forty-Three Gallons of Whiskey*, 93 U. S. 188; *Chew Heong v. U. S.*, 112 U. S. 536; *Baker v. Portland*, 5 Sawy. (U. S.) 566; *U. S. v. Schooner Peggy*, 1 Cranch (U. S.) 103; *Martin v. Hunter*, 1 Wheat. (U. S.) 304; *Denn v. Harnden*, 1 Paine (U. S.) 55; *Ex p. Hibbs*, 26 Fed. Rep. 421; *In re Metzger*, 5 N. Y. Leg.



judicial notice of its provisions.<sup>1</sup> While the courts thus, as a general rule, take judicial notice of the public treaties of the United States with other countries, still, where a treaty is relied on, the burden is on the party asserting it to inform the court, where the court is in fact without knowledge of the existence and terms of the treaty.<sup>2</sup>

*b.* TREATIES NOT REQUIRING LEGISLATIVE ENACTMENT. — A distinction is to be observed between a treaty which becomes the law of the land when ratified and confirmed, and one which imports a contract. Whenever the treaty operates of itself without the aid of any legislative enactment, it is to be regarded by the courts as equivalent to a legislative enactment.<sup>3</sup> Thus where it is provided by treaty that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not require supplementary legislative or executive action to authorize the courts to decline to override these limitations or exceed the prescribed restrictions.<sup>4</sup>

*c.* TREATIES REQUIRING LEGISLATIVE ENACTMENT. — But where the stipulations of the treaty are not self-executing, and are addressed rather to the political than to the judicial department, they can only be enforced by the courts as a rule of action after they have been put into effect by appropriate legislation.<sup>5</sup> Such is the case when the treaty embraces matters which are the subject of legislation by Congress,<sup>6</sup> as when the terms of the treaty require the appropriation of money in order that it may be carried into effect.<sup>7</sup> Also, where the language of the treaty is such as to import a contract, the ratification and confirmation of the contract must be by Congress, and until this is done the courts cannot disregard the existing laws on the subject.<sup>8</sup>

*d.* WHEN IN CONFLICT WITH ACTS OF CONGRESS. — No distinction is made between treaties made under authority of the *United States* and the laws of Congress, but both are declared to be the supreme law of the land. Consequently, being of equal dignity, when in conflict effect is to be given to the later as the last expression of the law-making power. So a treaty may supersede a prior act of Congress,<sup>9</sup> and also unwritten laws, as the law of nations

Obs. 83, 17 Fed. Cas. No. 9,511; *Jones v. Walker*, 2 Paine (U. S.) 688; *In re Veremaitre*, 3 Am. L. J. N. S. 438, 28 Fed. Cas. No. 16,915; *Ex p. McCabe*, 46 Fed. Rep. 363; *In re Ah Lung*, 18 Fed. Rep. 28.

*District of Columbia.* — *Jost v. Jost*, 1 Mackey (D. C.) 487.

*Georgia.* — *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415.

*Kentucky.* — *Com. v. Hawes*, 13 Bush (Ky.) 697, 26 Am. Rep. 242.

*Maine.* — *Little v. Watson*, 32 Me. 214.

*North Dakota.* — *Kreuger v. Schultz*, 6 N. Dak. 310.

*Ohio.* — *State v. Vanderpool*, 39 Ohio St. 273, 48 Am. Rep. 431.

*Oklahoma.* — *Gay v. Thomas*, 5 Okla. 1.

*Texas.* — *Blandford v. State*, 10 Tex. App. 627.

**1. Judicial Notice.** — See the title JUDICIAL NOTICE, vol. 17, p. 928.

**2.** *Richter v. Reynolds*, (C. C. A.) 59 Fed. Rep. 577.

**3. Self-executing Treaties.** — *Chew Heong v. U. S.*, 112 U. S. 536; *Foster v. Neilson*, 2 Pet. (U. S.) 314; *U. S. v. Forty-Three Gallons Whiskey*, 93 U. S. 188; *In re Metzger*, 5 N. Y. Leg. Obs. 83, 17 Fed. Cas. No. 9,511; *In re Ah Lung*, 18 Fed. Rep. 28. See also *Little v. Watson*, 32 Me. 224.

**4. Nature of Self-executing Treaty.** — *Com. v. Hawes*, 13 Bush (Ky.) 697, 26 Am. Rep. 242.

**5. Treaties Not Self-executing.** — *Foster v. Neilson*, 2 Pet. (U. S.) 253; *Whitney v. Robertson*, 124 U. S. 190; *In re Metzger*, 5 N. Y. Leg. Obs. 83, 17 Fed. Cas. No. 9,511. See also *Matter of Metzger*, (Supm. Ct.) 1 Park. Crim. (N. Y.) 108.

**6. Treaty Embracing Legislative Question.** — *Siemssen v. Bofer*, 6 Cal. 250.

**7. Treaty Appropriating Money.** — *Turner v. American Baptist Missionary Union*, 5 McLean (U. S.) 347.

**8. Treaty Importing Contract.** — *Taylor v. Morton*, 2 Curt. (U. S.) 454; *Foster v. Neilson*, 2 Pet. (U. S.) 314; *Turner v. American Baptist Missionary Union*, 5 McLean (U. S.) 344; *Garcia v. Lee*, 12 Pet. (U. S.) 519; *In re Ah Lung*, 18 Fed. Rep. 28. See also *Chouteau v. Eckhart*, 2 How. (U. S.) 344. *Compare U. S. v. Percheman*, 7 Pet. (U. S.) 86.

**9. Treaty Supersedes Statute.** — *The Cherokee Tobacco*, 11 Wall. (U. S.) 616; *Foster v. Neilson*, 2 Pet. (U. S.) 314; *Thingvalla Line v. U. S.*, 24 Ct. Cl. 255; *Scott v. Sandford*, 19 How. (U. S.) 629; *In re Ah Lung*, 18 Fed. Rep. 28; *Mitchel v. U. S.*, 9 Pet. (U. S.) 711; *U. S. v. Payne*, 8 Fed. Rep. 883; *Head Money Cases*, 112 U. S. 580; *In re Chin A On*, 18 Fed. Rep. 507; *Botiller v. Dominguez*, 130 U. S. 238;

or admiralty,<sup>1</sup> provided always the stipulation of the treaty on the subject is self-executing.<sup>2</sup> On the other hand, where the act of Congress is in contravention of expressed stipulations in an earlier treaty, it supersedes the treaty<sup>3</sup> if the latter is self-executing, or if legislation has been enacted to carry the treaty into effect,<sup>4</sup> provided the act is constitutional.<sup>5</sup>

**Treaty and Act Should Be Reconciled.** — In cases of apparent conflict between a statute and a treaty, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either, and will not impute to Congress an intent to violate a treaty, unless such intent is unmistakable.<sup>6</sup> So an act of Congress will not be given a retrospective effect when to do so would violate any treaty obligation, if such a construction can be avoided.<sup>7</sup> But where the intention to abrogate the treaty is so clearly and unequivocally manifested as to admit of no other construction, the statute must be so construed.<sup>8</sup>

**Intent of Enactment Not Considered.** — The courts will not go behind the legislative enactment and inquire whether Congress intended that the statute should have the effect which is necessarily produced by its due execution. It is not for the courts to determine whether the enactment was intentional or unintentional, even though it has been subsequently repealed and an express declaration has been made by Congress that its enactment was unintentional.<sup>9</sup>

**e. WHEN IN CONFLICT WITH STATE CONSTITUTIONS OR LAWS.** — Under the provisions of the Constitution<sup>10</sup> all treaties made<sup>11</sup> or which shall be made, under the authority of the United States, are declared to be the supreme law of the land, anything in the constitution or the laws of any state to the contrary notwithstanding. Provisions of a state constitution,<sup>12</sup> the common law,<sup>13</sup> or the laws of a state, which are in conflict with the provisions of treaties so made, must yield to the treaties<sup>14</sup> in so far as they

Valk v. U. S., 29 Ct. Cl. 62; Horner v. U. S., 143 U. S. 570.

**1. Effect on Unwritten Laws.** — Copyright Convention, 6 Op. Atty.-Gen. 291.

**2. Treaty Must Be Self-executing.** — Whitney v. Robertson, 124 U. S. 195.

**3. Statute Repeals Prior Treaty.** — Taylor v. Morton, 2 Curt. (U. S.) 454; The Clinton Bridge, Woolw. (U. S.) 155; North German Lloyd Steamship Co. v. Hedden, 43 Fed. Rep. 17; The Wellhaven, 55 Fed. Rep. 80; Webster v. Reid, Morr. (Iowa) 467; Fong Yue Ting v. U. S., 149 U. S. 698; Head Money Cases, 112 U. S. 580; The Cherokee Tobacco, 11 Wall. (U. S.) 616; Ropes v. Clinch, 8 Blatchf. (U. S.) 309; U. S. v. Tobacco Factory, 1 Dill. (U. S.) 265; Chinese Exclusion Case, 130 U. S. 600; Whitney v. Robertson, 124 U. S. 190; Thomas v. Gay, 169 U. S. 264; *In re Tung Yeong*, 19 Fed. Rep. 185; *In re Dugau*, 2 Lowell (U. S.) 367, 7 Fed. Cas. No. 4,120.

**4. Chinese Exclusion Case**, 130 U. S. 600.

**5. Act Must Be Constitutional** — Ropes v. Clinch, 8 Blatchf. (U. S.) 309; Fong Yue Ting v. U. S., 149 U. S. 698; Chinese Exclusion Case, 130 U. S. 600; *In re Dugau*, 2 Lowell (U. S.) 367, 7 Fed. Cas. No. 4,120.

**6. Treaty and Statute Reconciled if Possible.** — Whitney v. Robertson, 124 U. S. 195; Chew Heong v. U. S., 112 U. S. 536; Ropes v. Clinch, 8 Blatchf. (U. S.) 309; *In re Ah Lung*, 18 Fed. Rep. 28; *In re Chin A On*, 18 Fed. Rep. 507; *In re Tung Yeong*, 19 Fed. Rep. 185; Chinese Merchant's Case, 13 Fed. Rep. 605; *In re Ho King*, 14 Fed. Rep. 726; *Castro v. De Uriarte*, 16 Fed. Rep. 93; *Baker v. Newland*, 25

Kan. 25; *Matter of Lobrasciano*, (Surrogate Ct.) 38 Misc. (N. Y.) 415.

**7. Chew Heong v. U. S.**, 112 U. S. 536.

**8. Where Intent to Abrogate Is Manifest.** — *In re Chin A On*, 18 Fed. Rep. 507; *Baker v. Newland*, 25 Kan. 25; *Webster v. Reid*, Morr. (Iowa) 467.

**9. Effect Must Be Given to Manifest Intent.** — *Ropes v. Clinch*, 8 Blatchf. (U. S.) 304.

**10. Constitutional Provision.** — U. S. Const., art. 6, § 2.

**11. Conflict with Existing Treaties.** — See *Worcester v. Georgia*, 6 Pet. (U. S.) 515; *Hauenstein v. Lynham*, 100 U. S. 483; *Wharton v. Wise*, 153 U. S. 155; *Ware v. Hylton*, 3 Dall. (U. S.) 199; *Langford v. Monteith*, 1 Idaho 612.

**12. Constitutions Conflicting with Treaties.** — *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Ware v. Hylton*, 3 Dall. (U. S.) 199; *Gordon v. Kerr*, 1 Wash. (U. S.) 322; *In re Parrott*, 1 Fed. Rep. 502; *Ex p. Coy*, 32 Fed. Rep. 911; *Blandford v. State*, 10 Tex. App. 627.

**13. Conflict with Common Law.** — *Geofroy v. Riggs*, 133 U. S. 258.

**14. Statutes in Conflict with Treaties** — *United States*. — *Hauenstein v. Lynham*, 100 U. S. 483; *Geofroy v. Riggs*, 133 U. S. 258; *U. S. v. Rauscher*, 119 U. S. 407; *Ware v. Hylton*, 3 Dall. (U. S.) 236; *Owings v. Norwood*, 5 Cranch (U. S.) 344; *Baker v. Portland*, 5 Sawy. (U. S.) 566; *Blythe v. Hinckley*, 180 U. S. 333; *Denn v. Harnden*, 1 Paine (U. S.) 55; *Jones v. Walker*, 2 Paine (U. S.) 688; *In re Parrott*, 1 Fed. Rep. 481; *Ex p. Coy*, 32 Fed. Rep. 911; *Bahuaud v. Bize*, 105 Fed. Rep. 485,

conflict<sup>1</sup> or as long as the treaties are in force.<sup>2</sup> As in the case of a conflict between a federal statute and a treaty,<sup>3</sup> the courts will, where it can be done, place such a construction on the statute as to reconcile them with the treaty provisions.<sup>4</sup>

**VI. COMMERCIAL TREATIES**—1. **In General.**—International law places no limitation upon the powers of nations to enter into commercial treaties, except that the nations entering into such treaties shall not transgress the perfect rights of other powers.<sup>5</sup>

2. **Special or Exclusive Privileges.**—By treaty stipulations special or exclusive privileges may be granted by one nation to another, and when such privileges have been granted, the nation granting them may not afterwards allow like privileges to others contrary to the purpose of the agreement.<sup>6</sup>

"**Most Favored Nation**" Clause.—It is frequently stipulated in treaties that each party thereto shall grant to the other, in respect to the subject-matter of the treaty, the same rights, privileges, and immunities as may thereafter be granted, as to the same matter, to the most favored nation.<sup>7</sup> This clause is intended to include all treaties in which any nation is more favored as to the particular matter in question, and is not limited in its application to those cases in which the treaty, taken as a whole, is more favorable.<sup>8</sup>

**Duties on Imports.**—A stipulation in a treaty, that in the imposition of duties upon goods imported into one of the countries, which are the produce or manufacture of the other, no discrimination shall be made against them in favor of goods of like character imported from any other country, does not prevent special arrangements with other countries, founded upon concessions of special privileges.<sup>9</sup> But a provision of this kind in a treaty promissory in its nature is addressed to the political and not to the judicial department of the government, and the courts cannot try the question whether it has been observed or not.<sup>10</sup> When it is claimed that unjust discrimination is made by an act of Congress, no question can arise, as the act of Congress supersedes the treaty.<sup>11</sup>

**VII. TREATIES OF GUARANTY.**—To insure the performance of the stipulation of a treaty or the maintenance of an existing state of affairs, treaty obligations may be entered into. Such treaties of guaranty may be either for the benefit of the parties to them or for the benefit of a third nation. The

6 Op. Atty.-Gen. 291. See also *Passenger Cases*, 7 How. (U. S.) 466, dissenting opinion of Taney, C. J.

*Illinois.*—*Adams v. Akerlund*, 168 Ill. 632; *Wunderle v. Wunderle*, 144 Ill. 40; *Scharp v. Schmidt*, 172 Ill. 255.

*Iowa.*—*Opel v. Shoup*, 100 Iowa 407.

*Kentucky.*—*Yeaker v. Yeaker*, 4 Met. (Ky.) 33, 81 Am. Dec. 530.

*Louisiana.*—*Rabasse's Succession*, 47 La. Ann. 1452, 49 Am. St. Rep. 433.

*New York.*—*Kull v. Kull*, 37 Hun (N. Y.) 476; *People v. Warren*, (Buffalo Super. Ct. Gen. T.) 13 Misc. (N. Y.) 615; *Matter of Fattosini*, (Surrogate Ct.) 33 Misc. (N. Y.) 18; *Matter of Lobrasciano*, (Surrogate Ct.) 38 Misc. (N. Y.) 415.

*North Carolina.*—*Hamilton v. Eaton*, 2 Mart. (1 N. Car.) 1.

*Texas.*—*Blandford v. State*, 10 Tex. App. 627.

1. *Yeaker v. Yeaker*, 4 Met. (Ky.) 33, 81 Am. Dec. 530.

2. **Statute Suspended by Treaty.**—*Wunderle v. Wunderle*, 144 Ill. 40; *Opel v. Shoup*, 100 Iowa 407.

3. **Statute and Treaty Reconciled.**—See *supra*,

this section, *When in Conflict with Acts of Congress*.

4. *Matter of Fattosini*, (Surrogate Ct.) 33 Misc. (N. Y.) 18.

5. **Commercial Treaties.**—See *Vattel Law of Nations*, bk. 2, c. 2, § 27 *et seq.*; 1 *Kent Com.* 35.

6. **Special Privileges.**—*Vattel Law of Nations*, bk. 2, c. 2, § 30.

7. **Most Favored Nation.**—See generally the various treaties of the United States.

8. *Matter of Fattosini*, (Surrogate Ct.) 33 Misc. (N. Y.) 18.

"**Most Favored Nation**" Clause as Affecting **Alien's Rights.**—*Rixner's Succession*, 48 La. Ann. 552.

9. **Import Duties.**—*Bartram v. Robertson*, 122 U. S. 116; *Whitney v. Robertson*, 124 U. S. 190.

10. *Taylor v. Morton*, 2 Curt. (U. S.) 454; *North German Lloyd Steamship Co. v. Hedden*, 43 Fed. Rep. 17.

11. *Whitney v. Robertson*, 124 U. S. 190; *Taylor v. Morton*, 2 Curt. (U. S.) 454. See also *supra*, this title, *Nature and Effect—In the United States—When in Conflict with Acts of Congress*.



manner in which the guaranty is to be enforced depends upon the terms and object of the treaty.<sup>1</sup>

**VIII. TREATIES OF PEACE — 1. In General.** — As in the case of other treaties, treaties of peace are to be made by those in whom the power is vested by the fundamental law of the nation, and, as a general rule, are governed by the same general principles that are applicable to other treaties.<sup>2</sup>

**2. When Treaty Takes Effect** — *a.* AS TO CONTRACTING PARTIES. — The treaty of peace becomes obligatory upon the contracting parties from the moment of its conclusion, which is from the day it is signed, unless a particular time is specified.<sup>3</sup> Where there are preliminary articles, preparatory to the treaty, peace does not exist from the date of the articles but from the date of the treaty.<sup>4</sup>

*b.* AS TO SUBJECTS. — The treaty becomes obligatory upon the subjects of the parties only from the time they are duly notified. Where the subjects have, without knowing that a treaty of peace has been entered into, continued acts of hostility, it is incumbent upon their governments to undo as far as possible the effects which have been produced by such acts, and to make compensation for such effects as cannot be undone.<sup>5</sup>

**3. Effect.** — A treaty of peace extinguishes the war and the rights arising out of the war.<sup>6</sup> It quiets all titles arising from the war, whether the property is in the hands of the captor or has passed into the possession of another.<sup>7</sup> The treaty abolishes the subject of the war, and after peace is concluded neither the matter in dispute nor the conduct of either party during the war can be revived, even though this is not expressly declared in the treaty and even though the conduct of one of the powers in the course of the war was contrary to the law of nations.<sup>8</sup>

**Effect upon Allies.** — It is a well-settled principle of international law that the power by whom the war has been prosecuted cannot rightfully make peace without including his allies. But the treaty of the principal party obliges his allies only as far as they are willing to consent to it, unless they have given him full power to treat for them.<sup>9</sup>

**4. Acts of Hostility After Conclusion of Treaty.** — A capture before the time fixed for cessation of hostilities, but with knowledge of the conclusion of the treaty of peace, is void.<sup>10</sup> It seems that the individuals are not liable criminally for injuries caused by their acts of hostility, continued after the date of peace, when in ignorance of it.<sup>11</sup> But with regard to the civil liability the authorities are conflicting.<sup>12</sup>

**IX. TREATIES OF CESSION — In General.** — A treaty of cession is a deed or grant whereby one power transfers to another such right in territory as the

1. Treaty of Guaranty. — Hall Int. L., § 113.

2. Treaties of Peace. — See generally Wheat. Int. L., § 538 *et seq.*; Hall Int. L., § 579 *et seq.*; Vattel Law of Nations, bk. 4, c. 2, § 9 *et seq.* See also the title WAR.

The Terms "Armistice," "Truce," and "Suspension of Arms" are applied to agreements for cessation of hostilities for a limited duration or extent. Hall Int. L., § 192.

3. Taking Effect of Treaty. — See *supra*, this title, *When Treaties Take Effect — As to Contracting Parties*; Vattel Law of Nations, bk. 4, c. 3, § 24; Hall Int. L., § 199; 1 Kent Com. 169.

4. 1 Op. Atty.-Gen. 701.

5. When Treaty Takes Effect as to Individuals. — See Hall Int. L., § 202; Vattel Law of Nations, bk. 4, c. 3, § 24; 1 Kent Com. 170.

6. Effect of Treaty. — *Orr v. Hodgson*, 4 Wheat. (U. S.) 453.

7. The Schooner *Sophie*, 6 C. Rob. 138.

8. *Ware v. Hylton*, 3 Dall. (U. S.) 199; Hall Int. L., § 201.

9. Effect as to Allies. — Vattel Law of Nations, bk. 4, c. 2, § 15; 1 Kent Com. 167.

10. Hall Int. L., § 202; Woolsey Int. L., § 162; 1 Kent Com. 171.

11. Criminal Liability. — See Grot., bk. 3, c. 21, § 5; 1 Kent Com. 170; Hall Int. L., § 202.

12. Civil Liability. — See the authorities cited in the preceding note.

In the case of *The Mentor*, 1 C. Rob. 151, where a vessel was taken by British ships in 1783, after the cessation of hostilities but before that fact had come to the knowledge of either of the parties, an American owner was denied redress in the British admiralty against the immediate author of the injury. And subsequently, relief was also denied against the admiral in charge of the fleet.

grantor owns and can convey.<sup>1</sup> Such a treaty is sometimes entered into for the purpose of effecting peace.<sup>2</sup>

**Effect upon National Character.** — The national character of territory ceded by a treaty of peace continues as it was under the ceding power until the actual transfer has taken place.<sup>3</sup>

**Effect upon Laws.** — As a general rule the laws and customs in force at the time of the transfer continue in force until changed by the power to whom the property is transferred.<sup>4</sup> Where, however, the ceded territory lies within the acknowledged limits of the United States or is acquired by the establishment of a disputed line, the sovereignty of the state or territory within which it lies and of the United States immediately attach, producing a complete subjection to all of the laws and institutions of the two governments, local and general, unless otherwise stipulated by treaty.<sup>5</sup>

**Manner in Which Effected.** — A change of law may be effected by a mere declaration of the sovereign power, without formal act of the legislature;<sup>6</sup> or the sovereign power may issue a proclamation commissioning the governor appointed for the territory to call an assembly of the people for the purpose of enacting laws for the government of the territory. Where this is done, the sovereign is precluded from exercising the legislative power.<sup>7</sup>

**Effect upon Property Rights.** — This topic is considered under another title in this work.<sup>8</sup>

**X. VALIDITY — 1. In General.** — A treaty to be valid must be made in pursuance of the authority and in the scope of the powers conferred by the Constitution upon the treaty-making department of the government.<sup>9</sup> When it transcends these limits and attempts to regulate matters over which it cannot exercise any control, it is void, as where it is sought to regulate by treaty matters which are subject entirely to the control of the several states,<sup>10</sup> or where it is sought to deprive Congress of any part of the legislative power conferred on it by the people.<sup>11</sup> This does not, however, prevent the political department from entering into a stipulation that Congress will or will not exercise its legislative power in some particular manner on some particular subject.<sup>12</sup>

**2. Power of Court to Determine — a. IN GENERAL.** — The courts have the power of passing on the validity of a treaty in certain aspects. They can determine whether a treaty has been made by the persons and with the formalities prescribed by the Constitution; whether or not the provisions contained in the treaty are consonant with the provisions of the Constitution,<sup>13</sup> and whether or not it has been annulled or abrogated by those to whom that power has been committed by the Constitution. In other words, the courts

1. **Treaty of Cession.** — *Mitchel v. U. S.*, 9 Pet. (U. S.) 711.

2. 1 Kent Com. 166; Vattel Law of Nations, bk. 4, c. 2, § 11.

3. **National Character.** — See 1 Kent Com. 178. See also *The Fama*, 5 C. Rob. 106; *Goetze v. U. S.*, 103 Fed. Rep. 72.

4. **Change of Laws.** — *Goetze v. U. S.*, 103 Fed. Rep. 72; *American Ins. Co. v. 356 Bales Cotton*, 1 Pet. (U. S.) 511; *Strother v. Lucas*, 12 Pet. (U. S.) 410; *Mitchel v. U. S.*, 9 Pet. (U. S.) 734; *Campbell v. Hall*, 1 Cowp. 209, Loft. 655; *Blankard v. Galdy*, 2 Salk. 411; *Wilcox v. Wilcox*, 2 L. C. Jur. 1.

As to the Constitutional Rights of the Inhabitants of Ceded Territory and the powers of Congress in regard thereto, see *Downes v. Bidwell*, 182 U. S. 244.

5. *American Ins. Co. v. 356 Bales Cotton*, 1 Pet. (U. S.) 515, note.

6. **How Effected.** — *Jephson v. Riera*, 3 Knapp 151; *Canal Appraisers v. People*, 17 Wend. (N. Y.) 587; *Mitchel v. U. S.*, 9 Pet. (U. S.) 748. See also *Wilcox v. Wilcox*, 2 L. C. Jur. 1.

7. *Campbell v. Hall*, 1 Cowp. 204.

8. See the title TREATIES OF CESSION, post.

9. *License Cases*, 5 How. (U. S.) 613, opinion of Daniel, J.; *People v. Naglee*, 1 Cal. 232, 52 Am. Dec. 312.

10. *People v. Naglee*, 1 Cal. 232, 52 Am. Dec. 312; *Siemssen v. Bofer*, 6 Cal. 250; *Passenger Cases*, 7 How. (U. S.) 466, dissenting opinion of Taney, C. J.

11. *Scott v. Sandford*, 19 How. (U. S.) 629; *Siemssen v. Bofer*, 6 Cal. 250.

12. *Scott v. Sandford*, 19 How. (U. S.) 629. Compare *Siemssen v. Bofer*, 6 Cal. 250.

13. *Doe v. Braden*, 16 How. (U. S.) 635; *The Cherokee Tobacco*, 11 Wall. (U. S.) 616.

have power to pass upon the constitutionality of treaties. The validity of a treaty in such aspects has been termed its "necessary" validity, as contradistinguished from "voluntary" validity, or that validity which a treaty, after it has become voidable by reason of violations on the part of one power, continues to retain by the silent volition and acquiescence of the other.<sup>1</sup> When the conflict between the treaty and the Constitution is unavoidable, courts must declare the treaty, so far as concerns its effect as a municipal law, null and void.<sup>2</sup> The judicial department has also jurisdiction of questions which relate to property rights merely, and also of actions for the violation of treaty rights by a state, in cases proper for judicial investigation.<sup>3</sup>

*b. LIMITATIONS UPON POWER.* — It is not within the province of the judiciary to decide whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory upon the other; whether the acts of the foreign sovereign have justified the political department in withholding the execution of, or acting in contravention of, a promise contained in the treaty. These questions are for the consideration of the executive and legislative departments.<sup>4</sup> So, too, it is for the political department to determine whether a treaty went into effect from its date, or from its ratification by the assent of the Senate, or at another time, and whether or not the obligations assumed under the treaty will be fulfilled. Upon these matters the judiciary can only pass incidentally or indirectly. Nor can it direct or contravene the action of the executive department in respect of the *casus fœderis*, however manifest.<sup>5</sup>

*Power of Agent to Make.* — The judicial department cannot inquire whether the agent entering into a treaty on the behalf of a foreign government is empowered by the constitution and laws of that government to enter into such an engagement. The competency of the agent is addressed to the political department solely, and its decision is conclusive upon any inquiry into the matter.<sup>6</sup>

**3. Presumption of Validity.** — When a treaty has been executed and ratified by the Senate and proclaimed by the President, the courts will presume that it was lawfully made.<sup>7</sup>

**XI. EXTINGUISHMENT AND ABROGATION — 1. Extinguishment.** — As a general rule, treaties are extinguished in the same manner as are other contracts,<sup>8</sup> as by the satisfying of the objects for which they were entered into,<sup>9</sup> by the expiration of the time for which they were entered into, or by the mutual consent of the parties.<sup>10</sup> Thus where a later treaty between two powers covers the whole subject-matter of an earlier treaty between them, the earlier treaty will be considered as extinguished by implication.<sup>11</sup>

**2. Abrogation — a. IN GENERAL.** — A treaty which on its face is of indefinite duration and contains no clause providing for its termination may, in some instances, be annulled by one of the parties.<sup>12</sup> It may be violated by

1. *Jones v. Walker*, 2 Paine (U. S.) 696.

2. *Doe v. Braden*, 16 How. (U. S.) 635; *The Cherokee Tobacco*, 11 Wall. (U. S.) 616.

3. *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1, *dissenting opinion* of Thompson, J.

4. *Courts Cannot Pass on Validity.* — *Taylor v. Morton*, 2 Curt. (U. S.) 454; *Jones v. Walker*, 2 Paine (U. S.) 696; *Fellows v. Blacksmith*, 19 How. (U. S.) 366; *Doe v. Braden*, 16 How. (U. S.) 635; *Whitney v. Robertson*, 124 U. S. 190. See also *infra*, this title, *Extinguishment and Abrogation — Abrogation*.

5. *In re Metzger*, 5 N. Y. Leg. Obs. 83, 17 Fed. Cas. No. 9,511.

6. *Competency of Party.* — *Maiden v. Ingersoll*, 6 Mich. 376; *Doe v. Braden*, 16 How. (U.

S.) 635; *Fellows v. Blacksmith*, 19 How. (U. S.) 366.

7. *Validity Presumed.* — *Leighton v. U. S.*, 29 Ct. Cl. 288. See also *Fellows v. Blacksmith*, 19 How. (U. S.) 366.

8. *Extinguishment.* — See the title *CONTRACTS*, vol. 7, p. 145 *et seq.*

9. *Completion of Object.* — Hall Int. L., § 116 *et seq.*

10. *Expiration of Time.* — Hall Int. L., § 116 *et seq.*; Vattel Law of Nations, bk. 2, c. 13, § 198.

11. *Extinguishment by Later Treaty.* — *La Republique Francaise v. Schultz*, 57 Fed. Rep. 37.

12. *Abrogation.* — *Hooper v. U. S.*, 22 Ct. Cl.



proceedings on the part of one of the contracting parties which are inconsistent with its purpose or by an intentional breach of one or more of its articles.<sup>1</sup> Thus where one of the parties provokes the other to hostile acts or war, the latter may, at its option, abrogate the treaty obligations.<sup>2</sup> The same is true where the stipulations of the treaty are not carried out by one of the two parties,<sup>3</sup> either through disability or refusal to perform them.<sup>4</sup> Any failure of consideration of the contract embodied in the treaty releases the other party, though it is generally deemed that abrogation is only warranted when the breach is of an important provision of the treaty.<sup>5</sup> There may be such a change of circumstances as to justify the abrogation of a treaty.<sup>6</sup>

*b. WHO MAY ABROGATE* — (1) *In General*. — Treaties derive their obligation from the will of those having authority to conclude them, and can only be repealed or annulled by the will of those having the authority to repeal or annul them.<sup>7</sup>

(2) *In the United States*. — The power to abrogate or modify a treaty does not rest exclusively in the hands of the President and Senate of the United States, but Congress, in the exercise of the law-making and law-repealing power, may render a treaty of no effect.<sup>8</sup> Also, the power lodged in Congress of declaring war authorizes it to repeal all provisions of existing treaties with the hostile nation which are inconsistent with a state of war.<sup>9</sup>

*Methods*. — With regard to this power of Congress, it has been said that there are three modes in which Congress may practically, yet efficiently, annul or destroy the operative effect of any treaty with a foreign country. They may do it by giving the notice which the treaty contemplates shall be given before it shall be abrogated, when such a notice was provided for; or if the terms of the treaty require no such notice, they may do it by the formal abrogation of the treaty at once by express terms; and even where there is a provision for the notice, the government of the United States may disregard even that and declare that the treaty shall be from and after its date at an end, and meet the consequences of the responsibility for a breach of faith with a foreign government.<sup>10</sup>

*c. EFFECT OF WAR BETWEEN PARTIES*. — Treaties of peace and friendship are, of necessity, superseded by a declaration of war between the parties,<sup>11</sup> and this is also true of treaties in general.<sup>12</sup> There are, however, certain treaty stipulations which are real in their nature and which are accomplished by the act of ratification so that they cannot be dissolved by any subsequent event, not even by war between the sovereigns.<sup>13</sup> Such are stipulations which contemplate a permanent arrangement of territorial and other national rights. They are, at most, only suspended while the war lasts, and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.<sup>14</sup> Of this nature also is, it would seem, a provision removing the property disabilities of aliens.<sup>15</sup>

408. See also Vattel Law of Nations, bk. 2, c. 13.

1. **Breach of Provisions**. — See Hall Int. L., § 116 *et seq.*

2. **Hostile Acts**. — Leighton v. U. S., 29 Ct. Cl. 288. See also Vattel Law of Nations, bk. 2, c. 13, § 200.

3. **Failure to Perform Stipulation**. — Chinese Exclusion Case, 130 U. S. 581.

4. **Inability or Refusal**. — Davis v. Police Jury, 9 How. (U. S.) 280.

5. **What Breach Justifies Abrogation**. — Hooper v. U. S., 22 Ct. Cl. 408. See also Hall Int. L., § 116, p. 367 *et seq.*

6. Hooper v. U. S., 22 Ct. Cl. 408.

7. Jones v. Walker, 2 Paine (U. S.) 688.

8. See *supra*, this title, *Nature and Effect*.

9. Taylor v. Morton, 2 Curt. (U. S.) 454.

10. Ropes v. Clinch, 8 Blatchf. (U. S.) 304.

11. **Effect of War**. — Valk v. U. S., 29 Ct. Cl. 62.

12. Head Money Cases, 112 U. S. 580.

13. **Real Treaties**. — Chirac v. Chirac, 2 Wheat. (U. S.) 259; Fox v. Southack, 12 Mass. 143.

14. Society, etc., v. New Haven, 8 Wheat. (U. S.) 464. See also Woolsey Int. L., § 160.

15. **Rights of Aliens**. — Sutton v. Sutton, 1 Russ. & M. 663; Chirac v. Chirac, 2 Wheat. (U. S.) 259; Fox v. Southack, 12 Mass. 143.

**The Text Writers** do not agree as to the effect of a declaration of war. A statement of the

**Self-defense Not a Breach of Treaty.** — The right of self-defense is a natural right which cannot be renounced, and a justifiable act of self-defense does not constitute a breach of a treaty of peace.<sup>1</sup>

**d. EFFECT OF CHANGE OF GOVERNMENT.** — The formation of an empire in which is vested the treaty-making power does not abrogate a treaty previously entered into with one of the constituent parts of the empire, where treaties so made were not annulled by the instrument under which the empire was formed.<sup>2</sup> But if a later treaty covering the same subject-matter is entered into with the treaty-making power of the empire, the treaty with the constituent state is abrogated.<sup>3</sup> A treaty with an empire recognizing and continuing in force treaties entered into with the constituent parts of the empire before its formation does not give rise to any treaty rights on the part of citizens of a constituent part with which no previous treaty had been made.<sup>4</sup>

**e. EFFECT OF ABROGATION.** — Where the provisions of the treaty are violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture.<sup>5</sup>

**Effect on Vested Rights.** — Where a treaty is abrogated, whatever of a permanent character has been executed or vested under it is not affected, but the abrogation operates prospectively only. The rights which become so vested that the expiration or abrogation of the treaty will not destroy or impair them are such as are connected with and lie in property capable of sale and transfer or other disposition, not such as are personal and untransferable in their character.<sup>6</sup> So where real estate has been purchased or secured under a treaty, the right to the estate is not extinguished by the abrogation of the treaty.<sup>7</sup>

**Award under Treaty Stipulation.** — An award made under a stipulation in a treaty submitting a question to arbitration is to be construed as a treaty which has become final, and, as such, is a part of the supreme law of the land and is of the same force in the courts as an act of Congress.<sup>8</sup>

**f. ENFORCEMENT OF OBLIGATION.** — The treaty depends for its enforcement on the interest and honor of the governments which are parties to it. If these fail, its infractions become the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress.<sup>9</sup> Such party may do this either by presenting its complaint to the executive head of the government or by taking such other measures as it deems essential for the protection of its interests.<sup>10</sup>

**Power of Court.** — When the political department of the government declares a treaty to be abrogated, annulled, or modified, the judicial department cannot assert the continued obligation of the treaty.<sup>11</sup> Nor can the latter department pass upon the validity of a legislative release from treaty stipulations. It cannot determine whether the government is justified in disregarding its engagements with another nation, or inquire into the wisdom of its act in so

views of the various authorities will be found in Hall Int. L., § 125.

1. **Self-defense.** — *Leighton v. U. S.*, 29 Ct. Cl. 288.

2. **Change of Government.** — *In re Thomas*, 12 Blatchf. (U. S.) 370. See also Vattel Law of Nations, bk. 2, c. 12, § 197; Hall Int. L., § 27.

3. *In re Strobel*, (Supm. Ct. App. Div.) 39 N. Y. Supp. 169.

4. *Wunderle v. Wunderle*, 144 Ill. 40.

5. **Treaty Voidable.** — *In re Thomas*, 12 Blatchf. (U. S.) 370; *Hooper v. U. S.*, 22 Ct. Cl. 408; *Cushing v. U. S.*, 22 Ct. Cl. 1;

*Leighton v. U. S.*, 29 Ct. Cl. 288. See also Chinese Exclusion Case, 130 U. S. 581.

6. **Vested Rights Not Affected.** — Chinese Exclusion Case, 130 U. S. 581.

7. **Title to Real Property.** — *Society, etc., v. New Haven*, 8 Wheat. (U. S.) 464; Chinese Exclusion Case, 130 U. S. 581.

8. **Effect of Award under Treaty.** — *The La Nina*, (C. C. A.) 75 Fed. Rep. 513.

9. **Enforcement.** — *Head Money Cases*, 112 U. S. 580.

10. *Whitney v. Robertson*, 124 U. S. 190.

11. *The Clinton Bridge, Woolw.* (U. S.) 155.

doing.<sup>1</sup> So the courts cannot declare a statute void merely on the ground that it violates treaty obligations. Questions of this class are international questions, and are to be settled between the foreign nations interested in the treaty and the political department of the government.<sup>2</sup>

**As Between the Contracting Parties,** the courts have no jurisdiction of questions concerning the violation of treaties.<sup>3</sup> While an abuse by one of the parties to the treaty of rights obtained thereunder or a want of good faith in acting under the treaty may furnish a cause of complaint to the other party, such matters do not form a proper subject for the cognizance of the judicial department.<sup>4</sup> Thus the courts cannot determine whether a treaty with a foreign sovereign has been violated by him; whether the consideration for a particular stipulation in a treaty has been voluntarily withdrawn by one party so that it is no longer obligatory on the other; whether the views and acts of the foreign sovereign have given just occasion to withhold the execution of a promise contained in a treaty or to act in direct contravention of the promise.<sup>5</sup> The remedy for all infractions must be sought through reclamations or other means and not through the medium of the courts.<sup>6</sup>

**Repudiation by Individual.** — A subject of the government which breaks the treaty cannot stand in the courts as the next friend of the other party to the treaty, and will not be allowed to repudiate the act of his government in abrogating the treaty.<sup>7</sup>

**XII. CONSTRUCTION — 1. In General.** — It is not the province of courts of law to expound treaties with respect to the rights and obligations of the sovereign parties thereto.<sup>8</sup> The political department alone must determine what construction the contract embodied in the treaty shall receive and what cases come within its provisions,<sup>9</sup> and when this department asserts as to the other party to the treaty powers and rights under that instrument the judiciary cannot deny the construction.<sup>10</sup>

**Where Rights of Individuals Are Involved.** — But whenever the provisions of a treaty prescribe a rule by which the rights of a private citizen may be determined, and when such rights are of a nature to be enforced in a court of justice, the court resorts to the treaty for a rule of decision as it would to a legislative enactment.<sup>11</sup> In such event, it is frequently necessary for the courts to ascertain by construction the meaning intended to be conveyed by the terms used<sup>12</sup> and the application of the stipulations of the treaty to particular cases.<sup>13</sup>

**2. Rules of Construction — a. GENERAL RULE.** — In construing the language of treaties the courts will adopt the same general rules which are applicable in the construction of statutes, contracts, and written instruments generally, in order to carry out the purpose and intention of the makers.<sup>14</sup>

1. Chinese Exclusion Case, 130 U. S. 581. See also *Hooper v. U. S.*, 22 Ct. Cl. 408.

2. Head Money Cases, 112 U. S. 580; *The Cherokee Tobacco*, 11 Wall. (U. S.) 616; *In re Ah Lung*, 18 Fed. Rep. 28; *The Clinton Bridge*, Woolw. (U. S.) 155; *Cushing v. U. S.*, 22 Ct. Cl. 11. See also *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1, dissenting opinion of Thompson, J.

3. **Judicial Cognizance.** — *Nabob of Carnatic v. East India Co.*, 2 Ves. Jr. 56; *Taylor v. Morton*, 2 Curt. (U. S.) 454; *Whitney v. Robertson*, 124 U. S. 195; *Botiller v. Dominguez*, 130 U. S. 238; *The Clinton Bridge*, Woolw. (U. S.) 155.

4. U. S. Caldwell, 8 Blatchf. (U. S.) 131; *U. S. v. Lawrence*, 13 Blatchf. (U. S.) 295; *Head Money Cases*, 112 U. S. 580. Compare *State v. Vanderpool*, 39 Ohio St. 273, 48 Am. Rep. 431.

5. *Taylor v. Morton*, 2 Curt. (U. S.) 454.

6. *Head Money Cases*, 112 U. S. 580; *Whitney v. Robertson*, 124 U. S. 190.

7. **Individual Cannot Repudiate Abrogation.** — *Baker v. Newland*, 25 Kan. 25.

8. **Courts Cannot Construe Rights of Parties.** — *Elphinstone v. Bedreechund*, 1 Knapp 316; *Hill v. Reardon*, 2 Sim. & St. 431; *U. S. v. Reynes*, 9 How. (U. S.) 127; *Maiden v. Ingersoll*, 6 Mich. 373. See also *Lindo v. Rodney*, 2 Doug. 613, note.

9. **Construction of Political Department Controls.** — *Taylor v. Morton*, 2 Curt. (U. S.) 454.

10. *Garcia v. Lee*, 12 Pet. (U. S.) 519; *Foster v. Neilson*, 2 Pet. (U. S.) 254.

11. *Head Money Cases*, 112 U. S. 580.

12. *Wilson v. Wall*, 6 Wall. (U. S.) 83; *U. S. v. Rauscher*, 119 U. S. 407.

13. *Scharpf v. Schmidt*, 172 Ill. 255.

14. **Treaty Construed as Other Instruments.** — *Marryat v. Wilson*, 1 B. & P. 436; *Tucker v.*



**b. INTENTION OF PARTIES.** — In construing treaties, the court is guided by the intention of the parties in determining any questions in reference to them. If the intention is clear and free from doubt, the necessity for construction does not arise, the intention governing the court.<sup>1</sup>

**Intention Gathered from Whole Instrument.** — The intention of the framers of the treaty must be gathered from the whole instrument<sup>2</sup> and from the words made use of by them to express their intention, or from probable and rational conjectures. If the words express the meaning clearly, there should be no other means of interpretation employed; but if the words are obscure, ambiguous, or imperfect, the interpretation should be gathered from probable or rational conjectures. Where the interpretation is literal and in accordance with the words, that sense must be followed, both in words and construction, which is agreeable to common use.<sup>3</sup>

**Preliminary Correspondence.** — When the language used clearly declares a fact, or grants, defines, or confirms a right, it must be effectual, even if found to be inconsistent with the purpose disclosed by the preliminary correspondence.<sup>4</sup>

**Treaty Cannot Be Amended by Construction.** — The court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. It cannot dispense with any of the conditions or requirements of the treaty, or take away any qualification or integral part upon any notion of equity or general convenience or substantial justice. The terms which the parties have fixed, the forms which they have prescribed, and the circumstances under which they are to have operation rest in the discretion of the contracting parties, and whether they belong to the essence or the modal parts of the treaty equally give the rule to judicial tribunals. The same powers which have contracted are alone competent to change or dispense with any formality.<sup>5</sup> Thus a treaty providing for the payment of depredations committed by citizens of a power cannot be extended to include acts of war by that power.<sup>6</sup> So, too, a treaty stipulation that "free ships shall make free goods," will not be construed to imply the converse proposition, even though the two propositions constitute a well-recognized law of nations, as it was in the power of the parties expressly to stipulate for

Alexandroff, 183 U. S. 424; U. S. v. Payne, 8 Fed. Rep. 892; *The Amiable Isabella*, 6 Wheat. (U. S.) 1; U. S. v. Percheman, 7 Pet. (U. S.) 83; *North German Lloyd Steam Ship Co. v. Hedden*, 43 Fed. Rep. 20; *In re Metzger*, 5 N. Y. Leg. Obs. 83, 17 Fed. Cas. No. 9,511; *Adams v. Akerlund*, 168 Ill. 632; *Com. v. Hawes*, 13 Bush (Ky.) 697, 26 Am. Rep. 242; *Anderson v. Lewis*, *Freem.* (Miss.) 178; *Adrianse v. Lagrave*, 59 N. Y. 110, 17 Am. Rep. 317; *Matter of Lobrasciano*, (Surrogate Ct.) 38 Misc. (N. Y.) 415.

**Maxims for the Interpretation of Treaties.** — Vattel states, as general maxims to be observed in the interpretation of treaties, the following: It is not allowable to interpret what has no need of interpretation; if he who could and ought to have explained himself clearly and fully has not done it, it is the worse for him; he cannot be allowed to introduce subsequent restrictions which he has not expressed; neither the one nor the other of the parties interested in the contract has a right to interpret the deed or treaty according to his own fancy; on every occasion when a person could and ought to have made known his intention, we assume for true against him what he has sufficiently declared; every deed, and every treaty, must be interpreted by certain fixed rules calculated to determine its meaning, as naturally

understood by the parties concerned at the time when the deed was drawn up and accepted. Vattel *Law of Nations*, bk. 2, c. 17.

**Maxim "Expressio Unius Est Exclusio Alterius"** Applies in Case of Treaties. — *Tucker v. Alexandroff*, 183 U. S. 424.

**1. Intention Controlling.** — *The Amiable Isabella*, 6 Wheat. (U. S.) 1; *Society, etc., v. New Haven*, 8 Wheat. (U. S.) 464; U. S. v. *Texas*, 162 U. S. 1; *Ex p. McCabe*, 46 Fed. Rep. 363; *In re Metzger*, 5 N. Y. Leg. Obs. 83, 17 Fed. Cas. No. 9,511; *Jones v. Walker*, 2 Paine (U. S.) 688; U. S. v. *Payne*, 8 Fed. Rep. 883; *Howard v. Ingersoll*, 17 Ala. 780. See also *Marryat v. Wilson*, 1 B. & P. 436.

**2. Intention Gathered from Treaty.** — U. S. v. *Texas*, 162 U. S. 1.

**3. Ware v. Hylton**, 3 Dall. (U. S.) 199. See also *Little v. Watson*, 32 Me. 214.

**4. Preliminary Correspondence.** — *Little v. Watson*, 32 Me. 214.

**5. Court Cannot Amend Treaty.** — *The Amiable Isabella*, 6 Wheat. (U. S.) 1; *Lattimer v. Poteet*, 14 Pet. (U. S.) 4; *Society, etc., v. New Haven*, 8 Wheat. (U. S.) 464; *Strother v. Lucas*, 12 Pet. (U. S.) 410; *Chew Heong v. U. S.*, 112 U. S. 536; *Tucker v. Alexandroff*, 183 U. S. 424.

**6. Illustrations.** — *Leighton v. U. S.*, 29 Ct. Cl. 288.

either.<sup>1</sup> Where, however, the treaty necessarily implies a provision,<sup>2</sup> or where a provision can be fairly implied from the language and general scope of the treaty, considered in connection with the purposes which the contracting parties had in view and the nature of the subject about which they were treating, the provision is entitled to a like respect and observance as if it had been expressed in terms.<sup>3</sup>

**c. CONSTRUCTION ADOPTED BY PARTIES.** — The construction adopted by the parties to the treaty should, as a general rule, be followed, unless the terms of the instrument compel a different construction.<sup>4</sup> Where the mutual construction contravenes the language of the treaty, and the rights of third parties have intervened, the language will be taken as governing.<sup>5</sup>

**Construction Adopted by Political Department.** — That construction which has been placed by the political department upon the terms of the treaty, though not binding upon the judiciary, should be admitted when not inconsistent with their obvious intent.<sup>6</sup>

**Additions and Alterations.** — Where one of the contracting parties annexes to a treaty, at the time of ratifying it, a written declaration explaining ambiguous language, or adding new and distinct stipulations, and the treaty with the declaration attached is afterwards ratified by the other party and ratifications exchanged, the declaration annexed is a part of the treaty, and as binding as if inserted in the body of the instrument.<sup>7</sup>

**A Map Referred to in the Treaty** as giving boundaries is to be given the same effect as if it had been expressly made a part of the treaty.<sup>8</sup>

**d. LIBERAL CONSTRUCTION PREFERRED.** — As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is not only to avoid war and secure a lasting peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in the broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as can be done without the sacrifice of individual rights or the principles of personal liberty which lie at the foundation of jurisprudence.<sup>9</sup> Therefore, where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter construction is to be preferred.<sup>10</sup>

**Limitation of Rule.** — This rule of broad and liberal construction will not be so extended as to deprive a citizen of the rights accorded to him by the local laws,<sup>11</sup> nor so far as to give to aliens greater advantages or privileges than are accorded to citizens.<sup>12</sup> Thus, where a treaty stipulation provides that the citizens of one contracting power shall be entitled to the same protection in certain matters as native citizens of the other, the provision will be construed as extending to the citizens of the former the same protection accorded to

1. *The Nereide*, 9 Cranch (U. S.) 419.

2. **Implied Provisions.** — *Adriance v. Lagrave*, 59 N. Y. 110, 17 Am. Rep. 317.

3. *U. S. v. Watts*, 14 Fed. Rep. 130; *Com. v. Hawes*, 13 Bush (Ky.) 704, 26 Am. Rep. 242.

4. **Construction of Parties Adopted.** — *Patterson v. Jenks*, 2 Pet. (U. S.) 216.

5. *U. S. v. Payne*, 8 Fed. Rep. 892.

6. *Foster v. Neilson*, 2 Pet. (U. S.) 253; *Castro v. De Uriarte*, 16 Fed. Rep. 93; *U. S. v. Watts*, 14 Fed. Rep. 130; *Ex p. McCabe*, 46 Fed. Rep. 363; *Leighton v. U. S.*, 29 Ct. Cl. 288; *State v. Vanderpool*, 39 Ohio St. 273, 48 Am. Rep. 431.

7. **Additions and Alterations.** — *Doe v. Braden*, 16 How. (U. S.) 635.

8. **Map Included by Reference.** — *U. S. v. Texas*, 162 U. S. 1.

9. **Liberal Construction Preferred.** — *Tucker v. Alexandroff*, 183 U. S. 424.

10. *Shanks v. Dupont*, 3 Pet. (U. S.) 242; *Hauenstein v. Lynham*, 100 U. S. 483; *Geofroy v. Riggs*, 133 U. S. 258; *Adams v. Akerlund*, 168 Ill. 632; *Schultze v. Schultze*, 144 Ill. 290, 36 Am. St. Rep. 432; *Scharpf v. Schmidt*, 172 Ill. 255; *Doehrel v. Hillmer*, 102 Iowa 169; *Matter of Fattosini*, (Surrogate Ct.) 33 Misc. (N. Y.) 18; *Matter of Lobrasciano*, (Surrogate Ct.) 38 Misc. (N. Y.) 415. See also *Marryat v. Wilson*, 1 B. & P. 436.

11. **Limitations to Liberal Construction.** — *Matter of Fattosini*, (Surrogate Ct.) 33 Misc. (N. Y.) 18.

12. *In re Strobel*, (Supm. Ct. App. Div.) 39 N. Y. Supp. 169.

native citizens of the latter, and not as giving extraterritorial effect to the laws of the former country.<sup>1</sup>

*e.* CONSTRUCTION WHICH PLACES PARTIES ON EQUALITY. — That construction which tends to put the parties in a position of equality should be preferred.<sup>2</sup> And the interpretation which is favorable to the inferior party should be adopted.<sup>3</sup> Where the treaty imposes upon one party liabilities not imposed by international law, the rights of the other parties under such stipulations will be measured by the terms of the treaty.<sup>4</sup>

*f.* CONSTRUED AS INSTRUMENTS *IN PARI MATERIA*. — Treaties may be construed on the principle of instruments *in pari materia*. The courts may look to the provisions of other treaties on the same subject, which are free from doubt, or which, having been construed, will aid in determining the true meaning of the doubtful portion.<sup>5</sup> And it is a proper application of this principle to look into the legislation of the contracting parties upon the subject, and also to see what view the executive branches of the government have taken, as the courts will follow their interpretation.<sup>6</sup> This does not, however, authorize the consideration of state statutes for such purpose.<sup>7</sup>

*g.* NATURE OF MATTERS TO WHICH TREATY RELATES MAY BE REGARDED. — If the terms or expressions used by the contracting parties are vague or indefinite, or if they are susceptible of a more or less extended signification, the court must then look to the nature of the matters to which the terms relate, and presume the intention of the parties to be in accordance with reason.<sup>8</sup>

*h.* CONTEMPORANEOUS CIRCUMSTANCES CONSIDERED. — In construing treaties the courts may consider the situation of the parties and other circumstances existing at the time the treaty was entered into, in order to ascertain the intention of the parties.<sup>9</sup>

*i.* CONSTRUCTION SHOULD ACCORD WITH INTERNATIONAL LAW. — The construction placed upon treaties should be in accordance with the tendency of, and in conformity to, international law.<sup>10</sup>

*j.* EFFECT SHOULD BE GIVEN TO ALL PROVISIONS. — If possible, the construction placed upon the treaty must be such as to give full force and effect to all of its parts.<sup>11</sup> The construction should be such as to give the provisions of the treaty a practical effect, and should not render them ineffectual<sup>12</sup> or lead to absurd conclusions,<sup>13</sup> but should be reasonable<sup>14</sup> and sensible<sup>15</sup> and such as to accomplish the end had in view in the making of the

1. *J. & P. Baltz Brewing Co. v. Kaiserbrauerei*, (C. C. A.) 74 Fed. Rep. 222.

2. *Jones v. Walker*, 2 Paine (U. S.) 688, according to the maxim that "everything that tends to the common advantage in conventions, or has a tendency to place the contracting powers on an equality, is favorable. And in such cases it is safest and most consistent with equity to extend the signification of the terms than to limit them."

3. *Worcester v. Georgia*, 6 Pet. (U. S.) 582; *Leighton v. U. S.*, 29 Ct. Cl. 288; *Choctaw Preserves*, 2 Op. Atty.-Gen. 465.

4. *Love v. U. S.*, 29 Ct. Cl. 332.

5. *Matter of Lobrasciano*, (Surrogate Ct.) 38 Misc. (N. Y.) 415; *Shanks v. Dupont*, 3 Pet. (U. S.) 255. In this case, the question as to who was to be held a "British subject," under the treaty of 1794, was explained by reference to the meaning of the term in the treaty of 1783.

6. *Matter of Lobrasciano*, (Surrogate Ct.) 38 Misc. (N. Y.) 415; *State v. Vanderpool*, 39 Ohio St. 273, 48 Am. Rep. 431.

7. *State Statutes Not Considered*. — *Matter of Lobrasciano*, (Surrogate Ct.) 38 Misc. (N. Y.) 415.

8. *Nature of Matters Regarded*. — *Howard v. Ingersoll*, 17 Ala. 780. See also *U. S. v. Payne*, 8 Fed. Rep. 892.

9. *Circumstances May Be Considered*. — *Strother v. Lucas*, 12 Pet. (U. S.) 438; *U. S. v. Payne*, 8 Fed. Rep. 892; *U. S. v. Clarke*, 8 Pet. (U. S.) 462.

10. *Construction Should Conform to International Law*. — *Matter of Lobrasciano*, (Surrogate Ct.) 38 Misc. (N. Y.) 415.

11. *Effect Must Be Given to All of Provisions*. — *Geofroy v. Riggs*, 133 U. S. 258; *Goetze v. U. S.*, 103 Fed. Rep. 72; *U. S. v. Payne*, 8 Fed. Rep. 883; *Little v. Watson*, 32 Me. 214.

12. *Provisions Should Not Be Made Ineffectual*. — *Scharpf v. Schmidt*, 172 Ill. 255.

13. *Little v. Watson*, 32 Me. 214.

14. *Reasonable Interpretation*. — *U. S. v. Texas*, 162 U. S. 1.

15. *Sensible Interpretation*. — *Geofroy v. Riggs*, 133 U. S. 258.



treaty.<sup>1</sup> The provisions of a treaty are to be construed as intended to be applied to *bona fide* transactions.<sup>2</sup>

*k.* CONSTRUCTION OF TERMS AND WORDS. — Terms and words used in treaties are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any special sense impressed upon them by local law, unless such restricted sense is clearly intended.<sup>3</sup> Nice distinctions must be avoided, and due regard must be had to translations from a foreign tongue.<sup>4</sup> Where the language to be interpreted is a translation, the local, technical definition and use of a word will not be insisted upon when it would violate the spirit of the instrument.<sup>5</sup> Also where the instrument is drawn in two languages, that construction which establishes a conformity between them will prevail.<sup>6</sup> The meaning of words not necessarily technical or professional will be sought for in the general scope of the instrument and the intention of the parties as directly expressed or shown by concomitant and subsequent acts.<sup>7</sup> When a meaning can be given to ambiguous expressions in the treaty which will serve the purpose of both parties, without injury to either, the courts will adopt that interpretation.<sup>8</sup>

**3. Effect of Construction.** — After the intent and meaning of the stipulations of a treaty have been settled by judicial interpretation, the construction becomes, in so far as contract rights under the treaty are concerned, as much a part of the treaty as the text itself.<sup>9</sup>

**1. Purpose of Treaty to Be Accomplished.** — Location of Choctaw Reserves, 3 Op. Atty.-Gen. 113.

**2.** *U. S. v. Amistad*, 15 Pet. (U. S.) 595.

**3. Words Used in Ordinary Sense.** — *Geofroy v. Riggs*, 133 U. S. 258; *U. S. v. D'Auterive*, 10 How. (U. S.) 609. See also *Com. v. Hawes*, 13 Bush (Ky.) 697, 26 Am. Rep. 242.

**"Grant" and "Concession."** — The terms "grant" and "concession" are to be construed in their broadest sense so as to comprehend all lawful acts which operate to transfer a right of property, perfect or imperfect. *Mitchel v. U. S.*, 9 Pet. (U. S.) 711; *Strother v. Lucas*, 12 Pet. (U. S.) 436. See also *U. S. v. Clarke*, 8 Pet. (U. S.) 466; *New Orleans v. U. S.*, 10 Pet. (U. S.) 718.

In the Term "Laws" is included custom and usage when once settled; though it may be comparatively of recent date, and not one of

those to the contrary of which the memory of man runneth not. *Strother v. Lucas*, 12 Pet. (U. S.) 436.

The Term "Subjects," used in the Spanish treaty of 1795, is to be construed as including all those who owe allegiance, even temporary, to Spain. *The Pizarro*, 2 Wheat. (U. S.) 227. But it does not include a foreign corporation. *Scottish Union, etc., Ins. Co. v. Herriott*, 109 Iowa 606, 77 Am. St. Rep. 548.

**4.** *Matter of Fattosini*, (Surrogate Ct.) 33 Misc. (N. Y.) 18.

**5. Translations.** — *Matter of Lobrasciano*, (Surrogate Ct.) 38 Misc. (N. Y.) 415.

**6.** *U. S. v. Percheman*, 7 Pet. (U. S.) 89.

**7. Words Not Technical.** — *In re Metzger*, 5 N. Y. Leg. Obs. 83, 17 Fed. Cas. No. 9,511.

**8.** *Howard v. Ingersoll*, 17 Ala. 780.

**9. Effect on Contracts.** — *Rixner's Succession*, 48 La. Ann. 552.

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### CROSS-REFERENCE.

*For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the title STATE AND PUBLIC LANDS, vol. 26, p. 197, of this work.*



**I. SCOPE OF TITLE.** — It is the purpose of this article to discuss the effect on private rights in landed property of transfers of territorial sovereignty from foreign nations to the United States and Texas by conquest and cession, and the recognition and perfection of such rights by statute and treaty stipulation.<sup>1</sup>

**II. EFFECT OF TRANSFER OF TERRITORIAL SOVEREIGNTY** — **1. In General** — In the case of cessions of territory, it is the usage of all civilized nations to protect the property of the inhabitants by stipulation; and the treaties whereby the United States has from time to time extended its territorial possessions have generally contained such contractual arrangements.<sup>2</sup> But irrespective of whether a transfer of territorial sovereignty is the result of conquest or voluntary cession,<sup>3</sup> or of any convention between the parties, it is the established doctrine, based on modern usages and the sense of justice prevalent among civilized nations, that it does not affect private rights of property; that, on the contrary, the preservation and protection of such rights constitute a duty of high and sacred obligation, subordinate only to the necessities of the new government and the ends sought to be accomplished by it. The relation of the inhabitants to the former government is dissolved by the transfer, but their relations to each other and their rights of property remain undisturbed. The new government merely takes the place of that which has passed away; becomes invested with all its rights and subject to its concomitant obligations to the inhabitants.<sup>4</sup> While it is undoubtedly within the

**1. The Power to Acquire Foreign Territory** is not expressly conferred upon the government of the United States by the Federal Constitution, but is necessarily implied from the exclusive powers of declaring war and negotiating treaties, vested in it by that instrument. *American Ins. Co. v. 356 Bales Cotton*, 1 Pet. (U. S.) 512, affirming 1 Pet. (U. S.) 516 note; *Nelson v. U. S.*, 30 Fed. Rep. 115, 29 Fed. Rep. 202; *Gardiner v. Miller*, 47 Cal. 570. See also *People v. Folsom*, 5 Cal. 374.

The war power and the treaty-making power each carries with it authority to acquire territory. Louisiana, Florida, and Alaska were acquired under the latter, and California under both. *Stewart v. Kahn*, 11 Wall. (U. S.) 493. See also the title **STATE AND PUBLIC LANDS**, vol. 26, p. 215.

*Texas.* — The public lands of Texas never belonged to the United States, but when the republic, which acquired them from Mexico by conquest, was succeeded by the state, the latter retained title to and control over them. See the title **STATE AND PUBLIC LANDS**, vol. 26, p. 216.

**Cessions by States of the Union to the United States.** — See the title **STATE AND PUBLIC LANDS**, vol. 26, p. 215 *et seq.*

**2.** See generally the cases cited in this subsection.

**An Article to Secure This Object**, so deservedly held sacred in the view of policy, as well as of justice and humanity, is always required and never refused. *Henderson v. Poindexter*, 12 Wheat. (U. S.) 530, approved *U. S. v. Arredondo*, 6 Pet. (U. S.) 692.

**3. Conquest and Cession.** — The results of conquest without actual cession are apparently the same as where there is an act of cession. See the title **INTERNATIONAL LAW**, vol. 16, p. 1130. See generally cases cited in the note following.

**4. Effect of Transfer of Territorial Sovereignty** — **In General** — *United States.* — *Soulard v. U. S.*, 4 Pet. (U. S.) 511; *U. S. v. Percheman*, 7

Pet. (U. S.) 52; *U. S. v. Clarke*, 8 Pet. (U. S.) 436, 16 Pet. (U. S.) 228; *Delassus v. U. S.*, 9 Pet. (U. S.) 118; *Chouteau v. U. S.*, 9 Pet. (U. S.) 138; *Mitchel v. U. S.*, 9 Pet. (U. S.) 711; *Smith v. U. S.*, 10 Pet. (U. S.) 327; *Strother v. Lucas*, 12 Pet. (U. S.) 410; *Leitensdorfer v. Webb*, 20 How. (U. S.) 176; *U. S. v. Moreno*, 1 Wall. (U. S.) 400; *U. S. v. Repentigny*, 5 Wall. (U. S.) 211; *Hornsby v. U. S.*, 10 Wall. (U. S.) 224; *Dent v. Emmeger*, 14 Wall. (U. S.) 308; *Langdeau v. Hanes*, 21 Wall. (U. S.) 521; *Newhall v. Sanger*, 92 U. S. 761; *Slidell v. Grandjean*, 111 U. S. 412; *Bryan v. Kennett*, 113 U. S. 179; *Kinkhead v. U. S.*, 150 U. S. 483; *U. S. v. Chaves*, 159 U. S. 452; *Ainsa v. U. S.*, 161 U. S. 208; *Palmer v. U. S.*, Hoffm. Land Cas. (U. S.) 249, 18 Fed. Cas. No. 10,697, affirmed 24 How. (U. S.) 125; *U. S. v. Flint*, 4 Sawy. (U. S.) 42, 25 Fed. Cas. No. 15,121, affirmed 98 U. S. 61; *Muse v. Arlington Hotel Co.*, 68 Fed. Rep. 637; *Coburn v. San Mateo County*, 75 Fed. Rep. 520; *Callsen v. Hope*, 75 Fed. Rep. 758.

*Alabama.* — *Eslava v. Doe*, 7 Ala. 543.

*California.* — *Woodworth v. Fulton*, 1 Cal. 295; *Reynolds v. West*, 1 Cal. 322; *Vandershice v. Hanks*, 3 Cal. 28, 47; *Ferris v. Coover*, 10 Cal. 589; *Teschemacher v. Thompson*, 18 Cal. 11, 79 Am. Dec. 151; *Leese v. Clark*, 20 Cal. 388; *Ward v. Mulford*, 32 Cal. 365; *Thompson v. Doaksum*, 68 Cal. 503.

*Michigan.* — *May v. Specht*, 1 Mich. 187.

*New Mexico.* — *U. S. v. Lucero*, 1 N. Mex. 422; *Catron v. Laughlin*, (N. Mex. 1903) 72 Pac. Rep. 26.

*Tennessee.* — *Wilson v. Smith*, 5 Yerg. (Tenn.) 379.

*Washington.* — *Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. Ter. 159.

**By the Law of Nations**, the inhabitants, citizens, or subjects of a conquered or ceded country, territory, or province retain all the rights of property which have not been taken

power of the new government, subject only to international complications, to destroy all previously acquired rights, to do so would most flagrantly outrage the moral sense of the age, and justly place the author beyond the pale of civilization.<sup>1</sup>

**2. Texas Conquest.** — The division of the Mexican republic by the successful revolution of Texas did not work any forfeiture of rights of property; nor did the constitutional provisions of the latter prohibiting persons from evading participation in the struggle for independence or giving assistance to the enemy under penalty of forfeiting their lands, and declaring that aliens should not hold land except by titles directly emanating from the new government, *proprio vigore* divest titles.<sup>2</sup> Aliens who become such by force of law, resulting from the division of an empire, an event beyond their control, stand on a different footing in equity, at least, from those who, being aliens, attempt, against the law, to acquire real estate in a foreign country.<sup>3</sup>

**III. ACQUISITION OF PROPERTY IN LAND — 1. What Constitutes Property.** — The word "property," as used in this connection and applied to land, comprehends all vested rights and titles, whether legal or equitable, inchoate, or perfect. It embraces rights which lie in contract, as well those which are executory as those which are executed.<sup>4</sup>

**2. Classes of Grants and Concessions.** — Grants or concessions under the

from them by the orders of the conqueror, or the laws of the sovereign who acquires it by cession, and remain under their former laws until they shall be changed. *Mitchel v. U. S.*, 9 Pet. (U. S.) 711.

**Louisiana Territory.** — By the treaty of cession with France, the Louisiana territory was ceded to the United States in full sovereignty, and in every respect, with all its rights and appurtenances, as it was held by the republic of France, and as it was received by that republic from Spain. *New Orleans v. U. S.*, 10 Pet. (U. S.) 663.

**Corporate Property.** — The doctrine is applicable to the property rights of municipalities and other artificial persons, as well as to those of natural persons. *Strother v. Lucas*, 12 Pet. (U. S.) 412; *Woodworth v. Fulton*, 1 Cal. 295. See *infra*, III, 6. *Pueblo or Town Lands.* Church property held by perfect title is within the provision of the treaty ceding Alaska, which protects "private individual property." *Callsen v. Hope*, 75 Fed. Rep. 758.

**As Spain Had Power to Make Grants**, founded on any consideration, and subject to any restrictions, a grant binding on that government is binding on the United States as her successor. *U. S. v. Clarke*, 16 Pet. (U. S.) 228.

**Title Passed by Cession.** — A cession of territory is never understood to be a cession of the property belonging to the inhabitants. The government cedes only that which belongs to it, and lands previously granted into private ownership are not its own to cede. *U. S. v. Percheman*, 7 Pet. (U. S.) 52; *Mitchell v. U. S.*, 9 Pet. (U. S.) 711, *cited* *Vandelslice v. Hanks*, 3 Cal. 28, 47.

1. *McMullen v. Hodge*, 5 Tex. 34. To similar effect, *Trimble v. Smithers*, 1 Tex. 790; *School Trustees v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1902) 67 S. W. Rep. 147.

2. **Texas.** — *Jones v. McMasters*, 20 How. (U. S.) 8; *Airhart v. Massieu*, 98 U. S. 491, *distinguishing* *McKinney v. Savego*, 18 How. (U. S.) 235; *Williams v. Conger*, 125 U. S.

397; *Trimble v. Smithers*, 1 Tex. 790; *Blair v. Odin*, 3 Tex. 288; *McMullen v. Hodge*, 5 Tex. 34; *Hardy v. De Leon*, 5 Tex. 211; *Paul v. Perez*, 7 Tex. 338; *Swift v. Herrera*, 9 Tex. 263; *Jones v. Montes*, 15 Tex. 351; *Kilpatrick v. Sisneros*, 23 Tex. 113; *Maxey v. O'Connor*, 23 Tex. 234; *Musquis v. Blake*, 24 Tex. 461; *Sabriego v. White*, 30 Tex. 576, 23 Tex. 243; *Ortiz v. De Benavides*, 61 Tex. 60.

3. **Alienage Resulting from Division of an Empire.** — *Airhart v. Massieu*, 98 U. S. 491.

4. **What Constitutes Property.** — *Soulard v. U. S.*, 4 Pet. (U. S.) 511; *Smith v. U. S.*, 10 Pet. (U. S.) 327; *Strother v. Lucas*, 12 Pet. (U. S.) 410; *Hornsby v. U. S.*, 10 Wall. (U. S.) 224; *Tameling v. U. S. Freehold, etc., Co.*, 93 U. S. 644; *Slidell v. Grandjean*, 111 U. S. 412; *Bryan v. Kennett*, 113 U. S. 179; *Ainsa v. U. S.*, 161 U. S. 208; *U. S. v. Hint*, 4 Sawy. (U. S.) 42, 25 Fed. Cas. No. 15,121; *U. S. v. Cleveland, etc., Cattle Co.*, 33 Fed. Rep. 323; *Es-lava v. Doe*, 7 Ala. 543; *Teschemacher v. Thompson*, 18 Cal. 11, 79 Am. Dec. 151; *Ward v. Mulford*, 32 Cal. 365; *Thompson v. Doaksum*, 68 Cal. 593; *Smith v. Reynolds*, 9 App. Cas. (D. C.) 261.

**A Right of Any Validity** before a cession of territory is equally valid afterwards. *U. S. v. Moreno*, 1 Wall. (U. S.) 400; *Morrison v. Whetstone*, 5 La. Ann. 636.

**The Word "Grant"** as applied to property in land acquired prior to a cession is frequently used in a broad sense to comprehend all lawful acts which operated to transfer a right of property, perfect or imperfect. *U. S. v. Clarke*, 8 Pet. (U. S.) 436, 9 Pet. (U. S.) 169; *Mitchell v. U. S.*, 9 Pet. (U. S.) 711; *Strother v. Lucas*, 12 Pet. (U. S.) 410; *Bryan v. Kennett*, 113 U. S. 179; *Doe v. Latimer*, 2 Fla. 71.

**Imperfect Titles** in the territory of Florida were equally binding on the United States government after the cession of territory to it by Spain as they had been on the Spanish government before. *U. S. v. Clarke*, 16 Pet. (U. S.) 228.

former governments were generally made in one of three ways: first, by specific boundaries, entitling the applicant to the entire tract described; second, by quantity, to be located by the public authorities at some designated place or within a larger tract described by what are called outboundaries, where the applicant is entitled to the quantity specified and no more; third, of a place or rancho by some particular name, where the applicant is entitled to the tract commonly known by that name, within designated outboundaries, or, if no boundaries are given, to its known extent and limits as shown by proof of possession, settlement, and cultivation, or other competent evidence.<sup>1</sup>

**3. Considerations upon Which Grants Were Based.**—The considerations upon which grants and concessions were generally based were three in number: first, military or other services already rendered and of value to the nation; second, future services, deemed important for the improvement of the province, such as the erection and operation of mills, factories, and like establishments, or the introduction into the country of a large body of settlers; third, grants and concessions in moderate quantities for individual occupation, cultivation, and improvement. By far the greater number were of the latter class.<sup>2</sup>

**4. By Whom Grants Made**—*a.* IN GENERAL.—The title to the public lands of the nation and the power to grant them were vested in the supreme government, and in *Mexico* the laws for the disposition of the same emanated from that source; but while full control was generally retained by it, the exercise of the granting power was usually delegated to officials connected with the immediate government of the province where the land was situated.<sup>3</sup> In *Spanish America* the power to grant the public lands was sometimes vested in the governors of the different provinces, sometimes in the intendants; and, with few exceptions, no absolute right in or title to land could be acquired from other officers or bodies during the period of Spanish ownership and control.<sup>4</sup> During the entire period of Mexican sovereignty, and especially

**1. Spanish and French Grants and Concessions.**—*Trenier v. Stewart*, 101 U. S. 797. See, generally, cases in this subdivision relating to such grants and concessions.

**Mexican Grants.**—*Higuera v. U. S.*, 5 Wall. (U. S.) 827; *Alviso v. U. S.*, 8 Wall. (U. S.) 337; *Hornsby v. U. S.*, 10 Wall. (U. S.) 224; *Williams v. U. S.*, 92 U. S. 457; *Hosmer v. Wallace*, 97 U. S. 575; *Maxwell Land Grant Case*, 121 U. S. 325; *Doolan v. Carr*, 125 U. S. 618; *U. S. v. McLaughlin*, 127 U. S. 428; *Ainsa v. U. S.*, 161 U. S. 208.

The grants of Mexico in California were sometimes of tracts with defined boundaries, and sometimes of places by name where the boundaries were known and could be readily identified; but more frequently they were of a specified quantity of land within boundaries embracing a larger amount, to be measured off and segregated by magistrates of the vicinage. *Hosmer v. Wallace*, 97 U. S. 575.

In the first and third kinds, the claim of the grantee extends to the full limits of the boundaries designated in the grant or defined by occupation; but in the second kind, a grant of quantity only, within a larger tract, the grant is really a float, to be located by the consent of the government before it can attach to any specific land, like the land warrants of the United States. *U. S. v. McLaughlin*, 127 U. S. 428.

**2. Considerations.**—*U. S. v. Wiggins*, 14 Pet. (U. S.) 334; *Newhall v. Sanger*, 92 U. S. 761;

*Doe v. Latimer*, 2 Fla. 71. See also *U. S. v. Clarke*, 8 Pet. (U. S.) 437.

**Past Services as a Consideration.**—*U. S. v. Clarke*, 9 Pet. (U. S.) 168; *U. S. v. Acosta*, 1 How. (U. S.) 24; *U. S. v. Vallejo*, 1 Black (U. S.) 541; *Fremont v. U. S.*, 17 How. (U. S.) 542; *McKee v. U. S.*, Hoffm. Land Cas. (U. S.) 173, 16 Fed. Cas. No. 8,850.

**3. Spain and Mexico.**—*U. S. v. Clarke*, 8 Pet. (U. S.) 436; *U. S. v. Knight*, 1 Black (U. S.) 227; *U. S. v. Castellero*, 2 Black (U. S.) 17; *Cessna v. U. S.*, 169 U. S. 165; *U. S. v. Coe*, 170 U. S. 681; *Mobile v. Eslava*, 9 Port. (Ala.) 577, 33 Am. Dec. 325; *Leese v. Clarke*, 3 Cal. 17; *Republic v. Thorn*, 3 Tex. 499; *Jones v. Muisbach*, 26 Tex. 235.

**Land Titles in California.**—California belonged to Spain by the rights of discovery and conquest. The government of that country established regulations for transfers of the public domain to individuals. When the sovereignty of Spain was displaced by the revolutionary action of Mexico, the new government established regulations upon the same subject. These two sovereignties are the spring heads of all the land titles in California existing at the time of the cession of that country to the United States by the treaty of Guadalupe Hidalgo. *U. S. v. Moreno*, 1 Wall. (U. S.) 400.

**4. Florida and Louisiana Territories.**—*U. S. v. Clarke*, 8 Pet. (U. S.) 436; *Delassus v. U. S.*, 9 Pet. (U. S.) 118; *U. S. v. Delespine*, 15 Pet. (U. S.) 319; *U. S. v. Moore*, 12 How. (U.



after the years 1835 and 1836 when the states were superseded by departments and the federal constitution overthrown, it is difficult, owing to the frequent political changes which took place and the revolutionary character of the governments, to determine with precision whether an alleged grant was made by officers empowered to act, and was consummated according to the forms of procedure then recognized as essential.<sup>1</sup> It was undoubtedly the duty of the Congress of the United States, as it was its purpose in the various statutory enactments in respect to Mexican titles, to recognize and establish every right and title which, before the cession, Mexico recognized as good and valid.<sup>2</sup> The country achieved its independence from Spain in 1821, and not long thereafter, in 1824, enacted a national law for the colonization of the public domain. By this law, together with the regulations of the supreme executive of 1828, and the state legislation enacted pursuant thereto,<sup>3</sup> the supreme government vested power to grant the public lands in the governors or political chiefs of the states comprising the Mexican confederacy. The state legislatures or departmental assemblies possessed no power to make valid grants in the absence of concurrence by the governor, their function being restricted to the approval or disapproval of those made; nor did the alcalde, prefects, or other local officers.<sup>4</sup>

S.) 209; *Doe v. Latimer*, 2 Fla. 71; *Murdock v. Gurley*, 5 Rob. (La.) 457, 467; *Choppin v. Michel*, 11 Rob. (La.) 233; *Roussin v. Parks*, 8 Mo. 528.

**Mexican Territory.** — *Ely v. U. S.*, 171 U. S. 220; *Paschal v. Perez*, 7 Tex. 348; *Jones v. Garza*, 11 Tex. 209; *Norton v. Mitchell*, 13 Tex. 47; *Edwards v. Roark*, 19 Tex. 184; *Jones v. Muisbach*, 26 Tex. 235; *Yancey v. Norris*, 27 Tex. 40; *Holliday v. Harvey*, 39 Tex. 670; *Sheldon v. Milmo*, 90 Tex. 1, *reversing* (Tex. Civ. App. 1894) 29 S. W. Rep. 832. By the royal order of August 22, 1776, the northern and northwestern provinces of Mexico were formed into a new and distinct organization, called the Internal Provinces of New Spain. This organization included California. It conferred ample powers, civil, military, and political, on the commandant general. The archives of the former government also show that as early as 1786 the governors of California had authority from the commandant general to make grants limiting the number of sitios which should be granted. *U. S. v. Peralta*, 19 How. (U. S.) 343.

**The Florida Treaty of Cession** expressly recognizes the fact that officials in the ceded territory had been vested with power to grant. *U. S. v. Clarke*, 8 Pet. (U. S.) 436; *Mitchel v. U. S.*, 9 Pet. (U. S.) 711; *Smith v. U. S.*, 10 Pet. (U. S.) 326.

**Exception to Rule.** — During a period when Spain was reorganized and governed by the Cortes, the power to grant was by decree of that body of January 4, 1813, vested in the tribunals known as the "Provincial Deputations," but it seems this decree was operative only until the restoration of the king in 1814, when it was annulled by royal orders, and the old order of things re-established. *U. S. v. Clarke*, 8 Pet. (U. S.) 436; *U. S. v. Delespine*, 15 Pet. (U. S.) 319; *Ely v. U. S.*, 171 U. S. 220. Compare *Sheldon v. Milmo*, 90 Tex. 1, *reversing* (Tex. Civ. App. 1894) 29 S. W. Rep. 832, on the extent to which the decree was annulled.

**1. Mexican Grants Generally — Grants After 1835 and 1836.** — *Crespin v. U. S.*, 168 U. S.

208; *U. S. v. Coe*, 170 U. S. 681, 174 U. S. 578; *Ely v. U. S.*, 171 U. S. 220; *Faxon v. U. S.*, 171 U. S. 244; *Camou v. U. S.*, 171 U. S. 277, 184 U. S. 572; *Whitney v. U. S.*, 181 U. S. 104; *U. S. v. Brown*, Hoffm. Op. (U. S.) 74. Hoffm. Dec. (U. S.) 16, 24 Fed. Cas. No. 14,664. See also *U. S. v. Castillero*, 2 Black (U. S.) 17.

**By a National Law of April 4, 1837**, all colonization laws were certainly modified, if not repealed. *U. S. v. Coe*, 170 U. S. 681, 174 U. S. 578.

**2. Ely v. U. S.**, 171 U. S. 220.

**3. Exercise of Power Prior to Enactment of Laws Vesting It in the Governors.** — *Cessna v. U. S.*, 169 U. S. 165; *Ely v. U. S.*, 171 U. S. 220; *U. S. v. Maish*, 171 U. S. 242; *Reloj Cattle Co. v. U. S.*, 184 U. S. 624; *U. S. v. Green*, 185 U. S. 256; *Pino v. Hatch*, 1 N. Mex. 125; *Republic v. Thorn*, 3 Tex. 499; *Jones v. Garza*, 11 Tex. 209; *Jones v. Muisbach*, 26 Tex. 235; *Holliday v. Harvey*, 39 Tex. 670; *Uhl v. Musquez*, 1 Tex. Unrep. Cas. 650.

**4. Granting Power under Colonization Law of 1824 and the Regulations of 1828, and State Legislation Pursuant Thereto.** — *U. S. v. Workman*, 1 Wall. (U. S.) 745; *Beard v. Federy*, 3 Wall. (U. S.) 478; *U. S. v. Vigil*, 13 Wall. (U. S.) 449; *Crespin v. U. S.*, 168 U. S. 208; *Hays v. U. S.*, 175 U. S. 248; *U. S. v. Pena*, 175 U. S. 500; *Chavez v. U. S.*, 175 U. S. 552; *U. S. v. Elder*, 177 U. S. 104; *Mora v. Foster*, 3 Sawy. (U. S.) 469, 17 Fed. Cas. No. 9,784, *affirmed* on other grounds 98 U. S. 425; *Owen v. Presidio Min. Co.*, (C. C. A.) 61 Fed. Rep. 6; *Vanderslice v. Hanks*, 3 Cal. 28, 47; *Ferris v. Coover*, 10 Cal. 580; *Ohm v. San Francisco*, 92 Cal. 437, *citing* *Hart v. Burnett*, 15 Cal. 530.

**In Texas** it has been held that the national colonization law vested the title to the public lands in the respective states, which might dispose of them as they saw fit without interference from the supreme government. *U. S. v. Coe*, 170 U. S. 681; *Goode v. McQueen*, 3 Tex. 211; *Republic v. Thorn*, 3 Tex. 499; *Smith v. Power*, 14 Tex. 146; *Chambers v. Fisk*, 22 Tex. 504; *Wilcox v. Chambers*, 26 Tex. 180.

*b.* EFFECT OF CONQUEST OR CESSION ON POWER TO GRANT. — The date of the signing of a treaty of cession and not the time when the possession is changed, or, in the case of a transfer of territory by conquest, the date of the actual subjugation of the country, marks the termination of the granting power of the old government, unless it is otherwise stipulated. So also a government, although in possession of territory, is without power to make valid grants of the land during a time when its title is disputed by another nation, if the claim of the latter is eventually established. Grants and concessions in contravention of these rules are, therefore, void and of no effect unless recognized and ratified by the succeeding government, and are not within general treaty stipulations and statutes for the protection of previously acquired rights of property. Where otherwise valid, however, they have been very generally confirmed by special statutory provisions.<sup>1</sup> On the other hand, officers of a

**Approval or Disapproval of Grants by Legislature or Assembly.** — See *infra*, this subdivision, *Approval of Grants*.

1. **Florida Purchase.** — U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 9 Pet. (U. S.) 168, 16 Pet. (U. S.) 228; U. S. *v.* Huertas, 8 Pet. (U. S.) 488, 9 Pet. (U. S.) 172; U. S. *v.* Levy, 13 Pet. (U. S.) 81; O'Hara *v.* U. S., 15 Pet. (U. S.) 275; U. S. *v.* Breward, 16 Pet. (U. S.) 143; U. S. *v.* Low, 16 Pet. (U. S.) 162; Doe *v.* Braden, 16 How. (U. S.) 635; U. S. *v.* Morant, 123 U. S. 335, 124 U. S. 647; Sullivan *v.* Richardson, 33 Fla. 1.

**Louisiana Purchase**, including the disputed territories south of the thirty-first degree of north latitude between the Mississippi river and island of New Orleans and the Perdido river, and on the western border of Louisiana.

*United States.* — De La Croix *v.* Chamberlain, 12 Wheat. (U. S.) 599; Foster *v.* Neilson, 2 Pet. (U. S.) 253; Garcia *v.* Lee, 12 Pet. (U. S.) 511; Keene *v.* Whitaker, 14 Pet. (U. S.) 170; Pollard *v.* Kibbe, 14 Pet. (U. S.) 353 *reversing* on other grounds 9 Port. (Ala.) 712; Pollard *v.* Files, 2 How. (U. S.) 592, *reversing*; on other grounds 3 Ala. 47; Pollard *v.* Hagan, 3 How. (U. S.) 212; Kennedy *v.* Hunt, 7 How. (U. S.) 586; U. S. *v.* Reynes, 9 How. (U. S.) 127; Davis *v.* Police Jury, 9 How. (U. S.) 280, *reversing* 1 La. Ann. 288; Goodtitle *v.* Kibbe, 9 How. (U. S.) 471; U. S. *v.* D'Auterive, 10 How. (U. S.) 609; U. S. *v.* Power, 11 How. (U. S.) 570; Montault *v.* U. S., 12 How. (U. S.) 47; U. S. *v.* Pillerin, 13 How. (U. S.) 9; U. S. *v.* Rillieux, 14 How. (U. S.) 180; U. S. *v.* Davenport, 15 How. (U. S.) 1; U. S. *v.* Roselins, 15 How. (U. S.) 31; U. S. *v.* Ducros, 15 How. (U. S.) 38; U. S. *v.* Lynde, 11 Wall. (U. S.) 632; McMicken *v.* U. S., 97 U. S. 204; U. S. *v.* Watkins, 97 U. S. 219; Scull *v.* U. S., 98 U. S. 410; U. S. *v.* Baltimore, 98 U. S. 424; U. S. *v.* Perot, 98 U. S. 428; U. S. *v.* Clamorgan, 101 U. S. 822; Coffee *v.* Groover, 123 U. S. 1; Bouligney *v.* U. S., 3 Fed. Cas. No. 1,696a; Leverich *v.* Mobile, 110 Fed. Rep. 170.

*Alabama.* — Innerarity *v.* Byrne, 8 Port. (Ala.) 176; Hallett *v.* Doe, 7 Ala. 882; Doe *v.* Jones, 11 Ala. 63; Magee *v.* Doe, 22 Ala. 699; Eslava *v.* Bolling, 22 Ala. 721.

*Louisiana.* — Devall *v.* Choppin, 15 La. 566; Kenton *v.* Leonard, 1 Rob. (La.) 343, 355; Brooks *v.* Norris, 6 Rob. (La.) 175, writ of error dismissed 11 How. (U. S.) 204.

*Missouri.* — Harvey *v.* Rusch, 67 Mo. 551; Wright *v.* Thomas, 4 Mo. 577, 3 Mo. 243.

**Disputed Territory in Mississippi and Alabama** north of the thirty-first degree of north latitude, claimed by the United States by conquest and cession.

*United States.* — Harcourt *v.* Gaillard, 12 Wheat. (U. S.) 524, cited U. S. *v.* Arredondo, 6 Pet. (U. S.) 691; Henderson *v.* Poindexter, 12 Wheat. (U. S.) 530; Ross *v.* Doe, 1 Pet. (U. S.) 655, *affirming* Walk. (Miss.) 489; Pollard *v.* Hagan, 3 How. (U. S.) 212; Hickey *v.* Stewart, 3 How. (U. S.) 750; La Roche *v.* Jones, 9 How. (U. S.) 155; Robinson *v.* Minor, 10 How. (U. S.) 627; Coffee *v.* Groover, 123 U. S. 1.

*Mississippi.* — Doe *v.* Beaumont, 6 How. (Miss.) 237; Doe *v.* King, 3 How. (Miss.) 125; Grand Gulf R., etc., Co. *v.* Bryan, 8 Smed. & M. (Miss.) 234; Montgomery *v.* Doe, 13 Smed. & M. (Miss.) 161.

**Transfers by Conquest.** — Fremont *v.* U. S., 17 How. (U. S.) 542; U. S. *v.* Pico, 23 How. (U. S.) 321; U. S. *v.* Yorba, 1 Wall. (U. S.) 412; Romero *v.* U. S., 1 Wall. (U. S.) 721; U. S. *v.* Workman, 1 Wall. (U. S.) 745; Mumford *v.* Wardwell, 6 Wall. (U. S.) 423; Stearns *v.* U. S., 6 Wall. (U. S.) 589; Merryman *v.* Bourne, 9 Wall. (U. S.) 592; Hornsby *v.* U. S., 10 Wall. (U. S.) 224; Alexander *v.* Roulet, 13 Wall. (U. S.) 386; U. S. *v.* Wilson, 1 Black (U. S.) 267; U. S. *v.* Castillero, 2 Black (U. S.) 17; U. S. *v.* Pena, 175 U. S. 500; Palmer *v.* U. S., Hoffm. Land Cas. (U. S.) 249, 18 Fed. Cas. No. 10,697, *affirmed* 24 How. (U. S.) 125; Brown *v.* O'Connor, 1 Cal. 419; Leese *v.* Clarke, 3 Cal. 17; Scott *v.* Dyer, 54 Cal. 430; Pino *v.* Hatch, 1 N. Mex. 125.

**Territory Disputed Between Texas and Mexico**, which the latter acknowledged as belonging to Texas in its treaty with the United States in 1848, the federal government guaranteeing rights of property acquired while Mexico was in possession. Lerma *v.* Stevenson, 40 Fed. Rep. 356; State *v.* Bustamente, 47 Tex. 320; State *v.* Sais, 47 Tex. 307; State *v.* De Leon, 64 Tex. 553; Garza *v.* Texas, 64 Tex. 670; Clark *v.* Hills, 67 Tex. 141; Texas-Mexican R. Co. *v.* Locke, 74 Tex. 370; Texas Mexican R. Co. *v.* Jarvis, 80 Tex. 456, *distinguishing* Kenedy *v.* Jarvis, (Tex. 1886) 1 S. W. Rep. 191; State *v.* O'Connor, 96 Tex. 484, rehearing denied (Tex. 1903) 74 S. W. Rep. 899, *reversing* (Tex. Civ. App. 1902)

government in military occupation of territory by conquest are without power to make valid grants of the public lands, unless the government they represent has authorized or subsequently ratifies their acts.<sup>1</sup>

**5. Proceedings to Acquire**—*a. UNDER SPAIN*—(1) *Laws and Regulations—Petitions for Grants.*—Proceedings for the acquisition of land under Spain were governed by regulations or orders issued by that officer of the particular province in whom the granting power was vested;<sup>2</sup> and the first step in the proceedings was a petition for a grant, usually addressed to him but sometimes, it seems, to a subordinate official.<sup>3</sup>

(2) *Complete and Incomplete Titles—Conditions.*—In the execution of the power to grant, subordinate officials, the lieutenant governors, commandants of posts, or subdelegates, were employed to make the original concession or

71 S. W. Rep. 409; *Massey v. Galveston*, etc., R. Co., 7 Tex. Civ. App. 650; *Baldwin v. Goldfrank*, 9 Tex. Civ. App. 269, *affirmed* 88 Tex. 249.

**Such Claims, While Void and of No Binding Obligation** upon the United States government, are not beyond the reach of Congress to confirm or perfect in any manner it may deem proper, although it may require a special act for the purpose. *Pollard v. Kibbe*, 14 Pet. (U. S.) 353; *Pollard v. Files*, 2 How. (U. S.) 603.

**1. Officers in Military Occupation of Conquered Territory Without Power to Grant in Absence of Express Authorization.**—U. S. v. Power, 11 How. (U. S.) 570; *Fremont v. U. S.*, 17 How. (U. S.) 542; *Munford v. Wardwell*, 6 Wall. (U. S.) 423; *Alexander v. Roulet*, 13 Wall. (U. S.) 386; *More v. Steinbach*, 127 U. S. 70; *Ely v. U. S.*, 171 U. S. 220, *followed* in *U. S. v. Maish*, 171 U. S. 242, and *U. S. v. Green*, 185 U. S. 256; *U. S. v. Hare*, 4 Sawy. (U. S.) 653, 26 Fed. Cas. No. 15,303; *Scott v. Dyer*, 54 Cal. 430. See also *Reloj Cattle Co. v. U. S.*, 184 U. S. 624.

In Texas all grants, surveys, and locations of public lands were expressly prohibited during the unsettled period which followed the break with Mexico. *Rivers v. Foote*, 11 Tex. 662; *Donaldson v. Dodd*, 12 Tex. 381; *Edgar v. Galveston City Co.*, 21 Tex. 302; *Parker v. Bains*, 59 Tex. 15; *Williams v. League*, (Tex. Civ. App. 1898) 44 S. W. Rep. 570.

**2. For These Regulations** see generally the cases cited in this subdivision and particularly the following:

*United States.*—U. S. v. Clarke, 8 Pet. (U. S.) 436; *Chouteau v. U. S.*, 9 Pet. (U. S.) 147; *Les Bois v. Bramell*, 4 How. (U. S.) 440; *Menard v. Massey*, 8 How. (U. S.) 293; U. S. v. Moore, 12 How. (U. S.) 217; *Chaves v. U. S.*, 168 U. S. 177; *Muse v. Arlington Hotel Co.*, 68 Fed. Rep. 637.

*Florida.*—*Sullivan v. Richardson*, 33 Fla. 1. *Louisiana.*—*Fleitas v. New Orleans*, 1 Mart. N. S. (La.) 430.

*Missouri.*—*Harvey v. Rusch*, 67 Mo. 551; *Smith v. Madison*, 67 Mo. 694; *Tyler v. Wells*, 2 Mo. App. 526.

*Tennessee.*—*Wilson v. Smith*, 5 Yerg. (Tenn.) 379.

In the Louisiana Territory the laws of France prevailed from the first settlement of the country until November 25, 1769. From that date until the country came into the possession of the United States, the laws of Spain

acted upon and governed rights of property. The cession of the country by France to the United States followed so soon after its retrocession by Spain to France as to cause no interruption in the operation of the Spanish laws. *New Orleans v. U. S.*, 10 Pet. (U. S.) 663.

**Regulations on Quantity—Beneficiaries of Grants.**—*Chouteau v. U. S.*, 9 Pet. (U. S.) 147; *U. S. v. Clarke*, 9 Pet. (U. S.) 168, 8 Pet. (U. S.) 436.

If a person who applied for land was unmarried, a certain quantity of land was given to him; if he had a wife this quantity was increased, and if he had children an additional number of acres was conceded. This did not, however, confer any right of property upon the wife or children, or control the course of the title, against operative words of transfer vesting it absolutely in the applicant. *Frique v. Hopkins*, 4 Mart. N. S. (La.) 212.

**Public Establishments**, such as forts and the land pertaining thereto necessary for their service, are not susceptible of acquisition. *Mitchel v. U. S.*, 15 Pet. (U. S.) 52; *Hart v. Burnett*, 15 Cal. 530.

**3. Petitions for Grants.**—*Trenier v. Stewart*, 101 U. S. 797; *Muse v. Arlington Hotel Co.*, 68 Fed. Rep. 637; *Sullivan v. Richardson*, 33 Fla. 1.

**Course of Proceedings.**—In the days of the Spanish government the order of events in obtaining a grant of land was, (1) a petition to the lieutenant-governor for a tract of land with a more or less definite description; (2) an order by the lieutenant-governor to the surveyor to put the petitioner in possession of the land claimed, if it was part of the royal domain; (3) a certificate made by the surveyor or agrimensor that the land asked for was unappropriated, with a figurative plat of it, very seldom with accurate or detailed field notes; (4) a reference of the whole matter to the governor-general; and (5) a complete grant by him to the petitioner. *Tyler v. Wells*, 2 Mo. App. 526.

**Qualifications of Application.**—It is within the province of the officer making the grant or concession to pass upon the qualifications of the applicant to receive it, and his decision thereon is final. *U. S. v. Huertas*, 8 Pet. (U. S.) 488; *Chouteau v. U. S.*, 9 Pet. (U. S.) 147.

**Addressing Petition to Subordinate Officials.**—See cases cited *infra*, this subdivision, *Complete and Incomplete Titles*.



decree and order of survey and to put the applicant in possession. The title thus acquired was generally nothing but a warrant or permit to survey, occupy, and improve, with a view to a grant when this should be done, but it has invariably been respected by succeeding governments where a *bona fide* attempt was made to perform the conditions or nonperformance was excusable. It was not a vested right of property, however, the whole title, under Spanish regulations, remaining in the government and subject to its disposition until the preliminary proceedings had been approved and a formal conveyance or patent issued.<sup>1</sup> If the conditions were not performed the land reverted to the government without office found or other proceeding to declare the forfeiture, and no right, legal or equitable, could be predicated upon the original concession or decree, either against Spain or her successors in interest.<sup>2</sup> The government of the United States has always regarded conditions of inhabitation and cultivation, annexed to imperfect titles derived from Spain, as material and essential, and as having this character by force of its laws and usages.<sup>3</sup> By the eighth article of the Florida treaty, where performance of conditions was prevented by the recent unsettled state of the Spanish nation, owners in possession were given the same time to fulfil them after the ratification of the treaty as was limited in the grant or concession.<sup>4</sup>

(3) *Segregation of the Land*—(a) *In General*.—As epitomized by some of

**1. Complete and Incomplete Titles.**—*Delassus v. U. S.*, 9 Pet. (U. S.) 118; *Chouteau v. U. S.*, 9 Pet. (U. S.) 137; *U. S. v. Clarke*, 9 Pet. (U. S.) 169; *Mackey v. U. S.*, 10 Pet. (U. S.) 341; *Chouteau v. Eckhart*, 2 How. (U. S.) 344, *affirming* 7 Mo. 16; *Les Bois v. Bramell*, 4 How. (U. S.) 449; *Menard v. Massey*, 8 How. (U. S.) 293; *U. S. v. Le Blanc*, 12 How. (U. S.) 435; *Glenn v. U. S.*, 13 How. (U. S.) 250, *affirming* *Hempst.* (U. S.) 394, 10 Fed. Cas. No. 5,481; *U. S. v. Davenport*, 15 How. (U. S.) 1; *Fremont v. U. S.*, 17 How. (U. S.) 553; *McMicken v. U. S.*, 97 U. S. 204; *U. S. v. Perot*, 98 U. S. 428; *U. S. v. Pendell*, 185 U. S. 189.

*Alabama*.—*Doe v. Jones*, 11 Ala. 63.

*Louisiana*.—*Hooter v. Tippet*, 8 Mart. (La.) 637; *Gonsoulin v. Brashear*, 5 Mart. N. S. (La.) 33; *Lobdell v. Clark*, 4 La. Ann. 99; *Purvis v. Harmanson*, 4 La. Ann. 421; *Arce-neaux v. De Benoit*, 21 La. Ann. 673.

*Missouri*.—*Harvey v. Rusch*, 67 Mo. 551; *Smith v. Madison*, 67 Mo. 694. See also cases cited *supra*, this subdivision, *By Whom Grants Made*.

**Grants for Grazing Purposes.**—It is a question of some doubt whether concessions for the purpose of grazing cattle were anything more than licenses to use the land, and whether they were designed to operate upon the dominion; but it has been decided that they initiated this inchoate right of property. *U. S. v. Davenport*, 15 How. (U. S.) 1.

**A Grant Delivered Out for Survey** meant, not as with us, a perfect title, but an incipient right, which, when surveyed, required confirmation by the governor. *U. S. v. Hanson*, 16 Pet. (U. S.) 199; *U. S. v. Boisdore*, 11 How. (U. S.) 63; *Muse v. Arlington Hotel Co.*, 68 Fed. Rep. 637.

**Record of Grants.**—*Muse v. Arlington Hotel Co.*, 68 Fed. Rep. 637; *Sullivan v. Richardson*, 33 Fla. 1.

**Delivery of Formal Conveyance or Patent Not Essential.**—*Lavergne v. Elkins*, 17 La. 220. See also *Sullivan v. Richardson*, 33 Fla. 1.

**2. Nonperformance of Conditions.**—*U. S. v.*

*Mills*, 12 Pet. (U. S.) 215; *U. S. v. Kingsley*, 12 Pet. (U. S.) 477; *U. S. v. Drummond*, 13 Pet. (U. S.) 84; *U. S. v. Burgevin*, 13 Pet. (U. S.) 85; *U. S. v. Wiggins*, 14 Pet. (U. S.) 334; *Buyck v. U. S.*, 15 Pet. (U. S.) 215; *O'Hara v. U. S.*, 15 Pet. (U. S.) 275; *U. S. v. Delespine*, 15 Pet. (U. S.) 319; *U. S. v. Boisdore*, 11 How. (U. S.) 63; *Lecompte v. U. S.*, 11 How. (U. S.) 115; *U. S. v. Moore*, 12 How. (U. S.) 209; *U. S. v. Simon*, 12 How. (U. S.) 433; *Glenn v. U. S.*, 13 How. (U. S.) 250, *affirming* *Hempst.* (U. S.) 394, 10 Fed. Cas. No. 5,481; *Fremont v. U. S.*, 17 How. (U. S.) 553; *McMicken v. U. S.*, 97 U. S. 204; *Chaves v. U. S.*, 168 U. S. 177; *Mitchell v. Furman*, 180 U. S. 402.

*Florida*.—*Doe v. Latimer*, 2 Fla. 71; *Florida Town Imp. Co. v. Bigalsky*, (Fla. 1902) 33 So. Rep. 450.

*Louisiana*.—*Boissier v. Metayer*, 5 Mart. (La.) 678.

*Texas*.—*Hancock v. McKinney*, 7 Tex. 384.

**Exceptions to Rule—Grants in Absolute Property—Conditions Subsequent.**—*U. S. v. Arredondo*, 6 Pet. (U. S.) 692; *U. S. v. Huertas*, 8 Pet. (U. S.) 488; *U. S. v. Segui*, 10 Pet. (U. S.) 307; *U. S. v. Rodman*, 15 Pet. (U. S.) 130; *U. S. v. Hanson*, 16 Pet. (U. S.) 196; *U. S. v. Repentigny*, 5 Wall. (U. S.) 211.

**Excusing Nonperformance.**—*U. S. v. Arredondo*, 6 Pet. (U. S.) 692; *U. S. v. Kingsley*, 12 Pet. (U. S.) 484; *De Vilemont v. U. S.*, 13 How. (U. S.) 261, *affirming* *Hempst.* (U. S.) 389, 7 Fed. Cas. No. 3,839; *Winter v. U. S.*, *Hempst.* (U. S.) 344, 30 Fed. Cas. No. 17,895.

**Conditions Unauthorized by Law Void.**—*Wilson v. Smith*, 5 Yerg. (Tenn.) 379.

**Survey as a Condition.**—See *infra*, this subdivision, *Surveys*.

3. *Fremont v. U. S.*, 17 How. (U. S.) 556, *approved* *McMicken v. U. S.*, 97 U. S. 214.

4. **Performance After Ratification of Florida Treaty.**—*U. S. v. Clarke*, 9 Pet. (U. S.) 168; *U. S. v. Sibbald*, 10 Pet. (U. S.) 313; *U. S. v. Kingsley*, 12 Pet. (U. S.) 476.

the acts of Congress which have provided for the confirmation of Spanish titles, in order to sustain a claim there must have been a complete grant or concession from that government, or order of survey duly executed, or other mode of investiture of title in the original claimant, by separation of the land from the mass of the public domain by competent authority, either by actual survey or defined, fixed, natural, or other ascertainable boundaries or initial points, courses, and distances,<sup>1</sup> prior to the cession of the territory to the United States or a date fixed by treaty or statute.<sup>2</sup>

(b) **Descriptive Grants.**—A descriptive grant which designates a specific tract of land as its subject, with such certainty as to enable it to be identified and located, is sufficient to vest a right of property although no official survey was made prior to the termination of Spanish sovereignty.<sup>3</sup>

(c) **Indescriptive Grants.**—On the other hand, a grant, indefinite and uncertain as to the location, vests no right unless the location has been fixed and a specific tract segregated by an official Spanish survey, or by the possession and occupation of the claimant.<sup>4</sup>

**1. Segregation of Land—In General.**—*Scull v. U. S.*, 98 U. S. 410; *Dauterive v. U. S.*, 101 U. S. 700; *U. S. v. Clamorgan*, 101 U. S. 822.

**The Land Must Have Been Identified** by an actual survey with metes and bounds, or the description in the grant must be such that judgment can be rendered with precision by such metes and bounds, natural or otherwise. There must be nothing left to doubt or discretion in its location. If there is no previous actual survey which a surveyor can follow and find each line and its length, there must be such a description of natural objects for boundaries that he can do the same thing *de novo*. The separation from the public domain must not be a new or conjectural separation, with any element of discretion or uncertainty. *Scull v. U. S.*, 98 U. S. 410, *quoted in* *Muse v. Arlington Hotel Co.*, 68 Fed. Rep. 637.

**2. Florida Territory.**—By the terms of the Florida treaty no valid grants or concessions could be made by Spain after January 24, 1818; but this was held not to interfere with the power to survey lands under those executed previous to that date, which continued up to the change of flags. *U. S. v. Clarke*, 8 Pet. (U. S.) 436, 9 Pet. (U. S.) 168, 16 Pet. (U. S.) 228; *U. S. v. Huertas*, 8 Pet. (U. S.) 488, 9 Pet. (U. S.) 171; *U. S. v. Levy*, 13 Pet. (U. S.) 81; *U. S. v. Breward*, 16 Pet. (U. S.) 143; *U. S. v. Miranda*, 16 Pet. (U. S.) 153; *U. S. v. Acosta*, 1 How. (U. S.) 24. See also *Smith v. U. S.*, 10 Pet. (U. S.) 326.

Under the Act of Congress of June 22, 1860, 12 Stat. at L. 85, providing for the confirmation of certain void claims, the date of the cession, or of the change in territorial possession, and not the date fixed by the treaty, is the epoch to be observed. *U. S. v. Morant*, 123 U. S. 335.

**Louisiana Purchase.**—For dates fixed by acts of Congress in providing for the confirmation of claims in the Louisiana territory, see *Smith v. U. S.*, 10 Pet. (U. S.) 327; *Mackey v. U. S.*, 10 Pet. (U. S.) 340; *Glenn v. U. S.*, 13 How. (U. S.) 250.

**3. Descriptive Grants and Concessions.**—*Mackey v. U. S.*, 10 Pet. (U. S.) 341; *U. S. v. Boisdore*, 11 How. (U. S.) 63, opinion of McLean, J.

In all of the decisions upon the validity of

Spanish titles in *Florida* the court has gone as far as the most liberal equity can go in adopting some natural or artificial points in the description of grants, however subordinate or minor they may have been, to give locality to them. *Buyck v. U. S.*, 15 Pet. (U. S.) 215. See *U. S. v. Percheman*, 7 Pet. (U. S.) 52; *U. S. v. Clarke*, 8 Pet. (U. S.) 436; *U. S. v. Levy*, 8 Pet. (U. S.) 479; *U. S. v. Arredondo*, 13 Pet. (U. S.) 133.

**Survey of Descriptive Grants.**—In most grants, even those of a descriptive nature, a survey was required before the formal and perfect title would be given. This was the only certain mode of observing the condition attached to all grants, of noninterference with previously acquired rights of others. *Winter v. U. S.*, *Hempst.* (U. S.) 344, 30 Fed. Cas. No. 17,895.

**Obscure and Ambiguous Grants.**—Where a grant is obscure or ambiguous as to locality, preliminary proceedings, such as the survey, incorporated into the title papers by reference, may be referred to to give the location definiteness and certainty. *U. S. v. McMasters*, 4 Wall. (U. S.) 680; *Cavazos v. Trevino*, 6 Wall. (U. S.) 773; *Yontz v. U. S.*, 23 How. (U. S.) 495; *Cavazos v. Trevino*, 35 Tex. 133.

**4. Indescriptive Grants and Concessions.**—*Smith v. U. S.*, 10 Pet. (U. S.) 327; *Wherry v. U. S.*, 10 Pet. (U. S.) 338; *Buyck v. U. S.*, 15 Pet. (U. S.) 224; *O'Hara v. U. S.*, 15 Pet. (U. S.) 275; *U. S. v. Delespine*, 15 Pet. (U. S.) 319; *U. S. v. Miranda*, 16 Pet. (U. S.) 153; *U. S. v. Hanson*, 16 Pet. (U. S.) 198; *U. S. v. Clarke*, 16 Pet. (U. S.) 228; *U. S. v. King*, 3 How. (U. S.) 773; *U. S. v. Lawton*, 5 How. (U. S.) 10; *Villalobos v. U. S.*, 10 How. (U. S.) 541; *U. S. v. Boisdore*, 11 How. (U. S.) 63; *Lecompte v. U. S.*, 11 How. (U. S.) 115; *De Villemont v. U. S.*, 13 How. (U. S.) 266, *affirming* *Hempst.* (U. S.) 389, 7 Fed. Cas. No. 3,839; *U. S. v. D'Auterieve*, 15 How. (U. S.) 11, 101 U. S. 700; *Denise v. Ruggles*, 16 How. (U. S.) 244; *Ledoux v. Black*, 18 How. (U. S.) 473, *affirming* 5 La. Ann. 510; *Maguire v. Tyler*, 8 Wall. (U. S.) 650; *Mobile Transp. Co. v. Mobile*, 187 U. S. 479, *affirming* 128 Ala. 335, 86 Am. St. Rep. 143; *Sena v. U. S.*, 189 U. S. 233; *Winter v. U. S.*, *Hempst.* (U. S.) 344, 30 Fed. Cas. No. 17,895; *Muse v. Arlington Hotel*

(a) **Surveys.** — A private survey under the Spanish government was ineffectual to segregate land and vest a right of property. A survey to have that effect must have been made by a person having official authority to make it.<sup>1</sup> It must also have been an actual survey by running the lines, establishing the corners, marking trees and other objects on the ground, giving bearings and distances, and making field notes and plats of the work; and not a mere figurative or chamber survey.<sup>2</sup> In making the survey directions as to quantity and location of the land contained in the grant or concession must be followed, and if they are departed from, the survey is, to the extent of the departure, void and of no effect.<sup>3</sup> Even if the quantity cannot be found where the survey is directed to be made, the claimant is entitled to have an equivalent surveyed elsewhere only when authority to that effect is expressly given.<sup>4</sup> Where a survey is itself too imperfect to enable any specific tract to be identified, no right of property can be acquired under it.<sup>5</sup>

b. **UNDER MEXICAN RULE** — (1) *Laws and Regulations* — (a) **In General.** — Mention has already been made of the national laws and regulations under which rights and titles were acquired during the period of Mexican sovereignty.<sup>6</sup>

(b) **Of the Supreme Government.** — The national law of 1824, and regulations of 1828 established pursuant thereto,<sup>7</sup> fix and limit the extent of the power of

Co., 68 Fed. Rep. 637; *Doe v. Latimer*, 2 Fla. 71; *Lafayette v. Blanc*, 3 La. Ann. 60, *affirmed* 11 How. (U. S.) 104.

**Segregation by Possession — Burden of Proof.** — Where a party took possession, but had no survey executed during the time Spain exercised jurisdiction, this being his own neglect, it lies on him to establish the boundaries of his grant, and to identify his land with such certainty as to show what particular tract was severed from the public domain; and if he fails to do it, then he has no remedy in a court of justice. *U. S. v. Boisdore*, 11 How. (U. S.) 63, *approving Lafayette v. Blanc*, 3 La. Ann. 60, which was *affirmed* 11 How. (U. S.) 104.

**It Seldom or Never Appears** that any survey was had before the concession was issued. Surveys frequently followed the concession or grant; and where the proceeding is regular it affords strong evidence to support the title of the claimant. *Trenier v. Stewart*, 101 U. S. 797.

1. **Private and Official Surveys.** — *Smith v. U. S.*, 10 Pet. (U. S.) 327; *Mackay v. Dillon*, 4 How. (U. S.) 421; *Les Bois v. Bramell*, 4 How. (U. S.) 449; *Winter v. U. S.*, Hempst. (U. S.) 344, 30 Fed. Cas. No. 17,895. See also *U. S. v. Hanson*, 16 Pet. (U. S.) 196.

**A Warrant or Order of Survey Could Be Executed** by the surveyor-general, or by any deputy appointed by him, or the surveyor of the district, or by the commandant of a post, or by a private person specially authorized by the governor-general or intendant. *Winter v. U. S.*, Hempst. (U. S.) 344, 30 Fed. Cas. No. 17,895.

**Duty of Grants to Have Survey Made.** — Undoubtedly the Spanish regulations show that when a concession was made the duty was imposed on the grantee of having the order of survey executed at his own expense; and a return of the survey was to be made to the proper officer; and all this without cost to the royal treasury. In other words, the concession was an authority to the surveyor-general and his deputies to make the survey as a public

trust, and it was the duty of the grantee to call upon him for that purpose, or procure authority for a private person to do it. *Winter v. U. S.*, Hempst. (U. S.) 344, 30 Fed. Cas. No. 17,895.

2. **Actual Surveys.** — *U. S. v. Hanson*, 16 Pet. (U. S.) 198; *U. S. v. Lawton*, 5 How. (U. S.) 10; *Scull v. U. S.*, 98 U. S. 410; *Winter v. U. S.*, Hempst. (U. S.) 344, 30 Fed. Cas. No. 17,895; *Muse v. Arlington Hotel Co.*, 68 Fed. Rep. 637.

**Return of Survey** — The examination of the surveyor, the actual survey, and the return of the plat were conditions precedent, and there was no equity against the government and no just claim to a grant until they were performed. *Fremont v. U. S.*, 17 How. (U. S.) 542; *McMicken v. U. S.*, 97 U. S. 204; *Muse v. Arlington Hotel Co.*, 68 Fed. Rep. 637.

3. **Directions as to Quantity and Location of Land.** — *U. S. v. Richard*, 8 Pet. (U. S.) 471; *U. S. v. Huertas*, 8 Pet. (U. S.) 488, 9 Pet. (U. S.) 172; *U. S. v. Levy*, 13 Pet. (U. S.) 81; *U. S. v. Forbes*, 15 Pet. (U. S.) 173; *U. S. v. Breward*, 16 Pet. (U. S.) 143; *Villalobos v. U. S.*, 10 How. (U. S.) 541. See also *U. S. v. Huertas*, 8 Pet. (U. S.) 475; *U. S. v. Levi*, 8 Pet. (U. S.) 479; *U. S. v. Hernandez*, 8 Pet. (U. S.) 486; *U. S. v. Low*, 16 Pet. (U. S.) 162.

4. **Failure of Location to Produce Quantity Granted.** — *U. S. v. Sibbald*, 10 Pet. (U. S.) 321, 12 Pet. (U. S.) 488; *U. S. v. Arredondo*, 13 Pet. (U. S.) 133; *U. S. v. Forbes*, 15 Pet. (U. S.) 173; *Buyck v. U. S.*, 15 Pet. (U. S.) 215; *U. S. v. Clarke*, 16 Pet. (U. S.) 228.

5. **Indescriptive Surveys.** — *U. S. v. Lawton*, 5 How. (U. S.) 10.

6. See *supra*, this section, *By Whom Grants Made*.

**Laws Not Effective until Promulgated.** — *Gonzales v. Ross*, 120 U. S. 605; *Hayes v. U. S.*, 170 U. S. 637; *Donaldson v. Dodd*, 12 Tex. 381.

7. **For the Text of This Law and These Regulations** see generally the cases cited in this subsection and particularly *U. S. v. Vallejo*, 1



the Mexican states to grant the public lands, and detail the proceedings necessary to be taken to acquire a vested right of property from them; the legal right to make grants in other ways or for other purposes remaining in the general government. The avowed purpose of their enactment was to colonize the vacant lands and preserve them for settlement and cultivation; and it was not intended to delegate authority to the several states to sell them or grant them away in consideration of past public services or on condition of making public improvements.<sup>1</sup> The laws had no application to mission or town lands, insular lands, or mines, for the granting of which, when allowed, special provision was made by the supreme government.<sup>2</sup>

(c) **Of the Mexican States.** — By article three of the national law of 1824, the legislatures of the Mexican states were directed to form colonization laws or regulations to carry out the plan of the general government as therein expressed. In pursuance of this authority legislation was enacted which was generally but not always in conformity with the laws and regulations of the supreme government.<sup>3</sup>

(2) **Petition, Reference, and Concession.** — Under the laws and regulations, every person soliciting lands is required to address a petition to the governor of the particular state, setting forth his name, nationality, profession, religion, and other circumstances of his condition; and also to describe the land sought with as much certainty as possible, which is usually done by means of a map or plat annexed to the petition.<sup>4</sup> He is not required to prove his represen-

Black (U. S.) 541; U. S. v. Cambuston, 20 How. (U. S.) 59.

1. **General Scope and Purpose of National Laws.** — U. S. v. Cambuston, 20 How. (U. S.) 59; Fuentes v. U. S., 22 How. (U. S.) 443; U. S. v. Vallejo, 1 Black (U. S.) 541; U. S. v. Workman, 1 Wall. (U. S.) 745; Christy v. Pridgeon, 4 Wall. (U. S.) 196; U. S. v. Vigil, 13 Wall. (U. S.) 449; Chavez v. U. S., 175 U. S. 552; Bouldin v. Phelps, 12 Sawy. (U. S.) 293, 30 Fed. Rep. 547; Leese v. Clarke, 3 Cal. 17; Grant v. Jaramillo, 6 N. Mex. 313.

**Vacant Lands.** — The granting of unoccupied public lands only was authorized, and not those in the lawful possession of public establishments or of persons claiming under provisional title from the government. U. S. v. Workman, 1 Wall. (U. S.) 745.

**Instances of Unauthorized and Void Grants.** — "Sutter's General Title." — U. S. v. Sutter, 21 How. (U. S.) 170; U. S. v. Nye, 21 How. (U. S.) 408; U. S. v. Bassett, 21 How. (U. S.) 412, reversing Hoffm. Land. Cas. (U. S.) 112, 24 Fed. Cas. No. 14,538; U. S. v. Bennett, 23 How. (U. S.) 255, reversing Hoffm. Land. Cas. (U. S.) 104, 3 Fed. Cas. No. 1,327; U. S. v. Rose, 23 How. (U. S.) 262, reversing Hoffm. Land. Cas. (U. S.) 197, 27 Fed. Cas. No. 16,195; U. S. v. Murphy, 23 How. (U. S.) 476, reversing Hoffm. Land. Cas. (U. S.) 154, 27 Fed. Cas. No. 15,841; U. S. v. Hensley, 1 Black (U. S.) 35; Little v. U. S., Hoffm. Land. Cas. (U. S.) 325, 15 Fed. Cas. No. 8,396; Bouldin v. Phelps, 12 Sawy. (U. S.) 316, 30 Fed. Rep. 547.

2. **Town and Mission Lands.** — See *infra*, this section, *Pueblo or Town Lands; Indian Titles*; U. S. v. Bolton, 23 How. (U. S.) 341; U. S. v. Vallejo, 1 Black (U. S.) 541; U. S. v. Vigil, 13 Wall. (U. S.) 449; Grant v. Jaramillo, 6 N. Mex. 313; Chavez v. U. S., 175 U. S. 552.

**Islands.** — U. S. v. Osio, 23 How. (U. S.) 273, reversing Hoffm. Land. Cas. (U. S.) 100,

27 Fed. Cas. No. 15,972; U. S. v. Castillero, 23 How. (U. S.) 464, 2 Black (U. S.) 164; Bouldin v. Phelps, 12 Sawy. (U. S.) 316, 30 Fed. Rep. 547.

**Mines.** — U. S. v. Castillero, 2 Black (U. S.) 171; Moore v. Smaw, 17 Cal. 199, 79 Am. Dec. 123; U. S. v. San Pedro, etc., Co., 4 N. Mex. 299.

3. See generally the discussion herein of the acquisition of rights of property under Mexico.

**State Laws Providing for Sale of Land.** — Gonzales v. Ross, 120 U. S. 605; Hancock v. McKinney, 7 Tex. 384; Ryan v. Jackson, 11 Tex. 392; Manchaca v. Field, 62 Tex. 135.

**The Law of March 26, 1834,** of the state of Coahuila and Texas, which inaugurated a new system for the disposition of the public domain, did not divest the power to perfect rights already acquired under prior laws, and besides it never was generally effective in Texas territory. Gonzales v. Ross, 120 U. S. 605; Jenkins v. Chambers, 9 Tex. 167; Hatch v. Dunn, 11 Tex. 708; Clay v. Clay, 26 Tex. 24; Brown v. Simpson, 67 Tex. 225; Texas-Mexican R. Co. v. Locke, 74 Tex. 370.

4. **Petition, Reference, and Concession.** — U. S. v. Sutter, 21 How. (U. S.) 170; U. S. v. Knight, 1 Black (U. S.) 227, reversing on other grounds *sub nom.* Morehead v. U. S., Hoffm. Op. (U. S.) 404, 17 Fed. Cas. No. 9,792; Hornsby v. U. S., 10 Wall. (U. S.) 224; U. S. v. Elder, 177 U. S. 104; Scott v. Ward, 13 Cal. 459; Soto v. Kroder, 19 Cal. 87; Berreyesa v. Schultz, 21 Cal. 513.

**Addressing Petitions to Subordinate Officials.** — Proceedings commenced by petition to the alcalde or ayuntamiento instead of to the governor may be sufficient, if sanctioned by custom or usage, to entitle the applicant to a grant from the executive. State v. De Leon, 64 Tex. 553. Compare U. S. v. Pico, 23 How. (U. S.) 321,

tations, but the duty to ascertain the existence of the facts necessary to bring the grant within the law, both as regards the land and the qualifications of the applicant, devolves upon the governor.<sup>1</sup> No exclusive mode is prescribed for acquiring this information, but that official usually refers the matter to a local magistrate and upon receipt of his report grants or rejects the application accordingly.<sup>2</sup>

(3) *Qualifications of Grantees.* — Various qualifications are prescribed by the national and state laws, the possession of which by the applicant is necessary to entitle him to receive a grant, or a grant of a particular kind or quantity. The decision of the officers as to their existence, as expressed in the issuance of the grant, is generally conclusive, in the absence of fraud.<sup>3</sup>

(4) *Quantitative Limitations.* — The national law prohibited the uniting in the same hands with the right of property of more than eleven square leagues of land; and grants contrary to this provision are void to the extent of the excess. State laws sometimes contained provisions on the subject also.<sup>4</sup>

*reversing* Hoffm. Land Cas. (U. S.) 279, 19 Fed. Cas. No. 11,130.

**Employment of Agent or Attorney in Obtaining Grant — Joint Grants.** — The instrumentality of an agent or attorney may be employed in obtaining a grant, and there is no provision of law against comprising in one final title land granted on the joint application of two colonists. *White v. Holliday*, 11 Tex. 606.

**Effect of Circumstances of Condition on Course of Title.** — Although the quantity of land to which a person is entitled may be augmented by circumstances of his condition, such as having dependent upon him wife, family, or retainers, and the grant being for their benefit as well as his, these circumstances do not in any way control the course of the title as against operative words of transfer vesting it absolutely in the applicant. *Scott v. Ward*, 13 Cal. 459; *Berreyesa v. Schultz*, 21 Cal. 513, *citing* *Frique v. Hopkins*, 4 Mart. N. S. (La.) 212.

1. *U. S. v. Knight*, 1 Black (U. S.) 227, *reversing* on other grounds *sub nom.* Morehead *v. U. S.*, Hoffm. Op. (U. S.) 404, 17 Fed. Cas. No. 9,792.

2. *Hornshy v. U. S.*, 10 Wall. (U. S.) 224; *Morehead v. U. S.*, Hoffm. Op. (U. S.) 404, 17 Fed. Cas. No. 9,792, *reversed* on other grounds *sub nom.* *U. S. v. Knight*, 1 Black (U. S.) 227.

3. **Residence and Citizenship — Grants to Foreigners — United States.** — *U. S. v. Reading*, 18 How. (U. S.) 1, *affirming* 27 Fed. Cas. 16,127; *Spencer v. Lapsley*, 20 How. (U. S.) 264; *Dalton v. U. S.*, 22 How. (U. S.) 436; *Phillips v. Moore*, 100 U. S. 208; *U. S. v. Cambuston*, 7 Sawy. (U. S.) 575, 25 Fed. Cas. No. 14,713; *U. S. v. Limantour*, Hoffm. Land Cas. (U. S.) 389, 26 Fed. Cas. No. 15,601.

*California.* — *De Merle v. Mathews*, 26 Cal. 456.

*Texas.* — *Republic v. Thorn*, 3 Tex. 499; *Ruis v. Chambers*, 15 Tex. 586; *Edgar v. Galveston City Co.*, 21 Tex. 302; *Cowan v. Williams*, 49 Tex. 380; *State v. Sais*, 60 Tex. 87; *Manchaca v. Field*, 62 Tex. 135; *Groesbeck v. Golden*, (Tex. 1887) 7 S. W. Rep. 362.

**Grants to Heads of Families, Single Persons, or Married Women.** — *Edwards v. James*, 7 Tex. 372; *Styles v. Gray*, 10 Tex. 503; *Russell v. Randolph*, 11 Tex. 460; *White v. Holliday*, 11 Tex. 606; *Hardiman v. Herbert*, 11 Tex. 656; *Hatch v. Dunn*, 11 Tex. 708; *Burle-*

*son v. McGehee*, 15 Tex. 375; *Ruis v. Chambers*, 15 Tex. 586; *Fulton v. Duncan*, 18 Tex. 34; *Edwards v. Beavers*, 19 Tex. 506; *Johnston v. Smith*, 21 Tex. 722; *Bowmer v. Hicks*, 22 Tex. 155; *Howard v. Colquhoun*, 28 Tex. 134; *Decourt v. Sproul*, 66 Tex. 368; *Hill v. Moore*, 85 Tex. 335. See also the title STATE AND PUBLIC LANDS, vol. 26, p. 284 *et seq.*

**Grants to Single Persons under Age.** — *Palmer v. Lowe*, 98 U. S. 1, *affirming* 2 Sawy. (U. S.) 248, 18 Fed. Cas. No. 10,693; *Donner v. Palmer*, 31 Cal. 500. *Compare* *Lockhart v. Republic*, 2 Tex. 127; *De Leon v. White*, 9 Tex. 598.

4. **Quantitative Limitations — United States.** — *U. S. v. Hartnell*, 22 How. (U. S.) 286, *affirming* 26 Fed. Cas. No. 15,317; *Roland v. U. S.*, 7 Wall. (U. S.) 743; *U. S. v. Pico*, 5 Wall. (U. S.) 536; *Whitney v. U. S.*, 181 U. S. 104; *U. S. v. Castro*, 5 Sawy. (U. S.) 625, 25 Fed. Cas. No. 14,754.

*California.* — *Vanderslice v. Hanks*, 3 Cal. 28, 47; *Ferris v. Coover*, 10 Cal. 589.

*Texas.* — *Cavazos v. Trevino*, 35 Tex. 133; *State v. Sais*, 60 Tex. 87; *Manchaca v. Field*, 62 Tex. 135; *Howell v. Hanrick*, 88 Tex. 383, *reversing* (Tex. Civ. App. 1894) 24 S. W. Rep. 823, *distinguishing* *Hanrick v. Jackson*, 55 Tex. 30, which was *approved* in *Hanrick v. Dodd*, 62 Tex. 75; *Petslee v. Walker*, (Tex. Civ. App. 1904) 78 S. W. Rep. 980. *Compare*, on the power of a state legislature to provide for grants of more than eleven square leagues, contrary to the prohibition of the national law, *Chambers v. Fisk*, 22 Tex. 504.

**Division of Grant.** — That a grant is divided and titles issued to the land in several parcels, is no objection to its validity. Such was the customary method and contravened no provision of law. *McGehee v. Dwyer*, 22 Tex. 435, *citing* *Jenkins v. Chambers*, 9 Tex. 168.

**Where a Grant Contains No Express Limitation as to Quantity** its extent is only restricted by the boundaries named and the prohibition of the colonization law against grants to exceed eleven leagues. *U. S. v. Pico*, 5 Wall. (U. S.) 536; *U. S. v. Castro*, 5 Sawy. (U. S.) 625, 25 Fed. Cas. No. 14,754.

**Augmentation of Quantity Grantable under state law**, by direction of the executive, in proportion to the family, industry, and activity of the colonist. *Jenkins v. Chambers*, 9 Tex. 167;

(5) *Complete and Incomplete Titles* — (a) **In General.** — If the governor acceded to the petition, and issued the incipient title papers, and the proceedings were duly recorded, a present and immediate right of property vested in the applicant; but further proceedings were necessary to convert it into a perfect and absolute title.<sup>1</sup> No right of property vested until the governor had approved the petition and proceedings had thereunder, and made the concession.<sup>2</sup>

(b) **Approval of Grants** — *aa. IN GENERAL.* — A grant did not become definitively valid until it had been approved by the state legislature or assembly, or, if disapproved by it, by the supreme government. The duty to submit the title for approval devolved upon the governor, and his neglect could not divest the right of property acquired by the grant; but until it was approved the estate was subject to be defeated.<sup>3</sup>

*bb. EMPRESARIO CONTRACTS OR GRANTS — LITTORAL AND BORDER LEAGUE GRANTS.* — Grants to empresarios, or contractors engaging to colonize the land with many fami-

Groesbeck v. Golden, (Tex. 1887) 7 S. W. Rep. 362, overruling Harlan v. Hayne, 9 Tex. 461.

**The Spanish League.** — The old legal league of Spain, which was adopted in Mexico, consisted of 5,000 varas; and a vara in Texas has always been regarded as equivalent to 33.33 English inches, — making the league equal to a little more than 2.63 miles, and the square league equal to 4,428.4 acres. In California, after its acquisition by the United States, a vara came to be considered as exactly equal to 33 inches; and this result was sanctioned by the United States general land office as early as 1852. U. S. v. Perot, 98 U. S. 428.

**Construction of Grants as to Quantity** — See *infra*, this subdivision, *Segregation of the Land*.

1. See generally the cases cited in this subsection. Soto v. Kroder, 19 Cal. 87.

**An Espediente**, when complete, usually consists of the petition, with the map or plat annexed; a marginal decree, approving the petition; the order of reference to the proper officer, for information; the report of that officer in conformity to the order, the decree of concession, and the copy or duplicate of the grant. U. S. v. Knight, 1 Black (U. S.) 227.

**The Primitive Title** is the concession from the executive of the state. Clay v. Holbert, 14 Tex. 189.

2. **When Right of Property Vested.** — U. S. v. Garcia, 22 How. (U. S.) 274, reversing Hoffm. Land Cas. (U. S.) 157, 9 Fed. Cas. No. 5,215; U. S. v. Pico, 23 How. (U. S.) 321, reversing Hoffm. Land Cas. (U. S.) 279, 19 Fed. Cas. No. 11,130; Miramontes v. U. S., 131 U. S., appendix lxxiii; Berge v. U. S., 168 U. S. 66; U. S. v. Berreyesa, 24 Fed. Cas. No. 14,585, affirmed 154 U. S. 623. But see, where followed by long possession and occupation of premises, U. S. v. Alviso, 23 How. (U. S.) 318; U. S. v. Soto, Hoffm. Land Cas. (U. S.) 77, 182, 27 Fed. Cas. No. 16,356, 16,357; U. S. v. Pico, 1 Sawy. (U. S.) 347, 27 Fed. Cas. No. 16,048; U. S. v. Walkinshaw, 28 Fed. Cas. No. 16,633.

3. **Approval of Individual Grants.** — Fremont v. U. S., 17 How. (U. S.) 542, reversing 25 Fed. Cas. No. 15,164; U. S. v. Reading, 18 How. (U. S.) 1, affirming 27 Fed. Cas. No. 16,127; De Arguello v. U. S., 18 How. (U. S.) 539; U. S. v. Cervantes, 18 How. (U. S.) 553, affirming 3 Am. L. Reg. 745, 5 Fed. Cas. No. 2,560, overruling in effect Hoffm. Land Cas.

(U. S.) 9, 25 Fed. Cas. No. 14,768, which was reversed on other grounds in 16 How. (U. S.) 619; U. S. v. Larkin, 18 How. (U. S.) 557, affirming 26 Fed. Cas. No. 15,563; U. S. v. Sutter, 21 How. (U. S.) 170; U. S. v. Hartnell, 22 How. (U. S.) 286, affirming 26 Fed. Cas. No. 15,317; U. S. v. Knight, 1 Black (U. S.) 227; U. S. v. Johnson, 1 Wall. (U. S.) 326; Pico v. U. S., 2 Wall. (U. S.) 279; Beard v. Federy, 3 Wall. (U. S.) 478; Roland v. U. S., 7 Wall. (U. S.) 743, affirming 27 Fed. Cas. No. 16,190; Hornsby v. U. S., 10 Wall. (U. S.) 224; U. S. v. Vigil, 13 Wall. (U. S.) 449; U. S. v. Elder, 177 U. S. 104; Whitney v. U. S., 181 U. S. 104; Tobin v. Walkinshaw, McAll. (U. S.) 151, 23 Fed. Cas. No. 14,069; U. S. v. Enright, Hoffm. Land Cas. (U. S.) 239, 25 Fed. Cas. No. 15,053; U. S. v. Polack, Hoffm. Land Cas. (U. S.) 284, Hoffm. Op. (U. S.) 32, 27 Fed. Cas. No. 16,061; Harrison v. Ulrichs, 14 Sawy. (U. S.) 155, 39 Fed. Rep. 654.

**California.** — Vanderslice v. Hanks, 3 Cal. 28, 47; Ferris v. Coover, 10 Cal. 589; Waterman v. Smith, 13 Cal. 373; Cornwall v. Culver, 16 Cal. 424; Miller v. Dale, 44 Cal. 562; Chipley v. Farris, 45 Cal. 527; Taylor v. Escandon, 50 Cal. 428.

**Texas.** — Cavazos v. Trevino, 35 Tex. 133.

**Course of Proceedings.** — The regulations contemplated an approval to precede the issue of the formal grant; so when the grantee received this document the concession should be considered final. For a long time after the adoption of the regulations this course of proceeding was followed; but afterwards, and for some years previous to the conquest, a different practice prevailed, and the former title-papers were issued without waiting for the action of the assembly, a clause being inserted to the effect that the grant was subject to the approval of that body. Pico v. U. S., 2 Wall. (U. S.) 279; Tobin v. Walkinshaw, McAll. (U. S.) 151, 23 Fed. Cas. No. 14,069.

**Function of Assembly.** — The departmental assembly, in respect to the grant of lands, was an advisory body to the governor, and sustained the same relation to him that the senate of the United States does to the president in the matter of appointments and treaties. U. S. v. Vigil, 13 Wall. (U. S.) 449.

**Presumption of Approval.** — Vanderslice v. Hanks, 3 Cal. 28, 47; Ferris v. Coover, 10 Cal. 589; Yancey v. Norris, 27 Tex. 40.



lies, were not definitively valid until approved by the supreme government. The colonization of the land within twenty leagues of the boundaries of any foreign state or ten leagues of the sea coasts was also prohibited; and grants for that purpose were void if made without the approbation of the supreme executive power. This last restriction, except in *Texas*, has been held to apply only to grants to empresarios and foreigners and not to individual grants made to citizens of the country.<sup>1</sup>

(c) **Title Papers — Record of Grants.** — No particular form of patent or grant is prescribed by the laws and regulations, and no document of the kind is required to be executed and delivered to convey or vest the title.<sup>2</sup> The directions on the subject were, that when the grant was definitively made the governor should sign a document to the effect that it had been executed in conformity with the provisions of the law, and give it to the party in interest to serve as a title, and by virtue of which possession should be given; and that a record should be kept of all the petitions presented and grants made, with the maps of the lands granted.<sup>3</sup> It is the record required by the regulations, rather

**1. Empresario Contracts or Grants — Littoral and Border League Grants — United States.** — *De Arguello v. U. S.*, 18 How. (U. S.) 539; *U. S. v. Cervantes*, 18 How. (U. S.) 553, *affirming* 3 Am. L. Reg. 745, 5 Fed. Cas. No. 2,560; *White v. Burnley*, 20 How. (U. S.) 235; *U. S. v. Sutter*, 21 How. (U. S.) 170; *League v. Egery*, 24 How. (U. S.) 264; *Foote v. Egery*, 24 How. (U. S.) 267; *Christy v. Pidgeon*, 4 Wall. (U. S.) 106; *U. S. v. Elder*, 177 U. S. 104; *U. S. v. Bernal*, Hoffm. Land Cas. (U. S.) 50, 24 Fed. Cas. No. 14,581; *U. S. v. Greer*, Hoffm. Land Cas. (U. S.) 72, 26 Fed. Cas. No. 15,261; *U. S. v. Limantour*, Hoffm. Land Cas. (U. S.) 389, 26 Fed. Cas. No. 15,601; *U. S. v. Pacheco*, Hoffm. Land Cas. (U. S.) 79, 27 Fed. Cas. No. 15,981.

*California.* — *Ferris v. Coover*, 10 Cal. 589.

*Texas.* — *Edwards v. Davis*, 3 Tex. 321, 10 Tex. 316; *Republic v. Thorn*, 3 Tex. 499; *Jones v. Borden*, 5 Tex. 410; *Bissell v. Haynes*, 9 Tex. 556; *De Leon v. White*, 9 Tex. 598; *Hatch v. Dunn*, 11 Tex. 708; *Marsh v. Weir*, 21 Tex. 97; *Yancey v. Norris*, 27 Tex. 40; *Wood v. Welder*, 42 Tex. 396; *Cowan v. Williams*, 49 Tex. 380. Compare generally *Cavazos v. Trevino*, 35 Tex. 133; and for titles issued under the decree of the state congress of March 26, 1834, *Goode v. McQueen*, 3 Tex. 241; *Smith v. Power*, 14 Tex. 146, 23 Tex. 29; *Blount v. Webster*, 16 Tex. 616; *Johnston v. Smith*, 21 Tex. 722; *Wilcox v. Chambers*, 26 Tex. 180.

See generally as to grants to foreigners cases cited *supra*, this subdivision, *Qualifications of Grantees*, note.

**While These Countries Were under the Dominion of Spain**, the governors had authority to make grants to families or single persons, while those made by empresarios required the sanction of the king. The same policy was pursued by the Mexican government. *De Arguello v. U. S.*, 18 How. (U. S.) 539.

**2. Issuance of Formal Title Papers.** — *U. S. v. Larkin*, 18 How. (U. S.) 557, *affirming* 26 Fed. Cas. No. 15,563; *Smith v. Reynolds*, 9 App. Cas. (D. C.) 261.

**Delivery of Grants.** — *Donner v. Palmer*, 31 Cal. 500; *Lick v. Diaz*, 37 Cal. 437, 30 Cal. 65; *Lavergne v. Elkins*, 17 La. 226.

**Requisites of Complete Title.** — Possession being given, and the final proceedings written out, recorded, and attached to the previous proceedings, constituted the complete title. *State v. Sais*, 47 Tex. 307. To similar effect *U. S. v. Moreno*, 1 Wall. (U. S.) 400; *Phelan v. Poyoreno*, 74 Cal. 448.

It is a matter of common knowledge, as well as of law, that the initial paper, in all these cases of Mexican grants, was the petition or application for a grant. Each successive paper or certificate, to and including the final grant, and the certificate of juridical possession, was indorsed upon or attached to this petition, so that when the last step was taken which perfected the title the grantee had in his possession all the original papers in the case constituting one instrument, records of the different parts thereof having been made in the public archives as the proceedings progressed; and this instrument constituted his muniment of title. *Ohm v. San Francisco*, (Cal. 1890) 25 Pac. Rep. 155, same case on rehearing 92 Cal. 437.

**Construing Papers and Proceedings Together.** — All the instruments referred to and embraced in the expediente form parts of the title, and may be referred to for the correction of errors and mistakes in other parts thereof. Its legal effect must be determined by the whole, and not from a single part. *Sheppard v. Harrison*, 54 Tex. 91. See cases cited *infra*, this subdivision, *Segregation of the Land*, note on construction of grants.

**3. Regulations on Issuance of Title Papers and Recording Grants.** — *Fremont v. U. S.*, 17 How. (U. S.) 560; *U. S. v. Sutter*, 21 How. (U. S.) 170; *U. S. v. Knight*, 1 Black (U. S.) 227; *Gonzales v. Ross*, 120 U. S. 605; *U. S. v. Chaves*, 159 U. S. 452; *Vanderslice v. Hanks*, 3 Cal. 28, 47; *Ferris v. Coover*, 10 Cal. 580; *Smith v. Reynolds*, 9 App. Cas. (D. C.) 261.

**Presumption** that a testimonio had been issued, as it should have been, "to serve the grantee for a title." *Hanrick v. Dodd*, 62 Tex. 75, *citing* *Titus v. Kimbro*, 8 Tex. 215.

**That the Testimonio Was Not Written on Properly Stamped Paper** does not affect its validity. With a proper stamp it would require no proof

than any formal conveyance, that successively vests the incipient right and the perfect title; and unless it is shown to have been made and is produced, or its absence reasonably accounted for, no claim for land under the Mexican government can be sustained.<sup>1</sup> The document required to be given by the governor to the party interested was evidence of the grant and enabled him to get possession, but it did not divest the government of the legal title unless record was made in conformity with the law.<sup>2</sup>

(d) **Segregation of the Land** — *aa. IN GENERAL.* — Mexican grants which are so indefinite and uncertain that neither the boundaries nor outboundaries of the

or its execution. Without it the execution must be proved. *Gonzales v. Ross*, 120 U. S. 605; *Jones v. Montes*, 15 Tex. 351; *Chambers v. Fisk*, 15 Tex. 335; *Sheldon v. Milmo*, 90 Tex. 1.

1. **Record of Grants** — *United States.* — U. S. v. Cambuston, 20 How. (U. S.) 59, *reversing* on other grounds 25 Fed. Cas. No. 14,712; U. S. v. Teschmaker, 22 How. (U. S.) 392, *reversing* Hoffm. Land Cas. (U. S.) 28, 23 Fed. Cas. No. 13,843; Hoffm. Dec. (U. S.) 84, 28 Fed. Cas. No. 16,455; U. S. v. Pico, 22 How. (U. S.) 406, *reversing* Hoffm. Land Cas. (U. S.) 188, 19 Fed. Cas. No. 11,129; Hoffm. Dec. (U. S.) 65, 27 Fed. Cas. No. 16,045; U. S. v. Vallejo, 22 How. (U. S.) 416, *reversing* Hoffm. Land Cas. (U. S.) 174, 28 Fed. Cas. No. 16,819; *Fuentes v. U. S.*, 22 How. (U. S.) 443; U. S. v. Noe, 23 How. (U. S.) 312, *reversing* Hoffm. Land Cas. (U. S.) 162, 18 Fed. Cas. No. 10,285; U. S. v. Bolton, 23 How. (U. S.) 341; *Luco v. U. S.*, 23 How. (U. S.) 515, *affirming* 15 Fed. Cas. No. 8,594; U. S. v. Osio, 23 How. (U. S.) 273, *reversing* Hoffm. Land Cas. (U. S.) 100, 27 Fed. Cas. No. 15,972; *Palmer v. U. S.*, 24 How. (U. S.) 125, *affirming* Hoffm. Land Cas. (U. S.) 249, 18 Fed. Cas. No. 10,697; U. S. v. Castro, 24 How. (U. S.) 346; U. S. v. Knight, 1 Black (U. S.) 227; U. S. v. Vallejo, 1 Black (U. S.) 283, *affirming* Hoffm. Op. (U. S.) 53; Hoffm. Dec. (U. S.) 3, 28 Fed. Cas. No. 16,606, 1 Black (U. S.) 541; *White v. U. S.*, 1 Wall. (U. S.) 660, *affirming* 28 Fed. Cas. No. 16,673; *Romero v. U. S.*, 1 Wall. (U. S.) 721, *affirming* Hoffm. Land Cas. (U. S.) 219, 20 Fed. Cas. No. 12,029; *Pico v. U. S.*, 2 Wall. (U. S.) 279; *Peralta v. U. S.*, 3 Wall. (U. S.) 434, *affirming* 27 Fed. Cas. No. 16,029; U. S. v. Gomez, 3 Wall. (U. S.) 752; *Berreyesa v. U. S.*, 154 U. S. 623, *affirming* 24 Fed. Cas. No. 14,585; U. S. v. Chaves, 159 U. S. 452; *Hays v. U. S.*, 175 U. S. 248; U. S. v. Ortiz, 176 U. S. 422; U. S. v. Elder, 177 U. S. 104; *Whitney v. U. S.*, 181 U. S. 104; U. S. v. Pendell, 185 U. S. 189; U. S. v. Green, 185 U. S. 256; *Diaz v. U. S.*, 7 Fed. Cas. No. 3,878; U. S. v. Larkin, Hoffm. Land Cas. (U. S.) 313, 14 Fed. Cas. No. 8,091; *Redman v. U. S.*, Hoffm. Land Cas. (U. S.) 305, 20 Fed. Cas. No. 11,631; U. S. v. Bernal, Hoffm. Dec. (U. S.) 47, 24 Fed. Cas. No. 14,579; U. S. v. Brown, Hoffm. Op. (U. S.) 74, Hoffm. Dec. (U. S.) 16, 24 Fed. Cas. No. 14,664; U. S. v. Castro, Hoffm. Land Cas. (U. S.) 125, 25 Fed. Cas. No. 14,752; U. S. v. Cambuston, 7 Sawy. (U. S.) 575, 25 Fed. Cas. No. 14,713; U. S. v. Galindo, 25 Fed. Cas. No. 15,183; U. S. v. Page, Hoffm. Land Cas. (U. S.) 80, 27 Fed. Cas.

No. 15,987; U. S. v. Pico, Hoffm. Op. (U. S.) 412, 27 Fed. Cas. No. 16,047; U. S. v. Polack, Hoffm. Land Cas. (U. S.) 284, Hoffm. Op. (U. S.) 32, 27 Fed. Cas. No. 16,061; U. S. v. Rodriguez, Hoffm. Land Cas. (U. S.) 170, 27 Fed. Cas. No. 16,185; *Bouldin v. Phelps*, 12 Sawy. (U. S.) 325, 30 Fed. Rep. 547; *Owen v. Presidio Min. Co.*, (C. C. A.) 61 Fed. Rep. 6; *Muse v. Arlington Hotel Co.*, 68 Fed. Rep. 637. See also, *De Arguello v. U. S.*, 18 How. (U. S.) 539. Compare U. S. v. Cazares, Hoffm. Land Cas. (U. S.) 90, 25 Fed. Cas. No. 14,761; U. S. v. Walkinshaw, 28 Fed. Cas. No. 16,633.

*California.* — *Donner v. Palmer*, 31 Cal. 500; *Davis v. California Powder-works*, 84 Cal. 617, writ of error dismissed 151 U. S. 389; *Ohm v. San Francisco*, (Cal. 1890) 25 Pac. Rep. 155, *affirmed* on rehearing 92 Cal. 437.

*Texas.* — *McGehee v. Dwyer*, 22 Tex. 435.

**The Grant Was Required to Be in Writing**, the officers and tribunals before which it was to pass were designated, and every step in the process, from the petition of the party to the final consummation of the title, was not only required to be in writing, but also to be deposited and recorded in the proper public office among the public archives of the republic. Whenever, therefore, a party claims title to lands under a Mexican grant, the general rule is that the grant must be found in the proper office among the public archives; this is the highest and best evidence. U. S. v. Castro, 24 How. (U. S.) 346.

**Grant of Sobrante or Surplus.** — It appears from the archives that the same formalities were rarely if ever observed in relinquishing a sobrante to the grantee, within the general limits of whose grant it was found, as were deemed necessary in making an original concession. A grant of a sobrante to him within whose limits it was found was little more than a waiver or release of the condition of the original grant which restricted him to a specific quantity. U. S. v. Soto, Hoffm. Land Cas. (U. S.) 182, 27 Fed. Cas. No. 16,357.

**The Treaty of Gadsden** of Dec. 30, 1853, expressly provided that no grant prior to Sept. 25, 1853, should be respected or considered as obligatory which had not been recorded in the archives of Mexico. U. S. v. Pendell, 185 U. S. 189.

**Presumption that Record Was Made.** — U. S. v. Pendell, 185 U. S. 189; U. S. v. Green, 185 U. S. 256.

2. *Peralta v. U. S.*, 3 Wall. (U. S.) 434, *affirming* 27 Fed. Cas. No. 16,029; *Whitney v. U. S.*, 181 U. S. 104; *Bouldin v. Phelps*, 12 Sawy. (U. S.) 325, 30 Fed. Rep. 547.

specific tract intended to be granted can be fully located are void and vest no right of property; while, on the other hand, grants sufficiently descriptive to identify the boundaries of the specific tract segregate it from the mass of the public domain and vest the right of property without any survey or formal delivery of possession.<sup>1</sup>

*bb. OUTBOUNDARY GRANTS.* — Under Mexican law as construed by the federal courts of the United States, grants of a quantity of land to be located within designated outboundaries of a larger tract vest a present and immediate right of property; the segregation of the particular quantity being a condition subsequent, nonperformance of which does not divest the estate.<sup>2</sup>

*cc. DELIVERY OF JURIDICAL POSSESSION — (aa) In General.* — In the case of indescriptive grants, a formal delivery of possession by a magistrate of the vicinage or other person officially appointed for the purpose, called the delivery of juridical possession, is necessary to segregate the land granted and invest the grantee with a perfect title. The proceeding has a double operation: first, to make a formal tradition or livery of seizin of the property, which is essential under the civil as at the common law; second, to measure off and segregate the specific land granted and establish its boundaries.<sup>3</sup> The regulations

**1. Segregation of the Land — In General.** — *U. S. v. Armijo*, 5 Wall. (U. S.) 444, *affirming* 24 Fed. Cas. No. 14,466; *Pinkerton v. Ledoux*, 129 U. S. 346, *affirming* 3 N. Mex. 252; *Cameron v. U. S.*, 148 U. S. 301, *reversing* (Ariz. 1889) 21 Pac. Rep. 177; *Arivaca Land, etc., Co. v. U. S.*, 184 U. S. 649; *Gwin v. Calegaris*, 139 Cal. 384; *Weir v. Van Bibber*, 34 Tex. 226; *State v. Sais*, 47 Tex. 307; *Johns v. Schutz*, 47 Tex. 578. See also *Banks v. Mereno*, 39 Cal. 233.

**Construction of Grants as to Quantity and Boundaries — Construing Together the Various Preliminary and Final Papers and Proceedings — United States.** — *De Arguello v. U. S.*, 18 How. (U. S.) 539; *U. S. v. Larkin*, 18 How. (U. S.) 557, *affirming* Hoffm. Land Cas. (U. S.) 41, 26 Fed. Cas. No. 15,563; *U. S. v. Sutherland*, 19 How. (U. S.) 363; *U. S. v. Sutter*, 21 How. (U. S.) 170; *Gonzales v. U. S.*, 22 How. (U. S.) 161; *U. S. v. Pacheco*, 22 How. (U. S.) 225, *reversing* Hoffm. Land Cas. (U. S.) 150, 27 Fed. Cas. No. 15,982; *Yontz v. U. S.*, 23 How. (U. S.) 495; *U. S. v. D'Aguires*, 1 Wall. (U. S.) 311; *U. S. v. Pacheco*, 2 Wall. (U. S.) 587; *Fossat's Case*, 2 Wall. (U. S.) 649, *reversing* 25 Fed. Cas. No. 15,140, 21 How. (U. S.) 445, *dismissing appeal from* Hoffm. Land Cas. (U. S.) 376, 25 Fed. Cas. No. 15,139, 20 How. (U. S.) 413, *reversing* Hoffm. Land Cas. (U. S.) 211, 25 Fed. Cas. No. 15,137; *U. S. v. Pico*, 5 Wall. (U. S.) 536; *Feliz v. U. S.*, 8 Fed. Cas. No. 4,720; *Marsh v. U. S.*, Hoffm. Land Cas. (U. S.) 301, 16 Fed. Cas. No. 9,120; *Martin v. U. S.*, Hoffm. Land Cas. (U. S.) 146, 16 Fed. Cas. No. 9,168; *U. S. v. Bernal*, 24 Fed. Cas. No. 14,578; *U. S. v. Castro*, Hoffm. Op. (U. S.) 57, Hoffm. Dec. (U. S.) 97, 25 Fed. Cas. No. 14,753; *U. S. v. Castro*, 5 Sawy. (U. S.) 625, 25 Fed. Cas. No. 14,754; *U. S. v. Estudillo*, Hoffm. Land Cas. (U. S.) 204, 25 Fed. Cas. No. 15,058; *U. S. v. Larkin*, Hoffm. Dec. (U. S.) 23, 26 Fed. Cas. No. 15,562; *U. S. v. Peralta*, 27 Fed. Cas. No. 16,032; *U. S. v. Reid*, Hoffm. Land Cas. (U. S.) 120, 27 Fed. Cas. No. 16,141; *U. S. v. Richardson*, Hoffm. Dec. (U. S.) 69, 27 Fed. Cas. Nos. 16,156, 16,157;

*U. S. v. Walkinshaw*, 28 Fed. Cas. No. 16,633; *U. S. v. Wilson*, Hoffm. Land Cas. (U. S.) 84, 28 Fed. Cas. No. 16,735; *Weber v. U. S.*, Hoffm. Op. (U. S.) 66, Hoffm. Dec. (U. S.) 8, 29 Fed. Cas. No. 17,329; *Coburn v. San Mateo County*, 75 Fed. Rep. 520.

*California.* — *Ferris v. Coover*, 10 Cal. 589; *McGarvey v. Little*, 15 Cal. 27; *More v. Masini*, 37 Cal. 432.

See also as to quantity *supra*, this subdivision, *Quantitative Limitations*.

**2. Outboundary Grants Vest Right of Property.** — *Fremont v. U. S.*, 17 How. (U. S.) 542, *reversing* on other grounds 25 Fed. Cas. No. 15,164, two justices dissenting; *U. S. v. Vaca*, 18 How. (U. S.) 556; *Hornsby v. U. S.*, 10 Wall. (U. S.) 224; *Armijo v. U. S.*, Hoffm. Land Cas. (U. S.) 248, 1 Fed. Cas. No. 536; *Yount v. U. S.*, Hoffm. Land Cas. (U. S.) 43, 30 Fed. Cas. No. 18,188; *Teschmacher v. Thompson*, 18 Cal. 11, 79 Am. Dec. 151; *Wilson v. Castro*, 31 Cal. 420; *People v. Crockett*, 33 Cal. 150. See generally the cases cited in this subsection.

**The Right to So Much Land**, to be afterwards laid off, by official authority, in the territory described, passed from the government to the grantee, by the execution of the instrument granting it. *Fremont v. U. S.*, 17 How. (U. S.) 542.

**Deficiency in Quantity.** — If the quantity granted cannot be found within the designated boundaries the grantee cannot have an equivalent for the deficiency located elsewhere. *U. S. v. Rodriguez*, 27 Fed. Cas. No. 16,183.

**3. Delivery of Juridical Possession — In General — United States.** — *Malarin v. U. S.*, 1 Wall. (U. S.) 282; *Graham v. U. S.*, 4 Wall. (U. S.) 259, *affirming* Hoffm. Op. (U. S.) 60, Hoffm. Dec. (U. S.) 67, 26 Fed. Cas. No. 15,246; *U. S. v. Pico*, 5 Wall. (U. S.) 536; *Hanrick v. Barton*, 16 Wall. (U. S.) 166; *Van Reynegan v. Bolton*, 95 U. S. 33; *More v. Steinbach*, 127 U. S. 70; *Ainsa v. U. S.*, 161 U. S. 208; *Dodge v. Perez*, 2 Sawy. (U. S.) 645, 7 Fed. Cas. No. 3,953; *U. S. v. Castro*, 5 Sawy. (U. S.) 625, 25 Fed. Cas. No. 14,754; *Yount v.*



prescribed by law for the guidance of the magistrate in delivering the possession make it his duty to preserve a record of the various steps taken in the proceeding, to have the same attested by the assisting witnesses, and to deliver an authentic copy to the grantee.<sup>1</sup> The segregation of the land granted requires this official intervention of the government, and cannot be effected by an unauthorized survey, possession, or improvement by the grantee. A selection or location thus made is often respected, however, if not detrimental to the interests of the government, inconsistent with the terms of the grant, or in conflict with the rights of other persons, and may under some circumstances estop the grantee from having the grant located elsewhere.<sup>2</sup>

(*bb*) *Outboundary Grants.* — Outboundary grants, while they vest a right of property, are within this rule, and require delivery of juridical possession to convert them into complete titles.<sup>3</sup> Until thus segregated the grantee and

U. S., Hoffm. Dec. (U. S.) 36, 30 Fed. Cas. No. 18,187; *Bouldin v. Phelps*, 12 Sawy. (U. S.) 325, 30 Fed. Rep. 547.

*California.* — *Hart v. Burnett*, 15 Cal. 530; *Leese v. Clark*, 18 Cal. 535; *Mahoney v. Van Winkle*, 21 Cal. 553; *Steinbach v. Moore*, 30 Cal. 508.

See generally the cases cited in this subsection.

**Form of Location.** — *Fremont v. U. S.*, 17 How. (U. S.) 542; *Sutter's Case*, 2 Wall. (U. S.) 562, *reversing* 27 Fed. Cas. No. 16,424; *U. S. v. Armijo*, 5 Wall. (U. S.) 444, *affirming* 24 Fed. Cas. No. 14,466; *U. S. v. Soto*, Hoffm. Land Cas. (U. S.) 182, 27 Fed. Cas. No. 16,357.

**Order to Extend Title in Possession.** — No further petition or order is necessary to have the title extended in possession where the grant itself confers power and authority to act upon the proper commissioner. *Gonzales v. Ross*, 120 U. S. 605.

**Joint Grantees.** — Delivery of possession to one of two joint grantees inures to the benefit of both. *Trevino v. Fernandez*, 13 Tex. 630.

**1. Regulations Prescribed by Law.** — *Van Reynegan v. Bolton*, 95 U. S. 33.

**"Extension of Title."** — In the land system of the United States the final patent is the all-controlling document as to the legal title. But under Mexico the final "extension of title," the title of possession, is necessary to render the original title perfect. Until it issues the original grant does not attach itself to any specific land. When it issues the original title is said to be extended upon the particular land designated. *Hanrick v. Barton*, 16 Wall. (U. S.) 166.

**Evidence of Delivery.** — That the record or title of possession is not authenticated by instrumental or assisting witnesses will not affect its validity if its genuineness is proved by other sufficient and competent evidence; but parol evidence is not admissible to contradict it. *Sheirburn v. Hunter*, 3 Woods (U. S.) 281, 21 Fed. Cas. No. 12,744; *U. S. v. Graham*, 26 Fed. Cas. No. 15,246; *U. S. v. Payson*, 27 Fed. Cas. No. 16,015; *Clay v. Holbert*, 14 Tex. 189; *Jones v. Montes*, 15 Tex. 351; *Ruis v. Chambers*, 15 Tex. 586; *Grimes v. Bastrop*, 26 Tex. 310; *Sheppard v. Harrison*, 54 Tex. 91.

**In Texas** it was a common practice for empresarios and others to have their surveys completed in anticipation of the arrival of the colonists, or the measures requisite for the pro-

curement of the final title. The return of such surveys by a surveyor, and their recognition by the commissioner or alcalde, was treated as a substantial compliance with the law. A surveyor might adopt the surveys of other persons. *Spencer v. Lepsley*, 20 How. (U. S.) 264.

**2. Segregation Requires Official Intervention of Government** — *United States.* — *Fremont v. U. S.*, 17 How. (U. S.) 542; *U. S. v. Vallejo*, 1 Wall. (U. S.) 658; *Sutter's Case*, 2 Wall. (U. S.) 562, *reversing* on other grounds Hoffm. Dec. (U. S.) 27, 27 Fed. Cas. No. 16,424; *U. S. v. Pacheco*, 2 Wall. (U. S.) 587; *U. S. v. Armijo*, 5 Wall. (U. S.) 444, *affirming* 24 Fed. Cas. No. 14,466; *Hornsby v. U. S.*, 10 Wall. (U. S.) 234; *Hosmer v. Wallace*, 97 U. S. 575, *affirming* 47 Cal. 461; *Van Reynegan v. Bolton*, 95 U. S. 35; *Fraser v. O'Connor*, 115 U. S. 107, *affirming* 56 Cal. 499; *U. S. v. De Haro*, 154 U. S. 544, *reversing* Hoffm. Dec. (U. S.) 77, 25 Fed. Cas. No. 14,941, *affirming* Hoffm. Dec. (U. S.) 75, 25 Fed. Cas. No. 14,940; *U. S. v. Carillo*, Hoffm. Dec. (U. S.) 40, 25 Fed. Cas. No. 14,736; *U. S. v. Castro*, 25 Fed. Cas. No. 14,750; *U. S. v. Covillard*, Hoffm. Dec. (U. S.) 52, 25 Fed. Cas. No. 14,879; *U. S. v. Pacheco*, Hoffm. Dec. (U. S.) 62, 27 Fed. Cas. No. 15,980; *U. S. v. Richardson*, Hoffm. Dec. (U. S.) 69, 27 Fed. Cas. No. 16,156; *Weber v. U. S.*, Hoffm. Dec. (U. S.) 10, 29 Fed. Cas. No. 17,328.

*California.* — *Rose v. Davis*, 11 Cal. 141; *Moore v. Wilkinson*, 13 Cal. 478; *Boggs v. Merced Min. Co.*, 14 Cal. 279; *Riley v. Heisch*, 18 Cal. 200; *Leese v. Clarke*, 18 Cal. 574; *Es-trada v. Murphy*, 19 Cal. 270; *Mahoney v. Van Winkle*, 21 Cal. 552; *Carpentier v. Thirston*, 24 Cal. 268; *Thornton v. Mahoney*, 24 Cal. 580; *Love v. Shartzter*, 31 Cal. 487; *Yates v. Smith*, 38 Cal. 66.

**As the Law Reads,** "no person, though his grant be older than others, can take possession for himself, or measure, or set limits to his landed property, unless it is done by judicial authority, with the citation of all those who bound upon him, for whatever is done contrary to this will be null and of no validity or effect." *U. S. v. Armijo*, 5 Wall. (U. S.) 444, *affirming* 24 Fed. Cas. No. 14,466; *Waterman v. Smith*, 13 Cal. 373; *Ohm v. San Francisco*, (Cal. 1890) 25 Pac. Rep. 115, same case on rehearing 92 Cal. 437.

**3.** See the cases cited in the next two notes. See also *U. S. v. Throckmorton*, 98 U. S. 61;

the government are tenants in common of the whole tract;<sup>1</sup> and the former is entitled to take and be protected in the possession as against trespassers and persons not having equal rights therein.<sup>2</sup> The government, however, can continue to make valid grants of land within the outboundaries so long as a sufficient quantity remains to satisfy those previously made; and the one by virtue of which a particular parcel is first segregated, whether by description or delivery of juridical possession, will carry title to the premises,<sup>3</sup> unless some equity exists or exception is made in favor of prior grantees.<sup>4</sup>

(cc) *By Whom and Where Possession Delivered.* — Juridical possession was usually delivered by the alcalde of the district, unless the land granted was within the limits of a colony organized under an empresario contract or grant, when the title was extended by the commissioner of the colony; but special authority was sometimes conferred upon other persons. No valid extension of the title can be made on land not within the terms of the grant or the limits of the jurisdiction of the officer; except in cases where the exact location of the land or of the boundaries of the district is uncertain, when an honest mistake will not affect the title.<sup>5</sup> Where there is any doubt as to the boundaries and extent of the grant, it is conclusively removed by the delivery of juridical possession, which has all the force and efficacy of a judicial determination.<sup>6</sup>

(e) **Conditions** — *aa. IN GENERAL.* — Occupancy, cultivation, improvement, or other conditions, annexed to the grant by the laws of the country or its own terms, were conditions subsequent and not precedent. For nonperformance a forfeiture might be declared in a regular proceeding or denouncement; but until this was done the right or title remained vested, except in cases of aban-

U. S. v. Greer, Hoffm. Land Cas. (U. S.) 72, 26 Fed. Cas. No. 15,261; Emeric v. Penniman, 26 Cal. 123; Wilson v. Castro, 31 Cal. 421.

**Exception.** — The Gadsden treaty with Mexico of December 30, 1853, expressly provides that grants shall not be respected or considered as obligatory which have not been located prior to the cession. Ainsa v. U. S., 161 U. S. 208, 184 U. S. 639; U. S. v. Camou, 184 U. S. 572, 171 U. S. 277; Reloj Cattle Co. v. U. S., 184 U. S. 624; Arivaca Land, etc., Co. v. U. S., 184 U. S. 649; U. S. v. Pendell, 185 U. S. 189.

1. Frasher v. O'Connor, 115 U. S. 102, affirming 56 Cal. 499.

2. **Possessory Rights** — *United States.* — Van Reynege v. Bolton, 95 U. S. 36; Hosmer v. Wallace, 97 U. S. 575, affirming 47 Cal. 461; Frasher v. O'Connor, 115 U. S. 102, affirming 56 Cal. 499.

*California.* — Vanderslice v. Hanks, 3 Cal. 28, 47; Ferris v. Coover, 10 Cal. 589; Cornwall v. Culver, 16 Cal. 428; Riley v. Heisch, 18 Cal. 199; Mahoney v. Van Winkle, 21 Cal. 552; Carpentier v. Thirston, 24 Cal. 268; Thornton v. Mahoney, 24 Cal. 569; Carpentier v. Webster, 27 Cal. 524; Love v. Shartzler, 31 Cal. 493; Mott v. Reyes, 45 Cal. 379; Mound City Land, etc., Assoc. v. Philip, 64 Cal. 495; Shanklin v. McNamara, 87 Cal. 380.

3. **Subsequent Grants Within Same Outboundaries.** — Fremont v. U. S., 17 How. (U. S.) 558; Henshaw v. Bissell, 18 Wall. (U. S.) 255, affirming 1 Sawy. (U. S.) 553, 3 Fed. Cas. No. 1,447; Miller v. Dale, 92 U. S. 476; Carr v. Quigley, 149 U. S. 652, reversing 79 Cal. 130, 57 Cal. 294. (Cal. 1887) 16 Pac. Rep. 9; U. S. v. Armijo, 24 Fed. Cas. No. 14,466, affirmed 5 Wall. (U. S.) 444; Yates v. Smith, 38 Cal. 66; Hale v. Akers, 69 Cal. 160, writ of error dismissed 132 U. S. 554.

4. U. S. v. Armijo, 5 Wall. (U. S.) 444, affirming 24 Fed. Cas. No. 14,466.

5. **By Whom and Where Juridical Possession Delivered.** — Spencer v. Lapsley, 20 How. (U. S.) 264; Davila v. Mumford, 24 How. (U. S.) 214; Hanrick v. Barton, 16 Wall. (U. S.) 166; Gonzales v. Ross, 120 U. S. 605; Pinkerton v. Ledoux, 129 U. S. 346, affirming 3 N. Mex. 252; Sheirburn v. Hunter, 3 Woods (U. S.) 281, 21 Fed. Cas. No. 12,744; Mason v. Russel, 1 Tex. 721, 8 Tex. 226; Edwards v. James, 7 Tex. 372; Hancock v. McKinney, 7 Tex. 384; Hamilton v. Menifee, 11 Tex. 718; Howard v. Richeson, 13 Tex. 553; Hamilton v. Avery, 20 Tex. 630; McGehee v. Dwyer, 22 Tex. 435; Word v. McKinney, 25 Tex. 258; Martin v. Parker, 26 Tex. 253; Ledyard v. Brown, 27 Tex. 393; Elliot v. Mitchell, 28 Tex. 105; Barrett v. Kelly, 31 Tex. 476; Sideck v. Duran, 67 Tex. 256; Griffith v. Sauls, 77 Tex. 630. See also U. S. v. Narvaez, 27 Fed. Cas. No. 15,855.

**The Sale of Land Within the Limits of the Colony** might disturb the interest of the empresario or of the colonists, and hence reference of the contracts to the commissioner for execution. Spencer v. Lepsley, 20 How. (U. S.) 264.

**The Commissioner**, under a colonization contract, holds his office independent of the empresario, directly from the government. Bissell v. Haynes, 9 Tex. 556; Webb v. Webb, 15 Tex. 274.

**A Title Issued to a Colonist** affords *prima facie* evidence that the land granted is within the limits of the colony. Robertson v. Teal, 9 Tex. 344; Hatch v. Dunn, 11 Tex. 708; Howard v. Richeson, 13 Tex. 554.

6. U. S. v. Pico, 5 Wall. (U. S.) 536; Pinkerton v. Ledoux, 129 U. S. 346, affirming 3 N. Mex. 252; Yount v. U. S. Hoffm. Dec. (U. S.)

donment of grants. Abandonment resulted from nonperformance of conditions of occupancy or improvement for a long period of time without reasonable excuse.<sup>1</sup> Grants by municipal corporations or pueblos are not within this rule. They are to be construed in the same manner as grants by private persons; and nonperformance of conditions subsequent forfeits all the rights of the grantee without any denouncement, the title reverting to the pueblo.<sup>2</sup> It is no valid objection to a grant that it does not contain the usual conditions of cultivation and inhabitancy, at least where the applicant was in actual possession of the land when it was executed. It was customary under such circumstances to omit them.<sup>3</sup>

*bb. RESTRICTIONS ON ALIENATION.*—Some of the Mexican state legislation prohibits the alienation of the land granted for a limited period after the execution of the grant, and conveyances and agreements to convey entered into during the time limited are void and of no effect;<sup>4</sup> but there may be equities arising

36, 30 Fed. Cas. No. 18,187. See also *Malarin v. U. S.*, 1 Wall. (U. S.) 282.

**1. Conditions Subsequent**—*United States.*—*Fremont v. U. S.*, 17 How. (U. S.) 542, *reversing* 25 Fed. Cas. No. 15,164, 18 How. (U. S.) 30, two justices dissenting; *U. S. v. Reading*, 18 How. (U. S.) 1, *affirming* 27 Fed. Cas. No. 16,127; *U. S. v. Cervantes*, 18 How. (U. S.) 553, *affirming* 3 Am. L. Reg. 745, 5 Fed. Cas. No. 2,560, *reversing* in effect 25 Fed. Cas. No. 14,768, which was *reversed* on other grounds 16 How. (U. S.) 619; *U. S. v. Vaca*, 18 How. (U. S.) 556; *U. S. v. Larkin*, 18 How. (U. S.) 557, *affirming* 26 Fed. Cas. No. 15,563; *Fuentes v. U. S.*, 22 How. (U. S.) 443; *U. S. v. Noe*, 23 How. (U. S.) 312, *reversing* Hoffm. Land Cas. (U. S.) 162, 18 Fed. Cas. No. 10,285; *U. S. v. Bolton*, 23 How. (U. S.) 341; *Hornsby v. U. S.*, 10 Wall. (U. S.) 224; *Henshaw v. Bissell*, 18 Wall. (U. S.) 255, *affirming* 1 Sawy. (U. S.) 553, 3 Fed. Cas. No. 1,447; *Gonzales v. Ross*, 120 U. S. 605; *U. S. v. Olvera*, 154 U. S. 538; *Grimes v. U. S.*, Hoffm. Land Cas. (U. S.) 107, 11 Fed. Cas. No. 5,828; *McKee v. U. S.*, Hoffm. Land Cas. (U. S.) 173, 16 Fed. Cas. No. 8,850; *Nunez v. U. S.*, Hoffm. Land Cas. (U. S.) 191, 18 Fed. Cas. No. 10,379; *Pacheco v. U. S.*, Hoffm. Land Cas. (U. S.) 113, 18 Fed. Cas. No. 10,641; *Pico v. U. S.*, Hoffm. Land Cas. (U. S.) 116, 142, 19 Fed. Cas. Nos. 11,127, 11,128; *Semple v. U. S.*, Hoffm. Land Cas. (U. S.) 37, 21 Fed. Cas. No. 12,662; *U. S. v. Pacheco*, Hoffm. Land Cas. (U. S.) 79, 27 Fed. Cas. No. 15,981; *U. S. v. Juarez*, 26 Fed. Cas. No. 15,500; *U. S. v. Polack*, Hoffm. Land Cas. (U. S.) 284, Hoffm. Op. (U. S.) 32, 27 Fed. Cas. No. 16,061; *U. S. v. Reid*, Hoffm. Land Cas. (U. S.) 129, 27 Fed. Cas. No. 16,141; *U. S. v. Soto*, Hoffm. Land Cas. (U. S.) 68, 27 Fed. Cas. No. 16,355; *Vallejo v. U. S.*, Hoffm. Dec. (U. S.) 66, 28 Fed. Cas. No. 16,818; *U. S. v. Weber*, Hoffm. Land Cas. (U. S.) 126, 28 Fed. Cas. No. 16,657. See also *U. S. v. Pena*, 175 U. S. 500.

*California.*—*Gunn v. Bates*, 6 Cal. 263; *Ferris v. Coover*, 10 Cal. 589. *Contra*, *Leese v. Clarke*, 3 Cal. 18; *Vanderslice v. Hanks*, 3 Cal. 47, *overruling* on rehearing 3 Cal. 28.

*District of Columbia.*—*Smith v. Reynolds*, 9 App. Cas. (D. C.) 261.

*Texas.*—*Edwards v. James*, 7 Tex. 372; *Hancock v. McKinney*, 7 Tex. 384; *Swift v.*

*Herrera*, 9 Tex. 263; *Wheeler v. Moody*, 9 Tex. 372; *Ryan v. Jackson*, 11 Tex. 392; *Manchaca v. Field*, 62 Tex. 135; *Sideck v. Duran*, 67 Tex. 256.

See also *supra*, this subdivision, *Approval of Grants; Segregation of the Land.*

**Act or Omission After Conquest or Cession No Ground for Forfeiture.**—*Fremont v. U. S.*, 17 How. (U. S.) 542, *reversing* 25 Fed. Cas. No. 15,164, 18 How. (U. S.) 30; *U. S. v. Juarez*, 26 Fed. Cas. No. 15,500; *U. S. v. Sutter*, 21 How. (U. S.) 170; *Catron v. Laughlin*, (N. Mex. 1903) 72 Pac. Rep. 26. See also *Texas* cases cited *supra*, this note; *Ferris v. Coover*, 10 Cal. 589.

**Conditions Precedent.**—For the presentation of petitions for grants, qualifications of applicants, and other kindred matters in the nature of conditions precedent, see *supra*, this section, *Petition, Reference, and Concession.*

**2. Grant by Municipal Corporations.**—*Touchard v. Touchard*, 5 Cal. 307; *Norris v. Moody*, 84 Cal. 143, *distinguishing* *Holliday v. West*, 6 Cal. 525, *disapproving dicta* in *Hart v. Burnett*, 15 Cal. 530. *Compare* *Cullen v. Sprigg*, 83 Cal. 56.

**3. Unconditional Grants.**—*U. S. v. Larkin*, 18 How. (U. S.) 557, *affirming* Hoffm. Land Cas. (U. S.) 41, 26 Fed. Cas. No. 15,563; *U. S. v. Yorba*, 1 Wall. (U. S.) 412; *McKee v. U. S.*, Hoffm. Land Cas. (U. S.) 173, 16 Fed. Cas. No. 8,850; *Ferris v. Coover*, 10 Cal. 589; *Scott v. Ward*, 13 Cal. 459.

**Conditions in Grants.**—There appears to have been no uniformity in the conditions annexed by the grants issued by the different governors or political chiefs, or even by those issued by the same individual. Great latitude seems to have been exercised in prescribing conditions, both as to the number and the nature of them. *U. S. v. Larkin*, 18 How. (U. S.) 557, *affirming* Hoffm. Land Cas. (U. S.) 41, 26 Fed. Cas. No. 15,563.

**Conditions Not Authorized by Law Void.**—*Fremont v. U. S.*, 17 How. (U. S.) 542, *reversing* 25 Fed. Cas. No. 15,164; *Nieto v. Carpenter*, 7 Cal. 527, 21 Cal. 455; *Catron v. Laughlin*, (N. Mex. 1903) 72 Pac. Rep. 26; *Swift v. Herrera*, 9 Tex. 263; *Fulton v. Bayne*, 18 Tex. 50.

**4. Restrictions on Alienation**—*United States.*—*Phillips v. Moore*, 100 U. S. 208; *Hunnicut v. Peyton*, 102 U. S. 333. See also *Fremont v.*



from possession, improvement, and the like, which will sustain the claim of the purchaser against the title of the vendor, in spite of the prohibition.<sup>1</sup>

(6) *Irregularities in Papers or Proceedings.*—If the grant is genuine and lawfully executed, and issued at a proper time and by a legal officer, it will pass the right or title from the government, notwithstanding accidental defects, irregularities, or errors that may have intervened in the manner and form of execution.<sup>2</sup>

**6. Pueblo or Town Lands**—*a. GENERAL PUEBLO TITLE.*—Under the Spanish and Mexican governments, on a settlement being officially recognized as a pueblo or town, a tract of land embracing its site and adjoining territory to the extent of four square leagues was frequently, and without any formal grant, designated and set apart for its use and benefit, and the use and benefit of its inhabitants; and the municipal authorities were empowered to convey small parcels to individual inhabitants in absolute ownership, and use the remainder for commons, for pasture lands, as a source of revenue, or for other public purposes. The disposition and use, however, were subject to the control of the state, which could itself make grants of the land or reserve and appropriate portions for public use.<sup>3</sup> The granting power of the pueblo was exercised by the alcalde or mayor, subject to the direction or approval of the ayuntamiento or town council, which was in turn apparently subject to the

U. S., 17 How. (U. S.) 542, reversing 25 Fed. Cas. No. 15,164.

*Texas.*—Hunt v. Robinson, 1 Tex. 747; Robbins v. Robbins, 3 Tex. 496; Spillers v. Clapp, 3 Tex. 498; Jenkins v. Chambers, 9 Tex. 167; Hunt v. Turner, 9 Tex. 385, 60 Am. Dec. 167; Desmuke v. Griffin, 10 Tex. 113; Burleson v. Burleson, 11 Tex. 2; Ryan v. Jackson, 11 Tex. 391; Emmons v. Oldham, 12 Tex. 18; Portis v. Hill, 14 Tex. 69, 65 Am. Dec. 99; Clay v. Holbert, 14 Tex. 189; Harris v. Hardeman, 15 Tex. 466; Fulton v. Duncan, 18 Tex. 34; McKissick v. Colquhoun, 18 Tex. 148; Atkinson v. Bell, 18 Tex. 474; Johnston v. Smith, 21 Tex. 722; Williams v. Chandler, 25 Tex. 4; Clay v. Clay, 26 Tex. 24, 35 Tex. 509; Martin v. Parker, 26 Tex. 253; Williams v. Talbot, 27 Tex. 159; Ledyard v. Brown, 27 Tex. 393; Thomas v. Moore, 46 Tex. 433; Summers v. Davis, 49 Tex. 541; Holmes v. Johns, 56 Tex. 41; Cook v. Lindsay, 57 Tex. 67; Hines v. Thorn, 57 Tex. 98; Grant v. Wallis, 60 Tex. 350; Manchaca v. Field, 62 Tex. 135; Brown v. Simpson, 67 Tex. 225.

**1. Equities in Favor of Purchaser.**—Hunt v. Turner, 9 Tex. 385, 60 Am. Dec. 167; Clay v. Clay, 35 Tex. 509; Holmes v. Johns, 56 Tex. 41. See also Ledyard v. Brown, 27 Tex. 393.

**2. Irregularities in Papers and Proceedings.**—See generally and for various illustrations of the rule: Spencer v. Lapsley, 20 How. (U. S.) 264; U. S. v. Sutter, 21 How. (U. S.) 170; Hornsby v. U. S., 10 Wall. (U. S.) 224; U. S. v. Juarez, 26 Fed. Cas. No. 15,500; Scott v. Ward, 13 Cal. 459; Soto v. Kroder, 19 Cal. 87; Titus v. Kimbro, 8 Tex. 210; White v. Holliday, 11 Tex. 606; Clay v. Holbert, 14 Tex. 189; McGehee v. Dwyer, 22 Tex. 435; Sheppard v. Harrison, 54 Tex. 91; Houston v. Blythe, 60 Tex. 506.

**3. General Pueblo Title.**—See generally the cases *infra*, this subdivision, *California*, and particularly the following:

*United States.*—Townsend v. Greeley, 5 Wall. (U. S.) 326; U. S. v. Pico, 5 Wall. (U.

S.) 536; Alexander v. Roulet, 13 Wall. (U. S.) 386; Palmer v. Low, 98 U. S. 1, affirming 2 Sawy. (U. S.) 248, 18 Fed. Cas. No. 10,693; Brownsville v. Cavazos, 100 U. S. 138, affirming 2 Woods (U. S.) 293, 4 Fed. Cas. No. 2,043; Trenouth v. San Francisco, 100 U. S. 251; San Francisco v. Scott, 111 U. S. 768; U. S. v. Santa Fé, 165 U. S. 675; U. S. v. Sandoval, 167 U. S. 278; Cessna v. U. S., 169 U. S. 165; Montgomery v. Bevans, 1 Sawy. (U. S.) 653, 17 Fed. Cas. No. 9,735; San Francisco v. U. S., 4 Sawy. (U. S.) 553, 21 Fed. Cas. No. 12,316.

*California.*—Cohas v. Raisin, 3 Cal. 443; Hart v. Burnett, 15 Cal. 530; Brown v. San Francisco, 16 Cal. 451; Leese v. Clark, 18 Cal. 535, 20 Cal. 387; Stevenson v. Bennett, 35 Cal. 424; Weisenberg v. Truman, 58 Cal. 63; Baker v. Brickell, 87 Cal. 329; Ohm v. San Francisco, (Cal. 1890) 25 Pac. Rep. 155, 92 Cal. 437; Ames v. San Diego, 101 Cal. 390; Vernon Irr. Co. v. Los Angeles, 106 Cal. 237; Monterey v. Jacks, 139 Cal. 542.

*Louisiana.*—See De Armas v. New Orleans, 5 La. 132; New Orleans v. Bermudez, 3 Mart. (La.) 308.

*Texas.*—Dittmar v. Dignowitty, 78 Tex. 22.

**Word "Pueblo" Defined.**—See PUEBLO, vol. 23, p. 460; Grisar v. McDowell, 6 Wall. (U. S.) 363; Welch v. Sullivan, 8 Cal. 165; U. S. v. Varela, 1 N. Mex. 593.

**Manner of Establishing Towns.**—U. S. v. Sandoval, 167 U. S. 278.

**Form in Which Pueblo Lands Were Laid Out.**—Hart v. Burnett, 15 Cal. 530; Stevenson v. Bennett, 35 Cal. 424.

**Grant of More than Four Square Leagues.**—There was no law prohibiting a grant to a town of more than four square leagues of land. Lewis v. San Antonio, 7 Tex. 288, cited U. S. v. Santa Fé, 165 U. S. 675.

**The Mexican Colonization Law of 1824** expressly prohibited grants by the state of land belonging to towns. Vanderslice v. Hanks, 3 Cal. 28; Hart v. Burnett, 15 Cal. 530.

control of the state in making the grants;<sup>1</sup> and grants made by the prefect of the district in which the pueblo was situated or by a justice of the peace were void and of no effect unless specially authorized or ratified.<sup>2</sup>

**Grants by American Alcaldes.** — In *California* it is held that the conquest or cession of the country did not abrogate or suspend the power of the municipal authorities to make grants of the pueblo lands; but however this may be, alcalde titles acquired after as well as those acquired before the conquest have been, for the most part, perfected by federal and state legislation.<sup>3</sup>

**b. CONFIRMATION OF TITLES.** — (1) *In General.* — By the designation and setting apart of land to a pueblo,<sup>4</sup> it acquired an interest therein, which, though imperfect, was a vested right of property, and neither it nor the titles of individuals holding under it by valid grant were divested by the conquest or cession of the country. But the power to control the disposition and use of the land until it had passed into private ownership, retained by the state, passed thereon to the succeeding government; and a grant or confirmation by it was necessary to convert the municipal title into an absolute and indefeasible estate.<sup>5</sup> For this purpose various statutes have been enacted by

**1. How Granting Power of Pueblo Exercised.** — *Merryman v. Bourne*, 9 Wall. (U. S.) 593, *affirming* 17 Fed. Cas. No. 9,480; *Palmer v. Low*, 98 U. S. 1, *affirming* 2 Sawy. (U. S.) 248, 18 Fed. Cas. No. 10,693; *Trenouth v. San Francisco*, 100 U. S. 251; *San Francisco v. Le Roy*, 138 U. S. 656; *U. S. v. Santa Fé*, 165 U. S. 675; *U. S. v. Sandoval*, 167 U. S. 278; *Cessna v. U. S.*, 169 U. S. 165; *Cohas v. Raisin*, 3 Cal. 443; *Welch v. Sullivan*, 8 Cal. 165; *Hart v. Burnett*, 15 Cal. 530; *Leese v. Clark*, 18 Cal. 535; *White v. Moses*, 21 Cal. 34; *Ohm v. San Francisco*, (Cal. 1890) 25 Pac. Rep. 155, *affirmed* on rehearing 92 Cal. 437; *Dittmar v. Dignowitty*, 78 Tex. 22. See also *Beach v. Gabriel*, 29 Cal. 581.

**The Granting Power of the Municipal Authorities** was limited to the granting of house lots for building purposes, called solares, and sowing grounds for cultivating or planting, as gardens, vineyards, orchards, etc., called suertes. They had no power to lease or grant extensive tracts. *Redding v. White*, 27 Cal. 282. See also *U. S. v. Berreyesa*, 24 Fed. Cas. No. 14,585, *affirmed* on other grounds 154 U. S. 623.

**Record of Alcalde Grants — Records as Evidence.** — *Palmer v. Low*, 98 U. S. 1, *affirming* 2 Sawy. (U. S.) 248, 18 Fed. Cas. No. 10,693; *Touchard v. Keyes*, 21 Cal. 203; *Downer v. Smith*, 24 Cal. 114; *Rice v. Cunningham*, 29 Cal. 493; *Donner v. Palmer*, 31 Cal. 500; *Garwood v. Hastings*, 38 Cal. 216; *Sill v. Reese*, 47 Cal. 294; *Ohm v. San Francisco*, (Cal. 1890) 25 Pac. Rep. 155, *affirmed* on rehearing 92 Cal. 437. See also *Montgomery v. Bevans*, 1 Sawy. (U. S.) 653, 17 Fed. Cas. No. 9,735.

**Conditions in Alcalde Grants.** — *Donner v. Palmer*, 31 Cal. 500; *Lick v. Diaz*, 30 Cal. 65, 37 Cal. 437; *Norris v. Moody*, 84 Cal. 143, *approving* *Touchard v. Touchard*, 5 Cal. 307, and *Holliday v. West*, 6 Cal. 525, *overruling dicta* in *Hart v. Burnett*, 15 Cal. 530.

**Presumption of Approval of Grants.** — *Hart v. Burnett*, 15 Cal. 530.

**2. Grants by Prefects.** — *Alexander v. Roulet*, 13 Wall. (U. S.) 386; *Ohm v. San Francisco*, 92 Cal. 437, (Cal. 1890) 25 Pac. Rep. 155, *citing* *Hart v. Burnett*, 15 Cal. 530; *De La*

*Guerra v. Santa Barbara*, 117 Cal. 528. *Contra*, *U. S. v. Sherebeck*, Hoffm. Dec. (U. S.) 11, 27 Fed. Cas. No. 16,275.

**Grants by Justices of the Peace.** — *Merryman v. Bourne*, 9 Wall. (U. S.) 592, *affirming* 17 Fed. Cas. No. 9,480; *Hubbard v. Barry*, 21 Cal. 325. *Compare* *Reynolds v. West*, 1 Cal. 322.

**3. Grants by American Alcaldes.** — *Merryman v. Bourne*, 9 Wall. (U. S.) 592, *affirming* 17 Fed. Cas. No. 9,480; *More v. Steinbach*, 127 U. S. 70; *Montgomery v. Bevans*, 1 Sawy. (U. S.) 653, 17 Fed. Cas. No. 9,735; *Palmer v. Low*, 2 Sawy. (U. S.) 248, 18 Fed. Cas. No. 10,693, *affirmed* 98 U. S. 1; *Cohas v. Raisin*, 3 Cal. 443; *Dewey v. Lambier*, 7 Cal. 347; *Welch v. Sullivan*, 8 Cal. 165; *Hart v. Burnett*, 15 Cal. 530; *Payne v. Treadwell*, 16 Cal. 232; *White v. Moses*, 21 Cal. 34; *Scott v. Dyer*, 54 Cal. 430; *Spaulding v. Bradley*, 79 Cal. 449. See also *Norton v. Hyatt*, 8 Cal. 539; *infra*, this subdivision, *San Francisco*. *Contra*, *Woodworth v. Fulton*, 1 Cal. 205; *Reynolds v. West*, 1 Cal. 322; *Folsom v. Root*, 1 Cal. 374; *San Francisco v. Clark*, 1 Cal. 386; *Fisher v. Salmon*, 1 Cal. 413, 54 Am. Dec. 297.

**Confirmation by State of Alcalde Grants of Tide Lands and Water and Beach Lots.** — *Field v. Seabury*, 19 How. (U. S.) 323, *reversing* *McAll*. (U. S.) 60, 21 Fed. Cas. No. 12,575; *Mumford v. Wardwell*, 6 Wall. (U. S.) 423; *Walker v. Marks*, 2 Sawy. (U. S.) 152, *affirmed sub nom.* *Walker v. State Harbor Com'rs*, 17 Wall. (U. S.) 648; *Chapin v. Bourne*, 8 Cal. 294; *Seabury v. Arthur*, 28 Cal. 142; *People v. Davidson*, 30 Cal. 379.

**4. Acquisition of Vested Right.** — It was necessary that the proper authority should particularly designate the land to be acquired by a pueblo or town before a vested right or title to the use thereof could arise. *U. S. v. Santa Fe*, 165 U. S. 675 (extensively reviewing early decisions); *U. S. v. Sandoval*, 167 U. S. 278; *Rio Arriba Land, etc., Co. v. U. S.*, 167 U. S. 298.

**5. Confirmation of Titles — In General.** — See generally the cases cited *infra*, this subdivision, *California*, and particularly *Townsend v. Greeley*, 5 Wall. (U. S.) 326; *Grisar v. McDowell*, 6 Wall. (U. S.) 363, *affirming* 4 Sawy. (U. S.) 597, 11 Fed. Cas. No. 5,832; *Alexander*

Congress, pursuant to which many pueblo titles have been confirmed, and, in some instances, claims perfected where no vested right of property had been acquired previous to the cession. The most important of these statutes are those relating to towns and villages in the territory of Missouri and in California.<sup>1</sup>

(2) *Territory of Missouri*. — The statutes relating to St. Louis and certain other named towns and villages in the territory of Missouri confirmed directly the rights, titles, and claims of the individual inhabitants and of the municipalities, to lots and commons which had been inhabited, cultivated, or possessed prior to the 20th day of December, 1803. They operated *proprio vigore* in perfecting the title, and left the boundaries and validity of conflicting claims to be settled by agreement or judicial decision.<sup>2</sup> Lots not rightfully

*v. Roulet*, 13 Wall. (U. S.) 386; *Palmer v. Low*, 98 U. S. 1, *affirming* 2 Sawy. (U. S.) 248, 18 Fed. Cas. No. 10,693; *Carr v. U. S.*, 98 U. S. 433, *affirming* 3 Sawy. (U. S.) 477, 25 Fed. Cas. No. 14,731; *Knight v. U. S. Land Assoc.*, 142 U. S. 161, *reversing* on other grounds *sub nom.* United Land Assoc. *v. Knight*, 85 Cal. 448; *San Pedro, etc., Co. v. U. S.*, 146 U. S. 120; *U. S. v. Santa Fé*, 165 U. S. 675; *U. S. v. Sandoval*, 167 U. S. 278; *Rio Arriba Land, etc., Co. v. U. S.*, 167 U. S. 298; *Montgomery v. Bevans*, 1 Sawy. (U. S.) 653, 17 Fed. Cas. No. 9,735; *U. S. v. Hare*, 4 Sawy. (U. S.) 653, 26 Fed. Cas. No. 15,303; *Tripp v. Spring*, 5 Sawy. (U. S.) 209, 24 Fed. Cas. No. 14,180; *Hart v. Burnett*, 15 Cal. 530; *Stevenson v. Bennett*, 35 Cal. 424; *De Bernal v. Lynch*, 36 Cal. 135, *affirmed* 9 Wall. (U. S.) 315; *People v. Holladay*, 68 Cal. 439; *Hale v. Akers*, 69 Cal. 160, *writ of error dismissed* 132 U. S. 554; *Bird v. Montgomery*, 6 Mo. 511.

**Pueblos or Towns of Texas**. — *Brownsville v. Cavazos*, 100 U. S. 138, *affirming* 2 Woods (U. S.) 293, 4 Fed. Cas. No. 2,043; *Blair v. Odin*, 3 Tex. 288; *Lewis v. San Antonio*, 7 Tex. 288; *Brownsville v. Basse*, 36 Tex. 461; *Texas Mexican R. Co. v. Jarvis*, 69 Tex. 527; *Dittmar v. Dignowitty*, 78 Tex. 22; *Downing v. Diaz*, 80 Tex. 436; *School Trustees v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1902) 67 S. W. Rep. 147. See also *Von Rosenberg v. Haynes*, 85 Tex. 357.

1. See *infra*, this subsection, *Territory of Missouri; California*.

**Pueblos in Territory of New Mexico**. — Act Cong. Dec. 22, 1858, 11 Stat. at L. 374; *U. S. v. Lucero*, 1 N. Mex. 422; *U. S. v. Santistevan*, 1 N. Mex. 583; *U. S. v. Varela*, 1 N. Mex. 593, *affirmed* 94 U. S. 614; *Territory v. Delinquent Tax List*, (N. Mex. 1904) 76 Pac. Rep. 307.

**City of New Orleans**. — *New Orleans v. U. S.*, 10 Pet. (U. S.) 663; *New Orleans v. Casteres*, 3 Mart. (La.) 673.

2. **Claims of Individual Inhabitants**. — *United States*. — *Strother v. Lucas*, 12 Pet. (U. S.) 411, 6 Pet. (U. S.) 764; *Chouteau v. Eckhart*, 2 How. (U. S.) 344, *affirming* 7 Mo. 16; *Mackay v. Dillon*, 4 How. (U. S.) 421, *reversing* on other grounds 7 Mo. 7; *Gamache v. Piquignot*, 16 How. (U. S.) 451, *affirming* 17 Mo. 310; *Gutard v. Stoddard*, 16 How. (U. S.) 494; *Savignac v. Garrison*, 18 How. (U. S.) 136; *Glasgow v. Hortiz*, 1 Black (U. S.) 505, *affirming sub nom.* *Milburn v. Hardy*, 28 Mo. 514; *Milburn v. Hortiz*, 23 Mo. 532; *Ryan v.*

*Carter*, 93 U. S. 78. See also *West v. Cochran*, 17 How. (U. S.) 403.

*Missouri*. — *Vasseur v. Benton*, 1 Mo. 296; *Lajoie v. Primm*, 3 Mo. 529; *Newman v. Lawless*, 6 Mo. 279; *Bird v. Montgomery*, 6 Mo. 511; *Gurno v. Janis*, 6 Mo. 330; *Biehler v. Coonce*, 9 Mo. 347; *Montgomery v. Landusky*, 9 Mo. 714; *Page v. Scheibel*, 11 Mo. 167; *McGill v. Somers*, 15 Mo. 80; *Harrison v. Page*, 16 Mo. 182; *Byron v. Sarpy*, 18 Mo. 455; *Charleville v. Chouteau*, 18 Mo. 492; *Soulard v. Allen*, 18 Mo. 590; *Soulard v. Clark*, 19 Mo. 570; *Joyal v. Rippey*, 19 Mo. 660; *Barada v. Blumenthal*, 20 Mo. 162; *St. Louis v. Toney*, 21 Mo. 243; *Papin v. Hines*, 23 Mo. 274; *Tayon v. Hardman*, 23 Mo. 539; *Funkhouser v. Langkopf*, 26 Mo. 453; *Clark v. Hammerle*, 27 Mo. 55, 36 Mo. 621; *Papin v. Ryan*, 36 Mo. 406; *Fine v. St. Louis Public Schools*, 39 Mo. 59, 30 Mo. 166, 23 Mo. 570; *Schultz v. Lindell*, 24 Mo. 567, 40 Mo. 330; *St. Louis Public Schools v. Risley*, 40 Mo. 356; *St. Louis Public Schools v. Fritz*, 40 Mo. 372; *Bompart v. Stumpff*, 40 Mo. 446; *Baird v. St. Louis Hospital Assoc.*, 116 Mo. 419, 3 Mo. App. 435.

**Claims of Municipalities**. — *United States*. — *Les Bois v. Bramell*, 4 How. (U. S.) 449; *Carondelet v. St. Louis*, 1 Black (U. S.) 179, *affirming* 29 Mo. 527, 25 Mo. 448; *Dent v. Emmeger*, 14 Wall. (U. S.) 308; *St. Louis v. U. S.*, 92 U. S. 462, *affirming* 9 Ct. Cl. 455.

*Missouri*. — *Dent v. Bingham*, 8 Mo. 579; *Swartz v. Page*, 13 Mo. 603; *Carondelet v. McPherson*, 20 Mo. 192; *Vasquez v. Ewing*, 24 Mo. 31, 66 Am. Dec. 694, 42 Mo. 247, 46 Mo. 38, 2 Am. Rep. 481; *Dent v. Sigerson*, 29 Mo. 489; *Shepley v. Cowan*, 52 Mo. 559, *affirmed* 91 U. S. 330. See generally cases cited *supra*, this note.

**Proviso Saving Rights** of any persons claiming the same lands, or any part thereof, whose claims had been confirmed under the prior statutes enacted for the purpose of adjusting and settling claims to land in the territory. *Les Bois v. Bramell*, 4 How. (U. S.) 449; *Ryan v. Carter*, 93 U. S. 78; *Le Beau v. Gaven*, 37 Mo. 557; *Baird v. St. Louis Hospital Assoc.*, 116 Mo. 419, 3 Mo. App. 435.

**Alienations of Right**. — If the right existed at the passage of the act, it was confirmed without regard to the number of alienations to which it has been subjected, and inured to him who was entitled to it, whether he claimed by purchase or descent. *St. Louis v. Toney*, 21 Mo. 243.



owned or claimed by individuals, or held as commons belonging to the town or village or which should not be appropriated by the federal government for military uses, were reserved for the support of schools, and, by a later statute, granted for that purpose.<sup>1</sup>

(3) *California* — (a) **In General.** — Under the general statute enacted by Congress to ascertain and settle the private land claims in the state of California, the pueblo claim of a city, town, or village, and the claims of individuals holding under it, were presented for confirmation by the corporate authorities under one general claim. Individual claims adverse to the pueblo title, on the other hand, had to be separately presented by the claimants, as in other cases, and a confirmation of the pueblo title did not inure to their benefit.<sup>2</sup>

(b) **San Francisco.** — By an Act of Congress of July 1, 1864, the title to land within the corporate limits of San Francisco, which the city had relinquished and conveyed to individuals in actual possession or holding under alcalde grants or had reserved to itself for public purposes, by what is known as the Van Ness ordinance, was confirmed, subject to certain reservations to the federal government and without prejudice to *bona fide* adverse claims of third persons.<sup>3</sup> In the mean time the claim of the city had been presented for confirmation under the general act and was subsequently confirmed by judicial

**Nature of Commons and Common Field Lots.** — See COMMON, vol. 6, p. 233 note, and particularly the following cases: *Glasgow v. Hartz*, 1 Black (U. S.) 595; *Page v. Scheibel*, 11 Mo. 167; *Harrison v. Page*, 16 Mo. 182; *Charleville v. Chouteau*, 18 Mo. 498.

**Effect of Abandonment of Right.** — See *infra*, this section, *Abandonment and Forfeiture*.

**1. Reservation and Grant for Support of Schools.** — *St. Louis Public Schools v. Walker*, 9 Wall. (U. S.) 282, *affirming* 40 Mo. 383; *Glasgow v. Baker*, 128 U. S. 560, *affirming* 85 Mo. 559, (which *reversed* 14 Mo. App. 201), 72 Mo. 441, 50 Mo. 60; *Hammond v. St. Louis Public Schools*, 8 Mo. 65, 40 Mo. 383; *Trotter v. St. Louis Public Schools*, 9 Mo. 69; *Cabanné v. Walker*, 31 Mo. 274; *Mitchell v. Handfield*, 33 Mo. 431; *Cummings v. Powell*, 97 Mo. 524, 116 Mo. 473, 38 Am. St. Rep. 610.

**2. Confirmation of Pueblo Claims in California** — **In General.** — Act March 3, 1851, § 14, 9 Stat. at L. 631; *Lynch v. Bernal*, 9 Wall. (U. S.) 315, *affirming* 36 Cal. 135; *Chaboya v. Umbarger*, 97 U. S. 280, *affirming* 49 Cal. 525; *Leese v. Clark*, 18 Cal. 535; *Steinbach v. Moore*, 30 Cal. 498; *Merle v. Dixey*, 31 Cal. 130; *Stevenson v. Bennett*, 35 Cal. 424; *Mills v. Los Angeles*, 90 Cal. 522; *Ohm v. San Francisco*, 92 Cal. 437, (Cal. 1890) 25 Pac. Rep. 155; *De La Guerra v. Santa Barbara*, 117 Cal. 528. See generally cases cited *infra*, this subsection, *San Francisco*.

**Santa Cruz and Benicia.** — The pueblo titles of the towns of Santa Cruz and Benicia were confirmed by special act of Congress, in trust for persons in *bona fide* occupancy at the date of passage of the act. Act Cong. July, 23, 1866, 14 Stat. at L. 209; *Labish v. Hardy*, 77 Cal. 327.

**Evidence of Pueblo Grant — Failure to Present Claim for Confirmation.** — The statute provided that the fact of the existence of the town on July 7, 1846, being duly proved, should be *prima facie* evidence that it had received a grant of land. This provision, however, did not itself operate as a confirmation of the title of such towns, but their claims were subject

to forfeiture, as in other cases, if not presented within the time limited by the statute. *Grisar v. McDowell*, 6 Wall. (U. S.) 363, *affirming* 4 Sawy. (U. S.) 597, 11 Fed. Cas. No. 5,832; *Hart v. Burnett*, 15 Cal. 530; *Stevenson v. Bennett*, 35 Cal. 424. *Contra*, *Welch v. Sullivan*, 8 Cal. 165.

**3. Titles under Van Ness Ordinance — Act Cong. July 1, 1864, 13 Stat. at L. 332 — United States.** — *Lynch v. Bernal*, 9 Wall. (U. S.) 315, *affirming* 36 Cal. 135; *Merryman v. Bourne*, 9 Wall. (U. S.) 592, *affirming* 17 Fed. Cas. No. 9,480; *Palmer v. Low*, 98 U. S. 1, *affirming* 2 Sawy. (U. S.) 248, 18 Fed. Cas. No. 10,693; *San Francisco v. Scott*, 111 U. S. 768; *Hoadley v. San Francisco*, 124 U. S. 639, *affirming* 70 Cal. 320; *San Francisco v. Le Roy*, 138 U. S. 656; *Montgomery v. Bevans*, 1 Sawy. (U. S.) 653, 17 Fed. Cas. No. 9,735; *Mission Rock Co. v. U. S.*, 109 Fed. Rep. 763, *affirmed* 189 U. S. 391.

*California.* — *Hart v. Burnett*, 15 Cal. 621; *Holladay v. Frisbie*, 15 Cal. 631; *Payne v. Treadwell*, 16 Cal. 220; *San Francisco v. Beideman*, 17 Cal. 443; *Hubbard v. Sullivan*, 18 Cal. 508; *Board of Education v. Fowler*, 19 Cal. 11; *Wolf v. Baldwin*, 19 Cal. 306; *Hubbard v. Barry*, 21 Cal. 321; *Carleton v. Townsend*, 28 Cal. 219; *Borel v. Rollins*, 30 Cal. 408; *Davis v. Perley*, 30 Cal. 630; *Satterlee v. Bliss*, 36 Cal. 489; *Brooks v. Hyde*, 37 Cal. 366; *Valentine v. Mahoney*, 37 Cal. 389; *McLeran v. Benton*, 43 Cal. 467, 73 Cal. 344, 2 Am. St. Rep. 822; *Pickett v. Hastings*, 47 Cal. 269; *Hoadley v. San Francisco*, 50 Cal. 265; *Sawyer v. San Francisco*, 50 Cal. 370; *Board of Education v. Donahue*, 53 Cal. 190; *Davis v. Spring Valley Water Works*, 57 Cal. 543; *People v. Holladay*, 68 Cal. 439; *San Francisco v. Holladay*, 76 Cal. 18, 93 Cal. 241, 27 Am. St. Rep. 186, 124 Cal. 352; *Baker v. Brickell*, 87 Cal. 329; *Board of Education v. Martin*, 92 Cal. 209; *San Francisco v. Bradbury*, 92 Cal. 414; *San Francisco v. Mooney*, 106 Cal. 586; *San Francisco v. Sharp*, 125 Cal. 534.

decree, subject to modifications ingrafted thereon by an Act of March 3, 1866.<sup>1</sup> The title to the land within the pueblo limits not already granted to the city was thereby relinquished and granted to it without prejudice to any adverse right or claim; in trust to dispose of and convey the land to individuals in *bona fide* possession, in such quantities and upon such terms and conditions as the legislature of the state might prescribe, with the exception of tracts that should be reserved and set apart by ordinance for public uses.<sup>2</sup> By subsequent acts of Congress, the title to certain other tracts of land was confirmed in the city, and individuals claiming under it.<sup>3</sup>

*c.* STATE CONTROL OVER PUEBLO LANDS. — Subject to the rights acquired by the federal government, a state of the Union has, by virtue of its sovereignty, the power to control the disposition and use of pueblo lands within its boundaries, formerly possessed by the Spanish or Mexican government.<sup>4</sup>

*d.* DEDICATED AND GRANTED LANDS. — Municipal lands dedicated to public uses, or held by the pueblo or town by unconditional grant, could not be sold or conveyed by the crown to individuals, without the consent or approval of the municipal authorities, under the laws of either France or Spain; but such grants were void and of no effect.<sup>5</sup>

**7. Empresario Contracts or Grants.** — Under both the Spanish and Mexican governments contracts were entered into with empresarios, or contractors who engaged to introduce large numbers of settlers, in consideration of land granted or promised. Many of these contracts did not of themselves amount to grants to the empresario or vest any right of property in him. The establish-

**1. Confirmation of Pueblo Title.** — Act Cong. March 8, 1866, 14 Stat. at L. 4; *San Francisco v. U. S.*, 4 Sawy. (U. S.) 553, 21 Fed. Cas. No. 12,316. See generally the cases cited in the note following.

**Various Sources of Title to Land in San Francisco Stated Generally.** — *Houston v. San Francisco*, 47 Fed. Rep. 337; *Mission Rock Co. v. U. S.*, (C. C. A.) 109 Fed. Rep. 763, *affirmed* 189 U. S. 391; *Trenouth v. San Francisco*, 100 U. S. 251; *San Francisco v. Le Roy*, 138 U. S. 656.

**Relation Back of Pueblo Title** — The interest of the pueblo relates back to the cession of the country, and the title to the land confirmed to it is not affected by the intermediate Act of Congress of September 28, 1850, granting to the state all swamp and overflowed lands within its limits. *San Francisco v. Le Roy*, 138 U. S. 656; *Knight v. U. S. Land Assoc.*, 142 U. S. 161, *reversing* on other grounds *sub nom.* *United Land Assoc. v. Knight*, 85 Cal. 448; *Tripp v. Spring*, 5 Sawy. (U. S.) 209, 24 Fed. Cas. No. 14,180; *Valentine v. Sloss*, 103 Cal. 215. See also *Hart v. Burnett*, 15 Cal. 577.

**Relation Back of Decree of Confirmation.** — The decree took effect by relation on the day when the petition was presented, and parties obtaining conveyances from the city pending the proceedings took subject to the determination of the claim. *Lynch v. Bernal*, 9 Wall. (U. S.) 315, *affirmed* 36 Cal. 135; *U. S. v. Hare*, 4 Sawy. (U. S.) 653, 26 Fed. Cas. No. 15,303.

**2. Terms and Conditions of Confirmation.** — *Townsend v. Greeley*, 5 Wall. (U. S.) 326; *Grisar v. McDowell*, 6 Wall. (U. S.) 363, *affirming* 4 Sawy. (U. S.) 597, 11 Fed. Cas. No. 5,832; *Lynch v. Bernal*, 9 Wall. (U. S.) 315, *affirming* 36 Cal. 135; *Trenouth v. San Francisco*, 100 U. S. 251; *Montgomery v.*

*Bevans*, 1 Sawy. (U. S.) 653, 17 Fed. Cas. No. 9,735; *U. S. v. Hare*, 4 Sawy. (U. S.) 653, 26 Fed. Cas. No. 15,303; *Tripp v. Spring*, 5 Sawy. (U. S.) 209, 24 Fed. Cas. No. 14,180; *Dupond v. Barstow*, 45 Cal. 446; *Randell v. Austin*, 46 Cal. 55; *Iburg v. Suanet*, 47 Cal. 265; *Pickett v. Hastings*, 47 Cal. 270; *McManus v. O'Sullivan*, 48 Cal. 7, *writ of error dismissed* 91 U. S. 578; *Naglee v. Palmer*, 50 Cal. 641; *McCreery v. Sawyer*, 52 Cal. 257, *followed in* *McCreery v. Duane*, 52 Cal. 262, 293; *Rousset v. Reay*, 60 Cal. 328; *Baker v. Brickell*, 87 Cal. 329; *Newman v. San Francisco*, 92 Cal. 378; *Ohm v. San Francisco*, 92 Cal. 437, (Cal. 1890) 25 Pac. Rep. 155; *Home for Inebriate v. San Francisco*, 119 Cal. 534; *Whelan v. Brickell*, (Cal. 1894) 38 Pac. Rep. 85.

**3. Subsequent Confirmations.** — See Acts of July 1, 1870, 16 Stat. at L. 186; December 20, 1886, 25 Stat. at L. 352; *Houston v. San Francisco*, 47 Fed. Rep. 337; *Le Roy v. Cunningham*, 44 Cal. 599; *Naglee v. Palmer*, 50 Cal. 641; *Palmer v. Galvin*, 72 Cal. 183; *Galvin v. Palmer*, 113 Cal. 46.

**4. State Control over Pueblo Lands.** — *Hart v. Burnett*, 15 Cal. 530; *Payne v. Treadwell*, 16 Cal. 233; *Grogan v. San Francisco*, 18 Cal. 615; *San Francisco v. Canavan*, 42 Cal. 552; *Board of Education v. Martin*, 92 Cal. 209; *Monterey v. Jacks*, 139 Cal. 512. See also *New Orleans v. U. S.*, 10 Pet. (U. S.) 663.

**5. Dedicated and Granted Lands.** — *New Orleans v. U. S.*, 10 Pet. (U. S.) 663, *disapproving* *De Armas v. New Orleans*, 5 La. 132; *Strother v. Lucas*, 12 Pet. (U. S.) 411; *Doe v. Jones*, 11 Ala. 63, *citing* *New Orleans v. Metzinger*, 3 Mart. (La.) 296; *Bird v. Montgomery*, 6 Mo. 511; *Lewis v. San Antonio*, 7 Tex. 288, 15 Tex. 388; *Dittmar v. Dignowitty*, 78 Tex. 22.

ment of a Mexican colony under such a contract did not prevent grants of unoccupied lands within its borders being made directly by the government.<sup>1</sup>

**8. Indian Titles.** — Under the laws of the former governments, as under those of the United States, the native Indian population had only a possessory interest in the soil, founded on occupancy or other use. They were generally protected in this right until it was extinguished by abandonment or cession, but the ultimate fee was in the government and at its disposal. Lands allotted to individual Indians or set apart for Indian pueblos and missions were held under a like tenure. Grants made by Indians were void and of no effect as against the government, unless authorized or ratified by it,<sup>2</sup> except under the Mexican Republic, where civilized Indians might acquire public land by absolute grant and hold and convey it the same as other citizens.<sup>3</sup>

**1. Spanish and Mexican Empresario Contracts or Grants.** — *U. S. v. Arredondo*, 6 Pet. (U. S.) 691; *U. S. v. King*, 3 How. (U. S.) 773, 7 How. (U. S.) 833; *U. S. v. Philadelphia*, 11 How. (U. S.) 609; *U. S. v. Turner*, 11 How. (U. S.) 663; *Glenn v. U. S.*, 13 How. (U. S.) 250, *affirming Hempst.* (U. S.) 394, 10 Fed. Cas. No. 5,481; *U. S. v. Cox*, 17 How. (U. S.) 41; *De Arguello v. U. S.*, 18 How. (U. S.) 539; *Spencer v. Lapsley*, 20 How. (U. S.) 264; *U. S. v. Sutter*, 21 How. (U. S.) 170; *Gonzales v. Ross*, 120 U. S. 605; *Interstate Land Co. v. Maxwell Land Grant Co.*, 139 U. S. 569, *affirming* 41 Fed. Rep. 275; *Berreyesa v. Schults*, 21 Cal. 513; *Welder v. Lambert*, 91 Tex. 510. For other cases involving empresario contracts or grants under Mexico, see *supra*, this section, *Approval of Grants, Segregation of the Land*; title STATE AND PUBLIC LANDS, vol. 26, p. 286.

**The Mexican National Law** of 1824, and consequent regulations of 1828, contemplate two distinct species of grants: (1) grants to empresarios, or contractors, sometimes called pobladores, who engaged to introduce a body of foreign settlers; (2) the distribution of lands to Mexican citizens, families, or single persons. *De Arguello v. U. S.*, 18 How. (U. S.) 539.

**No Formal Act of Admission** or recognition of a person as a colonist was generally necessary to entitle him to the rights and privileges conferred by the empresario contract. *Hatch v. Dunn*, 11 Tex. 708; *Hamilton v. Menifee*, 11 Tex. 718; *Byrne v. Fagan*, 16 Tex. 391.

**Qualification of Colonists — By Whom Passed Upon.** — *Bissell v. Haynes*, 9 Tex. 556; *De Leon v. White*, 9 Tex. 598; *Webb v. Webb*, 15 Tex. 274.

**Consent of Empresario to Grant by State.** — *Spencer v. Lapsley*, 20 How. (U. S.) 264; *McGehee v. Dwyer*, 22 Tex. 435; *Martin v. Parker*, 26 Tex. 253.

**Proceedings to Confirm Empresario Titles.** — *Houston v. Perry*, 2 Tex. 37, 3 Tex. 390, 5 Tex. 462; *Herndon v. Robertson*, 15 Tex. 593; *Rose v. Governor*, 24 Tex. 496.

**2. General Indian Titles — Allotted Lands** — *U. S. v. Arredondo*, 6 Pet. (U. S.) 692; *Mitchel v. U. S.*, 9 Pet. (U. S.) 711, 15 Pet. (U. S.) 52; *U. S. v. Fernandez*, 10 Pet. (U. S.) 303; *U. S. v. Rillieux*, 14 How. (U. S.) 189; *Chouteau v. Molony*, 16 How. (U. S.) 203; *Jackson v. Porter*, 1 Paine (U. S.) 457, 13 Fed. Cas. No. 7,143; *Muse v. Arlington Hotel Co.*, 68 Fed. Rep. 637;

*Thompson v. Doaksum*, 68 Cal. 593; *Halloway v. Doe*, 4 Litt. (Ky.) 293; *Reboul v. Nero*, 5 Mart. (La.) 490; *Martin v. Johnson*, 5 Mart. (La.) 655; *Spencer v. Grimbail*, 6 Mart. N. S. (La.) 355; *Maes v. Gillard*, 7 Mart. N. S. (La.) 314; *Brooks v. Norris*, 6 Rob. (La.) 175; *Breaux v. Johns*, 4 La. Ann. 141, 50 Am. Dec. 555; *Montgomery v. Doe*, 13 Smed. & M. (Miss.) 161. See generally the titles INDIANS, vol. 16, p. 229 *et seq.*; STATE AND PUBLIC LANDS, vol. 26, pp. 226, 227.

**Indian Pueblo and Mission Lands.** — *U. S. v. Ritchie*, 17 How. (U. S.) 525; *U. S. v. Cervantes*, 18 How. (U. S.) 553, *affirming* 3 Am. L. Reg. 745, 5 Fed. Cas. No. 2,560; *U. S. v. Pico*, 5 Wall. (U. S.) 537; *Faxon v. U. S.*, 171 U. S. 244; *Harvey v. Barker*, 126 Cal. 262, *overruling Byrne v. Alas*, 74 Cal. 628, *affirmed* *Barker v. Harvey*, 181 U. S. 481; *U. S. v. Lucero*, 1 N. Mex. 422; *Territory v. Delinquent Tax List*, (N. Mex. 1904) 76 Pac. Rep. 307; *McMullen v. Hodge*, 5 Tex. 34, *cited* *Howard v. McKenzie*, 54 Tex. 171. See also *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103. The large tracts of land appurtenant to the mission establishments were never vested in the church or any other corporation or individual, by any grant of a legal title. The missionaries and Indians had a usufruct or occupancy of the land, at the will of the sovereign. *U. S. v. Cervantes*, 18 How. (U. S.) 552, *affirming* 3 Am. L. Reg. 745, 5 Fed. Cas. No. 2,560. By various laws of Spain and Mexico, missions were secularized and their possessory title, at least to the vacant lands appurtenant thereto, was extinguished; after which the proper authorities could make valid grants of such individuals. *U. S. v. Ritchie*, 17 How. (U. S.) 525; *U. S. v. Cervantes*, 18 How. (U. S.) 553, *affirming* 3 Am. L. Reg. 745, 5 Fed. Cas. No. 2,560; *U. S. v. Workman*, 1 Wall. (U. S.) 745, *cited* *Beard v. Federy*, 3 Wall. (U. S.) 478; *U. S. v. Jones*, 1 Wall. (U. S.) 766; *U. S. v. Larkin*, Hoffm. Land Cas. (U. S.) 313, 14 Fed. Cas. No. 8,091; *Panaud v. U. S.*, Hoffm. Op. (U. S.) 469, Hoffm. Dec. (U. S.) 18, 18 Fed. Cas. No. 10,704; *Hart v. Burnett*, 15 Cal. 530; *McMullen v. Hodge*, 5 Tex. 34. See also *Redman v. U. S.*, Hoffm. Land Cas. (U. S.) 305, 20 Fed. Cas. No. 11,631; *U. S. v. Pico*, Hoffm. Op. (U. S.) 412, 27 Fed. Cas. No. 16,047; *Jones v. Muisbach*, 26 Tex. 235; *Uhl v. Musquez*, 1 Tex. Unrep. Cas. 650; *Blair v. Odin*, 3 Tex. 288.

**3. Status of Civilized Indians in Mexican Republic.** — *U. S. v. Ritchie*, 17 How. (U. S.)



**9. Tide Lands and Lands under Navigable Waters.** — Tide lands and lands under navigable waters occupy no different position from that of other lands; and grants or other interests derived from the former governments, if otherwise valid, are within the protection of the treaties of cession, and the statutes recognizing and confirming land titles enacted pursuant thereto.<sup>1</sup>

**10. Possessory Rights, Prescription, Presumption of Grant.** — Possession and occupation of public land do not generally vest any right of property as against the government or its successors in title and interest, even though initiated by permission or license and under the expectation of obtaining a grant.<sup>2</sup> Title to land is sometimes acquired, however, by prescription or presumption of grant.<sup>3</sup>

**11. Abandonment and Forfeiture.** — Under the Anglo-Saxon system of jurisprudence, questions of abandonment of land by the owner rarely arise, since it is usually sold to a purchaser or to the state for taxes.<sup>4</sup> Under Spanish and Mexican law, however, abandonment under certain conditions would terminate the right or title. Under the land laws of some of the Mexican

525; *U. S. v. Wilson*, 1 Black (U. S.) 267; *U. S. v. Suñol*, Hoffm. Land Cas. (U. S.) 110, 27 Fed. Cas. No. 16,421; *McMullen v. Hodge*, 5 Tex. 34. See also *U. S. v. Walkinshaw*, 28 Fed. Cas. No. 16,633. *Contra*, *Suñol v. Hepburn*, 1 Cal. 255, *Hastings, C. J., dissenting*.

**Indian Pueblo Titles.** — *U. S. v. Lucero*, 1 N. Mex. 422; *U. S. v. Santistevan*, 1 N. Mex. 583; *U. S. v. Varela*, 1 N. Mex. 593, *affirmed* 94 U. S. 614; *Territory v. Delinquent Tax List*, (N. Mex. 1904) 76 Pac. Rep. 307.

**1. Tide Lands and Lands under Navigable Waters.** — *San Francisco v. Le Roy*, 138 U. S. 656; *Knight v. U. S. Land Assoc.*, 142 U. S. 161, *reversing* on other grounds *sub nom.* *United Land Assoc. v. Knight*, 85 Cal. 448; *Tripp v. Spring*, 5 Sawy. (U. S.) 209, 24 Fed. Cas. No. 14,180; *Coburn v. San Mateo County*, 75 Fed. Rep. 520; *Teschmacher v. Thompson*, 18 Cal. 11, 79 Am. Dec. 151; *Ward v. Mulford*, 32 Cal. 365; *People v. San Francisco*, 75 Cal. 388; *Valentine v. Sloss*, 103 Cal. 215. See also *Mobile v. Eslava*, 9 Port. (Ala.) 577, *affirmed* on other grounds 16 Pet. (U. S.) 234; *Richardson v. Sullivan*, 38 Fla. 90, 33 Fla. 1, *affirmed* on other grounds *sub nom.* *Richardson v. Louisville*, etc., R. Co., 169 U. S. 128.

**2. Spain.** — *Burgess v. Gray*, 16 How. (U. S.) 48, *affirming* 15 Mo. 220.

**Mexico — United States.** — *U. S. v. Garcia*, 22 How. (U. S.) 274, *reversing* Hoffm. Land Cas. (U. S.) 157, 9 Fed. Cas. No. 5,215; *U. S. v. Teschmaker*, 22 How. (U. S.) 392, *reversing* Hoffm. Land Cas. (U. S.) 28, 23 Fed. Cas. No. 13,843; *U. S. v. Osio*, 23 How. (U. S.) 273, *reversing* Hoffm. Land Cas. (U. S.) 100, 27 Fed. Cas. No. 15,972; *U. S. v. Chaboya*, 2 Black (U. S.) 593, *affirming* Hoffm. Op. (U. S.) 59, Hoffm. Dec. (U. S.) 107, 25 Fed. Cas. No. 14,770, 25 Fed. Cas. No. 14,769; *Peralta v. U. S.*, 3 Wall. (U. S.) 434, *affirming* 27 Fed. Cas. No. 16,029; *Serrano v. U. S.*, 5 Wall. (U. S.) 451; *De Haro v. U. S.*, 5 Wall. (U. S.) 599, *affirming* Hoffm. Dec. (U. S.) 53, 25 Fed. Cas. No. 14,939; *Miller v. Dale*, 92 U. S. 473, *affirming* 44 Cal. 562; *Zia v. U. S.*, 168 U. S. 108; *U. S. v. Berreyesa*, 24 Fed. Cas. No. 14,585, *affirmed* 154 U. S. 623; *Romero v. U. S.*, Hoffm. Land Cas. (U. S.) 219, 20 Fed. Cas. No. 12,029, *affirmed* 1 Wall. (U. S.) 721; *U. S. v. Brown*, Hoffm. Op.

(U. S.) 74, Hoffm. Dec. (U. S.) 16, 24 Fed. Cas. No. 14,664; *Vallejo v. U. S.*, Hoffm. Dec. (U. S.) 66, 28 Fed. Cas. No. 16,818. *Compare U. S. v. Alviso*, 23 How. (U. S.) 318; *U. S. v. Soto*, Hoffm. Land Cas. (U. S.) 177, 27 Fed. Cas. No. 16,356, Hoffm. Land Cas. (U. S.) 182, 27 Fed. Cas. No. 16,357; *U. S. v. Pico*, 1 Sawy. (U. S.) 347, 27 Fed. Cas. No. 16,048; *U. S. v. Walkinshaw*, 28 Fed. Cas. No. 16,633.

*California.* — *Mott v. Reyes*, 45 Cal. 379.

*New Mexico.* — *Grant v. Jaramillo*, 6 N. Mex. 313.

*Texas.* — *Trimble v. Smithers*, 1 Tex. 790; *Howard v. Perry*, 7 Tex. 259; *Jenkins v. Chambers*, 9 Tex. 167.

See the title STATE AND PUBLIC LANDS, vol. 26, p. 228 *et seq.*

**3. Prescription, Presumption of Grant — United States.** — *U. S. v. Fatio*, 8 Pet. (U. S.) 493; *Mitchel v. U. S.*, 9 Pet. (U. S.) 760; *U. S. v. Chaves*, 159 U. S. 452; *Bergere v. U. S.*, 168 U. S. 66; *U. S. v. Chavez*, 175 U. S. 509; *Peabody v. U. S.*, 175 U. S. 546; *U. S. v. Pendell*, 185 U. S. 189; *Smyth v. New Orleans Canal, etc., Co.*, (C. C. A.) 93 Fed. Rep. 899. See also *U. S. v. Rocha*, 9 Wall. (U. S.) 639.

*Alabama.* — *Innerness v. Mims*, 1 Ala. 660; *Mims v. Huggins*, 1 Ala. 676; *Tillotson v. Doe*, 5 Ala. 407, 39 Am. Dec. 330; *Doe v. Townsley*, 16 Ala. 239; *Doe v. Dill*, 19 Ala. 421.

*California.* — *Nieto v. Carpenter*, 21 Cal. 455.

*Louisiana.* — *Sanchez v. Gonzales*, 11 Mart. (La.) 207; *Landry v. Martin*, 15 La. 1, 10; *Devall v. Choppin*, 15 La. 566; *Pepper v. Dunlap*, 9 Rob. (La.) 283, 9 La. Ann. 137, *cited* Le Blanc v. Victor, 3 La. 44.

*Texas.* — *Lewis v. San Antonio*, 7 Tex. 288; *Herndon v. Casiano*, 7 Tex. 322; *Paschal v. Perez*, 7 Tex. 348; *Grimes v. Bastrop*, 26 Tex. 314; *Ballard v. Perry*, 28 Tex. 347; *Cavazos v. Trevino*, 35 Tex. 133; *State v. Cardinas*, 47 Tex. 250; *State v. Cuellar*, 47 Tex. 295; *Johns v. Schutz*, 47 Tex. 578; *Sheppard v. Harrison*, 54 Tex. 91; *Clark v. Hills*, 67 Tex. 141; *Texas Mexican R. Co. v. Jarvis*, 69 Tex. 527; *Von Rosenberg v. Haynes*, 85 Tex. 357; *Texas Mexican R. Co. v. Uribe*, 85 Tex. 386.

**4. Abandonment — In General.** — *Sena v. U. S.*, 189 U. S. 233. See also title STATE AND PUBLIC LANDS, vol. 26, p. 220.

states, also, abandonment of the country and sometimes of the land *ipso facto* worked a forfeiture of the property, which immediately reverted to the mass of the public domain.<sup>1</sup> The right or title might also be abandoned and revested in the government by a legally executed relinquishment or conveyance.<sup>2</sup> A vested right or title cannot be divested by the government or its officers, arbitrarily and without authority of law, but only for legal cause and in a regular proceeding.<sup>3</sup>

**IV. CONFIRMATION OF RIGHTS AND TITLES — 1. In General — By Whom and How Confirmed** — *a.* COMPLETE AND INCOMPLETE TITLES. — The obligation to recognize and perfect the rights and titles is political and rests with the legislative department of the government. The judiciary as such has no jurisdiction, either at law or in equity, to deal with them as rights of property, until they have been confirmed by the political power or its agencies;<sup>4</sup> but

**1. Spain.** — *Sena v. U. S.*, 189 U. S. 233; *Pontalba v. Copeland*, 3 La. Ann. 86; *Lajoie v. Primm*, 3 Mo. 530; *Page v. Scheibel*, 11 Mo. 167; *Landes v. Perkins*, 12 Mo. 239; *Byron v. Sarpy*, 18 Mo. 455; *Barada v. Blumenthal*, 20 Mo. 162; *St. Louis v. Toney*, 21 Mo. 243; *Clark v. Hammerle*, 36 Mo. 621; *Fine v. St. Louis Public Schools*, 39 Mo. 59, 30 Mo. 166, 23 Mo. 570.

**Mexico.** — *White v. Burnley*, 20 How. (U. S.) 235; *Phillips v. Moore*, 100 U. S. 208; *Sena v. U. S.*, 189 U. S. 233; *Holliman v. Peebles*, 1 Tex. 673; *Horton v. Brown*, 2 Tex. 78; *Goode v. McQueen*, 3 Tex. 241; *Hardy v. De Leon*, 5 Tex. 211; *Wheeler v. Moody*, 9 Tex. 372; *Yates v. Iams*, 10 Tex. 168; *White v. Holliday*, 11 Tex. 606; *Rivers v. Foote*, 11 Tex. 662; *Emmons v. Oldham*, 12 Tex. 18; *Grassmeyer v. Beeson*, 18 Tex. 753, 70 Am. Dec. 309; *Marsh v. Weir*, 21 Tex. 97; *Johnston v. Smith*, 21 Tex. 722; *Bowmer v. Hicks*, 22 Tex. 155; *Kilpatrick v. Sisneros*, 23 Tex. 113; *State v. Sais*, 47 Tex. 307; *Summers v. Davis*, 49 Tex. 541; *Sideck v. Duran*, 67 Tex. 256. See also *supra*, this section, *Conditions*. *Compare Ferris v. Coover*, 10 Cal. 589.

**2. Relinquishment or Conveyance to Government.** — *Lick v. Diez*, 37 Cal. 437, 30 Cal. 65; *Boissier v. Metayer*, 5 Mart. (La.) 678; *Pontalba v. Copland*, 3 La. Ann. 86; *Dikes v. Miller*, 25 Tex. Supp. 281, 78 Am. Dec. 571, same case on former appeals 24 Tex. 417, 11 Tex. 98; *Hanrick v. Dodd*, 62 Tex. 75; *Phillips v. J. B. Watkins Land Mortg. Co.*, 90 Tex. 195.

**3. Forfeitures of Right or Title.** — *Chaves v. U. S.*, 168 U. S. 177; *Camou v. U. S.*, 171 U. S. 277, 184 U. S. 572; *Montgomery v. Bevan*, 1 Sawy. (U. S.) 653, 17 Fed. Cas. No. 9,735; *Ferris v. Coover*, 10 Cal. 589; *Mott v. Reyes*, 45 Cal. 379; *Lick v. Diaz*, 30 Cal. 65, same case on final appeal 37 Cal. 437; *Holloway v. Galliac*, 47 Cal. 474; *Winn v. Cole*, *Walk*, (Miss.) 119; *Stark v. Mather*, *Walk*, (Miss.) 181, 12 Am. Dec. 553.

**After Conquest or Cession.** — No authority existed after the conquest of Mexico and the cession of territory by that country to the United States, in the absence of a statute conferring it, to prosecute any claim for a forfeiture which had accrued to the Mexican government by reason of alienage or other cause. *People v. Folsom*, 5 Cal. 373. See also in this connection *supra*, this section, *Conditions — In General*.

**4. In General — Incomplete Titles — United States.** — *De la Croix v. Chamberlain*, 12 Wheat. (U. S.) 599; *U. S. v. Clarke*, 8 Pet. (U. S.) 436; *Chouteau v. Eckhart*, 2 How. (U. S.) 344, *affirming* 7 Mo. 16; *U. S. v. King*, 3 How. (U. S.) 773; *Les Bois v. Bramell*, 4 How. (U. S.) 449; *Landes v. Brant*, 10 How. (U. S.) 370; *Glenn v. U. S.*, 13 How. (U. S.) 250, *affirming* *Hempst.* (U. S.) 394, 10 Fed. Cas. No. 5,481; *Burgess v. Gray*, 16 How. (U. S.) 48, *affirming* 15 Mo. 220; *Willot v. Sandford*, 19 How. (U. S.) 79; *Beard v. Federy*, 3 Wall. (U. S.) 478; *Maguire v. Tyler*, 8 Wall. (U. S.) 650, *reversing* on other grounds 40 Mo. 406; *Dent v. Emmeger*, 14 Wall. (U. S.) 308; *Tameling v. U. S. Freehold, etc., Co.*, 93 U. S. 661; *Craig v. Leitensdorfer*, 123 U. S. 189, *reversing sub nom.* *Leitensdorfer v. Campbell*, 5 Dill. (U. S.) 419, 15 Fed. Cas. No. 8,225, and note; *Knight v. U. S. Land Assoc.*, 142 U. S. 161, *reversing* on other grounds *sub nom.* *United Land Assoc. v. Knight*, 85 Cal. 448; *Astiazaran v. Santa Rita Land, etc., Co.*, 148 U. S. 80, *affirming* (Ariz. 1889) 20 Pac. Rep. 189; *Stoneroad v. Stoneroad*, 158 U. S. 240, *reversing* on other grounds 4 N. Mex. 59; *Rio Arriba Land, etc., Co. v. U. S.*, 167 U. S. 298; *Ainsa v. New Mexico, etc., R. Co.*, 175 U. S. 76; *Thompson v. Los Angeles Farming, etc., Co.*, 180 U. S. 72, *affirming* 117 Cal. 594; *U. S. v. Baca*, 184 U. S. 653; *U. S. v. Peralta*, 99 Fed. Rep. 618, 102 Fed. Rep. 1006; *U. S. v. Parrott*, McAll. (U. S.) 271, 447, 27 Fed. Cas. No. 15,998, 15,999, (Act of March 3, 1851); *Montgomery v. Bevan*, 1 Sawy. (U. S.) 653, 17 Fed. Cas. No. 9,735; *U. S. v. Flint*, 4 Sawy. (U. S.) 42, 25 Fed. Cas. No. 15,121, *affirmed* 98 U. S. 61; *Town v. De Haven*, 5 Sawy. (U. S.) 146, 24 Fed. Cas. No. 14,113.

**Alabama.** — *Doe v. Jones*, 11 Ala. 63; *Hall v. Root*, 19 Ala. 378; *Doe v. Higgins*, 39 Ala. 9. **California.** — *Leese v. Clarke*, 3 Cal. 17, 20 Cal. 387; *Estrada v. Murphy*, 19 Cal. 269; *Rico v. Spence*, 21 Cal. 504; *Minturn v. Brower*, 24 Cal. 644; *De Arguello v. Greer*, 26 Cal. 628; *Steinbach v. Moore*, 30 Cal. 507; *Stevenson v. Pennett*, 35 Cal. 432; *Banks v. Moreno*, 39 Cal. 246; *Chipley v. Farris*, 45 Cal. 538; *Thompson v. Doaksum*, 68 Cal. 593.

**Louisiana.** — *Lobdell v. Clark*, 4 La. Ann. 99; *Purvis v. Harmanson*, 4 La. Ann. 421; *Tucker v. Burris*, 13 La. Ann. 614; *Nixon v. Houillon*, 20 La. Ann. 515.

**Missouri.** — *Newman v. Lawless*, 6 Mo. 279; *Charleville v. Chouteau*, 18 Mo. 493.

during the interim may take such action as is necessary to preserve the *status in quo* of the estate and parties, by protecting possessory rights against trespassers and preventing waste.<sup>1</sup> Titles complete and perfect at the time of the conquest or cession may require confirmation by the political power to give them any standing in court, as well as those which are imperfect.<sup>2</sup> In some instances, however, the treaty stipulations and confirmatory statutes leave the validity of complete titles to be determined by the courts as the occasion may arise in due course of judicial proceedings.<sup>3</sup>

*New Mexico.*—Grant *v.* Jaramillo, 6 N. Mex. 313; Waddingham *v.* Robledo, 6 N. Mex. 347; Chavez *v.* De Sanchez, 7 N. Mex. 58; Catron *v.* Laughlin, (N. Mex. 1903) 72 Pac. Rep. 26.

*Oregon.*—Cowenya *v.* Hannah, 3 Oregon 465.

*Texas.*—Jones *v.* Menard, 1 Tex. 771; Trimble *v.* Smithers, 1 Tex. 790; Norton *v.* General Land Office Com'r, 2 Tex. 357; Kemper *v.* Victoria, 3 Tex. 135; McMullen *v.* Hodge, 5 Tex. 34; Jones *v.* Borden, 5 Tex. 410; Hughes *v.* Lane, 6 Tex. 289; Howard *v.* Perry, 7 Tex. 259; Paschal *v.* Perez, 7 Tex. 348; Hancock *v.* McKinney, 7 Tex. 384; Patton *v.* Skidmore, 19 Tex. 533; Hamilton *v.* Avery, 20 Tex. 612; Peck *v.* Moody, 23 Tex. 93; Walters *v.* Jewett, 28 Tex. 192; Paschal *v.* Dangerfield, 37 Tex. 273; Miller *v.* Brownson, 50 Tex. 591; White *v.* Martin, 66 Tex. 341; Pope *v.* Anthony, (Tex. Civ. App. 1902) 68 S. W. Rep. 521.

**Under the Spanish and Mexican Governments,** the judiciary had no authority to interfere at all in any case. The political department retained to itself all the power to reform or to annul titles. White *v.* Burnley, 20 How. (U. S.) 235.

**1. Protection of Possessory Rights and Preventing Waste.**—Le Roy *v.* Wright, 4 Sawy. (U. S.) 530, 15 Fed. Cas. No. 8,273; Tobin *v.* Walkinshaw, McAll. (U. S.) 151, 23 Fed. Cas. No. 14,069; U. S. *v.* Parrott, McAll. (U. S.) 271, 27 Fed. Cas. No. 15,998; Sunol *v.* Hepburn, 1 Cal. 255; Reynolds *v.* West, 1 Cal. 322; Gunn *v.* Bates, 6 Cal. 263; Ferris *v.* Coover, 10 Cal. 589; Soto *v.* Kroder, 19 Cal. 87; Sandoz *v.* Ozenne, 13 La. Ann. 616; Pino *v.* Hatch, 1 N. Mex. 125; Chaves *v.* Whitney, 4 N. Mex. 178; Wilson *v.* Smith, 5 Yerg. (Tenn.) 379. See also Puget Sound Agricultural Co. *v.* Pierce County, 1 Wash. Ter. 159.

**2. British Grants.**—Jackson *v.* Ingraham, 4 Johns. (N. Y.) 164; Johnson *v.* Waters, 12 Johns. (N. Y.) 365.

**California Titles.**—Fremont *v.* U. S., 17 How. (U. S.) 553; U. S. *v.* Fossatt, 21 How. (U. S.) 445; More *v.* Steinbach, 127 U. S. 70; Botiller *v.* Dominguez, 130 U. S. 238, reversing 74 Cal. 457, overruling Phelan *v.* Poyoreno, 74 Cal. 448; Ainsa *v.* New Mexico, etc., R. Co., 175 U. S. 76, reversing on other grounds (Ariz. 1894) 36 Pac. Rep. 213; Thompson *v.* Los Angeles Farming, etc., Co., 180 U. S. 72; Baker *v.* Harvey, 181 U. S. 481, affirming 126 Cal. 262; Houston *v.* San Francisco, 47 Fed. Rep. 337; Anzar *v.* Miller, 90 Cal. 342; De Toro *v.* Robinson, 91 Cal. 371; Tuffree *v.* Polhemus, 108 Cal. 670. *Contra*, early state cases, Reynolds *v.* West, 1 Cal. 322; Gunn *v.* Bates, 6 Cal. 263; Gregory *v.* McPherson, 13 Cal. 562; Leese *v.* Clark, 20 Cal. 387; Minturn *v.* Brower, 24 Cal. 644; Thompson *v.* Doaksum,

68 Cal. 597. See also Dodge *v.* Perez, 2 Sawy. (U. S.) 645, 7 Fed. Cas. No. 3,953.

**Florida Titles.**—Mitchel *v.* U. S., 9 Pet. (U. S.) 711; Glenn *v.* U. S., 13 How. (U. S.) 250, Hempst. (U. S.) 394, 10 Fed. Cas. No. 5,481 note; Florida *v.* Furman, 180 U. S. 402, cited Barker *v.* Harvey, 181 U. S. 481; Florida Town Imp. Co. *v.* Bigalsky, (Fla. 1902) 33 So. Rep. 450.

**New Mexico Titles.**—Chavez *v.* De Sanches, 7 N. Mex. 58. See also Pinkerton *v.* Ledoux, 129 U. S. 346; Ainsa *v.* New Mexico, etc., R. Co., 175 U. S. 76.

**Act Cong. June 11, 1870, 16 Stat. at L. 149,** relative to claims to land in the Hot Springs reservation in Arkansas. Filhiol *v.* U. S., 28 Ct. Cl. 110.

**Under Act Cong. March 3, 1891, 26 Stat. at L. 854,** for the confirmation of titles in several of the western states, the holder of a complete grant may apply for confirmation or not as he chooses. Title to land within the boundaries of the grant, disposed of by the United States to other persons, cannot be confirmed; but the claimant is given a cause of action against the government for its reasonable value. U. S. *v.* Martinez, 184 U. S. 441; Chavez *v.* De Sanchez, 7 N. Mex. 58.

**An Objection to a Suit on a Perfect Title** that the grant has not been confirmed as required by law, made for the first time on appeal from a judgment in favor of the owner, will not be entertained. Houghton *v.* Jones, 1 Wall. (U. S.) 702.

**3. Validity of Perfect Titles Determined in Ordinary Court Proceedings.**—*United States.*—U. S. *v.* Arredondo, 6 Pet. (U. S.) 692, distinguishing Foster *v.* Neilson, 2 Pet. (U. S.) 254; U. S. *v.* Percheman, 7 Pet. (U. S.) 52; U. S. *v.* Wiggins, 14 Pet. (U. S.) 334; U. S. *v.* Waterman, 14 Pet. (U. S.) 478; Barry *v.* Gamble, 3 How. (U. S.) 32, affirming 8 Mo. 88; U. S. *v.* King, 3 How. (U. S.) 773, 7 How. (U. S.) 833; U. S. *v.* Reynes, 9 How. (U. S.) 127; Doe *v.* Eslava, 9 How. (U. S.) 421, affirming 11 Ala. 1028, 7 Ala. 543; Doe *v.* Mobile, 9 How. (U. S.) 451, affirming 8 Ala. 270, 6 Ala. 738; U. S. *v.* Power, 11 How. (U. S.) 570; U. S. *v.* Philadelphia, 11 How. (U. S.) 69; U. S. *v.* Castant, 12 How. (U. S.) 437; U. S. *v.* Pillerin, 13 How. (U. S.) 9; U. S. *v.* McCullagh, 13 How. (U. S.) 216; U. S. *v.* Ducros, 15 How. (U. S.) 38; U. S. *v.* D'Auterieve, 15 How. (U. S.) 14, 101 U. S. 700; U. S. *v.* Roselius, 15 How. (U. S.) 36; Maguire *v.* Tyler, 8 Wall. (U. S.) 650, reversing on other grounds 40 Mo. 406; Trenier *v.* Stewart, 101 U. S. 797, affirming 55 Ala. 458, 39 Ala. 492; Ainsa *v.* New Mexico, etc., R. Co., 175 U. S. 76, reversing on other grounds



*b. MODES OF PROCEDURE.* — In the execution of the obligation, the government may adopt such modes of procedure as it may deem expedient. It may act by legislation directly upon the claims preferred; or it may provide for their submission to a special board or to a court, the action of which it may make subject to appeal through one or more courts or arrest at any stage. It is the sole judge of the propriety of the mode, and having plenary power may annex to the confirmation of a claim any conditions or limitations it chooses.<sup>1</sup> As a general rule, the validity of claims to land in the territory acquired by the United States has not been specifically determined by Congress; but that body has committed the duty of ascertaining what titles were good and valid to some judicial tribunal, and provided that, when so determined, they should be recognized and enforced.<sup>2</sup>

*c. JURISDICTION OF BOARDS AND COURTS* — (1) *Confirmation Proceedings.* — The jurisdiction exercised by the boards and by the judiciary, in statutory proceedings for the confirmation of land claims, is special in its nature, existing solely by reason of the law conferring it; and they have no authority to proceed except in the manner and to the extent prescribed. The public domain cannot be granted by the courts.<sup>3</sup> The rules of decision, however, are generally liberal. As declared by several of the acts of Congress, the court or other tribunal in passing on claims shall be governed by the stipulations of

(Ariz. 1894) 36 Pac. Rep. 213; *Muse v. Arlington Hotel Co.*, 68 Fed. Rep. 637; *Smyth v. New Orleans Canal, etc., Co.*, (C. C. A.) 93 Fed. Rep. 899.

*Florida.* — *McGee v. Doe*, 9 Fla. 382; *Doe v. Roe*, 13 Fla. 602; *Keech v. Enriquez*, 28 Fla. 597.

*Louisiana.* — *White v. Wells*, 5 Mart. (La.) 652; *Sanchez v. Gonzales*, 11 Mart. (La.) 207; *Murdock v. Gurley*, 5 Rob. (La.) 457; *Lavergne v. Elkins*, 17 La. 220; *Kittridge v. Hebert*, 9 La. Ann. 154; *Nixon v. Houillon*, 20 La. Ann. 515.

*Tennessee.* — *Wilson v. Smith*, 5 Yerg. (Tenn.) 379.

*Texas.* — *Jones v. Menard*, 1 Tex. 771; *McMullen v. Hodge*, 5 Tex. 34; *Hardy v. De Leon*, 5 Tex. 211; *Smith v. State*, 5 Tex. 397; *Edwards v. James*, 7 Tex. 372; *Hancock v. McKinney*, 7 Tex. 384; *Swift v. Herrera*, 9 Tex. 263; *State v. Sais*, 47 Tex. 307; *Baldwin v. Goldfrank*, 88 Tex. 249, *affirming* 9 Tex. Civ. App. 269.

The Courts in Passing on Such Titles will defer to the political and judicial authorities of the former governments in the administration and interpretation of the laws under which they were acquired. *Holliman v. Peebles*, 1 Tex. 699; *Edwards v. James*, 7 Tex. 372; *Hancock v. McKinney*, 7 Tex. 384; *Bissell v. Haynes*, 9 Tex. 556; *Hardiman v. Herbert*, 11 Tex. 656; *Ruis v. Chambers*, 15 Tex. 586; *Johnston v. Smith*, 21 Tex. 722; *Cavazos v. Trevino*, 35 Tex. 133; *Brownsville v. Basse*, 36 Tex. 461.

1. *Modes of Procedure* — *United States.* — *Grisar v. McDowell*, 6 Wall. (U. S.) 363, *affirming* 4 Sawy. (U. S.) 597, 11 Fed. Cas. No. 5,832; *Trenouth v. San Francisco*, 100 U. S. 251; *Ainsa v. U. S.*, 161 U. S. 208; *U. S. v. Sandoval*, 167 U. S. 278; *U. S. v. Flint*, 4 Sawy. (U. S.) 42, 25 Fed. Cas. No. 15,121, *affirmed* on other grounds 98 U. S. 61; *Apis v. U. S.*, 88 Fed. Rep. 931.

*Alabama.* — *Hall v. Root*, 19 Ala. 378.

*California.* — *Teschmacher v. Thompson*, 18 Cal. 11, 79 Am. Dec. 151; *Leese v. Clark*, 18 Cal. 571, 20 Cal. 388.

*Annexing Conditions to Confirmation.* — *Central Colorado Imp. Co. v. Pueblo County*, 95 U. S. 259, *reversing* 2 Colo. 628; *Baldwin v. Goldfrank*, 9 Tex. Civ. App. 269, *affirmed* 88 Tex. 249.

If the Treaty or the Law of Nations Is Violated by the statutes enacted for the purpose of ascertaining and settling land claims, it is a matter of international concern only. The courts have no jurisdiction to annul the limitations set by the political power. *Botiller v. Dominguez*, 130 U. S. 247, *reversing* 74 Cal. 457; *Ely v. U. S.*, 171 U. S. 220; *Grant v. Jaramillo*, 6 N. Mex. 313; *Jones v. Menard*, 1 Tex. 771.

2. *Ely v. U. S.*, 171 U. S. 220.

*Fraudulent Claims.* — It was to be expected that unfounded and fraudulent claims would be presented for confirmation. There was in the opinion of Congress no mode of separating them from those which were valid, without investigation by a competent tribunal. *Newhall v. Sanger*, 92 U. S. 761.

3. *Jurisdiction in Confirmation Proceedings* — *United States.* — *U. S. v. Forbes*, 15 Pet. (U. S.) 184; *U. S. v. Delespine*, 15 Pet. (U. S.) 319; *Chouteau v. Eckhart*, 2 How. (U. S.) 344, *affirming* 7 Mo. 16; *U. S. v. Lawton*, 5 How. (U. S.) 10; *U. S. v. Boisdoré*, 11 How. (U. S.) 63; *U. S. v. Power*, 11 How. (U. S.) 570; *U. S. v. Rillieux*, 14 How. (U. S.) 189; *Burgess v. Gray*, 16 How. (U. S.) 48, *affirming* 15 Mo. 220; *Zia v. U. S.*, 168 U. S. 198; *Thompson v. Los Angeles Farming, etc., Co.*, 180 U. S. 72; *Sena v. U. S.*, 189 U. S. 233; *Winter v. U. S.*, *Hempst.* (U. S.) 344, 30 Fed. Cas. No. 17,895.

*California.* — *McGarrahan v. Maxwell*, 28 Cal. 75.

*New Mexico.* — *Grant v. Jaramillo*, 6 N. Mex. 313.

*Texas.* — *Land Com'rs v. Riley*, 3 Tex. 237;

the treaty, the law of nations, the laws, usages, and customs of the former government, the principles of equity, and prior decisions of the Supreme Court, so far as they are applicable.<sup>1</sup>

(2) *Ordinary Actions — Federal and State Courts.* — Where the validity of claims to land in territory acquired by the United States is left to the judiciary to determine, as the occasion arises in actions at law and suits in equity, state as well as federal courts have jurisdiction, and the latter have no extraordinary powers of review over the decisions of the former.<sup>2</sup>

**2. Purposes and General Scope of Confirmatory Statutes.** — The main purposes of the statutes providing for the confirmation of rights and titles are to distinguish the land owned by the government from that belonging, either legally or equitably, to individuals, to authenticate those which are valid, and, by perfecting them where equitable, to carry out the obligation assumed by treaty or the law of nations.<sup>3</sup> Neither the treaties nor the statutes, in the absence of a direct declaration to that effect, create new rights or enlarge those previously existing, but they merely provide a remedy by which legal, just, and *bona fide* claims may be established.<sup>4</sup>

**3. Spanish, French, and British Incomplete Titles — a. ACTS OF CONGRESS.** — Various general acts of Congress were enacted for the purpose of ascertaining and confirming possessory rights in the Florida, Louisiana, and Mississippi territories, held under incomplete titles derived from the Spanish, French,

Texas Mexican R. Co. v. Jarvis, 80 Tex. 456; State v. O'Connor, 96 Tex. 484, rehearing denied 74 S. W. Rep. 899, reversing (Tex. Civ. App. 1902) 71 S. W. Rep. 409.

**1. Rules of Decision.** — U. S. v. Arredondo, 6 Pet. (U. S.) 691; Mitchel v. U. S., 9 Pet. (U. S.) 711; Smith v. U. S., 10 Pet. (U. S.) 327; Strother v. Lucas, 12 Pet. (U. S.) 410; U. S. v. Boisdoré, 11 How. (U. S.) 63; Fremont v. U. S., 17 How. (U. S.) 542; U. S. v. Cambuston, 20 How. (U. S.) 59; U. S. v. Fossatt, 21 How. (U. S.) 445, dismissing appeal from Hoffm. Land Cas. (U. S.) 376, 25 Fed. Cas. No. 15,139; U. S. v. Bolton, 23 How. (U. S.) 341; Yontz v. U. S., 23 How. (U. S.) 495; U. S. v. Castellero, 2 Black (U. S.) 17; U. S. v. Auguisola, 1 Wall. (U. S.) 352; U. S. v. Johnson, 1 Wall. (U. S.) 326; U. S. v. Moreno, 1 Wall. (U. S.) 400; U. S. v. Repentigny, 5 Wall. (U. S.) 211; Slidell v. Grandjean, 111 U. S. 412; Ainsa v. U. S., 161 U. S. 208; U. S. v. Sandoval, 167 U. S. 278; Ely v. U. S., 171 U. S. 220; U. S. v. Flint, 4 Sawy. (U. S.) 42, 25 Fed. Cas. No. 15,121, affirmed on other grounds 98 U. S. 61; U. S. v. Parrott, McAll. (U. S.) 271, 27 Fed. Cas. No. 15,098.

**Questions Involved in Inquiry.** — U. S. v. Hanson, 16 Pet. (U. S.) 196; U. S. v. Fossatt, 21 How. (U. S.) 445; More v. Steinbach, 127 U. S. 70; Thompson v. Los Angeles Farming, etc., Co., 180 U. S. 72.

**Bill of Review.** — The rules of equity by which the trial court is enjoined to proceed confer power upon it to open a case for a rehearing, on a proceeding in the nature of a bill of review. U. S. v. Rocha, 9 Wall. (U. S.) 639. *Contra*, U. S. v. Bolton, Hoffm. Op. (U. S.) 44, Hoffm. Dec. (U. S.) 93, 24 Fed. Cas. No. 14,623. See also U. S. v. Castro, 25 Fed. Cas. No. 14,750.

**Laches** on the part of the claimant in complying with the terms of his grant, or in prosecuting proceedings for confirmation. U.

S. v. Moore, 12 How. (U. S.) 209; Williams v. U. S., 92 U. S. 457.

**2. Ordinary Actions — Federal and State Courts.** — New Orleans v. De Armas, 9 Pet. (U. S.) 224; Mobile v. Eslava, 16 Pet. (U. S.) 234; Chouteau v. Eckhart, 2 How. (U. S.) 344; McDonogh v. Millaudon, 3 How. (U. S.) 693; Kennedy v. Hunt, 7 How. (U. S.) 586; San Francisco v. Scott, 111 U. S. 768; Phillips v. Mound City Land, etc., Assoc., 124 U. S. 605; California Powder Works v. Davis, 151 U. S. 389; Hooker v. Los Angeles, 188 U. S. 314; Crystal Springs Land, etc., Co. v. Los Angeles, 82 Fed. Rep. 114, affirmed 177 U. S. 169.

**3. Purposes of Confirmatory Statutes.** — U. S. v. Percheman, 7 Pet. (U. S.) 52; U. S. v. Clarke, 8 Pet. (U. S.) 436; Strother v. Lucas, 12 Pet. (U. S.) 410; Fremont v. U. S., 17 How. (U. S.) 553; U. S. v. Fossatt, 21 How. (U. S.) 446; Castro v. Hendricks, 23 How. (U. S.) 438; U. S. v. Knight, 1 Black (U. S.) 488; U. S. v. Auguisola, 1 Wall. (U. S.) 352; Rodriguez v. U. S., 1 Wall. (U. S.) 582, affirming on other grounds 27 Fed. Cas. No. 16,181a; U. S. v. Morillo, 1 Wall. (U. S.) 706; Botiller v. Dominguez, 130 U. S. 238; Florida v. Furman, 180 U. S. 402; Hall v. Root, 19 Ala. 378; Leese v. Clark, 20 Cal. 388; McGee v. Doe, 9 Fla. 382; Florida Town Imp. Co. v. Bigalsky, (Fla. 1902) 33 So. Rep. 450; Lavergne v. Elkins, 17 La. 220; Catron v. Laughlin, (N. Mex. 1903) 72 Pac. Rep. 26; State v. Sais, 47 Tex. 307.

**4. General Scope of Treaties and Statutes.** — Pollard v. Kibbe, 14 Pet. (U. S.) 353; Chouteau v. Eckhart, 2 How. (U. S.) 344, affirming 7 Mo. 16; Pollard v. Files, 2 How. (U. S.) 603; U. S. v. Reynes, 9 How. (U. S.) 127; U. S. v. D'Auterive, 10 How. (U. S.) 609; Ainsa v. U. S., 161 U. S. 208; Ely v. U. S., 171 U. S. 220; Reloj Cattle Co. v. U. S., 184 U. S. 624; U. S. v. Green, 185 U. S. 256; Josephs's Case, 1 Ct. Cl. 197.

or British governments.<sup>1</sup> Under the early acts, the duty of ascertaining the claims made devolved upon commissioners or land officials, who were sometimes ordered to report thereon to Congress for the direct action of that body, sometimes empowered to themselves reject or confirm them.<sup>2</sup> Later statutes conferred power upon the district courts of the United States to pass upon and reject or confirm claims to land in certain subdivisions of this territory, with a right of appeal to the Supreme Court.<sup>3</sup> Claims were generally required to be presented and sometimes to be prosecuted within a time limited, under penalty of being barred;<sup>4</sup> pending the expiration of which time, and often for a longer period in the case of claims for specific tracts, duly filed, the land involved was frequently withdrawn or reserved from sale or other disposition by the government.<sup>5</sup>

*b. EFFECT AND CONCLUSIVENESS OF CONFIRMATION* — (1) *On Rights of Adverse Claimants.* — The primary object of the confirmation proceedings is to ascertain whether the government is the owner of the land, and not to settle ownership as between individual claimants. If this question is

1. See generally the cases cited in this subsection.

2. *Confirmation by Congress and by Commissioners* — *United States.* — Chouteau *v.* Eckhart, 2 How. (U. S.) 344, *affirming* 7 Mo. 16; Barry *v.* Gamble, 3 How. (U. S.) 32, *affirming* 8 Mo. 88; U. S. *v.* Reynes, 9 How. (U. S.) 127; Doe *v.* Eslava, 9 How. (U. S.) 421, *affirming* 11 Ala. 1028; Doe *v.* Mobile, 9 How. (U. S.) 451, *affirming* 8 Ala. 279, 6 Ala. 738; U. S. *v.* D'Auterive, 10 How. (U. S.) 609; Blanc *v.* Lafayette, 11 How. (U. S.) 104, *affirming* 3 La. Ann. 59; U. S. *v.* Castant, 12 How. (U. S.) 437; Burgess *v.* Gray, 16 How. (U. S.) 48, *affirming* 15 Mo. 220; Tate *v.* Carney, 24 How. (U. S.) 357; U. S. *v.* Percheman, 7 Pet. (U. S.) 52; Strother *v.* Lucas, 12 Pet. (U. S.) 411, 6 Pet. (U. S.) 764; Morrison *v.* Jackson, 92 U. S. 654; Slidell *v.* Grandjean, 111 U. S. 412; Winter *v.* U. S., Hempst. (U. S.) 344, 30 Fed. Cas. No. 17,895.

*Alabama.* — Hall *v.* Doe, 19 Ala. 378; Kennedy *v.* Rochon, 26 Ala. 384.

*Louisiana.* — Boatner *v.* Scott, 1 Rob. (La.) 546; Spencer *v.* Grimball, 6 Mart. N. S. (La.) 355; Lobdell *v.* Clark, 4 La. Ann. 99; Morrison *v.* Whetstone, 5 La. Ann. 636; Newport *v.* Cooper, 10 La. 155; Dutillet *v.* Blanchard, 14 La. Ann. 97; Laforest *v.* Downing, 16 La. Ann. 301.

*Missouri.* — Moss *v.* Anderson, 7 Mo. 337; Soulard *v.* Clark, 19 Mo. 570; Connoyer *v.* Schaeffer, 48 Mo. 164, *affirmed* 22 Wall. (U. S.) 254.

*Acts Requiring Recording of Title Papers.* — De La Croix *v.* Chamberlain, 12 Wheat. (U. S.) 599; Strother *v.* Lucas, 6 Pet. (U. S.) 764, 12 Pet. (U. S.) 411; U. S. *v.* Power, 11 How. (U. S.) 570; Hall *v.* Doe, 19 Ala. 378; Fletcher *v.* Cavalier, 4 La. 267; Murdock *v.* Gurley, 5 Rob. (La.) 457, 467; Lobdell *v.* Clark, 4 La. Ann. 99; Roussin *v.* Parks, 8 Mo. 528; Wilson *v.* Smith, 5 Yerg. (Tenn.) 379.

3. *Confirmation by Courts — Proceedings.* — U. S. *v.* Clarke, 8 Pet. (U. S.) 436; U. S. *v.* Huertas, 8 Pet. (U. S.) 488; U. S. *v.* Hanson, 16 Pet. (U. S.) 106; U. S. King, 3 How. (U. S.) 773; Glenn *v.* U. S., 13 How. (U. S.) 250, *affirming* Hempst. (U. S.) 304; De Vilemont *v.* U. S., 13 How. (U. S.) 261, *affirming* Hempst. (U. S.) 389, 7 Fed. Cas. No.

3,839; U. S. *v.* Rillieux, 14 How. (U. S.) 189; Callender *v.* U. S., Hempst. (U. S.) 334, 4 Fed. Cas. No. 2,321; Robertson *v.* Sewell, (C. C. A.) 87 Fed. Rep. 536.

*Appeals.* — Villabolas *v.* U. S., 6 How. (U. S.) 81; U. S. *v.* Boisdore, 8 How. (U. S.) 113; U. S. *v.* Porche, 12 How. (U. S.) 426.

*Bills of Review.* — Sampeyreac *v.* U. S., 7 Pet. (U. S.) 222, *affirming* Hempst. (U. S.) 118.

*Power of Courts over Surveys.* — Sibbald *v.* U. S., 12 Pet. (U. S.) 489; Chaires *v.* U. S., 3 How. (U. S.) 611.

4. *Limitations.* — U. S. *v.* Clarke, 8 Pet. (U. S.) 436; Strother *v.* Lucas, 12 Pet. (U. S.) 410; U. S. *v.* Delespine, 15 Pet. (U. S.) 319; Stoddard *v.* Chambers, 2 How. (U. S.) 284; U. S. *v.* Marvin, 3 How. (U. S.) 620; Barry *v.* Gamble, 3 How. (U. S.) 32, *affirming* 8 Mo. 88; Les Bois *v.* Bramell, 4 How. (U. S.) 449; U. S. *v.* Porche, 12 How. (U. S.) 426; U. S. *v.* Patterson, 15 How. (U. S.) 10; McCabe *v.* Worthington, 16 How. (U. S.) 86, *affirming* 16 Mo. 514; U. S. *v.* Innerarity, 19 Wall. (U. S.) 595; Cambuston *v.* U. S., 95 U. S. 285; U. S. *v.* Watkins, 97 U. S. 219; Muse *v.* Arlington Hotel Co., 68 Fed. Rep. 637; Hall *v.* Doe, 19 Ala. 378; Guyol *v.* Chouteau, 19 Mo. 540.

5. *Reservations or Withdrawals.* — Stoddard *v.* Chambers, 2 How. (U. S.) 284; Barry *v.* Gamble, 3 How. (U. S.) 32; Menard *v.* Massey, 8 How. (U. S.) 295; Bissell *v.* Penrose, 8 How. (U. S.) 317; Mills *v.* Stoddard, 8 How. (U. S.) 345; Delauriere *v.* Emison, 15 How. (U. S.) 525, *affirming* 14 Mo. 37; McCabe *v.* Worthington, 16 How. (U. S.) 86, *affirming* 16 Mo. 514; Ham *v.* State, 18 How. (U. S.) 126, *affirming* 19 Mo. 593; Easton *v.* Salisbury, 21 How. (U. S.) 426, *affirming* 23 Mo. 100; Glasgow *v.* Baker, 128 U. S. 560, *affirming* 85 Mo. 559.

*Louisiana.* — Morrison *v.* Whetstone, 5 La. Ann. 636.

*Missouri.* — Hunter *v.* Hemphill, 6 Mo. 106; Perry *v.* O'Hanlon, 11 Mo. 506; Ashlev *v.* Turley, 13 Mo. 430; Fenwick *v.* Gill, 38 Mo. 510; Cummings *v.* Powell, 97 Mo. 524, 116 Mo. 473, 38 Am. St. Rep. 610.

See the title STATE AND PUBLIC LANDS, vol. 26, p. 224 note.



determined against the government it has no further concern in the matter.<sup>1</sup> The disposition of the land by the political power is binding and conclusive upon all persons, however, and the title of the conferee cannot be disputed in the courts or elsewhere, except so far as the claim is confirmed subject to rights of adverse claimants and questions of priority left to the courts to determine,<sup>2</sup> or where prior vested rights in the land have been acquired from the United States government itself, rendering the confirmation void and of no effect.<sup>3</sup> Where different claims to the same land are confirmed by the same act of Congress, the equities under the confirmation are equal and the better right must be determined by the courts.<sup>4</sup>

(2) *Legal and Equitable Titles* — (a) *In General*. — A grant may be made by

**1. Primary Object of Confirmation Proceedings.** — *U. S. v. Percheman*, 7 Pet. (U. S.) 52; *U. S. v. Patterson*, 15 How. (U. S.) 10; *Bullitt v. U. S.*, *Hempst.* (U. S.) 333, 4 Fed. Cas. No. 2,128; *Putnam v. U. S.*, *Hempst.* (U. S.) 332, 20 Fed. Cas. No. 11,484.

**Adverse Claimants as Parties** to confirmation proceedings under Act of May 26, 1824, 4 Stat. at L. 52. *U. S. v. Moore*, 12 How. (U. S.) 209; *U. S. v. Davenport*, 15 How. (U. S.) 1; *U. S. v. Roselius*, 15 How. (U. S.) 31.

**2. Effect of Confirmation on Rights of Adverse Claimants — In General — Confirmation Subject to Such Rights — United States.** — *Strother v. Lucas*, 12 Pet. (U. S.) 411, 6 Pet. (U. S.) 764; *Stoddard v. Chambers*, 2 How. (U. S.) 284; *Chouteau v. Eckhart*, 2 How. (U. S.) 344, *affirming* 7 Mo. 16; *Barry v. Gamble*, 3 How. (U. S.) 32, *affirming* 8 Mo. 88; *Les Bois v. Bramell*, 4 How. (U. S.) 449; *Kennedy v. Hunt*, 7 How. (U. S.) 586; *Menard v. Massey*, 8 How. (U. S.) 293; *Landes v. Brant*, 10 How. (U. S.) 370; *Robinson v. Minor*, 10 How. (U. S.) 627; *McCabe v. Worthington*, 16 How. (U. S.) 86, *affirming* 16 Mo. 514; *Ham v. State*, 18 How. (U. S.) 126, *affirming* 19 Mo. 593; *Willot v. Sandford*, 19 How. (U. S.) 79; *Cousin v. Labatut*, 19 How. (U. S.) 202; *Tate v. Carney*, 24 How. (U. S.) 357; *Hogan v. Page*, 2 Wall. (U. S.) 605, *reversing* on other grounds 32 Mo. 68, 22 Mo. 55; *Dent v. Emmegeer*, 14 Wall. (U. S.) 308; *Carpenter v. Rannels*, 19 Wall. (U. S.) 138, *affirming* 45 Mo. 584; *Connoyer v. Schaeffer*, 22 Wall. (U. S.) 254, *affirming* 48 Mo. 164; *Morrison v. Jackson*, 92 U. S. 654; *McMicken v. U. S.*, 97 U. S. 204; *Trenier v. Stewart*, 101 U. S. 797, *affirming* 55 Ala. 458, 49 Ala. 492; *Bryan v. Kennett*, 113 U. S. 179.

**Alabama.** — *Doe v. Greit*, 8 Ala. 930; *Baker v. Chastang*, 18 Ala. 417; *Hall v. Doe*, 19 Ala. 378; *Chastang v. Dill*, 19 Ala. 421; *Chastang v. Armstrong*, 20 Ala. 609; *Eslava v. Bolling*, 22 Ala. 721.

**Louisiana.** — *Higgins v. McMicken*, 1 La. 53; *Swift v. Williams*, 3 La. 235; *Rhodes v. Rhodes*, 10 La. 85; *O'Brien v. Smith*, 16 La. 94; *Thomas v. Turnley*, 3 Rob. (La.) 206; *Noulen v. Perkins*, 3 Rob. (La.) 233; *Terrell v. Chambers*, 6 Rob. (La.) 243, 12 La. 582; *Pontaiba v. Copland*, 3 La. Ann. 86; *Purvis v. Harmanson*, 4 La. Ann. 421, *overruling* *Jewell v. Porche*, 2 La. Ann. 148; *Thomas v. Phillips*, 7 La. Ann. 547; *Fluker v. Doughty*, 15 La. Ann. 673; *Lavedan v. Trinchard*, 35 La. Ann. 540.

**Mississippi.** — *Grand Gulf R., etc., Co. v.*

*Bryan*, 8 Smed. & M. (Miss.) 234; *Nixon v. Carco*, 28 Miss. 414.

**Missouri.** — *Bird v. Montgomery*, 6 Mo. 511; *Roussin v. Parks*, 8 Mo. 528; *Montgomery v. Landusky*, 9 Mo. 714; *Landes v. Perkins*, 12 Mo. 239; *Boone v. Moore*, 14 Mo. 421; *Wright v. Rutgers*, 14 Mo. 585; *Charleville v. Chouteau*, 18 Mo. 493; *Guyol v. Chouteau*, 19 Mo. 546; *Mercier v. Letcher*, 22 Mo. 66; *Papin v. Massey*, 27 Mo. 445; *Dent v. Sigerson*, 29 Mo. 489; *Cabanne v. Walker*, 31 Mo. 274; *Leitensdorfer v. Goebel*, 31 Mo. 474; *St. Louis Gas Light Co. v. Reiss*, 33 Mo. 551; *Papin v. Hines*, 23 Mo. 275; *Connoyer v. Washington University*, 36 Mo. 481; *Schultz v. Lindell*, 40 Mo. 330; *Connoyer v. La Beaume*, 45 Mo. 139; *Harvey v. Rusch*, 67 Mo. 551; *Tyler v. Wells*, 2 Mo. App. 526, *affirmed* 70 Mo. 33; *Cummings v. Powell*, 16 Mo. App. 559, *reversing* on other grounds 97 Mo. 524.

**Proof of Derivative Title.** — A claim cannot be confirmed directly to the individual heirs of a claimant where no proof is introduced to establish the heirship. *U. S. v. Le Blanc*, 12 How. (U. S.) 435; *U. S. v. Rillieux*, 14 How. (U. S.) 189.

**3. Prior Vested Rights Acquired from United States.** — See the cases cited in the preceding note, and see *New Orleans v. De Armas*, 9 Pet. (U. S.) 224; *Menard v. Massey*, 8 How. (U. S.) 293.

**Confirmed Claims Void for This Reason** are sometimes authorized to be located on other public lands. *Smith v. U. S.*, 10 Pet. (U. S.) 327; *Sibbald v. U. S.*, 12 Pet. (U. S.) 489; *Barry v. Gamble*, 3 How. (U. S.) 32, *affirming* 8 Mo. 88; *Les Bois v. Bramell*, 4 How. (U. S.) 449; *Bissell v. Penrose*, 8 How. (U. S.) 317; *U. S. v. Moore*, 12 How. (U. S.) 209; *U. S. v. Watkins*, 97 U. S. 219; *U. S. v. Morant*, 123 U. S. 335, 124 U. S. 647; *Bouligney v. U. S.*, 3 Fed. Cas. No. 1,696a; *Garrett v. Boeing*, (C. C. A. 68 Fed. Rep. 51; *Hodge v. Palms*, (C. C. A.) 68 Fed. Rep. 61, (C. C. A.) 117 Fed. Rep. 396; *Morancy v. Palms*, (C. C. A.) 68 Fed. Rep. 64; *Fletcher v. McArthur*, (C. C. A.) 68 Fed. Rep. 65, 117 Fed. Rep. 393; *McCants v. Peninsular Land Co.*, (C. C. A.) 68 Fed. Rep. 66.

**4. Different Claims to Same Land Confirmed by Same Act of Congress.** — *Berthold v. McDonald*, 22 How. (U. S.) 334, *affirmed* 24 Mo. 126; *Hallet v. Eslava*, 3 Stew. & P. (Ala.) 105; *Doe v. Eslava*, 11 Ala. 1028, 7 Ala. 543, *affirmed* 9 How. (U. S.) 421; *Hall v. Doe*, 19 Ala. 378; *Chastang v. Armstrong*, 20 Ala. 609; *Gonsoulin v. Brashear*, 5 Mart. N. S. (La.) 34;

a law as well as by a patent issued pursuant to a law, and a confirmation directly by Congress will vest the legal title, unless further proceedings are required to segregate the land from the mass of the public domain; in which event the legal title will not attach to the land until they have been had.<sup>1</sup> In such cases a patent issued on the confirmation adds nothing to it and cannot detract from it; but is merely documentary evidence, having the dignity of a record, of the existence of the confirmed title.<sup>2</sup> In the case of confirmation by commissioners or courts a patent is generally required before the claim is perfected by the vesting of the legal title.<sup>3</sup>

(b) **Segregation of the Land.** — Where a confirmed claim is indescriptive and no specific tract is segregated from the public domain by the confirmation, no title, legal or equitable, vests in the confirmee until it has been located by survey of the land department. Otherwise where it is confirmed according to previously ascertained boundaries.<sup>4</sup>

**4. California Rights and Titles** — *a. IN GENERAL.* — By an Act of Congress of March 3, 1851, the United States declared the conditions under which it would discharge its political obligations to claimants of land in the California territory, based on rights and titles derived from Spain and Mexico; and established the mode of procedure.<sup>5</sup> The effect of the act and other legislation

*Higgins v. McMicken*, 1 La. 53; *Swift v. Williams*, 3 La. 235; *Baker v. Thomas*, 4 La. 414; *Devall v. Choppin*, 15 La. 566; *Wilcoxon v. Rogers*, 16 La. 6; *Broussard v. Gonsoulin*, 12 Rob. (La.) 1.

**1. Confirmation by Congress** — *United States.* — *Strother v. Lucas*, 12 Pet. (U. S.) 411; *Chouteau v. Eckhart*, 2 How. (U. S.) 344, *affirming* 7 Mo. 16; *La Roche v. Jones*, 9 How. (U. S.) 155; *Doe v. Eslava*, 9 How. (U. S.) 421, *affirming* 11 Ala. 1028, 7 Ala. 543; *Doe v. Mobile*, 9 How. (U. S.) 451, *affirming* 8 Ala. 279, 6 Ala. 738; *Ryan v. Carter*, 93 U. S. 78. *Alabama.* — *Hallett v. Doe*, 7 Ala. 882; *Hall v. Doe*, 19 Ala. 378.

*Louisiana.* — *Boatner v. Walker*, 11 La. 582, 30 Am. Dec. 723; *Slack v. Orillion*, 11 La. 587, 30 Am. Dec. 724; *Metoyer v. Larenandière*, 6 Rob. (La.) 139; *Morrough v. Moss*, 5 La. Ann. 601; *Thomas v. Phillips*, 7 La. Ann. 546; *Beatty v. Michon*, 9 La. Ann. 102; *Kittridge v. Hebert*, 9 La. Ann. 154.

*Missouri.* — *Mitchell v. Handfield*, 33 Mo. 431; *Tyler v. Wells*, 57 Mo. 472; *Dean v. Bittner*, 77 Mo. 101, *affirming* 7 Mo. App. 413.

**2. Patent Issued on Statutory Confirmation.** — *Gonsoulin v. Gulf Co.*, (C. C. A.) 116 Fed. Rep. 251; *Doe v. Greit*, 8 Ala. 930; *Louis v. Giroir*, 40 La. Ann. 710; *Jopling v. Chachere*, 107 La. 522, *affirmed* 24 Supm. Ct. Rep. 214; *Aubuchon v. Ames*, 27 Mo. 93; *Fenwick v. Gill*, 38 Mo. 510; *Langlois v. Crawford*, 59 Mo. 456.

**3. Confirmations by Commissioners and Courts.** — *Burgess v. Gray*, 16 How. (U. S.) 48, *affirming* 15 Mo. 220; *Doe v. Higgins*, 39 Ala. 9; *Boatner v. Ventress*, 8 Mart. N. S. (La.) 644, 20 Am. Dec. 266; *Boatner v. Scott*, 1 Rob. (La.) 546; *Maguire v. Vice*, 20 Mo. 429; *Papin v. Hines*, 23 Mo. 274, 36 Mo. 406; *Le Beau v. Armitage*, 47 Mo. 138, 56 Mo. 191; *Smith v. Madison*, 67 Mo. 694.

**4. Segregation of the Land** — *United States.* — *Jourdan v. Barrett*, 4 How. (U. S.) 169; *Mackay v. Dillon*, 4 How. (U. S.) 421, *reversing* 7 Mo. 7; *Bissell v. Penrose*, 8 How. (U. S.) 317; *Mills v. Stoddard*, 8 How.

(U. S.) 345; *U. S. v. Boisdoré*, 11 How. (U. S.) 63; *West v. Cochran*, 17 How. (U. S.) 403; *Stanford v. Taylor*, 18 How. (U. S.) 409; *Willot v. Sandford*, 19 How. (U. S.) 79; *Cousin v. Labatut*, 19 How. (U. S.) 202; *Carondelet v. St. Louis*, 1 Black (U. S.) 179, *affirming* 29 Mo. 527; *Maguire v. Tyler*, 8 Wall. (U. S.) 650, *reversing* on other grounds 40 Mo. 406, 1 Black (U. S.) 195, *affirming* 30 Mo. 202, 25 Mo. 484; *Snyder v. Sickles*, 98 U. S. 203; *Slidell v. Grandjean*, 111 U. S. 412; *New Orleans v. Paine*, 147 U. S. 261, *affirming* 2 U. S. App. 330, which *affirmed* 49 Fed. Rep. 12; *Smyth v. New Orleans Canal, etc., Co.* (C. C. A.) 93 Fed. Rep. 899.

*Alabama.* — *Kennedy v. Townsley*, 16 Ala. 239; *Hall v. Doe*, 19 Ala. 378; *Chastang v. Armstrong*, 20 Ala. 609; *Magee v. Doe*, 22 Ala. 699; *Eslava v. Bolling*, 22 Ala. 721; *Doe v. Higgins*, 39 Ala. 9.

*Louisiana.* — *Litchworth v. Bartells*, 4 Mart. N. S. (La.) 136; *Lefebvre v. Comeau*, 11 La. 321; *Slack v. Orillion*, 11 La. 587, 30 Am. Dec. 724, 13 La. 56, 33 Am. Dec. 551; *Lott v. Prudhomme*, 3 Rob. (La.) 293; *Metoyer v. Larenandière*, 6 Rob. (La.) 139; *Fahey v. Anderson*, 6 La. Ann. 681; *Kittridge v. Hebert*, 9 La. Ann. 154.

*Missouri.* — *Ott v. Soulard*, 9 Mo. 581; *Boyce v. Papin*, 11 Mo. 16; *Mitchell v. Handfield*, 33 Mo. 431.

The Confirmation is an incipient United States title, which the government, in its political capacity, reserved to itself the power to locate by survey, and to grant by the acts of its executive officers, with which acts the courts of justice have no power to interfere. *Cousin v. Labatut*, 19 How. (U. S.) 202.

**5. Act Cong. March 3, 1851, 9 Stat. at L. 631.** — *Peralta v. U. S.*, 3 Wall. (U. S.) 434; *Beard v. Federy*, 3 Wall. (U. S.) 490; *Townsend v. Greeley*, 5 Wall. (U. S.) 335; *More v. Steinbach*, 127 U. S. 70; *Leese v. Clark*, 18 Cal. 574; *Estrada v. Murphy*, 19 Cal. 270; *Leese v. Clark*, 20 Cal. 415; *De Arguello v. Greer*, 26 Cal. 628; *Thompson v. Doaksum*, 68 Cal. 597.

relating to California public lands was to reserve the land covered by Spanish and Mexican claims, until an opportunity was afforded the parties in interest to have a judicial hearing and determination.<sup>1</sup> All claims not presented for confirmation during the time limited by the act, or which are finally rejected, are treated as nonexistent, and the land as *proprio vigore* restored to the public domain;<sup>2</sup> but Congress has, in many instances, intervened in favor of *bona fide* purchasers for a valuable consideration from claimants under rejected titles, and given them a preference right to purchase the land from the United States to the extent to which they have reduced it to possession.<sup>3</sup>

*b.* COURSE OF PROCEEDINGS. — Original jurisdiction to decide upon the validity of claims falling within the terms of the act is exclusively conferred upon a board of commissioners;<sup>4</sup> but its decision may be removed to the District Court of the United States and a trial *de novo* there had, with an ultimate right of appeal to the Supreme Court.<sup>5</sup>

*c.* CLAIMS OF ASSIGNEES. — While the vendee or assignee of the original grantee may present the claim, the proceedings should rather be brought in the name of the latter, who can produce the documents of title and best knows how to establish it; and especially so, where many persons have acquired interest in the land through him. In either event, however, the power of the commissioners and the courts is confined to determining the validity of the claim as against the United States, and they have no authority to settle the title as between adverse claimants to the land.<sup>6</sup>

**1. Temporary Reservation of Land Covered by Claims.** — *Newhall v. Sanger*, 92 U. S. 761; *Van Reynegau v. Bolton*, 95 U. S. 33; *Hosmer v. Wallace*, 97 U. S. 575, *affirming* 47 Cal. 461; *Doolan v. Carr*, 125 U. S. 618; *Middleton v. Low*, 30 Cal. 596; *Foss v. Hinkell*, 78 Cal. 158. See the title STATE AND PUBLIC LANDS, vol. 26, p. 224.

**2. Effect of Nonpresentation or Rejection of Claim.** — *U. S. v. Fossatt*, 21 How. (U. S.) 445, *dismissing appeal* from Hoffm. Land Cas. (U. S.) 376, 25 Fed. Cas. No. 15,139; *Beard v. Federy*, 3 Wall. (U. S.) 490; *Williams v. U. S.*, 92 U. S. 457; *Newhall v. Sanger*, 92 U. S. 764; *More v. Steinbach*, 127 U. S. 70; *Swat v. U. S.*, Hoffm. Land Cas. (U. S.) 230, 23 Fed. Cas. No. 13,680; *Dodge v. Perez*, 2 Sawy. (U. S.) 653; *Bouldin v. Phelps*, 12 Sawy. (U. S.) 316, 30 Fed. Rep. 547; *Estrada v. Murphy*, 19 Cal. 248; *Rico v. Spence*, 21 Cal. 504; *Steinbach v. Moore*, 30 Cal. 498; *Page v. Fowler*, 37 Cal. 107; *Hutton v. Frisbie*, 37 Cal. 481; *Banks v. Moreno*, 39 Cal. 233; *Rush v. Casy*, 39 Cal. 339; *McGary v. Hastings*, 39 Cal. 368; *Taylor v. Escadon*, 50 Cal. 428.

**3. Bona Fide Purchasers Holding under Rejected Titles — United States.** — *Frisbie v. Whitney*, 9 Wall. (U. S.) 187, *reversing* 6 D. C. 262; *Atherton v. Fowler*, 96 U. S. 513, *reversing sub nom.* *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462, 37 Cal. 100, 28 Cal. 605; *Hosmer v. Wallace*, 97 U. S. 575, *affirming* 47 Cal. 461; *Hays v. Steiger*, 156 U. S. 387, *affirming* 76 Cal. 555; *Beley v. Naphtaly*, 160 U. S. 353, *affirming* 44 U. S. App. 232; *Dodge v. Perez*, 2 Sawy. (U. S.) 645, 7 Fed. Cas. No. 3,953.

*California.* — *Hastings v. McGoogin*, 27 Cal. 85; *Page v. Hobbs*, 27 Cal. 484, 28 Cal. 605; *Hutton v. Frisbie*, 37 Cal. 475; *Durfee v. Plaisted*, 38 Cal. 80; *Sheehy v. True*, 45 Cal. 236; *Rutledge v. Murphy*, 51 Cal. 388; *Frisbie v. Moore*, 51 Cal. 516; *Bascomb v. Davis*, 56 Cal. 152; *Hosmer v. Duggan*, 56 Cal. 257;

*Watriss v. Reed*, 99 Cal. 134; *Wormouth v. Gardner*, 112 Cal. 506.

**4. Original Jurisdiction.** — *U. S. v. Castellero*, 2 Black (U. S.) 17.

**What Claims Within Scope of Act.** — *U. S. v. Castellero*, 2 Black (U. S.) 17; *Beard v. Federy*, 3 Wall. (U. S.) 478; *Mora v. Foster*, 3 Sawy. (U. S.) 469, 17 Fed. Cas. No. 9,784, *affirmed* 98 U. S. 425; *McGarrahan v. Maxwell*, 28 Cal. 75.

**5. Appeals and Proceedings on Appeal.** — *U. S. v. Ritchie*, 17 How. (U. S.) 525; *Fremont v. U. S.*, 17 How. (U. S.) 542; *U. S. v. De Pacheco*, 20 How. (U. S.) 261; *U. S. v. Fossatt*, 21 How. (U. S.) 445, *dismissing appeal* from Hoffm. Land Cas. (U. S.) 376, 25 Fed. Cas. No. 15,139, 2 Wall. (U. S.) 649, *reversing* on other grounds 25 Fed. Cas. No. 15,140; *Yturbi v. U. S.*, 22 How. (U. S.) 290, *affirming* Hoffm. Land Cas. (U. S.) 273, 30 Fed. Cas. No. 18,191; *U. S. v. Knight*, 1 Black (U. S.) 488; *U. S. v. Morillo*, 1 Wall. (U. S.) 706; *Beard v. Federy*, 3 Wall. (U. S.) 478; *U. S. v. Circuit Judges*, 3 Wall. (U. S.) 673, *reversing* order in 4 Sawy. (U. S.) 553, 21 Fed. Cas. No. 12,316, three justices dissenting; *Grisar v. McDowell*, 6 Wall. (U. S.) 363, *affirming* 4 Sawy. (U. S.) 597, 11 Fed. Cas. No. 5,832; *Newhall v. Sanger*, 92 U. S. 764; *De Fitch v. U. S.*, Hoffm. Land Cas. (U. S.) 272, 7 Fed. Cas. No. 3,741; *De Zaldo v. U. S.*, Hoffm. Land Cas. (U. S.) 98, 7 Fed. Cas. No. 3,872; *Le Roy v. Wright*, 4 Sawy. (U. S.) 530, 15 Fed. Cas. No. 8,273; *U. S. v. Flint*, 4 Sawy. (U. S.) 42, 25 Fed. Cas. No. 15,121, *affirmed* on other grounds 98 U. S. 61; *U. S. v. Fossatt*, Hoffm. Land Cas. (U. S.) 373, 25 Fed. Cas. No. 15,138; *Rodriguez v. U. S.*, Hoffm. Land Cas. (U. S.) 175, 27 Fed. Cas. No. 16,181.

**6. Claims of Assignees.** — *U. S. v. Fossatt*, 20 How. (U. S.) 413, *reversing* on other grounds Hoffm. Land Cas. (U. S.) 211, 25 Fed. Cas. No. 15,137; *U. S. v. Sutter*, 21 How. (U. S.) 170;



*d. EFFECT AND CONCLUSIVENESS OF DECREES* — (1) *On Validity of Right or Title*. — The decree of the board of commissioners, if not appealed from, or if, on appeal, affirmed, is binding and conclusive upon the claimant and the United States and their privies in representation or estate, on the validity of the right or title involved.<sup>1</sup> The proceedings of the board are judicial in character and have the same effect as other judicial proceedings.<sup>2</sup>

(2) *On Location of Land*. — The judicial tribunals in proceedings to confirm Mexican rights and titles have authority to ascertain by their decrees such boundaries of the land granted as were established by the former governments. To the extent that the grant is indescriptive, however, the premises cannot be located by them, unless the power to do so is expressly delegated.<sup>3</sup>

*e. SEGREGATION OF THE LAND* — (1) *In General* — *Act of March 3, 1851*. — The right of location where necessary to segregate the land acquired under Mexican titles, passed on the conquest and cession to the political department of the government to be exercised by it according to the regulations and usages of Mexico, with such modifications as it might deem expedient; and no title to any specific parcel vested until this had been done.<sup>4</sup> By the Act of Congress of March 3, 1851, the United States designated the manner and

*U. S. v. White*, 23 How. (U. S.) 249; *Castro v. Hendricks*, 23 How. (U. S.) 438, *affirming* 2 Hayw. & H. (D. C.) 293, 26 Fed. Cas. No. 15,347a; *U. S. v. Grimes*, 2 Black (U. S.) 612; *Beard v. Federy*, 3 Wall. (U. S.) 490; *Meador v. Norton*, 11 Wall. (U. S.) 442, *affirming* 4 Sawy. (U. S.) 603, 18 Fed. Cas. No. 10,351; *Brown v. Brackett*, 21 Wall. (U. S.) 387; *Dana v. U. S.*, Hoffm. Land Cas. (U. S.) 87, 6 Fed. Cas. No. 3,555; *Martin v. U. S.*, Hoffm. Land Cas. (U. S.) 146, 16 Fed. Cas. No. 9,168; *Thura v. U. S.*, Hoffm. Land Cas. (U. S.) 298, 23 Fed. Cas. No. 14,015; *U. S. v. Bale*, Hoffm. Land Cas. 92, 24 Fed. Cas. No. 14,504; *U. S. v. Hoppe*, Hoffm. Dec. (U. S.) 4, 26 Fed. Cas. No. 15,388; *U. S. v. Vallejo*, Hoffm. Op. (U. S.) 53, Hoffm. Dec. (U. S.) 3, 28 Fed. Cas. No. 16,606, *affirmed* 1 Black (U. S.) 283; *U. S. v. White*, Hoffm. Op. (U. S.) 475, Hoffm. Dec. (U. S.) 25, 95, 28 Fed. Cas. No. 16,680; *Hardy v. Harbin*, 4 Sawy. (U. S.) 536, 11 Fed. Cas. No. 6,060, 1 Sawy. (U. S.) 194, 11 Fed. Cas. No. 6,059, *affirmed* 154 U. S. 598; *U. S. v. De Rodriguez*, 7 Sawy. (U. S.) 617, 25 Fed. Cas. No. 14,950; *Hayner v. Stanly*, 8 Sawy. (U. S.) 214, 13 Fed. Rep. 217.

1. *Effect and Conclusiveness of Decrees*. — *U. S. v. Fossatt*, 21 How. (U. S.) 445, *dismissing appeal* from Hoffm. Land Cas. (U. S.) 376, 25 Fed. Cas. No. 15,139; *Malarin v. U. S.*, 1 Wall. (U. S.) 282; *Boyle v. Hinds*, 2 Sawy. (U. S.) 527, 3 Fed. Cas. No. 1,759; *San Francisco v. U. S.*, 4 Sawy. (U. S.) 553, 21 Fed. Cas. No. 12,316; *U. S. v. Payson*, 27 Fed. Cas. No. 16,016; *U. S. v. Vallejo*, Hoffm. Dec. (U. S.) 51, 28 Fed. Cas. No. 16,605; *Gregory v. McPherson*, 13 Cal. 574; *Mott v. Smith*, 16 Cal. 550; *Soto v. Kroder*, 19 Cal. 87; *Clark v. Lockwood*, 21 Cal. 220; *Mahoney v. Van Winkle*, 21 Cal. 576; *Kimball v. Semple*, 25 Cal. 454; *Semple v. Hagar*, 27 Cal. 168; *De Bernal v. Lynch*, 36 Cal. 143.

An Order for a Decree is not final either as to the subject matter or for purposes of an appeal; but the decree must be entered. *Bouldin v. Phelps*, 12 Sawy. (U. S.) 293, 30 Fed. Rep. 547.

*Construction of Decree as to Boundaries*. — *U. S. v. Halleck*, 1 Wall. (U. S.) 439; *More v. Masini*, 37 Cal. 432; *Valentine v. Sloss*, 103 Cal. 215.

2. *Character of Commissioners' Proceedings*. — *Thompson v. Los Angeles Farming, etc., Co.*, 180 U. S. 72, *affirming* 117 Cal. 594; *Boyle v. Hinds*, 2 Sawy. (U. S.) 527, 3 Fed. Cas. No. 1,759; *Beard v. Federy*, 3 Wall. (U. S.) 478; *Lynch v. Bernal*, 9 Wall. (U. S.) 315, *affirming* 36 Cal. 135.

3. *Power of Board or Court to Establish Boundaries*. — *U. S. v. Fremont*, 18 How. (U. S.) 30; *U. S. v. Sepulveda*, 1 Wall. (U. S.) 104; *U. S. v. Halleck*, 1 Wall. (U. S.) 439; *U. S. v. Billing*, 2 Wall. (U. S.) 444; *U. S. v. Hancock*, 133 U. S. 193, *affirming* 30 Fed. Rep. 851; *U. S. v. Fossatt*, Hoffm. Land Cas. (U. S.) 211, 25 Fed. Cas. No. 15,137, *reversed* on other grounds 20 How. (U. S.) 413; Hoffm. Land Cas. (U. S.) 376, 25 Fed. Cas. No. 15,139, *appeal dismissed* on jurisdictional grounds 21 How. (U. S.) 445; *U. S. v. De Rodriguez*, 7 Sawy. (U. S.) 617, 25 Fed. Cas. No. 14,950; *Valentine v. Sloss*, 103 Cal. 215. See *infra*, this subdivision, *Segregation of the Land*.

4. *Function of Political Power as to Locations United States*. — *Fremont v. U. S.*, 17 How. (U. S.) 565; *U. S. v. Pacheco*, 22 How. (U. S.) 225, *reversing* Hoffm. Land Cas. (U. S.) 150, 27 Fed. Cas. No. 15,982; *Yontz v. U. S.*, 23 How. (U. S.) 495; *U. S. v. Armijo*, 5 Wall. (U. S.) 450; *Hornsby v. U. S.*, 10 Wall. (U. S.) 235; *Carpentier v. Montgomery*, 13 Wall. (U. S.) 480; *U. S. v. McLaughlin*, 127 U. S. 428, *affirming* 12 Sawy. (U. S.) 179, 30 Fed. Rep. 147; *U. S. v. Castro*, 25 Fed. Cas. No. 14,750.

*California*. — *Moore v. Wilkinson*, 13 Cal. 486; *Teschemacher v. Thompson*, 18 Cal. 27, 79 Am. Dec. 151; *Leese v. Clark*, 18 Cal. 574; *Estrada v. Murphy*, 19 Cal. 270; *Johnson v. Van Dyke*, 20 Cal. 225; *De Arguello v. Greer*, 26 Cal. 615; *Love v. Shartzler*, 31 Cal. 494; *Yates v. Smith*, 38 Cal. 66; *People v. San Francisco*, 75 Cal. 401.

conditions under which the right and power to segregate land, the title to which has been confirmed, from the mass of the public lands, should be exercised, and declared the effect to be given to the proceedings had.<sup>1</sup> It vests the power to make locations in the surveyor general, subject to revision and approval by the general officers of the land department authorized to direct and supervise the disposition of the public domain. Return of the survey or plat is not required to be made to the confirming board or court;<sup>2</sup> but the court at least has implied power to see that locations made under its own decrees conform to such boundaries as are therein found to exist. Locations made under final decrees of the board cannot be revised by the court.<sup>3</sup>

(2) *Act of June 14, 1860* — (a) *In General*. — An Act of Congress of June 14, 1860, authorized surveys locating land, whether made under decrees of the board or of the court, to be brought into the District Court of the United States, on objection being made to them; and required them to be corrected, if found to vary from the specific directions contained in the decrees, or, if the decree contained no such direction, from the general rules governing in such cases. It has application only to surveys made subsequent to its enactment and those in relation to which proceedings were then pending for the purpose of contesting or reforming the same.<sup>4</sup>

(b) *Survey and Application for Review by Court*. — When the survey has been made and platted it is the duty of the surveyor-general to publish notice of the fact. In the meantime the survey and plat are retained in his office subject to inspection. If, upon the expiration of the publication, no application is made for the return of the survey into the District Court, or if, being made, the application is refused, the survey becomes final. On the other hand, if the survey is ordered into court, it does not become final until it has been approved by the decree of the court. Until the survey is established in one of these ways,

1. *Act March 3, 1851, 9 Stat. at L. 631*. — *Leese v. Clark*, 18 Cal. 575.

2. *Power Vested in Officers of Land Department*. — *Castro v. Hendricks*, 23 How. (U. S.) 438, *affirming* 2 Hayw. & H. (D. C.) 293, 26 Fed. Cas. No. 15,347a; *U. S. v. Sepulveda*, 1 Wall. (U. S.) 107; *Bissell v. Henshaw*, 1 Sawy. (U. S.) 553, 3 Fed. Cas. No. 1,447, *affirmed* 18 Wall. (U. S.) 255; *Van Reynegan v. Bolton*, 95 U. S. 33; *Leroy v. Jamison*, 3 Sawy. (U. S.) 369, 15 Fed. Cas. No. 8,271; *Mott v. Smith*, 16 Cal. 533; *Johnson v. Van Dyke*, 20 Cal. 225; *People v. San Francisco*, 75 Cal. 397.

3. *Implied Power of Confirming Board or Court*. — *U. S. v. Fossatt*, 21 How. (U. S.) 445, *dismissing appeal from Hoffm. Land Cas.* (U. S.) 376, 25 Fed. Cas. No. 15,139, 2 Wall. (U. S.) 649, *reversing on other grounds* 25 Fed. Cas. No. 15,140; *U. S. v. Berreyesa*, 23 How. (U. S.) 499; *U. S. v. Sepulveda*, 1 Wall. (U. S.) 104; *Alviso v. U. S.*, 8 Wall. (U. S.) 337, *affirming* 24 Fed. Cas. No. 14,435; *De Guyer v. Banning*, 167 U. S. 723, *affirming* 91 Cal. 400, which *reversed on rehearing* (Cal. 1890) 25 Pac. Rep. 252; *Bajorques v. U. S.*, Hoffm. Op. (U. S.) 53, Hoffm. Dec. (U. S.) 1, 2 Fed. Cas. No. 761; *U. S. v. Armijo*, 24 Fed. Cas. No. 14,466, *affirmed* 5 Wall. (U. S.) 444; *U. S. v. Bidwell*, Hoffm. Op. (U. S.) 54, Hoffm. Dec. (U. S.) 5, 24 Fed. Cas. No. 14,592; *U. S. v. Bajorques*, Hoffm. Op. (U. S.) 55, Hoffm. Dec. (U. S.) 2, 24 Fed. Cas. No. 14,620; *U. S. v. De Rodriguez*, 7 Sawy. (U. S.) 617, 25 Fed. Cas. No. 14,950; *U. S. v. Folsom*, 7 Sawy. (U. S.) 602, 25 Fed. Cas. No. 15,127; *U. S.*

*v. Peralta*, 99 Fed. Rep. 618, 102 Fed. Rep. 1006.

*California*. — *Sabichi v. Aquilar*, 43 Cal. 285; *Morris v. De Celis*, 51 Cal. 55. *Compare* *Valentine v. Sloss*, 103 Cal. 215, two justices *dissenting*.

4. *Act June 14, 1860, 12 Stat. at L. 33*. — *U. S. v. Sepulveda*, 1 Wall. (U. S.) 106; *Henshaw v. Bissell*, 18 Wall. (U. S.) 255, *affirming* 1 Sawy. (U. S.) 553, 3 Fed. Cas. No. 1,447, *citing* *U. S. v. Hallock*, 1 Wall. (U. S.) 453; *Miller v. Dale*, 92 U. S. 477; *U. S. v. Murphy*, 27 Fed. Cas. No. 15,837; *U. S. v. Semple*, Hoffm. Dec. (U. S.) 14, 27 Fed. Cas. No. 16,250; *Treadway v. Semple*, 28 Cal. 652.

*Course of Court Proceedings — Intervention of Third Persons*. — *U. S. v. Covilland*, 1 Black (U. S.) 339; *U. S. v. Halleck*, 1 Wall. (U. S.) 439; *Rodriguez v. U. S.*, 1 Wall. (U. S.) 582, *affirming on other grounds* 27 Fed. Cas. No. 16,181a; *U. S. v. Estudillo*, 1 Wall. (U. S.) 710; *Dehon v. Bernal*, 3 Wall. (U. S.) 774; *Alviso v. U. S.*, 8 Wall. (U. S.) 377, *affirming* 24 Fed. Cas. No. 14,435; *U. S. v. Bidwell*, Hoffm. Op. (U. S.) 54, Hoffm. Dec. (U. S.) 5, 24 Fed. Cas. No. 14,592; *U. S. v. Carrillo*, Hoffm. Dec. (U. S.) 40, 25 Fed. Cas. No. 14,736; *U. S. v. Folsom*, 7 Sawy. (U. S.) 602, 25 Fed. Cas. No. 15,127.

*Appeals from Decrees of Court Approving Surveys*. — *U. S. v. Estudillo*, 1 Wall. (U. S.) 710; *Alviso v. U. S.*, 8 Wall. (U. S.) 377, *affirming* 24 Fed. Cas. No. 14,435; *More v. Steinbach*, 127 U. S. 70; *Thornton v. Mahoney*, 24 Cal. 569; *McGarrahan v. Maxwell*, 28 Cal. 75.

it is only a mere preliminary proceeding, having no binding force or effect.<sup>1</sup>

(c) **Scope and Effect of Proceedings.** — The object of the act is not to settle questions of title, but to insure conformity of the survey with the decree under which it is made, and for purposes of the proceedings the decree is final and conclusive as to such boundaries as are established by it. The final approval of the survey establishes the fact that it is in conformity with the decree and renders it conclusive as to the location of the land against all floating claims not previously located.<sup>2</sup>

(3) **Subsequent Acts of Congress.** — Changes in the mode of proceeding in locating lands, the title to which has been confirmed, were made by acts of Congress subsequent to that of June 14, 1860.<sup>3</sup>

**f. VESTING OF EQUITABLE RIGHT AND OF LEGAL TITLE.** — By the terms of the Act of Congress of June 14, 1860, relating to the segregation of the land granted,<sup>4</sup> when the survey therein provided for has become final, it vests the legal title and has the same binding effect and conclusiveness as a patent.<sup>5</sup> With this exception the legal title does not vest until the issuance of a patent. The decree of confirmation, and subsequent proceedings had for the purpose of segregating the land where such are necessary, vest only an equitable estate.<sup>6</sup>

**1. Survey and Application for Review by Court.** — *Van Reynegan v. Bolton*, 95 U. S. 36; *Leroy v. Jamison*, 3 Sawy. (U. S.) 369, 15 Fed. Cas. No. 8,271; *Mahoney v. Van Winkle*, 21 Cal. 583; *McGarrahan v. Maxwell*, 28 Cal. 94; *Southern Pac. R. Co. v. Garcia*, 64 Cal. 517.

**Act Cong. June 2, 1862, 12 Stat. at L. 410**, introducing some changes in the manner of making surveys, did not repeal these requirements of the Act of 1860. *McGarrahan v. Maxwell*, 28 Cal. 75.

**2. Scope and Effect of Proceedings** — *United States*. — U. S. *v. Halleck*, 1 Wall. (U. S.) 439; *Fossat's Case*, 2 Wall. (U. S.) 649, reversing 25 Fed. Cas. No. 15,140; *Higuera v. U. S.*, 5 Wall. (U. S.) 827, affirming 26 Fed. Cas. Nos. 15,362, 15,363; *Henshaw v. Bissell*, 18 Wall. (U. S.) 255, affirming 1 Sawy. (U. S.) 553, 3 Fed. Cas. No. 1,447; *Brown v. Brackett*, 21 Wall. (U. S.) 387, affirming 45 Cal. 167; *Miller v. Dale*, 92 U. S. 473, affirming 44 Cal. 562; *Adam v. Norris*, 103 U. S. 591; *U. S. v. De Rodriguez*, 7 Sawy. (U. S.) 617, 25 Fed. Cas. No. 14,950; *U. S. v. Carpentier*, Hoffm. Dec. (U. S.) 81, 25 Fed. Cas. No. 14,728; *U. S. v. Larkin*, Hoffm. Dec. (U. S.) 23, 26 Fed. Cas. No. 15,562; *U. S. v. Pacheco*, Hoffm. Dec. (U. S.) 62, 27 Fed. Cas. No. 15,980; *U. S. v. Rico*, Hoffm. Dec. (U. S.) 48, 27 Fed. Cas. No. 16,160; *U. S. v. Soto*, 27 Fed. Cas. No. 16,354; *U. S. v. Vallejo*, Hoffm. Dec. (U. S.) 51, 28 Fed. Cas. No. 16,605; *U. S. v. Vaca*, Hoffm. Dec. (U. S.) 22, 28 Fed. Cas. No. 16,604; *Weber v. U. S.*, Hoffm. Op. (U. S.) 66, Hoffm. Dec. (U. S.) 8, 29 Fed. Cas. No. 17,329.

*California*. — *Boggs v. Merced Min. Co.*, 14 Cal. 279; *De Arguello v. Greer*, 26 Cal. 615; *Chiple v. Farris*, 45 Cal. 527; *San Diego v. Allison*, 46 Cal. 162.

**Removing and Correcting Ambiguities and Errors in Decree.** — *Dehon v. Bernal*, 3 Wall. (U. S.) 774; *U. S. v. De Haro*, 25 Fed. Cas. No. 14,938, reforming decree in 25 Fed. Cas. No. 14,937; *U. S. v. Enwright*, 25 Fed. Cas. No. 15,054; *U. S. v. Folsom*, Hoffm. Dec. (U.

S.) 42, 25 Fed. Cas. No. 15,125, Hoffm. Dec. (U. S.) 44, 25 Fed. Cas. No. 15,126; *U. S. v. Hoppe*, Hoffm. Dec. (U. S.) 4, 26 Fed. Cas. No. 15,388; *U. S. v. Peralta*, 27 Fed. Cas. Nos. 16,030, 16,032.

**3. Subsequent Acts of Congress.** — See Acts June 2, 1862, 12 Stat. at L. 410; July 1, 1864, 13 Stat. at L. 332; July 23, 1866, 14 Stat. at L. 218; *Quinby v. Conlan*, 104 U. S. 420, affirming 51 Cal. 412; *Mesa v. U. S.*, 4 Sawy. (U. S.) 551, 17 Fed. Cas. No. 9,492; *U. S. v. Castro*, 5 Sawy. (U. S.) 625, 25 Fed. Cas. No. 14,754; *McGarrahan v. Maxwell*, 28 Cal. 75; *Shartz v. Love*, 40 Cal. 93.

**4.** See *supra*, this subdivision, *Segregation of the Land*.

**5. Vesting of Legal Title Under Act June 14, 1860** — *United States*. — *Henshaw v. Bissell*, 18 Wall. (U. S.) 255, affirming 1 Sawy. (U. S.) 553; *Miller v. Dale*, 92 U. S. 473; *Adams v. Norris*, 103 U. S. 591; *Leroy v. Jamison*, 3 Sawy. (U. S.) 369, 15 Fed. Cas. No. 8,271; *Southern Pac. R. Co. v. Dull*, 10 Sawy. (U. S.) 515.

*California*. — *Seale v. Ford*, 29 Cal. 105; *O'Connell v. Dougherty*, 32 Cal. 459; *Merrill v. Chapman*, 34 Cal. 251, 35 Cal. 85; *Morris v. De Celis*, 51 Cal. 55; *Cruz v. Martinez*, 53 Cal. 239; *Southern Pac. R. Co. v. Garcia*, 64 Cal. 515.

**An Order for a Decree** will not affect this; but a formal decree must be made and entered, and the approved plat and survey attached to and made a part of it. *U. S. v. Gomez*, 1 Wall. (U. S.) 691; *U. S. v. Garcia*, 1 Sawy. (U. S.) 383, 25 Fed. Cas. No. 15,186; *U. S. v. Semple*, Hoffm. Dec. (U. S.) 14, 27 Fed. Cas. No. 16,250.

**6. Patent Required to Vest Legal Title.** — *Singleton v. Touchard*, 1 Black (U. S.) 342; *Foster v. Mora*, 98 U. S. 425, affirming 3 Sawy. (U. S.) 469, 17 Fed. Cas. No. 9,784; *Mezes v. Greer*, McAll. (U. S.) 401, 17 Fed. Cas. No. 9,520, affirmed 24 How. (U. S.) 268; *Mahoney v. Van Winkle*, 33 Cal. 448; *Gardiner v. Miller*, 47 Cal. 570; *Anzar v. Miller*, 90 Cal. 342.



*g. EFFECT AND CONCLUSIVENESS OF PROCEEDINGS — (1) In General.* — A patent issued upon confirmation of the right or title, or its equivalent for the purpose of passing the legal estate, relates back and takes effect as of the date of the filing of the petition with the board of commissioners, and is to be regarded as executed on that day; passing whatever interest the United States may then have had in the premises. It operates, in consequence, as an absolute bar to any claims to the land derived from the United States subsequent to that date.<sup>1</sup> Furthermore, claimants under titles acquired at any time subsequent to the conquest and cession of the country take in subordination to titles previously acquired from the former governments and confirmed and patented by the United States, although not parties to such proceedings, or given notice of them. The patent is a record showing the action and judgment of the government with respect to the latter; and, with such exceptions as the confirmation statute makes, is conclusive evidence of their validity, of the location of the land, and of the relinquishment by the United States of all its interest in the premises.<sup>2</sup> The patent, being conclusive upon the question of the existence and validity of the grant, necessarily establishes the title of the patentee from the date of the grant, the character of such title depending, up to the issuance of the patent, upon the nature of the grant, and the proceedings of the former government in relation thereto; whether the grant was of a specific tract segregated from other land by defined boundaries, or of a certain quantity of land lying within a designated larger tract, and, in the latter case, whether juridical possession had been given to the grantee.<sup>3</sup>

(2) *Adverse Claimants under Original Title.* — By a decree confirming a

**Patent Issued Pending Proceedings.** — A valid patent cannot be issued upon a claim, pending confirmation proceedings. It can only issue after the proceedings have become final. *McGarrahan v. New Idria Min. Co.*, 49 Cal. 331, *affirmed* on other grounds 96 U. S. 316.

**Death of Confirnee** after presentation of petition does not invalidate a patent issued in his name, but under the general Act of Congress of May 20, 1836, Rev. Stat. U. S., § 2448, it enures to the benefit of his heirs or assigns. *Waterman v. Smith*, 13 Cal. 373; *Chipley v. Farris*, 45 Cal. 527.

**Delivery of Patent** not necessary to vesting of title. *Chipley v. Farris*, 45 Cal. 527.

**1. Effect and Conclusiveness of Proceedings — In General.** — *United States.* — *Beard v. Federy*, 3 Wall. (U. S.) 491; *Adam v. Norris*, 103 U. S. 593.

*California.* — *Moore v. Wilkinson*, 13 Cal. 478; *Boggs v. Merced Min. Co.*, 14 Cal. 362; *Yount v. Howell*, 14 Cal. 465; *Stark v. Barrett*, 15 Cal. 361; *Mott v. Smith*, 16 Cal. 533; *Ely v. Frisbie*, 17 Cal. 259; *Leese v. Clark*, 18 Cal. 535, 20 Cal. 387; *Teschmacher v. Thompson*, 18 Cal. 11, 79 Am. Dec. 151; *Touchard v. Crow*, 20 Cal. 160, 81 Am. Dec. 108; *Ward v. Mulford*, 32 Cal. 365; *Morrill v. Chapman*, 35 Cal. 85, 34 Cal. 253; *McDonald v. McCoy*, 121 Cal. 55.

**Mines and Mineral Lands** are not excepted from the operation of the confirmatory proceedings, and pass by the patent. *Moore v. Maw*, 17 Cal. 224, 79 Am. Dec. 123; *Fremont v. Seals*, 18 Cal. 433; *Ah Hee v. Crippen*, 19 Cal. 497. *Compare* U. S. v. San Pedro, etc., Co., 4 N. Mex. 225, *affirmed* on other grounds 146 U. S. 120.

**Construction of Patent as to Boundaries and Location.** — *More v. Massini*, 37 Cal. 432;

*Chipley v. Farris*, 45 Cal. 527; *Wright v. Seymour*, 69 Cal. 122.

**2. Effect on Titles Acquired Subsequent to Conquest and Cession — Patent as Evidence — United States.** — *Beard v. Federy*, 3 Wall. (U. S.) 478; *More v. Steinbach*, 127 U. S. 70; *San Francisco v. Le Roy*, 138 U. S. 656; *Knight v. U. S. Land Assoc.*, 142 U. S. 161, *reversing* on other grounds *sub nom.* *United Land Assoc. v. Knight*, 85 Cal. 448; *De Guyer v. Banning*, 167 U. S. 723, *affirming* 91 Cal. 400; *U. S. v. Conway*, 175 U. S. 60; *Thompson v. Los Angeles Farming, etc., Co.*, 180 U. S. 72, *affirming* 117 Cal. 594; *U. S. v. Vaca*, Hoffm. Dec. (U. S.) 22, 28 Fed. Cas. No. 16,604; *U. S. v. Peralta*, 99 Fed. Rep. 618, 102 Fed. Rep. 1006; *Boyle v. Hinds*, 2 Sawy. (U. S.) 527, 3 Fed. Cas. No. 1,759; *Leroy v. Jamison*, 3 Sawy. (U. S.) 369, 15 Fed. Cas. No. 8,271; *Tripp v. Spring*, 5 Sawy. (U. S.) 209, 24 Fed. Cas. No. 14,180; *Manning v. San Jacinto Tin Co.*, 7 Sawy. (U. S.) 418; *Mora v. Nunez*, 7 Sawy. (U. S.) 455, 10 Fed. Rep. 634; *Hayner v. Stanly*, 8 Sawy. (U. S.) 214, 13 Fed. Rep. 217.

*California.* — *Waterman v. Smith*, 13 Cal. 373; *Hart v. Burnett*, 15 Cal. 577; *Soto v. Kroder*, 19 Cal. 87; *Pioche v. Paul*, 22 Cal. 111; *Kimball v. Semple*, 25 Cal. 454; *Durfee v. Plaisted*, 38 Cal. 83; *Miller v. Dale*, 44 Cal. 578; *Chipley v. Farris*, 45 Cal. 527; *Cassidy v. Carr*, 48 Cal. 339; *Cruz v. Martinez*, 53 Cal. 239; *Steinback v. Perkins*, 58 Cal. 86; *Carey v. Brown*, 58 Cal. 180; *Turner v. Donnelly*, 70 Cal. 604; *People v. San Francisco*, 75 Cal. 388, *reversing* on rehearing (Cal. 1887) 15 Pac. Rep. 747; *Adair v. White*, 85 Cal. 313; *Valentine v. Sloss*, 103 Cal. 215. See also the cases cited in the preceding note.

3. *Stark v. Barrett*, 15 Cal. 361; *Tesche-*

right or title and the subsequent proceedings necessary to perfect it, the legal title is vested in the confirmee; but he takes it subject to any prior rights in the land under the title confirmed, outstanding in favor of other persons. The holders of such rights have no legal title, however, and cannot maintain an action in ejectment against the confirmee or those holding under him, but must proceed in equity where their rights can be properly investigated; <sup>1</sup> except in cases where the legal title of the confirmee is vested in them under the doctrine of relation. <sup>2</sup>

(3) "*Third Persons.*" — Under the fifteenth section of the act, the proceedings had and patents issued on confirmed claims are conclusive between the United States and the claimants only, and do not affect the interests of "third persons." The term "third persons," however, embraces only those persons who hold independent titles acquired previous to the conquest and cession of the country, and of such character as would enable them to resist successfully any subsequent action of the government affecting them. <sup>3</sup>

**5. New Mexico and Arizona.** — By an Act of July 22, 1854, the surveyor-general for New Mexico was authorized to ascertain and make a full report on all Spanish and Mexican claims to land within the territory, with a view to the confirmation by Congress of all *bona fide* grants. Subsequently the provisions of the act were extended to the territory of Arizona, and many of the claims reported were confirmed by Congress. <sup>4</sup>

*macher v. Thompson*, 18 Cal. 11, 79 Am. Dec. 151.

**1. Adverse Claimants under Original Title — United States.** — *U. S. v. Covillard*, 1 Black (U. S.) 339; *Townsend v. Greeley*, 5 Wall. (U. S.) 326; *Carpentier v. Montgomery*, 13 Wall. (U. S.) 480; *Santa Clara Min. Assoc. v. Quicksilver Min. Co.*, 8 Sawy. (U. S.) 330, 17 Fed. Rep. 657; *Bouldin v. Phelps*, 12 Sawy. (U. S.) 312, 30 Fed. Rep. 547; *Miller v. Dale*, 92 U. S. 473, *affirming* 44 Cal. 562; *U. S. v. Vallejo*, Hoffm. Op. (U. S.) 53, Hoffm. Dec. (U. S.) 3, 28 Fed. Cas. No. 16,606, *affirmed* 1 Black (U. S.) 283.

*California.* — *Clark v. Lockwood*, 21 Cal. 220; *Estrada v. Murphy*, 19 Cal. 272; *Emeric v. Penniman*, 26 Cal. 124; *Salmon v. Symonds*, 30 Cal. 301; *O'Connell v. Dougherty*, 32 Cal. 462; *Banks v. Moreno*, 39 Cal. 246; *Schmitt v. Giovanari*, 43 Cal. 617; *Hartley v. Brown*, 51 Cal. 465; *Sherman v. McCarthy*, 57 Cal. 507; *Mound City Land, etc., Assoc. v. Philip*, 64 Cal. 497; *Byrne v. Alas*, 74 Cal. 639; *McDonald v. McCoy*, 121 Cal. 55, *distinguishing* *McDonald v. Burton*, 68 Cal. 445, and *Burton v. Burton*, 79 Cal. 490; *Los Angeles v. Pomeroy*, 125 Cal. 420; *De Castro v. Fellom*, 135 Cal. 225.

**2. Doctrine of Relation.** — *Steinbach v. Stewart*, 11 Wall. (U. S.) 566; *Stark v. Barrett*, 15 Cal. 361; *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108; *Schmitt v. Giovanari*, 43 Cal. 617; *Walbridge v. Ellsworth*, 44 Cal. 353; *McDonald v. McCoy*, 121 Cal. 55.

**3. "Third Persons"** — *United States.* — *Rodrigues v. U. S.*, 1 Wall. (U. S.) 582, *affirming* on other grounds 27 Fed. Cas. No. 16,181a; *U. S. v. Morillo*, 1 Wall. (U. S.) 706; *Beard v. Federy*, 3 Wall. (U. S.) 478; *Carpentier v. Montgomery*, 13 Wall. (U. S.) 480; *Henshaw v. Bissell*, 18 Wall. (U. S.) 255, *affirming* 1 Sawy. (U. S.) 553, 3 Fed. Cas. No. 1,447; *Knight v. U. S. Land Assoc.*, 142 U. S. 161, *reversing* on other grounds *sub nom.* *United Land*

*Assoc. v. Knight*, 85 Cal. 448; *California Powder Works v. Davis*, 151 U. S. 389, *dismissing writ of error* from 84 Cal. 617; *Thompson v. Los Angeles Farming, etc., Co.*, 180 U. S. 72, *affirming* 117 Cal. 594; *U. S. v. Flint*, 4 Sawy. (U. S.) 42, 25 Fed. Cas. No. 15,121, *affirmed* on other grounds 98 U. S. 61; *Harrison v. Ulrichs*, 14 Sawy. (U. S.) 155, 39 Fed. Rep. 654; *U. S. v. Sanchez*, Hoffm. Land Cas. (U. S.) 133, 27 Fed. Cas. No. 16,218; *Adam v. Norris*, 103 U. S. 591.

*California.* — *Waterman v. Smith*, 13 Cal. 420; *Moore v. Wilkinson*, 13 Cal. 488; *Boggs v. Merced Min. Co.*, 14 Cal. 362; *Yount v. Howell*, 14 Cal. 465; *Teschmacher v. Thompson*, 18 Cal. 27, 79 Am. Dec. 151; *Fremont v. Seals*, 18 Cal. 434; *Leese v. Clark*, 18 Cal. 535, 20 Cal. 424; *Minturn v. Brower*, 24 Cal. 668; *De Arguello v. Greer*, 26 Cal. 626; *Miller v. Hale*, 44 Cal. 576; *Hale v. Akers*, 69 Cal. 166; *Byrne v. Alas*, 74 Cal. 637; *People v. San Francisco*, 75 Cal. 399. *Compare* *Kimball v. Semple*, 25 Cal. 440; *Semple v. Hagar*, 27 Cal. 163; *Treadway v. Semple*, 28 Cal. 652; *Hagar v. Lucas*, 29 Cal. 309; *Yates v. Smith*, 40 Cal. 662, 38 Cal. 60, *Crockett, J., dissenting*.

**4. New Mexico and Arizona.** — *Acts Cong.* July 22, 1854, 10 Stat. at L. 308; July 15, 1870, 16 Stat. at L. 304.

*United States.* — *Tameling v. U. S. Freehold, etc., Co.*, 93 U. S. 644, *affirming* 2 Colo. 411; *Central Colorado Imp. Co. v. Pueblo County*, 95 U. S. 259, *reversing* 2 Colo. 628; *Maxwell Land-Grant Case*, 121 U. S. 325, 122 U. S. 365, *affirming* 26 Fed. Rep. 110, 21 Fed. Rep. 19; *Pinkerton v. Ledoux*, 129 U. S. 346, *affirming* 3 N. Mex. 252; *Interstate Land Co. v. Maxwell Land Grant Co.*, 139 U. S. 569, *affirming* 41 Fed. Rep. 275; *Astiazaran v. Santa Rita Land, etc., Co.*, 148 U. S. 80, *affirming* (Ariz. 1889) 20 Pac. Rep. 189, *cited* *Rio Arriba Land, etc., Co. v. U. S.*, 167 U. S. 208; *Stoneroad v. Stoneroad*, 158 U. S. 240, *reversing* 4 N. Mex. 59; *Russell v. Maxwell Land Grant Co.*, 158 U. S.

**6. Act Cong. March 3, 1891.** — By an Act of Congress of March 3, 1891, a court of private land claims was created to pass upon and adjudicate Spanish and Mexican claims to land within the territories of New Mexico, Arizona, and Utah, and the states of Nevada, Colorado, and Wyoming, its decrees being subject to appeal to the United States Supreme Court.<sup>1</sup>

**7. Texas Rights and Titles.** — Various constitutional provisions and statutes have been enacted by the republic and state of Texas, dealing with incomplete rights or titles derived from former governments. Under these laws such claims must be passed upon and their validity affirmed by a board of commissioners, or, in some instances, by the courts, before they have any standing as vested rights of property.<sup>2</sup>

**8. Direct and Collateral Attack.** — As with patents generally, those issued pursuant to the confirmation of Spanish and Mexican rights and titles, unless wholly void, can only be vacated and set aside in direct proceedings proper for the purpose, and not collaterally.<sup>3</sup>

**9. Construction of Grants.** — The familiar rule applicable to all concessions from a government, and especially to those which are gratuitous,<sup>4</sup> is applicable to grants and other interests in real estate derived from the former governments in this country, namely, that the grant or concession is to be strictly construed against the grantee, and in favor of the government grantor.<sup>5</sup>

253; *Shaw v. Kellogg*, 170 U. S. 312; U. S. v. *Ortiz*, 176 U. S. 422; *Maese v. Herman*, 183 U. S. 572, *affirming* 17 App. Cas. (D. C.) 52; U. S. v. *Cleveland, etc., Cattle Co.*, 33 Fed. Rep. 323.

*Colorado.* — *Colorado Fuel Co. v. Maxwell Land Grant Co.*, 22 Colo. 71.

*District of Columbia.* — *Smith v. Reynolds*, 9 App. Cas. (D. C.) 261, *reversed* on other grounds 166 U. S. 717.

*New Mexico.* — *Chaves v. Whitney*, 4 N. Mex. 178, *overruling* *Whitney v. McAfee*, 3 N. Mex. 37; *Lockhart v. Wills*, 9 N. Mex. 263, 344; *Catron v. Laughlin*, (N. Mex. 1903) 72 Pac. Rep. 26.

**1. Act March 3, 1891, 26 Stat. at L. 854.** — U. S. v. *Chaves*, 159 U. S. 452; *Ainsa v. U. S.*, 161 U. S. 208; U. S. v. *Sante Fé*, 165 U. S. 675; U. S. v. *Sandavol*, 167 U. S. 278; *Cessna v. U. S.*, 169 U. S. 165; *Ely v. U. S.*, 171 U. S. 220; U. S. v. *Camou*, 171 U. S. 277, 184 U. S. 572; *Perrin v. U. S.*, 171 U. S. 292; U. S. v. *Conway*, 175 U. S. 60; *Real de Dolores Del Oro v. U. S.*, 175 U. S. 71; *Ainsa v. New Mexico, etc., R. Co.*, 175 U. S. 76, *reversing* (Ariz. 1894) 36 Pac. Rep. 213; U. S. v. *Chavez*, 175 U. S. 509; *Las Animas Land Grant Co. v. U. S.*, 179 U. S. 201; U. S. v. *Martinez*, 184 U. S. 441; *Reloj Cattle Co. v. U. S.*, 184 U. S. 624; *Ainsa v. U. S.*, 184 U. S. 639; U. S. v. *Baca*, 184 U. S. 653; U. S. v. *Green*, 185 U. S. 256; *Lockhart v. Wills*, 9 N. Mex. 263, 344.

**2. Texas Rights and Titles.** — *Land Com'r's v. Riley*, 3 Tex. 237; *Warren v. Shuman*, 5 Tex. 441; *Howard v. Perry*, 7 Tex. 259; *Hancock v. McKinney*, 7 Tex. 384; *State v. Cardinas*, 47 Tex. 250; *State v. Cuellar*, 47 Tex. 295; *State v. Sarnes*, 47 Tex. 323; *Cowan v. Williams*, 49 Tex. 380; *Texas Mexican R. Co. v. Jarvis*, 69 Tex. 527; *Davis v. Bargas*, 88 Tex. 662, 12 Tex. Civ. App. 59; *State v. O'Connor*, 96 Tex. 484, *rehearing denied* 74 S. W. Rep. 899, *reversing* (Tex. Civ. App. 1902) 71 S. W. Rep. 400. See also *Texas* cases cited *supra*.  
**III. 4. By Whom Grants Made; IV. 1. In General** — *By Whom and How Confirmed.*

**Requirement that Titles Be Recorded.** — *Airhart v. Massieu*, 98 U. S. 491; *Gonzales v. Ross*, 120 U. S. 605; *Paschal v. Perez*, 7 Tex. 348; *Texas-Mexican R. Co. v. Locke*, 74 Tex. 370.

**Intervention of Adverse Claimants in Court Proceedings.** — *Villareal v. State*, 47 Tex. 319. Compare *Herndon v. Robertson*, 15 Tex. 593.

**Confirmation Subject to Rights of Third Persons.** — *Hamilton v. Avery*, 20 Tex. 612; *Spier v. Laman*, 27 Tex. 205; *Sheppard v. Avery*, 95 Tex. 501, *affirming* 28 Tex. Civ. App. 479, *reversing* (Tex. Civ. App. 1895) 32 S. W. Rep. 791.

**Reservation from Sale by State of Land Covered by Claims.** — *Summers v. Davis*, 49 Tex. 541; *Truehart v. Babcock*, 51 Tex. 169; *Westrope v. Chambers*, 51 Tex. 178; *Bryan v. Crump*, 55 Tex. 9; *Winsor v. O'Connor*, 69 Tex. 571; *Texas-Mexican R. Co. v. Locke*, 74 Tex. 370. See title STATE AND PUBLIC LANDS, vol. 26, p. 220, note *Texas*.

**3. Direct and Collateral Attack.** — See generally the cases cited in this subdivision; title STATE AND PUBLIC LANDS, vol. 26, p. 387 *et seq.*

**Suits in Equity to Set Aside Confirmation or Survey for Fraud.** — U. S. v. *Throckmorton*, 98 U. S. 61, *affirming* 4 Sawy. (U. S.) 42, 25 Fed. Cas. No. 15,121, *discussed in* U. S. v. *Minor*, 114 U. S. 233, which *reversed* 10 Sawy. (U. S.) 155; *Maxwell Land-Grant Case*, 121 U. S. 325, 122 U. S. 365, *affirming* 26 Fed. Rep. 119, same case on demurrer 21 Fed. Rep. 19; U. S. v. *San Jacinto Tin Co.*, 125 U. S. 273, *affirming* 10 Sawy. (U. S.) 639, 23 Fed. Rep. 279; U. S. v. *Hancock*, 133 U. S. 193, *affirming* 30 Fed. Rep. 851; *San Pedro, etc., Co. v. U. S.*, 146 U. S. 120, *affirming* 4 N. Mex. 225.

**4. See the title STATE AND PUBLIC LANDS**, vol. 26, p. 425 *et seq.*

**5. Construction of Grants.** — *Sena v. U. S.*, 189 U. S. 233; *Joseph's Case*, 1 Ct. Cl. 107; *Interstate Land Co. v. Maxwell Land Grant Co.*, 41 Fed. Rep. 275, *affirmed* 139 U. S. 570; *Sullivan v. Richardson*, 33 Fla. 1, *citing* 22 AM. AND ENG. ENCYC. OF LAW (1st ed.) 843.



**10. Evidence of Right or Title** — *a*. PRESUMPTIONS. — A Spanish title, if issued by a provincial officer, who, at the time, represented the crown in the granting of the public lands, raises a legal presumption that the officer had power to make the grant, and is *prima facie* evidence of its own validity.<sup>1</sup> This doctrine is the result of necessity springing from the absence of satisfactory information as to what restrictions, if any, attended the exercise of the granting power by these officials. Presumption, in such cases, is generally the best evidence of the fact of authority that can be obtained.<sup>2</sup> The doctrine has also been extended to Mexican titles as to which no definite and certain restrictions on the power to grant are ascertainable;<sup>3</sup> but has no application to those executed under the national law of 1824, or the supreme executive regulations of 1828 and state legislation established or enacted pursuant thereto, which provide essentials necessary to a valid grant and fix limits to the authority which may be exercised by the executives of the Mexican states.<sup>4</sup> Nor can any such presumption be indulged in under the terms of the Act of Congress of March 3, 1891, providing for the confirmation of Spanish and Mexican titles in several of the western states.<sup>5</sup> Under general principles of law<sup>6</sup> the acts and proceedings of the land officers, if within the sphere of their duties, are presumptively valid; otherwise where they act outside of or contrary to their usual and well-recognized functions.<sup>7</sup>

**1. Presumption of Validity of Spanish Titles** — *United States*. — U. S. *v*. Arredondo, 6 Pet. (U. S.) 692; U. S. *v*. Percheman, 7 Pet. (U. S.) 52; Keene *v*. McDonough, 8 Pet. (U. S.) 309; U. S. *v*. Clarke, 8 Pet. (U. S.) 436; Delassus *v*. U. S., 9 Pet. (U. S.) 118; Mitchel *v*. U. S., 9 Pet. (U. S.) 711; New Orleans *v*. U. S., 10 Pet. (U. S.) 663; Strother *v*. Lucas, 12 Pet. (U. S.) 410; U. S. *v*. Rodman, 15 Pet. (U. S.) 130; U. S. *v*. Delespine, 15 Pet. (U. S.) 226; U. S. *v*. Acosta, 1 How. (U. S.) 24; U. S. *v*. Peralta, 19 How. (U. S.) 343; Crespin *v*. U. S., 168 U. S. 208; Winter *v*. U. S., Hempst. (U. S.) 344, 30 Fed. Cas. No. 17,895; Owen *v*. Presidio Min. Co., (C. C. A.) 61 Fed. Rep. 6; Muse *v*. Arlington Hotel Co., 68 Fed. Rep. 637. *Alabama*. — Antones *v*. Eslava, 9 Port. (Ala.) 527; Mobile *v*. Eslava, 9 Port. (Ala.) 577, 33 Am. Dec. 325, affirmed on other grounds 16 Pet. (U. S.) 234.

*Texas*. — Goode *v*. McQueen, 3 Tex. 241; Sheldon *v*. Milmo, 90 Tex. 1, reversing (Tex. Civ. App. 1894) 29 S. W. Rep. 832.

*Contra*, of grants of land under water, Richardson *v*. Sullivan, 38 Fla. 90, 33 Fla. 1, affirmed on other grounds *sub nom.* Richardson *v*. Louisville, etc., R. Co., 169 U. S. 128. But see cases cited *supra*, III. 9. *Tide Lands and Lands under Navigable Waters*.

**Regulations Prescribed by Officer Having Power to Grant** are alterable by him at will, and do not prevent the presumption from arising in favor of grants not executed in conformity therewith. Delassus *v*. U. S., 9 Pet. (U. S.) 117; U. S. *v*. Clarke, 9 Pet. (U. S.) 168; U. S. *v*. Delespine, 15 Pet. (U. S.) 226.

**Presumption of Grant.** — See *supra*, III. 10. *Possessory Rights, Prescription, Presumption of Grant*.

**2. Reason for Rule.** — Crespin *v*. U. S., 168 U. S. 208, citing Soulard *v*. U. S., 4 Pet. (U. S.) 511; Goode *v*. McQueen, 3 Tex. 241.

**3. Presumption of Validity of Mexican Grants** — *In General*. — Crespin *v*. U. S., 168 U. S. 208; Whitney *v*. U. S., 181 U. S. 104. See also U. S. *v*. De Haro, 22 How. (U. S.) 293.

**Pueblo and Mission Land Grants.** — Reynolds *v*. West, 1 Cal. 322; Cohas *v*. Raisin, 3 Cal. 443; Den *v*. Den, 6 Cal. 81; Welch *v*. Sullivan, 8 Cal. 165; Hart *v*. Burnett, 15 Cal. 530; Payne *v*. Treadwell, 16 Cal. 220; Brown *v*. San Francisco, 16 Cal. 451; Leese *v*. Clark, 18 Cal. 535; White *v*. Moses, 21 Cal. 34; Uhl *v*. Musquez, 1 Tex. Unrep. Cas. 650; Dittmar *v*. Dignowitty, 78 Tex. 22.

**4. Exception to Rule** — **Mexican Grants.** — U. S. *v*. Cambuston, 20 How. (U. S.) 59, reversing on other grounds 25 Fed. Cas. No. 14,712, 7 Sawy. (U. S.) 575, 25 Fed. Cas. No. 14,713; Fuentes *v*. U. S., 22 How. (U. S.) 443; Crespin *v*. U. S., 168 U. S. 208; U. S. *v*. Ortiz, 176 U. S. 422; Whitney *v*. U. S., 181 U. S. 104; Den *v*. Hill, McAll. (U. S.) 480, 7 Fed. Cas. No. 3,784; Bouldin *v*. Phelps, 30 Fed. Rep. 547; Owen *v*. Presidio Min. Co., (C. C. A.) 61 Fed. Rep. 6.

**5. Act Cong. March 3, 1891, 26 Stat. at L. 854.** — Berge *v*. U. S., 168 U. S. 66; Crespin *v*. U. S., 168 U. S. 208; Hayes *v*. U. S., 170 U. S. 637; Ely *v*. U. S., 171 U. S. 220; Faxon *v*. U. S., 171 U. S. 244; Hays *v*. U. S., 175 U. S. 248; Chavez *v*. U. S., 175 U. S. 552; U. S. *v*. Ortiz, 176 U. S. 422; U. S. *v*. Elder, 177 U. S. 104; Florida *v*. Furman, 180 U. S. 402; Whitney *v*. U. S., 181 U. S. 104.

**6.** See the title PRESUMPTIONS, vol. 22, p. 1267 *et seq.*

**7. Usual Presumption of Validity of Official Acts Applicable to Land Officers.** — See generally and for various illustrations. Strother *v*. Lucas, 12 Pet. (U. S.) 411; U. S. *v*. Davenport, 15 How. (U. S.) 1; Gonzales *v*. Ross, 120 U. S. 605; U. S. *v*. Sherebeck, Hoffm. Dec. (U. S.) 11, 27 Fed. Cas. No. 16,275; Landry *v*. Martin, 15 La. 1, 10; Devall *v*. Choppin, 15 La. 566; Wilson *v*. Smith, 5 Yerg. (Tenn.) 379; Holliman *v*. Peebles, 1 Tex. 699; Edwards *v*. James, 7 Tex. 372; Hancock *v*. McKinney, 7 Tex. 384; Jenkins *v*. Chambers, 9 Tex. 167; Jones *v*. Garza, 11 Tex. 186; Ryan *v*. Jackson, 11 Tex. 391; Hatch *v*. Dunn, 11 Tex. 708; Jones *v*. Muishbach, 26 Tex. 235; Martin *v*.

*b.* JUDICIAL NOTICE OF LAND LAWS. — The land laws of former governments upon which the rights and titles depend are not foreign laws to be determined as questions of fact, but courts are bound to take judicial notice of them.<sup>1</sup> In doing so, however, it is often necessary to inquire into official customs, forms, and usages.<sup>2</sup>

*c.* CERTIFIED COPIES OF TITLE PAPERS. — A copy of a grant or of a survey, certified by the proper officer of the provincial government, is admissible in evidence without accounting for the non-production of the original; but is only *prima facie* conclusive.<sup>3</sup>

**TREATING JURY.** (See also the title JURY AND JURY TRIAL, vol. 17, pp. 1231, 1235, 1236.) — See note 4.

**TREATMENT.** — See note 5.

**TREBLE COSTS.** (See also the title COSTS, 5 ENCYC. OF PL. AND PR. 182.) — Treble costs are thrice the amount of single costs.<sup>6</sup>

Parker, 26 Tex. 253; Blythe v. Houston, 46 Tex. 76; Hanrick v. Jackson, 55 Tex. 17; Groesbeck v. Golden, (Tex. 1887) 7 S. W. Rep. 362.

**Execution of Papers by Deputy Officials.** — Viesca v. Wyche, 3 Woods (U. S.) 336, 28 Fed. Cas. No. 16,940; Winn v. Cole, Walk. (Miss.) 119; Hancock v. McKinney, 7 Tex. 384.

**1. Judicial Notice of Land Laws.** — *United States.* — U. S. v. Turner, 11 How. (U. S.) 663; Fremont v. U. S., 17 How. (U. S.) 542; U. S. v. Perot, 98 U. S. 428; U. S. v. Chaves, 159 U. S. 452; Crespin v. U. S., 168 U. S. 208; Bouldin v. Phelps, 30 Fed. Rep. 547.

*Alabama.* — Doe v. Eslava, 11 Ala. 1028, affirmed 9 How. (U. S.) 421.

*California.* — Payne v. Treadwell, 16 Cal. 221; Ohm v. San Francisco, 92 Cal. 437, (Cal. 1880) 25 Pac. Rep. 155.

*Florida.* — Sullivan v. Richardson, 33 Fla. 1, citing 22 AM. AND ENG. ENCYC. OF LAW (1st ed.) 843, note 4, 874, 875.

*New Mexico.* — U. S. v. Lucero, 1 N. Mex. 422; U. S. v. Varela, 1 N. Mex. 593.

*Texas.* — State v. Sais, 47 Tex. 307.

The Mexican Archives are public documents which the court has a right to consult, even if not made formal proof in a cause; or which, if inaccessible, it may examine by means of witnesses familiar with their contents. U. S. v. Teschmaker, 22 How. U. S.) 392; Romero v. U. S., 1 Wall. (U. S.) 721; Owen v. Presidio Min. Co., (C. C. A.) 61 Fed. Rep. 6.

**2. Inquiry into Official Customs, Forms, and Usages.** — U. S. v. Wiggins, 14 Pet. (U. S.) 334; Fremont v. U. S., 17 How. (U. S.) 542; Pino v. Hatch, 1 N. Mex. 125.

**3. Evidence of Right of Title.** — *United States.* — U. S. v. Percheman, 7 Pet. (U. S.) 52; U. S. v. Delespine, 12 Pet. (U. S.) 655, 15 Pet. (U. S.) 319; U. S. v. Wiggins, 14 Pet. (U. S.) 334; U. S. v. Rodman, 15 Pet. (U. S.) 130; U. S. v. Breward, 16 Pet. (U. S.) 143; U. S. v. Low, 16 Pet. (U. S.) 166; U. S. v. Hanson, 16 Pet. (U. S.) 196; U. S. v. Acosta, 1 How. (U. S.) 24; U. S. v. King, 3 How. (U. S.) 785; U. S. v. Boisdoré, 11 How. (U. S.) 63; U. S. v. Davenport, 15 How. (U. S.) 1; Airhart v. Massieu, 98 U. S. 500; Winter v. U. S., Hempst. (U. S.) 344, 30 Fed. Cas. No. 17,895.

*Alabama.* — Doe v. Eslava, 11 Ala. 1039.

*Florida.* — Sullivan v. Richardson, 33 Fla. 1.

*Louisiana.* — Lavergne v. Elkins, 17 La. 220.

*Texas.* — Paschal v. Perez, 7 Tex. 348; Herndon v. Casiano, 7 Tex. 322; State v. Cardinas, 47 Tex. 291; State v. Sais, 47 Tex. 307; Texas-Mexican R. Co. v. Locke, 74 Tex. 370.

**4. Treating Jury.** — In Carlisle v. Sheldon, 38 Vt. 445, it was said: "We think that the giving of victuals and drink 'by way of *treat*,' referred to in the statute, is something distinct from the ordinary exercise of friendly hospitality, and that the statute was not intended to forbid such acts of hospitality in the intercourse of friends as would be usual and ordinary, but was designed to apply to something of a different character—to an entertainment or *treat* which suggests the idea of convivial enjoyments and fellowship rather than the customary hospitalities of daily life. We do not consider the mere furnishing of food or drink, when confined within the limits of ordinary hospitality, as fairly coming within the mischief which the statute was designed to guard against; and when it is found, as it was virtually found by the County Court in this case, that the entertainment furnished to the jurors was not furnished for any improper purpose, and that it had no improper influence upon the verdict, we think that it ought not to be regarded as falling within" the statute.

**5. Medical Treatment.** — See MEDICAL, vol. 20, p. 528.

**Treatment — Divorce.** — A statute provided that a divorce should be granted where one of the parties had been so *treated* by the other as seriously to injure health or endanger reason. In construing this provision, in Robinson v. Robinson, 66 N. H. 610, the court said: "Any behavior of one party which affects the other physically or mentally is *treatment*, within the meaning of the statute."

**Cruel Treatment.** — See the title DIVORCE, vol. 9, p. 783.

**6. Treble Costs.** — Mairs v. Sparks, 5 N. J. L. 592; Davison v. Schooley, 10 N. J. L. 148; Welsh v. Anthony, 16 Pa. St. 254.

In Crane v. Dod, 2 N. J. L. 322, the court said: "And as to *trebling costs*, I think that it is evident from the case of *Thoroughgood v. Scroggs*, Cro. Eliz. 582, that the actual costs must be multiplied by three; that is, if the legal costs be ten dollars, judgment must be rendered for thirty." See also Van Auker v. Decker, 2 N. J. L. 99.

# TREES AND TIMBER.

BY HERBERT W. BEALL.

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## CROSS-REFERENCES.

*For other matters of SUBSTANTIVE LAW and EVIDENCE related to this title, see the following titles in this work: ADVERSE POSSESSION, vol. 1, p. 827; JOINT TENANTS AND TENANTS IN COMMON, vol. 17, p. 698; LICENSE (REAL PROPERTY), vol. 18, p. 1127; LOGS AND LUMBER, vol. 19, p. 522; STREETS AND SIDEWALKS, vol. 27, p. 1008; NUISANCES, vol. 21, p. 679; STATE AND PUBLIC LANDS, vol. 26, p. 452; TRESPASS, post; WASTE.*

**I. DEFINITIONS.** — The term “timber” in *England* means technically such trees as are fit to be used in building, as oak, ash, and elm. Other trees, however, are sometimes by custom regarded as timber, such as beech, birch, walnut, willow, and pollards.<sup>1</sup> A tree, under the English rule, must have attained a growth of twenty years before it was deemed to be timber.<sup>2</sup> A timber estate was one cultivated merely for the production of salable timber.<sup>3</sup>

As Used in the United States the word has either an enlarged or a restricted meaning according to the connection in which it is employed. As a generic term it properly signifies only such trees as are used in building either ships or dwellings, but its signification is not limited to trees; it applies to the wood or the particular form which the trees assume when no longer growing

1. **Definitions.** — *Chandos v. Talbot*, 2 P. Wms. 601; *Cumberland's Case*, Moo. K. B. 812; *Dashwood v. Magniac*, (1891) 3 Ch. 351; *Guffly v. Pindar*, Hob. 219; *Aubrey v. Fisher*, 10 East 446. Apple trees are not regarded as timber trees in *England*. *Bullen v. Denning*, 5 B. & C. 842, 12

E. C. L. 383. See also *Wyndham v. Way*, 4 Taunt. 316.

2. *Dunn v. Bryan*, Ir. R. 7 Eq. 143.

3. **Timber Estate.** — *Honywood v. Honywood*, L. R. 18 Eq. 309; *Dashwood v. Magniac*, (1891) 3 Ch. 351.



or standing in the ground. In the United States statutes the word "timber" as used collectively signifies standing or growing trees, and when otherwise used it applies only to trees cut down and prepared for transportation.<sup>1</sup> It has been held to include railroad ties,<sup>2</sup> but not fence rails,<sup>3</sup> nor shingles,<sup>4</sup> nor laths;<sup>5</sup> and not to include the mesquite,<sup>6</sup> nor the algaroba.<sup>7</sup>

**II. AS REALTY OR PERSONALTY — Sales.** — Growing trees are often, especially in the older cases, regarded as a part of the land, and the sale thereof as a sale of an interest in land.<sup>8</sup>

**Descent.** — In *England* standing trees are a part of the inheritance and go to the heir, and remain the property of the lessor.<sup>9</sup> It was possible, however, in early times, for one to grant his trees as distinct from the land, whereupon they became vested as chattels in the grantee and passed to his executors.<sup>10</sup> Likewise, a man might sell his land reserving the timber trees, in which case they remained in him as chattels distinct from the soil and went to his executors.<sup>11</sup>

**Life Tenant and Remainderman.** — Underwood and timber cut in the regular course of thinning belong as income to the tenant for life, but timber cut not in the regular course but to improve the growth of the remaining trees belongs to the remainderman.<sup>12</sup> Where timber ready for cutting is cut by a tenant for life impeachable for waste, he is entitled to the income of the fund produced by the sale thereof, and the first person taking an estate unimpeachable for waste is entitled to the capital on going into possession.<sup>13</sup>

**As Between the Landlord and the Tenant** the general property of timber and trees is in the landlord, and the general property of bushes and trees not timber is in the tenant.<sup>14</sup>

**One Tenant in Common** may cut trees proper to be cut upon the land held in common, and the remedy of the cotenant is an action against the trespassing cotenant for his share of the value.<sup>15</sup> It has furthermore been held that if

**1. Meaning in the United States.** — U. S. v. Schuler, 6 McLean (U. S.) 28. See also U. S. v. Stores, 14 Fed. Rep. 825; Bryant v. U. S., (C. C. A.) 105 Fed. Rep. 943; Clay v. Postal Tel. Cable Co., 70 Miss. 406; Keeton v. Audsley, 19 Mo. 362, 61 Am. Dec. 560; Hubbard v. Burton, 75 Mo. 65; Alcott v. Lakin, 33 N. H. 507, 66 Am. Dec. 739; Kollock v. Parcher, 52 Wis. 393.

In *Idol v. Jones*, 2 Dev. L. (13 N. Car.) 162, it was held that the words "he has stolen my bee tree" were not actionable, since the word "tree" without explanation means a standing tree, which is not a subject of larceny.

**2. Illustrations.** — Kollock v. Parcher, 52 Wis. 393.

**3.** McCauley v. State, 43 Tex. 374.

**4.** Battis v. Hamlin, 22 Wis. 669.

**5.** Babka v. Eldred, 47 Wis. 189.

**6.** Bustamente v. U. S., (Ariz. 1895) 42 Pac. Rep. 111.

**7.** Liu Kong v. Keahialoa, 8 Hawaii 511.

**8. As Realty or Personality — England.** — Wyndham v. Way, 4 Taunt. 316; Minors v. Leeford, Cro. Jac. 114. But see Wardell v. Usher, 3 Scott N. R. 508.

**Canada.** — Mitchell v. McGaffey, 6 Grant Ch. (U. C.) 361; Ferguson v. Hill, 11 U. C. Q. B. 530; Summers v. Cook, 28 Grant Ch. (U. C.) 179.

**Alabama.** — Magnetic Ore Co. v. Marbury Lumber Co., 104 Ala. 465, 53 Am. St. Rep. 73, following *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119.

**Georgia.** — Coody v. Gress Lumber Co., 82 Ga. 793.

**Indiana.** — Hostetter v. Auman, 119 Ind. 7.

**Michigan.** — Russell v. Myers, 3 Mich. 522.

**Missouri.** — Cooley v. Kansas City, etc., R. Co., 149 Mo. 487.

**Texas.** — Gulf, etc., R. Co. v. Foster, (Tex. Civ. App. 1898) 44 S. W. Rep. 198.

**Wisconsin.** — Strasson v. Montgomery, 32 Wis. 52.

The question whether standing trees are realty or personality has usually arisen in connection with the statute of frauds. It is discussed in the section treating of contracts for the sale of trees and timber.

**9.** Liford's Case, 11 Coke 48; Billingsby v. Hercy, Moo. K. B. 831.

**10.** Stukeley v. Butler, Hob. 173.

**11.** Liford's Case, 11 Coke 48; Billingsby v. Butler, Hob. 173.

If in such case the grantee afterwards bought the trees, they became reannexed to the inheritance. *Herlakenden's Case*, 4 Coke 63b.

**12.** Cowley v. Wellesley, 35 Beav. 635.

**13.** *Gent v. Harrison*, Johns. (Eng.) 517, 29 L. J. Ch. 68; *Lowndes v. Norton*, 6 Ch. D. 139; *Phillips v. Barlow*, 14 Sim. 263.

**14.** *Berriman v. Peacock*, 9 Bing. 384, 23 E. C. L. 313; *Ward v. Andrews*, 2 Chit. 636, 18 E. C. L. 435.

**15.** *Martyn v. Knowllys*, 8 T. R. 145. See also the title *JOINT TENANTS AND TENANTS IN COMMON*, vol. 17, p. 698.

one tenant in common has the right to cut timber himself he may license a third person to do so.<sup>1</sup>

**Covenants — Lessor and Lessee.** — A lessee may bring an action against a lessor upon his covenant to pay for trees planted by the lessee, but such covenant does not run with the land and give a right of action against the assignee of the lessor, unless such assignee be named in the covenant, for the reason that the subject-matter is not *in esse* at the time of the demise.<sup>2</sup>

**III. TREES SEVERED FROM THE SOIL.** — Timber when severed from the land either by the act of God or by a trespasser belongs to him who has the first estate of inheritance either in fee or in tail.<sup>3</sup> Timber blown down in large quantities does not belong to the tenant for life, but should be sold and the proceeds invested as capital. The tenant for life is, however, entitled to receive out of the income therefrom a sum equal to the income which would have been derived had there been no unusual destruction of the timber.<sup>4</sup> Where a tree is blown down entirely so that it will die, it is regarded as severed from the realty and becomes personalty and belongs to the executors, but trees which are partially uprooted and which must be cut in order to cultivate the land, belong to the devisee.<sup>5</sup> It is a general rule that trees cut and left upon the land are the personal property of the owner of the land or of the purchaser of such trees, and hence the owner may maintain trespass or trover in respect to the same, and where sold they will not pass to a subsequent vendee of the land.<sup>6</sup>

**IV. LINE TREES.** — The question of the ownership of line trees is and always has been somewhat confused. The confusion is the result of an attempt by the courts to follow one or the other of two old *English* cases. One of these laid down the rule that if A plants a tree upon the extreme limit of his land, the tree growing from its roots into the land of B next adjoining, A and B are tenants in common of the tree; but if all the roots grow in the land of A, though the boughs overshadow the land of B, yet the branches follow the root and the property of the whole is in A.<sup>7</sup> The other

1. *Baker v. Wheeler*, 8 Wend. (N. Y.) 505, 24 Am. Dec. 66. And see the title JOINT TENANTS AND TENANTS IN COMMON, vol. 17, p. 674.

2. *Grey v. Cuthbertson*, 2 Chit. 482, 18 E. C. L. 397. And see the title COVENANTS, vol. 8, p. 137.

3. *Trees Severed from the Soil.* — *Bewick v. Whitfield*, 3 P. Wms. 268; *Channon v. Patch*, 5 B. & C. 897, 12 E. C. L. 399; *Honywood v. Honeywood*, L. R. 18 Eq. 306; *Garth v. Cotton*, 3 Atk. 751.

4. *Bagot v. Bagot*, 32 Beav. 509; *In re Harrison*, 28 Ch. D. 220; *Altemose v. Hufsmith*, 45 Pa. St. 121.

5. *In re Ainslie*, 30 Ch. D. 485.

6. *Trees Cut and Left on Land* — *Arkansas.* — *Brock v. Smith*, 14 Ark. 431.

*Florida.* — *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19.

*Louisiana.* — *Woodruff v. Roberts*, 4 La. Ann. 127; *Frank v. Magee*, 49 La. Ann. 1250.

*Maine.* — *Goodwin v. Hubbard*, 47 Me. 595.

*Maryland.* — *Crouch v. Smith*, 1 Md. Ch. 401.

*Michigan.* — *Macomber v. Detroit*, etc., R. Co., 108 Mich. 491, 62 Am. St. Rep. 713.

*Missouri.* — *Keeton v. Audsley*, 19 Mo. 362, 61 Am. Dec. 560; *Kelley v. Vandiver*, 75 Mo. App. 435.

*New Hampshire.* — *Plumer v. Prescott*, 43 N. H. 277.

*New York.* — *Bennett v. Scutt*, 18 Barb. (N. Y.) 347.

*Pennsylvania.* — *Rogers v. Gilinger*, 30 Pa. St. 188, 72 Am. Dec. 694; *Altemose v. Hufsmith*, 45 Pa. St. 121; *Leidy v. Proctor*, 97 Pa. St. 492.

*Vermont.* — *Yale v. Seely*, 15 Vt. 221.

*Wisconsin.* — *State v. School*, etc., Lands, 19 Wis. 237; *Paine v. White*, 21 Wis. 423; *Golden v. Glock*, 57 Wis. 118, 46 Am. Rep. 32; *Hicks v. Smith*, 77 Wis. 146.

See also *Wincher v. Shrewsbury*, 3 Ill. 283, 35 Am. Dec. 108; *Brown v. Throckmorton*, 11 Ill. 529; *Fletcher v. Livingston*, 153 Mass. 388.

In *Plumer v. Prescott*, 43 N. H. 277, it was held that trees cut within a time specified belong, when cut, to the vendee thereof, and that his title is not lost by neglect to remove them. Such vendee, if he enters to remove his timber, while liable for trespass, is not liable in damages for the value of the wood removed.

Trees standing upon land at the time of its seizure, which are cut by a trespasser pending the seizure, are not mobilized by their detachment and will pass to the purchaser of the land under a judicial sale. *Frank v. Magee*, 49 La. Ann. 1250, citing *Rogers v. Gilinger*, 30 Pa. St. 188, 72 Am. Dec. 694; *Leidy v. Proctor*, 97 Pa. St. 492.

7. *Line Trees.* — *Waterman v. Soper*, 1 Ld. Raym. 737.

adopted the rule that where a tree grows in A's land, though the root grows in B's, yet, the body of the tree being in A's land, the tree belongs to him.<sup>1</sup> The latter rule is undoubtedly the law as regards trees whose trunk stands entirely in the land of one of the adjoining owners.<sup>2</sup> Where the tree stands entirely upon and is intersected by the line between the adjoining owners it is generally held to be common property of both parties, although some of the cases hesitate to declare that the adjoining owners are tenants in common.<sup>3</sup> To the argument that regarding such trees as in common might lead to the wanton destruction thereof, it has been said that such circumstance does not necessarily follow, since in such case the maxim *Sic utere tuo ut alienum non lædas* applies.<sup>4</sup> Moreover it is generally held that trespass will lie if one of the tenants in common destroys the tree without the consent of the other,<sup>5</sup> although it is universally admitted that each has the right to lop off the limbs or cut the roots of a tree which merely extends its branches and roots into his land.<sup>6</sup> The joint ownership is not such as gives the owner encroached upon any right to the fruit growing upon the overhanging branches.<sup>7</sup>

**V. TREES IN HIGHWAYS.** — Where the Abutting Owner Owns the Fee in the highway or a portion thereof, the trees growing thereupon are his exclusive property for all purposes not inconsistent with the use of the highway as such, and he may maintain an action for injuries done thereto unless such injuries are inflicted in the necessary construction or maintenance of the road.<sup>8</sup>

**Fee in Municipality.** — It has even been held that damages to trees growing in the highway may be recovered by the abutting owner whether the fee to the street be in him or in the municipality.<sup>9</sup> And one who, as against the municipality, has no property in or control of trees in front of his premises, may recover damages against third persons negligently injuring or destroying them.<sup>10</sup>

**Liability of Property Owner.** — On the other hand, the owner of property is bound to use reasonable care to prevent a tree standing on the sidewalk in front of his premises from becoming dangerous to travelers upon the street. And one injured by the breach of this obligation may recover damages against the owner.<sup>11</sup>

**Municipal Authorities.** — Even a highway commissioner has in some cases no right to remove a tree in a highway without first giving reasonable opportunity

1. *Masters v. Pollie*, 2 Rolle 141.

2. *Holder v. Coates*, M. & M. 112, 22 E. C. L. 264; *Millen v. Fandrye*, Popham 161; *Morrice v. Baker*, 3 Bulst. 198; *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728; *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326; *Hoffman v. Armstrong*, 48 N. Y. 201, 8 Am. Rep. 537; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645.

3. *Musch v. Burkhart*, 83 Iowa 301, 32 Am. St. Rep. 305; *Griffin v. Bixby*, 12 N. H. 454, 37 Am. Dec. 225; *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326, *affirming* *Relyea v. Beaver*, 34 Barb. (N. Y.) 547.

The conflict of opinion as to the nature of the ownership of line trees has in *France* been settled by the legislature, which declares them to be common property of the owners of the two estates. See *Holder v. Coates*, M. & M. 112, 22 E. C. L. 265; *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326.

4. *Relyea v. Beaver*, 34 Barb. (N. Y.) 547.

5. *Robinson v. Clapp*, 65 Conn. 365; *Griffin v. Bixby*, 12 N. H. 454, 37 Am. Dec. 225; *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326.

6. *Grandona v. Lovdal*, 70 Cal. 161; *Robin-*

*son v. Clapp*, 65 Conn. 365. See the title *NUISANCES*, vol. 21, p. 702.

7. *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728; *Hoffman v. Armstrong*, 48 N. Y. 201, 8 Am. Rep. 537.

8. **Trees in Highways.** — *Atlanta v. Holliday*, 96 Ga. 546; *Baker v. Shephard*, 24 N. H. 208; *Edsall v. Howell*, 86 Hun (N. Y.) 424; *Phifer v. Cox*, 21 Ohio St. 248, 8 Am. Rep. 58; *Lovejoy v. Campbell*, (S. Dak. 1902) 92 N. W. Rep. 24. But see *Miller v. Detroit*, etc., R. Co., 125 Mich. 171, 84 Am. St. Rep. 569.

In *Rhode Island* a town sergeant or surveyor may remove growing trees from the highway, but may not use them in building or repairing the road. *Tucker v. Eldred*, 6 R. I. 404.

9. *Lovejoy v. Campbell*, (S. Dak. 1902) 92 N. W. Rep. 24. See also *Edsall v. Howell*, 86 Hun (N. Y.) 424.

10. *Rockford Gas Light, etc., Co. v. Ernst*, 68 Ill. App. 300. See also *Sanderson v. Haverstick*, 8 Pa. St. 294.

**The Right Given by Statute to Lop Trees** growing near a highway does not confer the power to top them. *Unwin v. Hanson*, (1891) 2 Q. J. 115. See the definition *TOPPING*, *ante*.

11. *Weller v. McCormick*, 52 N. J. L. 470.



to the owner to remove it.<sup>1</sup> Municipal authorities are usually invested with power to remove trees from streets and highways if they regard them as an obstruction or as injurious to health.<sup>2</sup>

**Injuries by Telephone and Telegraph Companies.** — Where abutting landowners own the fee in the roads and streets, neither the municipal corporation nor a company employed or permitted by such corporation to erect telegraph or telephone wires has a right needlessly to mutilate or destroy trees standing upon such roads and streets; and such company is liable for all unnecessary damage so done by its agents, whether they were acting under instructions or in violation thereof.<sup>3</sup> It has been said that the question of the liability for injuries necessarily inflicted in placing telegraph and telephone wires in a highway depends upon the much-mooted question whether the use of the street or highway for poles and wires is an ordinary use within the contemplation of the parties when it was dedicated or condemned, or is a new and additional burden for which the abutting owner is entitled to compensation in case of injury.<sup>4</sup>

**Liability for Necessary Injury.** — Upon the question whether or not a telegraph or telephone company is liable to the owner of the trees where the injury is only such as is necessary in a reasonable prosecution of the work, the authorities are about evenly divided.<sup>5</sup>

**VI. CONTRACTS OF SALE** — 1. **When Regarded as Realty.** — When growing trees are regarded as a part of the realty a contract for the sale thereof is within the fourth section of the statute of frauds and must be in writing.<sup>6</sup>

1. *Clark v. Dasso*, 34 Mich. 86; *Stretch v. Cassopolis*, 125 Mich. 167, 84 Am. St. Rep. 567.

In *Massachusetts* only the mayor, aldermen, and selectmen may cut trees in a highway, and a private person who assumes to do so on the ground that such trees are a public nuisance is liable in damages. *Bliss v. Ball*, 99 Mass. 598.

**By-laws Passed for the Protection of Trees Planted in the Street or highway**, whose fee is in the abutting owner, apply only to other persons than the owner, and the public cannot prevent such owner from cutting them down if he chooses. *Lancaster v. Richardson*, 4 Lans. (N. Y.) 136.

2. See the titles **STREETS AND SIDEWALKS**, vol. 27, p. 1008; **HIGHWAYS**, vol. 15, p. 416.

3. **Injuries by Telephone and Telegraph Companies.** — *Postal Tel. Co. v. Brantley*, 107 Ala. 683; *Tissot v. Great Southern Tel., etc., Co.*, 39 La. Ann. 996, 4 Am. St. Rep. 248; *Wyant v. Central Telephone Co.*, 123 Mich. 51, 81 Am. St. Rep. 155; *Clay v. Postal Tel. Cable Co.*, 70 Miss. 406; *Van Siclen v. Jamaica Electric Light Co.*, 45 N. Y. App. Div. 1; *Daily v. State*, 51 Ohio St. 348, 46 Am. St. Rep. 578. See also the title **STREETS AND SIDEWALKS**, vol. 27, p. 99.

4. *Bronson v. Albion Telephone Co.*, (Neb. 1903) 93 N. W. Rep. 201, 60 L. R. A. 426.

5. **Liability for Necessary Injury.** — *Such liability is affirmed in the following cases:* *Bradley v. Southern New England Telephone Co.*, 66 Conn. 559; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Clay v. Postal Tel. Cable Co.*, 70 Miss. 406; *McCruden v. Rochester R. Co.*, 77 Hun (N. Y.) 600; *Daily v. State*, 51 Ohio St. 348, 46 Am. St. Rep. 578.

*It is denied in the following cases:* *Southern Bell Telephone, etc., Co. v. Constantine*, 23 U. S. App. 56; *Southern Bell Telephone Co. v. Francis*, 109 Ala. 224, 55 Am. St. Rep. 930;

*Wyant v. Central Telephone Co.*, 123 Mich. 51, 81 Am. St. Rep. 155; *Dodd v. Consolidated Traction Co.*, 57 N. J. L. 482.

See the title **TELEGRAPHS AND TELEPHONES**, vol. 27, p. 1008.

6. **Sale of Trees Within the Statute of Frauds** — *England.* — *Hewitt v. Isham*, 7 Exch. 77.

*Arkansas.* — *McLeod v. Dial*, 63 Ark. 10.

*Florida.* — *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19.

*Indiana.* — *Armstrong v. Lawson*, 73 Ind. 498; *Cool v. Peters Box, etc., Co.*, 87 Ind. 531; *Spacy v. Evans*, 152 Ind. 431.

*Iowa.* — *Sanders v. Clark*, 22 Iowa 275.

*Massachusetts.* — *Clafin v. Carpenter*, 4 Met. (Mass.) 580, 38 Am. Dec. 381; *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; *Driscoll v. Marshall*, 15 Gray (Mass.) 62; *Giles v. Simonds*, 15 Gray (Mass.) 441, 77 Am. Dec. 373; *Hill v. Cutting*, 107 Mass. 596.

*Michigan.* — *Wetherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653; *Greeley v. Stilson*, 27 Mich. 153. But see *Johnson v. Moore*, 28 Mich. 3; *Haskell v. Ayres*, 35 Mich. 90; *Wetmore v. Neuberger*, 44 Mich. 362; *Spalding v. Archibald*, 52 Mich. 365, 50 Am. Rep. 253; *Hoban v. Campau*, 52 Mich. 363; *White v. King*, 87 Mich. 107; *Oconto v. Lundquist*, 119 Mich. 264.

*New York.* — *Warren v. Leland*, 2 Barb. (N. Y.) 613; *Pierrepoint v. Barnard*, 6 N. Y. 279; *Bennett v. Scutt*, 18 Barb. (N. Y.) 347.

*Wisconsin.* — *Bruley v. Garvin*, 105 Wis. 625.

See generally the title **VERBAL AGREEMENTS (STATUTE OF FRAUDS)**.

In *Moring v. Ward*, 5 Jones L. (50 N. Car.) 272, it is held that a contract of purchase of standing timber created an estate which gave the purchaser a right to occupy the land for the purpose of cutting timber during the time specified in the instrument.

And in *Donworth v. Sawyer*, 94 Me. 242, it

The same has been held as to a sale of growing underwood,<sup>1</sup> of growing poles,<sup>2</sup> of so many cords of wood standing in the tree,<sup>3</sup> of bark on the trees,<sup>4</sup> and of a perpetual right to enter on a tract of land and cut timber to keep fences in repair.<sup>5</sup> In some states a deed conveying timber is within the registry laws;<sup>6</sup> in others it is not.<sup>7</sup>

**2. When Regarded as Personalty.** — The essential difference, however, between land and trees growing out of the land, and the fact that the latter have in commercial transactions come to be regarded rather as personalty, have led the courts in many modern cases to draw a distinction; and it is now very generally recognized that a contract for the sale of trees, if the vendee is to have the right to the soil for a time for the purpose of further growth and profit, is a contract for an interest in land, but that where the trees are sold in the prospect of separation from the soil immediately or within a reasonable time, without any stipulation for the beneficial use of the soil, but with license to enter and take them away, it is regarded as a sale of goods only, and not within the fourth section of the statute.<sup>8</sup>

**3. To Be Removed Within Specified Time.** — Contracts for the sale of standing trees to be removed within a specified time have generally been construed by the courts as sales of only so many trees as the vendee might cut and remove within the time designated, the balance remaining the property of the vendor.<sup>9</sup> Such a sale may, however, be regarded as absolute, and the agree-

is held that a deed of standing timber conveyed an interest in the land which might descend to the heir.

The purchaser of land under an agreement that no timber shall be cut until the land is paid for has a transferable interest in the timber, and his vendee may maintain an action for an injury thereto. *Lillibridge v. Sartwell*, 8 Pa. St. 523.

1. *Scorell v. Boxall*, 1 Y. & J. 396.

2. *Teal v. Auty*, 2 Brod. & B. 99, 6 E. C. L. 54.

3. *Knox v. Haralson*, 2 Tenn. Ch. 232.

4. *Thomson v. Poor*, 57 Hun (N. Y.) 285.

5. *Yeakle v. Jacob*, 33 Pa. St. 376.

**The Vendee of Standing Trees to Be Selected by the Vendee** has an assignable interest therein before selection, and his assignee may make such selection and may maintain trover against the vendor for conversion of the trees selected, although the vendor had no notice of the selection. *M'Coy v. Herbert*, 9 Leigh (Va.) 548, 33 Am. Dec. 256.

6. *McRae v. Stillwell*, 111 Ga. 65.

7. *Warren v. Leland*, 2 Barb. (N. Y.) 613; *Bent v. Hoxie*, 90 Wis. 625.

**8. Trees as Personalty — Not Within the Fourth Section — England.** — *Smith v. Surman*, 9 B. & C. 561, 17 E. C. L. 443.

*Connecticut.* — *Bostwick v. Leach*, 3 Day (Conn.) 484.

*Indiana.* — *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295.

*Kentucky.* — *Byasse v. Reese*, 4 Met. (Ky.) 372, 83 Am. Dec. 481; *Cain v. McGuire*, 13 B. Mon. (Ky.) 340; *Asher Lumber Co. v. Cornett*, (Ky. 1900) 58 S. W. Rep. 438; *Tilford v. Dotson*, 106 Ky. 755.

*Maine.* — *Erskine v. Plummer*, 7 Me. 447, 22 Am. Dec. 216, citing *Anonymous*, 1 Ld. Raym. 182.

*Maryland.* — *Smith v. Bryan*, 5 Md. 141, 59 Am. Dec. 104.

*Massachusetts.* — *Whitmarsh v. Walker*, 1

Met. (Mass.) 313; *Claffin v. Carpenter*, 4 Met. (Mass.) 580, 38 Am. Dec. 381; *Clap v. Draper*, 4 Mass. 266, 3 Am. Dec. 215; *Spurr v. Andrew*, 6 Allen (Mass.) 420; *Adam v. Briggs Iron Co.*, 7 Cush. (Mass.) 367; *Drake v. Wells*, 11 Allen (Mass.) 141; *Douglas v. Shumway*, 13 Gray (Mass.) 498; *Giles v. Simonds*, 15 Gray (Mass.) 441, 77 Am. Dec. 373; *Delaney v. Root*, 99 Mass. 546, 97 Am. Dec. 52; *White v. Foster*, 100 Mass. 375; *Poor v. Oakman*, 104 Mass. 309. See also *Putnam v. Tuttle*, 10 Gray (Mass.) 48. *Minnesota.* — *Herrick v. Newell*, 49 Minn. 198.

*New Jersey.* — *Silby v. Trotter*, 29 N. J. Eq. 228.

*New York.* — *Warren v. Leland*, 2 Barb. (N. Y.) 613. See also *Wood v. Shultis*, 4 Hun (N. Y.) 309. But see *Boyce v. Washburn*, 4 Hun (N. Y.) 792.

*Pennsylvania.* — *McClintock's Appeal*, 71 Pa. St. 365.

*Rhode Island.* — *Fish v. Capwell*, 18 R. I. 667, 49 Am. St. Rep. 807.

*Vermont.* — *Ellison v. Brigham*, 38 Vt. 64; *Sterling v. Baldwin*, 42 Vt. 306.

**9. To Be Removed Within Specified Time — Georgia.** — *Baxter v. Mattox*, 106 Ga. 344. See also *Perkins v. Peterson*, 110 Ga. 24.

*Maine.* — *Pease v. Gibson*, 6 Me. 81; *Howard v. Lincoln*, 13 Me. 122; *Webber v. Proctor*, 89 Me. 404.

*Massachusetts.* — *Reed v. Merrifield*, 10 Met. (Mass.) 155; *Fletcher v. Livingston*, 153 Mass. 388.

*Michigan.* — *Haskell v. Ayres*, 32 Mich. 93, 35 Mich. 89; *Wasey v. Mahoney*, 55 Mich. 194; *Udley v. S. N. Wilcox Lumber Co.*, 59 Mich. 263; *Kennedy v. Dawson*, 96 Mich. 83.

*Minnesota.* — *King v. Merriman*, 38 Minn. 47.

*New York.* — *McIntyre v. Barnard*, 1 Sandf. Ch. (N. Y.) 52, following *Pease v. Gibson*, 6 Me. 81; *Kellam v. McKinstry*, 69 N. Y. 264; *Boisauvin v. Reed*, 2 Keyes (N. Y.) 323, 1 Abb. App. Dec. (N. Y.) 161.

ment to remove as a covenant, in which case the timber remains the property of the purchaser, although not removed within the time provided for, and for the failure to remove the vendor may bring an action for breach of covenant. A wrongful taking of the timber by the vendor would in such a case constitute a conversion for which the purchaser would have a right of action.<sup>1</sup>

**4. Removal Within Reasonable Time.** — Where no time is specified for the removal of the timber, a reasonable time must be allowed, and what is a reasonable time is a question for the jury in each case.<sup>2</sup> Where the time for the removal of the timber is extended by parol, and the vendee relies upon such extension and fails to remove the timber within the time fixed by the written contract, the vendor is estopped from taking advantage of such failure.<sup>3</sup>

**5. Sale by Dimensions — As of What Time.** — In a sale of standing trees of a certain size it has been held on the one hand that the question of size should be determined when the tree was reached, without regard to the growth between the time of making the contract and the time of cutting;<sup>4</sup> on the other, that the dimensions given referred to the date when the conveyance was executed.<sup>5</sup>

**In Ascertaining the Diameter of Trees,** where all of a certain size are sold, the proper mode, before the tree is cut, is to measure the circumference at the place where the tree is to be cut and to divide such circumference by the number 3.1416. In making such measurements the bark is to be measured with the tree. After having been cut the size may be determined by averaging the measurements of the longest and shortest diameters of the stump.<sup>6</sup>

**Firewood.** — In a contract for the purchase of timber, trees suitable only for firewood will not pass.<sup>7</sup>

**Estoppel to Deny Title.** — One who has cut timber on the land of another cannot question the title of the owner of such land unless he has been ousted from the premises or has been compelled by another claimant of the title to pay for such timber.<sup>8</sup>

**Specific Performance.** — A contract for the sale of standing timber will not be

*Ohio.* — *Clark v. Guest*, 54 Ohio St. 298.

*Vermont.* — *Strong v. Eddy*, 40 Vt. 547.

*Wisconsin.* — *Golden v. Glock*, 57 Wis. 118, 46 Am. Rep. 32; *Larson v. Cook*, 85 Wis. 564.

**Lease and License Distinguished.** — It has been held that a contract in writing whereby the owner of land agrees to rent it and to permit the lessee to cut all of the growing timber therefrom, is a contract of lease, and not a mere license. *Crane v. Patton*, 57 Ark. 340.

**1. Covenant to Remove.** — *Magnetic Ore Co. v. Marbury Lumber Co.*, 104 Ala. 465, 53 Am. St. Rep. 73, explaining *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776; *Halstead v. Jessup*, 150 Ind. 85; *Green v. Bennett*, 23 Mich. 464; *Monroe v. Bowen*, 26 Mich. 523; *Johnson v. Moore*, 28 Mich. 3; *Wait v. Baldwin*, 60 Mich. 622, 1 Am. St. Rep. 551; *Williams v. Flood*, 63 Mich. 487; *Mee v. Benedict*, 98 Mich. 260, 39 Am. St. Rep. 543. See also *Stukeley v. Butler*, Hob. 168; *White v. Foster*, 102 Mass. 375.

**2. Removal Within Reasonable Time.** — *McRae v. Stillwell*, 111 Ga. 65; *Goette v. Lane*, 111 Ga. 400; *Hill v. Hill*, 113 Mass. 103, 18 Am. Rep. 455; *Wood v. Elliott*, 51 Mich. 320; *Holt v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119; *Andrews v. Wade*, (Pa. 1886) 6 Atl. Rep. 48; *Boults v. Mitchell*, 15 Pa. St. 371; *Union Tanning Co. v. Shug*, 22 Pa. Co. Ct. 647; *Patterson v. Graham*, 164 Pa. St. 234.

**Void for Uncertainty.** — A contract for the

sale of timber which allowed the purchaser an indefinite time in which to cut and remove was held void for uncertainty. *Gay Mfg. Co. v. Hobbs*, 128 N. Car. 46, 83 Am. St. Rep. 661. The same case held that thirteen years was not a reasonable time for the removal of the timber.

**3. Grange v. Palmer**, 56 Hun (N. Y.) 481. See also *Williams v. Flood*, 63 Mich. 487.

**4. Sale by Dimensions.** — *Wheeler v. Carpenter*, 107 Pa. St. 271; *Dexter v. Lathrop*, 136 Pa. St. 565.

**5. Warren v. Short**, 119 N. Car. 39; *Goldsboro Lumber Co. v. Hines Bros. Lumber Co.*, 126 N. Car. 254; *Whitted v. Smith*, 2 Jones L. (47 N. Car.) 36.

**"Saw Timber."** — In *Boults v. Mitchell*, 15 Pa. St. 364, a clause reserving "saw timber" was interpreted as referring to the condition of the timber at the date of the deed; and in *Kelly v. Robb*, 58 Tex. 377, the court admitted evidence to show that by the words "saw timber" the parties meant only pine timber and not oak.

A purchase of saw timber does not confer a right to cut telegraph poles. *Elliott v. Bloyd*, 40 Oregon 326.

**6. Bryant v. Bates**, (Ky. 1897) 39 S. W. Rep. 428; *Pease v. Gibson*, 6 Me. 81; *Olmstead v. Niles*, 7 N. H. 522; *Alcutt v. Lakin*, 33 N. H. 507, 66 Am. Dec. 739.

**7. Nash v. Drisco**, 51 Me. 417.

**8. Title.** — *Harris v. Amoskeag Lumber Co.*, 101 Ga. 641; *Lacy v. Johnson*, 58 Wis. 414.



specifically enforced where it is uncertain, vague, and indefinite in its terms, and where its performance by the receiver of the court would unduly affect the superintendence of the court.<sup>1</sup>

**6. Reservation of Trees.** — Where, upon a sale of land, growing timber is reserved, the title to such timber remains in the grantor and with it the right to enter upon the land to cut and remove such timber within a specified or reasonable time. Growing trees thus reserved are considered as real and not personal estate, and the grantor has likewise an interest in so much of the soil as is necessary to sustain the trees.<sup>2</sup> Such reservation, however, may be so worded as to constitute only a right to enter within the time specified to cut and remove the timber, and as conferring no right to timber cut by another after the expiration of the time.<sup>3</sup>

**Limitation of Time to Remove.** — Where the reservation of standing timber is coupled with the reservation of a right to enter and remove the same within a specified time, the limitation upon the right of entry is construed as a limitation upon the exception. Hence the vendor must remove the trees within the time specified or within a reasonable time thereafter, and the trees not so removed become the property of the vendee of the land.<sup>4</sup>

**VII. TRESPASS UPON TIMBER LANDS — 1. In General.** — Entering upon the land of another and cutting down trees and timber is ordinarily a simple act of trespass, for which the owner may have a right of action; and if the timber be removed he may bring an action of trover or replevin to recover the same.<sup>5</sup> A license to enter and cut timber is revoked by a subsequent sale of the land to a third person.<sup>6</sup>

**2. Damages.** — In estimating damages for injuries to or destruction of trees the courts have applied several rules.

**a. WHERE INJURY IS UNINTENTIONAL.** — Where the injury or destruction is unintentional, as where made under a mistake as to boundaries, or is the

1. *Bomer v. Canaday*, 79 Miss. 222. And see the title SPECIFIC PERFORMANCE, vol. 26, p. 32.

2. **Reservation of Trees.** — *Galwey v. Baker*, 7 Cl. & F. 379; *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776; *Howard v. Lincoln*, 13 Me. 122; *Strout v. Harper*, 72 Me. 270; *Putnam v. Tuttle*, 10 Gray (Mass.) 48; *Robinson v. Gee*, 4 Ired. L. (26 N. Car.) 186; *Bond v. Cashie, etc., R., etc., Co.*, 127 N. Car. 125; *Saltonstall v. Little*, 90 Pa. St. 422, 35 Am. Rep. 683; *Wheeler v. Carpenter*, 107 Pa. St. 271; *Knotts v. Hydrick*, 12 Rich. L. (S. Car.) 314.

3. *Rich v. Zeilsdorff*, 22 Wis. 544, 99 Am. Dec. 81; *Martin v. Gilson*, 37 Wis. 360.

4. **Limitation of Time to Remove** — *Kentucky*. — *Morris v. Sanders*, (Ky. 1897) 43 S. W. Rep. 733.

*Maine*. — *Pease v. Gibson*, 6 Me. 81.

*Massachusetts*. — *Perkins v. Stockwell*, 131 Mass. 529; *Murray v. Norfolk County*, 149 Mass. 328.

*Michigan*. — *Monroe v. Bowen*, 26 Mich. 523; *Richards v. Tozer*, 27 Mich. 451.

*New Jersey*. — *Irons v. Webb*, 41 N. J. L. 203, 32 Am. Rep. 193, following *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119.

*New York*. — *Inderlied v. Whaley*, 65 Hun (N. Y.) 407.

*Pennsylvania*. — *Saltonstall v. Little*, 90 Pa. St. 422, 35 Am. Rep. 683.

*South Carolina*. — *Knotts v. Hydrick*, 12 Rich. L. (S. Car.) 314, distinguishing *Judevine v. Goodrich*, 35 Vt. 19.

In *Gregg v. Birdsall*, 53 Barb. (N. Y.) 402, it was held that under the language of the reservation the title of the trees reserved would remain forever in the vendor, or if any time could be fixed by the vendee or by a judicial tribunal within which the power of removal was to be exercised it should be in the future and after notice given, and a reasonable time after the notice.

5. **For the General Principles** relating to trespass, trover, and replevin, see these respective titles in this work. See also *Kimball v. Lohmas*, 31 Cal. 155; *Ricketts v. Dorrel*, 55 Ind. 470; *Millar v. Humphries*, 2 A. K. Marsh. (Ky.) 446; *Betts v. Lee*, 5 Johns. (N. Y.) 340, 4 Am. Dec. 368; *Snyder v. Vaux*, 2 Rawle (Pa.) 423, 21 Am. Dec. 466; *Arpin v. Burch*, 68 Wis. 619.

In *Fairchild v. New Orleans, etc., R. Co.*, 60 Miss. 931, 45 Am. Rep. 427, it was held that the statutory penalty for cutting trees was not recoverable against a corporation whose employees, contrary to orders, cut timber on the land of the plaintiff, on the ground that such employees were not agents of the company within the rule of *respondent superior*. See also *New Orleans, etc., R. Co. v. Reese*, 61 Miss. 581.

6. See the title LICENSE (REAL PROPERTY), vol. 18, p. 1127.

For the effect of cutting timber as perfecting title by adverse possession, see the title ADVERSE POSSESSION, vol. 1, p. 827.

For the discussion of the cutting of trees as constituting waste, see the title WASTE.

result of negligence rather than of wilfulness, the measure of damages has been held to be, in some cases, the value of the trees considered separate and distinct from the land and not the difference in the value of the land before and after the injury;<sup>1</sup> in other and probably the majority of cases the injury has been held to be not the value of the trees, as such, but the damage done to the land by their destruction, or in other words, the difference between the value of the land before and after they were destroyed.<sup>2</sup> This rule has been held to apply with peculiar fitness in the case of fruit trees and shade trees which have little or no value separate from the land but which have great value as a part of the land.<sup>3</sup> In other cases still, the plaintiff has been allowed to recover both the value of the trees destroyed or injured and also the depreciation in the value of the land caused thereby, or either the one or the other at his option.<sup>4</sup>

**How Value Is Measured.** — In estimating the damage to trees their value as standing timber merely should be considered, and not the market value for transportation as shade or ornamental trees.<sup>5</sup> Moreover the measure of damages is not the value of the timber to the trespasser or to the purchaser, but to the owner of the land, estimated at the time of the trespass.<sup>6</sup>

**b. WHERE INJURY IS INTENTIONAL.** — Where the injury to trees is malicious, or the result of gross negligence and carelessness, or attended with circumstances of aggravation, exemplary damages are recoverable as a penalty, the amount of which is often fixed by statute, usually as treble damages.<sup>7</sup>

**1. Value of Trees as Distinct from Lands** — *California*. — Cleland *v.* Thornton, 43 Cal. 437.

*Georgia*. — Smith *v.* Gonder, 22 Ga. 353, following Martin *v.* Porter, 5 M. & W. 351, and Wild *v.* Holt, 9 M. & W. 672.

*Illinois*. — Birket *v.* Williams, 30 Ill. App. 452.

*Iowa*. — Freeland *v.* Muscatine, 9 Iowa 461, Greenfield *v.* Chicago, etc., R. Co., 83 Iowa 270.

*Kansas*. — Atchison, etc., R. Co. *v.* Hamilton, 6 Kan. App. 447.

*Missouri*. — Atkinson *v.* Atlantic, etc., R. Co., 63 Mo. 367.

*Nebraska*. — Fremont, etc., R. Co. *v.* Crum, 30 Neb. 70.

*New Hampshire*. — Foote *v.* Merrill, 54 N. H. 490, 20 Am. Rep. 151; Beede *v.* Lamprey, 64 N. H. 510, 10 Am. St. Rep. 426.

*New Jersey*. — Delaware, etc., R. Co. *v.* Salmon, 39 N. J. L. 316, 23 Am. Rep. 214.

*South Dakota*. — White *v.* Chicago, etc., R. Co., 1 S. Dak. 326.

*Tennessee*. — Burke *v.* Louisville, etc., R. Co., 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618.

**2. Injury to Land** — *Alabama*. — Southern Bell Telephone Co. *v.* Francis, 109 Ala. 234, 55 Am. St. Rep. 930.

*Arkansas*. — St. Louis, etc., R. Co. *v.* Ayres, 67 Ark. 371.

*California*. — Chipman *v.* Hibberd, 6 Cal. 162.

*Michigan*. — Achey *v.* Hull, 7 Mich. 423;

Thompson *v.* Moiles, 46 Mich. 42.

*Minnesota*. — Carner *v.* Chicago, etc., R. Co., 43 Minn. 375.

*New Hampshire*. — Wallace *v.* Goodall, 18 N. H. 439.

*New York*. — Bevier *v.* Delaware, etc., Canal Co., 13 Hun (N. Y.) 254; Harder *v.* Harder, 26 Barb. (N. Y.) 409; Easterbrook *v.* Erie R. Co., 51 Barb. (N. Y.) 94; Van Deusen *v.* Young, 29 N. Y. 9; Argotsinger *v.* Vines, 82

N. Y. 308, distinguishing Whitbeck *v.* New York Cent. R. Co., 36 Barb. (N. Y.) 644; Cook *v.* Brockway, 21 Barb. (N. Y.) 331; Dwight *v.* Elmira, etc., R. Co., 132 N. Y. 202, 28 Am. St. Rep. 563; Evans *v.* Keystone Gas Co., 148 N. Y. 112, 51 Am. St. Rep. 681; Edsall *v.* Howell, 86 Hun (N. Y.) 424.

*Texas*. — Hooper *v.* Smith, (Tex. Civ. App. 1899) 53 S. W. Rep. 65.

**3. Fruit and Shade Trees** — *Alabama*. — Southern Bell Telephone Co. *v.* Francis, 109 Ala. 224, 55 Am. St. Rep. 930.

*California*. — Montgomery *v.* Locke, 72 Cal. 75.

*Connecticut*. — Hoyt *v.* Southern New England Telephone Co., 60 Conn. 385.

*Kansas*. — Kansas City, etc., R. Co. *v.* Perry, 65 Kan. 792.

*Louisiana*. — Stoner *v.* Texas, etc., R. Co., 45 La. Ann. 115.

*New York*. — Dwight *v.* Elmira, etc., R. Co., 132 N. Y. 199, 28 Am. St. Rep. 563, overruling Whitbeck *v.* New York Cent. R. Co., 36 Barb. (N. Y.) 644; Evans *v.* Keystone Gas Co., 148 N. Y. 112, 51 Am. St. Rep. 681; Edsall *v.* Howell, 86 Hun (N. Y.) 424.

*North Carolina*. — Bennett *v.* Thompson, 13 Ired. L. (35 N. Car.) 146.

*Virginia*. — Norfolk, etc., R. Co. *v.* Bohannon, 85 Va. 293.

**4. Value of Trees Plus Injury to Land.** — Knisely *v.* Hire, 2 Ind. App. 86; Longfellow *v.* Quimby, 33 Me. 458; Miller *v.* Wellman, 75 Mich. 353; Bailey *v.* Chicago, etc., R. Co., 3 S. Dak. 531; Ensley *v.* Nashville, 2 Baxt. (Tenn.) 145.

**5. How Value Is Measured.** — Fremont, etc., R. Co. *v.* Crum, 30 Neb. 70.

6. Cathcart *v.* Bowman, 5 Pa. St. 317.

**7. Exemplary Damages or Penalty** — *Alabama*. — Postal Tel. Co. *v.* Lenoir, 107 Ala. 640, following Russell *v.* Irby, 13 Ala. 131; Givens

**Trespass by Mistake.** — Under statutes imposing damages in the nature of a penalty, such penalty is not imposed where the act is done by mistake or accident. In such case actual damages only may be recovered.<sup>1</sup>

**Cutting Trees as Criminal Offense.** — In a few instances the cutting of trees has been made a criminal offense.<sup>2</sup>

**c. DAMAGES FOR CONVERSION OF TIMBER.** — Where logs have been cut and an action of trover is brought for their recovery, the plaintiff may treat the place to which they have been transported and the place of their manufacture into timber as the place of conversion, and may recover their value there, without deduction for the labor and expense bestowed upon them, rather than upon the ground where cut.<sup>3</sup> And he may recover their value as logs as they lie upon the land, and is not restricted to the value of the trees before cutting.<sup>4</sup>

**Trespass Unintentional.** — Where the trespass, however, is unintentional, it has been held that the damages should be the value of the logs at such place, less the cost of cutting and transporting them.<sup>5</sup>

*v. Kendrick*, 15 Ala. 648; *Mitchell v. Billingsley*, 17 Ala. 391.

*California.* — *Daubenspeck v. Gear*, 18 Cal. 443.

*Illinois.* — *Behymer v. Odell*, 31 Ill. App. 350; *David v. Correll*, 74 Ill. App. 47.

*Michigan.* — *Osborn v. Lovell*, 36 Mich. 246; *Clark v. Field*, 42 Mich. 342.

*Mississippi.* — *Perkins v. Hackleman*, 26 Miss. 41, 59 Am. Dec. 243; *Heard v. James*, 49 Miss. 236; *Mhoon v. Greenfield*, 52 Miss. 434; *Keirn v. Warfield*, 60 Miss. 799.

*Missouri.* — *Emerson v. Beavaus*, 12 Mo. 511.

*New Jersey.* — *Winter v. Peterson*, 24 N. J. L. 524, 61 Am. Dec. 678.

*North Carolina.* — *Bennett v. Thompson*, 13 Ired. L. (35 N. Car.) 146.

*Wisconsin.* — *Lee v. Lord*, 76 Wis. 582.

It has been held that the penalty was recoverable only in actions prosecuted against the wrongdoer or the purchaser from him with notice of the wrong, and that if such wrongdoer or purchaser died before judgment the plaintiff could recover against his personal representative only single damages. *Cotter v. Plumer*, 72 Wis. 476.

If for any technical reason treble damages are not recoverable there may be at least a recovery for the trespass. *Andrews v. Youmans*, 78 Wis. 56.

If no actual value of the trees can be shown the plaintiff is entitled at any rate to nominal damages. *Keirn v. Warfield*, 60 Miss. 799.

**1. Trespass by Mistake** — *Alabama.* — *Russell v. Irby*, 13 Ala. 131.

*Arkansas.* — *Eaton v. Langley*, 65 Ark. 448.

*California.* — *Barnes v. Jones*, 51 Cal. 303.

*Georgia.* — *Yahoola River, etc., Hydraulic Hose Min. Co. v. Irby*, 40 Ga. 479.

*Illinois.* — *Whitcraft v. Vanderver*, 12 Ill. 235; *Watkins v. Gale*, 13 Ill. 152; *Cushman v. Oliver*, 81 Ill. 444. See also *Satterfield v. Western Union Tel. Co.*, 23 Ill. App. 446.

*Iowa.* — *Striegel v. Moore*, 55 Iowa 88.

*Louisiana.* — *Watterston v. Jette*, 7 Rob. (La.) 20.

*Michigan.* — *Wallace v. Finch*, 24 Mich. 255; *Winchester v. Craig*, 33 Mich. 206.

*Minnesota.* — *Whitney v. Huntington*, 37

*Minn.* 197; *King v. Merriman*, 38 *Minn.* 47; *Hayes v. Chicago, etc., R. Co.*, 45 *Minn.* 17.

*Mississippi.* — *McCleary v. Anthony*, 54 *Miss.* 708.

*Missouri.* — *Lindell v. Hannibal, etc., R. Co.*, 25 *Mo.* 550.

*Nevada.* — *Ward v. Carson River Wood Co.*, 13 *Nev.* 44.

*New York.* — *Nixon v. Stillwell*, 52 *Hun* (N. Y.) 353, 5 *N. Y. Supp.* 248.

*New Hampshire.* — *Batchelder v. Kelly*, 10 *N. H.* 436, 34 *Am. Dec.* 174.

*Vermont.* — *Tilden v. Johnson*, 52 *Vt.* 628, 36 *Am. Rep.* 769.

**Where the Action Is Brought by the Remainderman** for an injury to the inheritance, damages are to be strictly confined to the depreciation in value of the inheritance. The present damages may not be considered, since they would belong, if recoverable, to the tenant for life. *Van Deusen v. Young*, 29 *N. Y.* 9.

**For Depredations upon Timber Lands of the United States**, see the title STATE AND PUBLIC LANDS, vol. 26, p. 452.

**2. Cutting Trees as Criminal Offense.** — *Rex v. Taylor, R. & R. C. C.* 373; *Williams v. Hendricks*, 115 *Ala.* 277, 67 *Am. St. Rep.* 32; *Com. v. Wilder*, 127 *Mass.* 1; *McCauley v. State*, 43 *Tex.* 374.

**3. Damages for Conversion of Timber** — *United States.* — *Bly v. U. S.*, 4 *Dill.* (U. S.) 467.

*Georgia.* — *Parker v. Waycross, etc., R. Co.*, 81 *Ga.* 387.

*Michigan.* — *Symes v. Oliver*, 13 *Mich.* 9; *Final v. Backus*, 18 *Mich.* 218; *Grant v. Smith*, 26 *Mich.* 201; *Empire Mfg. Co. v. Stuart*, 46 *Mich.* 485.

*Minnesota.* — *Nesbitt v. St. Paul Lumber Co.*, 21 *Minn.* 491; *Shepard v. Pettit*, 30 *Minn.* 481, *disapproving* *Single v. Schneider*, 30 *Wis.* 570.

*Nevada.* — *Ward v. Carson River Wood Co.*, 13 *Nev.* 44.

*New York.* — *Brown v. Sax*, 7 *Cow.* (N. Y.) 95; *Baker v. Wheeler*, 8 *Wend.* (N. Y.) 505, 24 *Am. Dec.* 66.

*4. Firmin v. Firmin*, 9 *Hun* (N. Y.) 571.

**5. Trespass Unintentional** — *Alabama.* — *White v. Yawkey*, 108 *Ala.* 270.

*Louisiana.* — *Gardere v. Blanton*, 35 *La. Ann.* 811.



In Estimating the Value of Timber such value is to be ascertained by the price in the vicinity and not in a distant market,<sup>1</sup> and at the time when cut, and not by striking an average of value taken through several years.<sup>2</sup> Where the market value does not cover the cost of cutting and transporting, it would seem that the plaintiff may recover the value of the timber when first severed from the soil together with any profits which might have been derived from its sale in the ordinary market.<sup>3</sup>

Moreover, Where Timber Is Converted into coal or boards or shingles or other manufactured product, the owner of the timber may maintain trover for such product.<sup>4</sup>

**Confusion of Goods.** — Where timber so cut is mingled with other timber of the trespasser the general principles relating to confusion of goods are applicable.<sup>5</sup>

While the Owner of Stolen Timber may recover the enhanced value thereof, it has been held that such damages may not be recovered against an innocent purchaser from the thief, but only the value of the timber before its conversion.<sup>6</sup>

**Property in Logs — Trespasser.** — A trespasser, even though innocent, acquires no property in logs cut on the lands of another nor any lien thereon for the value of the labor and expense of cutting.<sup>7</sup>

**Public Lands.** — But a trespasser has against a stranger the right of possession in boards and rails cut upon land of the United States.<sup>8</sup>

**Wisconsin Rule.** — The statutory rule in Wisconsin is that the damages for trees or timber wrongfully cut on the lands of another are the highest market value thereof in whatever state or condition the same may be put by the party cutting them between the time of cutting and the time of trial of the action.<sup>9</sup> Such rule, however, does not apply to a purchaser in good faith of timber cut on the lands of another without notice of the fact that the logs were cut by a trespasser.<sup>10</sup> Nor does it apply to every case of technical conversion, but only where some element of wilfulness or wantonness or evil design is present.<sup>11</sup> As to such person, the rule of damages is the value of the timber upon the land at the time and place of cutting. The burden of proof, however, is upon the defendant to show that he was a purchaser in good faith.<sup>12</sup> A tax-title claimant is by special provision allowed to recover from a defendant who has in good faith acquired a title believed to be valid, only actual damages and not the statutory damages.<sup>13</sup>

**VIII. INJUNCTIONS TO PROTECT TIMBER.** — Injunctions to prevent the cutting of timber have often been refused on the ground that such preventive remedy is not usually applied to prevent trespass,<sup>14</sup> or that the threatened injury was not irreparable and that a complete remedy existed at law,<sup>15</sup> or

*Maine.* — *Cushing v. Longfellow*, 26 Me. 306; *Moody v. Whitney*, 38 Me. 174, 61 Am. Dec. 239.

*Michigan.* — *Winchester v. Craig*, 33 Mich. 205; *Skeels v. Starrett*, 57 Mich. 354.

*Pennsylvania.* — *Herdic v. Young*, 55 Pa. St. 176, 93 Am. Dec. 739.

*Wisconsin.* — *Weymouth v. Chicago, etc., R. Co.*, 17 Wis. 550, 84 Am. Dec. 763.

See also *King v. Merriman*, 38 Minn. 47; *Whitney v. Huntington*, 37 Minn. 197.

1. *Coxe v. England*, 65 Pa. St. 212.

2. *Schlater v. Gay*, 28 La. Ann. 340.

3. *Winchester v. Craig*, 33 Mich. 205. See also *Eaton v. Langley*, 65 Ark. 448.

4. *Riddle v. Driver*, 12 Ala. 590; *Betts v. Lee*, 5 Johns. (N. Y.) 348, 4 Am. Dec. 368; *Curtis v. Groat*, 6 Johns. (N. Y.) 168; 5 Am. Dec. 204; *Brown v. Sax*, 7 Cow. (N. Y.) 95.

5. See the title **CONFUSION OF GOODS**, vol. 6, p. 592.

6. *Lake Shore, etc., R. Co. v. Hutchins*, 32 Ohio St. 571, 30 Am. Rep. 629.

7. *Gates v. Rifle Boom Co.*, 70 Mich. 309; *Busch v. Fisher*, 89 Mich. 200.

8. *Carpenter v. Lewis*, 6 Ala. 682.

As to the title necessary to maintain replevin, see the title **REPLEVIN**, vol. 24, p. 475.

9. **Wisconsin Rule.** — *Webster v. Moe*, 35 Wis. 75; *Webber v. Quaw*, 46 Wis. 118; *Haseltine v. Mosher*, 51 Wis. 443. But see *Single v. Schneider*, 24 Wis. 299, the rule of which case is said to have occasioned the passage of the act.

10. *Wright v. E. E. Bolles Wooden Ware Co.*, 50 Wis. 167; *Tuttle v. Wilson*, 52 Wis. 643.

11. *Cohn v. Neeves*, 40 Wis. 393.

12. *Wright v. E. E. Bolles Wooden Ware Co.*, 50 Wis. 167; *Tuttle v. Wilson*, 52 Wis. 643.

13. *Fleming v. Sherry*, 72 Wis. 503. See also *Smith v. Sherry*, 54 Wis. 114.

14. **Injunction Refused.** — *Kerlin v. West*, 4 N. J. Eq. 452. But see *Shreve v. Black*, 4 N. J. Eq. 177.

15. *Georgia.* — *Hatcher v. Hampton*, 7 Ga. 49; *Powers v. Heery*, R. M. Charl. (Ga.) 523.

because the defendant's insolvency was not averred or proved,<sup>1</sup> or because the injury was merely threatened,<sup>2</sup> or because the plaintiff showed no title.<sup>3</sup> On the other hand, they have not infrequently been allowed to preserve property *in statu quo* until the ownership of the land could be determined, or where the legal remedy was clearly insufficient, or the damage irreparable, or the trespass a continuing one likely to beget a multiplicity of suits, or where a mortgagee's security would be impaired.<sup>4</sup>

*Maryland.*—*Hamilton v. Ely*, 4 Gill (Md.) 34; *Green v. Keen*, 4 Md. 98; *Shipley v. Ritter*, 7 Md. 408, 61 Am. Dec. 371; *Davis v. Reed*, 14 Md. 152.

*Michigan.*—*Powell v. Rowlings*, 38 Mich. 239.

*New Jersey.*—*West v. Walker*, 3 N. J. Eq. 279; *Cornelius v. Post*, 9 N. J. Eq. 196.

*New York.*—*Stevens v. Beekman*, 1 Johns. Ch. (N. Y.) 318.

*North Carolina.*—*Thompson v. Williams*, 1 Jones Eq. (54 N. Car.) 176; *Bogey v. Shute*, 1 Jones Eq. (54 N. Car.) 180.

*West Virginia.*—*Cox v. Douglass*, 20 W. Va. 175.

1. *Hihn v. Peck*, 18 Cal. 640; *Gause v. Perkins*, 3 Jones Eq. (56 N. Car.) 177, 69 Am. Dec. 728; *McCormick v. Nixon*, 83 N. Car. 113; *Dunkart v. Rinehart*, 87 N. Car. 224. But see *John L. Roper Lumber Co. v. Wallace*, 93 N. Car. 22.

2. *Griffin v. Winne*, 10 Hun (N. Y.) 571.

3. *Wearin v. Munson*, 62 Iowa 466. See also *Cox v. Douglass*, 20 W. Va. 175; *Small v. Slocumb*, 112 Ga. 279, 81 Am. St. Rep. 50.

4. *Injunction Granted—England.*—*Usborne v. Usborne*, 1 Dick. 75; *Hippesley v. Spencer*, 5 Madd. 422; *King v. Smith*, 2 Hare 239. See also *Humphreys v. Harrison*, 1 Jac. & W. 561; *Harper v. Aplin*, 54 L. T. N. S. 383.

*United States.*—*Wood v. Braxton*, 54 Fed. Rep. 1005; *King v. Stuart*, 84 Fed. Rep. 546; *King v. Campbell*, 85 Fed. Rep. 814.

*Alabama.*—*Thomas v. James*, 32 Ala. 723.

*California.*—*Haleck v. Mixer*, 16 Cal. 574.

*Florida.*—*Carney v. Hadley*, 32 Fla. 344, 37 Am. St. Rep. 101.

*Georgia.*—*Powell v. Cheshire*, 70 Ga. 357, 48 Am. Rep. 572; *Camp v. Dixon*, 112 Ga. 872.

*Indiana.*—*Thatcher v. Humble*, 67 Ind. 444.

*Iowa.*—*Palmer v. Butler*, 36 Iowa 583.

*Minnesota.*—*Butman v. James*, 34 Minn. 547.

*New Jersey.*—*Chenango Bank v. Cox*, 26 N. J. Eq. 452; *Piper v. Piper*, 38 N. J. Eq. 81.

*Pennsylvania.*—*Echert v. Ferst*, 10 Phila. (Pa.) 514, 30 Leg. Int. (Pa.) 352.

*Vermont.*—*Smith v. Rock*, 59 Vt. 232; *Griffith v. Hilliard*, 64 Vt. 643.

*Washington.*—*Arment v. Hensel*, 5 Wash. 152.

*Wisconsin.*—*Bunker v. Locke*, 15 Wis. 636.

A *Missouri* statute providing for the payment of a bounty for planting and protecting trees was held to be void under the constitution, which prohibited any political corporation from lending its credit or granting money to any individual, association, or corporation. *Deal v. Mississippi County* 107 Mo. 464. See also the title STATES, vol. 26, p. 474, for other cases construing this constitutional provision.

# TRESPASS.

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#### CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 21, p. 780.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see in this work such titles as: *ABUTTING OWNERS*, vol. 1, p. 224;

*ADVERSE POSSESSION*, vol. 1, p. 787; *AGENCY*, vol. 1, p. 930; *ANIMALS*, vol. 2, p. 340; *ARREST*, vol. 2, p. 832; *ASSAULT AND BATTERY*, vol. 2, p. 952; *ATTACHMENT*, vol. 3, p. 181; *ATTORNEY AND CLIENT*, vol. 3, p. 403; *BAILMENTS*, vol. 3, p. 732, and the titles treating of the several kinds of bailments; *CEMETERIES*, vol. 5, p. 794; *CONTRIBUTION AND EXONERATION*, vol. 7, p. 325; *CORPORATIONS (PRIVATE)*, vol. 7, p. 620; *CROPS*, vol. 8, p. 302; *DAMAGES*, vol. 8, p. 537; *EASEMENTS*, vol. 10, p. 397; *EJECTMENT*, vol. 10, p. 469; *EXECUTIONS*, vol. 11, p. 604; *EXEMPLARY DAMAGES*, vol. 12, p. 2; *EXEMPTIONS (FROM EXECUTION)*, vol. 12, p. 59; *FALSE IMPRISONMENT*, vol. 12, p. 719; *FENCES*, vol. 12, p. 1035; *FISH AND FISHERIES*, vol. 13, p. 554; *FIXTURES*, vol. 13, p. 594; *FORCIBLE ENTRY AND DETAINER*, vol. 13, p. 743; *HIGHWAYS*, vol. 15, p. 343; *HUSBAND AND WIFE*, vol. 15, p. 785; *INDEMNITY CONTRACTS*, vol. 16, p. 167; *INDEPENDENT CONTRACTORS*, vol. 16, p. 186; *INFANTS*, vol. 16, p. 255; *INJUNCTIONS*, vol. 16, p. 342; *INTEREST*, vol. 16, p. 984; *JOINT TENANTS AND TENANTS IN COMMON*, vol. 17, p. 701; *LANDLORD AND TENANT*, vol. 18, p. 149; *LATERAL AND SUBJACENT SUPPORT*, vol. 18, p. 541; *LICENSE (REAL PROPERTY)*, vol. 18, p. 1127; *LOGS AND LUMBER*, vol. 19, p. 543; *MALICIOUS MISCHIEF*, vol. 19, p. 633; *MALICIOUS PROSECUTION*, vol. 19, p. 647; *MASTER AND SERVANT*, vol. 20, p. 3; *MORTGAGES*, vol. 20, p. 897; *PARTNERSHIP*, vol. 22, p. 2; *PARTY WALLS*, vol. 22, p. 236; *PEWS AND PEW RIGHTS*, vol. 22, p. 761; *SHERIFFS AND CONSTABLES*, vol. 25, p. 658; *TREES AND TIMBER*, *ante*; *TRESPASS ON THE CASE*, *post*; *TRESPASS TO TRY TITLE*, *post*; *VENDOR AND PURCHASER*; *WATERS AND WATERCOURSES*.

**I. DEFINITION AND GENERAL VIEW — 1. Definition.** — Trespass, in Its Widest Sense, means any transgression or offense against the law, whether relating to a man's person or his property, whereby he is injuriously treated or damaged.<sup>1</sup>

In Its Narrower and Usual Legal Significance, it means an unlawful act, done with violence or force, to the person, property, or rights of another.<sup>2</sup>

The Amount of Violence Used is immaterial, as this will be implied by the law from the circumstances of the case. The mere touching of one's person against his will, the entering upon one's realty without his consent, and the unlawful exercise of authority over one's personal property, are all acts of trespass.<sup>3</sup>

"Trespass" Is Also the Name of the Remedy for an act done with force, where the injury is the direct result of the act, as distinguished from "trespass on the case," which lies for damages when the injury is consequential, and not the direct result of the act.<sup>4</sup>

The Distinction between injuries which are the proper subject of an action of trespass and those which are to be redressed by an action on the case, between injuries immediate and injuries consequential, is sometimes very subtle and attenuated. Acts which are of themselves invasions upon the person or property in possession of another are of the first class, or immediate injuries. Acts which by reason only of the subsequent occurrences occasion an injury to the person or property of another, which injury was either foreseen or ought to have been guarded against, come under the second class. If A threw a log on the highway and it hit B, he may maintain trespass; but if B came along afterwards and fell over the log and thereby received an injury, the remedy is case.<sup>5</sup> In some of the states the distinction between the forms of

1. 3 Bl. Com. 208.

2. Bouv. Law Dict.

3. 1 Archbold's Nisi Prius 405. See *infra*, this title, *Essentials — Force*.

4. See *infra*, this title, *Remedy*; and the title *TRESPASS ON THE CASE*, *post*.

5. *Dodson v. Mock*, 4 Dev. & B. L. (20 N. Car.) 146, 32 Am. Dec. 677.



the actions of trespass and trespass on the case has been abolished by statute, but the essential differences between the two actions remain the same, including the differences as to the facts required to be proved and the damages recoverable.<sup>1</sup>

**2. General View — a. AS TO PERSONS.** — Trespass as to persons takes the forms of assault and battery, wounding, false imprisonment, and the like.<sup>2</sup>

**b. AS TO PROPERTY — (1) Generally.** — The gist of the action of trespass on property is the disturbance of the possession,<sup>3</sup> and whether the property is real or personal, the plaintiff, to maintain trespass, must show possession of it or a right to take immediate possession of it at the time of the trespass.<sup>4</sup>

**Intention to Trespass.** — The mere intention to commit a trespass is not actionable.<sup>5</sup>

**(2) Realty.** — In its most restricted sense, trespass signifies no more than an unauthorized entry upon another man's ground, and doing some damage, however inconsiderable, to his real property.<sup>6</sup> In an action of trespass on the realty, it is the injury to the possession or to the soil which is the gist of the action. Anything else is aggravation.<sup>7</sup>

**Acts Which Constitute Trespass on Realty.** — Any entry on the land or into the building of another without license or without express or implied permission from the owner is a trespass.<sup>8</sup> The wanton and unnecessary destruction of another's fences, etc., in removing them from a highway which they obstructed;<sup>9</sup> the entry upon unoccupied lands without any claim of right or title, and for the purpose of keeping the true owner out of possession;<sup>10</sup> the

1. See *infra*, this title, *Remedy*.

2. See the titles ASSAULT AND BATTERY, vol. 2, p. 952; FALSE IMPRISONMENT, vol. 12, p. 719, where these subjects are treated exhaustively. The general principles stated below in the sections *Essentials*, and *Excuse, Justification, and Protection*, and, where appropriate, elsewhere throughout this article, apply to trespass on the person.

**Illustration of Trespass on the Person.** — In an action in two counts for (1) assault and battery and (2) forcible entry of the plaintiff's close, it was held that although the fact that after the defendant entered by permission through the outer door of the plaintiff's house, he went, against the commands of the plaintiff, into his sleeping room, did not constitute a trespass upon the close, the fact that he "took hold of his arm and shoulders and used sufficient force to awaken the plaintiff for the purpose of presenting a milk bill" constituted a trespass on the first count. *Richmond v. Fisk*, 160 Mass. 34.

**3. Gist of Action Is Disturbance of Possession.** — 4 Kent Com. 120; 3 Bl. Com. 210; *Brown v. Manter*, 22 N. H. 468.

**4. Plaintiff Must Show Possession or Right of Possession.** — *Lunt v. Brown*, 13 Me. 236; *Anderson v. Nesmith*, 7 N. H. 167; *Carter v. Jackson*, 56 N. H. 364; *Rowland v. Rowland*, 8 Ohio 40. See *infra*, this title, *Trespass as to Realty — Who May Maintain; Trespass as to Personalty — Who May Maintain*.

**5. Intention to Trespass Not Actionable.** — *Estey v. Smith*, 45 Mich. 402; *French v. Martin*, 24 N. H. 450; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Gates v. Lounsbury*, 20 Johns. (N. Y.) 427. An intention to impound a horse was held not actionable. *Gates v. Lounsbury*, 20 Johns. (N. Y.) 427. See also *infra*, this title, *Essentials — Intent*.

6. 3 Bl. Com. 209.

**"Entry upon" Realty.** — A person removing a partition fence on the dividing line "enters upon" the adjoining owner's land, although his feet may never have been on the adjoining owner's side of the line. *Garrett v. Sewell*, 108 Ala. 521.

7. Where the plaintiff brought an action *quare clausum fregit* for injury to his land, and also alleged the destruction of a dwelling house he had built thereon, it was held that, the evidence not sustaining his allegation as to the injury to the land, he could not recover for the destruction of his house, that being personal property and its destruction merely aggravation. *Houghtaling v. Houghtaling*, 5 Barb. (N. Y.) 379.

**8. Any Unauthorized Entry on Land Is a Trespass.** — *Hatch v. Donnell*, 74 Me. 163; *Brown v. Perkins*, 1 Allen (Mass.) 89; *Agnew v. Jones*, 74 Miss. 347; *Norvell v. Gray*, 1 Swan (Tenn.) 96; *Heermance v. Vernoy*, 6 Johns. (N. Y.) 5; *Baltimore, etc., R. Co. v. Boyd*, 67 Md. 32, 1 Am. St. Rep. 362.

**Action Involves No Question of Title.** — Forcible disturbance of peaceable possession is trespass, and an action therefor involves no question of title. *Newcombe v. Irwin*, 55 Mich. 620.

**Trespass by Crossing Private Lands.** — Injunction will lie against trespass by passing over private lands lying on the great ponds, to cut ice. The right of passage which rests on the statutes 1611 and 1649, Body of Liberties, is confined to the purposes contemplated at the time of the legislation, and the burden is not to be increased as the uses of ponds increase. *Slater v. Gunn*, 170 Mass. 509.

**9. Unnecessary Destruction of Obstructions on Highway.** — *Beardslee v. French*, 7 Conn. 125, 18 Am. Dec. 86.

**10. Entry on Unoccupied Land.** — *McCall v. Capehart*, 20 Ala. 521.

cutting and carrying away of trees;<sup>1</sup> the diversion of water;<sup>2</sup> the taking away of stone, ore, coal, or oil;<sup>3</sup> the deposit of material on another's land;<sup>4</sup> the breaking down of fences and digging and excavating the soil;<sup>5</sup> the drawing of timber across another's land, though it was not cut thereon;<sup>6</sup> the seduction of a daughter;<sup>7</sup> the abduction of a child;<sup>8</sup> entering upon another's land and removing a house therefrom, although the greater part of the house was on the defendant's own land;<sup>9</sup> entry by a mortgagee upon real estate and the removal by him of property described in his chattel mortgage;<sup>10</sup> exceeding the authority granted by a licensor, or using the license after its expiration or revocation,<sup>11</sup> constitute trespass. The sale of a mill situated on the lot of and belonging to a neighbor, and its removal by the purchaser, make the vendor liable as a trespasser;<sup>12</sup> as do the sale of timber standing upon another's land, and its subsequent cutting and removal by the purchaser;<sup>13</sup> and such cutting and removal constitute both the vendee hiring one to cut and remove it, and the person committing the act, trespassers.<sup>14</sup> Trespass will lie for collecting surface water and discharging it in volume on a person's land;<sup>15</sup> for injury to property by the owner of an easement of right of way;<sup>16</sup> for cutting and carrying away grass and crops.<sup>17</sup> A person who merely stops on the sidewalk in front of a man's house and remains there, using abusive and insulting language towards him, commits a trespass.<sup>18</sup> An officer who breaks into and

**1. Cutting and Carrying Away of Trees.**—*Montague v. Papin*, 1 Mo. 757; *Tackett v. Huesman*, 19 Mo. 525; *McCloskey v. Powell*, 123 Pa. St. 62, 10 Am. St. Rep. 513; *Loewenberg v. Rosenthal*, 18 Oregon 178.

**2. Diversion of Water.**—*Miller v. Shenandoah Pulp Co.*, 38 W. Va. 558; *Salley v. Robinson*, 96 Me. 474, 90 Am. St. Rep. 410; *Hogg v. Connellsville Water Co.*, 168 Pa. St. 456.

**3. Taking Away of Stone, Ore, etc.**—*Baker v. Hart*, 52 Hun (N. Y.) 363; *Warrior Coal, etc., Co. v. Mabel Min. Co.*, 112 Ala. 624; *Dyke v. National Transit Co.*, 22 N. Y. App. Div. 360; *Maye v. Yappen*, 23 Cal. 306.

**4. Deposit of Material on Another's Land.**—*Tegeler v. Kansas City*, 95 Mo. App. 162; *Hoffman v. Mill Creek Coal Co.*, 16 Pa. Super. Ct. 631.

**5. Breaking Fences, etc.**—*Adden v. White Mountains N. H. R. Co.*, 55 N. H. 413, 20 Am. Rep. 220; *Carl v. Sheboygan, etc., R. Co.*, 46 Wis. 625.

**6. Drawing Timber Across Land.**—*Brown v. Manter*, 22 N. H. 468. In this case the action was for breaking and entering the plaintiff's close, and cutting and carrying away certain pine timber. The evidence showed that the timber was not cut on the plaintiff's land, but was drawn across it. It was held that the action could be maintained, because the gist of the action is the disturbance of the plaintiff's possession.

**7. Seduction of a Daughter.**—*Logan v. Murray*, 6 S. & R. (Pa.) 175; *Hubbell v. Wheeler*, 2 Aik. (Vt.) 359. See also the title TRESPASS ON THE CASE, *post*.

**8. Abduction of a Child.**—*Wheeler v. Price*, 21 R. I. 99.

**9. Entering on Land and Removing a House or Other Property.**—*Bolling v. Whittle*, 37 Ala. 35.

**10. Corcoran v. Webster, 50 Wis. 125.**

**11. Exceeding License.**—B had the right from A of piling timber and bark on the highway in front of A's property, and was notified by A when the right expired to remove the timber. B refused, and A removed it on to his

own land. It was held that B was liable to A as a trespasser, and that A was not liable to B for the taking. *Wheelock v. Fuellhart*, 158 Pa. St. 359.

**12. Sale and Removal of Another's Property.**—*Wall v. Osborn*, 12 Wend. (N. Y.) 39.

**13. Dreyer v. Ming, 23 Mo. 434.**

**14. Small v. Ball, 47 Vt. 486.**

**15. Flooding Land.**—*Carll v. Northport*, 11 N. Y. App. Div. 120. But the casting of surface water upon a lot, as the consequence of grading a street, will not of itself constitute a trespass, unless the water is collected in a body. *Jordan v. Benwood*, 42 W. Va. 312; *Yeager v. Fairmont*, 43 W. Va. 259.

**16. Injury to Land by Owner of Easement.**—The owner of land subject to a right of way may maintain trespass against the owner of the easement for breaking down a gate across the way, it being necessary to the reasonable use and enjoyment of the owner's land, and not unreasonably interfering with the right of way. *Wille v. Bartz*, 88 Wis. 424.

**17. Cutting and Carrying Away Grass and Crops.**—The owner, by purchase or otherwise, of a crop of growing grass may maintain trespass *quare clausum fregit* against a stranger or against the owner of the land who, during its growth or the proper time for its removal, wrongfully enters and cuts and carries away the grass. *Dolloff v. Danforth*, 43 N. H. 219; *Sell v. Graves*, 16 Mont. 342; *Baldwin v. Curth*, 9 Ohio Cir. Dec. 594, 17 Ohio Cir. Ct. 174. See also *Myers v. Myers*, 1 Bailey L. (S. Car.) 306.

On the same principle, a tenant who agrees to make over a proportion of a grain crop to any one who should purchase the land is not a trespasser by harvesting it and turning his hogs upon the land to eat up the remainder of the crop. *Toles v. Meddaugh*, 106 Mich. 398.

**18. Adams v. Rivers, 11 Barb. (N. Y.) 390.**

And in *North Carolina* this is held to be a forcible trespass and indictable. *State v. Widenhouse*, 71 N. Car. 279; *State v. Buckner*, Phil. L. (61 N. Car.) 558, 98 Am. Dec. 83.



enters a dwelling house to serve a writ of replevin or other civil writ is a trespasser.<sup>1</sup> Where one by permission enters on land under an agreement with the owner to purchase, and afterwards refuses to carry his agreement into effect, he is liable in trespass as if he had entered without permission.<sup>2</sup>

(3) *Personalty — Possession — Disturbance of, Necessary.* — In the case of personal property, the disturbance of possession necessary to constitute trespass may be by an actual taking, a physical seizing or taking hold of the goods, removing them from their owner, or by exercising a control or authority over them inconsistent with their owner's possession.<sup>3</sup>

*Acts Which Constitute Trespass on Personalty.* — An action of trespass *vi et armis* can be maintained for taking away<sup>4</sup> or for killing<sup>5</sup> or injuring a dog<sup>6</sup> or other domestic animal;<sup>7</sup> for injury to horses and other property from careless driving;<sup>8</sup> for the death of a slave killed by the hirer;<sup>9</sup> for wrongful issue of process;<sup>10</sup> for abuse of lawful process;<sup>11</sup> for levy on exempt property.<sup>12</sup> It has been held that a shipowner who refused to carry a passenger according to his engagement thereby terminated the contract of carriage, and was liable in trespass for carrying the passenger's luggage beyond his reach.<sup>13</sup>

*Acts Which Do Not Constitute Trespass on Personalty — Original Taking Must Be a Trespass.* — In trespass *de bonis asportatis*, if the original taking be not a trespass as against the plaintiff, the subsequent conversion of the property will not render the defendant liable.<sup>14</sup>

*After a Delivery of Goods Sold*, the seller cannot, on account of fraud in the contract, forbid the goods to be taken away, and bring an action of trespass against the person taking them away.<sup>15</sup>

*Where Violence Used — No Trespass.* — It is not trespass to use violence amounting to breach of the peace in taking property which the defendant had bought from the plaintiff's vendee, and which he had the plaintiff's oral permission to take,<sup>16</sup> or to defend the possession of property against attachment by an officer until he has disclosed his authority.<sup>17</sup>

*c. SINGLE TRESPASS.* — A single trespass may be constituted by several

1. *Officer Breaking In to Serve Civil Writ.* — *Kelley v. Schuyler*, 20 R. I. 432, 78 Am. St. Rep. 887.

An officer who, after attaching B's furniture in A's house in Boston, occupied the house by a keeper for seven hours in the middle of the day without making any attempt to begin to remove the things, became a trespasser *ab initio*. *Davis v. Stone*, 120 Mass. 228.

Executing a distress warrant in the night time is a trespass. *Sherman v. Dutch*, 16 Ill. 283.

2. *Wendell v. Johnson*, 8 N. H. 220, 29 Am. Dec. 648.

3. *Trespass on Personalty — Disturbance of Possession the Test.* — *Holmes v. Doane*, 3 Gray (Mass.) 329; *Coffin v. Field*, 7 Cush. (Mass.) 355; *Codman v. Freeman*, 3 Cush. (Mass.) 306; *Anderson v. Kincheloe*, 30 Mo. 520; *Pope v. Cordell*, 47 Mo. 251.

*Constructive Possession of Goods*, by one having the general property in them and a right to reduce them to possession at pleasure, is sufficient to maintain either trespass or replevin. There is a tortious taking whenever there is an unlawful meddling with the property, or an exercise or claim of dominion over it without any pretense of authority or right. This, without a manual seizing of the property, is sufficient. *Haythorn v. Rushforth*, 19 N. J. L. 160, 38 Am. Dec. 540.

4. *Athill v. Corbet*, Cro. Jac. 463.

5. *White v. Brantley*, 37 Ala. 430; *Jemison v. Southwestern R. Co.*, 75 Ga. 444, 58 Am. Rep. 476; *Jacquay v. Hartzell*, 1 Ind. App. 500.

6. *Dand v. Sexton*, 3 T. R. 37; *Heiligmann v. Rose*, 81 Tex. 222, 26 Am. St. Rep. 804.

7. See the title *ANIMALS*, vol. 2, p. 341.

8. *Rappelyea v. Hulse*, 12 N. J. L. 257; *Burdick v. Worrall*, 4 Barb. (N. Y.) 596; *Waldron v. Hopper*, 1 N. J. L. 390.

9. *Nelson v. Bondurant*, 26 Ala. 341.

10. *Wrongful Issue of Process.* — *Coltraine v. McCain*, 3 Dev. L. (14 N. Car.) 308, 24 Am. Dec. 256; *Muse v. Vidal*, 6 Munf. (Va.) 27; *Boscher v. Roullier*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 396.

11. *Abuse of Lawful Process.* — *Vail v. Lewis*, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300; *Young v. Hyde*, 14 N. H. 35; *Codman v. Freeman*, 3 Cush. (Mass.) 306; *Green v. Morse*, 5 Me. 291; *Collins v. Waggoner*, 1 Ill. 186; *State v. Beckner*, 132 Ind. 371, 32 Am. St. Rep. 257.

12. *Levy on Exempt Property.* — *Dow v. Smith*, 7 Vt. 465, 29 Am. Dec. 202.

13. *Holmes v. Doane*, 3 Gray (Mass.) 328.

14. *Original Taking Must Be a Trespass.* — *Davis v. Young*, 20 Ala. 151; *Henderson v. Marx*, 57 Ala. 169; *Bradley v. Davis*, 14 Me. 44, 30 Am. Dec. 729.

15. *Delivery of Goods* — *M'Carty v. Vickery*, 12 Johns. (N. Y.) 348.

16. *Mills v. Wooters*, 59 Ill. 234.

17. *Leach v. Francis*, 41 Vt. 670.



acts done at different times and at different places, if they are all a part of the same transaction.<sup>1</sup> A single trespass may be committed on several closes.<sup>2</sup> The act of digging two parallel ditches upon the plaintiff's land and throwing up the earth between them to form a highway constitutes a single trespass.<sup>3</sup> When a single trespass only is alleged, the plaintiff may recover for several acts of trespass committed on the same day and for the same purpose.<sup>4</sup>

**II. ESSENTIALS** — 1. **Injury.** — It is not absolutely necessary that injury result from the act of trespass. Violation of the right of possession is sufficient to give a right to maintain trespass, and entitle to nominal damages, in the absence of proof of substantial injury.<sup>5</sup> The law will always imply some degree of injury.<sup>6</sup> Though the result should be beneficial, instead of injurious, the act is still trespass, and evidence of benefit accruing to the plaintiff's property is inadmissible in justification,<sup>7</sup> and sometimes even in mitigation of damages.<sup>8</sup>

2. **Force** — *a.* **PHYSICAL FORCE.** — Any unlawful exercise of authority over the goods of another, or any unauthorized entry upon the land of another, will support trespass, even though no force be exerted.<sup>9</sup>

1. *Browning v. Skillman*, 24 N. J. L. 351.

The defendants entered the plaintiff's store and put up a quantity of goods in a package, which one of the defendants carried away, while the other remained and selected goods for another package, which, on the return of the first defendant, they together carried away. It was held that the whole might properly be regarded as one trespass. *Harris v. Rosenberg*, 43 Conn. 227.

2. *Halligan v. Chicago, etc., R. Co.*, 15 Ill. 558.

3. *Ziebarth v. Nye*, 42 Minn. 541.

4. *Gusdorff v. Duncan*, 94 Md. 160.

In *Owens v. State*, 74 Ala. 401, it was decided that a single entry by the defendant, and moving from place to place on the lands of the prosecutor, on one and the same occasion, could not be divided into two acts of trespass. See also *infra*, this title, *Evidence*.

5. **Injury Not Essential** — *California.* — *Sefton v. Prentice*, 103 Cal. 670.

*Delaware.* — *Quillen v. Betts*, 1 Penn. (Del.) 53.

*Illinois.* — *Pfeiffer v. Grossman*, 15 Ill. 53.

*Maine.* — *Esty v. Baker*, 48 Me. 495.

*Maryland.* — *Baltimore, etc., R. Co. v. Boyd*, 67 Md. 32, 1 Am. St. Rep. 362.

*Massachusetts.* — *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241.

*Mississippi.* — *Keirn v. Warfield*, 60 Miss. 799; *Agnew v. Jones*, 74 Miss. 347.

*New Jersey.* — *U. S. Pipe Line Co. v. Delaware, etc., R. Co.*, 62 N. J. L. 254.

*New York.* — *Dixon v. Clow*, 24 Wend. (N. Y.) 188.

*Texas.* — *McCarthy v. Miller*, (Tex. Civ. App. 1900) 57 S. W. Rep. 973.

*Vermont.* — *New England Trout, etc., Club v. Mather*, 68 Vt. 338; *Bragg v. Laraway*, 65 Vt. 673.

See also *Ashby v. White*, 2 Ld. Raym. 955; *Mellor v. Spateman*, 1 Saund. 346, note 2.

**Contra.** — *Ramey v. W. W. Kimball Co.*, 58 S. W. Rep. 471, 22 Ky. L. Rep. 597.

**Illustrations** — **Crossing Uncultivated Private Lands** to reach public waters for the purpose of fishing is a trespass, notwithstanding the declaration in Acts 1892, No. 80, that it is not actionable to do so unless actual damage is

done. *New England Trout, etc., Club v. Mather*, 68 Vt. 338.

**Neglect of Duty by Officer.** — Where the defendant, a field driver, impounded the plaintiff's horse and advertised and sold him prematurely, without giving the plaintiff his lawful opportunity to pay, he was held liable as a trespasser *ab initio*. *Smith v. Gates*, 21 Pick. (Mass.) 55.

**Putting Fence on and Plowing Another's Land.** — In *Pfeiffer v. Grossman*, 15 Ill. 53, a party putting a fence on and plowing another's land, although not actually injuring the property, was held liable.

**By Owner of Easement.** — Action on the case lies against an intruder by one having a right of way, without proof of actual damage. *Williams v. Esling*, 4 Pa. St. 486, 45 Am. Dec. 710.

**Against Owner of Easement.** — Trespass *q. c. f.* lies for placing a shaft from one building to another across a passageway owned by the plaintiff, over which the defendant had a right of way, although the shaft in no way interfered therewith. *Esty v. Baker*, 48 Me. 495.

6. *Embrey v. Owen*, 6 Exch. 353; *Rochdale Canal Co. v. King*, 14 Q. B. 122, 68 E. C. L. 122; *Plumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 199; *Woodman v. Tufts*, 9 N. H. 88; *Snow v. Cowles*, 22 N. H. 302; *Pastorius v. Fisher*, 1 Rawle (Pa.) 27. See also *Baker v. Green*, 2 Bing. 317, 9 E. C. L. 419, where it was held that the law would presume some damage for a breach of duty by a sheriff for not arresting one against whom a writ had been issued.

7. **Beneficial Results Immaterial.** — *Sharpe v. Levert*, 51 La. Ann. 1249; *Hurley v. Jones*, 165 Pa. St. 34; *Murphy v. Fond du Lac*, 23 Wis. 365, 99 Am. Dec. 181; *Haynes v. Thomas*, 7 Ind. 38.

8. *Loomis v. Green*, 7 Me. 386; *Fisher v. Neysmith*, 106 Mich. 71.

But in *Murphy v. Fond du Lac*, 23 Wis. 365, 99 Am. Dec. 181, it was held that though benefit to the plaintiff's land would not form a complete defense, it would enter into the estimate of and reduce the damages. And it was so held in *Burtraw v. Clark*, 103 Mich. 383.

9. **Physical Force Unnecessary** — **As to Personality.** — *Guttner v. Pacific Steam Whaling Co.*, 96 Fed. Rep. 617; *Thornton v. Cochran*, 51 Ala.

*b. WORDS.* — Though mere words by themselves will not constitute a trespass, taken along with the actions which they accompany, actionable trespass may be constituted thereby,<sup>1</sup> and intemperate and threatening language accompanying a trespass upon realty will justify exemplary damages.<sup>2</sup>

**3. Intent.** — The Want of Motive or Intent to do an injury will not make the wrongful act any less a trespass. Action will lie, whether the act is wilful or not, if the injury sustained is the immediate result of the force originally applied by the defendant.<sup>3</sup>

**Where Intent Will Constitute a Trespass.** — While the presence of motive or intent

415; *Hardy v. Clendenen*, 25 Ark. 436; *Kimball v. Custer*, 73 Ill. 389; *Gibbs v. Chase*, 10 Mass. 125; *Robinson v. Mansfield*, 13 Pick. (Mass.) 139; *Miller v. Baker*, 1 Met. (Mass.) 27; *Morse v. Hurd*, 17 N. H. 246; *Haythorn v. Rushforth*, 19 N. J. L. 160, 38 Am. Dec. 540; *Phillips v. Hall*, 8 Wend. (N. Y.) 610, 24 Am. Dec. 108; *Allen v. Crary*, 10 Wend. (N. Y.) 349, 25 Am. Dec. 566; *Stewart v. Wells*, 6 Barb. (N. Y.) 79; *Neff v. Thompson*, 8 Barb. (N. Y.) 213; *Wintringham v. Lafoy*, 7 Cow. (N. Y.) 735; *Ward v. Taylor*, 1 Pa. St. 238; *Faxton v. Steckel*, 2 Pa. St. 93; *Welsh v. Bell*, 32 Pa. St. 12. See also *infra*, this title, *Trespass as to Personality*.

**As to Realty.** — *Hatch v. Donnell*, 74 Me. 163; *Brown v. Perkins*, 1 Allen (Mass.) 89; *Norvell v. Gray*, 1 Swan (Tenn.) 96; *Donovan v. Consolidated Coal Co.*, 88 Ill. App. 589.

Where one is allowed to enter a house by the owner on business, it is still a trespass if he without license allows his assistants to enter against the owner's will. *Cutler v. Smith*, 57 Ill. 252.

**1. Effect of Words to Constitute Trespass.** — A statement by an attaching officer that it was his duty to attach certain oxen, and that he did attach them, and his taking receipts for them, while leaving them in the possession in which he found them, was held not to be sufficient disturbance of the possession to render him liable in trespass. *Rand v. Sargent*, 23 Me. 326, 39 Am. Dec. 625. But see *Wintringham v. Lafoy*, 7 Cow. (N. Y.) 735, where it was held that merely making an inventory, threatening to remove the goods, and taking security for their forthcoming, were sufficient, though they were not touched by the officer.

A defendant's refusal of a request for the privilege of entering his close to cut wheat claimed by the plaintiff was held not to constitute trespass. *Wheeler v. Moore*, *Wright* (Ohio) 408.

A threat to commit an assault is not civilly actionable. *Rankin v. Sievern*, etc., R. Co., 58 S. Car. 532.

But stopping on the sidewalk in front of the plaintiff's house and using abusive language will constitute trespass. *Adams v. Rivers*, 11 Barb. (N. Y.) 390.

In *Robertson v. Cleveland*, etc., Mineral Land Co., 70 Mo. App. 262, the evidence showed that an employee of the defendant, acting under the defendant's orders, first demanded possession from the plaintiff's employees, and on refusal returned with two others and renewed the demand for possession, which was surrendered under compulsion. This was held to be forcible entry.

**2. Merest v. Harvey**, 5 Taunt. 442, 1 E. C. L. 150.

**3. Intent Not Material** — *England*. — *Lotan v. Cross*, 2 Campb. 464.

*Alabama*. — *Allison v. Little*, 85 Ala. 512.

*California*. — *Maye v. Yappen*, 23 Cal. 306.

*Illinois*. — *Burton v. McClellan*, 3 Ill. 434; *Coffman v. Burkhalter*, 98 Ill. App. 304; *Kirton v. North Chicago St. R. Co.*, 91 Ill. App. 559.

*Indiana*. — *Amick v. O'Hara*, 6 Blackf. (Ind.) 258.

*Maine*. — *State v. Smith*, 78 Me. 260, 57 Am. Rep. 802.

*Mississippi*. — *Keirn v. Warfield*, 60 Miss. 799.

*New Hampshire*. — *Cate v. Cate*, 44 N. H. 211.

*New Jersey*. — *Bruch v. Carter*, 32 N. J. L. 554.

*New York*. — *Guille v. Swan*, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234.

*North Carolina*. — *Newsom v. Anderson*, 2 Ired. L. (24 N. Car.) 42, 37 Am. Dec. 406 (where a person cut trees on his own land, and one accidentally fell upon the plaintiff's land, he was held liable for the injury caused).

*Pennsylvania*. — *McBride v. McLaughlin*, 5 Watts (Pa.) 375.

*Tennessee*. — *Luttrell v. Hazen*, 3 Sneed (Tenn.) 20.

*Vermont*. — *Judd v. Ballard*, 66 Vt. 668.

*Wisconsin*. — *Dexter v. Cole*, 6 Wis. 319, 70 Am. Dec. 465; *Gerhardt v. Swaty*, 57 Wis. 24.

**In the Leading Case of Guille v. Swan**, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234, the defendant ascended in a balloon, which came down in the plaintiff's garden. The defendant, being in peril, shouted for help, and a crowd of people broke through the fence into the garden to assist him, and trod down vegetables and flowers. It was held that the defendant was liable in trespass for all the damage done to the garden.

**A Party Unlawfully Engaged in a Fight** will be liable in damages for an injury inflicted by him on a third person not engaged in the fight, though no such injury may have been intended; but if such third person, by his own improper conduct, has brought the injury upon himself by unlawfully, recklessly, and unnecessarily placing himself in the way of danger, it is his own folly and he will be without remedy. *Cogdell v. Yett*, 1 Coldw. (Tenn.) 230.

**Contra.** — In *Roth v. Smith*, 41 Ill. 314, an action of trespass *vi et armis* for vindictive damages for false imprisonment, it was held that if the defendant did not intend when he made the affidavit to cause the plaintiff's arrest, he would not be liable.

is not essential to constitute a trespass, intent may so stamp the character of an act as to make it one.<sup>1</sup> On the other hand, wilfulness in committing the act will aggravate the damages, and evidence thereof is admissible,<sup>2</sup> and punitive damages or "smart money" may be assessed by the jury, although the property itself had no pecuniary value.<sup>3</sup> The mere absence of wilfulness is so little material to the constitution of trespass that, in general, nothing short of unavoidable accident will excuse,<sup>4</sup> and the want of intention to do the particular injury caused,<sup>5</sup> or any injury whatever, will not avail the defendant if the act was an illegal or mischievous one,<sup>6</sup> or a lawful act done in a careless or improper manner, from which injury to third persons may possibly result.<sup>7</sup> But if there be negligence by both parties, there can be no recovery without showing that the damage was wholly caused by the act of the defendant.<sup>8</sup>

#### 1. Where Intent Held to Constitute Trespass. —

In an action *quare clausum fregit*, where A sold his land to B, reserving the grain in the ground, which was to be threshed in the barn and the straw left for B's use; and A afterwards sold the grain to C, who had notice of the agreement with B; and C cut and stacked the grain, and afterwards entered the premises and hauled away and threshed the grain and did not return the straw; it was held that if B's entry was made for the purpose of getting out and removing the grain according to the agreement, although he may have changed his mind afterwards, an action of trespass could not be maintained against him; it was his intention which stamped the character of his act, and that was a question for the jury. *Moats v. Witmer*, 3 Gill & J. (Md.) 118.

Where it was alleged that a party was passing upon his right of way to go upon the land beyond, that was held to mean that he was carrying his intention into effect; he was then using the way for an unauthorized purpose; and it was a charge, not of intention, but of an act done with wrongful intent. *French v. Marstin*, 24 N. H. 450.

**2. Wilfulness as Aggravation — United States.** — *Durant Min. Co. v. Percy Consol. Min. Co.*, 35 C. C. A. 252; *Wooden-ware Co. v. U. S.*, 106 U. S. 432; *Benson Min., etc., Co. v. Alta Min., etc., Co.*, 145 U. S. 428; *Gentry v. U. S.*, 41 C. C. A. 185, 119 Fed. Rep. 70.

*California.* — *Lamb v. Harbaugh*, 105 Cal. 680.

*Georgia.* — *Stevens v. Stevens*, 96 Ga. 374.

*Illinois.* — *Yowell v. Braden*, 29 Ill. App. 29; *Kirton v. North Chicago St. R. Co.*, 91 Ill. App. 554.

*Indiana.* — *Anthony v. Gilbert*, 4 Blackf. (Ind.) 348; *Sunnyside Coal, etc., Co. v. Reitz*, 14 Ind. App. 478.

*Louisiana.* — *Guarantee Trust, etc., Co. v. E. C. Drew Invest. Co.*, 107 La. 251; *Nickerson v. Allen*, 110 La. 194.

*Maryland.* — *Shafer v. Smith*, 7 Har. & J. (Md.) 67; *Schindel v. Schindel*, 12 Md. 108.

*Massachusetts.* — *Sampson v. Henry*, 11 Pick. (Mass.) 379.

*New Jersey.* — *Ogden v. Gibbons*, 5 N. J. L. 598.

*North Carolina.* — *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N. Car. 648.

*Pennsylvania.* — *Huling v. Henderson*, 161 Pa. St. 553; *McBride v. McLaughlin*, 5 Watts (Pa.) 375.

*Tennessee.* — *Holt v. Hayes*, (Tenn. 1903) 73 S. W. Rep. 111.

*Vermont.* — *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496; *Devine v. Rand*, 38 Vt. 621.

*Wisconsin.* — *Gilman v. Brown*, 115 Wis. 1.

**Motive, if Material as to Damages, Is a Fact for the Jury.** — If the motive is material to the estimate of the damages, it is a fact for the jury. The court cannot make the legal conclusion that an act is a wanton trespass. *Longfellow v. Quimby*, 29 Me. 196, 48 Am. Dec. 525; *Sherman v. Dutch*, 16 Ill. 283.

**Contra.** — "The question whether there was sufficient evidence to entitle the plaintiff to recover punitive damages was one for the court and not for the jury." *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N. Car. 648.

**3. Parker v. Mise**, 27 Ala. 480, 62 Am. Dec. 776.

A mortgagor who strips a mortgaged property of all the valuable lumber, when his security is ample, places himself in the light of a wilful trespasser, and in such cases at law the jury may award exemplary damages. *Whiting v. Adams*, 66 Vt. 679, 44 Am. St. Rep. 875.

**4. General Rule — Where Not Unavoidable Accidents, Defendant Liable.** — *Brown v. Kendall*, 6 Cush. (Mass.) 292; *Bullock v. Babcock*, 3 Wend. (N. Y.) 391; *Jennings v. Fundeburg*, 4 McCord L. (S. Car.) 161. And see *Judd v. Ballard*, 66 Vt. 668. See also *infra*, this title, *Excuse, Justification, and Protection — Unavoidable Accident*.

**5. Cogdell v. Yett**, 1 Coldw. (Tenn.) 230; *Munger v. Baker*, 65 Barb. (N. Y.) 539.

**6. Illegal or Mischievous Act — Intention to Injure Immaterial.** — *Scott v. Shepherd*, 2 W. Bl. 802, 3 Wils. C. Pl. 403; *Vanderburgh v. Truax*, 4 Den. (N. Y.) 465, 47 Am. Dec. 268; *Guille v. Swan*, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234; *Munger v. Baker*, 65 Barb. (N. Y.) 539; *Kirton v. North Chicago St. R. Co.*, 91 Ill. App. 554.

**7. Lawful Act — Want of Due Care — Liability Follows.** — *Givens v. Kendrick*, 15 Ala. 648; *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55; *Hunter v. Farren*, 127 Mass. 481, 34 Am. Rep. 423; *Percival v. Hickey*, 18 Johns. (N. Y.) 257; *Vandenburgh v. Truax*, 4 Den. (N. Y.) 464, 47 Am. Dec. 268; *Jordan v. Wyatt*, 4 Gratt. (Va.) 151, 47 Am. Dec. 720.

**8. Brown v. Kendall**, 6 Cush. (Mass.) 292. Compare *Cogdell v. Yett*, 1 Coldw. (Tenn.) 230. See *infra*, this title, *Excuse, Justification, and Protection — Contributory Negligence*.



**Due Care and Precaution.** — Parties engaged in the prosecution of a lawful act are not liable for an accidental injury occurring during the performance of the act, when due care and precaution have been exercised.<sup>1</sup> But it has been held in *New York* that where one in making improvements on his own premises, or without lawful right, trespasses upon or injures his neighbor's property by casting material thereon, he is liable absolutely for the damage, irrespective of any question of care or negligence,<sup>2</sup> and this has been extended to injuries to persons traveling on the public highway, caused by the exploding of a blast on the defendant's land.<sup>3</sup>

**Want of Ordinary Care.** — But although without the intention to injure, if there be want of ordinary care and skill, even in the performance of a lawful action, liability follows.<sup>4</sup> No amount of care will excuse where the act performed is illegal.<sup>5</sup>

**III. EXCUSE, JUSTIFICATION, AND PROTECTION** — 1. **Unavoidable Accident.** — Trespass will not lie for injuries caused by unavoidable accident.<sup>6</sup>

2. **Good Faith.** — The act is no less a trespass though committed through ignorance of the parties' rights and in good faith.<sup>7</sup>

1. **Lawful Act** — **Where Due Care Exercised.** — *Williams v. Michigan Cent. R. Co.*, 2 Mich. 259, 55 Am. Dec. 59.

**Burden of Proof on Plaintiff.** — Where damage is done by a party in the exercise of his lawful rights, the plaintiff must prove that the loss occurred without fault on his part and in consequence of the neglect or want of care of the defendant. *Waldron v. Portland, etc., R. Co.*, 35 Me. 422.

2. **Contra** — **Question of Due Care Immaterial.** — *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258; *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 498.

3. *Sullivan v. Dunham*, 161 N. Y. 290, affirming 35 N. Y. App. Div. 342.

4. **Lawful Act** — **Want of Due Care and Skill** — *England.* — *Weaver v. Ward*, Hob. 134; *Wakeman v. Robinson*, 1 Bing. 213, 8 E. C. L. 478; *Gregory v. Piper*, 9 B. & C. 591, 17 E. C. L. 454.

*Connecticut.* — *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55.

*Kentucky.* — *Payne v. Smith*, 4 Dana (Ky.) 497.

*New York.* — *Bullock v. Babcock*, 3 Wend. (N. Y.) 391.

*Texas.* — *Gulf, etc., R. Co. v. Cusenberry*, 86 Tex. 525.

*Vermont.* — *Cogswell v. Baldwin*, 15 Vt. 404, 40 Am. Dec. 686.

*Virginia.* — *Jordan v. Wyatt*, 4 Gratt. (Va.) 151, 47 Am. Dec. 720.

**Illustrations.** — The act of uncocking a gun is voluntary and not unavoidable. *Underwood v. Hewson*, 1 Stra. 596.

And trespass lies for an injury sustained by frightening a horse by firing a gun, if there was reasonable ground to think that the firing might frighten it. *Cole v. Fisher*, 11 Mass. 137.

Shooting at a fox and accidentally killing a dog is trespass; the act of shooting was voluntary. *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496.

If the cattle of a person who is lawfully using a highway stray therefrom into unfenced or insufficiently fenced land, against his will,

he is not a trespasser, but if his cattle are unlawfully grazing upon a highway, and so stray, he is a trespasser. *Dovaston v. Payne*, 2 H. Bl. 527; *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121; *Cool v. Crommet*, 13 Me. 250.

5. **Illegal Act** — **Question of Care Immaterial.** — *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 505; *Sullivan v. Dunham*, 161 N. Y. 290, 76 Am. St. Rep. 274; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258.

6. **Unavoidable Accident.** — *Davis v. Saunders*, 2 Chit. 639, 18 E. C. L. 437; *Goodman v. Taylor*, 5 C. & P. 410, 24 E. C. L. 385; *Brown v. Kendall*, 6 Cush. (Mass.) 292; *Vincent v. Stinehour*, 7 Vt. 62, 29 Am. Dec. 145; *Roche v. Milwaukee Gas Light Co.*, 5 Wis. 55.

Where a horse ran away with its rider, against his will, and beyond his power of prevention, and ran against another, injuring it, the rider was not liable. *Gibbons v. Pepper*, 4 Mod. 405. See also *Wakeman v. Robinson*, 1 Bing. 213, 8 E. C. L. 478; *Goodman v. Taylor*, 5 C. & P. 410, 24 E. C. L. 385.

In *Vincent v. Stinehour*, 7 Vt. 62, 29 Am. Dec. 145, *Williams, C. J.*, after an examination of the authorities, said: "There must be some blame or want of care and prudence to make a man answerable in trespass; and where a horse takes a sudden fright, and there is no imprudence in the rider, either in managing the horse or in driving an unsafe horse, and the horse runs against another and injures him, the trespass is wholly involuntary and unavoidable, for which no action can be maintained." See also *Newell v. Giggey*, 13 Colo. 16.

7. **Good Faith Will Not Excuse** — *Alabama.* — *Allison v. Little*, 85 Ala. 512.

*Kentucky.* — *Johnson v. Park*, (Ky. 1891) 17 S. W. Rep. 273.

*Louisiana.* — *Guarantee Trust, etc., Co. v. L. C. Drew Invest. Co.*, 107 La. 251.

*Missouri.* — *Pitt v. Daniel*, 82 Mo. App. 168; *Macey v. Carter*, 76 Mo. App. 490.

*New York.* — *O'Horo v. Kelsey*, 60 N. Y. App. Div. 604; *Snow v. Pulitzer*, 142 N. Y. 263.

*Tennessee.* — *Luttrell v. Hazen*, 3 Sneed (Tenn.) 20.

**3. Mistake.**— Mere mistake will not excuse a trespass,<sup>1</sup> as where one bought an ox from the plaintiff, who directed him to go and take it from the enclosure, and by mistake he took the wrong ox;<sup>2</sup> or where one, having sold a steer running loose on the prairie, pointed out the wrong animal, which the purchaser killed, and both seller and purchaser were held liable.<sup>3</sup> Nor can the spirit in which the wrongful act was done be shown in mitigation of actual damages,<sup>4</sup> though mistaken belief and good faith will, as a rule, relieve from the statutory penalty<sup>5</sup> and from punitive damages.<sup>6</sup>

*Wisconsin.*— *Hazelton v. Week*, 49 Wis. 661, 35 Am. Rep. 796.

**Purchase from Vendor Who Had No Right to Sell.**— Where A, without B's consent, enters upon B's land and removes therefrom logs which C has unlawfully cut thereon and undertaken to sell to A, such entry and removal constitute a trespass to the realty though made in ignorance of B's rights. *Hazelton v. Weeks*, 49 Wis. 661, 35 Am. Rep. 796.

A, by direction of B, who had purchased of C a lot of timber cut by C without right on the plaintiff's close, entered on the close and removed the wood without knowledge of the defect in the title. It was held that he was liable in trespass. *Higginson v. York*, 5 Mass. 341.

But it must appear that vendor and purchaser acted in concert in doing the illegal act, or that the injury was the natural result of some act which they did, for the mere sale of land held by doubtful title or in adverse possession is not in itself illegal. *McClanahan v. Stephens*, 67 Tex. 354; *Sullivan v. Davis*, 29 Kan. 28.

**Under Statute.**— The defendants were held liable in treble damages for the carrying away of timber standing upon the plaintiff's land, without any lawful authority for taking it, although they had probable cause for believing and did believe that they had authority from the plaintiff for taking the timber. *Loewenberg v. Rosenthal*, 18 Oregon 178.

By statute in *Wisconsin* mistake as to the validity of title may mitigate damages for cutting timber, from "highest market value" to "actual damages." *Warren v. Putnam*, 68 Wis. 481.

But mistake as to validity of title will not excuse trespass where the plaintiff has made a claim. *Warren v. Putnam*, 68 Wis. 481.

And this extends to the case of a purchaser of timber who has knowledge of the claim. *Gerhardt v. Swaty*, 57 Wis. 24.

**Ignorance of Boundary Line.**— And where the defendant is in ignorance of the boundary line, good faith will not justify a trespass where his commands to his servants as to the place to cut timber from are indefinite. *Keirn v. Warfield*, 60 Miss. 799.

And where ignorance of the boundary line is the result of negligence, he will even be liable in treble damages where trees have been cut on another's land by his authority. *Crisler v. Ott*, 72 Miss. 166.

**1. Mistake Will Not Excuse.**— *Jeffries v. Hargis*, 50 Ark. 65; *Maye v. Yappen*, 23 Cal. 306; *Bowlin v. Siler*, 42 S. W. Rep. 90, 19 Ky. L. Rep. 788; *Pearson v. Inlow*, 20 Mo. 322, 64 Am. Dec. 189; *Blaen Avon Coal Co. v. Mc-*

*Culloh*, 59 Md. 403, 43 Am. Rep. 560; *Perry v. Jeffries*, 61 S. Car. 292.

**2.** *Hobart v. Hagget*, 12 Me. 67, 28 Am. Dec. 159.

**3.** *Hamilton v. Hunt*, 14 Ill. 472.

**4. Will Not Mitigate Actual Damages.**— *Maye v. Yappen*, 23 Cal. 306, where the owners of a mining claim took away gold-bearing earth from the adjoining claim in ignorance of the location of the dividing line. But see *Guarantee Trust, etc., Co. v. E. C. Drew Invest. Co.*, 107 La. 251.

Where the trespass was by mistake and unintentional, the value of the property when first taken, *i. e.*, in this case, the value of trees as standing trees, and not as logs, must govern. *Clark v. Holdridge*, 12 N. Y. App. Div. 613.

A distinction is frequently made between wilful trespassers and trespassers in good faith by assessing the actual damages against the former as the value of the goods in the market, and against the latter as the value at severance or taking. See *infra*, this title, *Damages*.

**5. Will Relieve from Statutory Penalty**— *Alabama*.— *Russell v. Irby*, 13 Ala. 131; *Glenn v. Adams*, 129 Ala. 189.

*Illinois*.— *Whitcraft v. Vanderver*, 12 Ill. 235; *Watkins v. Gale*, 13 Ill. 152; *Roth v. Smith*, 41 Ill. 314; *David v. Correll*, 74 Ill. App. 47.

*Kansas*.— *Wagstaff v. Schippel*, 27 Kan. 450.

*Michigan*.— *Russell v. Myers*, 32 Mich. 522.

*Missouri*.— *Klotz v. Lindsay*, 88 Mo. App. 594; *Pitt v. Daniel*, 82 Mo. App. 168; *Holliday v. Jackson*, 30 Mo. App. 263.

*New Hampshire*.— *Batchelder v. Kelly*, 10 N. H. 436, 34 Am. Dec. 174.

*Texas*.— *Lackey v. State*, 14 Tex. App. 164; *Allsup v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 1062.

**Contra.**— *Webber v. Quaw*, 46 Wis. 118.

The agent of S. entered into negotiations with P. for the purchase of certain timber, provided it stood on P.'s land. P. had a survey made, which by mistake showed the timber to be upon his land, and the agent cut it down under a contract of sale by which he was to take it away within three years. It was held that P. and S. were both liable in treble damages to the real owner of the land on which the timber stood. *McCloskey v. Powell*, 123 Pa. St. 62, 10 Am. St. Rep. 513.

In *Macey v. Carter*, 76 Mo. App. 490, where it was held that good faith and mistake would not mitigate the statutory penalty of double damage, *Rousey v. Wood*, 57 Mo. App. 651, was followed, but the peculiar circumstances of that case were apparently overlooked.

**6. Will Relieve from Punitive Damages**— *United States*.— *Durant Min. Co. v. Percy*

**4. Necessity.** — Necessity for the performance of the act will, as a rule, excuse.<sup>1</sup>

**5. Contributory Negligence.** — Negligence or fault of the person sustaining the injury will not excuse, unless it, along with the defendant's fault, is the direct cause of the damage.<sup>2</sup>

**Right of Trespasser to Maintain Trespass.** — A trespasser is liable for the injury which he does, but he does not forfeit his right of action for an injury sustained.<sup>3</sup>

**6. Acquiescence.** — Acquiescence in an act of trespass will, as a rule, bar one from maintaining an action for damages resulting therefrom,<sup>4</sup> as where

Consol. Min. Co., 35 C. C. A. 252; *Gentry v. U. S.*, 41 C. C. A. 185, 119 Fed. Rep. 70.

*Georgia.* — *Yahoola River, etc., Hydraulic Hose Min. Co. v. Irby*, 40 Ga. 479.

*Illinois.* — *Farwell v. Warren*, 51 Ill. 467. See also *Cutler v. Smith*, 57 Ill. 252.

*Kentucky.* — *Columbia Land, etc., Co. v. Tinsley*, 60 S. W. Rep. 10, 22 Ky. L. Rep. 1082.

*Louisiana.* — *Guarantee Trust, etc., Co. v. Holzell*, 107 La. 745; *Shepherd v. Young*, 2 La. Ann. 238.

*Maine.* — *Longfellow v. Quimby*, 29 Me. 196, 48 Am. Dec. 525.

*New York.* — *Dyke v. National Transit Co.*, 22 N. Y. App. Div. 360.

*Texas.* — *Jackel v. Reiman*, 78 Tex. 588.

*Wisconsin.* — *Scheer v. Kriesel*, 109 Wis. 127.

**1. Necessity Will Excuse.** — *Gulf, etc., R. Co. v. Clark*, 41 C. C. A. 597, 101 Fed. Rep. 678; *Mason v. Mansfield*, 4 Cranch (C. C.) 580; *Southern Bell Telephone, etc., Co. v. Constantine*, 23 U. S. App. 56.

**In Constructing a Highway.** — *Cool v. Crommet*, 13 Me. 250.

**In Stopping Fire.** — It is lawful to destroy buildings in case of a fire. *Conwell v. Emrie*, 2 Ind. 35; *Beach v. Trudgain*, 2 Gratt. (Va.) 219.

But it must be impossible to stop the spread of the fire by other means within the reach of the parties. *Beach v. Trudgain*, 2 Gratt. (Va.) 219.

**In Shoring Buildings.** — *Walters v. Hamilton*, 75 Mo. App. 237 (here the defendant had the owner's authority to enter to shore); *Buck v. Weeks*, 194 Pa. St. 522.

**In Stopping Prairie Fire.** — If an act be done from evident necessity which, without such necessity, would be illegal (as setting the prairie on fire to make a back fire, at a period of the year when this is not allowed by statute), it must appear that every possible care and diligence was taken to avoid injury to others or their property. *Burton v. McClellan*, 3 Ill. 434.

**In Erecting Electric-light Poles and Stringing Wires.** — Where an electric-light company has authority from a town to erect poles and string wires, the right to touch the trees of an abutting owner must be justified by necessity. *Van Siclen v. Jamaica Electric Light Co.*, 45 N. Y. App. Div. 1.

**Where Necessity No Justification.** — See *Dexter v. Alfred*, 74 Hun (N. Y.) 259; *Ellis v. Blue Mountain Forest Assoc.*, 69 N. H. 385.

**City's Authority Makes No Necessity.** — Au-

thority by a city to contractors to construct a sewer will not make the deposit of dirt from excavations upon the land of an abutting owner a necessity, and the owner may recover by trespass. *Kinser v. Dewitt*, 7 Ind. App. 597.

**Destruction of Property Unjustified by Necessity.** — Trespass was held to lie where liquors belonging to private owners were destroyed by the citizens in anticipation of the arrival of the federal army. *Harrison v. Wisdom*, 7 Heisk. (Tenn.) 99.

**2. Contributory Negligence — England.** — *Dovaston v. Payne*, 2 H. Bl. 527; *Butterfield v. Forrester*, 11 East 60. See also *Lynch v. Mordin*, 1 Q. B. 29, 41 E. C. L. 422, 4 Per. & Dav. 677.

*United States.* — 2 *Wheaton's Selwyn* 852, where it is said: "If the immediate and proximate cause of damage be the unskillfulness of the plaintiff, he cannot recover." Cited in *Betha v. Taylor*, 3 Stew. (Ala.) 484.

*Maine.* — *Cool v. Crommet*, 13 Me. 250.

*Massachusetts.* — *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121.

*New Hampshire.* — *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546.

*Pennsylvania.* — *Wynn v. Allard*, 5 W. & S. (Pa.) 524.

Contributory negligence is no defense to an unlawful and intentional assault. *Emmons v. Quade*, 176 Mo. 22.

**Where Fault of Injured Party May Excuse.** — *Myers v. Parker*, 74 Hun (N. Y.) 129.

Neglect or want of care on the part of the plaintiff, co-operating in producing the injury, will prevent recovery. *Waldron v. Portland*, etc., R. Co., 35 Me. 422.

**3. Right of Trespasser to Maintain Trespass — England.** — *Barnes v. Ward*, 9 C. B. 392; *Bird v. Holbrook*, 4 Bing. 628, 1 M. & P. 607; *Lynch v. Mardin*, 1 Q. B. 29, 41 E. C. L. 422, 4 Per. & Dav. 677; *Jordin v. Crump*, 8 M. & W. 782.

*Connecticut.* — *Johnson v. Patterson*, 14 Conn. 1, 35 Am. Dec. 96; *Birge v. Gardiner*, 19 Conn. 507, 50 Am. Dec. 261.

*New Hampshire.* — *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546.

*Contra.* — *Roulston v. Clark*, 3 E. D. Smith (N. Y.) 373.

**4. Acquiescence Will Bar Recovery.** — *Cadwell v. Farrell*, 28 Ill. 438; *Dutton v. Wetmore*, 10 Pa. Super. Ct. 530; *Ashcraft v. Cox*, (Ky. 1899) 50 S. W. Rep. 986.

Where the defendant applied to the bailee of goods for them, saying that he had authority from the owner to sell them, and took the



the trespass has been waived by referring the matter to a referee,<sup>1</sup> or where long assent to an act has, by implication, authorized the doing of another act necessary for the perfect use of the privilege.<sup>2</sup> But a railroad company who had been forbidden by the owner of land to enter thereon was held to acquire no right to do so from his subsequent mere acquiescence,<sup>3</sup> and acquiescence by one who had been deceived by a pretense of legal authority is not such consent as to affect his remedy at law.<sup>4</sup>

**Acquiescence Will Not Be Implied from Mere Inaction** on the landowner's part, though he is informed of the fact that a railroad company has entered or constructed its road upon his land, and if it has not evoked its right of eminent domain it will be liable in trespass.<sup>5</sup>

**Prohibition Unnecessary.** — One is not bound to object to the entry of contractors on his land to make the person employing them guilty of trespass.<sup>6</sup>

**A Presumption of Acquiescence May Be Rebutted**, as by evidence of want of means to bring suit.<sup>7</sup>

**7. Acting under Legal Advice.** — It is no defense that the defendant acted under the advice of counsel.<sup>8</sup>

**8. Protection of Process — In General.** — Where process is regularly issued by a court of competent jurisdiction, officers acting under its authority are protected from liability for trespass.<sup>9</sup>

**Process Regular on Its Face.** — It is enough for the officer's protection if the process or warrant is regular on its face, though there may have been some irregularity in issuing it.<sup>10</sup>

goods, sold them, and paid part of the proceeds to the bailee, requesting him to pay it to the owner, who received it without objection and requested the bailee to call on the defendant for the remainder, it was held that the defendant was not liable in trespass, though he could not show any authority from the owner to make the sale. *Wellington v. Drew*, 16 Me. 51.

1. *Patterson v. Peironnet*, 7 Watts (Pa.) 337.

2. *Law v. Nettles*, 2 Bailey L. (S. Car.) 447.

3. *Currie v. Natchez*, etc., R. Co., 61 Miss. 725.

4. *Bagwell v. Jamison*, Cheves L. (S. Car.) 249.

5. **Acquiescence Not Implied from Inaction.** — *Childs v. Kansas City*, etc., R. Co., 117 Mo. 414; *Walker v. Chicago*, etc., R. Co., 57 Mo. 275.

6. **Prohibition Unnecessary.** — *Northern Trust Co. v. Palmer*, 171 Ill. 383; *Marshall v. Eggleston*, 82 Ill. App. 52.

7. *Harris v. Ansonia*, 73 Conn. 359.

8. **Acting under Legal Advice.** — *Medairy v. McAllister*, (Md. 1903) 55 Atl. Rep. 461.

9. **Process Regularly Issued.** — *Wall v. Farnham*, 46 Me. 525; *Twitchell v. Shaw*, 10 Cush. (Mass.) 46, 57 Am. Dec. 80; *Wilmarth v. Burt*, 7 Met. (Mass.) 257; *Henderson v. Brown*, 1 Cal. (N. Y.) 92, 2 Am. Dec. 164; *Fitzgerald v. Elliott*, 162 Pa. St. 118, 42 Am. St. Rep. 812; *Evans v. Cleaver*, (Ky. 1896) 38 S. W. Rep. 133.

**Where the Warrant Is in Order.** — "Lord Mansfield said, in *Cooper v. Booth*, cited 2 Sharkie's Ev. 819, it would be a solecism to say that the legal execution of a legal warrant could be a trespass." *Sharkey, C. J.*, in *Payne v. Green*, 10 Smed. & M. (Miss.) 507.

10. **Process Regular on Its Face** — *England*. — *Rex v. Danser*, 6 T. R. 242.

*Alabama*. — *Averett v. Thompson*, 15 Ala. 678.

*California*. — *Thornburgh v. Hand*, 7 Cal. 554; *Burnham v. Stone*, 101 Cal. 164.

*Illinois*. — *Hill v. Figley*, 25 Ill. 156.

*Kentucky*. — *Lovier v. Gilpin*, 6 Dana (Ky.) 321.

*Maine*. — *Carle v. Delesdernier*, 13 Me. 363, 29 Am. Dec. 508; *Chase v. Fish*, 16 Me. 132; *Wilton Mfg. Co. v. Butler*, 34 Me. 431.

*Massachusetts*. — *Donahue v. Shed*, 8 Met. (Mass.) 326.

*Minnesota*. — *Mower v. Stickney*, 5 Minn. 397.

*Missouri*. — *Turner v. Franklin*, 29 Mo. 285; *Peery v. Gill*, 36 Mo. App. 685.

*New Hampshire*. — *Woods v. Davis*, 34 N. H. 328.

*New York*. — *Warner v. Shed*, 10 Johns. (N. Y.) 138; *Putnam v. Man*, 3 Wend. (N. Y.) 202, 20 Am. Dec. 686; *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181, *overruling* *Suydam v. Keys*, 13 Johns. (N. Y.) 444; *Earl v. Camp*, 16 Wend. (N. Y.) 562; *Horton v. Hendershot*, 1 Hill (N. Y.) 118; *Deyo v. Van Valkenburgh*, 5 Hill (N. Y.) 242.

*Pennsylvania*. — *Billings v. Russell*, 23 Pa. St. 189, 62 Am. Dec. 330.

*Virginia*. — *Yeager v. Carpenter*, 8 Leigh. (Va.) 454, 31 Am. Dec. 665.

*Wisconsin*. — *Sprague v. Birchard*, 1 Wis. 457; *Young v. Wise*, 7 Wis. 128; *Bogert v. Phelps*, 14 Wis. 88.

**Acting Officially.** — But where an officer acts officially and as a volunteer, he must himself show that the process was legal and sufficient. *Hunt v. Ballew*, 9 B. Mon. (Ky.) 390.

**Arresting Privileged Party.** — An officer who acts according to his precept in making an arrest is not a trespasser, although the party arrested be privileged from arrest. *Chase v. Fish*, 16 Me. 132; *Carle v. Delesdernier*, 13 Me. 363, 29 Am. Dec. 508; *Woods v. Davis*, 34 N. H. 328.

**Officer's Assistants Protected.** — The protection extends to the officer's assistants.<sup>1</sup>

**Where Officer Liable, His Assistants Liable.** — But where the officer abuses his authority under a valid and regular process, those assisting him by his command are liable as trespassers;<sup>2</sup> though a person assisting an officer in a legal process will not become a trespasser by a subsequent abuse by the officer of his authority.<sup>3</sup>

**Process Not Regular on Its Face.** — The officer serving process will be liable if it is not regular upon its face.<sup>4</sup>

**Void Process.** — Void process furnishes no protection,<sup>5</sup> either to the officer or to the plaintiff directing or ratifying the same.<sup>6</sup>

**Void for Want of Jurisdiction.** — An officer serving process void from want of jurisdiction is liable in trespass; it affords him no protection.<sup>7</sup>

**Parties Obtaining Process Irregularly Issued Are Liable.** — The parties at whose instance irregular process is issued are liable,<sup>8</sup> though the officer may be protected.<sup>9</sup>

**Only Officers to Whom Process Directed May Serve.** — Process served by a constable or person other than him to whom it is directed will make the party obtaining it,<sup>10</sup> and the person serving it, liable in trespass.<sup>11</sup>

**Must Not Exceed His Authority.** — The officer must keep within the limits of the authority of his process,<sup>12</sup> must levy the process on the proper person or property,<sup>13</sup> and must take the steps pointed out by the law, in order to justify under his authority.<sup>14</sup>

**No Sale or Removal Necessary.** — The mere levy, if unauthorized, is trespass without actual sale or removal of the goods.<sup>15</sup>

1. **Officer's Assistants Protected.** — *Wall v. Farnham*, 46 Me. 525.

If the officer is protected by the process, his aids are protected. *Payne v. Green*, 10 Smed. & M. (Miss.) 507; *Doolittle v. Doolittle*, 31 Barb. (N. Y.) 312; *Killpatrick v. Frost*, 2 Grant Cas. (Pa.) 168.

**Aiding Officially.** — Where a person acts officiously, and not under the command of the officer, he must show a valid process. *Reed v. Rice*, 2 J. J. Marsh. (Ky.) 44, 19 Am. Dec. 122.

2. **Where Officer Liable, Assistants Liable.** — *Oystead v. Shed*, 12 Mass. 506; *Elder v. Morrison*, 10 Wend. (N. Y.) 128, 25 Am. Dec. 548; *Hooker v. Smith*, 19 Vt. 151, 47 Am. Dec. 679.

3. *Wheelock v. Archer*, 26 Vt. 380; *Oystead v. Shed*, 12 Mass. 511.

4. **Process Not Regular on Its Face.** — *Colt v. Eves*, 1 Conn. 243; *Peed v. Barker*, 61 Mo. App. 556.

5. **Void Process.** — *Bond v. Wilder*, 16 Vt. 393; *McCartney v. Smith*, 10 Kan. App. 580.

6. *Howell v. Caryl*, 50 Mo. App. 440.

7. **Void for Want of Jurisdiction.** — *Huddleston v. Spear*, 8 Ark. 406; *Lafon v. Dufrocq*, 9 La. Ann. 350; *Guerin v. Hunt*, 8 Minn. 477; *Tobin v. Addison*, 2 Strobb. L. (S. Car.) 3. See also *Franken v. Trimble*, 5 Pa. St. 520.

8. **Parties Obtaining Liable** — *Dixon v. Watkins*, 9 Ark. 139; *Williams v. Bunker*, 78 Me. 373; *Guerin v. Hunt*, 8 Minn. 487; *Merritt v. St. Paul*, 11 Minn. 223; *Halsted v. Brice*, 13 Mo. 171; *Kerr v. Mount*, 28 N. Y. 659.

9. **Though Officer May Be Protected.** — *Dixon v. Watkins*, 9 Ark. 139; *Williams v. Bunker*, 78 Me. 373; *Kerr v. Mount*, 28 N. Y. 659.

**Party Obtaining.** — A party is never a trespasser for selling property by virtue of an execution in due form, issued upon a judgment

regularly obtained, though the same be afterwards reversed for error, and he is not liable as a trespasser *ab initio* for causing process to be executed, which is regularly obtained, though erroneously granted and subsequently set aside for error. *Kissock v. Grant*, 34 Barb. (N. Y.) 144.

10. *Halsted v. Brice*, 13 Mo. 171.

11. **Person Serving Process Not Directed to Him. Liable.** — *Barley v. Tipton*, 29 Mo. 206; *Friar v. McNama*, 70 Mo. App. 581; *McMillan v. Rowe*, 15 Neb. 520.

12. **Must Not Exceed Authority.** — *Rowe v. Bradley*, 12 Cal. 226; *Leach v. Francis*, 41 Vt. 670.

Where a justice notifies a constable that an appeal has been entered, and the execution superseded, if the constable persists in selling the property he is a trespasser. *O'Donnell v. Mullin*, 27 Pa. St. 199, 67 Am. Dec. 458.

13. **Must Levy on Proper Person or Property.** — *Rowe v. Bradley*, 12 Cal. 226; *Colt v. Eves*, 12 Conn. 243; *Waren v. Cochran*, 30 N. H. 379; *Moore v. Bowman*, 47 N. H. 494.

But an officer will not be liable in trespass for taking out of the custody of the defendant in a writ of replevin temporary buildings upon leased land, as these become chattels under the suit. *Gilbert v. Buffalo Bill's Wild West Co.*, 70 Ill. App. 326.

14. **Must Take Proper Legal Steps.** — *Boston, etc., R. Co. v. Small*, 85 Me. 462, 35 Am. St. Rep. 379; *Smith v. Gates*, 21 Pick. (Mass.) 55; *Coddington v. White*, 2 Duer (N. Y.) 390; *Bond v. Wilder*, 16 Vt. 393.

15. **No Sale or Removal Necessary.** — *Robinson v. Mansfield*, 13 Pick. (Mass.) 139; *Miller v. Baker*, 1 Met. (Mass.) 27; *Gibbs v. Chase*, 10 Mass. 125; *Stewart v. Wells*, 6 Barb. (N. Y.) 79; *Stevens v. Somerindyke*, 4 E. D. Smith (N.

**Liable for Deputy.** — A sheriff is liable for the unauthorized levy of his deputy.<sup>1</sup>

**9. Authority of Government.** — It is a good defense by an officer of the United States government that he acted under the lawful orders of the President of the United States and the secretary of the navy.<sup>2</sup>

**10. Authority of Statute.** — What would otherwise be a trespass is sometimes authorized by the legislature, and an officer acting under the authority of a statute is protected thereby.<sup>3</sup>

**11. Military Necessity.** — While military necessity will protect a member of an army of occupation from liability for taking, for the use of the army, private property belonging to the enemy, indiscriminate plundering, and the needless destruction of public or private property devoted to civil uses, are not authorized either by the laws of war or of nations, and either in peace or war a soldier who executes an illegal order is liable in a civil action to the party injured.<sup>4</sup>

**12. Legal Title.** — One having the legal title to property can enter peaceably without being guilty of trespass at the instance of one who has no lawful right to prevent the entry.<sup>5</sup> If a party can reclaim his own without committing a breach of the peace, he is not a trespasser.<sup>6</sup> The defendant may dispute the possessory right in the plaintiff, where the latter is in possession, by showing that the title and possessory right are vested in himself,<sup>7</sup> and

Y.) 418; *Paxton v. Steckel*, 2 Pa. St. 93; *Welsh v. Bell*, 32 Pa. St. 12.

**1. Liable for Deputy.** — *Miller v. Baker*, 1 Met. (Mass.) 27; *Stewart v. Wells*, 6 Barb. (N. Y.) 79.

**2. Authority of Government.** — *Durand v. Hollins*, 4 Blatchf. (U. S.) 451; *Ruan v. Perry*, 3 Cai. (N. Y.) 120.

**3. Authority of Statute.** — *Cool v. Crommet*, 13 Me. 250; *Keene v. Chapman*, 25 Me. 126; *Smith v. McAdam*, 3 Mich. 506; *Brown v. Beatty*, 34 Miss. 227, 69 Am. Dec. 389; *Woods v. Nashua Mfg. Co.*, 4 N. H. 527; *Edwards v. Law*, 63 N. Y. App. Div. 451; *McKee v. Pittsburgh*, 7 Pa. Super. Ct. 397.

**Authority of City Ordinance.** — In an action for cutting and disfiguring certain trees on the sidewalk in front of the plaintiff's lot, it was held a good defense that the defendant complied with the city ordinance requiring it to move its poles, and that the trimming of the trees was necessary and done under the directions of the city officers. *Southern Bell Telephone, etc., Co. v. Constantine*, 23 U. S. App. 56.

**Remedy of Party Injured.** — The remedy of the party injured will be as provided for in the statute. *Keene v. Chapman*, 25 Me. 126; *Smith v. McAdam*, 3 Mich. 506; *Woods v. Nashua Mfg. Co.*, 4 N. H. 527; *McKee v. Pittsburgh*, 7 Pa. Super. Ct. 397; *Robinson v. Winch*, 66 Vt. 110.

If the statute provides no specific remedy he must recover by an action of debt at common law. *Lebanon v. Olecott*, 1 N. H. 339.

**4.** See the title *MILITARY LAW*, vol. 20, p. 665.

**5. Under Legal Title** — *California*. — *Henderson v. Grewell*, 8 Cal. 581; *Canavan v. Gray*, 64 Cal. 5; *Burnham v. Stone*, 101 Cal. 161.

*Delaware*. — *Cann v. Warren*, 1 Houst. (Del.) 188.

*Georgia*. — *Clower v. Maynard*, 112 Ga. 340.

*Illinois*. — *Ryan v. Sun Sing Chow Poy*, 164

Ill. 259; *Mueller v. Kuhn*, 46 Ill. App. 496; *Schaefer v. Silverstein*, 46 Ill. App. 608; *White v. Naerup*, 57 Ill. App. 115.

*Indiana*. — *Culver v. Smart*, 1 Ind. 50.

*Kentucky*. — *Yeates v. Allin*, 2 Dana (Ky.) 134; *Tribble v. Frame*, 7 J. J. Marsh. (Ky.) 617; *Stillwell v. Duncan*, 103 Ky. 59, 19 Ky. L. Rep. 1701; *Hope v. Cason*, 3 B. Mon. (Ky.) 544.

*Maine*. — *Freeman v. Thayer*, 29 Me. 369.

*Maryland*. — *New Windsor v. Stocksdales*, 95 Md. 196.

*Massachusetts*. — *Williston v. Morse*, 10 Met. (Mass.) 17; *Lackey v. Holbrook*, 11 Met. (Mass.) 458.

*New Hampshire*. — *Rossiter v. Russell*, 18 N. H. 73; *Brown v. Foss*, 39 N. H. 525.

*New York*. — *Hyatt v. Wood*, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; *Wood v. Hyatt*, 4 Johns. (N. Y.) 313.

*North Carolina*. — *Walton v. File*, 1 Dev. & B. L. (18 N. Car.) 567.

*Vermont*. — *McGrady v. Miller*, 14 Vt. 128.

"To say that a person has a legal right of entry, but that he has no legal right to enter without the occupant's consent, or unless the occupant shall have surrendered the possession, or left it derelict, would be inconsistent and unmeaning." *Yeates v. Allin*, 2 Dana (Ky.) 134.

Although parol contracts for land are not valid under the *Kentucky* statute for a longer period than five years, nor enforceable under the statute of frauds if for longer than one year, the vendee under such a contract who has possession and has not renounced the contract may maintain trespass against the vendor entering, who has not given notice to quit. *Hope v. Cason*, 3 B. Mon. (Ky.) 544.

**6.** *Burke v. Douglass*, 115 Mich. 197.

**7. Defendant May Show Title and Possessory Right.** — *Barbarick v. Anderson*, 45 Mo. App. 270; *Cox v. Barker*, 81 Mo. App. 181; *Reed v. Price*, 30 Mo. 442; *Fuhr v. Dean*, 26 Mo. 116, 69 Am. Dec. 484.



after the entry, subsequent forcible acts will not make the owner a trespasser.<sup>1</sup>

**Title Prevailing Against Actual Possession with Bond to Convey.** — One without possession, holding a conveyance from the patentee, is not a trespasser when he enters on land in actual possession of one holding the patentee's bond to convey.<sup>2</sup> And a mere agreement to sell land confers on the grantee no license to enter,<sup>3</sup> nor to maintain trespass against the owner from whom he has the treaty of purchase for entering upon the land, as he is a mere tenant at will.<sup>4</sup>

**Must Connect with Outstanding Title in a Stranger.** — It is no defense to show a better outstanding title to land than that of the plaintiff, in a third person, unless the defendant can connect himself therewith or show authority or permission from such third person to make the entry.<sup>5</sup>

**13. License.** — Entry may be made under license from the owner,<sup>6</sup> the burden of proof of which is on the defendant seeking by it to justify his entry.<sup>7</sup>

**1. Subsequent Forcible Acts Will Not Make a Trespass.** — *Tribble v. Frame*, 7 J. J. Marsh. (Ky.) 617; *Harris v. Gillingham*, 6 N. H. 9, 23 Am. Dec. 701; *Barnes v. Dean*, 5 Watts (Pa.) 543, 30 Am. Dec. 346; *Stillwell v. Duncan*, 103 Ky. 59, 19 Ky. L. Rep. 1701; *Latta v. Redden*, 5 Ky. L. Rep. 426; *Illinois, etc., R., etc., Co. v. Cobb*, 94 Ill. 55; *Schaefer v. Silverstein*, 46 Ill. App. 608.

**Whether Lawful Owner May Enter by Force.** — As to whether a lawful owner entitled to immediate possession can use force in entering without being liable in trespass the decisions conflict. *State v. Ross*, 4 Jones L. (49 N. Car.) 315, 69 Am. Dec. 751, attempts to reconcile the decisions.

*Ives v. Ives*, 13 Johns. (N. Y.) 235, says: "It is also well settled that the person having title, that is having a right to enter, is not liable, in an action of trespass, for entering with force, although liable to indictment for a forcible entry. *Wilde v. Cantillon*, 1 Johns. Cas. (N. Y.) 123; *Hyatt v. Wood*, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258."

*Hyatt v. Wood*, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258, distinguishes between the ousted party's right to maintain an action for trespass by assault and battery and an action for trespass *quare clausum fregit*.

*Wilde v. Cantillon*, 1 Johns. Cas. (N. Y.) 123, decides that a tenant on sufferance cannot maintain trespass against the landlord.

*Wood v. Hyatt*, 4 Johns. (N. Y.) 313, decided on the same ground as *Wilde v. Cantillon*, 1 Johns. Cas. (N. Y.) 123, against the contention that it was a mere struggle for the possession.

In *Burnham v. Stone*, 101 Cal. 164, it was held, following the *English* rule, that no liability for damages was created by the entry of the rightful owner upon his land in wrongful possession of another, nor for the expulsion or attempted expulsion of the occupants by force, unless more force or violence was used than was reasonably necessary.

2. *Gatewood v. Head*, 2 Litt. (Ky.) 60.

3. *Erwin v. Olmsted*, 7 Cow. (N. Y.) 220.

4. *Walton v. File*, 1 Dev. & B. L. (18 N. Car.) 567. But see *Carney v. Reed*, 11 Ind. 417.

5. **Defendant Must Connect with Outstanding Title** — *Owings v. Gibson*, 2 A. K. Marsh. (Ky.) 515; *Jones v. Patterson*, 66 S. W. Rep. 377,

23 Ky. L. Rep. 1838; *Danforth v. Briggs*, 89 Me. 316; *Sullivan v. Eddy*, 164 Ill. 391.

But it is sufficient if he show a paramount outstanding title in another, to defeat an action under the *Georgia* statute allowing the owner or reversioner to maintain trespass while the tenant is in possession, because, in order to bring himself within the statute, a plaintiff out of possession must show himself the true owner. *Whiddon v. Williams Lumber Co.*, 98 Ga. 700; *Yahoola River, etc., Hydraulic Hose Min. Co. v. Irby*, 40 Ga. 482.

**6. Under License.** — *Coxe v. England*, 65 Pa. St. 212; *Ashcraft v. Cox*, 50 S. W. Rep. 986, 21 Ky. L. Rep. 31; *Danforth v. Briggs*, 89 Me. 316. See the title LICENSE (REAL PROPERTY), vol. 18, p. 1127.

See *Hall v. Louis Weber Bldg. Co.*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 551, where the distinction is made between the damage to personal property and the damages for the trespass. In this case a contractor entered upon the plaintiff's premises to shore up a building under a conditional license, and broke the conditions. It was held that he "did not commit a trespass, because he had a license from the plaintiff, and if the action were only for damages for trespass it would not lie," but "so far as it is an action for damages to personal property it will lie."

See also *Ramey v. W. W. Kimball Co.*, 58 S. W. Rep. 471, 22 Ky. L. Rep. 597, where a company, by its servants, peaceably entered the plaintiff's house and removed a piano hired by his son and daughter, they having made default in payment of the rent. It was held that trespass could not be maintained, no injury having been done to the plaintiff by the entry, and action on the special case by the son and daughter was the only remedy.

**7. Burden of Proof of License.** — A defendant seeking to justify his entry by the command or authority of another must show a license or order from that other. *Ladd v. Shattock*, 90 Ala. 134; *Sloane v. McConahy*, 4 Ohio 157; *McLeod v. Jones*, 105 Mass. 403, 7 Am. Rep. 539; *Collier v. Jenks*, 19 R. I. 493; *Northern Trust Co. v. Palmer*, 171 Ill. 383; *Williford v. Williams*, 127 N. Car. 60.

A mere inmate of a house cannot give a license to enter, though such a license, acted upon in good faith, might mitigate the damages. *Cutler v. Smith*, 57 Ill. 252. But see

**Irrevocable License.** — One who is in possession or who enters under a license which is not revocable cannot be treated as a trespasser,<sup>1</sup> even if he use such force as may be required.<sup>2</sup>

**Revocable License.** — It is otherwise under a revocable license. After the revocation the licensee is a trespasser if he maintains the possession.<sup>3</sup>

**Limited Right of Entry.** — A license to enter land may be limited in its scope, and the limitation must be observed, otherwise the licensee may be regarded as a trespasser.<sup>4</sup> A person may have a right to go upon land and cut timber thereon, and still be a trespasser by cutting other timber which he has agreed not to cut.<sup>5</sup>

**Implied License.** — It is settled that the owner of personal property, which has been wrongfully taken from him, does not commit a trespass by entering upon the realty of the wrongdoer and taking his own property, unless he commits a breach of the peace or uses unnecessary force.<sup>6</sup> This rule rests on the theory that where a person places the goods of another upon his premises, he gives to the owner of them an implied license to enter for the purpose of taking them,<sup>7</sup> and this doctrine has been extended to cases where permission to keep or the right to have one's personal property upon the land of another was held to imply the right to enter for its removal;<sup>8</sup> but the rule does not apply if the goods are deposited upon the land of another who is not a participant in the wrongful taking, unless in a case of theft and fresh pursuit.<sup>9</sup> The rule is also different where the chattels themselves are claimed by the party whose realty is entered upon. In that case, one entering without permission is a trespasser. He must, to reclaim his chattel, follow out his remedy by legal action.<sup>10</sup>

**License from One Having an Easement** to enter upon the plaintiff's land and clear out a ditch may be proved as a defense by one who does no more.<sup>11</sup>

**14. Special Contract.** — A written release of damages from a trespass will confine the grantor to an action on the contract.<sup>12</sup>

**15. Eminent Domain.** — Where the trespasser might have evoked the right

*Ramey v. W. W. Kimball Co.*, 58 S. W. Rep. 471, 22 Ky. L. Rep. 597, where it was held that such a license was effectual.

Proof of license to cross private lands, granted by a former owner of the lands, is inadmissible. *Dexter v. Alfred*, 74 Hun (N. Y.) 259.

**1. Irrevocable License.** — *Ferris v. Hoglan*, 121 Ala. 240.

**2. Lambert v. Robinson, 162 Mass. 34, 44 Am. St. Rep. 326.**

**3. Revocable License.** — *Bacon v. Hooker*, 177 Mass. 335, 83 Am. St. Rep. 279; *Mitchell v. Mitchell*, 54 Minn. 301; *Ockington v. Richey*, 41 N. H. 275; *Walton v. Lowrey*, 74 Miss. 484. See also *Halstead v. American Natural Gas Co.*, 17 Pa. Super. Ct. 605; *Silberman v. New Amsterdam Gas Co.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 42.

**4. Limited License.** — *Rogers v. Duhart*, 97 Cal. 500; *Morgan v. Perkins*, 94 Ga. 353; *Walton v. Lowrey*, 74 Miss. 484; *Agnew v. Jones*, 74 Miss. 347; *Walters v. Hamilton*, 75 Mo. App. 237; *Bear v. Harris*, 118 N. Car. 476; *Sharpe v. Levert*, 51 La. Ann. 1249; *Silliman v. Whitmer*, 11 Pa. Super. Ct. 243.

Where the plaintiff consented to the defendant's cutting down the gradient of the street in front of the lot sold by the defendant to the plaintiff, eighteen to twenty-four inches, and the defendant cut it three to five feet, the defendant was held liable only for damages arising

from the excessive cutting. *Feuerstein v. Jackson*, 4 Ohio Civ. Dec. 516, 8 Ohio Cir. Ct. 396.

**5. Limited License to Cut Timber.** — *Disbrow v. Westchester Hardwood Co.*, 17 N. Y. App. Div. 610; *Everett v. Gores*, 89 Wis. 421. See also *Cramer v. Groseclose*, 53 Mo. App. 648; *Williford v. Williams*, 127 N. Car. 60; *Irwin v. Patchen*, 164 Pa. St. 51.

**6. Implied License.** — *Webb v. Beavan*, 6 M. & G. 1055, and note 46 E. C. L. 1055, thereto; *Blades v. Higgs*, 10 C. B. N. S. 713, 100 E. C. L. 713; *Viner's Abr. "Trespass,"* (1) a; *Mad-den v. Brown*, 8 N. Y. App. Div. 454.

**7. Patrick v. Colerick, 3 M. & W. 483; *Mad-den v. Brown*, 8 N. Y. App. Div. 454.**

**8. White v. Elwell, 48 Me. 360, 77 Am. Dec. 231; *Doty v. Gorham*, 5 Pick. (Mass.) 487, 16 Am. Dec. 417; *McLeod v. Jones*, 105 Mass. 405, 7 Am. Rep. 539.**

**9. Anthony v. Haney, 8 Bing. 187, 21 E. C. L. 265; *McLeod v. Jones*, 105 Mass. 405, 7 Am. Rep. 539; *Pollock on Torts* (6th ed.), p. 372.**

**10.** If A enters upon the land of B without his permission, to take a chattel belonging to A, it is a trespass. *Heermance v. Vernoy*, 6 Johns. (N. Y.) 5; *Blake v. Jerome*, 14 Johns. (N. Y.) 406; *Newkirk v. Sabler*, 9 Barb. (N. Y.) 652.

**11. Heiser v. Gaul, 39 N. Y. App. Div. 162.**

**12. Special Contract.** — *Windle v. Crescent Pipe Line Co.*, 186 Pa. St. 224.

of eminent domain, he is not protected if he enters without evoking it or taking the proper proceedings under his authority.<sup>1</sup> Not having resorted to that authority, all the trespasser's acts are wrongful *ab initio*, and exemplary damages may be awarded.<sup>2</sup>

**IV. PARTIES LIABLE — 1. Direct Cause — a. PROXIMATE CAUSE.** — One is liable for the direct consequence of his wrongful act, though it may not have been the nearest cause of the injury in the chain of events,<sup>3</sup> and recovery must be had for direct damages by action of trespass *vi et armis* and not for consequential damages by action on the case.<sup>4</sup>

**b. EXTRANEOUS CAUSES.** — Liability for a trespass is not lessened by the contribution of extraneous causes.<sup>5</sup>

**2. Aiding, Abetting, and Inciting — a. IN GENERAL.** — One who aids, abets, or incites, or encourages or directs by conduct or words, in the perpetration of a trespass, is liable equally with the actual perpetrator.<sup>6</sup>

**1. Eminent Domain.** — *Cumberland Telephone, etc., Co. v. Cassidy*, 78 Miss. 666; *Studebaker v. New Castle Gas Co.*, 7 Pa. Super. Ct. 641; *Childs v. Kansas City, etc., R. Co.*, 117 Mo. 414; *Farrow v. Nashville, etc., R. Co.*, 109 Ala. 448; *Bassett v. Pennsylvania R. Co.*, 201 Pa. St. 226; *Omaha v. Croft*, 60 Neb. 59.

Trespass will lie by the owner or tenant of land which has been entered under right of eminent domain, without agreement with the owner or tenant or tendering security. *Philadelphia, etc., R. Co. v. Pottsville Water Co.*, 18 Pa. Co. Ct. 501.

**2. Cumberland Telephone, etc., Co. v. Cassidy**, 78 Miss. 666; *Republican Valley R. Co. v. Fink*, 18 Neb. 82; *Anderson, etc., R. Co. v. Kernodle*, 54 Ind. 314. See also *Oklahoma City v. Hill*, 6 Okla. 114 (here only actual damages were recovered).

**3. Proximate Cause — England.** — *Scott v. Shepherd*, 2 W. Bl. 892.

*Alabama.* — *Garrett v. Sewell*, 108 Ala. 521.

*California.* — *Hawthorne v. Siegel*, 88 Cal. 159, 22 Am. St. Rep. 291.

*Louisiana.* — *Bentley v. Fischer Lumber, etc., Co.*, 51 La. Ann. 451.

*Michigan.* — *Brady v. Northwestern Ins. Co.*, 11 Mich. 425.

*New Hampshire.* — *Ricker v. Freeman*, 50 N. H. 420, 9 Am. Rep. 267.

*New York.* — *Burdick v. Worrall*, 4 Barb. (N. Y.) 596; *Vandenburgh v. Truax*, 4 Den. (N. Y.) 464, 47 Am. Dec. 268; *Guille v. Swan*, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234.

*Tennessee.* — *James v. Caldwell*, 7 Yerg. (Tenn.) 38; *Johnson v. Perry*, 2 Humph. (Tenn.) 569.

*Texas.* — *Vandenburgh v. Truax*, 4 Den. (N. Y.) 464, 47 Am. Dec. 268.

But see *Bentley v. Fischer Lumber, etc., Co.*, 51 La. Ann. 451, where it was held that where the defendant built a levee on the plaintiff's land, and a mob cut it and precipitated water over the land, the defendant was held liable for the direct damage caused by the building of the levee, rendering the land unfit for cultivation, but not for the damage caused by the violence of the mob.

**4. James v. Caldwell**, 7 Yerg. (Tenn.) 38, which was an action for damages for the death of a horse caused by its running against a fence while pursued by dogs set upon it by the

defendant. See also *Johnson v. Perry*, 2 Humph. (Tenn.) 569.

**5. Extraneous Causes.** — *Scott v. Shepherd*, 2 W. Bl. 892 (squib case); *Hooksett v. Amoskeag Mfg. Co.*, 44 N. H. 105; *Ricker v. Freeman*, 50 N. H. 420, 9 Am. Rep. 267.

**6. Aiding, Abetting, Inciting, etc. — England.** — *Tompkinson v. Russell*, 9 Price 287; *Ra-leigh v. Goschen*, (1898) 1 Ch. 73.

*Arkansas.* — *Clark v. Bales*, 15 Ark. 452; *Moores v. Winter*, 67 Ark. 189.

*California.* — *Lewis v. Johns*, 34 Cal. 629.

*Connecticut.* — *Hall v. Howd*, 10 Conn. 514, 27 Am. Dec. 696; *Mallory v. Merritt*, 17 Conn. 178.

*Georgia.* — *Duckett v. State*, 93 Ga. 415.

*Illinois.* — *Northern Trust Co. v. Palmer*, 171 Ill. 383; *Roth v. Smith*, 41 Ill. 314; *Sundmacher v. Block*, 39 Ill. App. 553; *Donovan v. Consolidated Coal Co.*, 88 Ill. App. 589.

*Kentucky.* — *Ferguson v. Terry*, 1 B. Mon. (Ky.) 96.

*Massachusetts.* — *Brown v. Perkins*, 1 Allen (Mass.) 89; *Vosburgh v. Moak*, 1 Cush. (Mass.) 453, 48 Am. Dec. 613.

*Missouri.* — *McMannus v. Lee*, 43 Mo. 206, 97 Am. Dec. 386.

*New Jersey.* — *Bruch v. Carter*, 32 N. J. L. 554.

*New York.* — *Judson v. Cook*, 11 Barb. (N. Y.) 642; *Smith v. Felt*, 50 Barb. (N. Y.) 612; *Wall v. Osborn*, 12 Wend. (N. Y.) 40; *Morgan v. Varick*, 8 Wend. (N. Y.) 594; *Ketcham v. Newman*, 141 N. Y. 205.

*North Carolina.* — *Smithwick v. Ward*, 7 Jones L. (52 N. Car.) 64, 75 Am. Dec. 453; *Horton v. Hensley*, 1 Ired. L. (23 N. Car.) 163.

*Pennsylvania.* — *Welsh v. Cooper*, 8 Pa. St. 217; *McCloskey v. Powell*, 123 Pa. St. 62, 10 Am. St. Rep. 513; *Fox v. Northern Liberties*, 3 W. & S. (Pa.) 103; *Frantz v. Lenhart*, 56 Pa. St. 365; *Deal v. Bogue*, 20 Pa. St. 228, 57 Am. Dec. 702; *Reynolds v. Braithwaite*, 131 Pa. St. 416.

*Texas.* — *Kolb v. Bankhead*, 18 Tex. 232.

*Vermont.* — *Ross v. Fuller*, 12 Vt. 265, 36 Am. Dec. 342.

*West Virginia.* — *Shepherd v. McQuilkin*, 2 W. Va. 90.

A superior official ordering a subordinate officer to commit the trespass may be sued, not because of, but despite of, the fact that he was an officer of state. *Raleigh v. Goschen*, (1898) 1 Ch. 73.



**Presence at the Commission.** — Presence at the commission of a trespass, encouraging or inciting the same, or countenancing or approving it, will render a person liable.<sup>1</sup> Proof that a person was present without disapproving or opposing the trespass will warrant the jury in finding that he approved it,<sup>2</sup> but in general persons will not be deemed trespassers simply because they were present at the commission of a trespass which they did not aid or abet, and in which they neither participated nor had an interest,<sup>3</sup> nor even where they had a common interest with the trespasser, if they did not direct, participate in, or countenance the trespass.<sup>4</sup> But participation in an action accompanied by danger will make all the parties liable.<sup>5</sup>

**b. DIRECTION — MASTER AND SERVANT** — (1) *Liability for Consequences of Servant's Acts.* — One is liable for the natural consequences of the acts of his servant following his instructions,<sup>6</sup> or where the servant is acting strictly within the limits of his employment,<sup>7</sup> or for any trespass committed by his express command,<sup>8</sup> or for the wrongdoing of his servant in carrying out the duties of his employment, even if against his instructions.<sup>9</sup>

(2) *Liability for Acts of Independent Contractors.* — It is a well-settled general rule that a party who has contracted for the doing of certain work, for his use and benefit, is not liable for injuries arising in the performance of such work. In the application of this rule to the cases the decisions are apparently conflicting; but it may be regarded as settled that, if the employer keeps control of the mode of the work, his liability for the acts of a contractor or a servant is the same.<sup>10</sup> If the employer retains no immediate control of

1. **Presence at Commission.** — *Justice v. Mendell*, 14 B. Mon. (Ky.) 12; *Brown v. Perkins*, 1 Allen (Mass.) 89; *McMannus v. Lee*, 43 Mo. 206, 97 Am. Dec. 386; *Millspaugh v. Mitchell*, 8 Barb. (N. Y.) 333; *Shepherd v. McQuilkin*, 2 W. Va. 90; *Shaver v. Edgell*, 48 W. Va. 502.

2. **Presence, Without Disapproving or Opposing.** — *McMannus v. Lee*, 43 Mo. 206, 97 Am. Dec. 386; *Brown v. Perkins*, 1 Allen (Mass.) 89.

3. *Berry v. Fletcher*, 1 Dill. (U. S.) 67.

4. *Richardson v. Emerson*, 3 Wis. 319, 62 Am. Dec. 694.

5. **Participation.** — Where all the parties were playing a game of ball under circumstances carrying danger, and a traveler on the highway was struck by the ball, all were held liable. *Yosburgh v. Moak*, 1 Cush. (Mass.) 453, 48 Am. Dec. 613.

And where a number of persons met at the same time, and by mutual understanding engaged in a pistol fight, and a passer-by was wounded by one of the shots, all were held liable. *Murphy v. Wilson*, 44 Mo. 313, 100 Am. Dec. 290.

6. **Servant Following Instructions.** — *Gregory v. Piper*, 9 B. & C. 591, 17 E. C. L. 454; *Carle v. White Haven Ice Co.*, 4 Pa. Dist. 289; *May v. Bliss*, 22 Vt. 477. See the title MASTER AND SERVANT, vol. 20, p. 163.

7. **Servant Acting Within Limits of Employment.** — *Small v. Ball*, 47 Vt. 486; *May v. Bliss*, 22 Vt. 477; *Andrus v. Howard*, 36 Vt. 248, 84 Am. Dec. 680; *Oklahoma City v. Hill*, 6 Okla. 114; *Luttrell v. Hazen*, 3 Sneed (Tenn.) 20; *Van Siclen v. Jamaica Electric Light Co.*, 45 N. Y. App. Div. 1; *Streett v. Launier*, 34 Mo. 469. See the title MASTER AND SERVANT, vol. 20, p. 163.

8. **Express Command.** — *Mallory v. Merritt*, 17 Conn. 178; *West Chicago St. R. Co. v. Mor-*

*rison, etc., Co.*, 160 Ill. 288; *Bell v. Miller*, 5 Ohio 250; *Hower v. Ulrich*, 156 Pa. St. 410.

**Public Bodies and Corporations.** — Directing the cutting of timber by assessors of a plantation, who believed they had authority to do so, makes them liable. *State v. Smith*, 78 Me. 260, 57 Am. Rep. 802.

In *Oklahoma City v. Hill*, 6 Okla. 114, it was held that the city was liable for its officers' trespass, committed for its benefit in the exercise of a power concerning which they were authorized to act by law or the city's charter.

A corporation may be guilty of trespass *vi et armis* as well as an individual, through its servants obeying its orders. *Yahoola River, etc., Hydraulic Hose Min. Co. v. Irby*, 40 Ga. 479.

9. *McClung v. Dearborne*, 134 Pa. St. 396, 19 Am. St. Rep. 708; *Garretzen v. Duencckel*, 50 Mo. 104, 11 Am. Rep. 405. See the title MASTER AND SERVANT, vol. 20, p. 169.

10. **Employer's Liability for Independent Contractor.** — *West Chicago St. R. Co. v. Morrison, etc., Co.*, 160 Ill. 288; *Northern Trust Co. v. Palmer*, 171 Ill. 383; *Chicago, etc., R. Co. v. Watkins*, 43 Kan. 50; *Walters v. Hamilton*, 75 Mo. App. 237; *Crenshaw v. Ullman*, 113 Mo. 636; *Ketcham v. Newman*, 141 N. Y. 205; *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N. Car. 648; *Reynolds v. Braithwaite*, 131 Pa. St. 416. See the title INDEPENDENT CONTRACTORS, vol. 16, p. 192.

**Work Let to Independent Contractor.** — Where a contractor, under orders from his employer, attempted to excavate for a building to a greater width than his employer's lot, so that the excavation encroached upon his neighbor's land, it was held that the employer was a co-trespasser with the contractor. *Williamson v. Fischer*, 50 Mo. 198.

the work, he is not liable for injury caused by an act done without his knowledge or consent.<sup>1</sup>

**Lessors.** — A lessor railroad company is not liable for trespass by the servants of the lessee company in repairing the right of way.<sup>2</sup>

**c. DIRECTION OF VOID PROCESS.** — (1) *Party Obtaining Process.* — The direction of a void process makes the party in whose favor it is issued liable.<sup>3</sup> His attorney will sometimes also be liable,<sup>4</sup> but not where he does not go beyond the duties of his profession.<sup>5</sup>

(2) *Judge Exceeding His Jurisdiction.* — The inferior judge who exceeds his jurisdiction is, according to some authorities, liable as a trespasser.<sup>6</sup>

**d. DIRECTION OF VALID PROCESS ILLEGALLY EXECUTED.** — Neither a party who procures nor the magistrate who issues legal process is accountable for the manner in which it is executed, however unlawful that may be,<sup>7</sup> even where the principal receives the money, unless he consents to the officer's illegal action or subsequently adopts it.<sup>8</sup> But if the principal actively participates and intermeddles with the action of the sheriff, he will be liable for his wrongful acts.<sup>9</sup>

**e. UNDER INDEMNITY BOND.** — A person who induces a levy by signing an indemnity bond to indemnify the officer against the loss is liable.<sup>10</sup>

**1. Where Employer Retains No Control of Work — No Liability.** — *Parker v. Waycross, etc., R. Co.*, 81 Ga. 387. See the title **INDEPENDENT CONTRACTORS**, vol. 16, p. 192.

**2. Lessors.** — *Chicago, etc., R. Co. v. Eichman*, 47 Ill. App. 156.

**3. Direction of Void Process** — *California.* — *Poinsett v. Taylor*, 6 Cal. 78.

*Connecticut.* — *Williams v. Brace*, 5 Conn. 190; *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550; *Hall v. Howd*, 10 Conn. 514, 27 Am. Dec. 696.

*Kansas.* — *Shaw v. Rowland*, 32 Kan. 154.

*Massachusetts.* — *Miller v. Baker*, 1 Met. (Mass.) 27.

*Missouri.* — *Canifax v. Chapman*, 7 Mo. 175; *McNeeley v. Hutton*, 30 Mo. 332.

*New York.* — *Stewart v. Wells*, 6 Barb. (N. Y.) 79; *Coats v. Darby*, 2 N. Y. 517, *overruling* *Herrick v. Manly*, 1 Cai. (N. Y.) 253; *Judson v. Cook*, 11 Barb. (N. Y.) 642; *Newberry v. Lee*, 3 Hill (N. Y.) 523; *Millspaugh v. Mitchell*, 8 Barb. (N. Y.) 333 (here the defendant had full knowledge of the plaintiff's rights and persisted in directing the levy by the officer).

*Pennsylvania.* — *Wyke v. Wilson*, 173 Pa. St. 12; *Gillingham v. Clark*, 1 Phila. (Pa.) 51, 7 Leg. Int. (Pa.) 50.

See such titles as **ARREST**, vol. 2, p. 894, and **MALICIOUS PROSECUTION**, vol. 19, p. 647.

**4. Attorney's Liability.** — *Marks v. Culmer*, 6 Utah 419. See as to attorney's liability generally the title **ATTORNEY AND CLIENT**, vol. 3, p. 402.

**5. Ford v. Williams**, 13 N. Y. 584, 67 Am. Dec. 83.

**6. Inferior Judge Exceeding Jurisdiction.** — *Marshalsea's Case*, 10 Coke 68; *Terry v. Huntington*, *Hardres* 480; *Weller v. Toke*, 9 East 364; *Flack v. Harrington*, 1 Ill. 213, 12 Am. Dec. 170; *Evertson v. Sutton*, 5 Wend. (N. Y.) 281, 21 Am. Dec. 217; *Rembert v. Kelly*, *Harp. L. (S. Car.)* 65, 18 Am. Dec. 643. See also *Yates v. Lansing*, 9 Johns. (N. Y.) 395, 6 Am. Dec. 303; *Pratt v. Hill*, 16 Barb. (N. Y.) 306. And see the title **JUDGE**, vol. 17, p. 728 *et seq.*

**7. Execution of Process.** — *Freeman v. Roshier*, 13 Q. B. 780, 66 E. C. L. 780; *Weller v. Hanaur*, 95 Fed. Rep. 236; *People's Bldg., etc., Assoc. v. McElroy*, 79 Ill. App. 266; *Kreger v. Osborn*, 7 Blackf. (Ind.) 74; *Sutherland v. Ingalls*, 63 Mich. 620, 6 Am. St. Rep. 332; *Teel v. Miles*, 51 Neb. 542; *Adams v. Freeman*, 9 Johns. (N. Y.) 117; *Collins v. Ferris*, 14 Johns. (N. Y.) 246; *Hyde v. Cooper*, 26 Vt. 552. See also the title **SHERIFFS AND CONSTABLES**, vol. 25, p. 658.

**Contra.** — Putting a note into the hands of an attorney for collection was held to be a general authority making the principal liable for the officer's abuse of a writ. *Howell v. Caryl*, 50 Mo. App. 440.

In *Rowe v. Bradley*, 12 Cal. 226, the sheriff and the principal were both held liable where the officer entered the mining ground of A, on which he found the execution debtor B, and dug up and removed gold-bearing earth.

**8. Hyde v. Cooper**, 26 Vt. 552; *Freeman v. Roshier*, 13 Q. B. 780, 66 E. C. L. 780.

**9. Participation Constitutes Liability.** — *Weller v. Hanaur*, 95 Fed. Rep. 236; *Murray v. Mace*, 41 Neb. 60, 43 Am. St. Rep. 664; *Sternwald v. Siegel*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 70; *Grafton v. Carmichael*, 48 Wis. 660.

**10. Signing Indemnity Bond** — *United States.* — *Lovejoy v. Murray*, 3 Wall. (U. S.) 1; *Weller v. Hanaur*, 95 Fed. Rep. 236.

*Alabama.* — *Screws v. Watson*, 48 Ala. 628. *Arkansas.* — *Rice v. Wood*, 61 Ark. 442.

*California.* — *Lewis v. Johns*, 34 Cal. 629.

*Indiana.* — *State v. Beckner*, 132 Ind. 371, 32 Am. St. Rep. 257.

*Missouri.* — *Wetzell v. Waters*, 18 Mo. 396; *Peckham v. Lindell Glass Co.*, 9 Mo. App. 459; *Kamerick v. Castleman*, 29 Mo. App. 658; *Palmer v. Shenkel*, 50 Mo. App. 571.

*New York.* — *Herring v. Hoppock*, 15 N. Y. 413; *Dyett v. Hyman*, 129 N. Y. 351, 26 Am. St. Rep. 533; *Davis v. Newkirk*, 5 Den. (N. Y.) 92, *cited in* *Ball v. Loomis*, 29 N. Y. 417.

*Pennsylvania.* — *Welsh v. Cooper*, 8 Pa. St. 217.

**3. Person Acting under Orders.** — Acting under orders is no excuse, and the committer of the act is liable, whether he acts for himself or for others,<sup>1</sup> even though he is an infant acting under the command of his father.<sup>2</sup> But a father is not liable for the unauthorized trespass of his minor child.<sup>3</sup>

**Strangers Aiding.** — Strangers assisting an officer, though only on his request or demand, to levy upon and carry away one's property on an execution against another, become joint trespassers with him.<sup>4</sup>

**Volunteers Assisting in Trespass.** — And volunteers assisting a trespasser are not allowed to plead ignorance of the fact that the act was wrongful. They must stand, if at all, on their principal's justification.<sup>5</sup>

**Not Liable for Officer's Subsequent Trespass.** — But a person assisting an officer in a legal process will not become a trespasser by a subsequent abuse by the officer of his authority, which makes the officer a trespasser *ab initio*.<sup>6</sup>

**4. Ratification.** — One who afterwards assents to a trespass committed for his use and benefit is equally liable with him who committed it.<sup>7</sup>

**Done for the Ratifier's Use.** — The trespass must have been done for the use of the person ratifying it, and mere subsequent approval of a trespass will not affect a person unless the act was originally done in his name or for his use.<sup>8</sup> The ratification, to import liability, must be made with a full knowledge of the facts.<sup>9</sup>

See the title *INDEMNITY CONTRACTS*, vol. 16, p. 167.

**Agent of Principal.** — But it was held in *Ford v. Williams*, 13 N. Y. 577, 67 Am. Dec. 83, that the attorney of the principal, acting in the execution of the duties of his profession, who gave instructions to the sheriff to make the seizure and who signed the bond of indemnity, was not liable. See also as to attorney's liability the title *ATTORNEY AND CLIENT*, vol. 3, p. 402.

**Advising Surety to Sign.** — *Gray, C. J.*, in *Weller v. Hanaur*, 95 Fed. Rep. 236, in reviewing the decisions, declared his dissatisfaction with them on the point of the sureties' liability, and in giving his opinion said that one who merely advised or requested the surety to execute the indemnity bond could not be held liable.

**1. Person Acting under Orders** — *England.* — *Raleigh v. Goschen*, (1898) 1 Ch. 73; *Feather v. Reg.*, 6 B. & S. 257, 118 E. C. L. 296, 35 L. J. Q. B. 200, 12 L. T. N. S. 114.

*United States.* — *Mitchell v. Harmony*, 13 How. (U. S.) 115.

*Illinois.* — *Marshall v. Eggleston*, 82 Ill. App. 52.

*Maine.* — *Hazen v. Wight*, 87 Me. 233.

*Missouri.* — *Palmer v. Shenkel*, 50 Mo. App. 571.

*New York.* — *Brown v. Howard*, 14 Johns. (N. Y.) 119.

**Acting under Orders.** — "If any person commits a trespass (I use that word advisedly as meaning a wrongful act or one not justifiable) he cannot escape liability for the offense, he cannot prevent himself being sued, merely because he acted in obedience to the order of the executive government or of any officer of state." *Raleigh v. Goschen*, (1898) 1 Ch. 73.

**2.** *Scott v. Watson*, 46 Me. 362, 74 Am. Dec. 457. See the title *INFANTS*, vol. 16, p. 307.

**3.** *Malmberg v. Bartos*, 83 Ill. App. 481. See the title *PARENT AND CHILD*, vol. 21, p. 1057.

**4. Strangers Aiding Officer.** — *Palmer v. Shenkel*, 50 Mo. App. 571.

**5. Volunteers Assisting in Trespass.** — *Wallard v. Worthman*, 84 Ill. 446.

**6. Not Liable for Officer's Subsequent Trespass.** — *Wheelock v. Archer*, 26 Vt. 380; *Oystead v. Shed*, 12 Mass. 511; *Elder v. Morrison*, 10 Wend. (N. Y.) 128, 25 Am. Dec. 548.

**7. Ratification** — *Illinois.* — *Grund v. Van Vleck*, 69 Ill. 478; *Pardridge v. Brady*, 7 Ill. App. 639.

*Kentucky.* — *Ferguson v. Terry*, 1 B. Mon. (Ky.) 96; *Caldwell v. Sacra*, Litt. Sel. Cas. (Ky.) 118, 12 Am. Dec. 285.

*Maryland.* — *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403, 43 Am. Rep. 560.

*Missouri.* — *Perrin v. Claflin*, 11 Mo. 13.

*Nebraska.* — *Taylor v. Ryan*, 15 Neb. 573.

*New York.* — *Fox v. Jackson*, 8 Barb. (N. Y.) 355.

*North Carolina.* — *Horton v. Hensley*, 1 Ired. L. (23 N. Car.) 163.

*Pennsylvania.* — *Carle v. White Haven Ice Co.*, 4 Pa. Dist. 289; *Hower v. Ulrich*, 156 Pa. St. 410.

*Vermont.* — *Hyde v. Cooper*, 26 Vt. 552.

**What Does Not Constitute Ratification.** — See *Reed v. Rich*, 49 Ill. App. 262; *Richardson v. Emerson*, 3 Wis. 319, 62 Am. Dec. 694.

**8. Must Be Done for Ratifier's Use.** — *Wilson v. Tumman*, 6 M. & G. 236, 46 E. C. L. 236; *Grund v. Van Vleck*, 69 Ill. 478; *Reed v. Rich*, 49 Ill. App. 262; *Harper v. Baker*, 3 T. P. Mon. (Ky.) 422, 16 Am. Dec. 112.

A purchaser of goods at a constable's sale, although he knows of the illegality of the sale, is not thereby a trespasser by relation. *Ward v. Taylor*, 1 Pa. St. 238.

**9. Full Knowledge of Facts.** — *Fox v. Jackson*, 8 Barb. (N. Y.) 355; *Adams v. Freeman*, 9 Johns. (N. Y.) 117; *Benton v. Beattie*, 63 Vt. 186; *Holliday v. Jackson*, 30 Mo. App. 263; *Holladay-Klotz Land, etc., Co. v. T. J. Moss Tie Co.*, 79 Mo. App. 543; *Klotz v. Lindsay*, 88 Mo. App. 594; *Caris v. Nimmons*, 92 Mo. App. 66; *Oswalt v. Smith*, 97 Ala. 627.



**Measure of Damages.** — Ratification does not authorize the infliction of exemplary damages against the person ratifying.<sup>1</sup>

**5. Other Persons Who May Be Liable** — *a. INFANTS.* — Trespass lies against an infant.<sup>2</sup>

*b. CORPORATIONS.* — A corporation may be held liable in trespass.<sup>3</sup>

*c. PARTNERS.* — Partners of a firm are liable for the trespass of their copartners where the firm receives the benefit of it,<sup>4</sup> either where the partner had knowledge of the illegal act, though he took no part in it,<sup>5</sup> or even if he had no knowledge of it, if it was committed in a matter connected with the business of the firm,<sup>6</sup> the general rule being that notice to one partner is notice to all.<sup>7</sup>

*d. MARRIED WOMEN.* — A husband, though responsible for the personal torts of his wife, is not liable for a trespass committed by her in the management of her separate estate.<sup>8</sup>

**V. EXTENT OF LIABILITY — 1. Joint Trespass.** — All concerned in the act of trespass are principals,<sup>9</sup> and each trespasser is liable for the entire damage.<sup>10</sup>

**May Be Sued Either Jointly or Separately.** — Those who are liable for the same trespass may be sued either jointly or severally,<sup>11</sup> but where several joint trespassers are sued separately, the plaintiff must elect against whom he will take execution. Only one execution can be had,<sup>12</sup> although the plaintiff is entitled

**1. Ratification Does Not Justify Exemplary Damages.** — *The Amiable Nancy*, 3 Wheat. (U. S.) 546; *Grund v. Van Vleck*, 69 Ill. 478; *Pardridge v. Brady*, 7 Ill. App. 639; *Douglas v. Hoffman*, 72 Ill. App. 110; *Goldstein v. Miller*, 93 Ill. App. 103.

**Ratification Does Not Justify Exemplary Damages under Statute.** — *Batchelder v. Kelly*, 10 N. H. 436, 34 Am. Dec. 174.

**Contra — Ratifier Stands in Same Position as Agent.** — But it was held in *Lee v. Lord*, 76 Wis. 582, that the party adopting must stand in the same situation as the agent, and be subject to the same rule of damages

**2. Infant.** — See the title *INFANTS*, vol. 16, p. 307.

**3. Corporation.** — *Carll v. Northport*, 11 N. Y. App. Div. 120; *Whiteman v. Wilmington*, etc., R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411; *Hay v. Cohoes Co.*, 3 Barb. (N. Y.) 42; *Sunnyside Coal, etc., Co. v. Reitz*, 14 Ind. App. 478; *St. Louis, Alton, etc., R. Co. v. Dalby*, 19 Ill. 352.

A corporation is only liable for trespasses committed after the date of its incorporation. *Berry v. San Francisco, etc., R. Co.*, 50 Cal. 435. See also the title *CORPORATIONS (PRIVATE)*, vol. 7, p. 620.

**4. Partners.** — *Gerhardt v. Swaty*, 57 Wis. 24; *Brainerd v. Dunning*, 30 N. Y. 211; *U. S. v. Baxter*, 46 Fed. Rep. 350.

**5. Robinson v. Goings**, 63 Miss. 500.

**6. Brewing v. Berryman**, 15 N. Bruns. 515; *Lucas v. Bruce*, (Ky. 1864) 4 Am. L. Reg. N. S. 95.

**7. Tucker v. Cole**, 54 Wis. 539.

See generally the title *PARTNERSHIP*, vol. 22, p. 2.

**8. Married Women.** — *Quilty v. Battie*, 135 N. Y. 201, reversing 61 Hun (N. Y.) 164. See the title *HUSBAND AND WIFE*, vol. 15, p. 894.

**9. Joint Trespassers.** — *Olsen v. Upsahl*, 69 Ill. 273; *Gusdorff v. Duncan*, 94 Md. 160; *Guarantee Trust, etc., Co. v. E. C. Drew Invest. Co.*, 107 La. 251; *Welsh v. Stewart*, 31 Mo. App.

376; *Palmer v. Shenkel*, 50 Mo. App. 571; *Walters v. Hamilton*, 75 Mo. App. 237.

**10. Liable for Entire Damage — United States.**

— *Johnson v. Tompkins, Baldw.* (U. S.) 571.

*Georgia.* — *Brooks v. Ashburn*, 9 Ga. 297.

*Illinois.* — *Ously v. Hardin*, 23 Ill. 404.

*Louisiana.* — *Irwin v. Scribner*, 15 La. Ann. 583; *Wallace v. Miller*, 15 La. Ann. 449.

*Maine.* — *State v. Smith*, 78 Me. 260, 57 Am. Rep. 802.

*New Jersey.* — *Allen v. Craig*, 13 N. J. L. 294.

*New York.* — *Peck v. Ellis*, 2 Johns. Ch. (N. Y.) 131; *Judson v. Cook*, 11 Barb. (N. Y.) 642.

*North Carolina.* — *Horton v. Hensley*, 1 Ired. L. (23 N. Car.) 163.

*South Carolina.* — *Whitaker v. English*, 1 Bay (S. Car.) 15; *Chanet v. Parker*, 1 Mill (S. Car.) 333.

But see *Guarantee Trust, etc., Co. v. E. C. Drew Invest. Co.*, 107 La. 251, where A sold to B C's timber, which B cut and marketed in good faith. A was held liable in the value of the timber in the market, B for its value at the stump. See also *infra*, this title, *Verdict and Judgment — As to Joint Trespassers*.

**11. May Be Sued Either Jointly or Separately — Georgia.** — *Brooks v. Ashburn*, 9 Ga. 297.

*Illinois.* — *Northern Trust Co. v. Palmer*, 171 Ill. 383; *Coffman v. Burkhalter*, 98 Ill. App. 304.

*Kansas.* — *Shaw v. Rowland*, 32 Kan. 154.

*Maine.* — *Woodbridge v. Conner*, 49 Me. 353, 77 Am. Dec. 263.

*Maryland.* — *Gusdorff v. Duncan*, 94 Md. 160.

*Massachusetts.* — *Hewett v. Swift*, 3 Allen (Mass.) 420.

*New York.* — *Livingston v. Bishop*, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330; *Sternwald v. Siegel*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 70; *Guille v. Swan*, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234.

**12. Blann v. Crocheron**, 20 Ala. 320; *Blanchard v. Burbank*, 16 Ill. App. 375; *Allen v.*

to the costs of all the actions.<sup>1</sup>

**Plaintiff Entitled to Election.** — The plaintiff cannot be deprived of his election, and he may dismiss suit against one or more joint trespassers and proceed against the others.<sup>2</sup>

**What Is Not Joint Trespass.** — Where two or more persons acting independently, without concert, plan, or other agreement, inflict an injury upon another, it is not a joint trespass, and one cannot be held liable for the acts of the other.<sup>3</sup>

**Evidence of Separate Trespasses.** — Where suit is brought for a joint trespass, evidence of separate and distinct trespasses by each of the defendants will not entitle to recovery,<sup>4</sup> and evidence tending to show a subsequent trespass where it does not appear that it was participated in by all the defendants, is inadmissible.<sup>5</sup>

**2. Trespass Ab Initio** — *a.* IN GENERAL. — Where entry, authority, or license is given to any one by the law, and he abuses it, he becomes a trespasser *ab initio*.<sup>6</sup> But where entry, authority, or license is given by the party, and the receiver abuses it, he is liable for the abuse, but is not deemed a trespasser *ab initio*.<sup>7</sup>

*b.* ON REALTY. — Trespass *ab initio* often occurs where the original entry to real estate could not be resisted, being independent of the will or consent of the owner.<sup>8</sup>

Wheatley, 3 Blackf. (Ind.) 332; Fleming v. McDonald, 50 Ind. 278, 19 Am. Rep. 711; Lord v. Tiffany, 98 N. Y. 412, 50 Am. Rep. 689.

1. Lord v. Tiffany, 98 N. Y. 412, 50 Am. Rep. 689; Golding v. Hall, 9 Port. (Ala.) 169.

Where the action is for joint trespass, one defendant may be convicted for acts done alone as well as for those done in concert with others, and if one or more be proved to have committed one trespass, and one or more another, the plaintiff, or failing him the jury, must elect against whom the verdict will be rendered. Blanchard v. Burbank, 16 Ill. App. 375.

2. **Plaintiff Entitled to His Election.** — Gusdorff v. Duncan, 94 Md. 160; Power v. Baker, 27 Fed. Rep. 396.

3. **What Is Not a Joint Trespass.** — Bonte v. Postel, 109 Ky. 64.

4. **Evidence of Separate Trespasses Inadmissible.** — Sparkman v. Swift, 81 Ala. 231.

5. **Evidence of Subsequent Trespasses Inadmissible.** — Douglass v. Hoffman, 72 Ill. App. 110; Higby v. Williams, 16 Johns. (N. Y.) 215.

6. **Entry under License by law** — *England.* — Six Carpenters' Case, 8 Coke 146a, 1 Smith Lead. Cas. (8th ed.) 257; Bagshawe v. Goward, Cro. Jac. 147.

*Massachusetts.* — Hsley v. Nichols, 12 Pick. (Mass.) 270, 22 Am. Dec. 425; Pierce v. Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396; Smith v. Gates, 21 Pick. (Mass.) 55; Russell v. Hanscomb, 15 Gray (Mass.) 166; Purrington v. Loring, 7 Mass. 388; Melville v. Brown, 15 Mass. 82.

*New York.* — Pratt v. Petrie, 2 Johns. (N. Y.) 181; Sackrider v. M'Donald, 10 Johns. (N. Y.) 253; Coddington v. White, 2 Duer (N. Y.) 390.

*Pennsylvania.* — Wyke v. Wilson, 173 Pa. St. 12.

*Vermont.* — Hubbell v. Wheeler, 2 Aik. (Vt.) 359; Bond v. Wilder, 16 Vt. 393.

**A Collector of Taxes who keeps property which**

he has seized on his warrant beyond the time within which it could be legally sold, becomes a trespasser *ab initio*. Brackett v. Vining, 49 Me. 356; Pierce v. Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396.

A sheriff is liable as a trespasser *ab initio* where his deputy unlawfully sells property. Everett v. Herrin, 48 Me. 537.

7. **Entry under License by Party Injured** — *England.* — Six Carpenters' Case, 8 Coke 146a, 1 Smith Lead. Cas. (8th ed.) 257.

*Arkansas.* — Ballard v. Noaks, 2 Ark. 45. *Illinois.* — Pike v. Heinzmann, 89 Ill. App. 642.

*Indiana.* — Bennett v. McIntire, 121 Ind. 231. *Maine.* — Bradley v. Davis, 14 Me. 44, 30 Am. Dec. 729; Hunnewell v. Hobart, 42 Me. 565; Dingley v. Buffum, 57 Me. 379.

*Massachusetts.* — Cushing v. Adams, 18 Pick. (Mass.) 110; Smith v. Pierce, 110 Mass. 35; Richmond v. Fisk, 160 Mass. 34.

*New Hampshire.* — Wendell v. Johnson, 8 N. H. 220, 29 Am. Dec. 648; Jewell v. Mahood, 44 N. H. 474, 84 Am. Dec. 90.

*New York.* — Allen v. Crofoot, 5 Wend. (N. Y.) 506. See also Hill v. Bartholomew, 71 Hun (N. Y.) 453.

*Vermont.* — Hubbell v. Wheeler, 2 Aik. (Vt.) 359.

**The Reason for the Distinction** between the effect of the authority of the law and the authority of the owner, given in Hammond's Nisi Prius 59, and approved in State v. Moore, 12 N. H. 42, and in Parish v. Wilhelm, 63 N. Car. 50, in preference to the reason given in the Six Carpenters' Case, 8 Coke 146, is as follows: "The ground, therefore, upon which one who has been guilty of an abuse is made a trespasser *ab initio*, is (for there is no other) that of policy, and the rule was instituted to prevent an authority in law being turned into an instrument of injustice and oppression."

8. **Entry on Realty.** — Six Carpenters' Case, 8 Coke 146a, 1 Smith Lead. Cas. (8th ed.) 257; Allen v. Crofoot, 5 Wend. (N. Y.) 506.

*c. ABUSE OF PROCESS.* — Abuse of process by an officer constitutes him a trespasser *ab initio*.<sup>1</sup> Such a mistake as a person of ordinary care and common intelligence might commit will not amount to an abuse of process. Nothing less than a gross abuse of it will constitute trespass *ab initio*.<sup>2</sup>

**Intention from the First.** — In order to deprive the officer of the protection of his process and make him a trespasser *ab initio*, it has been held that his abuse of it must have been such as to raise a presumption that he intended the wrongful act from the first, and to use his legal authority as a cover for his illegal conduct.<sup>3</sup>

**Nonfeasance.** — Mere nonfeasance will not constitute trespass *ab initio*.<sup>4</sup>

**3. Contribution.** — Where judgment has been recovered against several defendants in trespass, the defendant is not entitled to contribution from his codefendants if he knew at the time that he was engaged in an unlawful act,<sup>5</sup> even if he has received a promise of indemnity.<sup>6</sup> But a servant or agent, obeying the instructions of his master or principal, not knowing that he was committing a trespass, can enforce contribution,<sup>7</sup> at least where there is an express promise to indemnify,<sup>8</sup> and such promise of indemnity includes an authority to the promisee to employ and indemnify agents, and he may recover

**1. Abuse of Process** — *England.* — *Ward's Case*, *Clayt.* 44.

*Connecticut.* — *Williams v. Ives*, 25 Conn. 568.

*Indiana.* — *Jarratt v. Gwathmey*, 5 Blackf. (Ind.) 237; *Burton v. Calaway*, 20 Ind. 469.

*Kentucky.* — *Barrett v. Lightfoot*, 1 T. B. Mon. (Ky.) 241, 15 Am. Dec. 110.

*Maine.* — *Mussey v. Cahoon*, 34 Me. 74; *Morse v. Reed*, 28 Me. 481.

*Massachusetts.* — *Smith v. Gates*, 21 Pick. (Mass.) 55; *Sherman v. Braman*, 13 Met. (Mass.) 407; *Coffin v. Field*, 7 Cush. (Mass.) 355; *McGough v. Wellington*, 6 Allen (Mass.) 505; *Purrinton v. Loring*, 7 Mass. 388.

*New Hampshire.* — *Blake v. Johnson*, 1 N. H. 91; *Barrett v. White*, 3 N. H. 210, 14 Am. Dec. 352.

*New York.* — *Van Brunt v. Schenck*, *Anth. N. P.* (N. Y.) 157.

*Pennsylvania.* — *Wilson v. Ellis*, 28 Pa. St. 238; *Kerr v. Sharp*, 14 S. & R. (Pa.) 399; *Freeman v. Smith*, 30 Pa. St. 264.

**2. What Will Constitute.** — *Dwinnels v. Boynton*, 3 Allen (Mass.) 310; *Ordway v. Ferrin*, 3 N. H. 69; *Taylor v. Jones*, 42 N. H. 25. But see *Brckett v. Vining*, 49 Me. 356, which conflicts with *Griell v. Hunter*, 40 Ala. 542, as to what is a gross abuse of process.

The alteration of the time of an adjournment of a sale, under a levy by the officer, from four A. M. to four P. M. was the correction of an obvious mistake which could deceive no one, and did not constitute the officer a trespasser. *Wheelock v. Archer*, 26 Vt. 380.

**3. Intention.** — *Smith v. Egginton*, 7 Ad. & El. 167, 34 E. C. L. 69; *Page v. De Puy*, 40 Ill. 506; *Taylor v. Jones*, 42 N. H. 25.

Where an act is lawfully done, it cannot be made unlawful *ab initio* unless by some positive act incompatible with the exercise of the legal right to do the first act. *Gates v. Lounsbury*, 20 Johns. (N. Y.) 427; *Stoughton v. Mott*, 25 Vt. 668.

**4. Mere Nonfeasance.** — *The Six Carpenters' Case*, 8 Coke 146a, 1 Smith Lead. Cas. (8th ed.) 257; *Waterbury v. Lockwood*, 4 Day (Conn.)

257, 4 Am. Dec. 215; *Hill v. Bartholomew*, 71 Hun (N. Y.) 453; *Hale v. Clark*, 19 Wend. (N. Y.) 498.

The following are acts of nonfeasance which have been held not to constitute an officer a trespasser *ab initio*: Failing to take proper care of property after a levy, *Waterbury v. Lockwood*, 4 Day (Conn.) 257, 4 Am. Dec. 215. A clerical error in a warrant, *Gordon v. Clifford*, 28 N. H. 412. The refusal to deliver back an article distrained, on payment, *Gardner v. Campbell*, 15 Johns. (N. Y.) 402. Making a mistake in the return of process, *Parker v. Pattee*, 4 N. H. 530. The refusal to take bail, *Churchill v. Churchill*, 12 Vt. 661.

**5. Contribution Among Trespassers.** — *Merryweather v. Nixan*, 8 T. R. 186; *Percy v. Clary*, 32 Md. 245; *St. John v. St. John's Church*, 15 Barb. (N. Y.) 346; *Peck v. Ellis*, 2 Johns. Ch. (N. Y.) 136. And see the title CONTRIBUTION AND EXONERATION, vol. 7, p. 364.

**6. Dunlap's Paley on Agency**, p. 152.

**7. Exception.** — *Drummond v. Humphreys*, 39 Me. 347; *Acheson v. Miller*, 2 Ohio St. 203, 59 Am. Dec. 663.

**8. Where Express Promise to Indemnify.** — *Avery v. Halsey*, 14 Pick. (Mass.) 174; *St. John v. St. John's Church*, 15 Barb. (N. Y.) 346; *Allaire v. Ouland*, 2 Johns. Cas. (N. Y.) 52; *Coventry v. Barton*, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376.

**Question Whether Promise to Indemnify Will Be Implied.** — In *St. John v. St. John's Church*, 15 Barb. (N. Y.) 346, *Mason, J.*, said: "The rule is stated thus in *Dunlap's Paley on Agency*, p. 152: 'If an agent, at the request of his principal, engage in the commission of an act which at the time is known to be a trespass, even a promise of indemnity would not be binding upon the principal.' This rule is recognized in many cases; while, on the other hand, it has been repeatedly adjudged that a promise to indemnify is binding if the agent acted in good faith, not knowing that he was committing a trespass. But as to the question whether in such a case the law will imply a promise of indemnity where the agent has fol-



against the promisor such damages as he may have been compelled to pay them.<sup>1</sup>

**VI. TRESPASS AS TO PERSONS.** — This subject will be found discussed under special titles in this work.<sup>2</sup>

**VII. TRESPASS AS TO REALTY — 1. Who May Maintain — Actual or Constructive Possession Necessary — a. POSSESSION IN GENERAL.** — In order to maintain trespass *quare clausum fregit* there must have been an actual possession by the plaintiff at the time when the trespass was committed, either by himself or by his authorized representative, or, failing that, a constructive possession in respect of the right being actually vested in him.<sup>3</sup> And in the latter case the action can be maintained only where the lands are unoccupied or there is no adverse possession.<sup>4</sup>

**b. ACTUAL POSSESSION — (1) Actual Possession Sufficient.** — Bare actual possession is sufficient to maintain trespass against mere tortfeasors,<sup>5</sup> and a

lowed the directions of the principal, there appears to be some conflict of opinion in the books."

1. *Stone v. Hooker*, 9 Cow. (N. Y.) 154. See also the title INDEMNITY CONTRACTS, vol. 16, p. 167.

2. See such titles as ASSAULT AND BATTERY, vol. 2, p. 952; FALSE IMPRISONMENT, vol. 12, p. 719.

3. **Actual or Constructive Possession Necessary.** — 4 Kent Com. 120; 1 Archbold's Nisi Prius, p. 10, note to Am. ed. 1, p. 478.

*Connecticut.* — *Waterbury Clock Co. v. Irion*, 71 Conn. 254.

*Georgia.* — *Ault v. Meager*, 112 Ga. 148; *Whiddon v. Williams Lumber Co.*, 98 Ga. 700.

*Illinois.* — *Galt v. Chicago*, etc., R. Co., 157 Ill. 125, and Illinois cases therein cited at p. 132.

*Iowa.* — *Heinrichs v. Terrell*, 65 Iowa 28.

*Kentucky.* — *Ohio*, etc., R. Co. v. Wooten, 20 Ky. L. Rep. 383, 46 S. W. Rep. 681.

*Maryland.* — *Gent v. Lynch*, 23 Md. 58, 87 Am. Dec. 558.

*Michigan.* — *Newcomb v. Love*, 112 Mich. 115.

*Minnesota.* — *Olson v. Minnesota*, etc., R. Co., 89 Minn. 280; *Moon v. Avery*, 42 Minn. 405.

*Mississippi.* — *Dejarnett v. Haynes*, 23 Miss. 600.

*Missouri.* — *Brown v. Hartzell*, 87 Mo. 564.

*Nebraska.* — *Nelson v. Jenkins*, 42 Neb. 133.

*New York.* — *Gardner v. Heart*, 1 N. Y. 528;

*Danihee v. Hyatt*, (Suprn. Ct. Gen. T.) 12 N. Y. Supp. 465; *De Grauw v. Warner*, 89 Hun (N. Y.) 9.

*North Carolina.* — *Smith v. Wilson*, 1 Dev. & B. L. (18 N. Car.) 40; *State v. Reynolds*, 95 N. Car. 616.

*Oklahoma.* — *Casey v. Mason*, 8 Okla. 665.

*Pennsylvania.* — *Wilkinson v. Connell*, 158 Pa. St. 126.

*West Virginia.* — *High v. Pancake*, 42 W. Va. 602.

*Wisconsin.* — *Stoltz v. Kretschmar*, 24 Wis. 283.

**Difference Between Actual and Constructive Possession.** — See *Wardlaw, J.* in *McColman v. Wilkes*, 3 Strobb. L. (S. Car.) 465, 51 Am. Dec. 637; *Brown v. Hartzell*, 87 Mo. 564. See also the titles ADVERSE POSSESSION, vol. 1,

p. 787; TITLE, OWNERSHIP, AND POSSESSION, ante, p. 232.

4. **Constructive Possession Sufficient Where No Adverse Possession.** — *Waterbury Clock Co. v. Irion*, 71 Conn. 254; *Smith v. Wunderlich*, 70 Ill. 426; *Hampton v. Massey*, 53 Mo. App. 501; *Fitch v. New York*, etc., R. Co., 59 Conn. 414; *Smucker v. Pennsylvania R. Co.*, 6 Pa. Super. Ct. 521; *McClain v. Todd*, 5 J. J. Marsh. (Ky.) 335, 22 Am. Dec. 37.

If the premises are actually occupied, the action must be brought by the party in possession; if they are vacant and unoccupied, the party having the legal title has the right of possession and must bring the action. *Dean v. Comstock*, 32 Ill. 173; *Halligan v. Chicago*, etc., R. Co., 15 Ill. 558.

To maintain trespass on an unoccupied city lot the plaintiff must show either a regular paper title or actual possession. *Gardner v. Heart*, 1 N. Y. 528.

Actual possession is not necessary to maintain an action of trespass where the party has the title to the soil, the title drawing to it the possession; nor where there is not an actual exclusive possession by another of the whole. *Wilcox v. Kinzie*, 4 Ill. 218; *Cook v. Foster*, 7 Ill. 652; *Cairo*, etc., R. Co. v. *Woosley*, 85 Ill. 370.

5. **Bare Possession Sufficient Against Mere Wrongdoer** — *England.* — *Catteris v. Cowper*, 4 Taunt. 547; *Graham v. Peat*, 1 East 244.

*California.* — *Golden Gate Mill*, etc., Co. v. *Joshua Hendy Mach. Works*, 82 Cal. 184.

*Connecticut.* — *Branch v. Doane*, 18 Conn. 233; *Curtiss v. Hoyt*, 19 Conn. 154, 48 Am. Dec. 149.

*Georgia.* — *Yahoola River*, etc., Hydraulic Hose Min. Co. v. *Irby*, 40 Ga. 479; *Bass v. West*, 110 Ga. 698.

*Illinois.* — *Bedden v. Clark*, 76 Ill. 338.

*Kentucky.* — *Crate v. Strong*, (Ky. 1902) 69 S. W. Rep. 957.

*Maine.* — *Hayward v. Sedgley*, 14 Me. 439, 31 Am. Dec. 64; *Look v. Norton*, 55 Me. 103; *Savaee v. Holyoke*, 59 Me. 345; *Hunt v. Rich*, 38 Me. 195; *Clancey v. Houdlette*, 39 Me. 451.

*Maryland.* — *Tyson v. Shuey*, 5 Md. 540; *New Windsor v. Stocksdales*, 95 Md. 196.

*Massachusetts.* — *First Parish v. Smith*, 14 Pick. (Mass.) 297.

mere intruder cannot, the plaintiff's possession being admitted or proven, show want of title in him,<sup>1</sup> nor can he put the plaintiff on proof of his title.<sup>2</sup> Bare possession is also sufficient to maintain trespass against one unable to show a better title than the plaintiff.<sup>3</sup> Actual possession will support trespass by one in peaceable possession, even against the owner with title not in possession who unlawfully invades the possession.<sup>4</sup> And similarly a party peaceably in possession may maintain trespass for an injury to his possession, though the trespasser has a better title to the lands,<sup>5</sup> but the true owner cannot be made answerable in damages for dispossessing a trespasser divested of all title.<sup>6</sup>

**Temporary Possession.** — One with merely a right of temporary possession can only recover for injury to that, and not for injury to the freehold.<sup>7</sup>

**Actual, Bona Fide Possession.** — Possession must be actual, *bona fide* possession,<sup>8</sup>

*Mississippi.* — Ware v. Collins, 35 Miss. 223, 72 Am. Dec. 122.

*Missouri.* — Russell v. Thorn, 1 Mo. 390; Richardson v. Murrill, 7 Mo. 333; Reed v. Price, 30 Mo. 442; Masterson v. West End Narrow Gauge R. Co., 5 Mo. App. 64.

*New Jersey.* — Bloom v. Stenner, 50 N. J. L. 59.

*New York.* — Boyer v. Little Falls, 5 N. Y. App. Div. 1.

*North Carolina.* — Myrick v. Bishop, 1 Hawks (8 N. Car.) 485; Frisbee v. Marshall, 122 N. Car. 760; Gwaltney v. Scottish Carolina Timber Co., 115 N. Car. 579.

*Pennsylvania.* — Cheney v. Dallett, 1 Del. Co. Rep. (Pa.) 225.

*South Carolina.* — Johnson v. M'Ilwain, Rice L. (S. Car.) 368.

*Texas.* — Bowner v. Wiggins, 52 Tex. 125; Beaumont Lumber Co. v. Ballard, (Tex. Civ. App. 1893) 23 S. W. Rep. 920.

**"Any Possession" Sufficient.** — Lord Kenyon, in Graham v. Peat, 1 East 244, said: "Any possession is a legal possession as against a wrongdoer." Quoted in Reed v. Price, 30 Mo. 442.

**Tortious Possession Sufficient.** — "Even a tortious possession will support trespass against a wrongdoer." 2 Wheat. Selw. 1018.

**An Occupant of Public Lands** is a tenant at will of the government and can maintain trespass against a wrongdoer. Duncan v. Potts, 5 Stew. & P. (Ala.) 82, 24 Am. Dec. 766.

1. Reed v. Price, 30 Mo. 442.

2. Illinois, etc., R., etc., Co. v. Cobb, 94 Ill. 55.

A description of a plaintiff, who relies upon his actual possession, as "first trustee," may be treated as mere surplusage, which will not put him upon proof of his title, and he will recover upon his actual possession alone. Mallett v. White, 52 Conn. 50.

**3. Bare Possession Sufficient Against One Without Better Title.** — Moore v. Moore, 21 Me. 350; Kilborn v. Rewee, 8 Gray (Mass.) 415; Sweetland v. Stetson, 115 Mass. 49; Newport v. Old Colony Steamboat Co., 19 R. I. 475; Stratton v. Lyons, 53 Vt. 641; Spurlock v. Port Townsend Southern R. Co., 13 Wash. 20; McNarra v. Chicago, etc., R. Co., 41 Wis. 69; Cardoza v. Calkins, 117 Cal. 106; Fowler v. Owen, 68 N. H. 270, 73 Am. St. Rep. 588;

Beach v. Morgan, 67 N. H. 529, 68 Am. St. Rep. 692; Courchaine v. Bullion, etc., Co., 4 Nev. 369.

**4. Against True Owner Unlawfully Invading the Possession.** — Baker v. Cornelius, 6 Tex. Civ. App. 28; Sinclair v. Stanley, 64 Tex. 67, 69 Tex. 718; Heironimus v. Duncan, 11 Tex. Civ. App. 610; Stevens v. Taft, 8 Gray (Mass.) 419.

5. Larue v. Russell, 26 Ind. 386.

**6. True Owner Not Answerable in Damages.** — Wildbor v. Rainforth, 8 B. & C. 4, 15 E. C. L. 144; Hyatt v. Wood, 4 Johns. (N. Y.) 157, 4 Am. Dec. 258; Muldrow v. Jones, Rice L. (S. Car.) 64; Myers v. Myers, 1 Bailey L. (S. Car.) 306; Bonner v. Wiggins, 52 Tex. 125; White v. Naerup, 57 Ill. App. 114. See also *supra*, this title, *Excuse, Justification, and Protection* — *Legal Title*.

**7. Temporary Possession.** — Bloom v. Stenner, 50 N. J. L. 59; Frisbee v. Marshall, 122 N. Car. 760.

**8. Actual Possession — What Constitutes.** — Occasional entries, and cutting and hauling off timber, do not constitute possession. Ohio, etc., R. Co. v. Wooten, 46 S. W. Rep. 681, 20 Ky. L. Rep. 383; Ozark Land Co. v. Leonard, 20 Fed. Rep. 881; Doolittle v. Linsley, 2 Aik. (Vt.) 155; Macauley v. Kamp, 60 Ill. App. 31; Ohio, etc., R. Co. v. Wooten, (Ky. 1898) 46 S. W. Rep. 681; Caskey v. Lewis, 15 B. Mon. (Ky.) 27. But they would if combined with color of title. Doolittle v. Linsley, 2 Aik. (Vt.) 155.

The marking of trees around a piece of land in the forest is not, of itself, actual possession, and would not maintain trespass even against one who was a stranger to the title and a trespasser against the true owner. Oatman v. Fowler, 43 Vt. 462; Kidder v. Kennedy, 43 Vt. 717.

The occasional getting of boards and shingles in a swamp are no more than trespass, and do not amount to possession of the swamp. Rowe v. Cape Fear Lumber Co., 128 N. Car. 301.

Surveying land, advertising it for sale or rent, and notifying the defendant's agents to keep his cattle off "that land," do not constitute sufficient actual possession to maintain trespass. Odd Fellows Sav. Bank v. Turman, (Cal. 1892) 30 Pac. Rep. 966. See also *infra*, this section, *m. Uninclosed Land*.

either in person or by servant<sup>1</sup> or agent.<sup>2</sup>

**Possession by Tenant.** — A lessor cannot maintain trespass while his tenant is in possession;<sup>3</sup> his remedy is case.<sup>4</sup> But the rule does not apply if the tenancy is one at will merely, if the injury is to the reversion and not a mere disturbance of possession.<sup>5</sup>

**Remainderman.** — A remainderman is in the same position as a landlord. Having no right to the immediate possession, he cannot maintain trespass. So an owner in remainder, subject to his father's widow's life estate as dower,

**1. Possession by Servant.** — *Uttendorffer v. Saegers*, 50 Cal. 496; *Russell v. Thorn*, 1 Mo. 390; *Lamb v. Swain*, 3 Jones L. (48 N. Car.) 370; *Davis v. Clancy*, 3 McCord L. (S. Car.) 422, where the possession by the plaintiff's servant of a house on a tract of land to which the plaintiff had color of title was held to give a right to maintain trespass for cutting timber on the land.

**2. Possession by Agent.** — *Bryce v. State*, 113 Ga. 705; *Field v. Lang*, 89 Me. 454; *Holman v. Herscher*, (Tex. 1891) 16 S. W. Rep. 984. See also *Merrill v. Hilliard*, 59 N. H. 481.

Where A permits B to live on his land to take care of it, as his servant or agent, a trespass committed by C is against the right of A, because "the possession of B would be the possession of A." *Russell v. Thorn*, 1 Mo. 390.

Where the plaintiff's tenant has abandoned his possession as tenant, and holds possession merely as the plaintiff's agent at the time of the trespass, the plaintiff can recover. *Field v. Lang*, 89 Me. 454.

**3. Owner Cannot Maintain While Tenant in Possession.** — 4 Kent Com. 120; *Uttendorffer v. Saegers*, 50 Cal. 496; *Gould v. Sterling*, 4 Ill. App. 439; *Bartlett v. Perkins*, 13 Me. 87; *French v. Fuller*, 23 Pick. (Mass.) 104; *Rousin v. Benton*, 6 Mo. 592; *New Jersey Midland R. Co. v. Van Syckle*, 37 N. J. L. 496; *Campbell v. Arnold*, 1 Johns. (N. Y.) 511; *Tebey v. Webster*, 3 Johns. (N. Y.) 468; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Catlin v. Hayden*, 1 Vt. 375.

**It Has Been Held in Missouri that a landlord can maintain trespass *quare clausum fregit* during a tenant's possession, for permanent injury.** *Cramer v. Groseclose*, 53 Mo. App. 648, following *Parker v. Schackelford*, 61 Mo. 68, in which the tenancy was not a strict tenancy, but for a cropping on shares, although the court did not intimate that that made any difference; and *Austin v. Huntsville Coal, etc., Co.*, 72 Mo. 535, 37 Am. Rep. 446, where the tenant never entered under the lease, and paid no rent, and was expressly held to have acquired no possession. The examination of these cases, therefore, shows that they can be reconciled with the general rule.

*Cramer v. Groseclose*, 53 Mo. App. 648, itself, was a case where the tenant, whose lease was for the purpose of clearing and plowing the land, was taken bound, under pain of forfeiture of the lease, not to cut, or permit to be cut, any timber except such as he had in the course of clearing at the time, and he permitted the defendant, who was aware of the terms of the lease, to cut other timber.

These three cases were cited and followed in *Bailey v. A. Siegel Gas Fixture Co.*, 54 Mo.

App. 50. Compare *Cramer v. Groseclose*, as to the right of a landlord under a forfeited lease of chattels, with *Swift v. Moseley*, 10 Vt. 208, 33 Am. Dec. 197.

**Where, by Agreement, a tenant's lease expired in the event of his rent being unpaid on the day of payment, and, the rent being in default, the landlord took possession, it was held that the tenant could not maintain trespass *quare clausum fregit* against the landlord, who had the right of possession and merely took possession of what was his own.** *Mueller v. Kuhn*, 46 Ill. App. 496; *Schaefer v. Silverstein*, 46 Ill. App. 608, where it was held that the owner might employ force to reclaim his own.

**A Landlord, Although the Owner in Fee, Cannot Justify a Trespass on the Premises Leased to and in possession of his tenant by proof of his title.** *Stevens v. Taft*, 8 Gray (Mass.) 419.

**Under Statute in Georgia the owner may maintain trespass for injuries to the freehold while the tenant is in possession.** *Yahoola, etc., Mining Co. v. Irby*, 40 Ga. 482.

4. See the titles LANDLORD AND TENANT, vol. 18, p. 451; TRESPASS ON THE CASE, *post*.

**5. Landlord May Sue for Injury to Reversion While Tenant at Will in Possession — Connecticut.** — *Curtiss v. Hoyt*, 19 Conn. 154, 48 Am. Dec. 149.

*Maine.* — *Little v. Palister*, 3 Me. 6 (this case has sometimes been erroneously cited as an exception to the rule, but here the acts were not injurious to the freehold and did not affect the plaintiff, the landlord); *Bartlett v. Perkins*, 13 Me. 87; *Davis v. Nash*, 32 Me. 411.

*Massachusetts.* — *Starr v. Jackson*, 11 Mass. 519; *Allen v. Thayer*, 17 Mass. 299; *Hersey v. Chapin*, 162 Mass. 176; *Hastings v. Livermore*, 7 Gray (Mass.) 194; *Sumner v. Tileston*, 7 Pick. (Mass.) 201; *Hingham v. Sprague*, 15 Pick. (Mass.) 102; *Cushing v. Adams*, 18 Pick. (Mass.) 110.

*North Carolina.* — *Jones v. Taylor*, 1 Dev. L. (N. Car.) 435. See also *Spencer v. Weatherly*, 1 Jones L. (N. Car.) 326.

*South Carolina.* — *Davis v. Clancy*, 3 McCord L. (S. Car.) 422; *Cannon v. Hatcher*, 1 Hill L. (S. Car.) 260, 26 Am. Dec. 177; *Alston v. Collins*, 2 Spears L. (S. Car.) 451; *McColman v. Wilkes*, 3 Strobb. L. (S. Car.) 465, 51 Am. Dec. 637, where it was held that the landlord might maintain trespass, the persons who held the land being rather agents of the plaintiff than his tenants.

*Texas.* — *Gulf, etc., R. Co. v. Cusenberry*, 86 Tex. 525.

*Wisconsin.* — *Stoltz v. Kretschmar*, 24 Wis. 283; *Gunsolus v. Lormer*, 54 Wis. 630.

**Tenant at Will Has No Claim for Injury to Freehold.** — *Gulf, etc., R. Co. v. Cusenberry*, 86 Tex. 525.



cannot maintain trespass *quare clausum fregit*. The remedy in such cases is by action on the case.<sup>1</sup> In *England* it is held that where the trespass is of a permanent nature, the owner of the reversion in fee of a property held by one of two tenants in common (as a party wall) can, though the tenant makes no complaint, maintain trespass.<sup>2</sup>

(2) *Time of Possession*. — The possession must have been had at the time when the act of trespass was committed,<sup>3</sup> and a subsequent conveyance will not deprive the owner at the time of the trespass of his right of action.<sup>4</sup>

**No Retroactive Effect.** — It follows that an act which was lawful at the time it was committed cannot be subsequently converted into a trespass by a legal fiction.<sup>5</sup> Therefore, a deed not actually executed on the date it bears has no retroactive effect to constitute a trespass.<sup>6</sup> And an agreement fixing a boundary line will not retroact so as to make the cutting of timber before its execution a trespass.<sup>7</sup> On the same principle, a deed will have no retroactive effect to protect a trespasser.<sup>8</sup> So a sheriff's deed, though it will relate back to the time of sale as regards the title, will not do so to give the purchaser such constructive possession before its date as will enable him then to enter without becoming a trespasser.<sup>9</sup> And a deed conveying an easement executed in correction of former defective deeds and after a trespass is not admissible in evidence.<sup>10</sup> But it is otherwise under the statute in regard to a settler under the homestead law, whose patent on being issued relates back to the date of his settlement,<sup>11</sup> and a perfected right to a patent of pre-emption

**1. Remainderman.** — The doctrine that trespass *qu. cl. fr.* is maintainable by the owner of land for injury to the freehold while in the occupation of a tenant at will cannot be extended to a remainderman who is not entitled to possession. His remedy would be either by action on the case or for waste. *Lawry v. Lawry*, 88 Me. 482. See also to the same effect, *Yocum v. Zahner*, 162 Pa. St. 468. And see the title TRESPASS ON THE CASE, *post*.

**2.** *Mayfair Property Co. v. Johnston*, (1894) 1 Ch. 508.

**Under the New York Revised Statutes** a person seized of an estate in remainder or reversion may maintain an action of waste or trespass for an injury done to the inheritance, notwithstanding any intervening estate for life or years. *Van Deusen v. Young*, 29 N. Y. 9; *Smith v. Felt*, 50 Barb. (N. Y.) 612.

**3. Time of Possession — When Trespass Committed** — *Alabama*. — *Garrett v. Sewell*, 108 Ala. 521; *Louisville, etc., R. Co. v. Hill*, 115 Ala. 334.

*Connecticut*. — *Imlay v. Sage*, 5 Conn. 489.

*Delaware*. — *Quillen v. Betts*, 1 Penn. (Del.) 53.

*Georgia*. — *Allen v. Macon, etc., R. Co.*, 107 Ga. 838.

*Illinois*. — *Galt v. Chicago, etc., R. Co.*, 157 Ill. 125; *Faith v. Yocum*, 51 Ill. App. 620.

*Kentucky*. — *Wilsons v. Bibb*, 1 Dana (Ky.) 7, 25 Am. Dec. 118.

*Massachusetts*. — *Greve v. Wood-Harmon Co.*, 173 Mass. 45.

*Missouri*. — *Chouteau v. Boughton*, 100 Mo. 406.

*Nebraska*. — *Hanlon v. Union Pac. R. Co.*, 40 Neb. 52; *Chicago, etc., R. Co. v. Shepherd*, 39 Neb. 523.

*New York*. — *Aikin v. Buck*, 1 Wend. (N. Y.) 466, 19 Am. Dec. 535; *De Grauw v. Warner*, 89 Hun (N. Y.) 9; *Wood v. Lafayette*, 68 N.

Y. 181; *Dean v. Metropolitan El. R. Co.*, 119 N. Y. 540.

*North Carolina*. — *Smith v. Ingram*, 7 Ired. L. (29 N. Car.) 175; *Presnell v. Ramsour*, 8 Ired. L. (30 N. Car.) 505.

*Ohio*. — *Rowland v. Rowland*, 8 Ohio 40.

*Pennsylvania*. — *Busch v. Calhoun*, 14 Pa. Super. Ct. 578; *Collins v. Beatty*, 148 Pa. St. 65.

*Texas*. — *Gulf, etc., R. Co. v. Cusenberry*, 86 Tex. 525.

*Vermont*. — *Kidder v. Kennedy*, 43 Vt. 717.

*Canada*. — *Brookfield v. Brown*, 22 Can. Sup. Ct. 398.

**4. Subsequent Conveyance Immaterial.** — *Carl v. Sheboygan, etc., R. Co.*, 46 Wis. 625.

**5. No Retroactive Effect.** — *Dean v. Metropolitan El. R. Co.*, 119 N. Y. 540.

**6.** *Pratt v. Potter*, 21 Barb. (N. Y.) 589; *Van Alstine v. Belden*, 41 N. Y. App. Div. 123.

**Where the Plaintiff's Title Is Put in Issue** he must stand or fall by the right to recover he had at the time of the trespass and no other, and a subsequent conveyance of realty from his wife and an assignment by her of the cause of action will not give him the right to maintain trespass. *Dean v. Metropolitan El. R. Co.*, 119 N. Y. 540.

**Subsequent Judgment Not Retroactive to Constitute Trespass.** — Where a widow and son agree on a division of the deceased's land, and the son takes possession, trespass will not lie against him, the judgment afterwards rendered including the portion in the widow's dower land. *Norton v. Norton*, 25 S. W. Rep. 750, 15 Ky. L. Rep. 872.

**7.** *Stockton v. Garfrias*, 12 Cal. 315.

**8.** *Davis v. Elmore*, 40 S. Car. 533.

**9.** *Presnell v. Ramsour*, 8 Ired. L. (30 N. Car.) 505.

**10.** *Caldwell v. Morganton Mfg. Co.*, 121 N. Car. 339.

**11.** *Red River, etc., R. Co. v. Sture*, 532 Minn. 95.

of public lands also has a retroactive effect, covering the time during which it was being perfected.<sup>1</sup> Where the *locus in quo* is trust property and there was a vacancy in the office of trustee at the time of the trespass, the title of a trustee suing relates back to the time of trespass.<sup>2</sup> Peaceable possession at the time of the trespass, under a parol contract to grant a deed, is sufficient to entitle the grantee to maintain trespass; the title will relate back on execution of the deed.<sup>3</sup>

(3) *Right of Action of Disseizee*. — A disseizee may maintain trespass against the disseizor for the disseizin itself, because he was then in possession; but not for an injury accruing after the disseizin, until he has gained possession by a re-entry,<sup>4</sup> and then he may maintain his action for any intermediate damage.<sup>5</sup>

(4) *Actual Possession Illegally Acquired*. — Actual possession, though illegally acquired, may support trespass,<sup>6</sup> and actual possession of land, though tortious, will prevent recovery.<sup>7</sup>

**Wrongful Possessor — Extent of His Recovery**. — The wrongful possessor of realty cannot recover for injury to the realty, in trespass, but he may recover direct damages for injuries to his person or property through the wrongful invasion of his possession, even against the real owner.<sup>8</sup> Although in possession he cannot recover against the owner of the fee with the right of possession,<sup>9</sup> and his possession extends only to his actual occupancy.<sup>10</sup>

**c. CONSTRUCTIVE POSSESSION** — (1) *Legal Title Without Possession*. — One having the right of property and of immediate possession can maintain trespass for injury to realty against intruders.<sup>11</sup> Where there is no adverse

1. Keith v. Tilford, 12 Neb. 271.

2. Rogers v. Brooks, 99 Ala. 31.

3. Carney v. Reed, 11 Ind. 417.

4. **Right of Action of Disseizee**. — Butler v. Taylor, 86 Me. 17; Rawson v. Putnam, 128 Mass. 552.

5. **After Re-entry, for Intermediate Injury** — England. — Liford's Case, 11 Coke 51; Holcomb v. Rawlins, Cro. Eliz. 540.

Delaware. — Stean v. Anderson, 4 Harr. (Del.) 209.

Illinois. — Smith v. Wunderlich, 70 Ill. 426; Scheffel v. Weiler, 41 Ill. App. 85.

Maine. — Abbott v. Abbott, 51 Me. 575; Brown v. Ware, 25 Me. 411.

Massachusetts. — Allen v. Thayer, 17 Mass. 299.

Mississippi. — Emrich v. Ireland, 55 Miss. 390; Alliance Trust Co. v. Nettleton Hardwood Co., 74 Miss. 584, 60 Am. St. Rep. 531, where it was held that trespass *de bonis asportatis* would on re-entry lie for cutting trees.

New York. — Sprague Nat. Bank v. Erie R. Co., 22 N. Y. App. Div. 526; Haley v. Wheeler, 8 Hun (N. Y.) 569; Dewey v. Osborn, 4 Cow. (N. Y.) 329; Holmes v. Seely, 19 Wend. (N. Y.) 507.

North Carolina. — Smith v. Ingram, 7 Ired. L. (29 N. Car.) 175; Graham v. Houston, 4 Dev. L. (15 N. Car.) 232.

Pennsylvania. — Enterprise Transit Co. v. Hazlewood Oil Co., 20 Pa. Super. Ct. 127.

Tennessee. — West v. Lanier, 9 Humph. (Tenn.) 762.

**Exceptions**. — But it has been decided in *New Hampshire* that a disseizee who has a right of re-entry need not wait for actual re-entry before maintaining trespass for intermediate damage. Carter v. Beals, 44 N. H. 408. See also Dexter v. Sullivan, 34 N. H. 478, where it was

held that an heir or devisee could maintain trespass without first making an entry.

And in *Oklahoma*, under the code, re-entry is not necessary before maintaining action for intermediate injury. Oklahoma City v. Hill, 6 Okla. 114.

6. *Evertson v. Sutton*, 5 Wend. (N. Y.) 281, 21 Am. Dec. 217. Here the plaintiff was legally entitled by suit at law to the possession he acquired illegally, and the action was against a judge who issued a warrant dispossessing him without having jurisdiction.

7. *Wilsons v. Bibb*, 1 Dana (Ky.) 7, 25 Am. Dec. 118.

8. **Trespasser May Maintain Trespass for Injury to the Possession Only**. — Comstock v. Brosseau, 65 Ill. 39; Bass v. West, 110 Ga. 698; Heironimus v. Duncan, 11 Tex. Civ. App. 610.

**Contra**. — Zell v. Ream, 31 Pa. St. 304; Townsend v. Bissell, 5 Thomp. & C. (N. Y.) 583, 3 Hun (N. Y.) 556. See also Muldrow v. Jones, Rice L. (S. Car.) 64.

9. **Cannot Recover Against True Owner with Right of Possession**. — White v. Naerup, 57 Ill. App. 114; Stillwell v. Duncan, 103 Ky. 59.

10. **Trespasser's Possession Only Extends to Actual Occupancy**. — Kincaid v. Logue, 7 Mo. 167; Sloane v. Moore, 7 Mo. 170; Whitehead v. Foley, 28 Tex. 290; Cantagrel v. Von Lupin, 58 Tex. 570; Parker v. Bains, 59 Tex. 15; Evitts v. Roth, 61 Tex. 85; Hibbard v. Foster, 24 Vt. 542; Beaumont Lumber Co. v. Ballard, (Tex. Civ. App. 1893) 23 S. W. Rep. 920.

11. **Right of Property and Immediate Possession**. — Bulkley v. Dolbeare, 7 Conn. 232; Tasker v. Ridgely, 4 Har. & M. (Md.) 497; Mason v. Lewis, 1 Greene (Iowa) 494; Davis v. Clancy, 3 McCord L. (S. Car.) 422; Snider v. Myers, 3 W. Va. 195; Perry v. Jefferies, 61 S. Car. 292.

possession, he who has title, though he has never been in actual possession, may maintain trespass.<sup>1</sup>

**When Neither Party Has Actual Possession,** the constructive possession is with the better title,<sup>2</sup> and such constructive possession will enable the party to maintain trespass for an injury to the freehold.<sup>3</sup>

**Title to Wild and Uncultivated Land** is deemed possession to maintain trespass if no adverse possession is proved.<sup>4</sup>

**Possession by Reservation.** — If in a lease for years there be a reservation of the trees, such reservation constitutes possession in fact in the lessor, and he may maintain trespass for cutting them down,<sup>5</sup> and being in possession in fact, he is not a trespasser for entering and cutting them down,<sup>6</sup> and the purchaser of timber reserved from land sold has a sufficient possession to maintain trespass against a stranger.<sup>7</sup> Reservation of timber may be made from lands conveyed, either by separate deed<sup>8</sup> or in the conveyance of the soil,<sup>9</sup> and cutting such timber during the period and in the manner stipulated in the reservation will not constitute trespass; but a *bona fide* purchaser of land, without notice, would be protected against a prior unrecorded sale of the timber the same as against any other unrecorded instrument.<sup>10</sup> A reservation from a deed of land for a special purpose, though valid as such, is inoperative until used for the purpose reserved, and an appropriation of it for any other purpose by the grantees of the deed or their assigns would make them trespassers,<sup>11</sup> and such reservation is not good in the hands of the reserver's lessee without an express grant.<sup>12</sup>

"The possession is constructive when the property is in the custody and occupancy of no one, but rightfully belongs to the plaintiff. In that case the title draws to it the possession." *Brown v. Hartzell*, 87 Mo. 564; *More v. Perry*, 61 Mo. 174.

Constructive possession, as contra-distinguished from one that is actual, never exists in the absence of title. *Blackburn v. Baker*, 7 Port. (Ala.) 284.

"A constructive possession is where a person has title, but no possession, and there is no one in possession." *Myrick v. Bishop*, 1 Hawks (8 N. Car.) 485. See also *Cohoon v. Simmons*, 7 Ired. L. (29 N. Car.) 190.

**1. Title Without Possession.** — *Gillespie v. Dew*, 1 Stew. (Ala.) 229, 18 Am. Dec. 42; *Ledbetter v. Fitzgerald*, 1 Ark. 448; *Wilson v. Bushnell*, 1 Ark. 465; *Smith v. Yell*, 8 Ark. 470; *Gent v. Lynch*, 23 Md. 58, 87 Am. Dec. 558; *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582; *Kennedy v. Wheatley*, 2 Hayw. (3 N. Car.) 402; *Russell v. Meyer*, 7 N. Dak. 335.

"The title [to land] draws after it the right of possession, and, in fact, gives a sufficient constructive possession to enable the owner to maintain trespass. An actual entry, under a deed or grant of land, is not necessary in this state to enable the grantee to maintain trespass *qu. cl. fr.*" *Woods, J.*, in *Warren v. Cochran*, 30 N. H. 379.

**Statutes.** — Under *Georgia Code*, § 2964, the true owner can bring trespass though not in possession at the time, by showing his title in proof of his ownership. *Yahoola River, etc., Hydraulic Hose Min. Co. v. Irby*, 40 Ga. 479.

The same result is arrived at by the *South Carolina Code of Procedure*, in place of the previous requirement of possession of part and title to whole. *Gilmore v. Roberts*, 18 S. Car. 551.

In *Oklahoma* by statute the owner of property has a remedy by action of trespass though not in possession. *Oklahoma City v. Hill*, 6 Okla. 114.

**2. Constructive Possession with Better Title.** — *Padgett v. Baker*, 1 Tenn. Ch. 222.

**One Having the Legal Title to a Strip of Land Over Which Another Claims a Right of Way** has constructive possession and may maintain trespass against the other for wrongful entry and tearing away fences, because the defendant had no such actual possession as ousted the plaintiff from his constructive possession. *Hurt v. Adams*, 86 Mo. App. 73.

**3.** *West v. Lanier*, 9 Humph. (Tenn.) 762; *Bailey v. Massey*, 2 Swan (Tenn.) 167.

**4. Wild and Uncultivated Land.** — *Thornton v. St. Louis Refrigerator, etc., Co.*, 69 Ark. 424; *Ward v. Taylor*, 1 Pa. St. 238; *Baker v. King*, 18 Pa. St. 138; *Miller v. Zufall*, 113 Pa. St. 317; *Irwin v. Patchen*, 164 Pa. St. 51; *Mather v. Trinity Church*, 3 S. & R. (Pa.) 513; *Enterprise Transit Co. v. Hazelwood Oil Co.*, 20 Pa. Super. Ct. 127.

**5. Possession by Reservation in Deed.** — *Liford's Case*, 11 Coke 46; *Phillips v. De Groat*, 2 Lans. (N. Y.) 192.

**6.** *Arch. N. P.* 411; *Goodwright v. Vivian*, 8 East 190.

**7.** *Goodrich v. Hathaway*, 1 Vt. 485, 18 Am. Dec. 701.

**8.** *Clap v. Draper*, 4 Mass. 266, 3 Am. Dec. 215; *Russell v. Myers*, 32 Mich. 522.

**9.** *Cohen v. Bryant*, 65 S. W. Rep. 347, 23 Ky. L. Rep. 1448; *Goodwin v. Hubbard*, 47 Me. 595; *Howard v. Lincoln*, 13 Me. 122.

**10.** *Russell v. Myers*, 32 Mich. 522.

**11.** *Dybert v. Matthews*, 11 Wend. (N. Y.) 35.

**12.** *Russell v. Scott*, 9 Cow. (N. Y.) 279.

**Reservation as a Protection to Reserver.** — Where a landlord in a lease to his tenant of a farm reserved one room for the use of his son,



A Donation Deed from the state of Arkansas is *prima facie* evidence of a valid title which, if the land is unoccupied, will vest the grantee with constructive possession.<sup>1</sup>

**Adverse Possession.** — Adverse possession for the statutory period gives the adverse holder a title in fee simple equivalent to a title by deed, and he may maintain trespass against all the world.<sup>2</sup> It must be continuous, exclusive, and uninterrupted for the whole of the statutory period.<sup>3</sup>

**By Homestead Laws.** — Entry to premises as homestead, and possession, constitute sufficient title to maintain trespass against one not shown to be in privity with a better title, and give from the date of the entry an inchoate title which is in a legal sense property, subject to defeat only by failure to comply with the conditions imposed by the act of Congress. Under the statute the holder's right relates back to the date of his settlement.<sup>4</sup>

**Under Contract to Convey.** — A written contract of purchase will, with possession, or acts amounting to possession, of part, extend by construction to the whole lot contained in it.<sup>5</sup>

**Levy of Execution.** — When an execution is regularly levied, and seizin and possession delivered by the sheriff to the plaintiff, he may, without actual entry and possession, maintain trespass against the defendant who continues in possession after the levy, or against other trespassers.<sup>6</sup>

(2) *Possession under Color of Title.* — The party in possession under claim of ownership and color of title can recover damages from a mere trespasser.<sup>7</sup>

**Actual Possession of a Part with Claim and Color of Title to the Whole** of a piece of land will give constructive possession of the whole,<sup>8</sup> unless the balance of the tract

he could not be held a trespasser by occupying the room along with his son, unless by so doing he obstructed the tenant in the use of the other premises or increased the expense of board of his son. *Santford v. Dobyns*, 30 S. W. Rep. 996, 17 Ky. L. Rep. 283.

The reservation by the lessor of a farm to make any changes or alterations to the mansion house during the year throws upon the lessee the reasonable consequences of exercising it, and nothing but want of due care in making the repairs can give the tenant a right of action for trespass. *Clark v. Lindsay*, 7 Pa. Super. Ct. 43.

1. *Thornton v. St. Louis Refrigerator, etc., Co.*, 69 Ark. 424.

**A Sheriff's Sale, Before a Deed Is Granted**, will not give the purchaser, who has not actual possession, any constructive possession sufficient to maintain trespass, or right to enter without becoming a trespasser. *McMillan v. Hafley*, 2 Law Repos. (4 N. Car.) 89; *Presnell v. Ramsour*, 8 Ired. L. (30 N. Car.) 505.

**A Mining Company Which Purchased a Property at a Sheriff's Sale** and held a deed from him, not sealed, which worked the property for a year and then let it go into neglect, and whose lute manager saw the defendants tearing out the machinery for seven weeks without protest, cannot maintain trespass against the defendants who had a claim of title. *United Copper Min., etc., Co. v. Franks*, 85 Me. 321.

**A Recorded Sheriff's Deed**, without the execution on which it was based, and without evidence of possession under it for seven years, is not sufficient title to found constructive possession under the statute. *Ault v. Meager*, 112 Ga. 148.

2. *Hughes v. Graves*, 39 Vt. 359. See the title **ADVERSE POSSESSION**, vol. 1, p. 883, *Effect of Adverse Possession*.

3. *Waters v. Swanfer*, 88 Md. 391.

4. **By Homestead Laws.** — *Culbertson Irrigating, etc., Co. v. Olander*, 51 Neb. 539; *Red River, etc., R. Co. v. Sture*, 32 Minn. 95; *Gulf, etc., R. Co. v. Clark*, 41 C. C. A. 597. See also the title **HOMESTEAD**, vol. 15, p. 516.

**The Receiver's Receipt** issued to one in possession claiming land under it as a homestead constitutes title to maintain trespass against a mere wrongdoer. *Gulf, etc., R. Co. v. Clark*, 41 C. C. A. 597.

**A Permit from the Secretary of the Interior** to cut timber upon the public lands of the United States does not attach to land upon which a homestead filing has been made. *Nelson v. Big Blackfoot Milling Co.*, 17 Mont. 553.

5. **Under Contract to Convey.** — *Hunt v. Taylor*, 22 Vt. 556; *Spear v. Ralph*, 14 Vt. 400; *Peach v. Sutton*, 5 Vt. 209.

6. **Levy of Execution.** — *Blaisdell v. Roberts*, 37 Me. 239; *Wellington v. Geary*, 3 Allen (Mass.) 508; *Langdon v. Potter*, 3 Mass. 215; *Gore v. Brazier*, 3 Mass. 523, 3 Am. Dec. 182; *Bartlett v. Perkins*, 13 Me. 87; *Chapman v. Gray*, 15 Mass. 439; *Allen v. Thayer*, 17 Mass. 299; *Cressy v. Sawyer*, 18 N. H. 95. *Contra*, *Bowne v. Graham*, 2 Tyler (Vt.) 411; *Kretzer v. Wysong*, 5 Gratt. (Va.) 9.

7. **Possession under Color of Title.** — *Kellogg v. King*, 114 Cal. 378, 55 Am. St. Rep. 74; *Nelson v. Mather*, 5 Kan. 151; *Douglass v. Dickson*, 31 Kan. 310; *Hoffman v. Harrington*, 44 Mich. 183.

8. **Possession of Part with Claim and Color of Title to Whole.** — *Beach v. Sutton*, 5 Vt. 209; *Spear v. Ralph*, 14 Vt. 400; *Hunt v. Taylor*, 22 Vt. 556. See also *Mitchell v. Bridgers*, 113 N. Car. 63.

It is a well-settled principle that when one enters on land claiming title to the same under

is in actual possession of the true owner or some other person claiming title.<sup>1</sup>

**Actual Possession Without Color of Title** extends only to the land occupied, and does not constitute constructive possession of any part of a section beyond that occupied.<sup>2</sup>

**Color of Title Without Possession** will not enable a party to maintain trespass *quare clausum fregit*, even against a wrongdoer.<sup>3</sup>

**Color of Title — How Constituted.** — Color of title is usually constituted by virtue of some written instrument.<sup>4</sup>

*d. EQUITABLE TITLE.* — One having the equitable title, with full right to call for the legal title, may maintain trespass.<sup>5</sup>

*e. PERSONAL REPRESENTATIVES.* — The doctrine, derived from 3 and 4 William IV., c. 42, that the right of action at common law for injury to realty survives to personal representatives, is now generally received in the *United States*.<sup>6</sup>

*f. WIDOW.* — A widow is in peaceable and legal possession of her husband's house by virtue of her right to dower, and can maintain trespass for forcible expulsion therefrom by the heir.<sup>7</sup> She can maintain trespass on her mere

a deed of conveyance and thereby acquires a seizin, it shall extend to the whole parcel to which he has right. *Stearns v. Palmer*, 10 Met. (Mass.) 32; *Kennebec Purchase v. Springer*, 4 Mass. 418, 3 Am. Dec. 227; *Gerhardt v. Swaty*, 57 Wis. 24.

**Color of Title** to a piece of land, with possession by self or servant of a house thereon, is possession of the whole tract against a wrongdoer and will give a right to maintain trespass. *Carwile v. House*, 6 Ala. 710.

1. *Fullam v. Foster*, 68 Vt. 590; *Langdon v. Templeton*, 66 Vt. 173.

2. **Actual Possession Without Color of Title** — *Alabama*. — *Blackburn v. Baker*, 7 Port. (Ala.) 284.

*Illinois*. — *Webb v. Sturtevant*, 2 Ill. 181; *Winkler v. Meister*, 40 Ill. 349.

*Kentucky*. — *Fish v. Branamon*, 2 B. Mon. (Ky.) 379.

*New York*. — *Aikin v. Buck*, 1 Wend. (N. Y.) 466, 19 Am. Dec. 535.

*Texas*. — *Whitehead v. Foley*, 28 Tex. 290; *Cantagrel v. Von Lupin*, 58 Tex. 570; *Parker v. Bains*, 59 Tex. 15; *Evitts v. Roth*, 61 Tex. 85.

*Vermont*. — *Hubbard v. Austin*, 11 Vt. 129; *Beaumont Lumber Co. v. Ballard*, (Tex. Civ. App. 1893) 23 S. W. Rep. 920.

In *Ring v. King*, 4 Dev. & B. L. (20 N. Car.) 164, it is held that such a possessor is in the possession of the whole tract only so long as no other person is in the actual adverse possession of any part. Whenever any one takes possession of any part, either with or without title, the former possessor loses possession of that part, and cannot maintain trespass for any act done on such part while he is out of possession. See also *supra*, this section, *Actual Possession Illegally Acquired*.

3. **Color of Title Without Possession.** — *Marr v. Boothby*, 19 Me. 150; *Savage v. Holyoke*, 59 Me. 345; *Butler v. Taylor*, 86 Me. 17.

**Where the Plaintiff Is Not in Actual Possession** of the land and cannot show a valid title to it, he must prove actual possession of part and a color of title to the other part of the land trespassed upon. *Edwards v. Noyes*, 65 N. Y. 125.

4. As to what constitutes color of title gen-

erally, see the title ADVERSE POSSESSION, vol. 1, p. 846 *et seq.*

5. **Equitable Title.** — *Russell v. Meyer*, 7 N. Dak. 335; *Miller v. Zufall*, 113 Pa. St. 317; *Gotshall v. Langdon*, 16 Pa. Super. Ct. 158; *Arnold v. Pfoutz*, 117 Pa. St. 103.

Where the plaintiffs purchased land under reservation of all timber cut and removed within a stated time, the equitable title, with the absolute right of possession, in such timber as was cut but not removed at the expiration of the period, passed to them, and they were held entitled to maintain trespass for its removal. *Inderlied v. Whaley*, 65 Hun (N. Y.) 407.

A deed naming no grantee, but given "for the use of a schoolhouse if the neighboring inhabitants see cause to build a schoolhouse thereon," was held to be a good defense against an action for trespass. *Bailey v. Kilburn*, 10 Met. (Mass.) 176, 43 Am. Dec. 423.

Where one bought property with his wife's money and took a deed to himself, a trust resulted for his wife, the formal legal title being in him and the equitable title in her, but a joint action by both will not lie. *Wrightsville, etc., R. Co. v. Holmes*, 85 Ga. 668. But see, *contra*, *Clay v. City of St. Albans*, 43 W. Va. 539, holding that where a conveyance was to a husband for the use of his wife, either she alone or both could maintain trespass for injury to the possession or the freehold.

6. **Personal Representatives** — *Kansas*. — *Hanlen v. Baden*, 6 Kan. App. 635.

*Maryland*. — *Lake Roland El. R. Co. v. Frick*, 86 Md. 259.

*Missouri*. — *Choteau v. Boughton*, 100 Mo. 406.

*New York*. — *Mitchell v. White Plains*, 91 Hun (N. Y.) 189; *Shepard v. Manhattan R. Co.*, 117 N. Y. 442.

*North Carolina*. — Under statute in North Carolina the right of action *q. c. f.* survives to the executor or administrator, not to the heir or devisee. *Dobbs v. Gullidge*, 4 Dev. & B. L. (20 N. Car.) 68.

See also the title SURVIVAL OF ACTIONS, 21 ENCYC. OF PL. AND PR. 309, and the title ASSIGNMENTS in this work, vol. 2, p. 1020 *et seq.*

7. **Widow.** — *Stevens v. Stevens*, 96 Ga. 374.

possession, even though no dower has been allotted to her; her damages being restricted to the diminution of her profits and uses.<sup>1</sup>

g. **MARRIED WOMAN.** — A married woman contracting to purchase a farm, paying the purchase money and doing much of the work, is legally presumed to be in possession, and not her husband, and she can maintain trespass for abuse of process by levy on horses, directed against her husband.<sup>2</sup>

h. **TENANT.** — A tenant in possession for a year or for years may recover for an injury to his possession,<sup>3</sup> even if his lease is merely parol.<sup>4</sup> So, a lessee for years may maintain a common-law action for actual damages for cutting down trees, based upon his possession.<sup>5</sup> A tenant is an owner and party interested within the statute, and can maintain trespass for entering, without agreement or tendering security, upon land under right of eminent domain.<sup>6</sup> He cannot maintain trespass without actual possession at the time of the trespass.<sup>7</sup> Having possession, he may maintain trespass for the destruction of buildings as to which he is under an obligation to rebuild, and recover full damages, as if he were the bailee of the buildings as personal property.<sup>8</sup> A lessee of part of a mill with a right to water power has not by the lease such an interest in the *locus in quo* as to enable him to maintain trespass *q. c. f.* against the lessor for opening a dam and diverting the water. He has no demise of the *locus*.<sup>9</sup> A tenant from year to year, in possession under a lease from the remainderman, can maintain trespass against a purchaser who has bought the property subject to, and with notice of, the lease and with knowledge of the possession.<sup>10</sup>

i. **ASSIGNEE.** — The right to maintain trespass is not assignable in writing and is not carried by a conveyance of land.<sup>11</sup> Therefore, a vendee of land cannot recover damages for injury to the land before the date of his purchase, and a devisee is in this respect on the same footing as a vendee.<sup>12</sup>

j. **OWNERS OF SEPARATE INTERESTS.** — Although the rule is that to enable one to maintain trespass his possession of the land must be exclusive, those having separate interests in land may sue, provided these interests are exclusive.<sup>13</sup> A tenant in common of a pasture field may maintain

1. *Frisbee v. Marshall*, 122 N. Car. 760.

2. *Van Nostrand v. Hubbard*, 35 N. Y. App. Div. 201.

3. *Tenant*. — *Weston v. Gravlin*, 49 Vt. 507.

4. *Under Parol Lease*. — *Hillhouse v. Jennings*, 60 S. Car. 392.

5. *For Cutting Down Trees*. — *Lewis v. Thompson*, 3 N. Y. App. Div. 329.

6. *Eminent Domain*. — *Philadelphia, etc., R. Co. v. Pottsville Water Co.*, 18 Pa. Co. Ct. 501. And see the title *EMINENT DOMAIN*, vol. 10, p. 1194.

7. *Tenant Must Be in Possession at Time of Trespass*. — *Heilbron v. Heinlen*, 72 Cal. 371; *McDougall v. Campbellton Water Supply Co.*, 34 N. Bruns. 467.

*Possession by a Tenant Pending an Appeal* from a judgment against him in an action of forcible detainer is lawful, and sufficient to enable him to maintain an action of trespass for disturbing him in the peaceable enjoyment of the demised premises. *Tobin v. French*, 93 Ill. App. 18.

*Where a Tenant's Lease Has Come to an End* and he is turned out by the owner, he cannot recover damages for a trespass except through his right and claim to the property which has been injured. *Vinson v. Flynn*, 64 Ark. 453.

*Contra* — *Tenant Entitled to Possession Can Maintain*. — *Burt v. Warne*, 31 Mo. 296, where it was held that the assignee of a lease, who had been recognized as the tenant by the agent

or the owners previous to the defendant's entry, being entitled to the possession, could maintain trespass.

8. *For Destruction of Buildings*. — *Anthony v. New York, etc., R. Co.*, 162 Mass. 60.

9. *Where No Demise of Locus*. — *Hull v. Sanctuary*, 68 Vt. 57.

10. *Lease from Remainderman*. — *Salimonic Min., etc., Co. v. Wagner*, 2 Ind. App. 81.

11. *Right of Action Not Assignable*. — *Allen v. Macon, etc., R. Co.*, 107 Ga. 838; *Chicago, etc., R. Co. v. Maher*, 91 Ill. 316; *Galt v. Chicago, etc., R. Co.*, 157 Ill. 125; *Faith v. Yocum*, 51 Ill. App. 620.

12. *Allen v. Macon, etc., R. Co.*, 107 Ga. 838. But compare *Chouteau v. Boughton*, 100 Mo. 406; *Webber v. Quaw*, 46 Wis. 118.

13. *Owners of Separate Interests*. — *Cox v. Glue*, 5 C. B. 533, 57 E. C. L. 533; *Tompkinson v. Russell*, 9 Price 287; *Clap v. Draper*, 4 Mass. 266, 3 Am. Dec. 215; *Richards v. Gauffret*, 145 Mass. 486; *Gilbert v. Kennedy*, 22 Mich. 5; *Avitt v. Farrell*, 68 Mo. App. 665; *Burley v. Pike*, 62 N. H. 495; *Stevens v. Adams*, 1 Thomp. & C. (N. Y.) 587; *Haskin v. Record*, 32 Vt. 575; *Ganter v. Atkinson*, 35 Wis. 48; *Wausau Boom Co. v. Plumer*, 49 Wis. 112.

"It Appears to Be a Principle of Law Well Settled, that where a man has a separate interest in the soil for a particular use, although the right of the soil is not in him, if he be injured in



trespass;<sup>1</sup> and a tenant in common of a house may sue a trespasser in his room, without joining his cotenants, where the injury is to his occupancy and not to the room.<sup>2</sup> The owner of the agricultural interests in land may become a trespasser as to the reserved mineral interests, but only by engaging in mining for the minerals reserved,<sup>3</sup> and he may by direct interference (as by actual destruction of the dam) subject himself to liability to the dominant owner of the easement to build or raise a dam.<sup>4</sup> Possession of an interest in the profits of land may be sufficient to support trespass.<sup>5</sup>

**Joint Tenants.** — Trespass cannot, as a rule, be maintained by one tenant in common against a cotenant, unless the trespass amounts to an ouster of the plaintiff or results in the total destruction of the property.<sup>6</sup>

**k. TRUSTEE.** — In trespass upon land conveyed in trust, the trustee can maintain the action, but if the *cestui que trust* be in actual possession, he should be the plaintiff, though it is otherwise in ejectment.<sup>7</sup>

**l. MORTGAGEE.** — A mortgagee of a building may maintain trespass against both the person who tears it down and the person who carries it away, even though the debt be not due.<sup>8</sup>

**m. IRREVOCABLE LICENSEE.** — An irrevocable licensee can maintain trespass *quare clausum fregit*.<sup>9</sup>

**2. Realty Which May Be Subject of Trespass** — **a. DWELLING HOUSES** — **By Execution of Civil Process.** — It is trespass to break into and enter a dwelling house for the execution of civil process,<sup>10</sup> but not for the execution of

the enjoyment of his particular use of the soil, he may maintain trespass *qu. cl. fr.*, but not if his interest is in common with others. Thus this action lies for him who has the herbage, although not a right to the soil. *Hoe v. Taylor*, Moo. K. B. 355." *Parsons, C. J.*, in *Clap v. Draper*, 4 Mass. 266, 3 Am. Dec. 215; and *obiter* to the same effect, *Rehoboth v. Hunt*, 1 Pick. (Mass.) 224.

**The Fact that the Plaintiff's Lessors Reserve the Right to Pasture** on land let for hunting does not affect the possession of the plaintiff's right to sue. *Kellogg v. King*, 114 Cal. 378, 55 Am. St. Rep. 74.

**A Farm Hand Who Has the Occupancy of a House and Garden**, as part of his compensation, has not such exclusive possession as will support trespass against his master for forcibly dispossessing him. *Heffelfinger v. Fulton*, 25 Ind. App. 33.

**And the Steward of a College**, who occupies a part of the college buildings, without showing a lease, is merely the servant of the proprietors, and cannot maintain trespass for forcible expulsion. *Wason v. McEachin*, 47 N. Car. 207.

**A Licensee by Parol of a Right to Maintain a Sewer** across an adjoining owner's land has such an exclusive interest as to enable him to maintain trespass *q. c. f.* against a stranger who injures the sewer by grading a street. *Miller v. Greenwich Tp.*, 62 N. J. L. 771.

**1. Tenant in Common of Pasture Field.** — *Morgan v. Hudnell*, 52 Ohio St. 552, 49 Am. St. Rep. 741.

**2. Tenant in Common of House.** — *Milner v. Milner*, 101 Ala. 599. See also *Newell v. Witcher*, 53 Vt. 580.

**3. Owners of Agricultural and Mineral Interests.** — *Ashman v. Wigton*, (Pa. 1887) 12 Atl. Rep. 74.

**4. Owner of Easement.** — *State v. Suttle*, 115 N. Car. 784.

**5. Possession of Interest in Profits of Land.** — *Stultz v. Dickey*, 5 Binn. (Pa.) 285, 6 Am. Dec. 411. See also *McCormick v. Huse*, 66 Ill. 315.

**6.** 1 *Chitty's Pl.* 192. See the title **JOINT TENANTS AND TENANTS IN COMMON**, vol. 17, p. 700.

**7. Trustee.** — 1 *Chitty's Pl.* 49; *Cox v. Walker*, 26 Me. 504. See also *infra*, this section, *Realty Which May Be Subject of Trespass* — *Churches, etc.*

**8.** *Woodruff v. Halsey*, 8 Pick. (Mass.) 333, 19 Am. Dec. 329.

**9. Irrevocable Licensee.** — *Richards v. Gauffret*, 145 Mass. 486.

**10. Breaking into Dwelling House to Execute Civil Process** — *England.* — 1 *Smith Lead. Cas.* 238; *Semayne's Case*, 5 Coke 91; *Buckenham v. Francis*, 11 Moo. 45, 2 E. C. L. 407.

*Massachusetts.* — *Isley v. Nichols*, 12 Pick. (Mass.) 270, 22 Am. Dec. 425.

*New Hampshire.* — *Gordon v. Clifford*, 28 N. H. 402.

*New York.* — *Hubbard v. Mace*, 17 Johns. (N. Y.) 127; *Curtis v. Hubbard*, 4 Hill (N. Y.) 437, 40 Am. Dec. 292.

*Rhode Island.* — *Kelly v. Schuyler*, 20 R. I. 432, 78 Am. St. Rep. 887; *Clark v. Wilson*, 14 R. I. 11.

*Vermont.* — *Hooker v. Smith*, 19 Vt. 151, 47 Am. Dec. 679.

And see the title **SHERIFFS AND CONSTABLES**, vol. 25, p. 658.

**Exceptions — Pursuit to Retake a Defendant.** — In a pursuit to retake a defendant an officer may break open an outer door. *Allen v. Martin*, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564.

**Where Execution Properly Commenced.** — And where the execution of process against goods has been properly commenced, the officer may afterwards break open the outer door to continue and complete the execution. *Glover v. Whittenhall*, 6 Hill (N. Y.) 597.

criminal process, if admittance be first demanded.<sup>1</sup>

If the Defendant or His Property Be Removed to a third person's house to avoid execution, although the officer may (after demand made) break open and enter,<sup>2</sup> if it turn out that the defendant or his property is not within, he is a trespasser.<sup>3</sup>

**What Constitutes Breaking Open.** — Even opening the door of a dwelling house which is only latched is trespass.<sup>4</sup> But a store, barn, or outhouse, not connected with the dwelling house, may be broken into to levy an execution.<sup>5</sup> Breaking open applies only to windows and outer doors;<sup>6</sup> having obtained admission to the house, the officer may break open inner doors, windows, cupboards, trunks, etc., without demand first made.<sup>7</sup>

The Taking of Goods after such an illegal entry is unlawful where part of the same act.<sup>8</sup>

**b. CHURCHES, ETC.** — Where the fee of a meeting house is in a corporation, another society which has the use of it as a meeting house has not such an exclusive possession as will enable it to maintain trespass;<sup>9</sup> and where the legal estate of the meeting house was in trustees, several of them could not give the minister the right to maintain the action, because they could not exclude the other trustees from the possession.<sup>10</sup> The original trustees of a church, named in the conveyance to them, can maintain trespass, though not appointed trustees under the statute, the legal title being vested in them individually.<sup>11</sup> Where, by a vote of the proprietors of a township, a

**1. But Not Criminal Process.** — *Semayne's Case*, 5 Coke 91; *Burdett v. Abbott*, 14 East 157; *Launock v. Brown*, 2 B. & Ald. 592, 2 Hale P. C. 117. See the titles ARREST, vol. 2, p. 832; WARRANTS.

**2. Where Property or Defendant in Third Person's House — England.** — 1 Hale 459; 2 Hale 117.

*Kentucky.* — *Keith v. Johnson*, 1 Dana (Ky.) 604, 25 Am. Dec. 167, and cases in note thereto.

*Maryland.* — *Gusdorff v. Duncan*, 94 Md. 160.

*Massachusetts.* — *Oystead v. Shed*, 13 Mass. 520, 7 Am. Dec. 172.

*New Hampshire.* — *Gordon v. Clifford*, 28 N. H. 402.

*Rhode Island.* — *Kelley v. Schuyler*, 20 R. I. 432, 78 Am. St. Rep. 887, and cases cited.

**3. At Officer's Peril.** — *Foster's Crim. Law* 320; *Semayne's Case*, 5 Coke 91, 1 Smith Lead. Cas. 114; *Johnson v. Leigh*, 1 Marsh. 565, 6 Taunt. 246, 1 E. C. L. 374; *Ratcliffe v. Burton*, 3 B. & P. 229; *Cooke v. Birt*, 5 Taunt. 765, 1 E. C. L. 258, where Dallas, J., said: "The sheriff may enter the house of a stranger if the door be open, but it is at his peril whether the goods be found there or not; if they be not he is a trespasser;" *Gusdorff v. Duncan*, 94 Md. 160.

Where a dwelling house is so constructed that there are two outer doors, entrances to distinct residences, though the residences communicate, it is a trespass to enter one residence forcibly through the other. *Stedman v. Crane*, 11 Met. (Mass.) 295.

But not if there be only one outer entrance to several residences. *Hubbard v. Mace*, 17 Johns. (N. Y.) 127; *Williams v. Spencer*, 5 Johns. (N. Y.) 352; *Lee v. Gansel*, 1 Cowp. 1.

**4. What Constitutes Breaking Open.** — *Curtis v. Hubbard*, 1 Hill (N. Y.) 337; *Ryan v. Shilcock*, 7 Exch. 72, 21 L. J. Exch. 55.

**5. Applies Only to Dwelling Houses.** — *Penton*

*v. Brown*, 1 Keb. 698; *Hodder v. Williams*, (1895) 2 Q. B. 663; *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321; *Newton v. Adams*, 4 Vt. 437; *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145.

**6.** "A dwelling house must be considered to begin at its outer fence," said Alderson, B., in *Whalley v. Williamson*, 7 C. & P. 294, 32 E. C. L. 512.

**7. May Break Open Inner Doors.** — *Lee v. Gansel*, 1 Cowp. 1; *Rex v. Bird*, 2 Show. 87; *Hutchison v. Birch*, 4 Taunt. 619; *Lloyd v. Sandilands*, 8 Taunt. 250, 4 E. C. L. 92; *Fitch v. Loveland*, Kirby (Conn.) 380; *Williams v. Spencer*, 5 Johns. (N. Y.) 352; *Hubbard v. Mace*, 17 Johns. (N. Y.) 127; *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321.

In *Gusdorff v. Duncan*, 94 Md. 160, it was held that where permission was granted to enter the plaintiff's house to serve a writ of replevin against a third person, and the defendant's agents then forcibly went upstairs, they would be trespassers *ab initio*.

But where this was done, merely without the plaintiff's consent, but not with force, it was held that no trespass was committed. *Walsh v. Taylor*, 39 Md. 599.

In *Ratcliffe v. Burton*, 3 B. & P. 223, it was thought that demand should first be made before breaking open inner doors; but it was decided in *Hutchison v. Birch*, 4 Taunt. 619, that none was necessary.

**8. Taking of Goods After Illegal Entry.** — *Curtis v. Hubbard*, 4 Hill (N. Y.) 437, 40 Am. Dec. 292; *People v. Hubbard*, 24 Wend. (N. Y.) 369; *Isley v. Nichols*, 12 Pick. (Mass.) 270, 22 Am. Dec. 425.

**9. Churches, etc.** — *Religious Cong. Soc. v. Baker*, 15 Vt. 119, 40 Am. Dec. 668. See also *Milford v. Godfrey*, 1 Pick. (Mass.) 91.

**10.** *Cox v. Walker*, 26 Me. 504.

**11.** *Walker v. Fawcett*, 7 Ired. L. (29 N. Car.)

lot of land was appropriated for the purpose of erecting a meeting house thereon, the parish had actual possession sufficient to enable it to maintain trespass against a stranger.<sup>1</sup> And the survivor of several bargainees under a deed of bargain and sale to them as agents and overseers for a church, although he was not in the constant habit of resorting to the meeting house when used as such, could maintain trespass because he was the trustee of those who were in the habit of using it, and their possession must be construed as his possession.<sup>2</sup>

**c. HIGHWAYS.** — Where the Abutting Owner Has the Fee of the Road to the Centre, he can maintain the action for acts of trespass committed thereon,<sup>3</sup> as for obstructing the highway by placing fence rails upon it,<sup>4</sup> or by erecting buildings thereon;<sup>5</sup> for alteration of the highway by a private individual;<sup>6</sup> for the removal of a sidewalk by village authorities;<sup>7</sup> for ploughing up a turnpike road by an individual;<sup>8</sup> for filling up a watercourse dug by the owner under the highway in front of his land;<sup>9</sup> against a servant of a turnpike corporation for cutting and carrying away thatch therefrom;<sup>10</sup> for carrying away the grass, though legally cut thereon;<sup>11</sup> against one who assists the city to take up curbstones laid down by the owner on his sidewalk, not being for the repair of the street;<sup>12</sup> for digging and removing the soil of the highway;<sup>13</sup> for piling timber thereon.<sup>14</sup>

**Dedication.** — But trespass cannot be maintained by an abutting owner, where the entry is on a public street, regularly platted, laid out, and dedicated to the public use by the recording of the plat,<sup>15</sup> nor where a railroad company has taken land by condemnation proceedings, so far as the highway abutting on the land taken is concerned, the condemnation proceedings carrying the possession of the adjoining highway, so far as it belonged to an occupier.<sup>16</sup>

**Even Where He Does Not Own the Fee of the Soil,** an abutting owner may recover in trespass for the destruction of ornamental trees which he has set out on the sidewalk with the sanction of the authorities.<sup>17</sup>

**Right to Deviate from a Highway.** — Where a highway becomes obstructed and impassable from temporary causes, a traveler has the right to go *extra viam* upon adjoining lands, without being guilty of trespass. This is based upon the doctrine that inevitable necessity or accident will excuse or justify an alleged trespass.<sup>18</sup>

1. *First Parish v. Smith*, 14 Pick. (Mass.) 297.

2. *Carrine v. Westerfield*, 3 A. K. Marsh. (Ky.) 331. See also the title RELIGIOUS SOCIETIES, vol. 23, pp. 323, 371.

3. Where the Locus in Quo Is a Highway, it is incumbent on the plaintiff to prove something more than a mere entry. He must prove some unlawful action, or, if lawful, that it was done in an improper manner. *Munson v. Mallory*, 36 Conn. 165, 4 Am. Rep. 52.

4. **Trespass on Highways — By Placing Fence Rails Thereon.** — *Lewis v. Jones*, 1 Pa. St. 336, 44 Am. Dec. 138.

5. **By Erecting Buildings Thereon.** — *Cortelyou v. Van Brundt*, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439.

6. **By Altering Highway.** — *Hunt v. Rich*, 38 Me. 195; *Hollenbeck v. Rowley*, 8 Allen (Mass.) 473.

7. **By Removal of Sidewalk.** — *Rogers v. Randall*, 29 Mich. 41.

8. **By Ploughing Up a Road.** — *Robbins v. Borman*, 1 Pick. (Mass.) 122.

9. **By Filling Up Watercourse under Highway.** — *Perley v. Chandler*, 6 Mass. 454, 4 Am. Dec. 159.

10. *Adams v. Emerson*, 6 Pick. (Mass.) 56.

11. **By Carrying Away Grass.** — *Bragg v. Laramy*, 65 Vt. 673.

12. **By Taking Up Curb Stones.** — *Muzzey v. Davis*, 54 Me. 361.

13. **By Digging Up and Removing Soil.** — *Gidney v. Earl*, 12 Wend. (N. Y.) 98.

14. **By Piling Timber Thereon.** — *Jenks v. Lansing Lumber Co.*, 97 Iowa 342.

15. **Where Street Dedicated.** — *Galt v. Chicago*, etc., R. Co., 157 Ill. 125.

16. **Condemnation Proceedings.** — *Fitch v. New York*, etc., R. Co., 59 Conn. 414.

17. **Ornamental Trees on Sidewalk.** — *Lane v. Lamke*, 53 N. Y. App. Div. 395; *Huling v. Henderson*, 161 Pa. St. 553.

18. **Right to Deviate from Highway — England.** — *Henn's Case*, W. Jones 296; Anonymous, 3 Salk. 182; *Pomfret v. Ricroft*, 1 Saund. 323; *Absor v. French*, 2 Show. 28; *Young v. —*, 1 Ld. Raym. 725; *Taylor v. Whitehead*, 2 Dougl. 745; *Bullard v. Harrison*, 4 M. & S. 393.

*Georgia.* — *Smith v. Savannah*, etc., R. Co., 84 Ga. 698.

*New York.* — *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Williams v. Safford*, 7 Barb. (N.



**Overhanging Doors, Gates, Windows, and Eaves.** — Abutting owners have a right to a reasonable use of the highway for swinging doors, gates, windows, or overhanging eaves, without being liable in trespass at the instance of the owner of the soil of the street.<sup>1</sup>

**d. PRIVATE WAYS.** — As a general rule, one having a right of way over private lands cannot deviate and go on the adjoining land if the way becomes impassable.<sup>2</sup> The use of a right of way is strictly limited to the terms of the grant, and the use of it with the intention of going on other lands of the grantor is a trespass.<sup>3</sup>

**e. LINE TREES.** — Trespass can be maintained for the destruction and cutting of line trees.<sup>4</sup> Trees on the line belong to the adjoining proprietors as tenants in common, and trespass lies, for their destruction, by either proprietor against the other.<sup>5</sup>

**f. FENCES.** — Trespass lies for removing a party fence,<sup>6</sup> or moving back the fence of another, even where the moving has the effect of dispossessing the possessor,<sup>7</sup> or for the removal, by the user of a right of way, of a fence on the owner's land, other than where it obstructed the right of way.<sup>8</sup> Fences continue to be part of the freehold, though accidentally detached, and their removal is a trespass on the realty.<sup>9</sup> Where adjoining owners have agreed upon a fence variant from the line, avowedly for convenience, and still have continued to claim according to the true line, neither party acquires a title or even a right of possession sufficient to maintain trespass against the other, merely on account of the fence.<sup>10</sup>

**g. EASEMENTS.** — The owner of an easement may maintain trespass.<sup>11</sup>

**h. SUPPORT OF ADJACENT SOIL.** — An owner has the right to lateral support for his land while in its natural state and unencumbered by buildings, and is entitled to damages for his soil falling into an adjoining owner's excavation.<sup>12</sup> But he has no right to lateral support for buildings erected on his land,<sup>13</sup> nor to damages for the subsidence of a building by reason of its additional weight, following an adjacent owner's excavation.<sup>14</sup>

Y.) 309; *Newkirk v. Sabler*, 9 Barb. (N. Y.) 652.

*Vermont.* — *Morey v. Fitzgerald*, 56 Vt. 487, 48 Am. Rep. 811.

See also the title **HIGHWAYS**, vol. 15, p. 506.

1. *O'Linda v. Lothrop*, 21 Pick. (Mass.) 292, 32 Am. Dec. 261. And see the title **ABUTTING OWNERS**, vol. 1, p. 225 *et seq.*

2. *Newkirk v. Sabler*, 9 Barb. (N. Y.) 655.

3. *French v. Marstin*, 24 N. H. 450. See also the title **PRIVATE WAYS**, vol. 23, p. 2.

4. **Line Trees.** — *Holder v. Coates*, M. & M. 112, 22 E. C. L. 264.

5. See the title **TREES AND TIMBER**, *ante*.

6. **Removing Party Fence.** — *Wells v. Rubenacher*, (Ky. 1891) 15 S. W. Rep. 1063; *Stoner v. Hunsicker*, 47 Pa. St. 514. And see the title **FENCES**, vol. 12, p. 1035.

7. **Moving Back Fence.** — *Rawson v. Putnam*, 128 Mass. 552.

8. **Removal of Fence by Owner of Right of Way.** — *Drake v. Crider*, 107 Pa. St. 210.

9. **Fences Detached from Freehold.** — *Hannibal, etc., R. Co. v. Crawford*, 68 Mo. 80. See the title **FIXTURES**, vol. 13, p. 504.

10. *Burrell v. Burrell*, 11 Mass. '294. See also the title **FENCES**, vol. 12, p. 1035.

11. **Easements.** — The Owner of the Agricultural Interests in Land may by direct interference subject himself to liability as a trespasser to the dominant owner of the easement to build or raise a dam. *State v. Suttle*, 115 N. Car. 784.

**The Owner of a Right of Way Cannot Maintain Trespass Against the Owner of Land for Moving a Gate Across the Road**, because, first, he could use his road without a gate, and therefore the removal was not a disturbance of the easement; and, second, if his right of way had been disturbed, his remedy is not trespass, but case. *Dietrich v. Berk*, 24 Pa. St. 470.

**An Abutting Owner Who Sets Out Ornamental Trees in the street opposite his premises**, with the sanction of the municipal authorities, has a right in the nature of an easement sufficient to enable him to recover for damage done by a horse girdling the trees, even if he does not own the fee of the soil. *Lane v. Lamke*, 53 N. Y. App. Div. 395. See also the title **EASEMENTS**, vol. 10, p. 397.

12. **Support of Adjacent Soil.** — *Humphries v. Brogden*, 12 Q. B. 739, 64 E. C. L. 739, 1 Eng. L. & Eq. 241; *Farrand v. Marshall*, 21 Barb. (N. Y.) 409. See the title **LATERAL AND SUBJACENT SUPPORT**, vol. 18, p. 541.

13. **Support of Buildings.** — *Wyatt v. Harrison*, 3 B. & Ad. 871, 23 E. C. L. 205; *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57; *Lasala v. Holbrook*, 4 Paige (N. Y.) 169, 25 Am. Dec. 524. See the title **LATERAL AND SUBJACENT SUPPORT**, vol. 18, p. 545.

14. **In the Absence of a Prescriptive Right**, a party, by erecting a house near the boundary line of his lot, does not acquire any right of support over the adjoining land, and the owner of the adjacent premises may lawfully excavate

*i.* RIVERS AND STREAMS. — The owner of the bed of a stream or pond, if it is subject to private ownership, can maintain trespass for the removal of ice which forms thereon; but a mere lessee of water power could not.<sup>1</sup>

*j.* LAND COVERED WITH WATER. — Land covered with water, if the water is not navigable, may be the subject of trespass.<sup>2</sup>

*k.* FISHERIES. — Trespass is the proper remedy for direct injury to fisheries.<sup>3</sup>

*l.* SHORE. — Although a riparian proprietor has the right to cut sedge or grass between high and low water mark, any one disturbing or destroying the sedge while clam fishing is not a trespasser.<sup>4</sup>

*m.* UNINCLOSED LAND. — Trespass lies by one in possession of land, whether inclosed or not.<sup>5</sup> Possession of a farm is possession of an uninclosed woodland attached to it, and cutting wood for a long number of years upon an uninclosed wood attached to and adjoining a farm in the plaintiff's possession is possession sufficient to support trespass.<sup>6</sup>

*n.* CHURCH PEWS. — Trespass will lie for an injury to a pew.<sup>7</sup>

*o.* OYSTER BEDS. — Oysters planted by an individual in a designated bed in tide waters where no oysters are spontaneously growing are the property of the person planting them. The taking of the oysters is a trespass for which he can maintain an action. His right of property being limited to the oysters, his action will, unless he has a grant of the land under water, properly be one *de bonis asportatis* for carrying them away, and not *quare clausum fregit* for entry on or injury to the bed.<sup>8</sup>

the same for the purpose of building thereon; and in such event, even though he be guilty of negligence in failing to give notice thereof to the other party, or in making the excavation in an unskilful manner, he cannot be made liable in an action of trespass. *Mamer v. Lussem*, 65 Ill. 484. But see the title LATERAL AND SUBJACENT SUPPORT, vol. 18, p. 546, for the view that such right cannot be acquired by prescription.

1. *Rivers, Streams, and Ponds.* — *Bigelow v. Shaw*, 65 Mich. 341, 8 Am. St. Rep. 902.

A Mere Lessee of a Mill and of the Water Power and the rights of flowage appurtenant thereto, but who is not the riparian owner of the mill pond, nor the owner in fee of the bed of the pond, cannot maintain trespass against one who enters upon the pond when it is frozen and cuts and removes ice therefrom, but does not interfere with the plaintiff's rights of flowage, or lessen his water supply. *Reysen v. Roate*, 92 Wis. 543. And see the title ICE, vol. 15, p. 907.

2. *Land Covered with Water.* — *Hall v. Alford*, 114 Mich. 165; *Mitchell v. Bridgers*, 113 N. Car. 63.

A marsh surrounding an island in a river covered with water from six to twelve inches deep is not navigable water, and hunting wild fowl thereon without the owner's permission is a trespass. *Hall v. Alford*, 114 Mich. 165.

3. See the title FISH AND FISHERIES, vol. 13, p. 584, and the ENCYC. OF PL. AND PR., vol. 9, p. 10.

4. *Shore.* — *Allen v. Allen*, 19 R. I. 114, 61 Am. St. Rep. 738.

*Injury to Alluvion.* — A riparian owner can maintain trespass and recover damages against a superior proprietor who, by the erection of an embankment, so changes the current of a stream that a valuable sandbank formed be-

tween high-water mark and low-water mark on the plaintiff's property is swept away, and future alluvion prevented. The plaintiff's right to take this alluvion, so long as it does not interfere with public rights, goes with the ownership of the soil. *Freeland v. Pennsylvania R. Co.*, 197 Pa. St. 529.

In Alaska it is held that no person can occupy any portion of the lands below high tide and by such occupancy acquire title thereto. All who go upon tide lands are trespassers, and remain trespassers until they are ejected by the proper authority. They can acquire no prescriptive rights whatever, either as against the government or such as would prevent the owner of the upland from occupying the tide flats as a littoral or riparian owner. *Lewis v. Johnson*, 1 Alaska 529; *Juneau Ferry Co. v. Alaska Steamship Co.*, 1 Alaska 533.

5. *Uninclosed Land.* — *Bedden v. Clark*, 76 Ill. 338; *Agnew v. Jones*, 74 Miss. 347; *Wahl v. Laubersheimer*, 174 Ill. 338; *Harrison v. Adamson*, 86 Iowa 693.

"Every man's land is, in the eye of the law, enclosed and set apart from his neighbor's." 3 Bl. Com. 209.

*Under Statute.* — "Inclosed" land under the Vermont statute prohibiting trespass (with the sanction of fine in addition to damages) by fishing, trapping, or shooting thereon, is land surrounded by visible objects, natural or artificial, and an imaginary line only is not sufficient. *Payne v. Gould*, 74 Vt. 208.

6. *Chandler v. Walker*, 21 N. H. 282, 53 Am. Dec. 202; *Machin v. Geortner*, 14 Wend. (N. Y.) 239.

7. See the titles PEWS AND PEW RIGHTS, vol. 22, p. 770, and EASEMENTS, vol. 10, p. 400.

8. *Oyster Beds.* — *Decker v. Fisher*, 4 Barb. (N. Y.) 502; *Lowndes v. Dickerson*, 34 Barb. (N. Y.) 586.

*p.* PUBLIC WATERS. — An individual cannot acquire such an exclusive possession in public waters as to enable him to maintain trespass.<sup>1</sup>

**VIII. TRESPASS AS TO PERSONALTY — 1. What Constitutes — a. IN GENERAL.** — Unlawful interference with, or exercise of authority over, the goods of another, without his consent, is a trespass; and this extends not merely to the actual laying hold of, appropriating, or carrying away the goods, but to any act of control or claim of dominion, even by words, whereby the use or possession of the goods is interfered with in any way, if only for an instant of time.<sup>2</sup>

The Return of the Property is no defense,<sup>3</sup> although it may mitigate the damages.<sup>4</sup>

**Intent.** — It is not necessary to show that the act was done with a wrongful intent, and good faith and mistake will not excuse it. The rule is that nothing but unavoidable accident, protection of process, or other sufficient excuse, will afford a justification.<sup>5</sup>

*b.* ILLEGAL LEVY OR ATTACHMENT. — An illegal levy upon personal property is a trespass, and this although the property has been neither sold nor removed.<sup>6</sup> A sheriff or other officer is liable as a trespasser where he seizes goods which, by statute, are exempt from levy and sale under legal process.<sup>7</sup> The officer levying is liable as a trespasser by levying on or attaching the goods of a person not named in the writ,<sup>8</sup> and it is no defense that

In *New Jersey* a grant from the state of land under water, for purposes of reclamation, gives no exclusive title to the grantee until he has made the reclamation, and till then he cannot maintain trespass against a citizen of the state for entering and taking oysters. *Polhemus v. Bateman*, 60 N. J. L. 163. See also *infra*, this title, *Trespass as to Personality*, paragraph *Animals*, and the title *FISH AND FISHERIES*, vol. 13, p. 584.

1. See the titles *NAVIGABLE WATERS*, vol. 21, p. 424; *WATERS AND WATERCOURSES*.

**Public Waters.** — In *Wisconsin*, by the laws of 1893, all fish in public waters are the property of the state, and public navigable streams being "public waters" within the meaning of the act, fishing therein with hook and line from a rowboat is not a trespass. *Willow River Club v. Wade*, 100 Wis. 86.

A person cannot obtain an injunction to restrain an alleged trespass by cutting grass after subsidence on the lake bed opposite his property, because he cannot acquire such exclusive possession as to exclude others from it. *Sapp v. Frazier*, 51 La. Ann. 1718, 72 Am. St. Rep. 493.

2. **What Constitutes Trespass on Personality.** — In *Hanmer v. Wilsey*, 17 Wend. (N. Y.) 91, an action for the wrongful taking of a horse, it was said: "The injury was complete, and the plaintiff's right of action was as perfect the moment after the horse was first led from his stable as it could have been after the lapse of a month or a year."

"That the gist of the action is the wrong done to the plaintiff's possession, is the established doctrine." *Moore, J.*, in *Wustland v. Potterfield*, 9 W. Va. 438. See *supra*, this title, *Definition and General View — As to Property*, and illustrations in note; *Essentials — Force*.

A landlord who distrained for a greatly excessive amount, putting a man in possession, without whose permission nothing could be moved, although otherwise the goods were not

removed from the plaintiff's control in such a way as to prevent him from carrying on his business, was held liable in trespass. *Baylis v. Usher*, 4 M. & P. 790.

"A claim of dominion, an intention being indicated to interfere with the goods, under pretense of any right or authority, amounts to a constructive trespass." *Whitehead, J.*, in *Haythorn v. Rushforth*, 19 N. J. L. 165, 38 Am. Dec. 540.

3. *Hanmer v. Wilsey*, 17 Wend. (N. Y.) 91.

4. *Stephenson v. Wright*, 111 Ala. 579. See also *infra*, this title, *Damages*.

5. See *supra*, this title, *Essentials; Excuse, Justification, and Protection*.

6. **Illegal Levy — No Sale or Removal Necessary.** — *Baylis v. Usher*, 4 M. & P. 792; *Miller v. Baker*, 1 Met. (Mass.) 27; *Stewart v. Wells*, 6 Barb. (N. Y.) 79; *Stevens v. Somerindyke*, 4 E. D. Smith (N. Y.) 418; *Graham v. Lane*, 3 Brews. (Pa.) 92; *Welsh v. Bell*, 32 Pa. St. 16; *Dixon v. White Sewing Mach. Co.*, 128 Pa. St. 397, 15 Am. St. Rep. 683. And see the title *ATTACHMENT*, vol. 3, p. 245; *EXECUTIONS*, vol. 11, p. 654; *SHERIFFS AND CONSTABLES*, vol. 25, p. 697 *et seq.*

7. **Seizing Goods Exempt from Levy.** — *Cook v. Baine*, 37 Ala. 350; *Spencer v. Long*, 39 Cal. 700; *Gibson v. Jenney*, 15 Mass. 205; *Brown v. Wait*, 19 Pick. (Mass.) 470, 31 Am. Dec. 154; *Wilson v. Ellis*, 28 Pa. St. 238; *Van Dresor v. King*, 34 Pa. St. 201, 75 Am. Dec. 643 (this was an action on the case which it was held would also lie). See also the title *EXEMPTIONS (FROM EXECUTION)* vol. 12, p. 252.

8. **Levying on Goods of Person Not Named in Writ.** — *Markley v. Rand*, 12 Cal. 275; *Boulware v. Craddock*, 30 Cal. 190; *Weston v. Dorr*, 25 Me. 176, 43 Am. Dec. 259; *Weber v. Henry*, 16 Mich. 399; *Yarborough v. Harper*, 25 Miss. 112; *State v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54; *Graham v. Lane*, 3 Brews. (Pa.) 92. See the title *SHERIFFS AND CONSTABLES*, vol. 25, p. 658.



the plaintiff subsequently recovered the goods in replevin against the purchaser at the constable's sale.<sup>1</sup>

**Effect of Wrongful Levy.** — When the means are unlawful, all the declared objects and purposes to be accomplished thereby are alike unlawful, and no legal right can thereby be acquired, either by the officer himself or by his employers; therefore, the taking of property by fraud cannot be legalized by subsequent attachment, but the attachment itself is ineffectual, and all parties may be treated as trespassers.<sup>2</sup>

**Attorney Ordering Levy — Plaintiff.** — Not only is the officer liable as a trespasser, but also the attorney who ordered the wrongful act,<sup>3</sup> and the plaintiff who has connected himself with it by some act of participation or direction,<sup>4</sup> or by subsequent assent or adoption, with the full knowledge of the facts, of an act done in the principal's name.<sup>5</sup> Special authority to commit the trespass must be proved, and the direction or ratification of a general agent is not sufficient to make his principal a trespasser.<sup>6</sup> But where one puts his case against another in the hands of an attorney for suit, there is a reasonable presumption of authority given, and it has been held that the plaintiff will be liable in trespass.<sup>7</sup>

**2. Innocent Receiver from Trespasser.** — One who innocently purchases or receives goods taken by an act of trespass, and which were so taken without his knowledge or subsequent assent and not for his use, is not by relation guilty of a trespass, though he sell the property.<sup>8</sup>

1. *Nagle v. Mullison*, 34 Pa. St. 48.

2. **Effect of Wrongful Levy.** — *Parsons v. Dickinson*, 11 Pick. (Mass.) 352; *Ilsey v. Nichols*, 12 Pick. (Mass.) 270, 22 Am. Dec. 425; *People v. Hubbard*, 24 Wend. (N. Y.) 369.

The contrary opinion, expressed in the Year Book 18 Edw. IV., fol. 4, pl. 19, and in *Widgery v. Haskell*, 5 Mass. 155, that the officer is protected as to the levy while liable as a trespasser for the entry, is discussed and denied in *Ilsey v. Nichols*, 12 Pick. (Mass.) 270, and *People v. Hubbard*, 24 Wend. (N. Y.) 369.

The rule in the text was also deliberately followed in *Deyo v. Jennison*, 10 Allen (Mass.) 410. In this case the plaintiff was fraudulently induced by his creditors to bring into the state property which by the laws of his place of residence was exempt from attachment, and the creditor then attached it. It was held that both the creditor and the officer were liable as trespassers, although the latter did not know of the fraud and merely obeyed the terms of his precept.

3. **Attorney Ordering Levy Liable.** — *McDougald v. Dougherty*, 12 Ga. 613; *Newberry v. Lee*, 3 Hill (N. Y.) 523; *Marks v. Culmer*, 6 Utah 419. See *contra* *Ford v. Williams*, 13 N. Y. 577, 67 Am. Dec. 83.

An attorney is not liable in trespass to the owner of property wrongfully seized under an execution issued by him when he had no hand in the seizure. *Hammon v. Fisher*, 2 Grant Cas. (Pa.) 330. See also the title ATTORNEY AND CLIENT, vol. 3, p. 403.

4. **Plaintiff Participating Liable.** — *Flewster v. Royle*, 1 Campb. 187; *Atkinson v. Gatcher*, 23 Ark. 101; *Goodyear v. Williston*, 42 Cal. 10; *Allen v. Crary*, 10 Wend. (N. Y.) 349, 25 Am. Dec. 566; *Newberry v. Lee*, 3 Hill (N. Y.) 523 (which holds that where the attorney is liable, the plaintiff in the suit is liable merely

as such and as the attorney's client), followed in *Foster v. Wiley*, 27 Mich. 245, 15 Am. Rep. 185; *Armstrong v. Dubois*, 1 Abb. App. Dec. (N. Y.) 8; *Justice v. Mendell*, 14 B. Mon. (Ky.) 12; *Millsbaugh v. Mitchell*, 8 Barb. (N. Y.) 333. See also *supra*, this title, *Parties Liable*.

5. **Plaintiff Ratifying Liable.** — *Taylor v. Ryan*, 15 Neb. 573; *Fox v. Jackson*, 8 Barb. (N. Y.) 355; *Brainerd v. Dunning*, 30 N. Y. 211; *Welsh v. Cochran*, 63 N. Y. 181, 20 Am. Rep. 519 (this case makes the modified statement that such assent, along with appropriation of the proceeds of the trespass, is evidence for the jury from which they may infer a previous command or authority); *Clark v. Woodruff*, 83 N. Y. 518; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479, 51 Am. Dec. 315. See also *supra*, this title, *Parties Liable*.

6. **Direction or Ratification by General Agent.** — *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479, 51 Am. Dec. 315; *Clark v. Woodruff*, 83 N. Y. 518; *Armstrong v. Dubois*, 1 Abb. App. Dec. (N. Y.) 11; *Welsh v. Cochran*, 63 N. Y. 181, 20 Am. Rep. 519.

7. *Newberry v. Lee*, 3 Hill (N. Y.) 523; *Foster v. Wiley*, 27 Mich. 245, 15 Am. Rep. 185.

8. **Innocent Receiver from Trespasser** — *England*. — *Wilson v. Barker*, 4 B. & Ad. 614, 24 E. C. L. 124; *Day v. Austin*, Owen 70.

*Alabama*. — *Prince v. Puckett*, 12 Ala. 832. *Kentucky*. — *Justice v. Mendell*, 14 B. Mon. (Ky.) 12.

*New York*. — *Marshall v. Davis*, 1 Wend. (N. Y.) 111, 19 Am. Dec. 463; *Nash v. Mosher*, 10 Wend. (N. Y.) 431; *Barrett v. Warren*, 3 Hill (N. Y.) 348; *McCarty v. Vickery*, 12 Johns. (N. Y.) 348.

*Pennsylvania*. — *Brooks v. Olmstead*, 17 Pa. St. 24; *Gloss v. Black*, 91 Pa. St. 418; *Talmadge v. Scudder*, 38 Pa. St. 517; *Hammon*

**Burden of Proof on Defendant.** — The burden of proof that he acquired the property innocently and by purchase in good faith and for value is on the defendant; if he cannot show that, no prior demand need be shown.<sup>1</sup> If he has not taken the precautions usual in the circumstances to ascertain the true facts, he cannot be allowed to allege his own recklessness, carelessness, or negligence as an excuse, and will be liable in trespass;<sup>2</sup> and knowledge of the trespass at the time of his acquisition will make him liable.<sup>3</sup> He must have received delivery of the property.<sup>4</sup>

**3. Property Subject to Trespass — In General.** — Everything in which the law recognizes property — all inanimate personal property, and most domiciled and tame animals, of which the law takes notice as having a value — may be the subject of trespass.<sup>5</sup>

**Animals.** — In general, the action of trespass will lie for injury to all domestic animals.<sup>6</sup>

**Dogs.** — The law takes notice of a dog as a valuable thing, and trespass may be maintained for killing a dog,<sup>7</sup> and it is not necessary that pecuniary value should be shown.<sup>8</sup> Justification that the dog was known to the plaintiff to be vicious, that it was trespassing on the defendant's property, and that the killing was necessary to protect his person or property, is sufficient to avoid liability.<sup>9</sup> But nothing short of necessity for killing it will excuse.<sup>10</sup>

**Wild Animals in Subjection.** — Trespass will also lie for injury to wild animals which have been reclaimed, so long as they are in a state of subjection; if they return to their natural liberty, the property in them ceases.<sup>11</sup> The principle of possession and occupancy strictly applies here.<sup>12</sup> So pursuit alone will not give a right of property in *feræ naturæ*, and trespass will not lie against a man for killing a wild animal started and pursued by another who was on the point of seizing it,<sup>13</sup> though wounding it so as to bring it under control will subject it to occupancy, unless the chase is intentionally aban-

*v. Fisher*, 2 Grant Cas. (Pa.) 330; *Ward v. Taylor*, 1 Pa. St. 238.

**Contra.** — *Galvin v. Bacon*, 11 Me. 28, 25 Am. Dec. 258, where Weston, J., said: "If the bailee of property for a special purpose sells it without right, the purchaser does not thereby acquire a lawful title or possession. In the case before us \* \* \* the defendant came honestly by the horse, but he did not receive possession of him from any one authorized to give it, and is therefore liable *civiliter* to the true owner for the taking as well as for the detention." Followed in *Stanley v. Gaylord*, 1 Cush. (Mass.) 536, 48 Am. Dec. 643.

In *Cary v. Hotailing*, 1 Hill (N. Y.) 311, 37 Am. Dec. 323, it was also held that the general and absolute ownership remains in the vendor, and trespass will lie against the vendee for the original taking by the latter and any subsequent acts of ownership by him. This case questions the authority of *Barrett v. Warren*, 3 Hill (N. Y.) 348.

**1. Burden of Proof on Defendant.** — *Tallman v. Turck*, 26 Barb. (N. Y.) 167; *Pierce v. Van Dyke*, 6 Hill (N. Y.) 613.

**2. Brooks v. Olmstead**, 17 Pa. St. 24.

**3. Knowledge of Trespass.** — *Millspaugh v. Mitchell*, 8 Barb. (N. Y.) 333. See also *Van Brunt v. Schenck*, 11 Johns. (N. Y.) 387.

**4. Delivery Necessary.** — *Marshall v. Davis*, 1 Wend. (N. Y.) 109, 19 Am. Dec. 463, followed in *Nash v. Mosher*, 19 Wend. (N. Y.) 431. See also *Cilley v. Cushman*, 12 Vt. 494.

If a bailee without authority mortgages the property, and the mortgagee takes possession

under his mortgage without delivery from the bailor, the mortgagee will be liable in trespass to the owner. *Stanley v. Gaylord*, 1 Cush. (Mass.) 536, 48 Am. Dec. 643.

Or if the bailee sells the property and the purchaser takes it away without delivery, he is liable, notwithstanding good faith. *Ely v. Ehle*, 3 N. Y. 506.

**5. Cooley on Torts** (3d ed.), p. 516; 1 Chitty on Pleading (16th Am. ed.) 188.

**6. See the title ANIMALS**, vol. 2, p. 341.

**7. Dogs.** — 2 Black. Com. 393; *Wright v. Ramscot*, 1 Saund. 84; *Parker v. Mise*, 27 Ala. 480, 62 Am. Dec. 776; *White v. Brantley*, 37 Ala. 430; *Dodson v. Mock*, 4 Dev. & B. L. (20 N. Car.) 148, 32 Am. Dec. 677; *State v. Latham*, 13 Ired. L. (35 N. Car.) 33; *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496.

**8. Pecuniary Value Not Necessary.** — *Dodson v. Mock*, 4 Dev. & B. L. (20 N. Car.) 148, 32 Am. Dec. 677.

**9. King v. Kline**, 6 Pa. St. 318.

**10. Necessity Alone Will Excuse.** — *Wright v. Ramscot*, 1 Saund. 84; *State v. Latham*, 13 Ired. L. (35 N. Car.) 33; *Perry v. Phipps*, 10 Ired. L. (32 N. Car.) 259, 51 Am. Dec. 387.

**11. Wild Animals in Subjection.** — *London's Case*, Year Book 14 Hen. VIII., 1b; *Goff v. Kilts*, 15 Wend. (N. Y.) 550; *Fleet v. Hege-*

*man*, 14 Wend. (N. Y.) 42.

**12. Young v. Hichens**, 6 Q. B. 606, 51 E. C. L. 606; *Ferguson v. Miller*, 1 Cow. (N. Y.) 243, 13 Am. Dec. 510.

**13. Pursuit Alone Not Sufficient.** — *Pierson v. Post*, 3 Cai. (N. Y.) 175, 2 Am. Dec. 264.

done by the hunter, although continued by his dogs.<sup>1</sup> And one who is in the act of cutting down a bee tree is in possession of the bees, and trespass will lie against one interfering with him.<sup>2</sup> Bees, when hived and reclaimed, may be the subject of trespass, and the owner may follow them and maintain trespass for their taking.<sup>3</sup> Oysters planted in a properly designated, artificially made oyster bed may be the subject of trespass,<sup>4</sup> and the oyster bed itself will be barred to another planting oysters there.<sup>5</sup> Although no one can acquire property in natural oyster beds, it is unlawful to appropriate oysters which have been planted there in good faith by another.<sup>6</sup>

**4. Who May Maintain**—*a.* IN GENERAL.—As in the case of realty, to entitle one to maintain trespass as to personalty, he must, at the time when the act which constitutes the trespass is done, either have the actual possession in him of the thing which is the subject of the trespass, or else he must have a constructive possession in respect of the thing being actually vested in him, with a right to immediate possession.<sup>7</sup>

1. *Buster v. Newkirk*, 20 Johns. (N. Y.) 75.

2. *Adams v. Burton*, 43 Vt. 36.

3. **Bees.**—*Merrills v. Goodwin*, 1 Root (Conn.) 209; *Adams v. Burton*, 43 Vt. 36; *Goff v. Kilts*, 15 Wend. (N. Y.) 550.

In *Merrills v. Goodwin*, 1 Root (Conn.) 209, it was held that the owner will not be liable in trespass for cutting down a tree on another man's land to retake bees that went from his own hive.

But in *Goff v. Kilts*, 15 Wend. (N. Y.) 550, it was held that this would be an act of trespass. See also *Ferguson v. Miller*, 1 Cow. (N. Y.) 243, 13 Am. Dec. 519. And see the title ANIMALS, vol. 2, pp. 341, 343, and 345.

4. **Oysters.**—*Fleet v. Hegeman*, 14 Wend. (N. Y.) 42; *State v. Taylor*, 27 N. J. L. 118. See also the title FISH AND FISHERIES, vol. 13, p. 566 *et seq.*

5. *Decker v. Fisher*, 4 Barb. (N. Y.) 592.

6. *Louisiana Land, etc., Co. v. Gasquet*, 45 La. Ann. 759. *Contra*, *Cook v. Raymond*, 66 Conn. 285.

7. **Who May Maintain**—*Actual or Constructive Possession Necessary*—*England.*—*Smith v. Milles*, 1 T. R. 480; *Ward v. Macauley*, 4 T. R. 489; *Thomas v. Philips*, 7 C. & P. 573, 32 E. C. L. 636; *Lotan v. Cross*, 2 Campb. 464.

*United States.*—*Wilson v. Haley Live Stock Co.*, 153 U. S. 39.

*Alabama.*—*Dunlap v. Steele*, 80 Ala. 424; *Davis v. Young*, 20 Ala. 151; *Nelson v. Bonduant*, 26 Ala. 341; *White v. Brantley*, 37 Ala. 430.

*Arkansas.*—*Moore v. Winter*, 67 Ark. 189; *Huddleston v. Spear*, 8 Ark. 406; *Warner v. Capps*, 37 Ark. 32; *Gracie v. Morris*, 22 Ark. 415.

*Delaware.*—*Coe v. English*, 6 Houst. (Del.) 456.

*Illinois.*—*Miller v. Kirby*, 74 Ill. 242.

*Maine.*—*Howe v. Farrar*, 44 Me. 233.

*Massachusetts.*—*Winship v. Neale*, 10 Gray (Mass.) 382.

*New Jersey.*—*Haythorn v. Rushforth*, 19 N. J. L. 160, 38 Am. Dec. 540.

*New York.*—*Neff v. Thompson*, 8 Barb. (N. Y.) 213; *Thorp v. Burling*, 11 Johns. (N. Y.) 285; *Smith v. Hill*, 22 Barb. (N. Y.) 656; *Van Brunt v. Schenck*, 11 Johns. (N. Y.) 385; *Hoyt v. Gelston*, 13 Johns. (N. Y.) 141; *Hurd v. West*, 7 Cow. (N. Y.) 752.

*Pennsylvania.*—*North v. Turner*, 9 S. & R. (Pa.) 244; *Ward v. Taylor*, 1 Pa. St. 238; *McElrath v. Kintzing*, 5 Pa. St. 336; *Dixon v. White Sewing Mach. Co.*, 128 Pa. St. 397, 15 Am. St. Rep. 683.

*Vermont.*—*Edwards v. Edwards*, 11 Vt. 587, 34 Am. Dec. 711; *Cilley v. Cushman*, 12 Vt. 494.

**Immediate Right Sufficient.**—*Hare v. Fuller*, 7 Ala. 717; *Davis v. Young*, 20 Ala. 151; *Codman v. Freeman*, 3 Cush. (Mass.) 306; *Dallam v. Fitler*, 6 W. & S. (Pa.) 323; *Poole v. Mitchell*, 1 Hill L. (S. Car.) 404; *Daniel v. Holland*, 4 J. J. Marsh. (Ky.) 18.

**And Where No Immediate Right, Not Maintainable.**—*Lewis v. Carsaw*, 15 Pa. St. 31.

**Possession by a Naked Bailee Is the Possession of the Lender**, and either one or the other may maintain trespass. 1 *Chitty's Pl.* 174; *Overby v. McGee*, 15 Ark. 459, 63 Am. Dec. 49; *Long v. Bledsoe*, 3 J. J. Marsh. (Ky.) 307; *Neff v. Thompson*, 8 Barb. (N. Y.) 213.

So, also, where there is no absolute right in the bailee to retain the property for a definite time. *Strong v. Adams*, 30 Vt. 221, 73 Am. Dec. 305.

**Insufficiency—Property in Possession of Tenant.**—*Ward v. Macauley*, 4 T. R. 489; *Smith v. Milles*, 1 T. R. 475. And see *Coe v. English*, 6 Houst. (Del.) 456.

**Timber or Grass Cut on Another's Land.**—One who cuts and stacks hay on an uninclosed prairie, owned by another, without authority, or cuts timber on government lands, acquires no property in such hay or timber and cannot maintain action for the destruction or taking away thereof. *Murphy v. Sioux City, etc., R. Co.*, 55 Iowa 473, 39 Am. Rep. 175; *Turley v. Tucker*, 6 Mo. 583, 35 Am. Dec. 449.

**Fraud in Contract.**—Fraud of the defendant's employer in inducing a contract of sale of timber will not support trespass against the defendant for cutting and taking it away, where the goods were actually delivered. *McCarty v. Vickery*, 12 Johns. (N. Y.) 348.

**Where Property Seized under Revenue Laws.**—Where A's vessel is seized by B under the United States revenue laws, and C, with consent of B, makes use of the vessel, A cannot maintain trespass, because B's possession was lawful and A was therefore not in possession at the time of C's trespass. *Van Brunt v. Schenck*, 11 Johns. (N. Y.) 377.



**b. ACTUAL POSSESSION.** — Bare possession of a chattel without proof of any other right will enable the possessor to maintain trespass against a wrongdoer, or any one except the true owner.<sup>1</sup> Where the plaintiff is not the rightful owner of the goods, and his right to maintain trespass rests upon his mere possession, whenever he loses possession (except by actual taking or seizing) he loses his right of action.<sup>2</sup> It is no defense to show title in a stranger; the defendant, to succeed, must connect himself with the true owner.<sup>3</sup>

**Possession by Agent or Servant.** — Actual possession in the owner sufficient to maintain trespass is constituted by the possession of his agent or servant.<sup>4</sup>

**Right Barred by Outstanding Possession in Another.** — It is well settled that the general owner cannot maintain trespass while there is an outstanding possession in another, accompanied with a special property, which that other can maintain against the general owner. Where he has not actual possession the plaintiff must have such a right as to be entitled to reduce the goods to actual possession when he pleases.<sup>5</sup> So that his parting with the possession to another person, under a contract which entitles such person to an interest in the thing, though for a limited time, as for instance under a contract for hiring, will prevent his maintaining trespass.<sup>6</sup> And this rule applies to conditional sales where the vendor, though he has a general property, has no right of immediate possession.<sup>7</sup>

**Second Trespasser Liable to Owner.** — On the principle that possession at the time of the trespass is sufficient to sustain the action, it has been held that if a

**1. Actual Possession Sufficient** — *England.* — *Sutton v. Buck*, 2 Taunt. 309; *Rooth v. Wilson*, 19 Eng. *Rul. Cas.* 15.

*Alabama.* — *Miller v. Clay*, 57 Ala. 162.

*Arkansas.* — *Warner v. Capps*, 37 Ark. 32.

*Minnesota.* — *Laing v. Nelson*, 41 Minn. 521.

*New York.* — *Gelston v. Hoyt*, 13 Johns. (N. Y.) 561; *Wheeler v. Lawson*, 103 N. Y. 40; *Stowell v. Otis*, 71 N. Y. 36; *Hanmer v. Wilsey*, 17 Wend. (N. Y.) 91; *Sickles v. Gould*, (County Ct.) 51 How. Pr. (N. Y.) 22; *Matthews v. Smith's Express Co.*, (County Ct.) 1 Misc. (N. Y.) 238; *Stevens v. Somerindyke*, 4 E. D. Smith (N. Y.) 418.

*Pennsylvania.* — *Entriken v. Brown*, 32 Pa. St. 364.

*Tennessee.* — *Carson v. Prater*, 6 Coldw. (Tenn.) 565.

*Vermont.* — *Potter v. Washburn*, 13 Vt. 558, 37 Am. Dec. 615; *Taylor v. Hayes*, 63 Vt. 475.

*West Virginia.* — *Wustland v. Potterfield*, 9 W. Va. 438.

The possession need not be with the consent, and may be adverse to the true owner. *Miller v. Kirby*, 74 Ill. 242; *Hurd v. West*, 7 Cow. (N. Y.) 752; *Adams v. Burton*, 43 Vt. 36.

**2. Where Plaintiff Not True Owner.** — *Pope v. Cordell*, 47 Mo. 251.

**3. Title in Stranger No Defense.** — *Wheeler v. Lawson*, 103 N. Y. 40; *Hanmer v. Wilsey*, 17 Wend. (N. Y.) 91; *Cook v. Howard*, 13 Johns. (N. Y.) 276; *Sickles v. Gould*, (County Ct.) 51 How. Pr. (N. Y.) 22.

**4. Possession by Agent or Servant.** — *Coe v. English*, 6 Houst. (Del.) 456; *Becker v. Smith*, 59 Pa. St. 469; *Willis v. Hudson*, 63 Tex. 678; *Cilley v. Cushman*, 12 Vt. 494; *Austin v. Tilden*, 14 Vt. 325.

Where an importer has the general right and property in the goods, that right draws after it a constructive possession, and the master of the

ship is but a bailee maintaining the possession for the benefit of the importer, who can maintain trespass *de bonis asportatis* for wrongful seizure. *Conard v. Pacific Ins. Co.*, 6 Pet. (U. S.) 262.

Where a public officer levies on chattels and leaves them in the possession of the defendant in the execution, for safekeeping, the latter is no more than the officer's servant, and the officer can maintain trespass against a stranger for taking them away. *Barker v. Miller*, 6 Johns. (N. Y.) 195.

**5. Right Barred by Outstanding Possession in Another.** — *Bourne v. Merritt*, 22 Vt. 429; *Smith v. Milles*, 1 T. R. 475; *Nash v. Mosher*, 19 Wend. (N. Y.) 431.

**6. Outstanding Possession in Another** — *England.* — *Gordon v. Harper*, 7 T. R. 9; *Ward v. Macauley*, 4 T. R. 489; 1 Chitty's Pl. 169.

*United States.* — *Corfield v. Coryell*, 4 Wash. (U. S.) 387.

*Connecticut.* — *Bulkley v. Dolbeare*, 7 Conn. 232.

*Indiana.* — *Hume v. Tufts*, 6 Blackf. (Ind.) 136.

*Maine.* — *Lunt v. Brown*, 13 Me. 236. Here there was a parol lease of the property.

*Massachusetts.* — *Muggridge v. Eveleth*, 9 Met. (Mass.) 233.

*New Hampshire.* — *Clark v. Carlton*, 1 N. H. 110.

*New York.* — *Putnam v. Wyley*, 8 Johns. (N. Y.) 432, 5 Am. Dec. 346.

*Pennsylvania.* — *Lewis v. Carsaw*, 15 Pa. St. 31.

**7. Conditional Sales.** — *Hurd v. Fleming*, 34 Vt. 171. See *infra*, this section, *Special Property*.

But where the price is not paid by the vendee at the stipulated time the vendor can maintain trespass. *Fields v. Williams*, 91 Ala. 502; *Jordan v. Wells*, 104 Ala. 383.

second trespasser take property out of the possession of the first trespasser, the owner may maintain an action against the last taker.<sup>1</sup>

*c. CONSTRUCTIVE POSSESSION.* — As hereinbefore stated, as the general property in a chattel draws to it the possession, he who has the general property, although he may not have the actual possession, yet, if he have the right to take possession at pleasure, may maintain trespass.<sup>2</sup>

*Vendee Before Delivery.* — The sale of a chattel gives the vendee a sufficient constructive possession, before delivery, to maintain trespass against a person who takes the chattel from the custody of the vendor without right.<sup>3</sup>

*d. SPECIAL PROPERTY.* — Special property, joined with the actual possession of personal property, by the plaintiff, is sufficient to maintain trespass.<sup>4</sup>

*Either Holder of General or of Special Property May Maintain.* — Either the person in whom the general property is, or the person in whom the special property is, may maintain an action of trespass for the taking or injuring of a chattel by a stranger, while it was in the actual possession of the latter.<sup>5</sup> And as recovery in such an action will oust the other party of his right of action, it is held that the party suing may recover as damages all that both are entitled to in the thing, that is, full value.<sup>6</sup>

*A Mortgagee who has possession or a right to immediate possession may maintain trespass,*<sup>7</sup> but not where the right depends upon a contingency which has not happened at the time of the trespass.<sup>8</sup>

*Mortgagor Against Mortgagee.* — A mortgagee has no right to take property out of the possession of the mortgagor, although the law day has passed without payment, and the mortgagor can recover for the illegal seizure of the property so taken.<sup>9</sup>

*A Bailee has a special property enabling him to maintain trespass against a stranger.*<sup>10</sup>

**1. Second Trespasser Liable to Owner.** — *Wilbraham v. Snow*, Sid. 438; *Cox v. Hall*, 18 Vt. 191.

**2. See *supra*, this section, 4. *a. In General.*** See also *Haythorn v. Rushforth*, 19 N. J. L. 160, 38 Am. Dec. 540; *Edwards v. Edwards*, 11 Vt. 587, 34 Am. Dec. 711.

**3. Vendee Before Delivery.** — *Parsons v. Dickinson*, 11 Pick. (Mass.) 352; *North v. Turner*, 9 S. & R. (Pa.) 244.

**4. Special Property.** — *Barker v. Chase*, 24 Me. 230 (bailee); *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670; *Poole v. Symonds*, 1 N. H. 289, 8 Am. Dec. 71; *Browning v. Skillman*, 24 N. J. L. 351; *Outcalt v. Durling*, 25 N. J. L. 443; *Wheeler v. Lawson*, 103 N. Y. 40.

**Conditional Sales.** — In *Colwill v. Reeves*, 2 Campb. 575, it was held that a person in possession of goods on sale or return has such a special property in them as to enable him to maintain trespass for taking them away.

**5. *Luse v. Jones*, 39 N. J. L. 707.**

Where a person has a lien on sheep for their keeping, either he or the owner may bring trespass. Action by one will bar action by the other. *Neff v. Thompson*, 8 Barb. (N. Y.) 213.

But one who contracts with the owner for the cutting and delivery of logs has no such lien or possession as to enable him to maintain trespass against a sheriff who levies on them, under process against the owner. *Fitzgerald v. Elliott*, 162 Pa. St. 118, 42 Am. St. Rep. 812.

**6. Full Value May Be Recovered.** — *Luse v. Jones*, 39 N. J. L. 707.

It was held in *Hasbrouck v. Winkler*, 48 N. J. L. 431, that a part owner in possession as owner could sue alone a stranger to the title and recover all the damages.

**Amount of Recovery by Special-property Man Against General Owner.** — "If, however, the suit is brought by a bailee or special-property man against the general owner, then the plaintiff can recover the value of his special property only; but if the writ is against a stranger, then he recovers the value of the property and interest, according to the general rule, and holds the balance beyond his own interest in trust for the general owner." *White v. Webb*, 15 Conn. 302.

**7. Mortgagee.** — *Dunlap v. Steele*, 80 Ala. 424; *Welch v. Whittemore*, 25 Me. 86; *Perry v. Chandler*, 2 Cush. (Mass.) 237; *Woodruff v. Halsey*, 8 Pick. (Mass.) 333, 19 Am. Dec. 329; *Boise v. Knox*, 10 Met. (Mass.) 40; *Kimball v. Marshall*, 8 N. H. 291; *Howell v. Caryl*, 50 Mo. App. 440; *Brown v. Cook*, 3 E. D. Smith (N. Y.) 123.

**8. *Skiff v. Solace*, 23 Vt. 279.**

**9. Mortgagor Against Mortgagee.** — *Thornton v. Cochran*, 51 Ala. 415.

**10. Bailee.** — *Rooth v. Wilson*, 1 B. & Ald. 59; *Davis v. Danks*, 3 Exch. 435; *St. Louis, etc., R. Co. v. Biggs*, 50 Ark. 169; *White v. Webb*, 15 Conn. 302; *New York, etc., R. Co. v. Auer*, 106 Ind. 219, 55 Am. Rep. 734; *Chamberlain v. West*, 37 Minn. 54; *Laing v. Nelson*, 41 Minn. 521; *Brownell v. Carney*, 3 Duer (N. Y.) 9; *Bass v. Pierce*, 16 Barb. (N. Y.) 595; *Faulkner v. Brown*, 13 Wend. (N. Y.) 63; *Lyle v. Barker*, 5 Binn. (Pa.) 457.

An Administrator may maintain trespass for taking and injuring personal property, committed after the death of the owner, and before administration granted.<sup>1</sup>

The Second Mortgagee in Possession may maintain trespass against a stranger.<sup>2</sup>

The Finder of an Article may maintain trespass against any one except the true owner.<sup>3</sup>

Public Officers. — Trespass *de bonis asportatis* may be maintained by a sheriff or other officer who has the custody of goods under valid legal process, for taking them from his possession. By his levy the officer acquires a special property in the goods.<sup>4</sup> He may maintain the action for a taking by subsequent seizure. It is not material that the goods are left in the possession of the original owner, who becomes merely the officer's servant,<sup>5</sup> or in the possession of a bailee,<sup>6</sup> or with a custodian,<sup>7</sup> such as a livery stable keeper.<sup>8</sup> But if he leaves the property in the possession of persons other than the defendant in the execution, taking a receipt under seal, stipulating for the redelivery within a specified time, he is no longer in possession, and cannot maintain an action until that time has expired.<sup>9</sup> No action will lie until the levy is actually made, as then the officer has no actual possession by the writ alone.<sup>10</sup> The action will not lie if the process is void,<sup>11</sup> or where the officer has obviously relinquished the possession of the goods.<sup>12</sup>

**IX. REMEDY** — 1. **Distinction Between Trespass and Case.** — Trespass, or trespass *vi et armis*, is the name of the remedy for an injury which is the direct result of an act done with force, in contradistinction to trespass "on the case," which is the proper remedy where the injury is consequential or where a direct injury is the result of negligence or mere nonfeasance.<sup>13</sup>

A Carrier has a special property in goods on which he has a lien for the freight and may maintain trespass against the owner for taking them away. *Cowing v. Snow*, 11 Mass. 415; *Brownell v. Carnley*, 3 Duer (N. Y.) 9.

And he may, in his own name, as the representative of the owner, sue a stranger for injury to the property carried. *The Beaconsfield*, 158 U. S. 303.

1. **Administrator.** — *Tharpe v. Stallwood*, 5 M. & G. 760, 44 E. C. L. 397, 12 L. J. C. Pl. 241; *Hutchins v. Adams*, 3 Me. 174; *Kirk v. Gregory*, 1 Ex. D. 55.

In *Tharpe v. Stallwood*, 5 M. & G. 760, 44 E. C. L. 397, *Creswell, J.*, says: "The case seems analogous to that of a disseizee, who, after re-entry, may maintain trespass for an injury done to the land during the time he was disseized, because, upon re-entry, he is supposed by relation never to have been out of possession."

2. **Second Mortgagee in Possession.** — *Hutchins v. Adams*, 3 Me. 174.

3. **Finder of an Article.** — 1 *Chitty's Pl.* 168; *Wilbraham v. Snow*, 2 Saund. 47, note 1; *Armory v. Delamirie*, 1 Stra. 505; *Poole v. Symonds*, 1 N. H. 289, 8 Am. Dec. 71; *Hoyt v. Gelston*, 13 Johns. (N. Y.) 141. And see the title *LOST PROPERTY*, vol. 19, p. 579.

4. **Public Officers** — *Connecticut*. — *Huntley v. Bacon*, 15 Conn. 267.

*Indiana*. — *Dunkin v. McKee*, 23 Ind. 447.

*Kentucky*. — *Rogers v. Darnaby*, 4 B. Mon. (Ky.) 238; *Williams v. Herndon*, 12 B. Mon. (Ky.) 484, 54 Am. Dec. 551.

*Mississippi*. — *Parker v. Dean*, 45 Miss. 408.

*New York*. — *Barker v. Miller*, 6 Johns. (N. Y.) 195; *Lockwood v. Bull*, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539; *Marsh v. White*, 3 Barb.

(N. Y.) 518; *Hilliard v. Austin*, 17 Barb. (N. Y.) 141.

See the title *SHERIFFS AND CONSTABLES*, vol. 25, p. 658.

**By Subsequent Seizure.** — *Huntley v. Bacon*, 5 Conn. 267; *Parker v. Dean*, 45 Miss. 408; *Rogers v. Darnaby*, 4 B. Mon. (Ky.) 238; *Winegardner v. Hafer*, 15 Pa. St. 144; *Hanchett v. Ives*, 33 Ill. App. 471.

5. **Goods in Owner's Possession.** — *Hilliard v. Austin*, 17 Barb. (N. Y.) 141; *Barker v. Miller*, 6 Johns. (N. Y.) 195.

6. **Goods in Bailee's Possession.** — *Weidensaul v. Reynolds*, 49 Pa. St. 73.

7. **Goods with Custodian.** — *Baker v. Fuller*, 21 Pick. (Mass.) 318.

8. *Hanchett v. Ives*, 33 Ill. App. 471.

9. *Lewis v. Carsaw*, 15 Pa. St. 31.

10. **Levy Must Be Actually Made.** — *Chuley v. Lockhart*, 59 Pa. St. 376, 98 Am. Dec. 350.

11. **Process Void — By Fraud in the Plaintiff in the Execution.** — *Bristol v. Wilsmore*, 2 Dowl. & R. 755.

**Want of Jurisdiction in the Judge.** — *Horton v. Hendershot*, 1 Hill (N. Y.) 118.

**By Levy on a Third Party's Goods.** — *Merritt v. Miller*, 13 Vt. 417.

12. **Where Officer Has Relinquished Possession.** — *Blades v. Arundale*, 1 M. & S. 711; *Taintor v. Williams*, 7 Conn. 271. See also *Lewis v. Carsaw*, 15 Pa. St. 31, where the officer left the goods with third parties other than the defendant in the execution on a written stipulation to return them to him in a specified time.

13. **Distinction Between Trespass and Case.** — *Dodson v. Mock*, 4 Dev. & B. L. (20 N. Car.) 146, 32 Am. Dec. 677.

**Where Trespass and Not Case Is the Proper Remedy.** — *Dale v. Grant*, 34 N. J. L. 142;



**Void and Voidable Process.** — It is well settled that where a party is sued for an act done under color of process, if the process be void, the action should be trespass *vi et armis*; if voidable only, trespass on the case.<sup>1</sup>

**Sometimes Concurrent Remedies.** — Sometimes trespass and case are concurrent remedies.<sup>2</sup> Where injury is the direct result of an act done carelessly or negligently, but unintentionally, the general rule is that either trespass or case will lie.<sup>3</sup>

**Distinction Between the Forms of Actions Abolished.** — The distinction between the forms of the two actions is now disregarded in most of the states, and in the majority of the states it has been abolished by statute. The rights and liabilities of the parties, however, are in no way affected, and in all essentials the two actions remain distinct.<sup>4</sup>

**Remedy under Statute.** — Several forms of the action are regulated by statute in most of the states.<sup>5</sup> The statutory remedy is cumulative and does not exclude the action at common law.<sup>6</sup> The fact that the defendant has been

Leame *v.* Bray, 3 East 593; Lotan *v.* Cross, 2 Campb. 464; Mills *v.* Wooters, 59 Ill. 234; Painter *v.* Baker, 16 Ill. 103; Holly *v.* Boston Gas Light Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233; Burdick *v.* Worrall, 4 Barb. (N. Y.) 596; Percival *v.* Hickey, 18 Johns. (N. Y.) 257; Price *v.* Graham, 3 Jones L. (48 N. Car.) 545; Dodson *v.* Mock, 4 Dev. & B. L. (20 N. Car.) 146, 32 Am. Dec. 677; Jordan *v.* Wyatt, 4 Gratt. (Va.) 151, 47 Am. Dec. 720; Wyant *v.* Crouse, 127 Mich. 158; Cox *v.* England, 65 Pa. St. 212; Wickliffe *v.* Sanders, 6 T. B. Mon. (Ky.) 296; Maher *v.* Ashmead, 30 Pa. St. 344, 72 Am. Dec. 708.

1. **Void and Voidable Process.** — Dixon *v.* Watkins, 9 Ark. 139; Hayden *v.* Shed, 11 Mass. 500. See the title TRESPASS ON THE CASE, *post*.

2. **Sometimes Concurrent Remedies.** — Van Dresor *v.* King, 34 Pa. St. 201, 75 Am. Dec. 643; Spencer *v.* Brighton, 49 Me. 326; Perry *v.* Lewis, 49 Miss. 443; Dow *v.* Smith, 7 Yt. 465, 29 Am. Dec. 202. These were actions against an officer for selling goods exempt under the statute. In other states it is held that case will not lie for such an injury. See also the title TRESPASS ON THE CASE, *post*.

3. **When Injury Direct Result of Careless or Negligent Act.** — Brennan *v.* Carpenter, 1 R. I. 474; Howard *v.* Tyler, 46 Vt. 683; Johnson *v.* Castleman, 2 Dana (Ky.) 377. *Contra*, Case *v.* Mark, 2 Ohio 169, *following* Leame *v.* Bray, 3 East 593, and Scott *v.* Shepherd, 2 W. Bl. 892. See the title TRESPASS ON THE CASE, *post*.

4. **Abolition by Statute of Distinction Between Action on the Case and Trespass** — *California.* — The distinction between actions on the case and trespass has been abolished in California; but the nature of the right of action and the amount of damages recoverable have not been affected. Rogers *v.* Duhart, 97 Cal. 500.

*Delaware.* — In Delaware, by Rev. Code 106, § 11. Cann *v.* Warren, 1 Houst. (Del.) 188. But trespass cannot be substituted for case, and the provision of the statute merely relates to the form of the action and nothing more. Cannon *v.* Horsey, 1 Houst. (Del.) 440. The effect of this is that a landlord can maintain trespass while his tenant is in possession, under the

statute, though not at common law. Coe *v.* English, 6 Houst. (Del.) 456.

*Illinois.* — In Illinois; but the substantial rights and liabilities of the parties are not affected. Blalock *v.* Randall, 76 Ill. 224; Pike *v.* Heinzmann, 89 Ill. App. 642.

*Maine.* — In Maine, by the Act of 1835, c. 178, § 1, incorporated into the Rev. Stat., c. 115, § 13. Welch *v.* Whittemore, 25 Me. 86; Perkins's Chitty's Pleading 126. The statute only abolishes the distinction between trespass and case as to form, and an amendment altering the declaration to case which would alter the substance of the action will not be allowed. Lawry *v.* Lawry, 88 Me. 482.

*Michigan.* — In Michigan the statute allows case where trespass only might formerly have been brought, for injuries to persons, personal property, or rights including relative rights, but does not apply to trespass on lands. Wood *v.* Michigan A. L. R. Co., 81 Mich. 358.

*Oklahoma.* — In Oklahoma the statute only abolishes the distinction between the forms of the action. Casey *v.* Mason, 8 Okla. 665.

*Pennsylvania.* — In Pennsylvania, by the Act of May 25, 1887, P. L. 271, so far as procedure is concerned; the plaintiff suing in trespass may recover if the facts establish his right to recover in case. Duffield *v.* Rosenzweig, 144 Pa. St. 520.

*Tennessee.* — In Tennessee, by the Act of 1850, where trespass would lie, case or trespass may be brought, but trespass cannot be substituted for case. The character of the wrong is not changed, but only the form of the remedy. Luttrell *v.* Hazen, 3 Sneed (Tenn.) 20.

*Virginia.* — In Virginia; and a declaration alleging trespass is sufficient for trespass on the case. Dangerfield *v.* Thompson, 33 Gratt. (Va.) 136, 36 Am. Rep. 783.

*West Virginia.* — In West Virginia, under the Code, where trespass will lie, case will lie. Wilson *v.* Phoenix Powder Mfg. Co., 40 W. Va. 412, 52 Am. St. Rep. 890.

*Wisconsin.* — Schultz *v.* Frank, 1 Wis. 352.

5. See *infra*, this section, *Criminal Trespass*, and *infra*, this title, *Damages — Double Damages; Treble Damages*.

6. **Statutory Remedy Cumulative.** — Montague *v.* Papin, 1 Mo. 757; Tackett *v.* Huesman, 19 Mo. 525.

convicted and punished for the crime will not bar the civil remedy<sup>1</sup> nor mitigate the civil damages.<sup>2</sup>

**2. Trespass Quare Clausum Fregit** — *a.* IN GENERAL. — The action *quare clausum fregit* is the remedy made use of for an unlawful or unauthorized entry on land or for a violent and forcible injury to real property.<sup>3</sup>

*b.* CONTINUING TRESPASS. — In an action for trespass at common law for injury to the realty, the plaintiff is only entitled to recover damages incurred prior to the commencement of the action.<sup>4</sup> Continuing trespass gives to the owner separate, successive causes of action, as the injuries are perpetrated, in each of which the damages recoverable are those sustained up to the time of its commencement.<sup>5</sup>

In Some States the Entire Damage May Be Recovered in One Action and not merely damage anterior to the commencement of the action.<sup>6</sup>

**Injunction as a Remedy for Continuing Trespass.** — Injunction may be granted against a continuing trespasser where a remedy by action of trespass, at common law, would be inadequate, requiring repeated actions for subsequent continuances of the trespass.<sup>7</sup> And in the equitable action damages up to the entry of judgment may be recovered.<sup>8</sup> Injunction will not be granted

**1. Remedy Not Barred by Conviction and Punishment.** — *Cannon v. Burris*, 1 Hill L. (S. Car.) 372.

**2. Nor the Civil Damages Mitigated.** — *Wolff v. Cohen*, 8 Rich. L. (S. Car.) 144.

**3. Quare Clausum Fregit.** — *Sturgis v. Warren*, 11 Vt. 433; *Maxwell v. Maxwell*, 31 Me. 184, 50 Am. Dec. 657; *Uttendorffer v. Saegers*, 50 Cal. 496.

**Entry upon Land — Instances.** — Entering upon uninclosed land with a surveyor and chain carriers, and surveying it, though no damage was done beyond treading down the shrubbery, will support trespass *quare clausum fregit*. *Dougherty v. Stepp*, 1 Dev. & B. L. (18 N. Car.) 371.

Trespass *q. c. f.* will not lie for entering a tent erected on ground of another by permission, the tent being a chattel. *Burleigh v. Ford*, 59 N. H. 536.

The action will lie for entering and driving the possessors from their possession by force. *Pearson v. Smith*, Conf. Rep. (1 N. Car.) 367.

One who has only a right of way over land cannot maintain the action against another using the way by permission of the owner of the soil. He has no exclusive possession. *Morgan v. Boyes*, 65 Me. 125.

Continuing a building on another's land may be the ground of another action of trespass, after recovery for its erection has been had. *Russell v. Brown*, 63 Me. 203.

**Injury to Land — Instances.** — A tenant who has exclusive possession of a wheat crop until it is harvested and his landlord's share severed from it, can maintain trespass *quare clausum fregit* against the succeeding tenant for allowing his hogs to break in and damage it. *Morrison v. Mitchell*, 4 Houst. (Del.) 324.

Injury from rocks and missiles thrown upon one's land by blasting operations will sustain the action. *Scott v. Bay*, 3 Md. 431.

**4. Continuing Trespass.** — *Uline v. New York Cent. R. Co.*, 101 N. Y. 98; *Pond v. Metropolitan El. R. Co.*, 112 N. Y. 187, 8 Am. St. Rep. 734; *Pappenheim v. Metropolitan El. R. Co.*, 128 N. Y. 436, 26 Am. St. Rep. 486; *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132;

*Mitchell v. White Plains*, 91 Hun (N. Y.) 189; *Stowers v. Gilbert*, 156 N. Y. 600.

**5. Pappenheim v. Metropolitan El. R. Co.**, 128 N. Y. 436, 26 Am. St. Rep. 486; *Carll v. Northport*, 11 N. Y. App. Div. 120.

Where one *vi et armis* enters and pastures cattle on the plaintiff's land, recovery for the full injury is not required by one suit, as it is a continuing trespass, for which an action could be annually maintained, the measure of damages being the value of the use and occupation of the land for one year. *Oklahoma City v. Hill*, 6 Okla. 114; *Creswell Ranch, etc., Co. v. Scoggins*, 15 Tex. Civ. App. 373; *Eno v. Christ*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 24. See also *Burditt v. New York Cent., etc., R. Co.*, 71 Hun (N. Y.) 361; *Western Book, etc., Co. v. Jevne*, 78 Ill. App. 668.

**6. Entire Damage Recoverable in One Action.** — *Jacksonville, etc., R. Co. v. Lockwood*, 33 Fla. 573; *Florida Southern R. Co. v. Parsons*, 33 Fla. 631; *Chicago, etc., R. Co. v. Robbins*, 54 Ill. App. 611; *Denver City Irrigation, etc., Co. v. Middaugh*, 12 Colo. 434, 13 Am. St. Rep. 234.

**In Georgia Only One Action Maintainable.** — In Georgia it is imperative that the owner bring a single action to recover all damages for permanent injury past, present, and future, he having no right to bring successive actions for damages sustained from time to time during the continuance of the nuisance. *Allen v. Macon*, etc., R. Co., 107 Ga. 838.

**7. Injunction as a Remedy.** — *Kellogg v. King*, 114 Cal. 378, 55 Am. St. Rep. 74; *De Groot v. Peters*, 124 Cal. 406, 71 Am. St. Rep. 91; *Preston v. Preston*, 85 Ky. 16; *Slater v. Gunn*, 170 Mass. 509; *Ellis v. Blue Mountain Forest Assoc.*, 69 N. H. 385; *Mitchell v. White Plain*, 91 Hun (N. Y.) 189; *Lambert v. Huber*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 462; *Eno v. Christ*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 24; *Haines v. Hall*, 17 Oregon 165; *Gobeille v. Meunier*, 21 R. I. 103.

**8. Pappenheim v. Metropolitan El. R. Co.**, 128 N. Y. 436, 26 Am. St. Rep. 486; *Stowers v. Gilbert*, 156 N. Y. 600; *Blondell v. Consoli-*

against repeated trespasses where there is an adequate and complete remedy at common law.<sup>1</sup>

**c. TRESPASS FOR MESNE PROFITS.** — The action of trespass for mesne profits is a form of action in trespass *quare clausum fregit* which was designed to supplement the action of ejectment, where the damages are now usually very small and inadequate. In this supplemental action the recovery of the plaintiff in ejectment is completed by the recovery of the mesne profits which the tenant in possession has wrongfully received during the time of his occupation.<sup>2</sup>

**When Maintainable.** — The plaintiff in ejectment is not entitled to maintain trespass for mesne profits until after judgment in ejectment.<sup>3</sup> It cannot be maintained even after judgment without re-entry to possession by the plaintiff.<sup>4</sup>

**The Judgment in Ejectment** is conclusive as to the plaintiff's right to the possession and the mesne profits,<sup>5</sup> and is also conclusive proof that the defendant was in possession till the time the writ was served, estopping him from denying that he had possession or that his possession was tortious,<sup>6</sup> but it is not conclusive as to his possession after that time.<sup>7</sup> It is conclusive against the defendant, as to title, from the time of the demise.<sup>8</sup>

**Improvements.** — It appears that the assessment of any claim for improvements by the defendant must have been made in the action of ejectment.<sup>9</sup> Under the *New York* and *Tennessee* codes this is not necessary, and where the defendant has been holding possession in good faith, improvements, and even working expenses, in the case of a mill, may be set off in the action for mesne profits.<sup>10</sup>

**Damages.** — The jury is not restricted to the rents, profits, and costs, but may exceed them and give punitive damages.<sup>11</sup>

**3. Trespass De Bonis Asportatis.** — The action *de bonis asportatis* may be

dated *Gas Co.*, 89 Md. 744; *Carll v. Northport*, 11 N. Y. App. Div. 120.

In *Krueger v. Wisconsin Telephone Co.*, 106 Wis. 96, it was held that where the proof showed that the defendants entered upon the plaintiff's land and erected an unsightly pole immediately in front of his show window, which in some degree interfered with the proper enjoyment of his property, this constituted a continuing trespass for which an injunction would be granted.

**1. Where Injunction Not Available.** — *Carney v. Hadley*, 32 Fla. 344, 37 Am. St. Rep. 101. See also the title *INJUNCTIONS*, vol. 16, p. 337.

**2. Trespass for Mesne Profits.** — 3 Bl. Com. 205; *Bouv. L. Dict.*

"The [Alabama] statute of 1821 abolishes the fictitious proceedings in ejectment," and the plaintiff may have judgment for the mesne profits as well as for the possession of land without a prior action of ejectment. *White v. Saint Guirons, Minor* (Ala.) 331, 12 Am. Dec. 56. See also *Blew v. Ritz*, 82 Minn. 530, where it was held that a recovery in ejectment is not necessary where the disseizor has abandoned the premises before suit, and the owner is in possession before bringing trespass for mesne profits.

**3. When Maintainable.** — *Donford v. Ellys*, 12 Mod. 138; *Wilkinson v. Kirby*, 15 C. B. 430, 80 E. C. L. 430. But see the last note *supra*.

**4. Only After Re-entry by Plaintiff.** — *Caldwell v. Walters*, 22 Pa. St. 378; *Carson v. Smith*, 1 Jones L. (46 N. Car.) 106; *Baker v. Kimball*, 140 Mass. 120; *Ainslie v. New York*,

1 Barb. (N. Y.) 168; *Morgan v. Varick*, 8 Wend. (N. Y.) 587.

**5. Effect of Judgment in Ejectment.** — *Lane v. Harrold*, 72 Pa. St. 267.

**6. Conclusive Proof of Defendant's Possession.** — *Lane v. Harrold*, 72 Pa. St. 267; *Avent v. Hord*, 3 Head (Tenn.) 458; *Jackson v. Combs*, 7 Cow. (N. Y.) 36.

**7. Time of Service of Writ.** — *Lane v. Harrold*, 72 Pa. St. 267; *Mitchell v. Freedley*, 10 Pa. St. 198; *Sopp v. Winpenny*, 68 Pa. St. 78; *Bailey v. Fairplay*, 6 Binn. (Pa.) 450, 6 Am. Dec. 486.

**8. As to Defendant's Title.** — *Buntin v. Duchane*, 1 Blackf. (Ind.) 56; *Lloyd v. Nourse*, 2 Rawle (Pa.) 49.

**9. Defendant's Claim for Improvements.** — *Chesround v. Cunningham*, 3 Blackf. (Ind.) 83; *Bailey v. Hastings*, 15 N. H. 525.

**10. Avent v. Hord, 3 Head (Tenn.) 458; *Holmes v. Davis*, 19 N. Y. 488.**

**Contra.** — In *Russell v. Blake*, 2 Pick. (Mass.) 505, it was held that in general the defendant should not set off a claim for permanent improvements. But in this case the evidence showed that the expense had been incurred after the commencement of the action in which the possession was claimed by him.

It was also so held in *Loomis v. Green*, 7 Me. 386, which, however, is an ordinary action *q. c. f.*, for cutting trees. The claim was for labor and improvements on the land where the trespass was committed.

**11. Punitive Damages May Be Given.** — *Goodtitle v. Tombs*, 3 Wils. C. Pl. 118; *Buntin v. Duchane*, 1 Blackf. (Ind.) 56.



maintained for the taking and carrying away of goods,<sup>1</sup> and even fixtures or portions of a building temporarily dis severed from the building.<sup>2</sup>

**Concurrent Remedies.** — It generally happens that trover<sup>3</sup> and replevin (from which trespass is distinguished by being merely for the recovery of damages)<sup>4</sup> are concurrent remedies with trespass.

**4. Criminal Trespass** — *a. IN GENERAL.* — In most of the states the statutes provide for criminal actions of trespass. The facts which must be proved to make out a case of criminal trespass are laid down in the statutes. The statutes being penal must be strictly construed.<sup>5</sup> While the general rules as to the essentials are much the same in all the states, the definitions and decisions under the various statutes will be found alphabetically arranged by states in the notes to the text which follows.

*b. WANTONNESS, MALICE, AND WILFULNESS.* — As a rule, wantonness and malice, or at least wilfulness, must be shown.<sup>6</sup>

**1. Trespass De Bonis Asportatis.** — *Erisman v. Walters*, 26 Pa. St. 467; *Parker v. Hall*, 55 Me. 362.

**2. Fixtures Temporarily Detached.** — *Wadleigh v. Janvrin*, 41 N. H. 503, 77 Am. Dec. 780.

**A Licensee**, authorized by the defendant by parol to build a bridge on the defendant's land, may maintain trespass *de bonis asportatis* against him for taking it away without the licensee's consent. *Ricker v. Kelly*, 1 Me. 117, 10 Am. Dec. 38. See *supra*, this title, *Trespass as to Personalty*.

**3. Trover a Concurrent Remedy.** — *Sanders v. Vance*, 7 T. B. Mon. (Ky.) 209, 18 Am. Dec. 167; *Stanley v. Gaylord*, 1 Cush. (Mass.) 536, 48 Am. Dec. 643; *Phillips v. Hall*, 8 Wend. (N. Y.) 610, 24 Am. Dec. 108; *Connah v. Hale*, 23 Wend. (N. Y.) 462. See the title *TROVER AND CONVERSION*, *post*.

**4. Replevin a Concurrent Remedy.** — See the title *REPLEVIN*, vol. 24, p. 475. And see the following cases:

*Arkansas.* — *Moore v. Winter*, 67 Ark. 189. *New Jersey.* — *Bruen v. Ogden*, 11 N. J. L. 370, 20 Am. Dec. 593; *Haythorn v. Rushforth*, 19 N. J. L. 160, 38 Am. Dec. 540.

*New York.* — *Clark v. Skinner*, 20 Johns. (N. Y.) 465, 11 Am. Dec. 302; *Thompson v. Button*, 14 Johns. (N. Y.) 84; *Mills v. Martin*, 19 Johns. (N. Y.) 7; *Rogers v. Arnold*, 12 Wend. (N. Y.) 30; *Barrett v. Warren*, 3 Hill (N. Y.) 348; *Pierce v. Van Dyke*, 6 Hill (N. Y.) 613; *Allen v. Crary*, 10 Wend. (N. Y.) 349, 25 Am. Dec. 566; *Pangburn v. Patridge*, 7 Johns. (N. Y.) 140, 5 Am. Dec. 250; *Ely v. Ehle*, 3 N. Y. 506; *Marshall v. Davis*, 1 Wend. (N. Y.) 109, 19 Am. Dec. 463.

**5. Statutes Strictly Construed.** — *Clifton Iron Co. v. Jemison Lumber Co.*, 108 Ala. 581; *Hill v. State*, 104 Ala. 64.

The frequent practice of going to the house of another and grossly abusing his family is merely a civil injury and not indictable. *Com. v. Edwards*, 1 Ashm. (Pa.) 46.

By the *Georgia* acts of 1865-6, p. 236, "it was not intended to make it a criminal trespass for one person to take and carry away from the dwelling house the personal goods of another, with his knowledge but without his consent." *Grier v. State*, 103 Ga. 428.

**6. Wantonness, Malice, and Wilfulness** — *Alabama.* — To justify a conviction for "wilfully and maliciously" cutting trees, under the Code,

malice must be shown as well as wilfulness. *Pippen v. State*, 77 Ala. 81. In an action for "unlawfully and wantonly" killing the hogs of another, malice is not an ingredient. *Thompson v. State*, 67 Ala. 106, 42 Am. Rep. 101. The criminal trespass of taking and using temporarily "any animal or vehicle without the consent of the owner" is constituted under the statute without criminal intent. *Bellinger v. State*, 92 Ala. 86. Where the defendant threw down a fence to obtain his cattle which were unlawfully detained until he paid for a trespass by them on the prosecutor's crops, he was held not liable under the statute. *Hill v. State*, 104 Ala. 64. Where, in ignorance of the boundary line, the prosecutor erected a fence on the defendant's land, it became the property of the latter, and he was not liable in trespass under the statute for its destruction or removal. *Wheeler v. State*, 109 Ala. 56.

*Arkansas.* — The *Arkansas* act of 1838 (*Mansfield's Dig.*, § 1658) not being repealed, intent is not necessary to constitute a misdemeanor for carrying away cut wood or timber from the owner's land. *State v. Malone*, 46 Ark. 140. But see *Boarman v. State*, 66 Ark. 65. Where mistake as to the boundary line is the result of negligence, it will not excuse in a penal action for destroying fences on the ground of want of intent. *Clark v. State*, 50 Ark. 570.

*Connecticut.* — In a prosecution under the *Connecticut* statute providing against entering upon the land of another without permission, for the purpose of hunting or fishing, knowledge of the unlawfulness of the act and guilty intent are not material. *State v. Turner*, 60 Conn. 222.

*Florida.* — Intention to make a profit by the carrying away of growing fruit is not necessary to constitute an offense under the statute. *Long v. State*, 42 Fla. 509. A trespass is not criminally "wilful" under the statute where the acts are committed with the consent or authority of the owner of the land. *Preston v. State*, 41 Fla. 627.

*Indiana.* — There must be malicious intent. *Hughes v. State*, 103 Ind. 344. One is not guilty for removing, in good faith, the fence of another which obstructs a road he has been using. *Palmer v. State*, 45 Ind. 388; *Lossen v. State*, 62 Ind. 437.

*Louisiana.* — In order to convict, it must be

*c.* MALICIOUS MISCHIEF AND MALICIOUS TRESPASS. — For a discussion of this phase of the subject reference is made to another part of this work.<sup>1</sup>

*d.* POSSESSION AND OWNERSHIP. — In some states possession, and in others ownership, is the foundation of the criminal action.<sup>2</sup>

proved that the cutting of timber from the land of another was done knowingly and wilfully, and not through mistake or inadvertence. *State v. Prince*, 42 La. Ann. 817.

*Mississippi*. — Good faith is no defense to a prosecution under the Mississippi statute. *Knight v. State*, 64 Miss. 802. See also *Perkins v. Hackleman*, 26 Miss. 41, 59 Am. Dec. 243.

*Missouri*. — Honest mistake and the absence of wantonness or other evil intent will relieve from liability for malicious trespass. *State v. Newkirk*, 49 Mo. 84; *State v. Zinn*, 26 Mo. App. 17.

*New York*. — Under the New York Penal Code, § 467, it is not necessary to show malice, but it is sufficient to show that the act was done intentionally with design. *Anderson v. How*, 116 N. Y. 336.

*North Carolina*. — The object of the act, as stated by Judge Boyden, in *State v. Hanks*, 66 N. Car. 612, was to keep off "interlopers," and so a trespass committed in ignorance, by accident, or under claim of right and *bona fide* belief therein, though it will subject to civil liability, will not incur liability under the penal statute. *State v. Hause*, 71 N. Car. 518. An entry on public lands without survey or grant from the state will not ground such a *bona fide* claim. *State v. Calloway*, 119 N. Car. 864. The defendant must prove not only his belief in his right to enter, but that he had reasonable ground therefor, and that cannot exist in the face of an adverse decision unreversed. *State v. Glenn*, 118 N. Car. 1194. A claim that he went upon the land in good faith, claiming title thereto, will not avail a defendant unless he satisfy the jury, in the absence of title, that he made the claim of good faith and had reasonable ground to believe it was well founded. *State v. Crawley*, 103 N. Car. 353; *State v. Durham*, 121 N. Car. 546. Where the servant of an owner or of one having a *bona fide* claim of right enters after being forbidden, the act does not constitute an indictable offense. *State v. Crosset*, 81 N. Car. 579; *State v. Winslow*, 95 N. Car. 649; *State v. Mace*, 65 N. Car. 344. For a definition of "wantonness" under the statute, see *State v. Brigman*, 94 N. Car. 888. Malice is not an essential element of the offense. *State v. Sneed*, 121 N. Car. 614. It is a wilful trespass, under the North Carolina code, where the injury is done deliberately, of purpose, and without regard to whether it is done rightfully or wrongfully, and evidence of the manner and circumstances attending the doing of the injury is admissible in proof that the intent was wilful or otherwise. *State v. Howell*, 107 N. Car. 835.

*Ohio*. — In Ohio the prosecution in a penal action for cutting timber was allowed to prove that the accused had agreed before the probate court not to go upon the land again, for the purpose of showing that he subsequently

went upon the land and cut the timber knowing that he had no right to do so. *Champion v. State*, 6 Ohio Cir. Dec. 777, 9 Ohio Cir. Ct. 627.

*Pennsylvania*. — The question of what is "wanton, reckless, and useless" cutting of trees is properly left to the jury. *Com. v. Clark*, 3 Pa. Super. Ct. 141. Testimony that the boundary line which had been marked by two surveyors years previously had been thereafter recognized by the parties as the limit of their possessions, is admissible in an action for cutting trees, and the question whether the accused cut them under a *bona fide* claim of a right is a question for the jury. *Com. v. Quiggle*, 19 Pa. Super. Ct. 343.

*Rhode Island*. — Good faith and taking under a fair claim of right will relieve from liability under the statute, though it does not by its terms require wantonness or malice to constitute an offense. *State v. Gardner*, 8 R. I. 151.

*Tennessee*. — To constitute the crime of maliciously destroying, injuring, or secreting personal property, the primary motive must be to do injury and thus gratify a malevolent disposition, because the statute was intended to punish wanton and malicious conduct. *Hampton v. State*, 10 Lea (Tenn.) 639. One found masked in a hen house for the purpose of stealing chickens was held properly convicted of a felony under the "ku-klux" law. *Walpole v. State*, 9 Baxt. (Tenn.) 370.

*Texas*. — To constitute an indictable offense, the cutting of timber on the land of another must be done knowingly. *State v. Arnold*, 39 Tex. 74. And good faith will relieve from liability. *Lackey v. State*, 14 Tex. App. 164.

*Virginia*. — In a prosecution under the statute for killing hogs, it is not material that the hogs were on the defendant's own land at the time, if the act was done knowingly, wilfully, and without lawful authority. *Com. v. Percavil*, 4 Leigh (Va.) 686.

1. See the title MALICIOUS MISCHIEF, vol. 19, p. 633.

2. Possession or Ownership — *Alabama*. — In Alabama it is possession of property which is the foundation of the action of trespass after warning, and the fact that the defendant has title or claim of title to the property is no defense or justification where the prosecutor has the possession. *Withers v. State*, 117 Ala. 89; *Burks v. State*, 117 Ala. 148; *Putnam v. State*, 117 Ala. 504; *Lawson v. State*, 100 Ala. 7; *Watson v. State*, 63 Ala. 19. The warning not to enter must be given by the party in possession, and warning by a landlord where the tenant is in possession under a lease is not sufficient. *Matthews v. State*, 81 Ala. 66; *Sewell v. State*, 82 Ala. 57. So, warning a person after he has obtained possession will not make him a criminal trespasser. *Goldsmith v. State*, 86 Ala. 55; *Watson v. State*, 63 Ala. 19. But the possession may mean something more than mere occupancy; it extends

*e. FORCE.* — Force is necessary, amounting to such a degree as will at least tend to produce a breach of the peace.<sup>1</sup> Bare words without such a demonstration are not sufficient.<sup>2</sup>

to the exclusive right to the possession, and a master is in possession through the occupancy of his servant. *Maddox v. State*, 122 Ala. 110.

*Arkansas.* — One who has paid the consideration for the land and has exclusive control is the "owner" within the meaning of the statute, though his deed for it has not been executed. *Wellington v. State*, 52 Ark. 266.

*Georgia.* — In Georgia the removal by one of two adjoining owners of a fence on their dividing line is not an indictable offense under the statute. There is not exclusive ownership in either party. *Gilreath v. State*, 96 Ga. 303. So a tenant removing cotton cropped on shares by contract between him and his landlord is not liable in criminal trespass. *Padgett v. State*, 81 Ga. 466. A lessee of land who cuts trees after the expiration of his lease, and after notice from the owner to desist, is a wilful trespasser and is liable to indictment. *Cox v. State*, 105 Ga. 610.

*Indiana.* — A tenant in possession under a lease is deemed the owner in law and may maintain the action. *State v. Burns*, 123 Ind. 427.

*North Carolina.* — Forcible trespass, under the statute, is an offense against the possession and does not depend upon the title. *State v. Webster*, 121 N. Car. 586; *State v. Bennett*, 4 Dev. & B. L. (20 N. Car.) 43; *State v. McCaulless*, 9 Ired. L. (31 N. Car.) 375; *State v. Davis*, 109 N. Car. 809. And the owner of the land must be in the actual use and enjoyment of it, otherwise there can be no forcible trespass. *State v. Newbury*, 122 N. Car. 1077; *State v. Bryant*, 103 N. Car. 436. A mortgagor, owner of a house and in actual possession of it, is not liable at the instance of the mortgagee, under the statute, as a wilful trespasser for pulling down the house. *State v. Jones*, 129 N. Car. 508. It is not forcible trespass to enter, with show of force, after being forbidden, on land in which the defendant is virtually in possession. *State v. Childs*, 119 N. Car. 858; *State v. Webster*, 121 N. Car. 586. The owner of the agricultural interest may subject himself to indictment under the code by destroying a dam built or raised by the dominant owner of an easement to build or raise a dam. *State v. Suttle*, 115 N. Car. 784.

*South Carolina.* — An equitable right will not entitle one to a prosecution against another put into possession by the owner. *State v. Mays*, 24 S. Car. 190. A licensee has not such an exclusive possession as will sustain an indictment for malicious trespass under the act. His civil remedy will depend upon whether his license is revocable or irrevocable. *State v. Gadsden*, 20 S. Car. 456.

*Texas.* — One claiming title may be guilty of malicious mischief for pulling down a fence if another is in peaceable possession. *Carter v. State*, 18 Tex. App. 573. The joint owner of a fence may be convicted for pulling down the dividing fence without the consent of the other. *Hurlbut v. State*, 12 Tex. App. 252. There

must be proof that the land was not the property of the defendant where it is alleged that he cut down trees on land which was not his own. *White v. State*, 14 Tex. App. 449. A tenant in possession of premises under a lease is the owner thereof till its expiration, under the statute, and in such a case an information alleging the ownership of the landlord will not be sustained. *Brumley v. State*, 12 Tex. App. 609; *Coggins v. State*, 12 Tex. App. 109.

**1. Force as an Element** — *North Carolina.* — To constitute forcible trespass under the North Carolina statute it is not absolutely necessary that there should be actual breach of the peace, but there must be such a demonstration, as with weapons, or multitude of people, in the presence of the owner, as is calculated to intimidate, and which tends to a breach of the peace. *State v. Covington*, 70 N. Car. 71; *State v. Smith*, 100 N. Car. 466; *State v. Tolever*, 5 Ired. L. (27 N. Car.) 452; *State v. Armfield*, 5 Ired. L. (27 N. Car.) 207; *State v. Ray*, 10 Ired. L. (32 N. Car.) 39; *State v. Mills*, 104 N. Car. 905, 17 Am. St. Rep. 706; *State v. Pollok*, 4 Ired. L. (26 N. Car.) 305, 42 Am. Dec. 140; *State v. Jacobs*, 94 N. Car. 950; *State v. Barefoot*, 89 N. Car. 565; *State v. Woodward*, 119 N. Car. 836; *State v. Davis*, 109 N. Car. 809; *State v. Robbins*, 123 N. Car. 730, 68 Am. St. Rep. 841; *State v. Hawkins*, 125 N. Car. 690, 74 Am. St. Rep. 669.

**Numbers Sufficient.** — *State v. Simpson*, 1 Dev. I. (12 N. Car.) 504; *State v. Elks*, 125 N. Car. 603; *State v. Conder*, 126 N. Car. 985.

**2.** *State v. Covington*, 70 N. Car. 71; *State v. Ray*, 10 Ired. L. (32 N. Car.) 39; *State v. King*, 74 N. Car. 177; *State v. Lloyd*, 85 N. Car. 573. But see *State v. Widenhouse*, 71 N. Car. 279; *State v. Buckner*, Phil. L. (61 N. Car.) 558, 98 Am. Dec. 83.

**Where One Enters Without Objection**, without weapons, and leaves when told, he is not guilty of forcible trespass, though he uses insulting words and threatening gestures. *State v. Hawkins*, 125 N. Car. 690, 74 Am. St. Rep. 669.

**Forcible Trespass by Single Person Without Weapon.** — One person riding into the yard of the prosecutrix, after being forbidden, and remaining there cursing her and her husband after being ordered to leave, is guilty of forcible trespass. *State v. Hinson*, 83 N. Car. 640.

**Entry Not Forcible in Its Incipency May Become So After an Order to Leave.** — *State v. Webster*, 121 N. Car. 586; *State v. Wilson*, 94 N. Car. 839; *State v. Talbot*, 97 N. Car. 494, followed in *State v. Gray*, 109 N. Car. 790.

**Breaking the Outer Door to Execute Civil Process** is forcible trespass. *State v. Whitaker*, 107 N. Car. 802; *State v. Armfield*, 2 Hawks (9 N. Car.) 246, 11 Am. Dec. 762.

**An Entry Without Force Amounting to a Breach of the Peace**, or such as is calculated to produce a breach of the peace, is only a civil trespass. *Temple v. State*, 6 Baxt. (Tenn.) 496.



*f.* PRESENCE OF OWNER. — In *North Carolina*, the presence of the owner before the trespass is complete is necessary to constitute criminal trespass.<sup>1</sup>

*g.* TRESPASS AFTER WARNING. — In *Alabama* and *Georgia* the statutes make prior warning in some instances necessary to render the offense indictable.<sup>2</sup>

**X. EVIDENCE** — *Scope of Section.* — In this section, only such general matters relating to evidence will be treated as do not fall naturally into any of the other principal divisions of this title.

**1. Admissibility** — *a.* MATERIAL FACTS. — As a General Rule material facts must be pleaded, otherwise evidence thereof will not be admitted.<sup>3</sup> The defendant's pleading may show such a case as to entitle the plaintiff to prove material facts he has not pleaded.<sup>4</sup>

Time Is Not a Material Fact, because the plaintiff is at liberty to prove any one trespass before the commencement of the action.<sup>5</sup>

*b.* ACTS AFTER COMMENCEMENT OF ACTION. — Although evidence of acts committed after the commencement of the action cannot usually be given,<sup>6</sup> it is sometimes admissible.<sup>7</sup>

*c.* AS TO MOTIVE. — Evidence as to motive is admissible for the purpose of enhancing the damages,<sup>8</sup> and to overcome a plea of justification.<sup>9</sup>

*d.* AS TO CUSTOM. — The custom of a particular place or the general custom of a state may be given in evidence.<sup>10</sup>

*e.* IN MITIGATION OF DAMAGES. — Circumstances in mitigation of damages may be shown if relevant and proper only, under the general issue,<sup>11</sup> if they do not amount to a justification, in which case they must be specially pleaded.<sup>12</sup>

*f.* WRITTEN INSTRUMENT. — A deed or other written instrument under

**1. Owner Must Be Present.** — *State v. Laney*, 87 N. Car. 535; *State v. Love*, 2 Dev. & B. L. (19 N. Car.) 267; *State v. Mills*, 2 Dev. & B. L. (19 N. Car.) 552; *State v. Fort*, 4 Dev. & B. L. (20 N. Car.) 192; *State v. Bennett*, 4 Dev. & B. L. (20 N. Car.) 43; *State v. Walker*, 10 Ired. L. (32 N. Car.) 234; *State v. McCauless*, 9 Ired. L. (31 N. Car.) 375; *State v. Smith*, 2 Ired. L. (24 N. Car.) 127.

The presence of the owner's son, forbidding, is sufficient. *State v. Drake*, 1 Winst. L. (60 N. Car.) 241.

**Presence Before Completion of Trespass Sufficient.** — It is not necessary that the owner should be present all the time. It is sufficient if he is present before the trespass is completed. *State v. Gray*, 109 N. Car. 790; *State v. McAdden*, 71 N. Car. 207; *State v. Lawson*, 98 N. Car. 759; *State v. Webster*, 121 N. Car. 586; *State v. Robbins*, 123 N. Car. 730, 68 Am. St. Rep. 841; *State v. Elks*, 125 N. Car. 603.

**2. Prior Warning** — *Alabama.* — The warning may be verbal or written. *Watson v. State*, 63 Ala. 19. And the defendant's actual knowledge of it must be shown; this may be done by circumstantial evidence. *Owens v. State*, 74 Ala. 401. "Premises," in the action for trespass after warning, means any real estate for an entry on which a civil action might be sustained. *Sandy v. State*, 60 Ala. 18; *Wright v. State*, 136 Ala. 139.

*Georgia.* — An order to leave the "premises" of the prosecutor, and a notification not to put his foot upon the prosecutor's "place," is not explicit notice to the accused not to use a frequented path across the prosecutor's pasture. *Murphey v. State*, 115 Ga. 201. In *Georgia*, where the prosecutor, who had had possession for nearly seven years, placed her daughter in

possession, and the daughter gave the accused notice, under the statute, to keep off the land, this was held sufficient notice, though both the prosecutor and the accused claimed the land under deeds by a common grantor. Land need not be actually under crop to be "cultivated land" under the statute. *Bryce v. State*, 113 Ga. 705.

**3. Material Facts Must Be Pledged.** — *Cowlishaw v. Cheslyn*, 1 Crompt. & J. 49; *Faulk v. Thornton*, 108 N. Car. 314; *Coody v. Gress Lumber Co.*, 82 Ga. 793.

**4. Shelton v. Alcox**, 11 Conn. 245.

**5. Time Not a Material Fact.** — *Knapp v. Slocomb*, 9 Gray (Mass.) 73.

**6. Acts After Commencement of Action.** — *Chappell v. State*, 86 Ala. 54.

**7. Keane v. Old Colony R. Co.**, 161 Mass. 203.

In an action for cutting timber, evidence that it was hauled away after the commencement of the action is admissible. *Wolf v. Wolf*, 158 Pa. St. 621.

**8. See supra**, this title, *Essentials* — *Intent*, and *infra*, *Damages* — *Evidence Admissible*.

**9. Watrous v. Steel**, 4 Vt. 629, 24 Am. Dec. 648.

**10. As to Custom.** — *Stultz v. Dickey*, 5 Binn. (Pa.) 285, 6 Am. Dec. 411; *Cook v. Rider*, 16 Pick. (Mass.) 186.

**11. In Mitigation of Damages.** — *Brown v. May*, 1 Munf. (Va.) 288.

**12. In Mitigation of Damages, if Not Amounting to Justification.** — *Collins v. Perkins*, 31 Vt. 624; *Womack v. Bird*, 51 Ala. 504; *Wehle v. Haviland*, (C. Pl. Gen. T.) 42 How. Pr. (N. Y.) 399; *Farwell v. Warren*, 51 Ill. 467; *Anthony v. Gilbert*, 4 Blackf. (Ind.) 348; *Williams v. Hathaway*, 20 R. I. 534; *Barrett v.*

which one of the parties holds or claims is admissible, even though it may be defective, to show color of title, the nature and extent of his claim, or a common source of title,<sup>1</sup> but not if it does not tend to establish the party's right, and is otherwise unnecessary.<sup>2</sup>

*g.* AS TO TITLE. — The plaintiff need not prove his title or actual possession where the defendant admits his possession but claims the title. The burden is then on the defendant to prove his title.<sup>3</sup> The plaintiff need not show title as well as possession where the defendant makes out no title.<sup>4</sup> As against a mere wrongdoer, the plaintiff in possession need not show title.<sup>5</sup> Possession at the time of the trespass and for many years previously is *prima facie* proof of title,<sup>6</sup> and evidence of this may be by parol.<sup>7</sup> But such presumption of title may be rebutted by showing that the title, notwithstanding such possession, is in another.<sup>8</sup> In *Illinois*, in an action for cutting trees, the plaintiff must prove ownership of the land, both at common law<sup>9</sup> and in an action under the Timber Act.<sup>10</sup>

*h.* AS TO POSSESSION. — Evidence showing ownership is *prima facie* proof of possession.<sup>11</sup> Possession is a question of fact for the jury.<sup>12</sup>

*i.* DECLARATIONS AND ADMISSIONS. — Declarations in disparagement of the title of the declarant<sup>13</sup> and admissions against the interest of the party making them are admissible.<sup>14</sup>

*j.* AS TO AUTHORITY OF LAW AND PROTECTION OF PROCESS. — An officer may, in defense, show his office, the authority under which he acted, and, if he acted under process, that the process was regular and valid.<sup>15</sup>

**2. Presumptions.** — Presumptions may arise, from the circumstances of the case, as to justification,<sup>16</sup> ownership and title,<sup>17</sup> or possession.<sup>18</sup>

*Mobile*, 129 Ala. 179. See also *infra*, *Damages* — *Evidence Admissible*.

**1. Written Instruments Admissible — Realty.** — *Grimes v. Butts*, 65 Ill. 347; *Wright v. Dunn*, 73 Tex. 293; *Woods v. Toombs*, 36 Tex. 85; *Hoffman v. Harrington*, 28 Mich. 90; *Garner v. Lasker*, 71 Tex. 431; *Chicago v. McGraw*, 75 Ill. 566; *Higdon v. Kennemer*, 112 Ala. 351; *Wylie v. Railes*, 8 Kan. App. 856, 55 Pac. Rep. 523.

**Personalty.** — *Henson v. Taylor*, 108 Ga. 567. *2. Herbert v. Pue*, 72 Md. 307; *Doane v. Wilcutt*, 16 Gray (Mass.) 368; *Moody v. Moeller*, 72 Tex. 635, 13 Am. St. Rep. 839; *Robinson v. Edwards*, 70 Me. 158; *Woodbeck v. Wilders*, 18 Cal. 131.

**Sometimes Regulated by Statute.** — The admissibility of such proof is sometimes regulated by statute. *Rio Grande, etc., R. Co. v. Milmo Nat. Bank*, 72 Tex. 467.

**3. As to Title.** — *Tison v. Broward*, 17 Fla. 465.

**4. Plaintiff Need Not Show Title as Well as Possession.** — *Shoup v. Shields*, 116 Ill. 488; *Brandon v. Grimke*, 1 Nott & M. (S. Car.) 356; *Dewey v. Bordwell*, 9 Wend. (N. Y.) 65; *Dexter v. Billings*, 110 Pa. St. 135; *Walker v. Wilson*, 8 Bosw. (N. Y.) 586.

**5. Field v. Apple River Log Driving Co.**, 67 Wis. 569.

**6. Possession Prima Facie Proof of Title.** — *Burlington, etc., R. Co. v. Beebe*, 14 Neb. 463; *Gerhardt v. Swaty*, 57 Wis. 24.

**7. Parol.** — *Pacific Express Co. v. Dunn*, 81 Tex. 85.

**8. Gulf, etc., R. Co. v. Cusenberry**, 86 Tex. 525.

**9. Clay v. Boyer**, 10 Ill. 506.

**10. Whiteside v. Divers**, 5 Ill. 336.

**11. Eno v. Christ**, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 24.

**12. Possession Question of Fact.** — *Firth v. Veeeder*, 58 Hun (N. Y.) 605, 12 N. Y. Supp. 579; *Allison v. Little*, 93 Ala. 150; *Zundel v. Baldwin*, 114 Ala. 328.

**13. Declarations.** — *Greenl. on Ev.*, § 109, and cases cited; *Crockett v. Lashbrook*, 5 T. B. Mon. (Ky.) 530; *Pike v. Hayes*, 14 N. H. 19, 40 Am. Dec. 171. See the title ADMISSIONS, vol. 1, p. 670.

**14. Copley v. Rose**, 2 N. Y. 115; *Gilbert v. Felton*, 5 Gray (Mass.) 406; *Kellenberger v. Sturtevant*, 7 Cush. (Mass.) 465; *Gordon v. Cook*, 47 Mich. 248; *Welsh v. Cooper*, 8 Pa. St. 217; *Roberts v. Young*, 42 Pa. St. 439; *Lawrence v. Wilson*, 160 Mass. 305.

**Declarations of Former Occupant.** — The declarations of a former occupant under whom the defendant claims are evidence for the defendant. *Morss v. Salisbury*, 48 N. Y. 636.

**Declarations of Bailor.** — But the declarations of one under whom a party claims as bailee are not admissible to prove the bailment unless they are part of the *res gesta* or constituted the bailment. *Jones v. McNeil*, 2 Bailey L. (S. Car.) 466. **15. See supra**, this title, *Excuse, Justification, and Protection*.

**16. Presumptions as to Justification.** — *Rightmire v. Shepard*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 800.

When proved, the presumption is that a trespass was wilful. *Mississippi River Logging Co. v. Page*, 68 Minn. 269.

**17. Presumptions as to Ownership and Title.** — *Lerma v. Stevenson*, 40 Fed. Rep. 356; *Warfield v. Walter*, 11 Gill & J. (Md.) 80; *Jones v. Muldrow*, Cheves L. (S. Car.) 254.

**18. Presumption as to Possession.** — *Marsteller*

**3. Relevancy.** — The general rule as to the relevancy of evidence applies in the action of trespass.<sup>1</sup>

**4. Prima Facie Evidence of Title.** — A *prima facie* case of title in actions of trespass may be made out in various ways.

In Realty, one may establish a *prima facie* title to the land by other means than a valid deed to the party,<sup>2</sup> as by long possession under claim of title,<sup>3</sup> by land office certificate when so provided under the statute,<sup>4</sup> or by tax title held by a third person where the other party to the action is not in possession.<sup>5</sup>

As to Personalty. — Possession of and title to land is *prima facie* evidence of title to personalty wrongfully taken from it.<sup>6</sup>

**5. Weight and Sufficiency.** — Questions as to weight and sufficiency of evidence are determined by the nature of the facts proven. Sometimes these facts make out a *prima facie* case, and the jury are required to mould their verdict accordingly, and a verdict contrary to such evidence will be set aside.<sup>7</sup> In other cases, they have only such weight as the jury may give them.<sup>8</sup>

**6. Burden of Proof.** — As to realty, where the plaintiff's ownership is put in issue, or where each party claims the property by his pleadings, the burden of proof is on the plaintiff,<sup>9</sup> unless the plaintiff is in possession of the property, in which case the burden is on the defendant to make out title in himself. If each shows independent title of equal strength, the party out of possession will fail.<sup>10</sup> Where the issue is the place where an admitted injury was done, the defendant may assume the burden of proof by his defense.<sup>11</sup> In trespass *de bonis asportatis* the burden of proof of ownership,<sup>12</sup> seizure, conversion, and value of the goods is on the plaintiff, as well as that of proving oppression or malice when exemplary damages are sought.<sup>13</sup> In an action to recover the

*v. Coryell*, 4 Leigh (Va.) 325; *Griffin v. Crepin*, 60 Me. 270.

1. See the title EVIDENCE, vol. 11, p. 501 *et seq.*

**Illustrations of Irrelevant Testimony** — *Alabama*. — *Allison v. Little*, 85 Ala. 512.

*California*. — *Lamb v. Harbaugh*, 105 Cal. 680.

*Connecticut*. — *Southington Ecclesiastical Soc. v. Gridley*, 20 Conn. 200; *Evans v. Bidwell*, 20 Conn. 209.

*Indiana*. — *Chenoweth v. Hicks*, 5 Ind. 224.

*Kansas*. — *Larkin v. Taylor*, 5 Kan. 433.

*Minnesota*. — *Heartz v. Klinkhammer*, 39 Minn. 488.

*Mississippi*. — *Mississippi Cent. R. Co. v. Miller*, 40 Miss. 45; *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 332.

*Tennessee*. — *Crawford v. Bynum*, 7 Yerg. (Tenn.) 381.

*West Virginia*. — *Beaty v. Baltimore, etc., R. Co.*, 6 W. Va. 388.

2. *Evans v. Wabash, etc., Canal*, 15 Ind. 319.

**In Texas** proof of actual possession by the plaintiff is *prima facie* evidence of title in him as against a trespasser. *Pacific Express Co. v. Dunn*, 81 Tex. 85; *Edrington v. Butler*, (Tex. Civ. App. 1895) 33 S. W. Rep. 143.

**3. Possession under Claim of Title.** — *Baier v. Ziegelbauer*, 66 Wis. 524; *Burlington, etc., R. Co. v. Beebe*, 14 Neb. 463.

**4. Land Office Certificate.** — *Burlerson v. Teeple*, 2 Greene (Iowa) 542.

**5. Tax Titles Held by Third Person.** — *Tolles v. Duncombe*, 34 Mich. 101.

6. *Dorsey v. Patterson*, 7 Iowa 420.

**7. Weight and Sufficiency of Evidence** — *Newell v. Giggey*, 13 Colo. 16; *Wedge v. Spencer*,

(Supm. Ct. Gen. T.) 7 N. Y. Supp. 173; *Yowell v. Braden*, 29 Ill. App. 29; *Wolff v. Cohen*, 8 Rich. L. (S. Car.) 144; *Holliday v. Jackson*, 30 Mo. App. 263; *Keating v. Hayden*, 132 Ill. 308.

The recital in a deed that a grantee died intestate leaving the grantors, who were his widow and heirs at law, is evidence of the fact as between one claiming title and a mere trespasser. *Young v. Shulenberg*, 35 N. Y. App. Div. 79, affirmed 165 N. Y. 385.

8. *Dean v. Fail*, 8 Port. (Ala.) 491; *Leavenworth v. Baldwin*, 2 Day (Conn.) 317; *Hogmire v. McCoy*, 2 Har. & J. (Md.) 351.

**9. Burden of Proof.** — *Tabor v. Judd*, 62 N. H. 288; *Nelson v. Jenkins*, 42 Neb. 133; *Hays v. Ison*, 72 S. W. Rep. 733, 24 Ky. L. Rep. 1947.

10. *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265; *Townsend v. Kerns*, 2 Watts (Pa.) 180; *Caskey v. Lewis*, 15 B. Mon. (Ky.) 27.

11. *Hudson v. Miller*, 97 Ill. App. 74; *Campbell v. King*, 32 Mo. App. 38.

**Illustrations.** — Where, in an action of trespass *q. c. f.*, every part of a forty-acre lot belonged to the plaintiff, except such as was in fact and law reserved by a deed and decree of partition, it devolved upon the defendant to show that the act of spoliation, which he admitted, was committed on the part reserved. *Campbell v. King*, 32 Mo. App. 38.

And where the plaintiff had a grant from the state of five hundred acres, with the exception of two hundred and fifty acres previously granted, it was held to be incumbent on the defendant to show that the trespass was committed on the part excepted. *McCormick v. Monroe*, 1 Jones L. (46 N. Car.) 13.

12. *Carter v. Simpson*, 7 Johns. (N. Y.) 535.

13. *Willis v. Hudson*, 72 Tex. 598.



statutory penalty for cutting trees, the burden of showing mistake or reasonable care in justification is on the defendant.<sup>1</sup>

**XI. DAMAGES — 1. Evidence Admissible** — *a.* IN ENHANCEMENT OF DAMAGES. — Evidence may be introduced showing the circumstances attending the perpetration of the trespass, in order to guide the court and the jury in the assessment of the damages.<sup>2</sup> This rule is, however, subject to the qualification that matter which may be the subject of a separate action cannot be proved in aggravation, as an assault, in an action for breaking the close.<sup>3</sup>

**Consequential Injury**, where the injury is remote, cannot be given in evidence for the purpose of enhancing the damages;<sup>4</sup> but special damages strictly consequential of the trespass may be proved, or where the principal act and the consequence constitute one transaction, as when the trespass consisted of throwing down the plaintiff's fence, and his cattle escaped;<sup>5</sup> and where the trespass is the proximate or efficient cause of injury afterwards accruing, damages for such injury may be proved and recovered.<sup>6</sup>

*b.* IN MITIGATION OF DAMAGES. — **Facts and Circumstances Which Induced the Act of Trespass** are admissible in mitigation of damages,<sup>7</sup> even though they happen to involve the character of the plaintiff.<sup>8</sup> As a rule the circumstances must have been of recent date.<sup>9</sup>

**Where Not Admissible in Mitigation.** — Evidence that a house pulled down was used as a house of ill fame is not admissible in mitigation of damages.<sup>10</sup> Invalid proceedings of a county board are not admissible to mitigate damages for opening a road thereunder.<sup>11</sup>

1. Keirn *v.* Warfield, 60 Miss. 799.

2. **Evidence Admissible in Enhancement of Damages.** — Anonymous, Minor (Ala.) 52, 12 Am. Dec. 31; Lamb *v.* Harbaugh, 105 Cal. 680; Barnum *v.* Vandusen, 16 Conn. 200; Stevens *v.* Stevens, 96 Ga. 374; Taner *v.* Hutson, 5 Ind. 322, 61 Am. Dec. 96; Sodousky *v.* McGee, 4 J. J. Marsh. (Ky.) 267; Schindel *v.* Schindel, 12 Md. 108; Snively *v.* Fahnestock, 18 Md. 391; Young *v.* Mertens, 27 Md. 114; Ogden *v.* Gibbons, 5 N. J. L. 598; Romaine *v.* Norris, 8 N. J. L. 80; Duncan *v.* Stalcup, 1 Dev. & B. L. (18 N. Car.) 440; Sawyer *v.* Jarvis, 13 Ired. L. (35 N. Car.) 179. See also generally the title DAMAGES, vol. 8, p. 537.

**Insulting Words** used at the time of the trespass may be given in evidence to show the character of the act. Ratliff *v.* Huntly, 5 Ired. L. (27 N. Car.) 545; Golding *v.* Williams, Dudley L. (S. Car.) 92.

3. **Matter Which May Be Subject of a Separate Action.** — Sampson *v.* Coy, 15 Mass. 493; Lawrence *v.* Phelps, 2 Root (Conn.) 334; Fisher *v.* Conway, 21 Kan. 18, 30 Am. Rep. 419.

**Contra.** — Druse *v.* Wheeler, 22 Mich. 439, where it was held in an action *quare clausum fregit* for breaking the plaintiff's close, including, besides the removal of certain fences and sheds, the imprisonment of his person, that the personal arrest might be considered by the jury as an aggravation of the wrongful entry, although it would have been a ground of action by itself.

And in Pendleton *v.* Davis, 1 Jones L. (46 N. Car.) 98, it was held that the fact that a blow being given in presence of the court rendered the defendant liable to be fined for that as a contempt, did not prevent the circumstance from being considered as an aggravation of the blow in a civil action of trespass.

4. **Remote Consequential Injury.** — Sims *v.*

Glazener, 14 Ala. 695, 48 Am. Dec. 120; Thomas *v.* Isett, 1 Greene (Iowa) 470, where loss of profits was allowed to be proved, and loss of credit was not. See the next subdivision.

It was held not competent to show what would be the value of wharves which could have been erected by the plaintiff, or the value of a bridge over the river if the same had been built on the spot where the defendant located its railroad. Wrightsville, etc., R. Co. *v.* Holmes, 85 Ga. 668.

5. **Where Act and Consequence One Transaction.** — Damron *v.* Roach, 4 Humph. (Tenn.) 134.

6. **Proximate Cause.** — Hawthorne *v.* Siegel, 88 Cal. 159, 22 Am. St. Rep. 291.

7. **Mitigation of Damages.** — Wells *v.* Head, 4 C. & P. 568, 19 E. C. L. 531; Reed *v.* Bias, 8 W. & S. (Pa.) 189; Boling *v.* Wright, 16 Ala. 664; Huftalin *v.* Misner, 70 Ill. 55; Sawyer *v.* Jarvis, 13 Ired. L. (35 N. Car.) 179 (evidence of title in an action for assault, where the consideration may mitigate the damages); Wasson *v.* Canfield, 6 Blackf. (Ind.) 407; Simpson *v.* McCaffrey, 13 Ohio 508; Boggan *v.* Bennett, 102 Ala. 400; Carter *v.* Bedortha, 124 Mich. 548.

8. **Plaintiff's Character.** — Rhodes *v.* Bunch, 3 McCord L. (S. Car.) 66. But see *contra*, Willis *v.* Forrest, 2 Duer (N. Y.) 310; Corning *v.* Corning, 6 N. Y. 97.

9. **Circumstances Must Have Been of Recent Date.** — Huftalin *v.* Misner, 70 Ill. 55; Willis *v.* Forrest, 2 Duer (N. Y.) 310; Avery *v.* Ray, 1 Mass. 12; Lee *v.* Woolsey, 19 Johns. (N. Y.) 319, 10 Am. Dec. 230; Collins *v.* Todd, 17 Mo. 537; Cox *v.* Whitney, 9 Mo. 531; Rochester *v.* Anderson, 1 Bibb (Ky.) 428.

10. **Evidence Not Admissible in Mitigation.** — Johnson *v.* Farwell, 7 Me. 370, 22 Am. Dec. 203; Weston *v.* Gravin, 49 Vt. 507. *Contra*, Simpson *v.* McCaffrey, 13 Ohio 508.

11. Barnard *v.* Haworth, 9 Ind. 103.

**Evidence as to Possession.** — Evidence that the defendant had a right to the possession of the close at the time of his entry and that the plaintiff had originally taken possession of it by disseizin and trespass, though not a defense to the action, may be given in mitigation of damages.<sup>1</sup>

**Evidence as to Ownership.** — Under the general issue the defendant has a right to show in mitigation of damages, in an action for the taking of oxen, that the property in them, at the time of the taking, was in a third person, and that the taking was under such circumstances as not to render the plaintiff liable to such third person for the value of the cattle;<sup>2</sup> and, when pleaded, that a slave taken from the plaintiff's close did not belong to him, reducing the gravamen of the offense.<sup>3</sup>

**Evidence of Benefit to Plaintiff.** — It has been held that a defendant cannot show, in mitigation of damages, any benefit to the plaintiff from the consequences of the trespass.<sup>4</sup> But the proper statement of the rule appears to be that one who has wrongfully taken property cannot mitigate damages by showing that he has himself applied the property to the owner's use without his consent.<sup>5</sup> But where the property has been so applied, by the act of a third person and the operation of law, the fact should be taken into account in estimating the damages,<sup>6</sup> and if it is applied with the owner's consent, he can only recover for the detention up to the time of giving the license.<sup>7</sup>

**Evidence of Payments in part satisfaction** may be proved to diminish the plaintiff's claim *pro tanto*.<sup>8</sup>

**An Unaccepted Offer of Return of a chattel wrongfully seized** will not mitigate damages.<sup>9</sup>

**Delivery in Part.** — And delivery to the plaintiff of a portion of wood and timber unlawfully cut and carried away will be allowed to be proved in mitigation of the damages.<sup>10</sup>

**Replacing Property Inadvertently Removed.** — And where soil and grass were inadvertently removed from the plaintiff's land, evidence that, on complaint, they were replaced was held admissible in mitigation of damages.<sup>11</sup>

**In Trespass for Mesne Profits against a bona fide purchaser,** it is equitable that the defendant should be allowed the value of his improvements, made in good faith, to the extent of the rents and profits claimed,<sup>12</sup> but this would not apply to a wilful trespasser, who would not be allowed to claim mitigation of damages for any benefit he had done to the plaintiff's land.<sup>13</sup>

**2. Damages Recoverable — a. IN GENERAL.** — Damages are of two kinds; first, actual damages, which are such as will compensate the plaintiff for actual injuries sustained, and second, exemplary or vindictive damages, which are inflicted with a view not to compensate the plaintiff, but to punish the defendant.<sup>14</sup> There are, besides, nominal damages, which are awarded where

1. Evidence as to Possession. — M'Donald v. Lightfoot, Morr. (Iowa) 450. See also Caston v. Perry, 2 Bailey L. (S. Car.) 104, a similar case.

2. Evidence as to Ownership. — Anthony v. Gilbert, 4 Blackf. (Ind.) 348.

3. Ballard v. Leavell, 5 Call (Va.) 531.

4. Evidence of Benefit to Plaintiff. — Dollam v. Fitler, 6 W. & S. (Pa.) 323.

5. Hammer v. Wilsey, 17 Wend. (N. Y.) 91; Bird v. Womack, 69 Ala. 390.

6. Application to Owner's Use by Third Person and Operation of Law. — Collins v. Perkins, 31 Vt. 624; Kaley v. Shed, 10 Met. (Mass.) 317; Perry v. Chandler, 2 Cush. (Mass.) 237; Higgins v. Whitney, 24 Wend. (N. Y.) 379; Sherry v. Schuyler, 2 Hill (N. Y.) 204; Stewart v. Martin, 16 Vt. 397; Hopple v. Higbee, 23 N. J. L. 342.

7. Application to Owner's Use with His Consent. — Goodrich v. Foster, 20 N. H. 177.

8. Payment in Part Satisfaction. — Chamberlin v. Murphy, 41 Vt. 110.

9. Unaccepted Offer of Return. — Powers v. Florance, 7 La. Ann. 524.

10. Loewenberg v. Rosenthal, 18 Oregon 178.

11. Replacement of Soil, etc. — Flynt v. Chicago, etc., R. Co., 38 Mo. App. 94. See also Fields v. Williams, 91 Ala. 502.

12. Mesne Profits — Value of Improvements. — Jackson v. Loomis, 4 Cow. (N. Y.) 168, 15 Am. Dec. 347.

13. Wilful Trespasser. — Loomis v. Green, 7 Me. 386; Russell v. Blake, 2 Pick. (Mass.) 505.

14. Damages Recoverable — In General. — Berry v. Fletcher, 1 Dill. (U. S.) 67. And see generally the titles DAMAGES, vol. 8, p. 537; EXEMPLARY DAMAGES, vol. 12, p. 2.

the successful plaintiff has brought suit for the enforcement of a right, or, suing for actual damages, has failed to prove them.<sup>1</sup>

**b. ACTUAL DAMAGES.**—In Ordinary Cases, the measure of damages is the actual value of the property taken or destroyed; to that the plaintiff is entitled.<sup>2</sup>

It Is Only Where the Trespass Is Committed Wantonly or Maliciously that the jury may, if they think proper, give vindictive or exemplary damages; unless there are aggravating circumstances, only such damages as will compensate the plaintiff will be allowed.<sup>3</sup>

**For Taking Stone, Coal, Oil, Gold.**—The measure of damages for taking stone, oil, and ore is, as a general rule, the value of the property taken when it is separated from the realty and becomes a chattel; but the rule is not invariable, and the trend of the decisions in the various states is shown by the following specific cases. For stone knowingly taken from another's quarry, the value of the stone after it was detached from the land and had become personalty, and not as it lay in the land as a part of the realty, is the measure of damages.<sup>4</sup> For coal taken, the value of the coal *in situ*, and any other injury shown to have been done to the land, and not the value of the coal as a chattel, is the measure of damages.<sup>5</sup> For taking oil, its value above ground

1. See *infra*, this section, *Nominal Damages*.

2. **General Rule—Actual Damages Recoverable**—*Alabama*.—*Alabama State Land Co. v. Slaton*, 120 Ala. 259.

*California*.—*Maye v. Yappen*, 23 Cal. 306, *armmed Goller v. Fett*, 30 Cal. 481.

*Illinois*.—*Coffman v. Burkhalter*, 98 Ill. App. 304.

*Louisiana*.—*Lafon v. Dufrocq*, 9 La. Ann. 350.

*Maine*.—*Weston v. Dorr*, 25 Me. 176, 43 Am. Dec. 259; *Reynolds v. Chandler River Co.*, 43 Me. 513.

*Michigan*.—*Gilbert v. Kennedy*, 22 Mich. 5. *New York*.—*O'Horo v. Kelsey*, 60 N. Y. App. Div. 604.

*North Carolina*.—*Wylie v. Smitherman*, 8 Ired. L. (30 N. Car.) 236.

*Pennsylvania*.—*Rogers v. Fales*, 5 Pa. St. 154; *Reynolds v. Breathwaite*, 131 Pa. St. 416.

*South Carolina*.—*Johnson v. Packer*, 1 Nott & M. (S. Car.) 1; *Richardson v. Dukes*, 4 McCord L. (S. Car.) 156.

*Texas*.—*Jackel v. Reiman*, 78 Tex. 588; *Heiligmann v. Rose*, 81 Tex. 222, 26 Am. St. Rep. 804.

*Vermont*.—*Kidder v. Kennedy*, 43 Vt. 717; *Weston v. Gravlín*, 49 Vt. 507.

And as to injury to the person, see *Kirton v. North Chicago St. R. Co.*, 91 Ill. App. 554.

**Where Property Has Been Taken by the True Owner.**—There is an exception to the rule that the plaintiff is entitled to the actual value of the property taken. Where the plaintiff is in peaceable possession of the property it is correct to say that he can recover the full value of the property against any stranger to the title, but where it is shown by the evidence that all the property taken has been taken by the true owner, then the plaintiff cannot be liable over to any one for the value of the property, and, therefore, the only reason why he could ever recover the value thereof fails, and that is eliminated as an item of damage from the case. *Pabst Brewing Co. v. Greenberg*, (C. C. A.) 117 Fed. Rep. 135; *Squire v.*

*Lollenbeck*, 9 Pick. (Mass.) 551, 20 Am. Dec. 506.

3. **Without Aggravating Circumstances, Only Actual Damages Recoverable**—*United States*.—*Berry v. Fletcher*, 1 Dill. (U. S.) 67.

*Connecticut*.—*Curtiss v. Hoyt*, 19 Conn. 154, 48 Am. Dec. 149.

*Maryland*.—*Jacob Tome Institute v. Cothers*, 87 Md. 569.

*Missouri*.—*Walker v. Borland*, 21 Mo. 289; *Engle v. Jones*, 51 Mo. 316; *Franz v. Hilterbrand*, 45 Mo. 121; *Welsh v. Stewart*, 31 Mo. App. 376 (the petition must state such a case as will support the recovery of exemplary damages, otherwise they cannot be recovered); *Prueitt v. Cheltenham Quarry Co.*, 33 Mo. App. 18; *Cookman v. Nill*, 81 Mo. App. 297.

*New Hampshire*.—*Moore v. Bowman*, 47 N. H. 494.

*New Jersey*.—*Hopple v. Higbee*, 23 N. J. L. 342.

*North Carolina*.—*Wylie v. Smitherman*, 8 Ired. L. (30 N. Car.) 236; *Duncan v. Stalcup*, 1 Dev. & B. L. (18 N. Car.) 440; *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N. Car. 648.

*Texas*.—*Jackel v. Reiman*, 78 Tex. 588.

*Virginia*.—*Fishburne v. Engledove*, 91 Va. 548.

See *infra*, this section, *Exemplary or Punitive Damages*, for cases where these may be imposed.

**Where the Defendant Was Convicted of an Assault** by threatening the plaintiff by cocking and uncocking a gun, it was held that finding only trivial damages would lead the ill disposed to consider an assault as a thing that might be committed with impunity, and the jury might consider whether or not such a result would be produced. *Beach v. Hancock*, 27 N. H. 223, 59 Am. Dec. 373.

4. **Stone Taken from Quarry.**—*Cheaney v. Nebraska, etc., Stone Co.*, 41 Fed. Rep. 740; *Baker v. Hart*, 52 Hun (N. Y.) 363.

5. **Coal.**—*Warrior Coal, etc., Co. v. Mabel Min. Co.*, 112 Ala. 624.



has been held to be the measure of recovery.<sup>1</sup> Where the action is for an injury to the land itself, the measure of damages for removing, by mistake, gold-bearing earth from a gold mine is the value of the gold-bearing earth at the time it was separated from the surrounding soil, and became a chattel. The expense of extracting the gold and separating it from the earth after it is moved to the place of washing, is to be deducted from the value of the gold.<sup>2</sup>

**Cutting Trees.** — This topic is discussed elsewhere in this work.<sup>3</sup>

**Where the Trespass Is an Encroachment on or Occupation of Real Property,** the measure of damages is not the full value of the land, but the damage the plaintiff has sustained by being deprived of its use.<sup>4</sup>

**Injury to Realty.** — Where land is injured by excavations or otherwise, in a part of it, the measure of damages will be the difference in the market value of the whole tract immediately before the injury and such value immediately after it, and not merely of the part.<sup>5</sup>

**Diversion of Water.** — This question will be found discussed elsewhere in this work.<sup>6</sup>

**In the Case of Merchantable Chattels,** the actual value will usually be assessed as the market value at the time of the trespass.<sup>7</sup>

In *Illinois* the value of the coal at the mouth of the pit, less the cost of carrying it there from the place where it had been dug, allowing nothing for digging, is the measure of damages. *Donovan v. Consolidated Coal Co.*, 88 Ill. App. 589.

**Where the Taking Is Wilful,** the damage is the value of the coal after being mined, allowing nothing for mining. *Sunnyside Coal, etc., Co. v. Reitz*, 14 Ind. App. 478.

**1. Oil.** — *Dyke v. National Transit Co.*, 22 N. Y. App. Div. 360.

**2. Gold.** — *Maye v. Yappen*, 23 Cal. 306, affirmed and followed in *Goller v. Fett*, 30 Cal. 481.

**3. Cutting Trees.** — See the title TREES AND TIMBER, ante.

**4. Encroachment on or Occupation of Land.** — *McGann v. Hamilton*, 58 Conn. 69; *Shadwell v. Hutchinson*, 2 B. & Ad. 97, 22 E. C. L. 33; *McWilliams v. Morgan*, 75 Ill. 473; *Frizzell v. Duffer*, 58 Ark. 612; *Jacob Tome Institute v. Crothers*, 87 Md. 569; *Oklahoma City v. Hill*, 6 Okla. 114; *Eno v. Christ*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 24.

**For Occupation of Land by a Tramway,** the rental value of the land occupied, plus the decrease in the rental value of the remainder caused by such occupation, is the measure of damages. *Leigh v. Garysburg Mfg. Co.*, 132 N. Car. 167.

**The Measure of Damages for Injuries Done by Laying a Pipe Line in a Highway** opposite the plaintiff's land is not the difference in value before and after the laying, because that would proceed upon the theory that the pipe line and the injury therefrom are to continue forever. *Hartman v. Tully Pipe Line Co.*, 71 Hun (N. Y.) 367.

**For Occupying and Cultivating Land, the Fair Market Value of the Crops.** — *Negley v. Cowell*, 91 Iowa 256, 51 Am. St. Rep. 345.

**For the Seizure of Growing Crops,** the damages are the value of the crops at the time of the trespass. *Irwin v. Nolde*, 176 Pa. St. 594.

**5. Injury in a Part of Land** — *Chicago, etc., R. Co. v. Willits*, 45 Kan. 110; *Denver City Irrig-*

*ation Co. v. Middaugh*, 12 Colo. 434, 13 Am. St. Rep. 234; *Adden v. White Mountains N. H. R. Co.*, 55 N. H. 413, 20 Am. Rep. 220; *Carl v. Sheboygan, etc., R. Co.*, 46 Wis. 625.

**For Inadvertently Digging Some Soil and Grass from the Plaintiff's Land,** which were replaced on complaint made, only the value of the soil and grass removed were considered. *Flynt v. Chicago, etc., R. Co.*, 38 Mo. App. 94.

**Where Flinty Soil Was Dag Up While Prospecting for manganese,** only the cost of filling up the excavations was recoverable. *St. Louis Manganese Co. v. Miller*, (Ark. 1889) 11 S. W. Rep. 958.

**For Depositing Dirt on One's Land,** the difference in value of the land before and after the act, unless the cost of repairing the injury is less than that, is sufficient. *Tegeler v. Kansas City*, 95 Mo. App. 162; *Hoffman v. Mill Creek Coal Co.*, 16 Pa. Super. Ct. 631.

**For Further Instructions — Injury to Grazing.** — *Harrison v. Adamson*, 86 Iowa 693.

**Injury by Construction of Railroad.** — *Jacksonville, etc., R. Co. v. Lockwood*, 33 Fla. 573; *Florida Southern R. Co. v. Parsons*, 33 Fla. 631.

**Covering Land with Brushwood.** — *Hutchinson v. Parker*, 64 N. H. 89.

**Forming Highway on Land.** — *Ziebarth v. Nye*, 42 Minn. 541.

**6. Diversion of Water.** — See the title WATERS AND WATERCOURSES.

**For Cutting Down the Plaintiff's Penstocks, Digging Up and Throwing Out Her Pump Logs, and Disconnecting the Water System with Which She Supplied a Village,** the basis of damages was held to be, (1) the direct injury to the works; (2) the interruption of the water supply to consumers and consequent loss of revenue; (3) the more rapid decay of the whole system of logs, resulting from air being allowed to enter the system at places where the logs were taken up. *Boyer v. Little Falls*, 5 N. Y. App. Div. 1.

**7. Market Value at Time of Trespass.** — *Gardner v. Field*, 1 Gray (Mass.) 151; *Coolidge v. Choate*, 11 Met. (Mass.) 79; *Gresham v. Taylor*, 51 Ala. 505; *Maye v. Yappen*, 23 Cal. 306.

For Injury to Personal Property, the difference in value before and after the injury, and the expense of repairing, are recoverable.<sup>1</sup>

For the Destruction of Property That May Be Readily Reproduced, as, for instance, a house, the measure of recovery has been held to be the cost of reproducing it, together with the value of its use while that was being done.<sup>2</sup>

What Is Covered by Trespass. — For taking chattels, trespass covers the tortious taking, the value, and the detention.<sup>3</sup> Where property has been voluntarily restored,<sup>4</sup> or applied to the owner's use with his consent,<sup>5</sup> not its value, but compensation for the injury and loss of its use only is recoverable.

A Trespasser *ab Initio*, by the Abuse of Process, is liable for the entire value of the goods wrongfully taken.<sup>6</sup>

Wrongful Entry — Value of Personal Property Taken. — And the value of personal property belonging to the plaintiff taken away during a wrongful entry on his land may be recovered in addition to damage for entry, in an action *quare clausum fregit*.<sup>7</sup>

One with a Life Estate can only recover damages for the breaking and entering his close, and for whatever, if anything, has been carried away which was necessary for the enjoyment of his life estate.<sup>8</sup>

Where the Defendant Was an Innocent Receiver from a trespasser of cross-ties made from the plaintiff's timber, he was still held liable for the value of the cross-ties, and not of the wood as "stumpage."<sup>9</sup>

Injury to Health and Feelings. — It is sometimes held that injury to health and feelings may form an element in the estimate of actual damages.<sup>10</sup>

Counsel Fees, Legal Expenses, and Traveling Expenses cannot be included in the damages awarded,<sup>11</sup> even under the name of exemplary damages.<sup>12</sup>

Interest. — The jury may allow interest if they think proper,<sup>13</sup> except where the damages awarded are enlarged damages recoverable under the statute, in which case interest, as a rule, will not be allowed.<sup>14</sup>

1. Difference in Value. — *Cookman v. Nill*, 81 Mo. App. 297; *Streett v. Laumier*, 34 Mo. 469; *English v. Missouri Pac. R. Co.*, 73 Mo. App. 232.

2. Destruction of House. — *Marks v. Culmer*, 6 Utah 419.

3. Damages for Taking, Value, and Detention. — *Daniel v. Holland*, 4 J. J. Marsh. (Ky.) 18; *Norfleet v. Vaughn*, 68 Ga. 830; *Ham-matt v. Russ*, 16 Me. 171; *Denison v. Hyde*, 6 Conn. 508. But see *Lewis v. Morse*, 20 Conn. 211, where only the value was allowed and damages for the detention were disallowed.

Detention. — The law does not recognize interest as the exact measure of damages for the detention of property taken in trespass in addition to its value. *Longfellow v. Quimby*, 29 Me. 196, 48 Am. Dec. 525.

4. Detention. — *Fields v. Williams*, 91 Ala. 502.

5. *Goodrich v. Foster*, 20 N. H. 177.

6. *Cate v. Schaum*, 51 Md. 299.

7. *Moore v. Baylis*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 62.

8. *McKeen v. Gammon*, 33 Me. 187.

9. Innocent Receiver. — *Parker v. Waycross*, etc., R. Co., 81 Ga. 387; *Birmingham Mineral R. Co. v. Tennessee Coal*, etc., R. Co., 127 Ala. 137.

10. Actual Damage May Include Injury to Health and to Feelings. — *Preiser v. Wielandt*, 48 N. Y. App. Div. 569; *Hatchell v. Kimbrough*, 4 Jones L. (49 N. Car.) 163.

In an action for damages by a widow for wrongful expulsion by the heirs, it was held that actual damage, apart from any aggravation

that might be proved, included damages to her health and those referable to pain and suffering, such as might be the natural and probable result of the wrongful act. *Stevens v. Stevens*, 96 Ga. 374.

Injury to the plaintiff's feelings through the unlawful removal of the body of his child from a burial lot constitutes an element of the damages. *Bessemer Land*, etc., Co. v. *Jenkins*, 111 Ala. 137, 56 Am. St. Rep. 26.

Contra. — Distress of mind has no bearing on the question of actual damages. *Williams v. Yoe*, 19 Tex. Civ. App. 281.

11. Counsel Fees, etc. — *Young v. Tustin*, 4 Blackf. (Ind.) 277; *Bendich v. Scobel*, 107 La. 242.

12. *Falk v. Waterman*, 49 Cal. 225.

But see *Rogers v. Fales*, 5 Pa. St. 154, where the plaintiff was allowed reasonable costs incurred in vindicating his rights by action, and a reasonable sum to compensate him for injury and vexation.

13. Interest May Be Allowed. — *Hopple v. Higbee*, 23 N. J. L. 342; *Pacific Ins. Co. v. Conard, Baldw.* (U. S.) 138; *Walker v. Borland*, 21 Mo. 289; *Fields v. Williams*, 91 Ala. 502; *Beals v. Guernsey*, 8 Johns. (N. Y.) 446, 5 Am. Dec. 348; *Longfellow v. Quimby*, 33 Me. 457; *Gress Lumber Co. v. Coody*, 104 Ga. 611; *District of Columbia v. Robinson*, 14 App. Cas. (D. C.) 512. See also *Longfellow v. Quimby*, 29 Me. 196, 48 Am. Dec. 525. And see the title INTEREST, vol. 16, p. 1027.

14. Interest on Statutory Damages Not Allowed. — *Smith v. Morgan*, 73 Wis. 375; *Jean v. San-*

**Trouble of Looking After Trespassers.** — The trouble of looking after the trespassers is not of the nature of compensation, and cannot be considered by the jury in the estimation of damages.<sup>1</sup>

**Disseizee — Mesne Profits.** — It is only after re-entry that a disseizee can recover for mesne profits; till then all he can have is damages for the first entry.<sup>2</sup>

**c. CONSEQUENTIAL DAMAGES.** — The wrongdoer is responsible for the consequences which flow immediately from his wrongdoing,<sup>3</sup> and the responsibility is not removed by the fact that the consequences of the act could have been prevented by the care or skill of the injured party.<sup>4</sup> The trespass must be proved and not merely the consequences.<sup>5</sup>

**d. NOMINAL DAMAGES.** — Where the suit is brought for the purpose of settling the question of right to property, the law implies damage to the owner, and in the absence of proof as to injury he is entitled to recover nominal damages.<sup>6</sup> And where suit is brought for the actual value of property destroyed, the owner is entitled to nominal damages if none other be proved and trespass be established,<sup>7</sup> and to no more.<sup>8</sup>

**Plaintiff in Fault.** — Where by his own acts and provocations the plaintiff has wantonly induced the trespass, he cannot complain when he is awarded only nominal damages.<sup>9</sup>

**e. DOUBLE DAMAGES.** — Double damages are sometimes authorized under the statute;<sup>10</sup> but to recover these the statute must be counted on.<sup>11</sup> A count on the statute may be joined with a general count in trespass, in which case the double damages and penalty, if any, imposed by the statute, may be recovered.<sup>12</sup>

**f. TREBLE DAMAGES.** — Treble damages are frequently allowed by statute.<sup>13</sup>

diford, 39 Ala. 317. And see the title **INTEREST**, vol. 16, p. 1031.

1. Longfellow v. Quimby, 29 Me. 196, 48 Am. Dec. 525.

2. See *supra*, this title, *Trespass as to Realty*; Holmes v. Seely, 19 Wend. (N. Y.) 507; Stean v. Anderson, 4 Harr. (Del.) 209.

3. **Immediate Consequential Damages.** — Hawthorne v. Siegel, 88 Cal. 159, 22 Am. St. Rep. 291; Burson v. Cox, 6 Baxt. (Tenn.) 360; Taylor v. Hayes, 63 Vt. 475; Carlisle v. Callahan, 78 Ga. 320.

The loss of hogs and other property through the throwing over of the plaintiff's fences was properly a question for the jury as to whether it was a consequence of the pulling down and entitled him to damages. Welch v. Piercy, 7 Ired. L. (29 N. Car.) 365.

Consequential damages for destruction of the plaintiff's business were not allowed where the landlord broke into his premises and seized property, and, attempting to justify under a distress warrant, his defense failed from a variance. Kirby v. Douglas, 75 Ill. 443.

Similar cases are Mitchell v. Wood, 17 Kan. 26, where the plaintiff was not allowed damages for the loss of prospective business profits after the irregular ouster; and Bass v. West, 110 Ga. 698.

And damage for an alleged injury, by a danger, as from fire, which might never lead to loss or detriment in fact, cannot be recovered. Fore v. Western North Carolina R. Co., 101 N. Car. 526.

4. Phares v. Stewart, 9 Port. (Ala.) 336, 33 Am. Dec. 317; Garrett v. Sewell, 108 Ala. 521.

5. Brown v. Lake, 29 Ohio St. 64.

6. **Nominal Damages.** — Pfeiffer v. Grossman, 15 Ill. 53; Pastorius v. Fisher, 1 Rawle (Pa.)

27; Dixon v. Clow, 24 Wend. (N. Y.) 188; Bolivar Mfg. Co. v. Neponset Mfg. Co., 16 Pick. (Mass.) 241; Blondell v. Consolidated Gas Co., 89 Md. 744.

7. Keirn v. Warfield, 60 Miss. 799; Murphy v. Fond du Lac, 23 Wis. 365, 99 Am. Dec. 181; Kidder v. Kennedy, 43 Vt. 717; Rogers v. Fales, 5 Pa. St. 154; Rich v. Rich, 16 Wend. (N. Y.) 663; Quillen v. Betts, 1 Penn. (Del.) 53; Slingerland v. International Contracting Co., 43 N. Y. App. Div. 215; Nafe v. Hudson, 19 Tex. Civ. App. 381.

Where, in trespass *q. c. f.*, a forcible entry is alleged and only a simple trespass proved, the plaintiff is entitled to nominal damages. Harris v. Sneeden, 104 N. Car. 369.

8. **Recovery limited to Nominal Damages.** — Benson v. Waukesha, 74 Wis. 31; Murphy v. Fond du Lac, 23 Wis. 365, 99 Am. Dec. 181; Williams v. Brown, 76 Iowa 643; Flynt v. Chicago, etc., R. Co., 38 Mo. App. 94; Kidder v. Barker, 18 Vt. 454; Bisson v. Joyce, 66 N. H. 478; Hazen v. Wight, 87 Me. 233; Polhemus v. Bateman, 60 N. J. L. 163.

9. **Where Plaintiff in Fault.** — Henderson v. Lyles, 2 Hill L. (S. Car.) 504.

10. **Double Damages.** — Macey v. Carter, 76 Mo. App. 490.

11. Tankersley v. Wedgworth, 22 Ala. 677.

12. Withington v. Young, 4 Mo. 378.

13. **Treble Damages Allowed by Statute** — *California*. — Barnes v. Jones, 51 Cal. 303.

*Illinois*. — Campbell v. Conover, 26 Ill. 64.

*Iowa*. — Wilson v. Gunning, 80 Iowa 331.

*Kansas*. — Chicago, etc., R. Co. v. Watkins, 43 Kan. 50; Newlin v. Rogers, 6 Kan. App. 910.

*Massachusetts*. — Pierce v. Spring, 15 Mass.

480.

*Michigan*. — Russell v. Myers, 32 Mich. 522.



The statutes are construed strictly.<sup>1</sup> The facts must be expressly pleaded under the statute.<sup>2</sup>

**Only the Owner Can Recover Treble Damages.**—As a rule, under the express provisions of the statute it is only the owner of the legal estate in fee, regardless of possession, who can maintain the action for treble damages.<sup>3</sup>

**Wilfulness.**—As a rule the act complained of must be wilful.<sup>4</sup>

**Probable Cause, combined with honest belief, will relieve from the statutory penalty.**<sup>5</sup>

*Missouri.*—*Lowe v. Harrison*, 8 Mo. 350; *Caris v. Nimmons*, 92 Mo. App. 66; *Avitt v. Farrell*, 68 Mo. App. 665.

*New York.*—*Newcomb v. Butterfield*, 8 Johns. (N. Y.) 342.

*Oregon.*—*Loewenberg v. Rosenthal*, 18 Ore. 178.

*Pennsylvania.*—*Welsh v. Anthony*, 16 Pa. St. 254.

**1. Statutes Construed Strictly.**—In *Shiffer v. Broadhead*, 134 Pa. St. 539, where the defendants were authorized to enter on the plaintiff's land and cut timber not exceeding a certain size, and they cut other timber, it was held not a case for the statutory penalty but for single damages only.

The wrongful cutting down and carrying away of any kind of trees of value from the land of another are embraced in the provisions of the *Kansas* Laws of 1862, c. 208. *Simpson v. Woodward*, 5 Kan. 571.

**2. Facts Must Be Expressly Pleased under Statute.**—*Newcomb v. Butterfield*, 8 Johns. (N. Y.) 342; *Lowe v. Harrison*, 8 Mo. 350; *Welsh v. Anthony*, 16 Pa. St. 254; *Tankersly v. Wedgworth*, 22 Ala. 677.

**3. Only Owner of the Land Can Recover**—*Alabama.*—*Gravlee v. Williams*, 112 Ala. 539; *Allison v. Little*, 93 Ala. 150; *Rogers v. Brooks*, 99 Ala. 31.

*Illinois.*—*David v. Correll*, 68 Ill. App. 123; *Wright v. Bennett*, 4 Ill. 258; *Whiteside v. Divers*, 5 Ill. 336; *Behymer v. Odell*, 31 Ill. App. 350.

*Kansas.*—*Newlin v. Rogers*, 6 Kan. App. 910.

*Kentucky.*—*Coppage v. Griffith*, 40 S. W. Rep. 908, 19 Ky. L. Rep. 459.

*Michigan.*—*Miller v. Wellman*, 75 Mich. 353.

*Vermont.*—*Davenport v. Newton*, 71 Vt. 11.

**"Owner" under Penal Statute.**—A lessee for years is not an "owner" within the meaning of the statute awarding treble damages for cutting down trees. His remedy is a common-law action for actual damages. *Lewis v. Thompson*, 3 N. Y. App. Div. 329.

And the heirs, not the administrators, of a decedent, have the right to maintain trespass to recover the statutory penalty for wrongfully and wilfully cutting trees during the decedent's lifetime, without the consent of the owner of the land. *Louisville, etc., R. Co. v. Hill*, 115 Ala. 334.

The grantee of standing timber is not an "owner" of the land within the meaning of the statute. *Clifton Iron Co. v. Jemison Lumber Co.*, 108 Ala. 581.

One having had only bare possession, who has been ejected, is not entitled to treble damages under the *New York* statute unless he is

dispossessed in a forcible manner, within the meaning of the statute. *Rowe v. Brooklyn L. Ins. Co.*, (Supm. Ct. Tr. T.) 16 Misc. (N. Y.) 323; *Willard v. Warren*, 17 Wend. (N. Y.) 257.

**4. "Wilfully" under Statute Defined.**—The word "wilfully" in the *Vermont* Trespass Act is not synonymous with "voluntary," but implies a tort or wrong. *Savage v. Tullar, Brayt.* (Vt.) 223.

In *Iowa* it is uniformly held that the term "wilful" in Code, § 3983, making it an offense wilfully to commit a trespass by cutting down timber, etc., not only means intentionally or deliberately, but with a bad or evil purpose, as in violation of law or wantonly, and in disregard of the rights of others, or knowingly and of stubborn purpose, or contrary to a known duty, or without authority and careless whether the doer has the right or not. *Parker v. Parker*, 102 Iowa 501.

"Wilfully," under McClain's Code *Iowa*, § 4571, means wantonly and without excuse. *Werner v. Flies*, 91 Iowa 501.

"Wilfully," in *New York* Code Civ. Pro., § 1669, is defined in *Yeamans v. Nichols*, (N. Y. City Ct.) 81 N. Y. Supp. 500.

**5. Probable Cause, with Honest Belief, Will Relieve from Penalty.**—*Glenn v. Adams*, 129 Ala. 189; *David v. Correll*, 74 Ill. App. 47; *Belt v. Reid*, 84 Ill. App. 501; *Lindell v. Hannibal, etc., R. Co.*, 25 Mo. 550; *Russell v. Myers*, 32 Mich. 522; *Brown v. Mead*, 68 Vt. 215. But compare *Rousey v. Wood*, 57 Mo. App. 651; *Macy v. Carter*, 76 Mo. App. 490.

**Illustrations and Statements of Rule.**—In *Keirn v. Warfield*, 60 Miss. 799, it was said: "The true view of the law on this subject is thus: 'The letter of the statute gives the penalty upon proof of any cutting upon the land of another.' The courts have modified its rigor by holding that the defendant may defeat a recovery by showing that it occurred through accident, inadvertence, and mistake; provided reasonable care and caution were taken to avoid the mistake."

The *Wisconsin* statute (Rev. Stat., § 4269) making the purchaser of logs from a trespasser liable, applies only where the purchaser has notice of the unlawful cutting. *Joseph Dessert Lumber Co. v. Wadleigh*, 103 Wis. 318.

Without proof of wilfulness the owner is confined to his common-law remedy. *Belt v. Reid*, 84 Ill. App. 501.

If a party intending to commit a trespass upon public lands, through mistake cuts down trees on the land of another person, he is liable to the penalty under the statute. *Givens v. Kendrick*, 15 Ala. 648; *Perkins v. Hackleman*, 26 Miss. 41, 50 Am. Dec. 243. In both of these cases it was stated that the case would be

Interest will not be allowed to be added to the penalty.<sup>1</sup>

A General Finding for the plaintiff, with no finding of the single value, will not authorize the court to treble the value.<sup>2</sup>

Jurisdiction. — The action for treble damages is triable in the county where the land or some part of it lies, not where the parties reside.<sup>3</sup>

g. EXEMPLARY OR PUNITIVE DAMAGES — (1) *Trespass on the Person*. — In cases of trespass on the person, where there are circumstances showing malice, insult, oppression, wanton or wilful violence, courts are at liberty to instruct a jury that they may find exemplary damages, and a criminal suit and conviction is no bar to the civil action.<sup>4</sup>

(2) *Trespass on Property* — (a) *Realty*. — It is well settled that in cases of trespass *quare clausum fregit*, which are attended with the aggravating circumstances of wantonness and malice, the jury may give exemplary damages.<sup>5</sup>

(b) *Personalty*. — In trespass for destroying or taking away another's goods, aggravating circumstances, such as violence,<sup>6</sup> malicious abuse of process,<sup>7</sup>

different, if, intending to cut upon his own land, the plaintiff had by mistake cut beyond his boundaries.

It is enough to make him liable that the defendant knew that the timber he cut was not on his own land. *Watkins v. Gale*, 13 Ill. 152.

A belief on the part of a person entering upon land not in his control, that the land is his, is no defense to a complaint for a violation of *Massachusetts Stat.* 1890, c. 410, forbidding an entry without right upon the improved or inclosed land of another. *Fitzgerald v. Lewis*, 164 Mass. 495.

The cutting being conceded or proved, the burden of proof of this is on the defendant. *Davis v. Cotey*, 70 Vt. 120.

In *California*, the plaintiff must prove that the removal of trees was wilful and malicious, before recovering treble damages under the statute. *Stewart v. Sefton*, 108 Cal. 197.

In *Kansas*, wanton and malicious destruction, not mere taking away and conversion, must be proved to constitute malicious trespass, under *Rev. Stat.*, § 8682. *Miller v. Clark*, 78 Mo. App. 447.

Where the statute authorizes treble damages for cutting trees without leave, the burden is on the plaintiff to show that the cutting was without leave. *Padman v. Rhodes*, 126 Mich. 434.

1. Interest on Statutory Penalty Not Allowed. — *McCloskey v. Powell*, 8 Pa. Co. Ct. 22, 138 Pa. St. 383; *Dunbar Furnace Co. v. Fairchild*, 121 Pa. St. 563; *Smith v. Morgan*, 73 Wis. 375; *Everett v. Gores*, 92 Wis. 527.

Contra. — *Gates v. Comstock*, 113 Mich. 127.

The jury, under the *Missouri* statute, can only assess single damages, which may, if a proper case can be made, be trebled by the court. *Rousey v. Wood*, 57 Mo. App. 650.

2. Value Must Be Assessed by Jury. — *La-beaume v. Woolfolk*, 18 Mo. 514; *Ewing v. Leaton*, 17 Mo. 465.

3. Jurisdiction. — *Henderson v. Bennett*, 58 S. Car. 30.

4. Exemplary Damages — *Trespass on the Person*. — *Towle v. Blake*, 48 N. H. 92; *Corwin v. Walton*, 18 Mo. 71, 59 Am. Dec. 285; *Blanchard v. Burbank*, 16 Ill. App. 375; *Pendleton v. Davis*, 1 Jones L. (46 N. Car.) 98.

See the title EXEMPLARY DAMAGES, vol. 12, p. 17.

"Punitive damages are in no way limited by the amount of actual damage. The smallest actual damage will, in a proper case, be sufficient to support a verdict and judgment including thousands of dollars punitive damages." *Creighton, J.*, in *Donovan v. Consolidated Coal Co.*, 88 Ill. App. 589.

5. Exemplary Damages — *Trespass on Realty*. — *Mitchell v. Billingsley*, 17 Ala. 391; *Stevens v. Stevens*, 96 Ga. 374; *Best v. Allen*, 30 Ill. 30, 81 Am. Dec. 338; *Cumberland Telephone, etc., Co. v. Cassidy*, 78 Miss. 666; *Hickey v. Welch*, 91 Mo. App. 4. And see the title EXEMPLARY DAMAGES, vol. 12, p. 19.

A definition of "malicious" in an instruction as "a doing of the wrongful act without legal right," such as would warrant punitive damages, is erroneous. "The intentional doing of a wrongful act without legal right" would have been proper. *Ohio Valley Tel. Co. v. Meyer*, (Ky. 1900) 56 S. W. Rep. 673.

It was held that trespass would lie for mental anguish, although no physical injury was sustained, where the defendant broke down the fence between his and the plaintiff's premises, threw up a bank of earth in the plaintiff's back yard, used abusive language, and threatened to shoot her; and that exemplary damages would be awarded even for prospective injury. *Hickey v. Welch*, 91 Mo. App. 4.

Damages for wilful and malicious trespass by a landlord are not limited by the provision in the lease limiting his liability to a certain sum as the highest penalty as liquidated damages. *West Chicago St. R. Co. v. Morrison, etc., Co.*, 160 Ill. 288.

6. *Trespass on Personalty*. — *Tyson v. Ewing*, 3 J. J. Marsh. (Ky.) 185; *Shores v. Brooks*, 81 Ga. 468, 12 Am. St. Rep. 332; *Storm v. Green*, 51 Miss. 103. See also the title EXEMPLARY DAMAGES, vol. 12, p. 18.

7. *Malicious Abuse of Process*. — *McBride v. McLaughlin*, 5 Watts (Pa.) 375; *Cutler v. Smith*, 57 Ill. 252; *Sherman v. Dutch*, 16 Ill. 283.

It is not necessary that the malice and oppression, if present, be aimed at the actual victim, if he suffered by it. *McBride v. McLaughlin*, 5 Watts (Pa.) 375.

wanton malice and insult,<sup>1</sup> outrage to the plaintiff's feelings,<sup>2</sup> wantonness and malice,<sup>3</sup> will authorize the jury to award exemplary damages.

**XII. VERDICT AND JUDGMENT** — 1. In General. — In general the verdict must be clear, certain, and sufficient, covering the whole of the issues.<sup>4</sup>

2. As to Realty — Judgment Proof of Possession — No Proof of Title. — A judgment in an action of trespass against the plaintiff's tenant for breaking and entering the close is good evidence of the plaintiff's right of possession, but it is not conclusive proof of his right of property or of his title to maintain a writ of entry.<sup>5</sup>

Continuance of Possession. — But the plaintiff's possession will, in a subsequent action between the parties, be presumed to continue, unless the contrary appears.<sup>6</sup>

Jurisdiction. — Where the general issue is pleaded, in an action *quare clausum fregit*, the question of title is not necessarily raised so as to take the case out of the jurisdiction of a justice of the peace.<sup>7</sup>

Judgment as a Bar to Future Action. — A judgment in trespass will only be a bar to a future action as regards that part of the plaintiff's close where the trespass was committed.<sup>8</sup> And where such judgment only showed that the defendant, who justified under a right of way, had trespassed on some part of the plaintiff's close, without showing on what part, it was no evidence that the defendant had no right of way whatever.<sup>9</sup>

3. As to Personalty — Judgment Transfers the Property When Satisfied. — If the judgment includes the value of chattels for the taking of which the action is brought, the property is, upon satisfaction of the judgment, transferred to the trespasser,<sup>10</sup> and the owner cannot afterwards either retake the property or sue the vendee of the trespasser for or on account of it.<sup>11</sup> It is otherwise where nominal damages only are recovered; in that case the title is not changed,<sup>12</sup> as, where the judgment was in an action *quare clausum fregit* for cutting down wood, which the defendant converted into coal, the title to the coal remained in the plaintiff.<sup>13</sup>

4. As to Joint Trespassers — The Most Culpable. — In respect of a trespass committed jointly by several persons, the jury may estimate the damages

1. Wanton Malice and Insult. — *Duncan v. Stalcup*, 1 Dev. & B. L. (18 N. Car.) 440.

2. Outrage to Feelings. — *Loftus v. Maxey*, 73 Tex. 242; *Clark v. Bales*, 15 Ark. 452.

3. Wantonness and Malice. — *Curtiss v. Hoyt*, 19 Conn. 154, 48 Am. Dec. 149.

4. Verdict Must Be Clear. — See the ENCYC. OF PL. AND PR., vol. 21, p. 864.

5. Judgment Proof of Possession — No Proof of Title. — *Wade v. Lindsay*, 6 Met. (Mass.) 407; *Johnson v. Morse*, 11 Allen (Mass.) 540; *Morse v. Marshall*, 97 Mass. 519; *Johnson v. C.*, etc., Sand, etc., Co., (C. C. A.) 86 Fed. Rep. 269. But see *contra Weidner v. Lund*, 105 Ill. App. 454.

The judgment would not be exclusive upon the right of possession, even, at a subsequent time, because intervening events may have restored the plaintiff to possession, or terminated the possession or the right which the defendant had at the time of the judgment. *Thayer v. Carew*, 13 Allen (Mass.) 82; *Morse v. Marshall*, 97 Mass. 519; *Stean v. Anderson*, 4 Harr. (Del.) 209.

6. *Stean v. Anderson*, 4 Harr. (Del.) 209. *Morse v. Marshall*, 97 Mass. 519, goes further and decides that "a judgment for the defendant in an action of trespass *quare clausum* does not necessarily settle anything beyond the particular facts of the trespass sued for. It may

be rendered upon failure of the plaintiff to prove the acts alleged, or upon his failure to prove his right of possession."

7. Question of Title — Jurisdiction. — *Maxam v. Wood*, 4 Blackf. (Ind.) 297.

8. *Dunckel v. Wiles*, 11 N. Y. 420.

9. *Howard v. Albrow*, 100 Mass. 236.

On the other hand, a judgment in a writ of entry, though conclusive of the question of title, does not necessarily bar an action of trespass, because the plaintiff in trespass may be in possession of the estate, although he is not the owner and the defendant is. *Stevens v. Taft*, 8 Gray (Mass.) 419.

10. Satisfied Judgment in Trespass Transfers Personalty. — *Fox v. Northern Liberties*, 3 W. & S. (Pa.) 103; *Smith v. Smith*, 51 N. H. 571.

It is the satisfaction of the judgment which vests the property of the goods in the trespasser. *Goldsmith v. Stetson*, 39 Ala. 183; *Schindel v. Schindel*, 12 Md. 108; *Jones v. McNeil*, 2 Bailey L. (S. Car.) 466.

When satisfied, the judgment relates back to the time of the conversion. *Smith v. Smith*, 51 N. H. 571.

11. *Fox v. Northern Liberties*, 3 W. & S. (Pa.) 103.

12. *Loomis v. Green*, 7 Me. 386.

13. *Curtis v. Groat*, 6 Johns. (N. Y.) 168, 5 Am. Dec. 204.



according to the amount which they think the most culpable ought to pay; for this is the damage sustained by the plaintiff, and in cases of trespass there can be no apportionment of damages.<sup>1</sup>

In Joint Trespass Against Several Persons Who Plead Jointly, the jury cannot discriminate and assess several damages or different degrees of damages against those of the defendants whom they find guilty. The damages must be entire,<sup>2</sup> even where the defendants plead severally.<sup>3</sup>

There May Be Several Recoveries,<sup>4</sup> but there can be only one satisfaction.<sup>5</sup>

**1. Amount Which Most Culpable Should Pay —** *England*. — *Brown v. Allen*, 4 Esp. 158.

*United States*. — *Berry v. Fletcher*, 1 Dill. (U. S.) 67.

*Arkansas*. — *Clark v. Bales*, 15 Ark. 452.

*Georgia*. — *Simpson v. Perry*, 9 Ga. 508.

*Indiana*. — *Prichard v. Campbell*, 5 Ind. 494.

*Kentucky*. — *Dougherty v. Dorsey*, 4 Bidd (Ky.) 207; *United Soc. of Shakers v. Underwood*, 11 Bush (Ky.) 265, 21 Am. Rep. 214; *Sodousky v. McGee*, 4 J. J. Marsh. (Ky.) 267.

*Massachusetts*. — *Halsey v. Woodruff*, 9 Pick. (Mass.) 555.

*Pennsylvania*. — *Shultz v. Hunter*, 2 Browne (Pa.) 233.

**Highest Damages Awarded.** — And where the action is brought against several defendants and the jury assess several damages, the plaintiff may enter a *remittitur* as to the lesser damages and take judgment against all who are guilty of the joint trespass, for the greater damages. *Halsey v. Woodruff*, 9 Pick. (Mass.) 555. *Contra*, *White v. M'Neily*, 1 Bay (S. Car.) 11; *Whitaker v. English*, 1 Bay (S. Car.) 15. In *South Carolina* it was held in these two early cases that where several were sued for a joint trespass, the jury might apportion the damages as they thought just and proper, and this may be considered as a part of the common law of that state.

**2. Jury Cannot Discriminate Between Joint Trespassers —** *England*. — *Heydon's Case*, 11 Coke 5; *Austin v. Willward*, Cro. Eliz. 860; *Hill v. Goodchild*, 5 Burr. 2790.

*Alabama*. — *Layman v. Hendrix*, 1 Ala. 212; *Hair v. Little*, 28 Ala. 236; *Fields v. Williams*, 91 Ala. 502.

*Indiana*. — *Carney v. Reed*, 11 Ind. 417.

*Kentucky*. — *Cunningham v. Dyer*, 2 T. B. Mon. (Ky.) 50; *Sodousky v. McGee*, 4 J. J. Marsh. (Ky.) 267.

*New Jersey*. — *Allen v. Craig*, 13 N. J. L. 294.

*New York*. — *Bohun v. Taylor*, 6 Cow. (N. Y.) 315.

*Pennsylvania*. — *Shultz v. Hunter*, 2 Browne (Pa.) 233.

*Virginia*. — *Ammonett v. Harris*, 1 Hen. & M. (Va.) 488; *Crawford v. Morris*, 5 Gratt. (Va.) 90.

But see *Byrne v. Riddell*, 3 La. Ann. 670, where the principal instigator was assessed in larger damages than the actual committer.

The jury may assess several damages of the same amount against two codefendants. *May v. Bliss*, 22 Vt. 477.

**But if the Trespass Be Not Entire**, and one defendant be guilty of part of it, and another be not guilty of that but be guilty of another part, then the jury not only may, but should, find several damages. For it would be unjust

and illegal to render a judgment against a party for an act of which he was shown to be innocent, and in such case the plaintiff might have several judgments, because the injuries would be several. *Sodousky v. McGee*, 4 J. J. Marsh. (Ky.) 267.

"It is not denied that in some cases the jury may sever the damages, as where some defendants are found guilty at one time and some at another; or where the action is for two distinct trespasses, and some are found guilty of only one, and some of only the other; or where the trespass is laid entire, and some are found guilty of only part of it." *Ford, J.*, in *Allen v. Craig*, 13 N. J. L. 294.

In *Buddington v. Shearer*, 20 Pick. (Mass.) 477, it was held that where damage was done by two dogs belonging to different owners, each owner was liable for the injury done by his own dog. This was an action of trespass for double damages under Rev. Stat., c. 58, § 13.

It was so decided in an action under a similar statute in *Connecticut*. *Russell v. Tomlinson*, 2 Conn. 206.

**3.** *Allen v. Craig*, 13 N. J. L. 294; *Hill v. Goodchild*, 5 Burr. 2790; *Heydon's Case*, 11 Coke 5.

**4. Several Recoveries.** — *Byrne v. Riddell*, 3 La. Ann. 670; *Livingston v. Bishop*, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330; *Sheldon v. Kibbe*, 3 Conn. 214, 8 Am. Dec. 176; *Knott v. Cunningham*, 2 Sneed (Tenn.) 204; *Lovejoy v. Murray*, 3 Wall. (U. S.) 1; *Roodhouse v. Christian*, 55 Ill. App. 107.

**An Unsatisfied Judgment** against one of two joint trespassers is no bar to an action against his cotrespasser for the same trespass. *Sheldon v. Kibbe*, 3 Conn. 214, 8 Am. Dec. 176; *Fowler v. Owen*, 68 N. H. 270, 73 Am. St. Rep. 588.

**5. Only One Satisfaction** — *England*. — *Cocke v. Jennor*, Hob. 66.

*Alabama*. — *Golding v. Hall*, 9 Port. (Ala.) 169; *Layman v. Hendrix*, 1 Ala. 212; *Blann v. Crocheron*, 20 Ala. 320.

*Connecticut*. — *Fields v. Law*, 2 Root (Conn.) 320; *Sheldon v. Kibbe*, 3 Conn. 214, 8 Am. Dec. 176.

*Illinois*. — *Roodhouse v. Christian*, 55 Ill. App. 107.

*Indiana*. — *Allen v. Wheatley*, 3 Blackf. (Ind.) 332; *Fleming v. McDonald*, 50 Ind. 278, 19 Am. Rep. 711.

*Kentucky*. — *Sodousky v. McGee*, 4 J. J. Marsh. (Ky.) 267.

*New York*. — *Livingston v. Bishop*, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330.

*Pennsylvania*. — *Shultz v. Hunter*, 2 Browne (Pa.) 233.

*Tennessee*. — *Knott v. Cunningham*, 2 Sneed (Tenn.) 204.

**Election.** — The plaintiff cannot be deprived of his election as to which of the defendants he shall recover from.<sup>1</sup>

**A General Verdict** for the plaintiff applies to all the defendants.<sup>2</sup>

**The Jury May Acquit One Defendant** and find the other guilty and assess the damages against him.<sup>3</sup>

**Where One Defendant Is Defaulted** and the others acquitted upon pleas which, if true, are a defense for all, the plaintiff cannot have judgment against the defaulted.<sup>4</sup>

**TRESPASSING ANIMALS.** — See the titles ANIMALS, vol. 2, p. 341; INJURIES TO ANIMALS BY RAILROADS, vol. 16, p. 478; and see ENCYCLOPÆDIA OF PLEADING AND PRACTICE, title TRESPASSING, VICIOUS, AND DISEASED ANIMALS, vol. 21, p. 886.

**1. Election.** — Shultz *v.* Hunter, 2 Browne (Pa.) 233; Knott *v.* Cunningham, 2 Sneed (Tenn.) 204.

If the plaintiff makes a case of exemplary damages against one of two defendants, and not against the other, he may dismiss as to the latter and recover against the former. *Pardridge v. Brady*, 7 Ill. App. 639.

**2. General Verdict** — *Cane v. Watson*, Morr. (Iowa) 52; *Sutliff v. Gilbert*, 8 Ohio 405.

**Where, in Trespass de Bonis Asportatis, All the Parties Were Defaulted by Agreement,** the

plaintiff is not required to prove the joint liability in order to hold liable one of the defendants, against whom no evidence appears. *Gardner v. Field*, 1 Gray (Mass.) 151.

**3. Blackburn v. Baker**, 7 Port. (Ala.) 284; *Drake v. Barrymore*, 14 Johns. (N. Y.) 166; *Lansing v. Montgomery*, 2 Johns. (N. Y.) 382; *Owens v. Derby*, 3 Ill. 26; *Golding v. Hall*, 9 Port. (Ala.) 169.

**4. Defaulted Defendant May Have Benefit of Others' Default.** — *Biggs v. Benger*, 2 Ld. Raym. 1372; *Gilbert v. Buffalo Bill's Wild West Co.*, 79 Ill. App. 326.

# TRESPASS ON THE CASE.

BY JOHN SIMPSON.

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## CROSS-REFERENCES.

See for matters of PROCEDURE the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 21, p. 901.

See in this work the title TRESPASS, ante, and references there given.

**I. DEFINITION AND GENERAL VIEW.** — The term "trespass on the case" is generally used as synonymous and convertible with "action on the case" (also called simply "case"). In reality, it is the earliest form of that action, and is distinct from, though analogous to, the action on the case on promises, distinctively known as *assumpsit*, which is a later growth from the same origin. It is difficult to give, in a few words, a perfectly accurate and comprehensive definition of trespass on the case. The most accurate definitions are probably those given below, with the qualifications noted.<sup>1</sup> It may be

1. **Definitions.** — "Trespass upon the case lies where a party sues for damages for any wrong or cause of complaint to which covenant or

trespass will not apply." Stephen on Pleading (Andrews's Am. ed.) 85.

This definition is hardly comprehensive



said that it is a common-law form of action, occupying a position between actions on contract and trespass *vi et armis*, and giving redress wherever these forms of action afford no remedy. That originally was, and still remains, the object of the action. The test of its applicability has always been the existence of new and peculiar circumstances in each case, which make it necessary to set forth the plaintiff's whole case at length in his original writ, and it is a remedy barred to all cases where an adequate remedy exists by some other form of action. The cases where trespass on the case is the only remedy may be grouped into a few well-defined classes. Although the principles which distinguish the scope of the action on the case from that of trespass on the one hand and assumpsit on the other are sufficiently clear and well defined, it is not always easy to determine into which form of action the individual case falls. This is particularly so with the distinction between immediate injury, requiring trespass as a remedy, and consequential injury, requiring case as a remedy. It may have been for this reason that latterly courts have allowed the plaintiff to waive the trespass and sue for the consequential damages only. Again, where a duty arises out of a contract, it is often optional with the plaintiff to sue in assumpsit on the contract or for the breach of the common-law duty in an action on the case. It should be noted here that the abolition of the distinction between the forms of actions in most of the states has made no change in the essentials of the various remedies.

**II. ORIGIN AND HISTORY.**—The invention of the form of action on the case was the result of the practical application of the maxim *ubi jus ibi remedium*.<sup>1</sup>

**Whether Derived from Common Law or from Statute of Westminster.**—Whether it originated in the common law, of which the statute of Westminster II. (13 Edw. I., c. 24) was merely an affirmation, or whether it had its origin in that statute, appears to be doubtful. Probably the former is the correct theory.<sup>2</sup>

**The Statute at All Events Gave Force and Authority** to the remedy for new cases by enacting that "whosoever from henceforth it shall fortune in the chancery, that in one case a writ is found, and in like case (*consimili casu*), falling under like law, and requiring like remedy, is found none, the clerks of the chancery shall agree in making the writ; or the plaintiffs may adjourn it until the next Parliament, and let the cases be written in which they cannot agree, and let them refer themselves until the next Parliament; and by consent of men learned in the law a writ shall be made, lest it might happen after that the court should long time fail to minister justice unto complainants."<sup>3</sup>

**The Novel Form of Action Gradually Took Shape** during that and the succeeding

enough, as it does not include the class of cases where case is a concurrent remedy with trespass. See *infra*, this title, *Choice of Remedy*.

"Personal actions arising *ex delicto* simply from tort or wrong, where no breach of any contract is suggested, and no forcible violence imputed to the defendant. This negative description is the only one that can easily be given of what are denominated actions of trespass on the case. It would, I believe, be impossible to recount all the occasions of bringing these anomalous suits. Every civil right affecting our persons or our property may be attacked by injustice, and that injustice may again be multifariously diversified in acts of open malice or secret fraud." 3 Wooddesson's Lectures 167.

"Where any special consequential damages arise which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed, both by common law and the statute of Westminster II., c. 24,

to bring a special action on his own case, by a writ formed according to the peculiar circumstances of his own particular grievance. For, wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; and, therefore, wherever a new injury is done, a new method of remedy must be pursued." 3 Bl. Com. 123.

See Broom's Leg. Max. (8th Am. ed.) 202, where it is pointed out that this election is not given only according to whether the plaintiff sues for a misfeasance or a nonfeasance, for case frequently occurs where there is a simple nonperformance of a particular contract; the neglect to perform the duty arising from the contract, or the nonfeasance, being the ground of the action upon tort.

1. Broom's Leg. Max. (5th Am. ed.) 192.

2. 3 Reeves Hist. Eng. Law 287; 1 Chitty Pl. 107.

3. Statute of Westminster II. (13 Edw. I., c. 24).

reigns. Actions *sur le cas* appear in the Year Books of Edward I. and Edward II., and in the reign of Edward III. the reported cases show that the form of action was more and more being applied to cases in the nature of contract.<sup>1</sup>

In the Following Reigns the Application of the Action Was Still Further Expanded to cases for which the common law had not before provided a remedy. The nature of the actions can only be briefly indicated here, but the cases referred to in the note will serve to show how early the classes of cases to which the action was applicable were defined. The marks of discrimination between trespass and trespass on the case were beginning to be more clearly ascertained, and the distinction, afterwards adopted and since closely adhered to, that force might be laid *vi et armis*, and consequential damages arising therefrom, being the immediate cause of the action, on the case, was becoming recognized.<sup>2</sup>

**Breach of Contract — Nonfeasance.** — Already the action was being made applicable to cases where the breach of contract consisted in nonfeasance only, the cause of action lying in the fact that the plaintiff was misled and induced to act by an undertaking which was afterwards broken.<sup>3</sup>

From This Point the Action of Assumpsit Appears to Have Branched Off, but the two actions have remained in many cases concurrent remedies, and it will appear from a subsequent portion of this title<sup>4</sup> that, while all cases founded upon a breach of the express or implied promise involved in a contract are classed as actions of assumpsit and *ex contractu*, and those founded upon a breach of duty owed or trust reposed in the defendant, though, it may be, arising from a contract, are classed as actions on the case and purely *ex delicto*, the election of a remedy often remains with the plaintiff.<sup>5</sup>

**III. WHEN ACTION WILL LIE — 1. In General — Where No Other Adequate Remedy.** — Trespass on the case, or, to use the wider term, an action on the case,<sup>6</sup> lies in general for any legal injury for which the common law has provided no other adequate remedy.<sup>7</sup>

1. 3 Reeves Hist. Eng. Law 289; Hare on Contracts 125.

2. 3 Reeves Hist. Eng. Law, p. 431 *et seq.*

The discussions which arose upon these cases are instructive as showing the principles which led to the establishment of the action. These discussions will be found set forth in 3 Reeves Hist. Eng. Law, p. 559 *et seq.*

3. Hare on Contracts 134.

4. See *infra*, this title, *Choice of Remedy*.

5. Hare on Contracts 132.

"Broadly stated, case is a remedy for torts, assumpsit for breaches of contract; but the rule is not universal and may mislead. Real as is the distinction between tort and contract, it is frequently laid down arbitrarily and does not readily admit of a precise or scientific classification." Hare on Contracts 150.

6. The Term "Action on the Case" was not indicative of any form of action, but of a substantive class of actions of many different species that took their name from the fact that they were not included within any of the common forms of writs issuing from chancery, but were begun by writs setting out the particular circumstances of the case. *Cockrill v. Butler*, 78 Fed. Rep. 686.

7. Where No Other Adequate Remedy — 3 Bl. Com. 123; *Pasley v. Freeman*, 3 T. R. 51; *Ashby v. White*, 1 Smith Lead. Cas. (8th ed.) 278; *Hussey v. Peebles*, 53 Ala. 432; *Aderholt v. Smith*, 83 Ala. 486; *Yates v. Joyce*, 11 Johns. (N. Y.) 136; *Kujek v. Goldman*, 150 N. Y. 176, 55 Am. St. Rep. 670; *Sullivan v. Water-*

*man*, 20 R. I. 372; *Griffin v. Farwell*, 20 Vt. 151. See also *Electric Traction Co. v. New Orleans*, 45 La. Ann. 1475.

Where an Action of Covenant Not Available. — *McGinigal v. Mong*, 5 Pa. St. 269.

For Refusal to Note Transfer of Stock. — *Telford, etc., Turnpike Co. v. Gerhab*, (Pa. 1888) 12 Atl. Rep. 90.

Case for Indemnity. — *Adamson v. Jarvis*, 4 Ping. 66, 13 E. C. L. 343.

Action on the Case for Conspiracy. — The action on the case for conspiracy to injure has taken the place of the old writ of conspiracy. *Mott v. Danforth*, 6 Watts (Pa.) 304, 31 Am. Dec. 468.

Though conspiracy may be the gist of the action, it is necessary to show some tort and damage done in execution of it. *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 88 Am. St. Rep. 895; *Griffith v. Ogle*, 1 Binn. (Pa.) 174; *Doremus v. Hennessy*, 62 Ill. App. 391.

And it appears that in older cases in the nature of conspiracy, a verdict against one of the defendants was proper, the other being acquitted. The action might even be brought against one alone, thus distinguishing it from the writ of conspiracy to indict of treason or felony, which could only be brought against two or more. *Skinner v. Gunton*, 1 Saund. 228c, 229, note 4.

Conspiracy to Withdraw Property. — *Mott v. Danforth*, 6 Watts (Pa.) 304, 31 Am. Dec. 468; *Penrod v. Mitchell*, 8 S. & R. (Pa.) 522.

**Case Will Not Lie** where the plaintiff can have adequate redress by any of the forms of action known and practised.<sup>1</sup>

**No Moral Turpitude Necessary.** — It is not necessary to prove moral turpitude. The action lies wherever a damage is occasioned by a wrong done.<sup>2</sup>

**No Benefit to Defendant Necessary.** — Nor is it necessary that the defendant should be benefited through the act done, or be in collusion with the person who is, if the plaintiff be injured.<sup>3</sup>

**2. Consequential Injuries Resulting from Acts of Force.** — While trespass lies for injuries which are the direct result of acts of force,<sup>4</sup> an action on the case lies for consequential injuries to person, property, or rights.<sup>5</sup>

**3. Immediate Injuries Resulting from Negligence or Nonfeasance** — *a.* IN GENERAL. — Trespass on the case and not trespass is the remedy where there is no act done and the injury arises rather from negligence or mere nonfeasance,<sup>6</sup> or a lawful act done negligently, or the negligent omission to do an act whereby injury is occasioned.<sup>7</sup> The action will lie against a corporation aggregate for neglect of a corporate duty,<sup>8</sup> but not against a *quasi*-corporation.<sup>9</sup> It is immaterial whether the particular act from which the injury

1. *Kelly v. McCaw*, 29 Ala. 227, citing *Adams v. Paige*, 7 Pick. (Mass.) 542, and *Griffin v. Farwell*, 20 Vt. 151. Compare *Ashby v. White*, 1 Smith Lead. Cas. (8th ed.) 301.

2. *Doremus v. Hennessy*, 62 Ill. App. 391; *Adams v. Paige*, 7 Pick. (Mass.) 542. See also ENCYC. OF PL. AND PR., vol. 21, p. 902.

3. **No Benefit to Defendant Necessary.** — *Pasley v. Freeman*, 3 T. R. 51.

4. See the title TRESPASS, *ante*.

5. **Consequential Injury to Person, Property, or Rights** — *England.* — *Day v. Edwards*, 5 T. R. 648; *Reynolds v. Clarke*, 1 Stra. 634; *Scott v. Shepherd*, 2 W. Bl. 892; *Shapcott v. Mugford*, 1 Ld. Raym. 187; *Haward v. Bankes*, 2 Burr. 1113; *Savignac v. Roome*, 6 T. R. 125; *Leame v. Bray*, 3 East 593.

*Alabama.* — *Bell v. Troy*, 35 Ala. 184; *Pruitt v. Ellington*, 59 Ala. 454; *Bay Shore R. Co. v. Harris*, 67 Ala. 6; *Drake v. Lady Ensley Coal, etc., Co.*, 102 Ala. 501, 48 Am. St. Rep. 77.

*Florida.* — *Crawford v. Watterson*, 5 Fla. 472.

*Kentucky.* — *Johnson v. Castleman*, 2 Dana (Ky.) 377.

*Massachusetts.* — *Cole v. Fisher*, 11 Mass. 137.

*Michigan.* — *Wyant v. Crouse*, 127 Mich. 158.

*New Jersey.* — *Rappelyea v. Hulse*, 12 N. J. L. 257; *Waldron v. Hopper*, 1 N. J. L. 390.

*North Carolina.* — *Kelly v. Lett*, 13 Ired. L. (35 N. Car.) 50.

*Ohio.* — *Case v. Mark*, 2 Ohio 169.

*Pennsylvania.* — *Legaux v. Feasor*, 1 Yeates (Pa.) 586; *Meyer v. Horst*, 106 Pa. St. 552.

*Rhode Island.* — *Vogel v. McAuliffe*, 18 R. I. 791.

*South Carolina.* — *Carsten v. Murray*, Harp. L. (S. Car.) 113.

*Tennessee.* — *Johnson v. Perry*, 2 Humph. (Tenn.) 569.

*Virginia.* — *Winslow v. Beal*, 6 Call (Va.) 44; *Taylor v. Rainbow*, 2 Hen. & M. (Va.) 423.

In *Bairdridge v. Allen*, 2 Ired. L. (24 N. Car.) 206, and *Blin v. Campbell*, 14 Johns. (N. Y.) 432, it was held that either case or trespass

might be brought. See also *infra*, this title, *Choice of Remedy*.

**The Terms "Immediate" and "Consequential"** — While there is no difference of opinion as to the class of cases which call for trespass as the remedy and the class for which case is the remedy, the above cited cases show that it is often very difficult to determine into which class a particular case may fall, and it is often a nice question whether the injury is immediate or consequential. These terms are explained by Baldwin, J., in *Jordan v. Wyatt*, 4 Gratt. (Va.) 151, 47 Am. Dec. 720.

**Collisions.** — Questions of this nature often arise in determining the proper remedy for cases of the running down of one vessel by another. The rule may be generally stated thus: If there is wilfulness, the action should be trespass; if merely negligence, case. *Ogle v. Barnes*, 8 T. R. 188; *Johnson v. Castleman*, 2 Dana (Ky.) 377; *Barnes v. Cole*, 21 Wend. (N. Y.) 188; *Rathbun v. Payne*, 19 Wend. (N. Y.) 399. But in *Gates v. Miles*, 3 Conn. 64, trespass was held to be the only remedy.

**6. Injuries from Negligence or Nonfeasance.** — *Ogle v. Barnes*, 8 T. R. 188; *Turner v. Hawkins*, 1 B. & P. 472; *Shapcott v. Mugford*, 1 Ld. Raym. 187; *Bell v. Troy*, 35 Ala. 184; *Cate v. Cate*, 50 N. H. 144, 9 Am. Rep. 179.

**7. Lawful Act Done Negligently or Negligent Omission.** — *Coggs v. Bernard*, 1 Smith Lead. Cas. (8th ed.) 199; *Canadian Pac. R. Co. v. Clark*, (C. C. A.) 73 Fed. Rep. 76; *Pruitt v. Ellington*, 59 Ala. 454; *Hinks v. Hinks*, 46 Me. 423; *Campbell v. Stakes*, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561; *Stone v. Knapp*, 29 Vt. 501; *Gregoir v. Leonard*, 71 Vt. 411.

**Leaving Dangerous Machinery Uncovered.** — *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548.

**Negligent Omission by Plaintiff or Justice.** — *Shaw v. Reed*, 16 Mass. 450.

**Neglect to Repair Fence.** — *Cate v. Cate*, 50 N. H. 144.

**Using Defective Machinery.** — *Spencer v. Campbell*, 9 W. & S. (Pa.) 32.

**8. Riddle v. Merrimack River Locks, etc.**, 7 Mass. 169, 5 Am. Dec. 35.

**9. Hedges v. Madison County**, 6 Ill. 567. See also the title NEGLIGENCE, vol. 21, p. 455.



results was rightful or wrongful,<sup>1</sup> a wrongful act done wilfully, where the cause of action is the *causa causata* rather than the *causa causans*,<sup>2</sup> or forcible or otherwise.<sup>3</sup>

*b. INJURIES BY PUBLIC OFFICERS FROM NEGLIGENCE OF DUTY.* — Action on the case is the only remedy for any damage received in consequence of neglect by a public officer to perform a duty imposed on him by virtue of his office.<sup>4</sup>

*c. INJURIES BY ONE'S SERVANTS FROM NEGLIGENCE.* — For injuries arising from the carelessness or negligence of the defendant's servants in the course of their employment, the master is liable in an action on the case;<sup>5</sup> even where the injuries are immediate, and where either master or servant, being the actual committer of the act, would be liable in trespass,<sup>6</sup> unless the injury was inflicted by the master's express command,<sup>7</sup> in which case an action of trespass alone will lie.<sup>8</sup> The rule is different in the case of deputies of public officers, their acts being considered in law to be done, directly and personally, by their superiors.<sup>9</sup>

**4. Injuries from Fraud or Deceit.** — Fraud or deceit, resulting in damage, gives a good cause of action, no matter whether the representations made relate to personal chattels or to realty.<sup>10</sup>

1. *Keller v. Stoltz*, 71 Pa. St. 356.

2. *Cotteral v. Cummins*, 6 S. & R. (Pa.) 343; *Wilt v. Vickers*, 8 Watts (Pa.) 227; *Hill v. Kimball*, 76 Tex. 210.

3. *Cotteral v. Cummins*, 6 S. & R. (Pa.) 343.

**For Discharging a Gun at the Plaintiff's Vessel and Wounding the Master**, so that the voyage had to be abandoned and the plaintiff lost the freight and passage money, the remedy is case, not trespass. *Adams v. Hemmenway*, 1 Mass. 145.

**4. Neglect by Public Officer.** — *Brown v. Jarvis*, 1 M. & W. 704; *Williams v. Mostyn*, 4 M. & W. 145; *Aireton v. Davis*, 9 Bing. 741, 23 E. C. L. 449; *Dorman v. Kane*, 5 Allen (Mass.) 40; *Burrell v. Lithgow*, 2 Mass. 526; *Lovell v. Bellows*, 7 N. H. 375; *Brown County v. Butt*, 2 Ohio 349; *Bridges v. Perry*, 14 Vt. 262.

It being one of the duties of county officers to provide a proper jail, they may be sued in case by a sheriff, who, through their neglect to do so, has been held liable in damages for a prisoner's escape. *Brown County v. Butt*, 2 Ohio 348.

In *Van Dresor v. King*, 34 Pa. St. 201, 75 Am. Dec. 643, it was held that case would lie, as well as trespass, against an officer for seizing goods exempt from levy. See the title *TRESPASS, ante*.

**Actual Damage Recoverable.** — As a rule, the actual damage sustained is the amount recoverable. *Pugh v. M'Rae*, 2 Ala. 393; *Potter v. Lansing*, 1 Johns. (N. Y.) 215, 3 Am. Dec. 310; *Russell v. Turner*, 7 Johns. (N. Y.) 189, 5 Am. Dec. 254; *Mott v. Danforth*, 6 Watts (Pa.) 304, 31 Am. Dec. 468; *Penrod v. Mitchell*, 8 S. & R. (Pa.) 522; *Smith v. Hart*, 2 Bay (S. Car.) 395; *Blanding v. Rogers*, 2 Brev. (S. Car.) 394, 4 Am. Dec. 595.

**Exemplary Damages** may be awarded where the malice shown justifies them. *Barnett v. Reed*, 51 Pa. St. 190, 88 Am. Dec. 574; *Lawrence v. Hagerman*, 56 Ill. 70, 8 Am. Rep. 674.

**5. Injuries from Negligence of Servants.** — *Aldridge v. Great Western R. Co.*, 4 Scott N.

R 156; *Canadian Pac. R. Co. v. Clark*, (C. C. A.) 73 Fed. Rep. 76; *Illinois Cent. R. Co. v. Reedy*, 17 Ill. 580; *Galena, etc., R. Co. v. Jacobs*, 20 Ill. 478; *Illinois Cent. R. Co. v. Middlesworth*, 46 Ill. 494; *St. Louis, etc., R. Co. v. Dalby*, 19 Ill. 375; *Broughton v. Whalton*, 8 Wend. (N. Y.) 474.

**6. Even Where Injuries Immediate.** — *Havens v. Hartford, etc., R. Co.*, 28 Conn. 69; *Johnson v. Castleman*, 2 Dana (Ky.) 377; *Yerger v. Warren*, 31 Pa. St. 319; *Allegheny Valley R. Co. v. McLain*, 91 Pa. St. 442; *Drew v. Peer*, 93 Pa. St. 234.

The case of *Barnes v. Hurd*, 11 Mass. 57, draws the distinction very clearly.

**7.** Thus, where the plaintiff's sheep were run over by a train, the engine driver having orders to go at a certain high rate of speed, it was held that trespass did not lie, and that case was the remedy. *Sharrod v. London, etc., R. Co.*, 4 Exch. 580.

**8.** *Gates v. Miles*, 3 Conn. 64. See also the title *TRESPASS, ante*.

It is pointed out by *Redfield, J.*, in *Clafin v. Wilcox*, 18 Vt. 605, that the fact that the injury in the case of *Gates v. Miles*, 3 Conn. 64, occurred by the positive act of the defendant, or of his servant acting in his presence and under his express orders, distinguishes it from the cases in the second note above.

**9. Deputies of Public Officers.** — *Campbell v. Phelps*, 17 Mass. 244. See also the titles *MASTER AND SERVANT*, vol. 20, p. 3; *TRESPASS, ante*.

**10. Fraud or Deceit.** — *Pasley v. Freeman*, 3 T. D. 56; *Lyde v. Barnard*, 1 M. & W. 101; *Barney v. Dewey*, 13 Johns. (N. Y.) 224, 7 Am. Dec. 372; *Culver v. Avery*, 7 Wend. (N. Y.) 380, 22 Am. Dec. 586; *Upton v. Vail*, 6 Johns. (N. Y.) 181, 5 Am. Dec. 210; *Monell v. Colden*, 13 Johns. (N. Y.) 395, 7 Am. Dec. 390.

It has even been held to apply to relative rights, as in *Kujek v. Goldman*, 150 N. Y. 176, 55 Am. St. Rep. 670, where the plaintiff recovered damages for the fraudulent repre-

Thus, on a False Warranty of Chattels, made knowingly and with intent to defraud, the purchaser has a remedy by action on the case in the nature of deceit for the fraud, concurrently with the remedy in assumpsit on the warranty.<sup>1</sup> It will also lie on a fraudulent warranty of the quality of land,<sup>2</sup> or as to the ownership or title,<sup>3</sup> or that it is free from incumbrance.<sup>4</sup>

**Acting as Agent Without Authority.** — In *Maine* and *Massachusetts* it is settled that the only remedy against one who undertakes to act as agent without authority, or in excess of his authority, is an action on the case for deceit.<sup>5</sup>

**Case Will Lie for Fraud in the Sale of patent rights,**<sup>6</sup> or for selling goods as the manufacture of another.<sup>7</sup> Case lies for infringement of a patent,<sup>8</sup> for infringement of a copyright,<sup>9</sup> or for violation of a trademark.<sup>10</sup>

**Where the Action Will Not Lie.** — The mere nonperformance of a promise, as the breach of an agreement that a slave purchased should not be removed from the district, is not such a deceit as will support the action.<sup>11</sup>

**5. Injuries to Persons Absolutely** — *a.* INJURIES TO HEALTH. — For injuries to health, case is, as a rule, the appropriate remedy, they being necessarily consequential in their nature,<sup>12</sup> though it is held that trespass will also lie for such injuries, where they are the direct consequences of acts of violence.<sup>13</sup> This applies to injuries to the person which are the result of the negligence or want of skill of a physician or other practitioner.<sup>14</sup>

*b.* INJURIES TO FAME — DEFAMATION AND CONSPIRACY TO DEFAME. — Action on the case lies for libel and slander<sup>15</sup> or for conspiracy to defame.<sup>16</sup>

*c.* MALICIOUS ABUSE OF LAWFUL PROCESS. — Case, and not trespass,

sensation of a woman to be chaste, by which he was induced to marry her.

**Intent to Deceive Held to Be Necessary.** — *Wachsmuth v. Martini*, 45 Ill. App. 244, affirmed 154 Ill. 515.

**1. On False Warranty of Chattels.** — *Webster v. Hodgkins*, 25 N. H. 128; *Mahurin v. Harding*, 28 N. H. 128, 59 Am. Dec. 401; *Carter v. Glass*, 44 Mich. 154, 38 Am. Rep. 240; *Beebe v. Knapp*, 28 Mich. 53; *Pierce v. Carey*, 37 Wis. 232.

In *Trice v. Cockran*, 8 Gratt. (Va.) 442, 56 Am. Dec. 151, it was held that actual fraud in the warranty was not necessary to support an action on the case. See also *Lewis v. Terry*, 111 Cal. 39, 52 Am. St. Rep. 146.

**For Fraudulently Inducing the Plaintiff to Buy a Share of Worthless Stock.** — *Smith v. Bellows*, 77 Pa. St. 441. See the title ASSUMPSIT, vol. 3, p. 164.

**Chattel Paid for in Counterfeit Money.** — In *Lane v. Hogan*, 5 Yerg. (Tenn.) 290, it was held that an action on the case for fraud would lie to recover the price of a horse which had been paid for with counterfeit bank notes.

**2. False Warranty of Land.** — *Bostwick v. Lewis*, 1 Day (Conn.) 250, 2 Am. Dec. 73.

**3. As to Ownership or Title.** — *Frost v. Raymond*, 2 Cai. (N. Y.) 188, 2 Am. Dec. 228; *Monell v. Colden*, 13 Johns. (N. Y.) 395, 7 Am. Dec. 390; *Wardell v. Fosdick*, 13 Johns. (N. Y.) 325, 7 Am. Dec. 383.

Where the defendant was in possession of the locus and represented to the plaintiff that A, who had erected buildings thereon, had a right to sell them, and the plaintiff purchased them from A, an action on the case was held to lie against the defendant on his refusal to allow the plaintiff to remove the buildings. *Harris v. Powers*, 57 Ala. 139.

**4. Ward v. Wiman**, 17 Wend. (N. Y.) 193.

**5. Gilmore v. Bradford**, 82 Me. 547; *Noyes v. Loring*, 55 Me. 408; *Abbey v. Chase*, 6 Cush. (Mass.) 54; *Jefts v. York*, 10 Cush. (Mass.) 392; *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146; *Long v. Colburn*, 11 Mass. 97, 6 Am. Dec. 160. See also *Jenkins v. Hutchinson*, 13 Q. B. 744, 66 E. C. L. 744.

**6. Fraud in Sale of Patent Rights.** — *Bull v. Pratt*, 1 Conn. 342; *Peck v. Bacon*, 18 Conn. 377; *Kendall v. Wilson*, 41 Vt. 567.

**7. Selling Goods as Manufacture of Another.** — *Blofeld v. Payne*, 4 B. & Ad. 410, 24 E. C. L. 87; *Morison v. Salmon*, 2 Scott N. R. 449.

**8. Infringement of a Patent.** — *Walton v. Potter*, 3 M. & G. 411, 42 E. C. L. 219; *Minter v. Mower*, 6 Ad. & El. 735, 33 E. C. L. 199; *Perry v. Skinner*, 2 M. & W. 471; *Morgan v. Seaward*, 2 M. & W. 544; *Dobson v. Campbell*, 1 Sumn. (U. S.) 319.

**9. Infringement of Copyright.** — *Roworth v. Wilkes*, 1 Campb. 94; *Moore v. Clarke*, 9 M. & W. 692.

**10. Violation of Trademark.** — *Crawshay v. Thompson*, 4 M. & G. 357, 43 E. C. L. 189. See also the title FRAUD AND DECEIT, vol. 14, p. 12.

**11. Fenwick v. Grimes**, 5 Cranch (C. C.) 439.

**12. 3 Bl. Com. 122.**

**13. See the title TRESPASS. ante.**

**14. 3 Bl. Com. 122.** See the title TRESPASS, ante. See also *infra*, this title, *Choice of Remedy*.

**15. 3 Bl. Com. 123.** See also the title LIBEL AND SLANDER, vol. 18, p. 851.

Action on the case lies for procuring one's discharge from his employment by means of slanderous statements. *Moran v. Dunphy*, 177 Mass. 485.

**16. Conspiracy to Defame.** — *Griffith v. Ogle*, 1 Binn. (Pa.) 174; *Hood v. Palm*, 8 Pa. St. 237; *Haldeman v. Martin*, 10 Pa. St. 369; *Wildee v. McKee*, 111 Pa. St. 335, 56 Am. Rep. 271;

lies for the malicious abuse of legal process, regularly issued from a court of competent jurisdiction;<sup>1</sup> as maliciously suing out a writ of attachment,<sup>2</sup> or a commission in bankruptcy,<sup>3</sup> or other process;<sup>4</sup> also, for malicious arrest on process regular on its face,<sup>5</sup> against a sheriff for failure to allow bail,<sup>6</sup> or for malicious prosecution.<sup>7</sup>

**The Broad Distinction Laid Down** between case and trespass for the abuse of process is that where the process is void, as where the court had no jurisdiction, trespass will lie; where it is only voidable, case is the proper remedy.<sup>8</sup>

**Where Malice Made Gravamen, Though Process Void.**—Case, concurrently with trespass, will also lie, it is held, where the court had no jurisdiction, provided the malice and falsehood be put forward as the gravamen, and the arrest or other act of trespass be claimed as the consequence,<sup>9</sup> but there is no such election where malice is not proved.<sup>10</sup>

**Resistance to Lawful Process.**—Case is also the proper remedy for resistance to or disobedience of legal process, as for pound breach or rescue of property distrained,<sup>11</sup> or against a witness for disobeying a subpoena.<sup>12</sup>

*Doremus v. Hennessy*, 62 Ill. App. 391, affirmed 176 Ill. 609, 68 Am. St. Rep. 203.

**1. Malicious Abuse of Lawful Process.**—*Sutton v. Johnstone*, 1 T. R. 493, 535; *Cooper v. Booth*, 3 Esp. 135; *Gyfford v. Woodgate*, 11 East 297; *Luddington v. Peck*, 2 Conn. 700; *Watson v. Watson*, 9 Conn. 141, 23 Am. Dec. 324; *Cannon v. Sipples*, 39 Conn. 505; *Blalock v. Randall*, 76 Ill. 224; *Owens v. Starr*, 2 Litt. (Ky.) 234; *Barnett v. Reed*, 51 Pa. St. 190, 88 Am. Dec. 574.

**2. Maliciously Suing Out a Writ of Attachment.**—*Lawrence v. Hagerman*, 56 Ill. 69, 8 Am. Rep. 674; *Hayden v. Shed*, 11 Mass. 500; *Rogers v. Pitman*, 2 Jones L. (47 N. Car.) 56; *Olinger v. McChesney*, 7 Leigh (Va.) 687; *Shaver v. White*, 6 Munf. (Va.) 113, 8 Am. Dec. 730.

**3. Maliciously Suing Out a Commission in Bankruptcy.**—*Chapman v. Pickersgill*, 2 Wils. C. Pl. 145.

**4. Or Other Process.**—*Warfield v. Walter*, 11 Gill & J. (Md.) 80.

**5. Malicious Arrest.**—*Wetherden v. Embden*, 1 Campb. 295; *Elsee v. Smith*, 2 Chit. 304, 18 E. C. L. 344; *Grainger v. Hill*, 4 Bing. N. Cas. 212, 33 E. C. L. 328; *Belk v. Broadbent*, 3 T. R. 185; *Wentworth v. Bullen*, 9 B. & C. 840, 17 E. C. L. 503; *Watkins v. Lee*, 5 M. & W. 270; *Heywood v. Coolinge*, 9 Ad. & El. 268, 36 E. C. L. 136; *James v. Phelps*, 11 Ad. & El. 483, 39 E. C. L. 150; *Swift v. Chamberlain*, 3 Conn. 537; *Turner v. Walker*, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329; *Plummer v. Dennett*, 6 Me. 421, 20 Am. Dec. 316; *Apgar v. Woolston*, 43 N. J. L. 58; *McHugh v. Pundt*, 1 Bailey L. (S. Car.) 441.

In *Allison v. Rheam*, 3 S. & R. (Pa.) 142, an action of trespass, it was held, would also lie, because it would be impossible, in many cases, to prove malice, where it did exist.

An action against three for maliciously procuring arrest by conspiracy is properly an action on the case for the undue arrest and not the conspiracy, and thus it will lie though two of the defendants be acquitted. *Skinner v. Gunton*, 1 Saund. 228c.

**6. Taylor v. Smith**, 104 Ala. 537.

**Contra.**—It was held in *Berry v. Hamill*, 12 S. & R. (Pa.) 210, citing *Allison v. Rheam*, 3 S. & R. (Pa.) 130, that trespass *vi et armis* was the only remedy and that case would not lie.

**7. Malicious Prosecution.—In General, Malice Must Be Proved.**—*Royer v. Swazey*, 10 W. N. C. (Pa.) 432; *Turner v. Walker*, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329. But see *Fripp v. Martin*, 1 Spears L. (S. Car.) 236, where it was held that a mere omission to withdraw a writ after payment of the money, whereby goods were wrongfully sold under execution, was enough without proof of malice.

**8. Where Process Void, Trespass Lies; Where Voidable, Case.**—*Barnett v. Reed*, 51 Pa. St. 190, 88 Am. Dec. 574; *Riley v. Johnston*, 13 Ga. 260; *Kennedy v. Barnett*, 64 Pa. St. 141; *Brown v. Wood*, 1 Bailey L. (S. Car.) 457; *Kramer v. Lott*, 50 Pa. St. 495, 88 Am. Dec. 556; *Dixon v. Watkins*, 9 Ark. 139. See also *Bixby v. Harris*, 26 N. H. 125. And see the title TRESPASS, ante.

**9. Where Malice Made Gravamen, Though Process Void.**—*Morris v. Scott*, 21 Wend. (N. Y.) 281, 34 Am. Dec. 236; *Hays v. Younglove*, 7 B. Mon. (Ky.) 545; *Apgar v. Woolston*, 43 N. J. L. 58; *Stone v. Stevens*, 12 Conn. 219, 30 Am. Dec. 611; *Mask v. Rawls*, 57 Miss. 270.

In *New York* a clear right of election arises under 2 Rev. Stat. 456 (2d ed.). § 16, by which section case may be brought for almost any trespass affecting the person or personal property. *Morris v. Scott*, 21 Wend. (N. Y.) 281, 34 Am. Dec. 236.

**10. Platt v. Niles**, 1 Edm. Sel. Cas. (N. Y.) 230.

**Neglect of Duty Resulting in Abuse of Process.**—Where the neglect of the officer consisted in refusing to give the defendant in a writ the benefit of the three hundred dollar act, it was held that case would lie as well as trespass. *Van Dresor v. King*, 34 Pa. St. 201, 75 Am. Dec. 643. It is to be noted that in this case the injury from the neglect of duty fell upon the defendant in the writ and not upon the person from whom the duty imposed proceeded.

Where a constable sold goods distrained without the requisite notice or appraisement, it was held that, the injury being inflicted by negligence or nonfeasance, the remedy was in case. *McCutcheon v. Philadelphia*, 7 Phila. (Pa.) 207.

**11. For Pound Breach.**—*Parrett Nav. Co. v. Stower*, 6 M. & W. 564.

**12. Lamont v. Crook**, 6 M. & W. 615; *Pearson v. Hles*, 2 Dougl. 561; *Amey v. Long*, 9 East 473.



*d. LIABILITY FOR INJURIES BY ANIMALS.*—The owner of animals is liable in case for any injuries they may inflict,<sup>1</sup> if it be laid and proved that he knew the mischievous nature of the animal or that it had done mischief before.<sup>2</sup>

**6. Injuries to Persons Relatively.**—The action lies for the seduction of a daughter, where there is also a loss of her services, or where the relation, however slight, of master and servant is shown to exist,<sup>3</sup> or for enticing away a daughter,<sup>4</sup> servant,<sup>5</sup> or wife.<sup>6</sup> For the infliction of personal injuries on a child, servant, or wife, trespass, though perhaps not exclusive, and not case, seems to be the proper remedy.<sup>7</sup>

**7. Injuries to Realty**—*a. ACTS DONE ON LAND OTHER THAN THAT OF PLAINTIFF.*—The action will lie for consequential injuries to real estate where the acts causing the injuries are done on the defendant's own land, or on any land other than the plaintiff's.<sup>8</sup>

**1. Owner of Animals Liable.**—Boulton v. Banks, Cro. Car. 254; Hodsoll v. Stallebrass, 11 Ad. & El. 301, 39 E. C. L. 94.

**2. Scienter Must Be Proved.**—Mason v. Keeling, 12 Mod. 332; Jenkins v. Turner, 1 Ld. Raym. 109; Buxendin v. Sharp, 2 Salk. 662; Jones v. Perry, 2 Esp. 482; Coggswell v. Baldwin, 15 Vt. 404, 40 Am. Dec. 686; Mulherrin v. Henry, 11 Pa. Co. Ct. 49.

**Animals Breaking the Close.**—The owner of animals is liable in trespass where they break the close of another. See the titles ANIMALS, vol. 2, p. 341; TRESPASS, *ante*.

**Animal Breaking the Close While in Care of Third Person.**—In an action in trespass where a stud horse belonging to the defendant broke the plaintiff's close and injured his horse, and it appeared that at the time a third party had the horse in service, but whether on hire or as the defendant's agent did not appear, it was held that trespass would not lie, but case. Wales v. Ford, 8 N. J. L. 267. But see the title TRESPASS, *ante*.

**Presence of Owner.**—Where it was laid and proved that the defendants, with their dog, drove and lugged the plaintiff's cattle, it was held that trespass would lie; had the injury been done without the defendants' agency, case would have been the remedy. Dilts v. Kinney, 15 N. J. L. 130. See also Mulherrin v. Henry, 11 Pa. Co. Ct. 49.

**3. For Seduction of a Daughter.**—Bennett v. Allcott, 2 T. R. 166; Speight v. Oliviera, 2 Stark. 493, 3 E. C. L. 501; Furman v. Applegate, 23 N. J. L. 28; Moran v. Dawes, 4 Cow. (N. Y.) 412; Martin v. Payne, 9 Johns. (N. Y.) 387, 6 Am. Dec. 288; Ream v. Rank, 3 S. & R. (Pa.) 215; Parker v. Elliot, 6 Munf. (Va.) 587.

Some old authorities hold that trespass *vi et armis* might also be brought for the seduction of a daughter. Woodward v. Walton, 2 B. & P. N. R. 476; Tullidge v. Wade, 3 Wils. C. Pl. 18.

**Where Plaintiff's Close Broken, Remedy Concurrent with Trespass.**—Where there is also a breaking into the plaintiff's house, the plaintiff may either waive the trespass and bring an action on the case, or bring trespass *quare clausum fregit*, treating the seduction as aggravation. Bennet v. Allcott, 2 T. R. 166; Ream v. Rank, 3 S. & R. (Pa.) 215. See also Davenport v. Russell, 5 Day (Conn.) 145.

**Otherwise, Case Is the Only Remedy.**—Where the entry to the plaintiff's house is by his license, trespass *vi et armis* will not lie, and the only remedy is in case for the seduction. Bennett v. McIntire, 121 Ind. 231; Rasor v. Qualls, 4 Blackf. (Ind.) 286, 30 Am. Dec. 658. See also the title TRESPASS, *ante*.

Where the injury is done in the house of another, only case will lie. Clough v. Tenney, 5 Me. 446.

**4. Enticing Away.**—Jones v. Tevis, 4 Litt. (Ky.) 25, 14 Am. Dec. 98.

**5. Legaux v. Feasor,** 1 Yeates (Pa.) 586. See also Moran v. Dunphy, 177 Mass. 485.

**6. Winsmore v. Greenbank,** Willes 579; Van Vacter v. McKillip, 7 Blackf. (Ind.) 578; Haney v. Townsend, 1 McCord L. (S. Car.) 207.

**7. Infliction of Personal Injuries**—Trespass the Proper Remedy.—Ditcham v. Bond, 2 M. & S. 436; Hoover v. Heim, 7 Watts (Pa.) 62; Durden v. Barnett, 7 Ala. 169.

A distinction was drawn in Wilt v. Vickers, 8 Watts (Pa.) 227, where it was held that where a child was not in his father's service at the time of receiving personal injuries, but was hired out to another, the father's remedy was case, his injury being to the reversionary right which he had to the services of his child. See *infra*, this section, 9. *a. Injuries to Reversion.*

**Injury to Wife from Assault on Third Party.**—Where personal injury to the plaintiff's wife resulted from an assault upon another person, case was held to be the proper remedy, the injury being strictly consequential. Hill v. Kimball, 76 Tex. 210.

**Injury to Wife by Defendant's Servant.**—In a case of forcible injury to a wife by the defendant's servant in the course of his employment, without his master's command or assent, it was held that case was the proper remedy. Drew v. Peer, 93 Pa. St. 234. See also *supra*, this section, 3. *c. Injuries by One's Servants from Negligence.*

**8. Acts Done on Land Other than That of Plaintiff.**—Knight v. Dunbar, 83 Me. 359; Hogwood v. Edwards, Phil. L. (61 N. Car.) 350.

**Illustrations.**—An action on the case lies for injuries to real estate by the construction of a railroad in its proximity. Pennsylvania R. Co. v. Duncan, 111 Pa. St. 352; Northern Cent. R. Co. v. Holland, 117 Pa. St. 613; Philadelphia etc., R. Co. v. Patent, 17 W. N. C.

*b.* ACTS DONE ON PLAINTIFF'S LAND BY ONE LAWFULLY THEREON. — Case is also the only remedy where the injury is done upon the plaintiff's land by one with the right of entry thereon.<sup>1</sup>

*c.* INJURIES TO REVERSION. — Where the injury is to real property in reversion, an action on the case is the only remedy available to the reversioner. As he is not in possession, the action of trespass cannot be maintained.<sup>2</sup> Thus, case is the landlord's remedy for injury to the reversion when a tenant for a year or longer is in possession.<sup>3</sup>

**An Action on the Case in the Nature of Waste** is sustainable at common law by a reversioner against the tenant or a stranger for cutting trees or otherwise injuring the reversionary estate, although the action of waste could not lie.<sup>4</sup>

(Pa.) 198. Or by the location and use of railroad tracks on the street on which it abuts. *Jeffersonville, etc., R. Co. v. Esterle*, 13 Bush (Ky.) 667. Or by the erection of the abutments of a bridge on the highway adjoining the plaintiff's property. *Delaware County's Appeal*, 119 Pa. St. 159. Or for building a house so near the adjoining property that the eaves project over the latter, intercepting the light and causing water to drip. *Garraty v. Duffy*, 7 R. I. 476. Or for injuries to the surface by the owner of underlying mineral deposits, who neglects to leave adequate support. *Williams v. Hay*, 120 Pa. St. 485, 6 Am. St. Rep. 719. Or for the filling up of a dock by the discharge of the contents of a city sewer. *Clark v. Peckham*, 9 R. I. 455. Or for the pollution of a stream above the plaintiff's farm. *Drake v. Lady Ensley Coal, etc., Co.*, 102 Ala. 501, 48 Am. St. Rep. 77. Or for digging a ditch in a lane around the plaintiff's lot. *Runyon v. Bordine*, 14 N. J. L. 472.

Where the grantee of a disseizor maintained, on the land in which he was wrongfully in possession, an embankment which caused other land of the disseizee to be flooded, it was held that case and not trespass was the proper remedy for the nuisance. *Fifield v. Bailey*, 55 N. H. 380.

Where the injury consisted of the destruction of wood on the plaintiff's land, caused by a negligent act committed on the defendant's land, it was held that the action was more accurately described as one on the case, and the plaintiff would therefore not be entitled to nominal damages if no damage were proved. *Northern Pac. R. Co. v. Lewis*, 162 U. S. 366.

**1. Acts Done on Plaintiff's Land by One Lawfully Thereon.** — Where one who had water rights in certain property, and had dug up the old pipes and put down new ones, was sued for unnecessarily damaging the property in so doing, it was held that, a right to enter upon the land existing under a license for a special purpose, the unnecessary damage done in the performance of the act authorized would sustain an action upon the case and not an action of trespass. *Edelman v. Yeakel*, 27 Pa. St. 26. See also *Dean v. McLean*, 48 Vt. 412, 21 Am. Rep. 130; *Felch v. Gilman*, 22 Vt. 38.

Case lies for injuries resulting from a failure to replace bars or to close gates by which the defendant, having a right of way, has lawfully entered, on the principle that case and not trespass lies for acts of mere nonfeasance. *Hinks v. Hinks*, 46 Me. 423; *Stone v. Knapp*, 29 Vt. 501; *Gregoir v. Leonard*, 71 Vt. 411.

Where heavier articles were stored in a house than were allowed, in disregard of the contract on which it was rented, and the house fell down from the pressure, trespass on the case was held to be the proper remedy, the injury being consequential. *Brooks v. Clifton*, 22 Ark. 54.

**2. Injuries to the Reversion.** — *Bucki v. Cone*, 25 Fla. 1; *Baker v. Sanderson*, 3 Pick. (Mass.) 348; *McIntire v. Westmoreland Coal Co.*, 118 Pa. St. 108. See the title TRESPASS, *ante*.

**3. Landlord's Remedy When Tenant in Possession.** — *Lienow v. Ritchie*, 8 Pick. (Mass.) 235; *R'ge v. Railroad Transfer Co.*, 56 Mo. App. 133; *Bacon v. Bullard*, 20 R. I. 404. See also the titles LANDLORD AND TENANT, vol. 18, p. 149; TRESPASS, *ante*.

**Removal of Crops.** — Case lies by a landlord against one who, with notice of the former's lien, removes the tenant's crop. *Hussey v. Peebles*, 53 Ala. 432.

**Driving Tenant Away.** — Case is the landlord's remedy for loss of rent and destruction or dilapidation of the premises, against one who, wishing to injure him, drives the tenant away by threats or force, even though the tenant's abandonment is a breach of contract. *Walden v. Conn*, 84 Ky. 312, 4 Am. St. Rep. 204.

**4. Action on the Case in Nature of Waste.** — *Chase v. Hazelton*, 7 N. H. 171; *Randall v. Cleaveland*, 6 Conn. 328; *White v. Wagner*, 4 Har. & J. (Md.) 373, 7 Am. Dec. 674; *Elliot v. Smith*, 2 N. H. 430; *Brown v. Dinsmoor*, 3 N. H. 103; *Campbell v. Arnold*, 1 Johns. (N. Y.) 511; *Tobey v. Webster*, 3 Johns. (N. Y.) 468; *Ripka v. Sergeant*, 7 W. & S. (Pa.) 9, 42 Am. Dec. 214. See also the title WASTE.

**Mortgagee of Realty.** — A mortgagee of a reversion may maintain case against the tenant for life for injuries done by trespassers cutting down trees, and that before foreclosure or condition broken. *Fay v. Brewer*, 3 Pick. (Mass.) 203.

**Case Lies by the Purchaser at an Execution Sale** for the removal of a building by the defendant in the execution, who remains in possession after the sale without redeeming, and removes the building without license from the purchaser. *Topping v. Evans*, 58 Ill. 209.

But a vendor of land, by articles of agreement, in part executed, having parted with the possession to the vendee, has not such a several and distinct estate in the land sold as will vest him with a right of action against a mere stranger, for an injury done to it, during the continuance of the equitable estate of the

The damage may be merely nominal.<sup>1</sup>

**8. Injuries to Incorporeal Property.**—The action lies where the estate injured is of an incorporeal nature, as the disturbance of the enjoyment of an easement annexed to land, the injury in such cases being always consequential.<sup>2</sup> Thus it will lie for the obstruction of a right of way,<sup>3</sup> the obstruction of water,<sup>4</sup> disturbance of the right to use a pew,<sup>5</sup> disturbance of a right to enter and take oil,<sup>6</sup> or for the diversion of water, the use of which the plaintiff had by covenant under seal.<sup>7</sup>

**Special Damage — Obstruction of Public Right of Way.**—Case lies for the obstruction of a highway or public right of way, by one who has sustained any special damage beyond that which affects the public at large.<sup>8</sup> Fault on the part of the person injured will deprive him of his remedy.<sup>9</sup>

**9. Injuries to Personalty — a. INJURIES TO REVERSION.**—Case is the only remedy for injuries to personal property in reversion.<sup>10</sup>

**b. OTHER INJURIES TO PERSONALTY — REMEDY GENERALLY CONCURRENT WITH ASSUMPSIT.**—Case lies for injuries to personal property which are not committed with force, or which are merely consequential. There is a large class of cases founded on an implied or express contract, where assumpsit also lies, and case is available as a concurrent remedy, the breach of contract being waived and the action being brought on the common-law neglect or other breach of duty arising out of the contract. Thus it lies against attorneys, and bailees, such as common carriers, for injuries resulting from neglect in the course of their employment, as well as from breach of duty arising out of special contracts.<sup>11</sup>

**10. On Statute.**—Remedy by action on the case is frequently given by the express provision of a statute to the party aggrieved.<sup>12</sup>

**Remedial Statutes.**—Case lies for the breach of a remedial statute where the act does not require any particular form of action to be brought.<sup>13</sup>

**Penal Statutes.**—As a rule, case is not the remedy under a penal statute. The statute of Westminster II., c. 50, does not allude to statutes generally, but only "where the law faileth," and could only affect statutes subsequently

vendee. *Ives v. Cress*, 5 Pa. St. 118, 47 Am. Dec. 401.

**1. Damage May Be Nominal.**—*Ripka v. Sergeant*, 7 W. & S. (Pa.) 9, 42 Am. Dec. 214; *Schnable v. Koehler*, 28 Pa. St. 181.

**2. Injury to Incorporeal Property — Easement.**—*Mainwaring v. Giles*, 5 B. & Ald. 361, 7 E. C. L. 131; *Bryan v. Whistler*, 8 B. & C. 288, 15 E. C. L. 219; *Wetmore v. Robinson*, 2 Conn. 529; *Shafer v. Smith*, 7 Har. & J. (Md.) 67; *Strickler v. Todd*, 10 S. & R. (Pa.) 63, 13 Am. Dec. 649; *Union Petroleum Co. v. Bliven Petroleum Co.*, 72 Pa. St. 173; *Wilson v. Wilson*, 2 Vt. 68.

**3. Obstruction of Right of Way.**—*Greasley v. Codling*, 2 Bing. 263, 9 E. C. L. 407; *Cushing v. Adams*, 18 Pick. (Mass.) 110; *Wright v. Freeman*, 5 Har. & J. (Md.) 467; *Smith v. Wiggin*, 48 N. H. 105; *Osborne v. Butcher*, 26 N. J. L. 308; *Okeson v. Patterson*, 29 Pa. St. 22.

**Unauthorized Use of Right of Way.**—For using a road laid out over the defendant's land and which the defendant had signified his intention not to use for any purpose, it was said that case would have been the proper remedy; an action of trespass where the defendant waived his right of objection by joining issue. *Lambert v. Hoke*, 14 Johns. (N. Y.) 383. See also *infra*, this section, 10. *On Statute*.

*Strickler v. Todd*, 10 S. & R. (Pa.) 63, 13 Am. Dec. 649.

**5. Disturbance of Right to Use a Pew.**—*Marshall v. White*, Harp. L. (S. Car.) 122; *Perrin v. Granger*, 33 Vt. 101.

**6. Union Petroleum Co. v. Bliven Petroleum Co.**, 72 Pa. St. 173.

**7. Lindeman v. Lindsey**, 69 Pa. St. 93, 8 Am. Rep. 219.

**8. Special Damage.**—*Chichester v. Lethbridge*, Willes 71; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. Cas. 281, 29 E. C. L. 336; *Martin v. Bliss*, 5 Blackf. (Ind.) 35, 32 Am. Dec. 52.

**9. Butterfield v. Forrester**, 11 East 60. See also the title NUISANCES, vol. 21, p. 679.

**10. Injuries to Personalty—To the Reversion.**—*Hall v. Pickard*, 3 Campb. 187; *Bucki v. Cone*, 25 Fla. 1.

**A Mortgagee of Chattels** may maintain the action against a stranger carrying them out of the mortgagor's possession. *Hall v. Snowhill*, 14 N. J. L. 8.

**11.** See *infra*, this title, *Choice of Remedy*, where these cases are treated in full.

**12.** 1 Chitty on Pleading 161.

**13. Cockrill v. Butler**, 78 Fed. Rep. 679; *Mount v. Hunter*, 58 Ill. 246; *Cole v. Muscatine*, 14 Iowa 296; *Lambert v. Hoke*, 14 Johns. (N. Y.) 383; *Mapel v. John*, 42 W. Va. 30, 57 Am. St. Rep. 839.



enacted by construction or as declaratory of the common law. Chapter 24, giving the remedy by action on the case, created no new liabilities.<sup>1</sup> Case may, however, be brought when the party seeks to recover for special damages occasioned by the breach of a penal statute.<sup>2</sup> Case is the proper remedy to recover a tax under a statute,<sup>3</sup> or for damages for the taking of property under an act alleged to be unconstitutional.<sup>4</sup>

**Where a Statutory Remedy Is Inadequate.** — Although, in general, where a statute prescribes a particular remedy, that, and no other, must be pursued, the action has been held to lie in cases where a statutory remedy is inadequate,<sup>5</sup> or unavailable in the particular case.<sup>6</sup>

**IV. CHOICE OF REMEDY — 1. Where Concurrent with Trespass.** — The liability for consequential damages within the scope of this action may result from an act which is itself a trespass,<sup>7</sup> in which case the plaintiff may either consider the act itself as the cause of the injury and declare in trespass, or waive the trespass and sue in case for the consequences.<sup>8</sup> Case is a concurrent remedy with trespass where a direct and violent injury is done by carelessness or negligence, and not wilfully, the plaintiff having the election of waiving the trespass and proceeding in case on the negligence.<sup>9</sup>

**Tenants in Common.** — One tenant in common may maintain case against the

1. *Heeney v. Sprague*, 11 R. I. 463, 23 Am. Rep. 502, note by Ch. J. Durfee.

See also *Russell v. Louisville, etc., R. Co.*, 93 Va. 322, where it was held that debt is the proper action to recover a penalty where the statute provides for no particular form, and that case will not lie.

2. **For the Breach of a Penal Statute.** — "When a statute makes the doing or omitting any act illegal, and subjects the offending parties to penalties for the public wrong only, a party specially injured by the illegal act or omission has the right of suing therefor at the common law." *Aldrich v. Howard*, 7 R. I. 199.

**Statute — Where Case Only Remedy.** — In an action under a statute to recover double the price of building the part of a divisional fence which was assigned to the defendants by fence viewers, it was held that assumpsit would not lie, there being no promise, express or implied. "It should have been an action on the case, setting forth all the facts necessary to establish a legal obligation to build the fence, a neglect to do it, the construction of it by the plaintiff, the adjudication of its sufficiency, and the neglect of the defendants to pay therefor within one month after demand." *Sanford v. Haskell*, 50 Me. 86.

When an action on the case is brought for neglect of a statutory duty, the plaintiff must show that the duty was imposed for his benefit, or for his security from the injury suffered. *Smith v. Tripp*, 13 R. I. 152.

3. *Franklin v. Warwick, etc., Water Co.*, 24 R. I. 224.

4. *Hamilton County v. Cincinnati, etc., Turnpike Co.*, *Wright (Ohio)* 603.

5. **Where Statutory Remedy Inadequate.** — *Lawrence v. Hagerman*, 56 Ill. 69, 8 Am. Rep. 674; *Adams v. Paige*, 7 Pick. (Mass.) 542; *Chapman v. Pickersgill*, 2 Wils. C. Pl. 146, where the action was held to lie for falsely and maliciously suing out a commission of bankruptcy, although there was a remedy provided therefor under the statute. See also *Aldrich v. Howard*, 7 R. I. 199. *Contra*, *Braem v. Mer-*

*chants Nat. Bank*, 127 N. Y. 508, where it was held that where a remedy for cases new in principle has been granted by statute, the scope of the action on the case is limited by the terms of the statute.

6. *Michalson v. All*, 43 S. Car. 459, 49 Am. St. Rep. 857.

7. **Case Concurrent with Trespass.** — *Branscomb v. Bridges*, 1 B. & C. 145, 8 E. C. L. 63; *Smith v. Goodwin*, 2 N. & M. 114, 28 E. C. L. 355; *Bixby v. Harris*, 26 N. H. 125; *Osgood v. Clark*, 26 N. H. 307. The two last-mentioned cases were for the collection of an illegal tax.

8. **Remedy Concurrent with Trespass — Both Immediate and Consequential Injury.** — Where the defendant's servant, by his express command, rode the plaintiff's mare, which he found trespassing on his farm, several miles away and then turned her loose, whereby the plaintiff lost her services for many days, it was held that case would lie for the consequential injury concurrently with trespass for the immediate injury; the defendant's right to arrest the mischief to his close being limited to the removal of the trespassing animal to the extreme limits of the close, but no farther. *Knott v. Digges*, 6 Har. & J. (Md.) 230.

Where goods were forcibly and wrongfully taken from the plaintiff's possession after he had sold them and received a part of the purchase money, he might have brought trespass and recovered their value. But, the sale having been rescinded by the vendee because the seizure of the goods disabled the plaintiff from delivering, a consequential injury resulted to the plaintiff in the loss of his sale, for which an action on the case would lie. *Frankenthal v. Camp*, 55 Ill. 169.

9. **Direct Injury Resulting from Negligence — Indiana.** — *Schuer v. Veeder*, 7 Blackf. (Ind.) 342.

*Kentucky.* — *Johnson v. Castleman*, 2 Dana (Ky.) 377.

*Michigan.* — *Wyant v. Crouse*, 127 Mich. 158. *New Hampshire.* — *Dalton v. Favour*, 3 N. H. 465.

other for loss and damage by negligence to the joint property, not only where there has been a total destruction of the subject-matter of the tenancy, in which case trespass may also be brought,<sup>1</sup> but also for partial injury to it.<sup>2</sup>

**Wrongful Distress.** — In a case of wrongful distress it has been held that the party suing is not obliged to bring trespass; he may waive the trespass and bring case, but trespass is the more appropriate remedy, unless the case is one merely of excessive distress.<sup>3</sup>

**2. Where Concurrent with Assumpsit.** — Case will also lie for violation of the duty which the contractual relations between the parties involve, in many cases where assumpsit is a concurrent remedy,<sup>4</sup> as in the case of common carriers,<sup>5</sup> wharfingers,<sup>6</sup> or similar bailees, even though the bailment is a gratuitous undertaking.<sup>7</sup> Although assumpsit will also usually lie for breach of the

*New York.* — *Blin v. Campbell*, 14 Johns. (N. Y.) 432; *M'Allister v. Hammond*, 6 Cow. (N. Y.) 342.

*Rhode Island.* — *Brennan v. Carpenter*, 1 R. I. 474.

*Vermont.* — *Howard v. Tyler*, 46 Vt. 683; *Claflin v. Wilcox*, 18 Vt. 605 (which reviews and attempts to reconcile the cases cited in the second note under III. 2, *supra*).

*Virginia.* — *Jordan v. Wyatt*, 4 Gratt. (Va.) 151, 47 Am. Dec. 720.

See also *Van Dresor v. King*, 34 Pa. St. 201, 75 Am. Dec. 643.

In *Percival v. Hickey*, 18 Johns. (N. Y.) 257, 9 Am. Dec. 210, the view was taken that where the injury was immediate and was the result of gross negligence, trespass was the appropriate remedy.

In *Gilson v. Fisk*, 8 N. H. 404, it was held that trespass might be waived and case brought whether the act was wilful or not, where trover was a concurrent remedy with trespass. See also *Knott v. Digges*, 6 Har. & J. (Md.) 230. And see *contra*, *Wilson v. Smith*, 10 Wend. (N. Y.) 324, where it was held that where the act was wilful trespass must be brought.

Where the injury consisted in driving the plaintiff's mare upon a fence, causing her death, it was held that the plaintiff had an election between trespass and case. *Waterman v. Hall*, 17 Vt. 128, 42 Am. Dec. 484.

1. See the title **JOINT TENANTS AND TENANTS IN COMMON**, vol. 17, p. 703; 1 Chitty Pl. 89.

**2. Tenants in Common May Maintain Case Against Each Other.** — *Bond v. Hilton*, Bush. L. (44 N. Car.) 308, 50 Am. Dec. 552; *Cubitt v. Porter*, 8 B. & C. 257, 15 E. C. L. 211; *Anders v. Meredith*, 4 Dev. & B. L. (20 N. Car.) 199, 34 Am. Dec. 376; *McGehee v. Peterson*, 57 Ala. 334.

3. *Olinger v. M'Chesney*, 7 Leigh (Va.) 660; *Branscomb v. Bridges*, 1 B. & C. 145, 8 E. C. L. 63; *Smith v. Goodwin*, 4 B. & Ad. 413, 24 E. C. L. 89. See the title **TRESPASS**, *ante*.

**Effect of Recovery in Case and Trespass in England.** — It is to be noted that in England there was a substantial reason for attending to the distinction between trespass and case with strictness, which never had any application in the *United States*; in actions of trespass in England, if the plaintiff did not recover to the amount of forty shillings, he recovered no more costs than damages.

**4. Case Concurrent with Assumpsit.** — *Boorman v. Brown*, 3 Q. B. 511, 43 E. C. L. 843; *Hyde v. Moffat*, 16 Vt. 271; *Dean v. McLean*,

28 C. of L.—40

48 Vt. 412, 21 Am. Rep. 130; *Standard Brewery v. Hales*, etc., *Malting Co.*, 70 Ill. App. 363. See also *Britt v. Pitts*, 111 Ala. 401.

**5. Although Assumpsit Will Lie Against Common Carriers** for breach of an express or implied contract of carriage, a breach of their common-law duty to carry and convey goods and passengers in safety is a tort, the subject of an action on the case, which was indeed originally regarded as the only remedy. *Bretherton v. Wood*, 3 Brod. & B. 54, 7 E. C. L. 345; *Ansell v. Waterhouse*, 2 Chit. 1, 18 E. C. L. 227, 6 M. & S. 385; *Pozzi v. Shipton*, 8 Ad. & El. 963, 35 E. C. L. 574; *Bridge v. Grand Junction R. Co.*, 3 M. & W. 244; *Walker v. Jackson*, 10 M. & W. 161; *Lovett v. Hobbs*, 2 Show. 127; *Leslie v. Wilson*, 6 Moo. 415, 3 Brod. & B. 171, 7 E. C. L. 395; *Emigh v. Pittsburgh*, etc., R. Co., 4 Biss. (U. S.) 114; *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222, 46 Am. Rep. 688; *Orange Bank v. Brown*, 3 Wend. (N. Y.) 158; *M'Call v. Forsyth*, 4 W. & S. (Pa.) 179; *Southern Express Co. v. McVeigh*, 20 Gratt. (Va.) 264; *Spence v. Norfolk*, etc., R. Co., 92 Va. 102.

**Against Common Carriers for Misconduct of Their Servants.** — *New Orleans*, etc., R. Co. v. *Hurst*, 36 Miss. 660, 74 Am. Dec. 785.

**Common Carriers — Innkeepers, etc.** — Case lies against common carriers, and those exercising the kindred trades of innkeepers, public warehousemen, etc., for refusal to exercise their trades. *Y. B.*, 21 Hen. VI. 55; *Jackson v. Rogers*, 2 Show. 327; *Allnutt v. Inglis*, 12 East 527; *Pickford v. Grand Junction R. Co.*, 8 M. & W. 372; *Ansell v. Waterhouse*, 6 M. & S. 385. See *Rex v. Kilderby*, 1 Saund. 312a, note.

Action on the case was held to lie against an innkeeper for breach of his duty to provide safe accommodations for his guest, whereby the latter was injured. *Stanley v. Bircher*, 78 Mo. 245. See also the title **INNS AND INNKEEPERS**, vol. 16, p. 505.

**6. Where a City Keeps a Public Wharf and Receives Tolls** for its use, it is liable in an action on the case for neglect of its duty to maintain the wharf in proper repair. The right of action is not based on the city ordinances or on the neglect to enforce them, but on the violation of the duty which arises out of the control which the city has over the port, and her receipt of tolls from the vessels which come into it. *Pittsburgh v. Grier*, 22 Pa. St. 54, 60 Am. Dec. 65.

7. *Coggs v. Bernard*, 2 Ld. Raym. 900; *Ferrier v. Wood*, 9 Ark. 85; *Howe v. Cooke*, 21

contract, action on the case for the breach of the common-law duty is often the better remedy.<sup>1</sup> Case, as well as assumpsit, lies against surgeons and physicians for ignorance and want of skill in the treatment of a patient, on account of the implied duty arising from their character and undertaking,<sup>2</sup> and, similarly, against attorneys at law for negligence in the conduct of suits and other business,<sup>3</sup> and the principle has been extended to the unskilful performance of other contracts requiring a high degree of skill.<sup>4</sup> It will also lie, concurrently with assumpsit, for a breach of duty arising out of an express or implied contract.<sup>5</sup>

**Where Case Will Not Lie.** — Case will not lie for money had and received by the defendant to the plaintiff's use, the remedy being in assumpsit.<sup>6</sup> But where one received money in specie, simply for safekeeping, to be redelivered on demand, and converted it to his own use, it was held that there was a breach of his duty to redeliver the specific money, which supported an action on the case.<sup>7</sup>

**V. ABOLITION OF DISTINCTION BETWEEN FORMS OF ACTION — ITS EFFECT.** — The distinction between the forms of the actions of trespass and trespass on the case has been abolished in many of the states. It must be kept in mind, however, that the essentials of the actions remain as before; only the technical distinction is done away with; the substantial rights and liabilities of the parties are not affected. The subject has already been treated in another article, and need be only referred to here.<sup>8</sup>

Wend. (N. Y.) 29; *Shreeve v. Adams*, 6 Phila. (Pa.) 260, 24 Leg. Int. (Pa.) 396.

Where one intrusted with paper on which to print the plaintiff's work, pledged the paper, case was held to lie. *Smith v. White*, 6 Bing. N. Cas. 218, 37 E. C. L. 353.

**1. Action on the Case the Better Remedy.** — Action on the case enables the plaintiff to bring suit against one or more joint owners, instead of being compelled to join them all as in a declaration in assumpsit on the contract. *Bretherton v. Wood*, 3 Brod. & B. 54, 7 E. C. L. 345; *M'Call v. Forsyth*, 4 W. & S. (Pa.) 179; *Orange Bank v. Brown*, 3 Wend. (N. Y.) 158.

**2. Slater v. Baker**, 2 Wils. C. Pl. 359 (where it was stated that trespass *vi et armis* might have been a more appropriate remedy); *Seare v. Prentice*, 8 East 348; *Peck v. Martin*, 17 Ind. 115; *Mullin v. Flanders*, 73 Vt. 95; *Kuhn v. Brownfield*, 34 W. Va. 252 (which was an assumpsit case).

**Breach of Duty Gist of Action.** — And the breach of duty from want of skill, and not a breach of contract, being the gist of the action, it is immaterial that the defendant was employed by another to cure the plaintiff. *Gladwell v. Stegall*, 5 Bing. N. Cas. 733, 35 E. C. L. 292.

**3. Against Attorneys at Law.** — *Walker v. Goodman*, 21 Ala. 647; *Sevier v. Holliday*, 2 Ark. 512; *O'Barr v. Alexander*, 37 Ga. 195; *Dearborn v. Dearborn*, 15 Mass. 316; *Salisbury v. Gourgas*, 10 Met. (Mass.) 442; *Wilson v. Coffin*, 2 Cush. (Mass.) 316; *Holmes v. Peck*, 1 R. I. 242; *Crooker v. Hutchinson*, 1 Vt. 73.

**4. On an Implied Warranty and Negligent Performance of a Contract.** — *Brown v. Edgington*, 2 M. & G. 279, 40 E. C. L. 371; *Erie City Iron Works v. Barber*, 102 Pa. St. 156.

The distinction between breach of contract and breach of duty arising from a contract is applied and stated at length in *Zell v. Arnold*, 2 P. & W. (Pa.) 292, an action on the case where a millwright contracted to build a clover mill, etc., and did so unskilfully.

**5. Barnett v. Lynch**, 5 B. & C. 589, 12 E. C. L. 327.

An action on the case was held to lie concurrently with assumpsit on the promise of indemnity implied where one was employed by his principal to take possession of chattels which did not belong to the principal, and for the taking of which, without knowledge of the tort, the agent had been held liable in damages to the true owner. *Moore v. Appleton*, 26 Ala. 633. See also *Myers v. Gilbert*, 18 Ala. 467.

**6. Royce v. Oakes**, 20 R. I. 418; *Riley v. La Rue*, 20 R. I. 425.

**7. Royce v. Oakes**, 20 R. I. 252.

**Where the Defendants Agreed with the Plaintiff that He Should Open a Store** in a certain place and that they should supply him with goods to carry on the business, and he, in reliance on the agreement, abandoned his other business and leased a store and made other preparations, but the defendants refused to perform their part of the contract, it was held that an action on the case would not lie. *Mulvey v. Staab*, 4 N. Mex. 50.

**8. See the title TRESPASS, ante.**



# TRESPASS TO TRY TITLE.

By JOHN SIMPSON.

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**I. DEFINITION.** — In *Texas* the action of trespass to try title is intended to serve all the purposes of an action of ejectment as known to the law of *England* and to the other states. Wherever ejectment will lie at common law, trespass to try title may be used under the *Texas* statutes. It is, in its nature, a suit to recover possession of land unlawfully withheld from the owner and to which he has the right of immediate possession.<sup>1</sup> In this action the question of title as well as the right to the possession is determined, and as fully settled as it could be by a suit to quiet title; hence, seldom, if ever, could a suit to quiet title, technically considered, be necessary in *Texas*.<sup>2</sup>

**II. ESSENTIALS AND PARTIES LIABLE** — **Actual Trespass.** — In *South Carolina* an actual trespass must be proved.<sup>3</sup> But in *Texas* it is not necessary to prove trespass except where there is no controversy about the title, but only as to

1. **Definition.** — *Hays v. Texas*, etc., R. Co., 62 Tex. 397. See the title EJECTMENT, vol. 10, p. 467.

2. **Scope.** — *Thomson v. Locke*, 66 Tex. 383.

3. **In South Carolina Actual Trespass Must Be Proved.** — *Cornneil v. Bickley*, 1 McCord L. (S. Car.) 466; *Massey v. Trantham*, 2 Bay (S. Car.) 421.

boundaries, and where the plaintiff, having the superior title, charges the defendant with trespassing on his land.<sup>1</sup>

**Tenants Disowning Tenancy.** — Where persons in possession of land as tenants disown that relation, trespass by the owner to try title will lie against them.<sup>2</sup>

**Eminent Domain.** — As in the ordinary case of trespass *quare clausum fregit*, a railway company, though it has a statutory method for taking lands by condemnation proceedings, is subject to liability in an action of trespass to try title if it does not resort to the statutory remedy.<sup>3</sup>

**Possessor in Fiduciary Capacity.** — The action is properly brought against the person in possession, though he holds in a fiduciary capacity for the benefit of others.<sup>4</sup>

**Trespasser by Relation.** — Trespass to try title will lie against one, though the entry was made by his son and tenant, the defendant being a trespasser by relation.<sup>5</sup>

**Though Title Not in Dispute.** — Where the defendant, in fencing land belonging to himself, incloses that of the plaintiff, and uses the entire inclosure for pasture, he is liable in an action of trespass to try title for the rental value of the land, though he never disputed the plaintiff's title or right to possession.<sup>6</sup>

**Lienholders in Possession.** — One cannot dispossess lienholders in possession without discharging their lien, and an action against them will not lie.<sup>7</sup>

**III. WHO MAY MAINTAIN** — 1. **In General** — Where Possession Necessary. — In *South Carolina*, the person in possession may bring trespass to try title for any entry on his land.<sup>8</sup>

**Where Possession Not Necessary.** — In *Texas* it is not necessary that the plaintiff be in possession; he may maintain the action whether in or out of possession.<sup>9</sup> It is sufficient if he owns the land and either has, or is entitled to, the possession, and that the defendant claims it adversely.<sup>10</sup> So, in *Alabama*, neither possession by the plaintiff nor actual ouster by the defendant is necessary. A right of entry and possession in the plaintiff is sufficient.<sup>11</sup>

**Present Possessory Title Necessary.** — There must be a present possessory title; therefore, a remainderman cannot recover for land covered by a life interest,<sup>12</sup> and a mortgagee cannot maintain against the mortgagor who remains the real owner, and entitled to the possession.<sup>13</sup>

**A Conveyance by the Plaintiff,** during the pendency of the action, of his interest in the land, will not defeat his recovery.<sup>14</sup>

**State Cannot Maintain.** — The state cannot maintain the action, for it cannot be disseized.<sup>15</sup>

1. **In Texas Trespass Need Not Be Proved.** — *Viesca v. Wyche*, 3 Woods (U. S.) 336; *Stroud v. Springfield*, 28 Tex. 672.

2. **Against Tenants Disowning Tenancy.** — *Hall v. Haywood*, 77 Tex. 4.

3. **Eminent Domain.** — *Hays v. Texas*, etc., R. Co., 62 Tex. 397; *St. Louis S. W. R. Co. v. Hargrove*, (Tex. Civ. App. 1895) 31 S. W. Rep. 696. See also the title TRESPASS, *ante*.

4. **Against Possessor in Fiduciary Capacity.** — *Bonner v. Greenlee*, 6 Ala. 411.

5. **Trespasser by Relation.** — *Binda v. Benbow*, 11 Rich. L. (S. Car.) 24.

6. **Though Title Not in Dispute.** — *Hastings v. O'Connor*, (Tex. Civ. App. 1899) 52 S. W. Rep. 567.

7. **Lienholders in Possession.** — *Carleton v. Hausler*, 20 Tex. Civ. App. 275.

8. **In South Carolina, Possession Necessary.** — *Watson v. Hill*, 1 Strobb. L. (S. Car.) 78.

**Exclusive Possession Necessary.** — The action is not available to commissioners of streets dedicated to the use of the inhabitants, for all

having the right of using them may be considered as tenants in common. The remedy would be by indictment or case. *Street Com'rs v. Taylor*, 1 Brev. (S. Car.) 129.

9. **In Texas, Possession Not Necessary.** — *Hays v. Texas*, etc., R. Co., 62 Tex. 397; *Thomson v. Locke*, 66 Tex. 383; *Edrington v. Butler*, (Tex. Civ. App. 1895) 33 S. W. Rep. 143.

10. **Ownership and Possessory Right Sufficient.** — *Edrington v. Butler*, (Tex. Civ. App. 1895) 33 S. W. Rep. 143.

11. **In Alabama Right of Entry and Possession Sufficient.** — *White v. St. Guirons*, Minor (Ala.) 331, 12 Am. Dec. 56.

12. **Present Possessory Title Necessary — Remainderman Cannot Recover.** — *Cook v. Caswell*, 81 Tex. 684; *Adams v. Ramsey*, 19 Tex. Civ. App. 294.

13. **Mortgagee Cannot Maintain Against Mortgagor Entitled to Possession.** — *Duty v. Graham*, 12 Tex. 427, 62 Am. Dec. 534.

14. **Conveyance During Pendency of Action.** — *Bailey v. Laws*, 3 Tex. Civ. App. 529.

15. **State Cannot Maintain.** — *State v. Arledge*,

**Joint Ownership.** — Under a statute providing that where there are two or more plaintiffs or defendants, any one or more of the plaintiffs may recover against one or more of the defendants, it is held that under an allegation of joint ownership, one plaintiff may recover either in whole or in part against one or all of the defendants.<sup>1</sup>

**2. Prior Possession.** — As in the ordinary action of trespass *quare clausum fregit*, mere prior possession will enable a party to maintain the action against a wrongdoer who has no title in himself.<sup>2</sup> This has been held not to apply to public domain or where the real title is still in the state; a possessory right cannot mature in such a case.<sup>3</sup>

**Prior Possession Combined with Acts of Improvement** by a purchaser of land sold under execution will enable him to maintain the action against one in possession.<sup>4</sup>

**As a Test of Possession Sufficient to Warrant Recovery**, the payment of taxes on vacant lands by one who has not the title thereto is not equivalent to possession.<sup>5</sup>

**Where a Grantee Enters into Possession of One of Two Tracts** conveyed to him as one piece of land, he has constructive possession of the whole, notwithstanding the fact that his grantor acquired the two tracts from different persons, and he can recover against persons showing no title.<sup>6</sup>

**3. Legal Title.** — The action may be maintained by the holder of the legal title to the land.<sup>7</sup>

**4. Equitable Title.** — The action may be maintained as well upon an equitable as upon a legal title.<sup>8</sup> A deed to the land is not absolutely necessary. Where the plaintiff has paid the purchase money and the evidence shows proceedings amounting to a valid sale, that will vest the title sufficiently to support an action to try title against a trespasser.<sup>9</sup> The location of valid cer-

<sup>1</sup> Bailey L. (S. Car.) 551; State v. Stark, 3 Brev. (S. Car.) 101.

<sup>2</sup> **Joint Ownership.** — Anderson v. Anderson, 95 Tex. 367, in which it is pointed out that the statute is apparently intended to avoid the effect of the previously rendered contrary decision in Teal v. Terrell, 48 Tex. 509.

<sup>3</sup> **Prior Possession Sufficient Against Wrongdoer.** — Gray v. Thompson, 5 Tex. Civ. App. 32; Alexander v. Gilliam, 39 Tex. 227; Caplen v. Drew, 54 Tex. 493; Holland v. San Antonio, (Tex. Civ. App. 1893) 23 S. W. Rep. 756 (this was an action by a tenant in possession under a lease, who was held entitled to actual damages sustained); Dickey v. Grace, (Tex. Civ. App. 1894) 25 S. W. Rep. 41; Watkins v. Smith, 91 Tex. 589; Lockett v. Glenn, (Tex. 1901) 65 S. W. Rep. 482; Estes v. Turner, 30 Tex. Civ. App. 365. See also the title TRESPASS, ante.

<sup>4</sup> Collyns v. Cain, 9 Tex. Civ. App. 193.

But in House v. Reavis, 89 Tex. 626, reversing (Tex. Civ. App. 1896) 34 S. W. Rep. 646, it was held that prior possession as against a trespasser is not overcome by proof of a grant from the state to one with whose patent the defendant does not connect.

Where the evidence was sufficient to show prior possession by the plaintiff and those through whom he claimed, and the defendant did not show title or superior right of possession, such prior possession was held sufficient to raise a presumption of title in the plaintiff and authorize a recovery. Boston v. McMenamy, 29 Tex. Civ. App. 272.

<sup>5</sup> Badger v. Lyon, 7 Ala. 564.

<sup>6</sup> Texas Tram, etc., Co. v. Gwin, 29 Tex. Civ. App. 1.

Possession under a defective title of a tract enclosed by a fence, by one who moves the fence back, without intention to abandon the rest of the tract, leaves him in constructive possession of the whole tract as against an intruder under mere color of title. Watkins v. Smith, 91 Tex. 589.

<sup>7</sup> Allen v. Boggess, 94 Tex. 83.

<sup>8</sup> See supra, this title, Definition.

**A Trustee Holding the Naked Legal Title** can sue in his own name, though the entire equitable title be in another. Aldridge v. Pardee, 24 Tex. Civ. App. 254.

**8. Action May Be Maintained upon an Equitable Title.** — Martin v. Parker, 26 Tex. 253; Easterling v. Blythe, 7 Tex. 210, 56 Am. Dec. 45; Miller v. Alexander, 8 Tex. 36; Herrmann v. Reynolds, 52 Tex. 391; Folwell v. Clifton, (Tex. Civ. App. 1894) 28 S. W. Rep. 569; Wright v. Dunn, 73 Tex. 293; Lewis v. Goguette, 3 Stew. & P. (Ala.) 184; Sloan v. Thompson, 4 Tex. Civ. App. 419; Garrett v. Lyle, (Tex. Civ. App. 1893) 23 S. W. Rep. 715; New York, etc., Land Co. v. Gardner, (Tex. Civ. App. 1894) 25 S. W. Rep. 737; O'Connor v. Vineyard, (Tex. Civ. App. 1897) 43 S. W. Rep. 55; Neyland v. Ward, 22 Tex. Civ. App. 369; Bullock v. Sprowls (Tex. Civ. App. 1899) 54 S. W. Rep. 657; Stipe v. Shirley, 27 Tex. Civ. App. 97; Craig v. Harless, (Tex. Civ. App. 1903) 76 S. W. Rep. 594.

**9. Deed to Land Not Necessary.** — Erhart v. Bass, 54 Tex. 97; Butler v. Brown, 77 Tex. 342.

**Where Legal and Equitable Title Reserved.** — A contract of sale under which the vendee went into possession, but which recited that the "legal and equitable title" was reserved



tificates on land, though no patent has been demanded, is sufficient title to support the action and will not be defeated by a plea of stale demand.<sup>1</sup>

**Legal Title as Against Equitable Title.** — But a plaintiff asserting an equitable title as against a legal title must show that the holder of the latter purchased with notice of the plaintiff's claim, or that he is not a purchaser for value.<sup>2</sup>

**One Who Has Pre-empted Land,** though his patent is not complete, has, under the Texas statute, such an equitable right as will enable him to maintain the action.<sup>3</sup>

**Plaintiff Without Legal or Equitable Title.** — The action will not lie where the plaintiff has no legal or equitable title and the defendant has the legal title.<sup>4</sup>

**5. Title by Adverse Possession.** — If the plaintiff relies on adverse possession, the full statutory period must have run before the issuing of the writ.<sup>5</sup>

**6. Undivided Interests — Co-heirs and Administrator.** — Title to an undivided interest in land, or title in common to land, will support the action, without joinder of cotenants as parties,<sup>6</sup> and if the defendant shows no title the plaintiff is entitled to recover the entire tract.<sup>7</sup> But one tenant in common cannot maintain the action against his cotenant without proving an actual

in the vendor until all the purchase money and interest was paid, was held sufficient to enable the vendee to maintain the action. *Clay County Land, etc., Co. v. Wood*, 71 Tex. 460.

**By Holders of Vendor's Lien.** — Where the grantors conveyed land in consideration of an annuity, retaining a vendor's lien, and prior to their death the grantee defaulted in a payment, the fact that the debt was barred by limitations did not prevent an action of trespass to try title being maintained by their heirs. *McRae v. Poor*, (Tex. Civ. App. 1898) 48 S. W. Rep. 47.

A vendor who reserves a vendor's lien in the deed and purchase-money note, requiring payment of interest, and whose vendee dies insolvent, can maintain trespass to try title on default in the interest, without first claiming against the vendee's estate. *Curran v. Texas Land, etc., Co.*, 24 Tex. Civ. App. 499.

And a vendor can maintain against the vendee's grantee who assumes but fails to pay the vendor's lien notes, even though the notes are barred by limitation. *Smith v. Cottingham*, 20 Tex. Civ. App. 303.

**A Transfer of a Land Certificate** prior to location and issuance of patent carries an equitable title sufficient to support an action against the locator's heirs. *Ehrenberg v. Baker*, (Tex. Civ. App. 1899) 54 S. W. Rep. 435.

**1. Duren v. Houston, etc., R. Co.**, 86 Tex. 287; *Creswell Rancho, etc., Co. v. Waldstein*, (Tex. Civ. App. 1894) 28 S. W. Rep. 260; *Threadgill v. Bickerstaff*, 87 Tex. 520; *Grant v. Hill*, (Tex. Civ. App. 1894) 30 S. W. Rep. 952.

The doctrine of limitations and laches does not apply to an equitable title where the party does not require to sue for specific performance of the agreement for a deed, so as to prevent the title from being set up as a defense. *Tompkins v. Brooks*, (Tex. Civ. App. 1897) 13 S. W. Rep. 70. See also *infra*, this title, *Defenses — Stale Demand*.

**2. Legal Title as Against Equitable Title.** — *Fordtran v. Perry*, (Tex. Civ. App. 1901) 60 S. W. Rep. 1000.

**3. Pre-emption of Land.** — *Buford v. Gray*, 51 Tex. 331.

**A Purchase by a Settler of School Lands** will give a title sufficient to maintain the action

against a mere trespasser, though it may be subject to forfeiture for failure to occupy. *Dowding v. Dittmore*, 26 Tex. Civ. App. 606.

**Under Rev. Stat. Tex. 1895, Art. 5259**, an action cannot be maintained on a right lower than that acquired by survey of as well as location on the land. *Fall v. Nations*, 17 Tex. Civ. App. 160.

**Actual Settlement of School Lands** makes a *prima facie* title. *Walker v. Marchbanks*, (Tex. Civ. App. 1903) 74 S. W. Rep. 929.

**In Alabama an Assignment of Land** by an instrument not under seal will not vest the assignee with such a title as will enable him to maintain the action. *Ansley v. Nolan*, 6 Port. (Ala.) 379.

**4. Franco-Texan Land Co. v. McCormick**, (Tex. 1893) 23 S. W. Rep. 123.

**5. Adverse Possession — Full Statutory Period Must Have Run.** — *Hood v. Palmer*, 7 Rich. L. (S. Car.) 138; *Bishop v. Lusk*, 8 Tex. Civ. App. 30. See as to constitution of title by adverse possession the title ADVERSE POSSESSION, vol. 1, p. 787.

**Adverse Possession by Plaintiff's Tenant.** — Title to land by limitation may be acquired by adverse possession of it through a tenant. The admissions of the tenant are incompetent against the landlord. *Warren v. Frederichs*, 76 Tex. 647.

**6. Undivided Interest in Land Will Support Action.** — *Roosevelt v. Davis*, 49 Tex. 463; *Guilford v. Love*, 49 Tex. 715; *Leland v. Eckert*, 81 Tex. 226; *Bonner v. Greenleaf*, 6 Ala. 411; *Hill v. Smith*, 6 Tex. Civ. App. 312; *Pendleton v. Robertson*, (Tex. Civ. App. 1895) 32 S. W. Rep. 442; *Hintze v. Krabbenschmidt*, (Tex. Civ. App. 1897) 44 S. W. Rep. 38; *Maxson v. Jennings*, 19 Tex. Civ. App. 700.

**7. May Entitle to Recovery of Whole Tract.** — *Wilcoxon v. Howard*, 26 Tex. Civ. App. 281; *El Paso v. Ft. Dearborn Nat. Bank*, (Tex. Civ. App. 1903) 71 S. W. Rep. 799.

**Proof of Title in an Undivided Interest in a Survey** will support the action for the entire survey against a stranger to the title. *Hill v. Smith*, 6 Tex. Civ. App. 312. But see *Perkins v. Davidson*, 23 Tex. Civ. App. 31, where it was held that the plaintiff owning an undivided interest must define its extent.

ouster,<sup>1</sup> and a cotenant must have his exact interest defined by the judgment.<sup>2</sup>

A Coparcener may bring the action. The widow of an intestate, without joining her coheirs,<sup>3</sup> and a purchaser from one coheir, without joining the other coheirs, may maintain the action.<sup>4</sup> A purchaser of several undivided interests, if one of the conveyances is effectual, can dispossess a trespasser showing no right.<sup>5</sup>

The Administrator of an Estate, while administration is pending, is a proper party plaintiff with the heir,<sup>6</sup> and he may sue alone without making the heirs parties.<sup>7</sup>

The Heirs Alone, it is held, cannot in such circumstances maintain the action.<sup>8</sup>

The Heir in Possession may maintain the action without obtaining administration.<sup>9</sup>

**IV. PLAINTIFF MUST ESTABLISH TITLE.** — In general, the rule is that the plaintiff must recover, if at all, upon the strength of his own, and not upon the weakness of the defendant's title.<sup>10</sup> In other words, the plaintiff, in order to recover against even a naked trespasser, must show that he is the absolute owner of the land at the time of the commencement of the suit, not only as against the defendant, but as against all other persons.<sup>11</sup> And until he makes a *prima facie* case, the defendant is not required to offer any evidence at all.<sup>12</sup> Where the plaintiff is shown to have no title he cannot recover.<sup>13</sup> The defendant may defeat the plaintiff's title by showing that it was obtained by fraud.<sup>14</sup>

**V. COMMON SOURCE OF TITLE.** — Where both parties claim title from a common source, the burden is on the plaintiff to establish a superior title.<sup>15</sup>

Where Common Source of Title Is Shown or Conceded, the plaintiff is not required to show the defendant's title and its invalidity,<sup>16</sup> and the common grantor's title

1. One Tenant in Common Against Another. — *Jones v. Perkins*, 1 Stew. (Ala.) 512; *Foster v. Foster*, 2 Stew. (Ala.) 356. See also the title JOINT TENANTS AND TENANTS IN COMMON, vol. 17, p. 646.

2. Cotenant Must Have His Interest Defined. — *Cartmell v. Gammage*, (Tex. Civ. App. 1901) 64 S. W. Rep. 315.

3. *McFadden v. Haley*, 1 Brev. (S. Car.) 96.

4. Purchaser from Coheir Without Joinder. — *Perry v. Walker*, 1 Brev. (S. Car.) 103. See also *Minor v. Powers*, (Tex. Civ. App. 1893) 24 S. W. Rep. 710.

5. Purchaser of Undivided Interest. — *Maxson v. Jennings*, 19 Tex. Civ. App. 700.

6. Administrator. — *Cassidy v. Kluge*, 73 Tex. 154.

7. Administrator May Sue Alone. — *Bogges v. Brownson*, 59 Tex. 417; *Burdett v. Haley*, 51 Tex. 540; *Shannon v. Taylor*, 16 Tex. 413.

8. Heirs Alone Cannot Sue While Administration Pending. — *Northcraft v. Oliver*, 74 Tex. 162.

9. Heir in Possession. — *Houston, etc., R. Co. v. Knapp*, 51 Tex. 569.

10. Plaintiff Must Recover on Strength of Own Title. — *Harlock v. Jackson*, Treadw. (S. Car.) 135; *Caplen v. Drew*, 54 Tex. 493; *Dalby v. Booth*, 16 Tex. 563; *Kinney v. Vinson*, 32 Tex. 126; *Toomer v. Parkey*, Treadw. (S. Car.) 323; *Hughes v. Lane*, 6 Tex. 289; *Young v. Watson*, 1 McMull. L. (S. Car.) 449; *Devine v. Keller*, 73 Tex. 364; *Linthicum v. March*, 37 Tex. 349; *Soape v. Doss*, 18 Tex. Civ. App. 649; *Willoughby v. Townsend*, 18 Tex. Civ. App. 724, *affirmed* (Tex. Civ. App. 1899) 51 S. W. Rep. 335, 93 Tex. 80; *McCoy v. Pease*, 17 Tex. Civ. App. 303; *Smith v. Rothe*, (Tex. Civ. App. 1900) 55 S. W. Rep. 754.

11. Must Show Absolute Ownership. — *Mazyck*

*v. Birt*, 2 Brev. (S. Car.) 155; *Hooper v. Hall*, 35 Tex. 82; *Tally v. Thorn*, 35 Tex. 727; *Brown v. Roberts*, 75 Tex. 103; *Simpson v. McLemore*, 8 Tex. 448; *Allen v. Worsham*, (Tex. Civ. App. 1899) 50 S. W. Rep. 157.

One Claiming as a Settler on School Land must prove that he is an actual settler in order to recover. *Renner v. Peterson*, (Tex. Civ. App. 1899) 51 S. W. Rep. 867.

12. Plaintiff Must First Make Out *Prima Facie* Case. — *Brown v. Roberts*, 75 Tex. 103; *Sims v. Randal*, 1 Brev. (S. Car.) 85; *Hill v. Grant*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1016.

Where the plaintiff admits legal title in the defendant, but avers fraud, it is not enough to prove title in himself. He must show that the defendant's title is invalid. *Bosse v. Cadwalader*, (Tex. Civ. App. 1893) 23 S. W. Rep. 260.

Actual settlement of school lands makes a *prima facie* title. *Walker v. Marchbanks*, (Tex. Civ. App. 1903) 74 S. W. Rep. 929.

13. *Jones v. Lee*, (Tex. Civ. App. 1897) 41 S. W. Rep. 195.

14. Fraud in Plaintiff's Title. — *Price v. M'Gee*, 1 Brev. (S. Car.) 373; *McKamey v. Thorp*, 61 Tex. 648.

15. Common Source of Title. — *Parker v. Campbell*, (Tex. Civ. App. 1901) 65 S. W. Rep. 484.

Where the court found that the parties claimed from a common source and that the defendants were the innocent purchasers without notice of a deed to the plaintiff, a judgment for the defendants was justified. *Conner v. Downs*, (Tex. Civ. App. 1903) 75 S. W. Rep. 335.

16. Where Common Source Shown or Conceded. — *Simmons Hardware Co. v. Davis*, 87 Tex. 146, *reversing* (Tex. Civ. App. 1894) 27 S. W. Rep. 426.



will not be inquired into.<sup>1</sup> The plaintiff will not be nonsuited if he shows a claim of title by the defendant and himself from a common source; beyond that he need not go, but the defendant is not thereby estopped from showing that he had acquired a better title than the common origin,<sup>2</sup> or from proving a superior outstanding title, with which he is not connected, provided it never vested in the common source.<sup>3</sup>

**VI. DEFENSES — 1. Superior Outstanding Title.** — When the plaintiff shows title, the defendant not in possession may defeat recovery by showing a superior outstanding title in himself or in another.<sup>4</sup> Although in cases of an outstanding equity the defendant must connect himself with the title, it is not so in the case of outstanding legal title; with such the defendant does not need to connect.<sup>5</sup> A defendant cannot show paramount title in another to defeat the purchase at a sheriff's sale of his own title.<sup>6</sup>

**2. Outstanding Equity.** — An outstanding equity in the land is no defense unless a connection by the defendant with such equity be shown.<sup>7</sup> An equi-

1. *Byne v. Wise*, (Tex. Civ. App. 1895) 31 S. W. Rep. 1069.

2. **Plaintiff Need Not Go Beyond Common Source** — *Martin v. Ranlett*, 5 Rich. L. (S. Car.) 541, 57 Am. Dec. 770; *Linthicum v. March*, 37 Tex. 349; *Wade v. Boyd*, 24 Tex. Civ. App. 492.

3. **Superior Outstanding Title in Stranger.** — *Rice v. St. Louis, etc., Co.*, 87 Tex. 90, 47 Am. St. Rep. 72, *overruling* 6 Tex. Civ. App. 355; *Smith v. Davis*, 18 Tex. Civ. App. 563; *Ferguson v. Ricketts*, 93 Tex. 565.

A defendant who claims title through the same person as the plaintiff is not bound to him as a common source, where he also claims title independent of such source. *Mayfield v. Robinson*, 22 Tex. Civ. App. 385.

It was held that where the parties claim under a common source, the defendant cannot defeat the title under which he so claims by showing a superior title in a stranger, with which he does not connect. *Pfouts v. Thompson*, (Tex. Civ. App. 1894) 27 S. W. Rep. 904; *Easterwood v. Dunn*, 19 Tex. Civ. App. 320.

And the defendants cannot avail themselves of any benefit from a deed from one of several plaintiffs, who are tenants in common, to a third person, without connecting themselves with such title. *Hintze v. Krabbenschmidt*, (Tex. Civ. App. 1897) 44 S. W. Rep. 38.

In *Burns v. Goff*, 79 Tex. 239, the opinion was expressed that the rule of common source of title cannot be defeated under the statute now in force. Rev. Stat. Tex. 1879, art. 4802.

Proof of mere possession by the defendant at the time of receiving conveyances from the common source is insufficient to show title superior to the common source to defeat recovery by one showing common source and superior title deraigned thereunder. *Gordon v. Hall*, 29 Tex. Civ. App. 230.

It is not enough for the defendant to prove that previous to the common source a third party held the title. He must show that the same party subsequently conveyed the title which the common source claimed and attempted to convey. *Gann v. Roberts*, (Tex. Civ. App. 1903) 74 S. W. Rep. 950.

**What Constitutes Common Source of Title.** — Where one plaintiff claims as heir of T., and the other as grantee of other heirs, and the defendant, while in possession, received a deed from the grantee of T.'s executor, and no other

derainment of the defendant's title is shown, the parties will be held to claim under T. as a common source of title. *Gorden v. Hall*, 29 Tex. Civ. App. 230.

4. **Superior Outstanding Title.** — *Hallett v. Es-lava*, 2 Stew. (Ala.) 115; *Jones v. Perkins*, 1 Stew. (Ala.) 512; *Mazyck v. Birt*, 2 Brev. (S. Car.) 155; *Bosse v. Cadwallader*, (Tex. Civ. App. 1893) 23 S. W. Rep. 260; *Riddle v. Bick-erstaff*, 50 Tex. 155; *Lemberg v. Cabaniss*, 75 Tex. 228; *Adams v. House*, 61 Tex. 639; *Capp v. Terry*, 75 Tex. 391.

5. **Defendant Need Not Connect with Legal Title.** — *Pool v. Unknown Heirs*, (Tex. Civ. App. 1899) 49 S. W. Rep. 923; *Lockwood v. Ogden*, (Tex. Civ. App. 1899) 50 S. W. Rep. 1077; *Mayer v. Templeton*, (Tex. Civ. App. 1899) 53 S. W. Rep. 68; *Meyer v. Hale*, (Tex. Civ. App. 1893) 23 S. W. Rep. 990; *Dupree v. Frank*, (Tex. Civ. App. 1897) 39 S. W. Rep. 988; *Tenzler v. Tyrrell*, (Tex. Civ. App. 1903) 75 S. W. Rep. 57.

The title which vested in an assignee in a bankruptcy, where the proceedings had been closed and the property had reverted to the bankrupt, cannot be used as an outstanding title to defeat the recovery of that property in an action by the bankrupt's heirs. *Herndon v. Davenport*, 75 Tex. 462.

6. *McElwee v. Beason*, 2 Rich. L. (S. Car.) 26; *Sumner v. Palmer*, 10 Rich. L. (S. Car.) 38; *O'Neal v. Duncan*, 4 McCord L. (S. Car.) 246.

7. **Defendant Must Connect with Outstanding Equity.** — *Fitch v. Boyer*, 51 Tex. 336; *Shields v. Hunt*, 45 Tex. 424; *Johnson v. Timmons*, 50 Tex. 521; *Goode v. Jasper*, 71 Tex. 48; *Tapp v. Corey*, 64 Tex. 594; *Meyer v. Hale*, (Tex. Civ. App. 1893) 23 S. W. Rep. 990; *West v. Keeton*, 17 Tex. Civ. App. 139; *Owens v. New York, etc., Land Co.*, (Tex. Civ. App. 1898) 45 S. W. Rep. 601. *Contra*, *Capp v. Terry*, 75 Tex. 391.

**Exceptions — Undivided Interest.** — Where the equitable title relates to the whole of a piece of land, and the defendant owns an undivided interest in it, he is so connected with the title that he is entitled to the full protection of it, and to defeat a recovery of any part of the land by the plaintiff. In such a case the doctrine in the text is held to have no application. *Robertson v. Du Bose*, 76 Tex. 1.



table title cannot be set up by the defendant against a legal title in the plaintiff.<sup>1</sup>

**3. Stale Demand.** — Stale demand is no defense by a naked trespasser against an action based on an equitable title,<sup>2</sup> and this applies *a fortiori* to an action based on a legal title,<sup>3</sup> and a defense of stale demand by one not connecting with the legal title and not showing possession will not defeat recovery by the holder of the equitable title.<sup>4</sup> Where one equitable title is asserted against another, the plea of stale demand is not available as a defense, and lapse of time will not defeat the plaintiff's title, unless the defendant has acquired adverse prescriptive possession under the statute of limitations.<sup>5</sup> The doctrines of limitations and laches do not apply to an equitable title where the party does not require to sue for specific performance of the agreement for a deed, so as to prevent the title from being set up as a defense.<sup>6</sup>

**4. Possession.** — Peaceable Possession by the Defendant at the time the suit was brought is a sufficient defense, until the plaintiff shows a sufficient title.<sup>7</sup>

**Adverse and Notorious Possession by a Stranger** will defeat the plaintiff's title, even though it has been abandoned,<sup>8</sup> but the length of time of the abandonment will be taken into consideration in determining the character of such possession.<sup>9</sup>

**Title from State.** — Mere prior possession of land in a defendant is alone insufficient to support a judgment against a plaintiff showing title from the state.<sup>10</sup>

**5. Landlord Defending Tenant's Title.** — A landlord, with leave of the court, may come in as a codefendant with his tenant, to protect his title,<sup>11</sup> but the court has no authority to dismiss the case against the tenant without leave of the plaintiff.<sup>12</sup> Where the landlord comes in to defend the title it is enough for the plaintiff to show that he is not the true owner, to entitle him to a verdict.<sup>13</sup> A codefendant, brought in to defend his tenant's title against a plaintiff who purchased at a sheriff's sale under execution against the tenant, will defeat the plaintiff's recovery by showing a title paramount to that of the tenant.<sup>14</sup>

**6. Undivided Interests.** — A tenant in common, being no trespasser, can defend his cotenant's title as well as his own.<sup>15</sup>

**VII. EVIDENCE — 1. Admissibility.** — The admissibility of evidence in trespass to try title is, in general, governed by the usual rules of evidence. A few examples of what deeds are admissible or not admissible in evidence are given in the footnote.<sup>16</sup>

**1. Equitable Title No Defense Against Legal Title.** — *Williman v. Robertson*, 1 Brev. (S. Car.) 201; *Yellow Pine Lumber Co. v. Carroll*, 76 Tex. 135. *Contra*, *Neil v. Keese*, 5 Tex. 23, 51 Am. Dec. 746; *Robertson v. Du Bose*, 76 Tex. 1.

**2. Stale Demand — No Defense by Naked Trespasser.** — *Schleicher v. Gutbrod*, (Tex. Civ. App. 1896) 34 S. W. Rep. 657; *Karnes v. Butler*, (Tex. Civ. App. 1901) 62 S. W. Rep. 950.

**3. Texas Tram, etc., Co. v. Gwin, (Tex. Civ. App. 1899) 52 S. W. Rep. 110; *Tinsley v. Magnolia Park Co.*, (Tex. Civ. App. 1900) 59 S. W. Rep. 629.**

**4. By One Not in Possession Not Connecting with Legal Title.** — *Edwards v. Gill*, 5 Tex. Civ. App. 203; *McCoy v. Pease*, 17 Tex. Civ. App. 303.

**5. Stipe v. Shirley, 27 Tex. Civ. App. 97.**

**6. Tompkins v. Broocks, (Tex. Civ. App. 1897) 43 S. W. Rep. 70.**

**7. Peaceable Possession.** — *Linthicum v. March*, 37 Tex. 349; *Hughes v. Lane*, 6 Tex. 291; *Dalby v. Booth*, 16 Tex. 563.

**8. Adverse Possession by Stranger.** — *Mazyck*

*v. Birt*, 2 Brev. (S. Car.) 155. See the title **ADVERSE POSSESSION**, vol. 1, p. 787.

**9. Smoke v. Smoke, 10 Rich. L. (S. Car.) 433. Where the plaintiffs establish superior title to half the land, they are still bound by limitation from recovery where the defendants have had actual possession of part of the land in controversy for more than ten years, claiming the whole under a bond of title. *Ellis v. Le Bow*, 66 Tex. 532.**

**10. Where Plaintiff Shows Title from State.** — *Yarbrough v. De Martin*, 28 Tex. Civ. App. 276; *Corrigan v. Fitzsimmons*, (Tex. Civ. App. 1903) 76 S. W. Rep. 68.

**11. Evans v. Hinds, 2 Hill L. (S. Car.) 527; *Crosby v. Floyd*, 2 Bailey L. (S. Car.) 116.**

**12. Evans v. Hinds, 2 Hill L. (S. Car.) 527.**

**13. Goudelock v. Massey, 2 Strobb. L. (S. Car.) 187.**

**14. Pope v. Clarke, 2 Strobb. L. (S. Car.) 361.**

**15. Linnartz v. McCulloch, (Tex. Civ. App. 1897) 27 S. W. Rep. 279.**

**16. Deeds Admissible or Not Admissible.** — A deed which is unquestionably good as to some

**2. Burden of Proof.** — If the plaintiff makes out a *prima facie* case, the burden of showing a superior title or that the plaintiff's title is invalid is on the defendant.<sup>1</sup>

Where the Defendant Disclaims Title to the land and claims an easement over it, the plaintiff need not prove his title, the defendant thereby assuming the burden of proof of his easement.<sup>2</sup>

Where the Defendant Is in Possession claiming land, the burden is on the plaintiff to show that it is within the boundaries of his patent.<sup>3</sup>

**3. Weight and Sufficiency.** — The weight and sufficiency of the evidence in each particular case depend upon the facts submitted, and it is therefore impossible to lay down any strict rule governing the value of the testimony, which is usually a question for the jury.<sup>4</sup>

**VIII. MEASURE OF DAMAGES — 1. Under Statute.** — In *Texas* it is provided by statute that damages shall not be assessed thereunder for use and occupation, or for injuries done over two years prior to the commencement of the suit.<sup>5</sup>

**2. At Common Law.** — At common law, damages to the extent of the mesne profits are recoverable<sup>6</sup> down to the time of the trial.<sup>7</sup> The *criteria* of damages in the action of trespass for mesne profits are to be taken, and these are not increased or diminished by the profit acquired by the defendant from his occupancy.<sup>8</sup>

**3. Period of Defendant's Possession Must Be Proved.** — Damages for use and occupation and rent cannot be recovered merely on evidence of, or defendant's

of the grantees, parties to the action, is admissible, though it may not be good as to others, also parties to the action. *Lindsay v. Hoke*, 21 Ala. 542.

A deed executed after the commencement of the suit is admissible to show a ratification by the grantor of the conduct of another in executing a prior deed as his attorney in fact. *McCulloch County Land, etc., Co. v. Whitefort*, 21 Tex. Civ. App. 314.

A deed, though ineffectual, is admissible in aid of the description in a subsequent deed superseding it, and conveying and confirming the title. *Arnall v. Newcomb*, 29 Tex. Civ. App. 521.

A void deed under which the defendants claim may be put in evidence to show common source of title. *Wren v. Howland*, (Tex. Civ. App. 1903) 75 S. W. Rep. 894.

**Acknowledgment of Deed After Suit Commenced.**

— The fact that a deed relied on by the plaintiff was not acknowledged till after the suit was brought does not make it an after-acquired title. *Walker v. Downs*, (Tex. Civ. App. 1901) 61 S. W. Rep. 725.

**A Deed Which Is Not Connected with the Source** through which a party claims title is not admissible in evidence in support of such title. *Hawley v. Brooks*, (Tex. Civ. App. 1897) 39 S. W. Rep. 316.

**A Judgment Vesting Title in the Plaintiff** is admissible against the defendant as a muniment of title though the latter was not a party to the action. *Ellis v. Le Bow*, 96 Tex. 532.

**A Judgment Passing the Title** to land of the defendants to the plaintiff is ineffectual against persons to whom, before the commencement of the action, some of the defendants have conveyed their interest. *Ellis v. Le Bow*, 96 Tex. 532.

**Common Source of Title** may be shown by the

plaintiff by introducing in evidence the defendant's abstract of title filed in the court, the filing being equivalent to an admission by the defendant that he claims title under the instruments named in the abstract. *Gonzales v. Batts*, 20 Tex. Civ. App. 421.

**1. Burden of Proof.** — *Smith v. Gillum*, 80 Tex. 120; *Burk v. Turner*, 79 Tex. 276.

**2. When Defendant Disclaims Title.** — *San Antonio v. Ostrom*, 18 Tex. Civ. App. 678.

**3. Where Defendants in Possession.** — *Clawson v. Williams*, 27 Tex. Civ. App. 130.

**4. Weight and Sufficiency of Evidence.** — **Evidence of Possession** by the defendant under an apparently valid purchase from the state is sufficient to support a verdict in his favor. *Payton v. Love*, 20 Tex. Civ. App. 613.

**Evidence Necessary to Found Judgment for Defendant.** — A judgment in favor of the defendant based on any evidence which does not show title in him deraigned from the sovereignty of the soil, or that he claims in common source with the plaintiff, or, at least, had prior possession, is erroneous. *Clements v. Clements*, 18 Tex. Civ. App. 617.

**5. Measure of Damages — Under Statute.** — *Rev. Stat. Tex.*, art. 5273.

**6. Measure of Damages — At Common Law.** — *Avent v. Read*, 2 Port. (Ala.) 480, 27 Am. Dec. 663; *Duff v. Hutson*, 2 Bailey L. (S. Car.) 215.

**7. Damages to Time of Trial Reasonable.** — *Masters v. Eastis*, 3 Port. (Ala.) 368; *Shumake v. Nelms*, 25 Ala. 126.

**8. Criteria of Damages — As in Action for Mesne Profits.** — *Bullock v. Wilson*, 3 Port. (Ala.) 382.

**The Purchase Price with Interest Thereon** to the time of judgment is the measure of damages in an action for breach of warranty where the plaintiff has not been in possession. *Johns v. Hardin*, 81 Tex. 37.

admission of, possession and rental. The period of possession must be alleged and proved.<sup>1</sup>

**4. Claim for Improvements by Defendant.** — The defendant may, under the *Texas* statute, claim for any improvements made while he was a possessor in good faith,<sup>2</sup> but not for improvements on the public domain.<sup>3</sup>

**Proof Required.** — He must prove the value of the land with and without the improvements, as required by the statute.<sup>4</sup> He must prove that he believed he had a good title.<sup>5</sup> He will not recover, where he purchased from one having no title to the land, knowing at the time of the plaintiff's claim.<sup>6</sup> Where it is conceded that the improvements were made against the plaintiff's protest, a decision in his favor is conclusive against the plea of good faith.<sup>7</sup> It cannot be held, as a matter of law, that the defendant did not make his improvements in good faith, merely because he held under a void tax title.<sup>8</sup> But if his title is proved to be void and he was notified of the plaintiff's right, before making the improvements, his claim will not be allowed.<sup>9</sup>

**Recovery for Improvements Not Restricted to a Purchaser.** — The recovery for improvements made is not restricted to one claiming title by purchase, and is available to an heir of the grantee, holding possession in good faith.<sup>10</sup>

**Right to Value of Improvements Independent of Statute.** — One has an equitable right, independent of the statute, to the value of improvements made in good faith.<sup>11</sup>

**Where the Defendant's Improvements Are Not Made in Good Faith,** the plaintiff should be allowed the rental value, inclusive of the improvements, instead of rent for the land alone without reference to improvements.<sup>12</sup>

**Where Improvements Made in Good Faith.** — This rule has been held to apply even where the improvements were made in good faith.<sup>13</sup>

**IX. JUDGMENT AND ITS EFFECT.** — The judgment has no greater effect upon the parties' rights than if it had been rendered in ejectment.<sup>14</sup>

**A Defendant Who Is Dismissed from the Suit** is not bound by a judgment rendered against the other defendants, although they are his tenants,<sup>15</sup> and a discontinuance or abandonment by one of two plaintiffs does not preclude recovery by the other.<sup>16</sup>

**A Disclaimer by a Defendant** does not entitle him to a general judgment in his favor, a trespass being proven against him.<sup>17</sup>

**1. Plaintiff Must Prove Period of Possession.** — *Parsons v. Hart*, 19 Tex. Civ. App. 300; *Hart v. Meredith*, 27 Tex. Civ. App. 271.

**2. Defendant May Claim for Improvements Made in Good Faith.** — *Devine v. Keller*, 73 Tex. 364; *Roche v. Lovell*, 74 Tex. 191; *Franklin v. Campbell*, 5 Tex. Civ. App. 174; *Robert v. Ezell*, 11 Tex. Civ. App. 176; *Bassett v. Sherrod*, 13 Tex. Civ. App. 327; *Ferguson v. Cochran*, (Tex. Civ. App. 1898) 45 S. W. Rep. 30; *Boyd v. Miller*, 22 Tex. Civ. App. 165; *Rowan v. Rainey*, 25 Tex. Civ. App. 593.

**3. No Claim for Improvements on Public Domain.** — *Finks v. Cox*, (Tex. Civ. App. 1895) 30 S. W. Rep. 512.

**Where a Parol Gift of Homestead Land Proved to Be Void,** a purchaser from the donee in good faith was held, on a recovery by the donor, to be entitled to the value of his improvements, and where the land had no actual rental value without the improvements, the statute (Rev. Stat. Tex., art. 5278) furnishes no reason for imposing liability for rent on the defendant. *Morris v. Wells*, 27 Tex. Civ. App. 363.

**4. Must Prove Value as Required by Statute.** — *McCown v. McCafferty*, 14 Tex. Civ. App. 77.

**5. Settle-gast v. O'Donnell**, 16 Tex. Civ. App. 56. The defendant cannot recover, in a suit by a railroad company, for the removal of struc-

tures from its right of way. *Olive v. Sabine*, etc., R. Co., 11 Tex. Civ. App. 208.

**6. Greenwood v. McLeary**, (Tex. Civ. App. 1894) 25 S. W. Rep. 708.

**7. Improvements Made Against Plaintiff's Protest.** — *Bell v. Wright*, 94 Tex. 407; *Wilcoxon v. Howard*, 26 Tex. Civ. App. 281.

**8. Netzorg v. Green**, 26 Tex. Civ. App. 119.

**9. Texas, etc., R. Co. v. Barber**, (Tex. Civ. App. 1902) 71 S. W. Rep. 393.

**10. Recovery Not Restricted to Purchaser.** — *Rowan v. Rainey*, 25 Tex. Civ. App. 593.

**11. Right Independent of Statute.** — *Wood v. Cahill*, 21 Tex. Civ. App. 38.

**12. Where Improvements Not Made in Good Faith.** — *Gilley v. Williams*, (Tex. Civ. App. 1897) 43 S. W. Rep. 1094.

**13. Where Improvements Made in Good Faith.** — *Evetts v. Tendick*, 44 Tex. 570.

**14. Effect of Judgment as in Ejectment.** — *Camp v. Forrest*, 13 Ala. 114; *Scott v. Rhea*, 5 Tex. 258. See the title EJECTMENT, vol. 10, p. 467.

**15. Does Not Bind Defendant Dismissed from Suit** — *Hart v. Meredith*, 27 Tex. Civ. App. 271.

**16. Discontinuance by One Plaintiff Does Not Affect Others.** — *Biencourt v. Parker*, 27 Tex. 558.

**17. Warnell v. Moore**, 10 Tex. 235.



**TRESPASS VI ET ARMIS.** — See the title *TRESPASS, ante*.

**TRIAL.** (See also the titles CONSTITUTIONAL LAW, vol. 6, pp. 962, 993 *et seq.*; DUE PROCESS OF LAW, vol. 10, p. 287; FINAL JUDGMENTS AND DECREES, vol. 13, p. 23; QUESTIONS OF LAW AND FACT, vol. 23, p. 543; and see HEARING, vol. 15, p. 308; NEW TRIAL, vol. 21, p. 534. See further ENCYCLOPÆDIA OF PLEADING AND PRACTICE, titles REMOVAL OF CAUSES, vol. 18, pp. 250, 285; TRIAL, vol. 21, p. 953.) — In a general sense the term “trial” means an investigation and decision of the matters in issue between opposing parties before a competent tribunal.<sup>1</sup> In a more restricted sense the term means the investigation of the matters of fact in issue.<sup>2</sup> In its broad sense it includes all the steps taken in a cause, from its submission to the court or jury to the rendition of the judgment.<sup>3</sup>

1. **Broad Sense of Term.** — *Byers v. State*, 105 Ala. 31; *Castellaw v. Blanchard*, 106 Ga. 97; *Jenks v. State*, 39 Ind. 1; *Hunnel v. State*, 86 Ind. 431; *State v. Gardner*, 8 Ind. App. 440; *State v. Nash*, 7 Iowa 347. See also *Crossland v. Admire*, 118 Mo. 89; *Bullard v. Kuhl*, 54 Wis. 544.

A *trial* is the determination of the issues of the action. *Galpin v. Critchlow*, 112 Mass. 339, 13 Am. L. Reg. N. S. 137.

In *Spencer v. Thistle*, 13 Neb. 229, it was said: “A *trial* is a judicial examination of the issues in an action.” To the same effect, see *Tingley v. Dolby*, 13 Neb. 374; *Vermilyea v. Palmer*, 52 N. Y. 471; *Swan Tp. v. McClannahan*, 53 Ohio St. 403.

A *trial* means a judicial hearing upon the issues in a case for the purpose of determining such issues. *State v. Bergman*, 37 Minn. 408.

A *trial* is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue. *Anderson v. Pennie*, 32 Cal. 266; *Tregambo v. Comanche Mill, etc., Co.*, 57 Cal. 505; *Finn v. Spagnoli*, 67 Cal. 330; *Schwoerer v. Christopher*, 64 Mo. App. 81; *Crossland v. Admire*, 118 Mo. 87; *Grand Forks Second Nat. Bank v. St. Thomas First Nat. Bank*, 8 N. Dak. 50; *Bullard v. Kuhl*, 54 Wis. 544.

**Previously Formed Opinion.** — In *People v. Plummer*, 9 Cal. 310, it was said: “The very meaning of the word *trial*, which is an ‘examination by a test,’ shows that the triers are to act not upon previously formed opinions, but upon inquiry, first instituted and carried on before them.” Quoting 2 *Graham and Waterman on New Trials* 374.

**Term Applicable to Determination of Issues of Law as Well as of Fact.** — A *trial* is a judicial determination of the issues in an action, whether they are issues of law or of fact. *Meyer v. Norton*, 9 Fed. Rep. 437; *Miller v. Tobin*, 18 Fed. Rep. 609; *Boyd v. Gill*, 19 Fed. Rep. 145; *Babbitt v. Clark*, 103 U. S. 606; *Harris v. San Francisco Sugar Refining Co.*, 41 Cal. 404; *Redington v. Cornwell*, 90 Cal. 49; *Jenks v. State*, 39 Ind. 1; *Mathews v. Clayton County*, 79 Iowa 510; *State v. Kendall*, 56 Kan. 238; *National Bank v. Bryant*, 13 Bush (Ky.) 423; *Vertrees v. Newport News*, 95 Ky. 314; *State v. Brown*, 63 Mo. 439; *State v. Missouri Pac. R. Co.*, 149 Mo. 104; *Coatney v. St. Louis, etc., R. Co.*, 151 Mo. 35; *Place v. Butter-nuts Woolen, etc., Mfg. Co.* (Supm. Ct. Spec. T.) 28 How. Pr. (N. Y.) 184.

A *trial* means “a judicial examination of an issue of law or fact raised by demurrer or plea.” *Mathews v. Clayton County*, 79 Iowa 512. And see *infra, Demurrer*.

2. **Confined to Investigation of Matters of Fact.** — *King v. Sears*, 91 Ga. 577; *Castellaw v. Blanchard*, 106 Ga. 97; *Jenks v. State*, 39 Ind. 1; *State v. Nash*, 7 Iowa 347.

**Bouvie's Definition.** — *Bouvier* defines *trial* as “the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue.” *Bouv. L. Dict., quoted in Crossland v. Admire*, 118 Mo. 89. See also *Com. v. Tack*, 3 Brews. (Pa.) 536.

**Blackstone's Definition.** — A *trial* is defined by *Blackstone* to be “the examination of the matter of fact in issue.” 3 *Black. Com.* 330. See also *And. Steph. Pl.*, § 86; *Lewis v. Smythe*, 2 Woods (U. S.) 118; *U. S. v. Curtis*, 4 Mason (U. S.) 232; *Meyer v. Norton*, 9 Fed. Rep. 437; *Reed v. State*, 147 Ind. 41; *State v. Spores*, 4 Oregon 199; *Deane v. Willamette Bridge R. Co.*, 22 Oregon 167.

**Sickness of Juror.** — A statute provided that if, before the conclusion of a *trial*, a juror became sick so as to be unable to perform his duty, the court might order him to be discharged, and in that case a new juror might be sworn and the *trial* might begin anew. In construing this provision, in *State v. Hazledahl*, 2 N. Dak. 524, the court said: “We think that generally where the word *trial* is used in connection with the jury it means the examination of the issue of fact. The sequence of the wording of the statute would indicate that it is so used. It says: ‘A new juror may be sworn, and the *trial* begin anew.’ The *trial* begins anew after the new juror is sworn.”

3. **Trial Includes All Steps Taken in Cause.** *Castellaw v. Blanchard*, 106 Ga. 97; *Jenks v. State*, 39 Ind. 1; *Bruce v. State*, 87 Ind. 450; *Sturgeon v. Gray*, 96 Ind. 166; *Barnaby v. State*, 106 Ind. 539; *Hotsenpiller v. State*, 144 Ind. 9; *Nichols v. State*, 28 Ind. App. 674.

The word *trial* has been held to “include all the steps taken in a case prior to final judgment.” *Grand Forks Second Nat. Bank v. St. Thomas First Nat. Bank*, 8 N. Dak. 55.

**Beginning of Trial.** — In *Lipscomb v. State*, 76 Miss. 253, it was held that a *trial* is commenced “when all dilatory proceedings have been disposed of, and when all ordinary efforts the object of which is to prevent a *trial* have been ineffectually exhausted, and the cause is called for *trial*, and nothing remains to be done

**Trial by Jury.** — A trial by jury implies the proper selection and swearing

except to proceed therein." *Compare* State v. Kent, 5 N. Dak. 516.

It has been held that the *trial* does not begin until the panel is completed and the jury sworn. *Hunnell v. State*, 86 Ind. 431; *State v. Hazledahl*, 2 N. Dak. 521; *Wagner v. State*, 42 Ohio St. 537; *Cregier v. Bunton*, 2 Strobb. L. (S. Car.) 503.

But in *Ward v. Territory*, 8 Okla. 25, it was said: "A *trial* in a criminal case begins at the commencement of the impaneling of the jury, and is ended when the jury is discharged." See *infra*, this note, *Criminal Cases; Preliminary Steps, Questions, Etc.; Selecting and Impaneling Jury*.

**End of Trial.** — In *Hill v. State*, 41 Tex. 253, it was said: "The *trial* may well be held incomplete until all the issues of law as well as of fact have been determined and the final judgment entered."

*Trial* held to end with the charge of the court. See *State v. Hazledahl*, 2 N. Dak. 521.

*Trial* held to be terminated by the verdict of the jury or the finding of the court. See *Hotsenpiller v. State*, 144 Ind. 9; *Wagner v. State*, 42 Ohio St. 537. See *infra*, this note, *Criminal Cases; Verdict*.

**Agreed Case.** — Where a case was submitted to the court upon an agreed statement of facts, it was held that there was no *trial* of a question of fact by the court. *Owensboro v. Weir*, 95 Ky. 158.

**Arbitration.** — A hearing before an arbitrator has been held not to be a *trial*. *Hall v. Brand*, 12 Q. B. D. 39.

**Same — Compulsory Arbitration.** — So it has been held that a *trial* before arbitrators on a compulsory rule of reference under the *Pennsylvania* statute was not a *trial*. *Thorne v. Towanda Tanning Co.*, 15 Fed. Rep. 289.

**Arraignment.** — See *infra*, this note, *Preliminary Steps, Questions, Etc.*

**Arrest of Judgment.** — The word *trial* has been held not to refer to a rehearing on a motion in arrest of judgment. *Ward v. Territory*, 8 Okla. 12.

**Assessment of Damages.** — An inquiry of damages after interlocutory judgment has been held not to be a *trial*. *Crossland v. Admire*, 118 Mo. 87; *Schwoerer v. Christophel*, 64 Mo. App. 81.

Where the defendants suffered a default in a cause to recover damages for usury, and upon demand by the plaintiff the court ordered the clerk to call a jury to assess damages, it was held that the proceedings were not a *trial*. *Deane v. Willamette Bridge R. Co.*, 22 Oregon 167.

But in *Anderson v. Marriott*, 14 U. C. Q. B. 161, proceedings for the assessment of damages were held to be a *trial*.

**Auditor.** — See *infra*, this note, *Master — Auditor — Commissioner*.

**Commissioners.** — See *infra*, this note, *Master — Auditor — Commissioner*.

**Compromise.** — That a compromise is not a *trial*, see *Com. v. Tack*, 3 Brews. (Pa.) 536.

**Criminal Cases.** — In *State v. Spotted Hawk*, 22 Mont. 45, it was said: "The word *trial*,

when used in connection with criminal proceedings, means proceedings in open court, after the pleadings are finished and it is otherwise ready, down to and including the rendition of the verdict. It includes all those steps in the *trial* during which the defendant may be of assistance to his counsel in conducting the proceedings." To the same effect, see *State v. Little Whirlwind*, 22 Mont. 425.

The word *trial*, in its comprehensive sense, embraces all the proceedings down to the acquittal or conviction of the party. *Hirschfelder v. State*, 19 Ala. 538. And see *supra*, this note, *Beginning of Trial; End of Trial*.

A statute provided that in criminal cases the accused should be present during *trial*. In construing this provision in *Sweeden v. State*, 19 Ark. 209, the court said: "The phrase 'during the *trial*,' used in the section of law we have quoted, means that it is necessary that the defendant should be present in court at each and every time, and on all occasions, at which and when any substantive step is taken by the court in his cause after the indictment is presented by the grand jury to the court up to and until final judgment (including that also) is pronounced in his cause by the court, and even afterwards, if any subsequent step should be taken by his counsel." See also the title CONSTITUTIONAL LAW, vol. 6, p. 993.

**Trial in Sense of Prosecution.** — See *Hirschfelder v. State*, 19 Ala. 534.

**Default.** — Where there is a judgment by default it is generally held that there is no *trial*. *Shaw v. Kendig*, 57 Iowa 390; *Myrick v. Pierce*, 5 Minn. 65; *Anderson v. Marriott*, 14 U. C. Q. B. 161.

In *Crossland v. Admire*, 118 Mo. 91, it was said: "It will be seen by every definition that a *trial* is had for the determination of issues. Issues are made under the code, as well as at common law, by the pleadings. In case of default in pleading there can be no issues to be tried, and no *trial* can be had within the meaning of the term as given in the books, and as understood by the profession." But *compare* *McCallon v. Waterman*, 1 Flipp. (U. S.) 651.

The hearing of an application to set aside a default entered against the defendant has been held to be a *trial*. *Tregambo v. Comanche Mill, etc., Co.*, 57 Cal. 501.

**Default — Demurrer.** — Where the issue raised by a demurrer was noticed for a hearing and the demurrant defaulted on the demurrer, this was held to constitute a *trial*. *Bright v. Milwaukee, etc., R. Co.*, (Supm. Ct. Spec. T.) 1 Abb. N. Cas. (N. Y.) 14.

**Demurrer.** — It has been held that a hearing upon a demurrer to the plaintiff's pleading on the ground that it does not state facts sufficient to show a cause of action is a *trial*. *Langdon v. Fogg*, 18 Fed. Rep. 5; *Boyd v. Gill*, 10 Fed. Rep. 145; *Wilson v. Rock Island Paper Co.*, 20 Fed. Rep. 705; *Lookout Mountain R. Co. v. Houston*, 32 Fed. Rep. 711; *Hobart v. Illinois Cent. R. Co.*, 81 Fed. Rep. 5; *Maher v. Tower Hotel Co.*, 94 Fed. Rep. 225; *Alley v. Nott*, 111 U. S. 472; *Scharff v. Levy*, 112 U.

of the jury; the examination of witnesses, or the submission of documentary

S. 711; *Gregory v. Hartley*, 113 U. S. 742; *Laidley v. Huntington*, 121 U. S. 179; *St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412; *Miller v. Kent*, (Supm. Ct.) 60 How. Pr. (N. Y.) 451.

And that a *trial* includes a hearing on demurrer, see *Langdon v. Fogg*, 18 Fed. Rep. 5; *Miller v. Tobin*, 18 Fed. Rep. 609; *Goldtree v. Spreckels*, 135 Cal. 666.

In *Meyer v. Norton*, 9 Fed. Rep. 433, a demurrer was entered to the defendant's answer, and judgment was given sustaining the demurrer and dismissing the defendant's cross-petition. It was held that these proceedings constituted a *trial*.

But where upon a hearing the demurrer was overruled, it was held not to be a *trial*. *Miller v. Tobin*, 18 Fed. Rep. 609; *Hone v. Dillon*, 29 Fed. Rep. 465.

And where a demurrer is special and addressed to merely formal defects, the proceedings have been held not to constitute a *trial*. *Richards v. Rock Rapids*, 31 Fed. Rep. 507. See also *Boyd v. Gill*, 19 Fed. Rep. 150.

But in *State v. Spotted Hawk*, 22 Mont. 45, it was said: "Touching the absence of the defendant from the court room during the process of the argument upon the demurrer and the motion to set aside the information, we think that this was in no sense of the word absence from court during *trial*."

And a demurrer to an information was held to be no part of the *trial* in *Miller v. State*, 29 Neb. 437.

**Disagreement.** — Where a case is submitted to the jury and there is a disagreement, it has been held that there has been a *trial* before a jury. *Ravesies v. U. S.*, 21 Ct. Cl. 243; *Van Hoorebeke v. U. S.*, 46 Fed. Rep. 456; *Hillborn v. U. S.*, 27 Ct. Cl. 547; *Weed v. U. S.*, 82 Fed. Rep. 417. See *infra*, this note, *Mistrial*.

**Discontinuance.** — Where, after the summons was served, and on the return day, without any other proceedings, the plaintiff directed the justice to enter a judgment of discontinuance, no *trial* was had or entered upon. *Anderson v. Pennie*, 32 Cal. 265.

**Finding by Court with Consent of Defendant.** — The defendant, being arraigned for plea, pleaded that he was not guilty as charged, but afterwards by counsel consented that the court, without the introduction of any evidence or hearing of any testimony, should find him guilty as charged. It was held that there had been a *trial* within the statute providing for appeals within ten days after *trial*. *State v. Gardner*, 8 Ind. App. 440.

**Finding or Determination.** — In *Westbay v. Gray*, 116 Cal. 667, it was said: "Subdivision 1 of section 581 of the Code of Civil Procedure provides that an action may be dismissed, or a judgment of nonsuit entered, '(1) by the plaintiff himself at any time before *trial*, upon payment of costs,' etc. In *Hancock Ditch Co. v. Bradford*, 13 Cal. 637, in construing a like expression in our former practice act, the court said: 'By *trial*, here, is meant the determination or finding in the case.'"

**Hearing.** — The word "hearing" refers to

equity suits, the word *trial* to actions at law. *Waggener v. Cheek*, 2 Dill. (U. S.) 563; *Doughty v. West, etc., Mfg. Co.*, 8 Blatchf. (U. S.) 107; *Vannevar v. Bryant*, 21 Wall. (U. S.) 43; *Wooster v. Handy*, 23 Fed. Rep. 53.

But in *Grand Forks Second Nat. Bank v. St. Thomas First Nat. Bank*, 8 N. Dak. 56, it was said: "We are not concerned in holding that the hearing before the competent tribunal constitutes the *trial* and the whole thereof. That may not be technically correct. But we do assert that it constitutes a part, and a very important part, of every *trial*. In common parlance, both to the layman and the lawyer, it includes the whole *trial*. We speak of a case as having been 'tried to the jury,' or 'tried to the court,' meaning simply that the evidence was produced and the arguments made before the jury or the court, as the case may be."

And for instances of *trial* and "hearing" used synonymously, see *Glennon v. Britton*, 155 Ill. 232; *Chandler v. Coe*, 56 N. H. 184.

**Indictment.** — See *infra*, this note, *Pleadings*.

**Instructions Held to Be Part of Trial.** — See *Maurer v. People*, 43 N. Y. 1.

**Issue to Jury — Equity.** — In *McClave v. Gibb*, 157 N. Y. 421, it was said: "It is claimed that the *trial* of special issues before a jury in an equity case constitutes a step in the *trial*. It is no more so than the taking of evidence upon a commission. It is not a *trial* where the issues of fact or of law are finally determined." See also *Vermilyea v. Palmer*, 52 N. Y. 471.

**Jeopardy and Trial.** — In *Com. v. Cook*, 6 S. & R. (Pa.) 596, it was said: "Twice put in jeopardy, and twice put on *trial*, convey to the plainest understanding different ideas." See also *Reynolds v. State*, 3 Ga. 53. See generally the title *JEOPARDY*, vol. 17, p. 580.

**Judge.** — In *Horne v. Rogers*, 110 Ga. 371, it was said: "The very definition of *trial* carries with it the idea of the superintendence of a judge." See also *Smith v. Frisbie*, 7 Iowa 486, and see *infra*, *Trial by Jury*.

**Master — Auditor — Commissioner.** — A hearing before a master, a commissioner, or an auditor is not a *trial*. *Hess v. Reynolds*, 113 U. S. 73; *Carson v. Hyatt*, 118 U. S. 289; *Ketchum v. Black River Lumber Co.*, 4 Fed. Rep. 143; *Stone v. Sargent*, 129 Mass. 503.

**Mistrial.** — The term *trial* has been held not to include a mistrial. See *Bullard v. Kuhl*, 54 Wis. 544.

A statute provided that a petition and affidavit for removal might be filed at any time before the *trial* or final hearing. In construing this provision in *Brayley v. Hedges*, 53 Iowa 584, the court said: "The petition must be filed at any time before 'the *trial*,' not before a *trial* or any *trial*. 'The *trial*' of a cause cannot mean a mistrial which counts for nothing. The words surely refer to that *trial* which shall determine the issue of fact in the case which is the object of the *trial*. A mistrial, therefore, was not in the contemplation of the lawmakers." And see *supra*, this note, *Disagreement*.



evidence, or both; the right of counsel to address the jury upon evidence; and

**Motion.** — A motion for entry of an *ex parte* order of an interlocutory nature has been held not to constitute a *trial*. *McHenry v. New York, etc., R. Co.*, 25 Fed. Rep. 67.

The hearing of a motion, where no decision is necessary upon an issue of fact arising upon the pleadings, has been held not to be a *trial*. *McDermott v. Halleck*, 65 Kan. 403.

In *Swan Tp. v. McClannahan*, 53 Ohio St. 411, it was said: "A hearing upon a motion was not designed to take the place of a *trial*. It may be had upon affidavits taken without opportunity for cross-examination, and is not in any proper sense a *trial*. Therefore, upon the overruling of a motion to vacate a provisional injunction, the court is not authorized, without a *trial* of the issues, to enter final judgment for the plaintiff."

**Motion to Elect.** — In *State v. Kendall*, 56 Kan. 238, it was held that a hearing on a motion to compel the state to elect upon which offense it would stand was not a *trial*.

**Motion to Discharge Attachment.** — In *Cheyenne First Nat. Bank v. Swan*, 3 Wyo. 370, it was held that the action of a court in hearing and determining a motion to discharge an attachment was not in a strict legal sense a *trial*.

**Motion to Quash Indictment.** — It has been held that the hearing of a motion to quash an indictment was not a part of the *trial*. *Epps v. State*, 102 Ind. 542; *Territory v. Gay*, 2 Dak. 125.

**Motion to Quash Information.** — Argument and hearing on motion to quash an information have been held to be no part of a *trial*. *State v. Little Whirlwind*, 22 Mont. 426; *State v. Spotted Hawk*, 22 Mont. 33; *Miller v. State*, 29 Neb. 437.

**New Trial.** — The hearing and disposition of a motion for a new trial has been held to be a *trial*. *Finn v. Spagnoli*, 67 Cal. 330; *State v. Underwood*, 57 Mo. 40; *Le Roy v. Territory*, 3 Okla. 596; *Gibson v. State*, 3 Tex. App. 437; *Berkley v. State*, 4 Tex. App. 122.

In *Mechanics' Banking Assoc. v. Kiersted*, 4 Duer (N. Y.) 641, the court said of a motion for a new *trial* at special term: "Such a motion is an actual hearing and examination of a cause upon the merits, upon the issues joined in it." See also *Place v. Butternuts Woolen, etc., Mfg. Co.*, (Supm. Ct. Spec. T.) 28 How. Pr. (N. Y.) 184.

But in a number of cases a motion for new *trial* has been held to be no part of the *trial*. *Epps v. State*, 102 Ind. 539; *Reed v. State*, 147 Ind. 41; *Lillard v. State*, 151 Ind. 322; *State v. West*, 45 La. Ann. 928; *People v. Ormsby*, 48 Mich. 494; *State v. Brown*, 63 Mo. 439; *State v. Lewis*, 80 Mo. 110; *Davis v. State*, 51 Neb. 301; *Territory v. Chenowith*, 3 N. Mex. 225; *Griffin v. State*, 34 Ohio St. 299; *Ward v. Territory*, 8 Okla. 12.

The overruling of a motion for a new *trial* has been held to be no part of a *trial*. *People v. Ormsby*, 48 Mich. 494.

**Nonsuit.** — The hearing of a motion to set aside an involuntary nonsuit has been held to be a *trial*. *State v. Missouri Pac. R. Co.*, 149 Mo. 104.

A judgment on an involuntary nonsuit is a

consummation of a *trial* of the case, and the setting aside of that judgment and granting another *trial* upon the issues thereof is a granting of a new *trial*. *Coatney v. St. Louis, etc., R. Co.*, 151 Mo. 35, *overruling Ready v. Smith*, 141 Mo. 305, and *affirming State v. Missouri Pac. R. Co.*, 149 Mo. 104.

**Pleadings.** — Questions of pleadings have been held not to relate to *trial*. See *Lewis v. Smythe*, 2 Woods (U. S.) 119; *Reed v. State*, 147 Ind. 41; *Davis v. State*, 51 Neb. 301.

**Pleadings — Answer.** — Filing of an answer does not constitute a *trial*. *Durkee v. Illinois Cent. R. Co.*, 81 Fed. Rep. 2.

**Pleadings — Indictment.** — In *State v. Nash*, 7 Iowa 365, the word *trial* was held to include the finding of the indictment, the court saying that the word *trial* in its larger senses "includes as well the finding of the indictment against a criminal as the proceedings of the court had after the issue has been determined, and a verdict of the jury rendered."

**Pleadings — Summary Proceedings.** — The term *trial* has been confined to the *trial* of issues that arise upon the pleadings and held not to relate to controversies involved in summary proceedings. See *Columbus, etc., R. Co. v. Thurstin*, 44 Ohio St. 525.

**Pleadings — Issues Need Not Necessarily Arise from Pleadings.** — But in *Place v. Butternuts Woolen, etc., Mfg. Co.*, (Supm. Ct. Spec. T.) 28 How. Pr. (N. Y.) 186, it was said: "When the merits of the cause is brought up, and the cause is placed on the calendar of the court, and the issues, whether of law or of fact and whether arising on the pleadings or out of subsequent proceedings, are presented to the court, and by the court judicially examined, then there is a *trial*."

**Plea in Bar — Plea in Abatement.** — A statute relating to the review of criminal proceedings contained the following provision: "But in the Supreme Court only errors of law occurring on the trial or appearing in the pleadings or judgment can be reviewed." In *Wagner v. State*, 42 Ohio St. 537, it was held that the word *trial* in the sense of this limitation had reference to a *trial* upon a plea in bar, but did not extend to a hearing or motion to quash, or *trial* upon a plea in abatement.

And that the hearing on a plea in abatement is no part of a *trial*, see *Miller v. State*, 29 Neb. 437.

**Plea of Guilty.** — Where the defendant pleads guilty, and no issue of law is raised by demurrer, and judgment is rendered upon such plea, there is no *trial*. *Mathews v. Clayton County*, 79 Iowa 510.

**Preliminary Steps, Questions, Etc.** — In *State v. Spotted Hawk*, 22 Mont. 45, it was said that the word *trial* "does not include the preliminary steps wherein the court is passing upon questions of law and preliminary motions with a view of settling the issues." See also *Lewis v. Smythe*, 2 Woods (U. S.) 119; *State v. Little Whirlwind*, 22 Mont. 425; *Cregier v. Bunton*, 2 Strobb. L. (S. Car.) 503.

Argument or decision of preliminary questions does not constitute a *trial*. *Lewis v. Smythe*, 2 Woods (U. S.) 119.

the formal determination of the issue by the jury in the form of a verdict.<sup>1</sup>

A preliminary motion does not constitute part of the *trial*. *State v. Kendall*, 56 Kan. 238; *Miller v. State*, 29 Neb. 437.

Appointment of a day for a *trial* to begin has been held to be no part of the *trial*. *State v. Abrams*, 11 Oregon 160.

**Same — Appointment of Counsel.** — In *Hall v. State*, 132 Ind. 317, it was held that the appointment of counsel to assist in the prosecution of a felony was no part of a *trial*.

**Same — Arraignment.** — In a criminal case the term *trial* does not include the arraignment or any other merely preparatory proceeding which may be taken prior to the time of administering the requisite oath to the jury. *U. S. v. Curtis*, 4 Mason (U. S.) 232, 25 Fed. Cas. No. 14,905; *Byers v. State*, 105 Ala. 31; *Hunnell v. State*, 86 Ind. 434; *Reed v. State*, 147 Ind. 41.

**Preliminary Examination.** — The preliminary examination of a person accused of a crime has been held not to be a *trial*. *State v. Bergman*, 37 Minn. 407.

In *Withers v. State*, 36 Ala. 264, it was said: "In all preliminary inquiries before committing magistrates, no matter what the grade of the offense charged, the legislature has secured to the accused the right to the aid of counsel, although such an investigation is not, in a legal sense, a *trial*, which means an inquiry in which the guilt or innocence of the accused is finally passed upon."

In *State v. Goetz*, 65 Kan. 130, it was said: "It is claimed that as section 55 of the Criminal Code (Gen. Stat. 1901, § 5495) provides: 'If upon the *trial* it shall appear that the defendant is guilty of a public offense other than that charged in the warrant, he shall be held in the custody of the officer and tried for such offense,' no additional or other complaint need have been filed. The term *trial*, as found in this section, has already been construed by this court as meaning 'preliminary examination,' and not a *trial* in the ordinary sense of the term." See also *Redmond v. State*, 12 Kan. 172.

**Preliminary Injunction.** — Proceedings for a temporary injunction have been held not to constitute a *trial*. See *Franklin v. Wolf*, 78 Ga. 446.

**Receiver.** — Proceedings for the appointment of a temporary receiver have been held not to be a *trial*. See *Franklin v. Wolf*, 78 Ga. 446.

**Referee.** — A *trial* was commenced, a jury impaneled, and a witness sworn and examined, when the court ordered the case referred to a referee. In holding this to be no *trial*, in *Syracuse Third Nat. Bank v. McKinstry*, 5 Thomp. & C. (N. Y.) 53, the court said: "A *trial* is a judicial examination of the issues between the parties. Code, § 252. Such an examination may be had without being followed by a conclusion, determination, or verdict, *e. g.*, when a jury disagree, or a juror is withdrawn, or when a complaint is dismissed. But when the court refuses to examine the issues, and of its own motion sends the case to a referee, it would be a stretch of common sense and of law to hold that there had been a *trial*. What issue of law or of fact was judicially examined by such a proceeding?"

And yet it is only for a *trial*, so defined, that a *trial* fee is allowed."

**Selecting and Impaneling Jury.** — The selection of the jury has been held to be a part of a *trial*. *Hopt v. People*, 110 U. S. 574; *People v. Stewart*, 64 Cal. 60; *People v. Wong Ark*, 96 Cal. 128; *People v. Zeigler*, 135 Cal. 462; *Ohio River R. Co. v. Blake*, 38 W. Va. 720. Compare *State v. Hazledahl*, 2 N. Dak. 521.

The calling and examination of jurors has been held to be part of a *trial*. *Territory v. Kelly*, 2 N. Mex. 292.

**Sentence.** — Ordering the judgment or pronouncing the sentence is not a part of the *trial*. *Reed v. State*, 147 Ind. 41.

In *Reg. v. Castro*, L. R. 9 Q. B. 358, Blackburn, J., said: "The question what the sentence in a criminal cause should be is a question of mixed law and judicial discretion, to be guided by the facts proved on the taking of the verdict, and therefore is to be determined by the judges, and so it is properly and technically included in the word *trial*. The *trial* by the court of the cause before it includes all those, and the word *trial* is not confined to taking the verdict." Compare *O'Connell v. Reg.*, 11 Cl. & F. 250.

**Signing Orders.** — Signing orders has been held to be no part of the *trial*. See *Weatherman v. Com.*, 91 Va. 796.

**Verdict.** — The word *trial* includes the verdict. *Strafer v. Carr*, 6 Fed. Rep. 466; *Harris v. San Francisco Sugar Refining Co.*, 41 Cal. 404; *Davis v. State*, 51 Neb. 301.

And in *State v. Spores*, 4 Oregon 199, the court said: "Then we conclude that the *trial* not only includes the examination of the issues of fact between the state and defendant, but that it includes the decision of those issues of fact also, which decision is made known by the announcement of the verdict of the jury."

The reception of a verdict is a part of the *trial*. *Ward v. Territory*, 8 Okla. 24.

A statute provided that a new *trial* must be moved for within thirty days from the *trial*. It was held that this meant that the new *trial* must be moved for thirty days from the date of the verdict. *Castellaw v. Blanchard*, 106 Ga. 97.

**View.** — A view by a jury has been held to be no part of a *trial*. *State v. Lee Doon*, 7 Wash. 308.

**Regularly Called for Trial.** — See *Union Pac. R. Co. v. Horney*, 5 Kan. 341.

**Speedy Trial.** — See the title CONSTITUTIONAL LAW, vol. 6, pp. 962, 992; and see SPEEDY TRIAL, vol. 26, p. 136.

**Trial of Right of Property.** — See *McAdams v. Beard*, 34 Ala. 478; *Treadway v. Treadway*, 56 Ala. 390.

**1. Trial by Jury.** (See also the title CONSTITUTIONAL LAW, vol. 6, pp. 974, 986; JURY AND JURY TRIAL, vol. 17, p. 1086.) — *Com. v. Tack*, 3 Brews. (Pa.) 536. See also *Clark v. Mitchell*, 64 Mo. 580.

In *Costly v. State*, 19 Ga. 614, it was held that a provision in the Constitution of Georgia that "*trial* by jury, as heretofore used in this state," should remain inviolate forever meant nothing more than that *trial* by jury in its

**TRIAL DE NOVO.** (See also *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, titles *APPEALS*, vol. 2, pp. 20, 324, 327; *APPEARANCES*, vol. 2, p. 614.) — See note 1.

**TRIAL TERM.** — See note 2.

**TRIBE.** — See note 3.

**TRIBUNAL.** — See note 4.

**TRIBUTARY.** — See note 5.

essential elements, as contradistinguished from other modes of *trial*, should be preserved.

**History.** — See *Lommen v. Minneapolis Gas-light Co.*, 65 Minn. 196, 60 Am. St. Rep. 450; *Brown v. State*, 62 N. J. L. 674 *et seq.*

**Elements.** — In *Lommen v. Minneapolis Gas-light Co.*, 65 Minn. 209, 60 Am. St. Rep. 450, it was said: "The essential and substantive attributes or elements of jury *trial* are and always have been number, impartiality, and unanimity. The jury must consist of twelve; they must be impartial and indifferent between the parties; and their verdict must be unanimous."

In *Kleinschmidt v. Dunphy*, 1 Mont. 118, it was said: "'*Trial* by jury,' as the words are used in the constitution, had, at the time of its adoption, a fixed legal signification, and from time immemorial has meant a *trial* by a tribunal of twelve men, acting only upon a unanimous determination."

**Judge Necessary.** — "'*Trial* by jury' \* \* \* is a *trial* by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law." *Capital Traction Co. v. Hof*, 174 U. S. 13, *quoted in* *Dennee v. Cromer*, (C. C. A.) 114 Fed. Rep. 624; *Howe v. Raymond*, 74 Conn. 71, and *Richmond v. Henderson*, 48 W. Va. 398.

**Twelve Jurors.** — *Trial* by jury *ex vi termini* means a *trial* by twelve men. *West v. Gammon*, (C. C. A.) 98 Fed. Rep. 428; *State v. Hamey*, 168 Mo. 167; *Ex p. Slater*, 72 Mo. 102; *State v. Almy*, 67 N. H. 274; *Brown v. State*, 62 N. J. L. 674.

"*Trial Before a Jury*" and "*Trial by Jury*" **Distinguished.** — See *Weed v. U. S.*, 82 Fed. Rep. 417.

**Trial with Jury.** — Where at the *trial* of an action the judge, at the conclusion of the plaintiff's evidence, withdrew the case from the jury and gave judgment dismissing the action, it was held that there was not a "*trial* with a jury." *Hagen v. Canadian Pac. R. Co.*, 30 Ont. 138.

"*Trial*" **Held to Mean Trial by Jury.** — See *U. S. v. Curtis*, 4 Mason (U. S.) 232, 25 Fed. Cas. No. 14,905; *McMillan v. Scott*, 2 Nat. Bankr. Reg. 86, 10 Fed. Cas. No. 5,620.

**Issue of Fact.** — In *Raleigh, etc., R. Co. v. Davis*, 2 Dev. & B. L. (19 N. Car.) 466, it was said: "'*Trial* by jury' in civil cases is equivalent to 'conviction by verdict' in criminal proceedings. They do not include by force of those terms any case in which there is not an issue of fact." And see *supra*, this definition, *Confined to Investigation of Matters of Fact*.

**Specific Issue of Fact to Be Tried by Jury.** — In *Vermilyea v. Palmer*, 52 N. Y. 474, it was said: "A jury *trial* under the code is only

where the jury determines the whole issue by a general verdict, with or without special findings, or by a special finding embracing all the facts. \* \* \* It follows that when a specific question of fact only is ordered to be tried by a jury it is not a *trial* of the issue by jury. It is not, of course, a *trial* by referees, but it is a *trial* by the court." See also *McClave v. Gibb*, 157 N. Y. 413.

**1. Trial de Novo or Trial de Novo.** — See *Ostrom v. Tarver*, (Tex. Civ. App. 1895) 29 S. W. Rep. 70.

**2. Trial Term.** — In *Murray v. Holden*, 1 McCrary (U. S.) 342, it was said: "In all the states there is, by law or rule, a *trial* term — *i. e.*, a term at which a cause may for the first time be called for *trial*. In practice but few contested cases are tried at the first *trial* term, and it often happens that controversies arise upon questions of pleading — so that, as in this case, no issues of fact are joined at that term. It is, nevertheless, the term at which, within the meaning of the law, such cases could first be tried, and therefore is the term at or before which the petition for removal must be filed."

**3. Tribe, Band, or Nation** — See *Dobbs v. U. S.*, 33 Ct. Cl. 308. See also the title *INDIANS*, vol. 16, p. 212, and see *INDIAN*, vol. 16, p. 210.

In *Montoya v. U. S.*, 180 U. S. 266, it was said: "We are more concerned in this case with the meaning of the words *tribe* and 'band.' By a *tribe* we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory; by a 'band,' a company of Indians not necessarily, though often, of the same race or *tribe*, but united under the same leadership in a common design. While a 'band' does not imply the separate racial origin characteristic of a *tribe*, of which it is usually an offshoot, it does imply a leadership and a concert of action."

**4. Tribunal.** — A statute prescribed a rule of practice in case of appeals from justices' courts or other inferior *tribunals*. In holding a board of supervisors to be a *tribunal* the court said: "But the order of allowance was made in the exercise of a judicial function, and it appears to us that the board of supervisors, in exercising such function, may properly enough be called a *tribunal*." *Scott v. Lasell*, 71 Iowa 182.

**5. Tributary.** — A steamboat was insured while navigating the Mississippi and its *tributaries*. In construing this policy the court said: "It is proven in this case that said Cypress bayou was navigable for steamboats, and as before stated, empties into Red river, which empties into the Mississippi. Now while it



**TRICK.** — The word “trick” is defined as a sly, dexterous, ingenious procedure fitted to puzzle or amuse, and is classed as a synonym with strategy, wile, fraud, cheat, deception, delusion.<sup>1</sup>

**TRIED.** — See note 2.

**TRIENNIAL COHABITATION.** — See the title MARRIAGE, vol. 19, p. 1167.

**TRIMMING.** — See note 3.

**TRIMMINGS.** — See note 4.

**TRINITARIAN.** — See note 5.

**TRINKETS.** — A trinket is any small piece of ornament or decoration more for ornament than for use.<sup>6</sup>

**TRIP.** — See note 7.

**TRIPPLICATE.** — See DUPLICATE, vol. 10, p. 319.

**TRIPPING.** — See note 8.

cannot perhaps be said that said bayou empties immediately into the Mississippi river, yet its flowing water mingled with the water of Red river, and Red river contributes to the Mississippi, and in a general sense it seems to me that it may be said that said bayou is a *tributary* of the Mississippi within the meaning of the terms employed in the policy of insurance in this case.” *Miller v. Citizens' F., etc., Ins. Co.*, 12 W. Va. 131, 29 Am. Rep. 454.

In *Evans v. Owens*, (1895) 1 Q. B. 237, it was held that a brook running into a river which ran directly into the river Severn was a *tributary* of the Severn. *Compare Merricks v. Cadwallader*, 51 L. J. M. C. 20.

A reservoir has been held not to be a *tributary* of a river. *Harbottle v. Terry*, 10 Q. B. D. 131; *George v. Carpenter*, (1893) 1 Q. B. 505. In these cases the court held that the word *tributary* necessarily involved the notion of a stream.

1. *Trick.* — *State v. Smith*, 82 Minn. 342, quoting *Webst. Dict.* This was a swindling case.

2. *Tried.* — In *Duffy v. Moran*, 12 Nev. 98, it was held that when a court, in the trial of an equity cause, called a jury to decide special issues, and the jury also found a general verdict, the presumption was that the court only called the jury as advisory. The court said: “In a chancery suit the action is not *tried* until the verdict has been ‘sanctioned and established by the chancellor. In this case it was not *tried* until after the argument of counsel, ‘as to what the judgment should be.’ There is nothing in the transcript showing that the court submitted to the jury anything but the special issues stated, and, it being a case of purely equitable cognizance, we cannot presume the court called the jury for any other purpose except to be advised by it.”

3. *Trimming* — *Ship's Cargo.* — In *Budd v. New York*, 143 U. S. 529, it was said: “*Trimming* in the canal boat, spoken of in the statute, is shoveling the grain from one place to another, and is done by longshoremen with scoops or shovels; and *trimming* the ship's cargo when loading is stowing it and securing it for the voyage.”

4. *Trimmings.* — In *Wright v. Hitchcock*, L. R. 5 Exch. 46, the word *trimming* was held to mean “something attached to any part of the dress either of men or women, whether it is called the frill of a sleeve, or the ruffle of a shirt, or the *trimming* of a lady's dress.”

*Revenue Act.* — See *Hartranft v. Meyer*, 149 U. S. 546.

Same — *Hat Trimmings.* — Ribbons composed of silk and cotton, in which silk is the component material of chief value, used as *trimmings* for ornamenting hats and bonnets, and having a commercial value only for that purpose, are liable only to the duty imposed upon such articles. *Robertson v. Edelhoff*, 132 U. S. 614.

Artificial fruits with artificial stems and leaves are *trimmings*. *Marsh v. Seeberger*, 30 Fed. Rep. 422.

5. *Trinitarian.* — See *Atty.-Gen. v. Dublin*, 38 N. H. 552.

6. *Trinkets.* — *Bernstein v. Baxendale*, 6 C. B. N. S. 251, 95 E. C. L. 251, quoted in *Ocean Steamship Co. v. Way*, 90 Ga. 752.

An eyeglass with a gold chain attached was held not to be a *trinket* within the English Carriers' Act. *Davey v. Mason, C. & M.* 45, 41 E. C. L. 30.

*Trinkets.* — In *Bernstein v. Baxendale*, 6 C. B. N. S. 251, 95 E. C. L. 251, it was said: “I am of opinion that the rule should be made absolute so far as to reduce the damages to eleven pounds, seventeen shillings, being the value of the ‘German-silver boxes,’ which I am of opinion do not properly fall within the definition of *trinkets*, and therefore are not within the protection of the first section of the Carriers' Act. As to the other articles, viz., the bracelets, shirt pins, rings, brooches, and tortoise-shell and pearl portemonnaies, I think they all fall properly within the description of *trinkets*.”

7. *This Trip.* (See also the title TICKETS AND FARES, ante, p. 150.) — In *Pier v. Finch*, 24 Barb. (N. Y.) 516, it was said: “‘This trip.’ What trip? A trip, in its ordinary signification, means a journey, jaunt, or excursion by some person; and as the ticket is given to the passenger as evidence of his right, ‘this trip’ must be construed to mean the journey such passenger proposes to make, and does not become operative until he undertakes it. When the purchaser commences his trip, and becomes a passenger, the ticket is good for that trip and no other; and at the end of the trip the conductor has the right to demand, and the passenger is bound to surrender, the ticket. The passenger cannot use it for any other trip, and has no longer any right to the possession of it.”

8. *Tripping.* — In *Duff Mfg. Co. v. Forgeie*, Volume XXVIII,

**TRIVIAL BREACH OF PEACE.** — See PETIT MISDEMEANOR, vol. 22, p. 760.

**TRIVIAL IMPERFECTION.** — See note 1.

**TROOPS.** — See note 2.

**TROUBLE.** — See note 3.

**TROUT.** — See note 4.

78 Fed. Rep. 631, it was said: "In mechanics, *tripping* consists in releasing or setting free some mechanism, and a *tripping* plate is one performing that function."

1. **Trivial Imperfection — Building Contracts.** — See Lippert v. Lasar, (Cal. 1893) 33 Pac. Rep. 797, and see generally the title WORKING CONTRACTS.

2. **Troops.** (See also the title MILITARY LAW, vol. 20, p. 615; MILITIA, vol. 20, p. 668.) — "The word *troops* conveys to the mind the idea of an armed body of soldiers whose sole occupation is war or service, answering to the regular army." Dunne v. People, 94 Ill. 138. And in that case it was held that national guards or militia were not *troops* within the meaning of Const. U. S., art. 1, § 10. See also State v. Wagener, 74 Minn. 518.

3. **Trouble.** — A statute allowed to a person whose land had been taken for laying out a street full indemnity therefor and for the *trouble* and expense to which he had been put by the proceedings. In construing this provision, the court said: "The word *trouble* in the statute refers to *trouble* from which some material or pecuniary injury results, involving labor and the expenditure of time, or

occasioning inconvenience to the owner in the use and occupation of the land, all of which may be estimated in damages by a standard common to all cases. But mental *troubles*, so difficult to estimate by any pecuniary standard, and which may vary in different individuals according to their temperament or health, do not come within the meaning of the statute, and are not the subject-matter of damages." Whitney v. Lynn, 122 Mass. 343.

4. **Trout.** — In State v. Lewis, 87 Me. 498, it was said: "The prohibition of the statute relates to land-locked salmon, *trout*, or togue. The common and ordinary meaning of the word *trout* is a fresh-water fish; a fish which at least breeds and ordinarily lives in the fresh water, even if it may sometimes escape to the salt water when it has an opportunity; and although zoologically the term may be more inclusive, we think that the legislature used the word in this section in its more limited, but common and ordinary, sense. Words of common use in a statute are to be taken in their ordinary signification." See generally the titles FISH AND FISHERIES, vol. 13, p. 554; GAME AND GAME LAWS, vol. 14, p. 654.

# TROVER AND CONVERSION.

BY BRISCOE BALDWIN CLARK.

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#### CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 21, p. 1009.

See in this work the titles *REPLEVIN*, vol. 24, p. 475; *TRESPASS*, ante, and the references there given.

**I. DEFINITION, NATURE, AND ORIGIN OF ACTION.** — The action of trover is an action on the case whereby the owner of personal property may recover damages against a person who has committed the wrong of conversion with respect to the property.<sup>1</sup>

**Etymology — Fictitious Basis of Action.** — The name of the action is derived from the French verb *trouver*, meaning to find, as the action was based on the fiction that the defendant had found the property, and, being in lawful possession of it, wrongfully converted it.<sup>2</sup> This fiction, however, as an element necessary for a recovery, is immaterial,<sup>3</sup> and the action can be maintained irrespective of the manner by which the defendant obtained the possession of the property, as the plaintiff could waive the tort by which the possession was originally acquired by the defendant, and the defendant would not be heard to assert his originally wrongful act.<sup>4</sup>

**Legal Remedy.** — The action of trover is a legal as distinguished from an equitable remedy.<sup>5</sup>

**Tort Action.** — The action is one of tort,<sup>6</sup> since the gist of the action is the wrongful conversion, and it will not lie unless there has been such conversion.<sup>7</sup>

**Origin of Action.** — The action of trover is founded on the statute of 13 Edw. I., c. 24, which provided that whensoever a writ should be found in chancery and in a like case falling under the same right and requiring a like remedy no precedent of a writ could be produced, the clerks in chancery should agree in forming a new one, and if they could not so agree it should be adjourned to the next Parliament, where a writ should be framed by consent of the learned in the law.<sup>8</sup> Thus, it belongs to that class of actions known as actions on the case.<sup>9</sup>

**Trover Is Distinguished from Replevin** in that the latter was a common-law action, and was for the recovery of specific property, though in many jurisdictions, by virtue of statutory enactments, the plaintiff is now entitled to recover the value of the property to be replevied where the property itself cannot be had,<sup>10</sup> whereas in trover the plaintiff is limited to recovery of damages for the wrongful conversion.<sup>11</sup>

**Distinguished from Trespass.** — The action of trespass, as a common-law action, is maintainable only by one whose property has been unlawfully taken by another, and is inapplicable where the defendant acquired possession lawfully, however tortious his subsequent retention of possession may have become,<sup>12</sup> whereas the action of trover is maintainable irrespective of the wrongfulness or lawfulness of acquiring the original possession of the property.<sup>13</sup>

**1. Definition.** — *Cooper v. Chitty*, 1 Burr. 20; *Davis v. Hurt*, 114 Ala. 146; *Bigelow v. Young*, 30 Ga. 121; *Glisson v. Herring*, 2 Dev. L. (13 N. Car.) 156; *Waring v. Pennsylvania R. Co.*, 76 Pa. St. 491; *Reid v. Colcock*, 1 Nott & M. (S. Car.) 592, 9 Am. Dec. 729.

**2. Fiction.** — *Cooper v. Chitty*, 1 Burr. 20; *Smith v. Grove*, 12 Mo. 51.

**3. Fiction Immaterial.** — *Peters v. Johnson*, Minor (Ala.) 100; *Payne v. Elliott*, 54 Cal. 339, 35 Am. Rep. 80; *Platt v. Tuttle*, 23 Conn. 233; *Haddix v. Einstman*, 14 Ill. App. 443; *Stephenson v. Little*, 10 Mich. 433; *Smith v. Grove*, 12 Mo. 51; *Blakey v. Douglas*, (Pa. 1886) 6 Atl. Rep. 398; *Royce v. Oakes*, 20 R. I. 252.

**4. Cooper v. Chitty**, 1 Burr. 20.

**5. Legal Remedy.** — *Hance v. Tittabawassee Boom Co.*, 70 Mich. 227; *Alter v. Stockham Bank*, 51 Neb. 797; *Meier v. Wilkens*, 15 N. Y. App. Div. 97; *Fulton v. Fulton*, 48 Barb. (N. Y.) 581.

**6. Tort Action.** — *Cooper v. Chitty*, 1 Burr. 20; *Craumer v. McEndaffer*, 2 Ind. App. 569;

*Sawyer v. Robertson*, 11 Mont. 416; *Carroll v. Fethers*, 102 Wis. 436.

**7. Conversion Gist of Action.** — *Davis v. Hurt*, 114 Ala. 146; *Payne v. Elliott*, 54 Cal. 339, 35 Am. Rep. 80; *Gibbs v. Jones*, 46 Ill. 319.

**8. Origin of Action** — Statute 13 Edw. I. — *Bolles* Important English Statutes (2d ed.) 16.

**9. Classified with Actions on the Case.** — *Harper v. Scott*, 63 Ill. App. 401; *Hull v. Southworth*, 5 Wend. (N. Y.) 265; *Brice v. Vanderheyden*, 9 Wend. (N. Y.) 472; *Hooker v. Latham*, 118 N. Car. 179; *Royce v. Oakes*, 20 R. I. 252.

**10. Distinguished from Replevin.** — See the title REPLEVIN, vol. 24, p. 477.

**11. German Nat. Bank v. Meadowcroft**, 4 Ill. App. 630; *Hall v. Amos*, 5 T. B. Mon. (Ky.) 89, 17 Am. Dec. 42; *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323; *Glisson v. Herring*, 2 Dev. L. (13 N. Car.) 159; *Kid v. Mitchell*, 1 Nott & M. (S. Car.) 334, 9 Am. Dec. 702.

**12. Distinguished from Trespass.** — See the title TRESPASS, ante.

**13. Cooper v. Chitty**, 1 Burr. 20; *Allen v. Crary*, 10 Wend. (N. Y.) 349, 25 Am. Dec. 566.

**Distinguished from Detinue.** — The action of detinue, a common-law action for the recovery of personal chattels *in specie* or for damages for their unlawful detention, while supplying in some manner the defects of the action of trespass, did not afford the complete or ready remedy afforded by the action of trover, and was superseded by the action of trover.<sup>1</sup>

**Effect of Abolition by Code of Forms of Action.** — Irrespective of the abolition of forms of action by the code in the several jurisdictions, the action of trover remains substantially the same; the gist of the action still remains the wrongful conversion, and without proof of it the plaintiff cannot recover, whatever else he may prove and whatever may be his right of recovery in another form of action.<sup>2</sup>

**The Action of Trover Is a Transitory Action,** and may be maintained in one jurisdiction for conversion of personal property in another jurisdiction;<sup>3</sup> and the fact that the action is for the conversion of a portion of real estate severed by a trespasser, as where a trespasser fells timber or removes fixtures, does not change the rule.<sup>4</sup> In some instances statutory provisions have been enacted with regard to the venue in actions of trover.<sup>5</sup>

**II. FOR WHAT PROPERTY TROVER MAY BE MAINTAINED — 1. In General.** — The action of trover may be, as a general rule, maintained for the wrongful conversion of any species of personal property which is the subject of private ownership.<sup>6</sup> This includes personal property in which individuals are capable of acquiring a qualified property only, such as wild geese which have been tamed and strayed away without gaining their natural liberty,<sup>7</sup> or a whale which has been killed and anchored with marks of appropriation,<sup>8</sup> but not

**Extent to Which Remedies Concurrent.** — It has been said that trover could be maintained in all cases where trespass *de bonis asportatis* was maintainable, though trespass could not be maintained in all cases where trover was maintainable. *Prescott v. Wright*, 6 Mass. 20; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356, 25 Am. Dec. 396; *Glenn v. Garrison*, 17 N. J. L. 1. But the statement that trover may be maintained in all cases where trespass *de bonis asportatis* would lie is not absolutely correct. See *infra*, this title, *Conversion — Conversion by Wrongful Taking*.

**1. Distinguished from Detinue.** — *Porter v. Miller*, 7 Tex. 475. And see the title *DETINUE*, 6 ENCYC. OF PL. AND PR. 645.

**2. Effect of Abolition by Code of Forms of Action.** — *Conner v. Allen*, 33 Ala. 516; *Davis v. Hurt*, 114 Ala. 146; *Omaha, etc., Smelting, etc., Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185; *Bixel v. Bixel*, 107 Ind. 534.

**3. Transitory Actions.** — *Brown v. Hedges*, 1 Salk. 290; *Gesner v. Gas Co.*, 2 Nova Scotia 72; *Updegraff v. Lesem*, 15 Colo. App. 297; *Robinson v. Armstrong*, 34 Me. 145; *Whidden v. Seelye*, 40 Me. 247, 63 Am. Dec. 661; *Makely v. Booth Co.*, 129 N. Car. 11; *Smith v. Butler*, 1 Daly (N. Y.) 508; *Glen v. Hodges*, 9 Johns. (N. Y.) 67; *Mather v. Trinity Church*, 3 S. & R. (Pa.) 511, 8 Am. Dec. 663; *Tyson v. McGuineas*, 25 Wis. 656. See also *First Nat. Bank v. Brown*, 85 Tex. 80.

**4. Updegraff v. Lesem**, 15 Colo. App. 297; *Tyson v. McGuineas*, 25 Wis. 656.

**5. Statutory Provisions.** — See *Bird v. Georgia R. Co.*, 72 Ga. 655; *Duryee v. Orcott*, 9 Johns. (N. Y.) 248; *Hull v. Southworth*, 5 Wend. (N. Y.) 265; *Brice v. Vanderheyden*, 9 Wend. (N.

Y.) 472; *Floyd v. Gibbs*, (Tex. Civ. App. 1895) 34 S. W. Rep. 154.

**6. For What Property Trover May Be Maintained.** — *State v. Omaha Nat. Bank*, 59 Neb. 483.

**Illustrations.** — Trover has been held to lie for the conversion of a book containing processes for color making, *Makepeace v. Jackson*, 4 Taunt. 770, 14 Rev. Rep. 664; of domestic fowls, *Leonard v. Belknap*, 47 Vt. 602; domestic animals, *Drew v. Spaulding*, 45 N. H. 472, such as dogs, *Binstead v. Buck*, 2 W. Bl. 1117; *Graham v. Smith*, 100 Ga. 434, 62 Am. St. Rep. 323; *Cummings v. Perham*, 1 Met. (Mass.) 555, in which last case it was held that trover would lie for a dog which the defendant had converted, though under the *Massachusetts* statute the defendant would have been justified in killing the dog for the reason that it was running at large without a collar; slaves, *Jones v. Cole*, 2 Bailey L. (S. Car.) 330; *M'Hugh v. Dinkins*, 2 Brev. (S. Car.) 324; *Craufurd v. Smith*, 93 Va. 623, the last case holding that where the defendant was guilty of conversion of slaves prior to the enactment of the Emancipation Act, trover could be maintained against him therefor after the enactment of such act; newspapers, *Teal v. Felton*, 12 How. (U. S.) 284; letters, *Earle v. Holderness*, 4 Bing. 462; *Clendon v. Dinneford*, 5 C. & P. 18, 24 E. C. L. 103; doctor's prescriptions, *R. C. Stuart Drug Co. v. Hirsch*, (Tex. Civ. App. 1899) 50 S. W. Rep. 583; and articles of church furniture, *Stebbins v. Jennings*, 10 Pick. (Mass.) 172.

**7. Wild Geese.** — *Amory v. Flynn*, 10 Johns. (N. Y.) 102, 6 Am. Dec. 316.

**8. Whale.** — *Taber v. Jenny*, 1 Sprague (U. S.) 315.



animals *feræ naturæ* which were not in the possession of the plaintiff and which have no earmarks of ownership.<sup>1</sup>

**Public Policy.** — Trover cannot be maintained for property which has for its object the violation of the law and which it is unlawful to possess, such as counterfeit money.<sup>2</sup> The fact, however, that property may have been used for an unlawful purpose does not prevent the maintenance of trover therefor, if it is also capable of use for a lawful purpose.<sup>3</sup>

**Intangible Property.** — Since the courts have disregarded the fiction in the action of trover with regard to the loss, the action has been held to be applicable as a remedy for the conversion of intangible property.<sup>4</sup> So at an early date the action was held to be maintainable for the conversion of written agreements,<sup>5</sup> and it will lie for a certificate of membership in a board of trade;<sup>6</sup> but trover cannot be maintained for a license to sell liquor or to occupy a market stand,<sup>7</sup> nor for the good will of a business.<sup>8</sup>

**Change in Form of Property.** — Trover may be maintained though through the action of the defendant there has been a change in the original form of the property. Thus, where wood has been converted and made into coal it has been held that the owner of the wood could maintain trover for the conversion of the coal;<sup>9</sup> and the action has been held to be maintainable where timber was converted into lumber<sup>10</sup> or sawlogs<sup>11</sup> or staves.<sup>12</sup>

**Records.** — It seems that trover will not lie for the conversion of records, as records are not private property;<sup>13</sup> but it will lie for exemplifications of records.<sup>14</sup> Thus, trover has been held to lie for a writ of execution issued upon a judgment.<sup>15</sup>

**Judgment.** — In *North Carolina*, it has been held that though a judgment of a justice of the peace is not a record, the judgment creditor has not such a property therein that he may maintain trover therefor.<sup>16</sup> In other courts,

1. **Oysters Planted in Public Waters.** — *Shepard v. Levenson*, 2 N. J. L. 369; *Brinckerhoff v. Starkins*, 11 Barb. (N. Y.) 248.

2. **Public Policy — Counterfeit Money.** — *Spalding v. Preston*, 21 Vt. 9, 50 Am. Dec. 68.

3. *Cox v. Cook*, 14 Allen (Mass.) 165 (robe used in driving in violation of Sunday laws); *Averill v. Chadwick*, 153 Mass. 171 (game unlawfully exposed for sale); *Boucher v. Shewan*, 14 U. C. C. P. 419, holding, in an action for the conversion of certain pamphlets, where the defense relied on was the illegal character of the pamphlets as containing a scoffing and indecent attack on Christianity, that the material in the pamphlets, independently of the printed matter thereon, was property and that the action was maintainable.

4. **Intangible Property.** — *Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80; *Ayres v. French*, 41 Conn. 151.

5. *Scott v. Jones*, 4 Taunt. 865.

6. *Olds v. Chicago Open Board of Trade*, 33 Ill. App. 445.

7. **Licenses.** — *Meier v. Wilkens*, 15 N. Y. App. Div. 97.

8. **Good Will.** — *Meier v. Wilkens*, 15 N. Y. App. Div. 97.

9. **Property Changed in Form.** — *Riddle v. Driver*, 12 Ala. 590.

10. *Pierrepont v. Barnard*, 5 Barb. (N. Y.) 364.

11. *Gates v. Rifle Boom Co.*, 70 Mich. 309; *Whitney v. Huntington*, 37 Minn. 197.

12. *Heard v. James*, 49 Miss. 236.

13. **Records.** — *Jones v. Winckworth, Hardres* 111.

**Limitation of Rule.** — In *Keeler v. Fassett*, 21 Vt. 539, 52 Am. Dec. 71, Royce, C. J., said in reference to this rule: "The reason assigned for the rule indicates its proper limitation. In the first place, the denial of the action should doubtless be understood as extending to individual parties, who may suppose themselves interested in the preservation of the record, but not to a person having the official custody of it; for possession, accompanied with the responsibilities of such a person, would seem to constitute a sufficient title to maintain the action against a wrongdoer. In the next place, the rule should be taken as being predicated of the record strictly so called, which is made and preserved by public authority, and not of such papers as have relation to the record, but are not parcel of it."

14. *Hudspeth v. Wilson*, 2 Dev. L. (13 N. Car.) 372, 21 Am. Dec. 344. See also *Jones v. Winckworth, Hardres* 111, wherein trover was held to be maintainable for the exemplification of letters patent.

15. *Keeler v. Fassett*, 21 Vt. 539, 52 Am. Dec. 71, holding further that such an action may be maintained although the execution may have expired prior to the commencement of the action, since its absence from the office whence it issued might embarrass the judgment creditor in procuring a fresh execution upon the judgment, and might even create a presumption that the judgment had been satisfied. See also *Little v. Gibbs*, 4 N. J. L. 240.

16. *Cobb v. Cornegay*, 6 Ired. L. (28 N. Car.) 358, 45 Am. Dec. 497; *Platt v. Potts*, 11 Ired. L. (33 N. Car.) 266, 53 Am. Dec. 412. *Contra*,

however, trover for the conversion of a judgment by reason of an unauthorized execution of a satisfaction thereof has been sustained.<sup>1</sup>

**2. Evidences of Indebtedness.** — Since, as just shown, the action of trover may be maintained for the conversion of intangible property, it will lie for an evidence of indebtedness,<sup>2</sup> a written guaranty,<sup>3</sup> a bank-deposit book,<sup>4</sup> or a solicitor's docket and papers.<sup>5</sup>

**Insurance Policy.** — So trover has been held to be maintainable for the conversion of an insurance policy.<sup>6</sup>

**Bonds.** — The action may be maintained for the conversion of bonds.<sup>7</sup>

**Accounts.** — It has been held that trover was maintainable for a statement of account.<sup>8</sup>

**Bills, Notes, and Checks.** — For the conversion of bills of exchange<sup>9</sup> or checks,<sup>10</sup>

*Hudspeth v. Wilson*, 2 Dev. L. (13 N. Car.) 372, 21 Am. Dec. 344.

1. *Rivinus v. Langford*, (C. C. A.) 75 Fed. Rep. 959; *Johnson v. Dunn*, 75 Minn. 533; *De Fino v. Stern*, 5 N. Y. App. Div. 56.

2. **Evidence of Indebtedness.** — *Jarvis v. Rogers*, 15 Mass. 389.

**Trover Lies for an Unstamped Agreement**, if it can, upon payment of a penalty and stamp duty, be stamped and rendered available. *Scott v. Jones*, 4 Taunt. 865.

3. **Guaranty.** — *M'Leod v. M'Ghie*, 2 M. & G. 326, 40 E. C. L. 394; *Biddle v. Bayard*, 13 Pa. St. 150.

4. **Bank-deposit Book.** — *Newman v. Munk*, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 639.

5. **Solicitor's Docket.** — *Doyle v. Eccles*, 17 U. C. C. P. 644.

6. **Insurance Policy.** — *Watson v. M'Lean*, El. Bl. & El. 75, 96 E. C. L. 75; *Wills v. Wells*, 2 Moo. 247; *Woodworth v. Hascall*, 59 Neb. 124; *Luckey v. Gannon*, (N. Y. Super. Ct. Gen. T.) 37 How. Pr. (N. Y.) 134; *Bailey v. American Deposit, etc., Co.*, 52 N. Y. App. Div. 402; *Toplitz v. Bauer*, 161 N. Y. 325. See also *Buck v. Knowlton*, 21 Can. Sup. Ct. 371.

7. **Bonds** — *England.* — *Standing v. Grundy*, 6 L. J. Exch. 181.

*Canada.* — *Bank of Upper Canada v. Widmer*, 2 U. C. Q. B. O. S. 222.

*United States.* — *Chew v. Louchheim*, (C. C. A.) 80 Fed. Rep. 500.

*Alabama.* — *Donnell v. Thompson*, 13 Ala. 440; *Blackman v. Lehman*, 63 Ala. 547, 35 Am. Rep. 57.

*Illinois.* — *Monmouth First Nat. Bank v. Dunbar*, 19 Ill. App. 558; *Ennor v. Galena, etc., R. Co.*, 23 Ill. App. 124; *Monmouth First Nat. Bank v. Strang*, 28 Ill. App. 325.

*Iowa.* — *McNamara v. New Melleray*, 88 Iowa 502.

*Maine.* — *Kimball v. Billings*, 55 Me. 147, 92 Am. Dec. 581.

*Maryland.* — *Smith v. Robertson*, 4 Har. & J. (Md.) 30; *Dean v. Turner*, 31 Md. 52.

*Massachusetts.* — *Snow v. Alley*, 144 Mass. 546, 59 Am. Rep. 119.

*New York.* — *Carver v. Creque*, 46 Barb. (N. Y.) 507; *Campbell v. Parker*, 9 Bosw. (N. Y.) 322; *Denslow v. Fowler*, 2 Cow. (N. Y.) 592; *Pierson v. Townsend*, 2 Hill (N. Y.) 550; *Martin v. Hillen*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 309, 66 Hun (N. Y.) 681, affirmed 142 N. Y. 140; *Caywood v. Van Ness*, 74 Hun (N.

Y.) 28; *Barber v. Hathaway*, 47 N. Y. App. Div. 165; *Blanck v. Nelson*, 39 N. Y. App. Div. 21; *Industrial, etc., Trust v. Tod*, 52 N. Y. App. Div. 195.

*Pennsylvania.* — *Romig v. Romig*, 2 Rawle (Pa.) 241; *Reynolds v. Cridge*, 131 Pa. St. 189.

*Vermont.* — *Bullock v. Rogers*, 16 Vt. 294.

**Trover by Assignee of Bond Against Maker Sustained.** — *Clowes v. Hawley*, 12 Johns. (N. Y.) 484.

**Trover Sustained Though Bond Not Transferable.** — *Brickhouse v. Brickhouse*, 11 Ired. L. (33 N. Car.) 404.

**Bond Paid.** — In *Besherer v. Swisher*, 3 N. J. L. 316, it seems to have been held that trover would not lie for a bond which had been paid, but not taken up.

8. **Account.** — *Fullam v. Cummings*, 16 Vt. 697.

9. **Bills of Exchange** — *England.* — *Atkins v. Owen*, 4 Ad. & El. 819, 31 E. C. L. 191, 2 Hurl. & W. 59; *Cranch v. White*, 1 Bing. N. Cas. 414, 27 E. C. L. 438, 6 C. & P. 767, 25 E. C. L. 641; *Parry v. Frame*, 2 B. & P. 451; *Goggerley v. Cuthbert*, 2 B. & P. N. R. 170; *Down v. Halling*, 4 B. & C. 330, 10 E. C. L. 347; *Wilkinson v. Whalley*, 5 M. & G. 590, 44 E. C. L. 311, 6 Scott N. R. 631, 1 Dowl. & L. 9, 7 Jur. 468, 12 L. J. C. Pl. 270; *Morrison v. Buchanan*, 6 C. & P. 18, 25 E. C. L. 258; *Roberts v. Wyatt*, 2 Taunt. 268; *Lovell v. Martin*, 4 Taunt. 799; *Treuttel v. Barandon*, 8 Taunt. 100, 4 E. C. L. 33; *Alsager v. Close*, 10 M. & W. 576; *Kleinwort v. Comptoir Nat., etc.*, (1894) 2 Q. B. 157, 63 L. J. Q. B. 674.

*Indiana.* — *Comparet v. Burr*, 5 Blackf. (Ind.) 419; *Richmond First Nat. Bank v. Gibbons*, 7 Ind. App. 629; *Kidder v. Biddle*, 13 Ind. App. 653.

*New York.* — *People v. Bank of North America*, 75 N. Y. 547; *Hynes v. Patterson*, 95 N. Y. 1; *Tobin v. Kirk*, 73 Hun (N. Y.) 229; *Lawatsch v. Cooney*, 86 Hun (N. Y.) 546.

*Ohio.* — *Gibsonburg Banking Co. v. Wake-man Bank Co.*, 10 Ohio Cir. Dec. 754, 20 Ohio Cir. Ct. 591.

*South Carolina.* — *Abrahams v. South-western R. Bank*, 1 S. Car. 441, 7 Am. Rep. 33.

**Trover by Drawer of Bill Held to Be Maintainable.** — *Evans v. Kymer*, 1 B. & Ad. 528, 20 E. C. L. 437.

10. **Checks.** — *Lovell v. Hammond Co.*, 66 Conn. 500; *Krager v. Pierce*, 73 Iowa 359;

of banknotes or bills,<sup>1</sup> and of promissory notes, trover may be maintained;<sup>2</sup> and the action has been held to lie even against the maker of the note<sup>3</sup> or by the

Columbia Mill Co. *v.* National Bank of Commerce, 52 Minn. 224; Richmond *v.* Soporstos, (N. Y. City Ct. Gen. T.) 18 N. Y. Supp. 433; Schmidt *v.* Garfield Nat. Bank, 64 Hun (N. Y.) 298; Haas *v.* Altieri, (N. Y. City Ct. Gen. T.) 19 N. Y. Supp. 687; Schreiber *v.* Finan, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 560; Carter *v.* Eighth Ward Bank, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 128; Pawson *v.* Miller, 66 N. Y. App. Div. 12; Precker *v.* London, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 197; Keiner *v.* Folsom, (Supm. Ct. App. T.) 79 N. Y. Supp. 1099; Mayer *v.* Kilpatrick, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 689; Graton, etc., Mfg. Co. *v.* Redelsheimer, 28 Wash. 370.

**A Check Not Made Payable to the Plaintiff**, or negotiated, but which is his property, may be the subject of an action of trover. Tilden *v.* Brown, 14 Vt. 164.

1. **Banknotes.**—Burn *v.* Morris, 4 Tyrw. 485; Moody *v.* Keener, 7 Port. (Ala.) 218; Boyle *v.* Levings, 28 Ill. 314; Coffin *v.* Anderson, 4 Blackf. (Ind.) 395; Colebrook *v.* Merrill, 46 N. H. 160; Little *v.* Gibbs, 4 N. J. L. 240; Dows *v.* Bignall, Hill & D. Supp. (N. Y.) 407; Graves *v.* Dudley, 20 N. Y. 76.

**Conversion by Bank of Its Own Bills.**—During the civil war, a customer of a bank in South Carolina left a number of the bank's own bills with the bank as security for the return of a like sum of Confederate treasury notes borrowed for a limited time. Within this time he tendered this sum in Confederate treasury notes and demanded a return of the bank bills; and upon the refusal of the bank to deliver them, brought trover for their conversion. It was held that his right to recover was not taken away by the fact that the property pledged was money or bills of the bank itself, but that the same principle was to govern as if the article deposited had been a watch or a jewel. Abrahams *v.* South-western R. Bank, 1 S. Car. 441, 7 Am. Rep. 33.

2. **Promissory Notes**—*United States.*—Lincoln Sav. Bank, etc., Co. *v.* Allen, (C. C. A.) 82 Fed. Rep. 148.

*Alabama.*—Carter *v.* Lehman, 90 Ala. 126; St. John *v.* O'Connell, 7 Port. (Ala.) 466.

*Colorado.*—E. F. Hallack Lumber, etc., Co. *v.* Gray, 19 Colo. 149.

*Connecticut.*—Netleton *v.* Riggs, 1 Root (Conn.) 125; Tucker *v.* Jewett, 32 Conn. 563.

*Georgia.*—Seago *v.* Pomeroy, 46 Ga. 227; Rushin *v.* Tharpe, 88 Ga. 779; Fisher *v.* George S. Jones Co., 108 Ga. 490; Holmes *v.* Langston, 110 Ga. 861.

*Illinois.*—Boyle *v.* Levings, 28 Ill. 314; Hughes *v.* Lumsden, 8 Ill. App. 185.

*Indiana.*—Comparet *v.* Burr, 5 Blackf. (Ind.) 419; Harlan *v.* Brown, 9 Ind. App. 319; Stephenson *v.* Feezer, 55 Ind. 416.

*Iowa.*—Allison *v.* King, 25 Iowa 56; Dean *v.* Nichols, etc., Co., 95 Iowa 89; Warder, etc., Co. *v.* Cuthbert, 99 Iowa 681.

*Louisiana.*—Romero *v.* Newman, 50 La. Ann. 80.

*Maine.*—McNear *v.* Atwood, 17 Me. 434; Neal *v.* Hanson, 60 Me. 84.

*Maryland.*—Thompson *v.* Gortner, 73 Md. 474.

*Massachusetts.*—Neale *v.* Weare Bank, 3 Allen (Mass.) 202; Day *v.* Whitney, 1 Pick. (Mass.) 503; Kingman *v.* Pierce, 17 Mass. 247; Security Bank *v.* Fogg, 148 Mass. 273; Scolians *v.* Rollins, 173 Mass. 275, 73 Am. St. Rep. 284.

*Michigan.*—Harris *v.* Cable, 104 Mich. 365.

*Minnesota.*—Nininger *v.* Banning, 7 Minn. 274.

*Missouri.*—Fry *v.* Baxter, 10 Mo. 302; Richardson *v.* Ashby, 132 Mo. 238; Vansandt *v.* Hobbs, 84 Mo. App. 628.

*Nebraska.*—Halbert *v.* Rosenbalm, 49 Neb. 498; Cortelyou *v.* Hiatt, 36 Neb. 584.

*New Jersey.*—New Brunswick Bank *v.* Neilson, 15 N. J. L. 337, 29 Am. Dec. 691.

*New York.*—Murray *v.* Burling, 10 Johns. (N. Y.) 172; Bissel *v.* Drake, 19 Johns. (N. Y.) 66; Decker *v.* Mathews, 12 N. Y. 313; Laverty *v.* Snethen, 68 N. Y. 522, 23 Am. Rep. 184; Griggs *v.* Day, 136 N. Y. 152, 32 Am. St. Rep. 704; Petrie *v.* Williams, 68 Hun (N. Y.) 589; Boyer *v.* Fenn, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 128; Pease Piano Co. *v.* Waterloo Organ Co., 36 N. Y. App. Div. 627.

*North Carolina.*—Smith *v.* Durham, 127 N. Car. 417.

*Pennsylvania.*—McClellan *v.* Hertzog, 6 S. & R. (Pa.) 154; Brunner *v.* Griffith, 4 Pa. Dist. 640; Davis *v.* Funk, 39 Pa. St. 243, 80 Am. Dec. 519; Fell *v.* McHenry, 42 Pa. St. 41; Craig *v.* McHenry, 35 Pa. St. 120.

*South Dakota.*—Grigsby *v.* Day, 9 S. Dak. 585; Gillespie *v.* Evans, 10 S. Dak. 234.

*Tennessee.*—Clark *v.* Cullen, (Tenn. Ch. 1897) 44 S. W. Rep. 204.

*Texas.*—Thomas *v.* Morse, 80 Tex. 289.

*Utah.*—Walley *v.* Deseret Nat. Bank, 14 Utah 305.

*Vermont.*—Pierce *v.* Gilson, 9 Vt. 216; Lamb *v.* Clark, 30 Vt. 347; Robbins *v.* Packard, 31 Vt. 570, 76 Am. Dec. 134; Park *v.* McDaniels, 37 Vt. 594; Spencer *v.* Dearth, 43 Vt. 98; Stewart *v.* Martin, 49 Vt. 266.

*Washington.*—Howard *v.* Seattle Nat. Bank, 10 Wash. 280.

*Wisconsin.*—Lyle *v.* McCormick Harvesting Mach. Co., 108 Wis. 81.

*Canada.*—Walsh *v.* Brown, 18 U. C. C. P. 60; Robinson *v.* Ferguson, 23 N. Bruns. 332.

**Though the Owner Could Not Have Sued on the Note** in his own name, he may maintain trover therefor. Donnell *v.* Thompson, 13 Ala. 440; Lowremore *v.* Berry, 19 Ala. 130, 54 Am. Dec. 188.

**A Promissory Note Payable in a Commodity** and therefore not negotiable, may be the subject of wrongful conveyance. Hicks *v.* Lyle, 46 Mich. 488.

**Illegal Contract.**—Where the note was illegal as against public policy, trover will not lie for its conversion. Morrill *v.* Goodenow, 65 Me. 178.

3. **Against Maker of Note.**—Netleton *v.* Riggs, 1 Root (Conn.) 125; Tucker *v.* Jewett, 32 Conn. 563; Kingman *v.* Pierce, 17 Mass. 247; Syl-



maker,<sup>1</sup> as where the maker intrusts the note to another for a special purpose, and such other wrongfully converts it.<sup>2</sup> So trover can be maintained by the maker of a note which has been paid, where the holder refuses to give it up.<sup>3</sup>

**A Release of the Maker** of the note by the owner does not discharge a third person from liability to the owner in trover for a prior wrongful conversion of the note arising out of his collection thereof.<sup>4</sup>

**3. Stock Certificates and Shares of Stock.** — It has frequently been held that trover is maintainable for the conversion of shares of stock in corporations<sup>5</sup>

*vester v. Girard*, 4 Rawle (Pa.) 185; *Fell v. McHenry*, 42 Pa. St. 41.

**What Must Be Shown.** — But to enable the payee to maintain trover against the maker, a wrongful taking must be shown, or a refusal to deliver the note when demanded by the plaintiff. *Alexander v. Rundle*, 75 Ill. 85.

**1. By Maker of Note.** — *Decker v. Mathews*, 12 N. Y. 313; *Buck v. Kent*, 3 Vt. 99, 21 Am. Dec. 576.

**Right to Sue Not Dependent on Payment.** — Where a note belonging to the maker is wrongfully converted by another by negotiating it, the maker's right to maintain trover for such conversion does not depend upon the fact of payment of the note to the person to whom it is negotiated. *Decker v. Mathews*, 12 N. Y. 313.

**2. Neal v. Hanson**, 60 Me. 84; *Murray v. Burling*, 10 Johns. (N. Y.) 172; *Hynes v. Patterson*, 95 N. Y. 1; *Buck v. Kent*, 3 Vt. 99, 21 Am. Dec. 576; *Park v. McDaniels*, 37 Vt. 594; *Spencer v. Dearth*, 43 Vt. 98; *Stewart v. Martin*, 49 Vt. 266.

**Illustration.** — In *Buck v. Kent*, 3 Vt. 99, 21 Am. Dec. 576, it appeared that the plaintiff gave his note to the defendant, to whose order it was payable, in exchange for two horses, upon the understanding that if the plaintiff should elect to rescind the contract the note was to be returned. The plaintiff did rescind, but the defendant transferred the note to a third person, who recovered its value against the plaintiff. It was held that trover was maintainable for the note.

**Maker of Accommodation Note.** — Where the plaintiff gave a note for accommodation to the defendant, who was to pay and take care of it and save the defendant from liability, and the defendant paid and took up the note, after using it for the purpose designed, and then claimed to hold it as a valid instrument and refused to give it up, it was held that the plaintiff had a right to maintain trover for it. *Park v. McDaniels*, 37 Vt. 594.

**3. Refusal to Surrender Paid Note.** — *Otisfield v. Mayberry*, 63 Me. 197; *Stone v. Clough*, 41 N. H. 290; *Pierce v. Gilson*, 9 Vt. 216; *Gleason v. Owen*, 35 Vt. 590; *Spencer v. Dearth*, 43 Vt. 98. See, however, *Lowremore v. Berry*, 19 Ala. 130, 54 Am. Dec. 188; *Todd v. Crookshanks*, 3 Johns. (N. Y.) 432.

Trover may be maintained by the maker of a promissory note against the payee after the note is fully paid, if the payee having the note in his possession refuses to deliver it to the maker, or if after the payment the payee disposes of the note. *Stone v. Clough*, 41 N. H. 290.

In *Otisfield v. Mayberry*, 63 Me. 197, Apple-

ton, C. J., said: "The maker of a note has a right to its possession upon payment. In his hand it is evidence of such payment. In the hands of a stranger it is *prima facie* evidence of indebtedness. If a suit is brought it imposes upon the maker the necessity of a defense, the procurement of testimony, the employment of counsel, and the delay, expense, and vexation of litigation. The possession of it by the maker is of importance to him. The conversion of it by another may become a source of indefinite injury. Accordingly it has been held in this state in *Neal v. Hanson*, 60 Me. 84; in Vermont in *Buck v. Kent*, 3 Vt. 99, 21 Am. Dec. 576; *Pierce v. Gilson*, 9 Vt. 216; and in *Spencer v. Dearth*, 43 Vt. 98; and in New Hampshire in *Stone v. Clough*, 41 N. H. 290, that trover may be maintained by the maker against the payee for the conversion or wrongful withholding of his paid promissory note."

**4. Allison v. King**, 25 Iowa 56.

**5. Shares of Stock — United States.** — *Chew v. Louchheim*, 80 Fed. Rep. 500, 39 U. S. App. 619; *London, etc., Bank v. Aronstein*, 117 Fed. Rep. 601, 54 C. C. A. 663.

*California.* — *Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80; *Kullman v. Greenebaum*, 92 Cal. 403, 27 Am. St. Rep. 150. See also *Edwards v. Sonoma Valley Bank*, 59 Cal. 136.

*Colorado.* — *Continental Divide Min. Invest. Co. v. Bliley*, 23 Colo. 160; *Salida Bldg., etc., Assoc. v. Davis*, 16 Colo. App. 294.

*Connecticut.* — *Ayres v. French*, 41 Conn. 151; *Seymour v. Ives*, 46 Conn. 109.

*Illinois.* — *McDonald v. Danahy*, 96 Ill. App. 380, affirmed 196 Ill. 133.

*Indiana.* — *Citizens' St. R. Co. v. Robbins*, 144 Ind. 671.

*Iowa.* — *Loetscher v. Dillon*, 119 Iowa 202.

*Maryland.* — *Maryland F. Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779; *Franklin Bank v. Harris*, 77 Md. 423.

*Michigan.* — *McDonald v. McKinnon*, 92 Mich. 254; *Smith v. Thompson*, 94 Mich. 381; *Allen v. Dubois*, 117 Mich. 115, 72 Am. St. Rep. 557; *Hine v. Commercial Bank*, 119 Mich. 448; *Feige v. Burt*, 124 Mich. 565. See also *Morton v. Preston*, 18 Mich. 60, 100 Am. Dec. 146; *Daggett v. Davis*, 53 Mich. 35, 51 Am. Rep. 91.

*Minnesota.* — *Carpenter v. American Bldg., etc., Assoc.*, 54 Minn. 403, 40 Am. St. Rep. 345.

*Missouri.* — *Greer v. Lafayette County Bank*, 128 Mo. 559; *Withers v. Lafayette County Bank*, 67 Mo. App. 115; *Miller v. Lange*, 84 Mo. App. 219.

*Nevada.* — *Boylan v. Huguet*, 8 Nev. 353.

*New York.* — *Cousland v. Davis*, 4 Bosw. (N. Y.) 619; *Anderson v. Nicholas*, 5 Bosw. (N. Y.)

or for the conversion of a stock certificate;<sup>1</sup> and it seems that whenever there is a conversion of shares by means of a wrongful use of a certificate, the owner may count either on the conversion of the certificate or on the shares themselves without mention of the certificate, since the one is merely symbolical of the other.<sup>2</sup>

In Pennsylvania, however, it is held that though trover may lie for the conversion of a certificate of stock as it would for a bond, note, etc.,<sup>3</sup> it will not lie for the conversion of the shares themselves.<sup>4</sup>

**The Measure of Damages** in trover for the conversion of a certificate of stock is the value of the stock represented by the certificate.<sup>5</sup>

**4. Muniments of Title.** — Trover may be maintained for the wrongful conversion of the muniments of title to tangible property, such as title deeds to real estate,<sup>6</sup> a mortgage,<sup>7</sup> a lease,<sup>8</sup> a public-land certificate,<sup>9</sup> or a bill of lading.<sup>10</sup>

**5 Money.** — Trover may be maintained for the conversion of money where the defendant was under an obligation to return to the plaintiff specific money intrusted to his care,<sup>11</sup> and it is not essential that the money for the conver-

121, 28 N. Y. 600; Van Schaick v. Ramsey, 90 Hun (N. Y.) 550; Markham v. Jaudon, 41 N. Y. 235; Smith v. Savin, 141 N. Y. 315; Miller v. Miles, 171 N. Y. 675, 58 N. Y. App. Div. 103; Condouris v. Imperial Turkish Tobacco, etc., Co., (C. Pl. Gen. T.) 3 Misc. (N. Y.) 66; Mahaney v. Walsh, 16 N. Y. App. Div. 601; Matter of Pierson, 19 N. Y. App. Div. 478; Usher v. Van Vranken, 48 N. Y. App. Div. 413.

*Oregon.* — Budd v. Multnomah St. R. Co., 12 Oregon 271, 53 Am. Rep. 355.

*Tennessee.* — Morris v. Wood, (Tenn. Ch. 1896) 35 S. W. Rep. 1013.

*Texas.* — Gresham v. Island City Sav. Bank, 2 Tex. Civ. App. 52; Baker v. Wasson, 59 Tex. 140.

*Utah.* — Kuhn v. McAllister, 1 Utah 273.

*Washington.* — Kahaley v. Haley, 15 Wash. 678.

1. Stewart v. Bright, 6 Houst. (Del.) 344; Barry v. Calder, 48 Hun (N. Y.) 449; Gillett v. Gillett, 54 N. Y. Super. Ct. 525; Connor v. Hillier, 11 Rich. L. (S. Car.) 193, 73 Am. Dec. 105; Kuhn v. McAllister, 1 Utah 273. See also Cumnock v. Savings Inst., 142 Mass. 342.

2. Condouris v. Imperial Turkish Tobacco, etc., Co., (C. Pl. Gen. T.) 3 Misc. (N. Y.) 66; Godfrey v. Pell, 49 N. Y. Super. Ct. 226.

In Daggett v. Davis, 53 Mich. 35, 51 Am. Rep. 91, it was said: "We see no reason why, if the shares are converted by means of a wrongful use of the certificate, the owner in suing may not count upon the conversion of either. The shares are the property converted, but the certificate itself is also property; standing as it does as the representative of the shares, and as its conversion may take the shares from the owner, it seems to be as proper to count upon its conversion as upon the conversion of money or any chattel."

3. Sewall v. Lancaster Bank, 17 S. & R. (Pa.) 285; Biddle v. Bayard, 13 Pa. St. 150; Ryman v. Gerlach, 153 Pa. St. 197; Blood v. Erie Dime Sav., etc., Co., 164 Pa. St. 95.

4. Neiler v. Kelley, 69 Pa. St. 407; Sewall v. Lancaster Bank, 17 S. & R. (Pa.) 285. See, however, Pennsylvania L. Ins. Co. v. Philadelphia, etc., R. Co., 153 Pa. St. 160.

5. **Measure of Damages.** — Stewart v. Bright,

6 Houst. (Del.) 344. See generally *infra*, this title, *Damages Recoverable*.

**6. Muniments of Title — Title Deeds.** — Atkin v. Slater, 1 C. & K. 356, 47 E. C. L. 356; Hooper v. Ramsbottom, 1 Marsh. 414, 6 Taunt. 12, 1 E. C. L. 292; Lord v. Wardle, 4 Scott 402, 3 Bing. N. Cas. 680, 32 E. C. L. 279; Esdaile v. Oxenham, 5 Dowl. & R. 49, 3 B. & C. 225, 10 E. C. L. 57; Hampson v. Boulton, 5 U. C. Q. B. O. S. 23; Burr v. Munro, 6 U. C. Q. B. O. S. 57; Anderson v. Hamilton, 4 U. C. Q. B. 372; Dowling v. Miller, 9 U. C. Q. B. 227; Towle v. Lovet, 6 Mass. 394; Weiser v. Zeisinger, 2 Yeates (Pa.) 537; Oswald v. King, 2 Brev. (S. Car.) 471.

In Towle v. Lovet, 6 Mass. 394, trover was held to be maintainable by an administrator against a stranger for the conversion of a title deed of the plaintiff's intestate.

**Land Scrip.** — In Nelson v. King, 25 Tex. 655, trover was held to be maintainable for the conversion of land scrip.

**Where, However, There Is a Dispute About the Delivery of a Deed to Land,** and the controversy will thus involve the determination of the title to the land conveyed by it, trover cannot be maintained for a conversion of the deed. Hooker v. Latham, 118 N. Car. 179.

**7. Mortgage.** — Campbell v. Parker, 9 Bosw. (N. Y.) 322; Caywood v. Van Ness, 74 Hun (N. Y.) 28; Ferrier v. Manning, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 531; Barber v. Hathaway, 47 N. Y. App. Div. 165; Gleason v. Owen, 35 Vt. 590; Howard v. Seattle Nat. Bank, 10 Wash. 280. Compare Wyll v. Grigsby, 10 S. Dak. 13.

**8. Lease.** — Parry v. Frame, 2 B. & P. 451, 5 Rev. Rep. 651; Weeks v. Goode, 6 C. B. N. S. 367, 95 E. C. L. 367.

**9. Land Certificate.** — Wilson v. Rucker, 1 Call (Va.) 500.

**10. Bill of Lading.** — Alderson v. Gulf, etc., R. Co., (Tex. Civ. App. 1893) 23 S. W. Rep. 617.

**11. Money — England.** — Orton v. Butler, 5 B. & Ald. 652, 7 E. C. L. 224, *per* Abbott, C. J.; Kinastori v. Moor, Cro. Car. 89; Draycot v. Piot, Cro. Eliz. 818; Hall v. Dean, Cro. Eliz. 841; Shipwick v. Blanchard, 6 T. R. 208.

*Alabama.* — Moody v. Keener, 7 Port. (Ala.) 218; Taylor v. Dwyer, 129 Ala. 325.

sion of which the action is brought should have been confined in a bag or pouch.<sup>1</sup> Thus, the action may be maintained for money delivered to the defendant to be paid over by him to the plaintiff,<sup>2</sup> or for money delivered to an agent to hold *in specie* or for a particular purpose.<sup>3</sup> So it was held that trover would lie where in the settlement of an account the defendant by fraud secured an overpayment,<sup>4</sup> and where by mistake money of a large denomination was paid as money of a smaller denomination.<sup>5</sup> Similarly, where money is deposited in a bank as a special deposit trover will lie for its conversion.<sup>6</sup> But a general indebtedness, not imposing any duty to return specific money, but which may be discharged by the payment of money generally, cannot be made the basis for an action of trover.<sup>7</sup>

**6. Real Estate and Severed Portions Thereof.** — The action of trover is maintainable for the conversion of personal property only, and cannot be maintained for damages to real property.<sup>8</sup> Thus, the action cannot be main-

*Colorado.* — *Benson v. Eli*, 16 Colo. App. 494.

*Connecticut.* — *McNamara v. McDonald*, 69 Conn. 484, 61 Am. St. Rep. 48.

*Illinois.* — *Boyle v. Levings*, 28 Ill. 314; *Hinckley v. Lewis*, 45 Ill. 327; *Harper v. Scott*, 63 Ill. App. 401; *Grand Pac. Hotel Co. v. Rowland*, 88 Ill. App. 519.

*Indiana.* — *Sloan v. Lick Creek, etc., Gravel Road Co.*, 6 Ind. App. 584; *Worley v. Moore*, 97 Ind. 15.

*Kansas.* — *Emporia Nat. Bank v. Layfeth*, 63 Kan. 17.

*Maine.* — *Norton v. Kidder*, 54 Me. 189.

*Massachusetts.* — *Chapman v. Cole*, 12 Gray (Mass.) 141, 71 Am. Dec. 739; *Barrett v. Bruffee*, 182 Mass. 229.

*Michigan.* — *Pierce v. Underwood*, 112 Mich. 186; *Adams v. Elseffer*, (Mich. 1902) 92 N. W. Rep. 772. See also *Muskegon Booming Co. v. Hendricks*, 89 Mich. 172.

*Minnesota.* — *Farrand v. Hurlburt*, 7 Minn. 477; *American Express Co. v. Piatt*, 51 Minn. 568; *Reynolds v. St. Paul Trust Co.*, 51 Minn. 236; *Holland v. Bishop*, 60 Minn. 23.

*Nebraska.* — *Murphey v. Virgin*, 47 Neb. 692; *State v. Omaha Nat. Bank*, 59 Neb. 483; *Bantley v. Baker*, 61 Neb. 92; *Globe Sav. Bank v. National Bank of Commerce*, 64 Neb. 413.

*New York.* — *McNaughton v. Cameron*, 44 Barb. (N. Y.) 406; *Donohue v. Henry*, 4 E. D. Smith (N. Y.) 162; *Graves v. Dudley*, 20 N. Y. 76; *Goldberg v. Wolff*, (C. Pl. Gen. T.) 10 N. Y. Supp. 544; *Panama R. Co. v. Johnson*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 777, 63 Hun (N. Y.) 629; *Richmond v. Soportos*, (N. Y. City Ct. Gen. T.) 18 N. Y. Supp. 433; *Thompson v. Vroman*, 66 Hun (N. Y.) 245; *Taylor v. Bowen*, 52 N. Y. App. Div. 126; *Jackson v. Moore*, 72 N. Y. App. Div. 217.

*Oregon.* — *Salem Light, etc., Co. v. Anson*, 41 Oregon 562.

*Pennsylvania.* — *Alexander v. Goldstein*, 13 Pa. Super. Ct. 518.

*Rhode Island.* — *Royce v. Oakes*, 20 R. I. 252.

*South Dakota.* — *Smith v. Donahoe*, 13 S. Dak. 334.

*Tennessee.* — *Kramer v. Wood*, (Tenn. Ch. 1899) 52 S. W. Rep. 1113.

*Texas.* — *Gregory v. Montgomery*, 23 Tex. Civ. App. 68; *Black v. Black*, (Tex. Civ. App. 1902) 67 S. W. Rep. 928; *Jones v. Hunt*, 74 Tex. 657.

*Vermont.* — *Lamb v. Clark*, 30 Vt. 347.

1. *Draycot v. Piot*, Cro. Eliz. 818; *Hall v. Dean*, Cro. Eliz. 841; *Kinaston v. Moor*, Cro. Car. 89.

2. *Donohue v. Henry*, 4 E. D. Smith (N. Y.) 162.

3. *Farrand v. Hurlburt*, 7 Minn. 477; *Graves v. Dudley*, 20 N. Y. 76.

4. *Worley v. Moore*, 97 Ind. 15.

5. *Chapman v. Cole*, 12 Gray (Mass.) 141, 71 Am. Dec. 739.

6. *Coffin v. Anderson*, 4 Blackf. (Ind.) 395.

7. **Trover Not Maintainable for General Indebtedness** — *England.* — *Palmer v. Jarmain*, 2 M. & W. 282; *Orton v. Butler*, 5 B. & Ald. 652, 7 E. C. L. 224.

*Georgia.* — *Cooke v. Bryant*, 103 Ga. 727.

*Michigan.* — *Muskegon Booming Co. v. Hendricks*, 89 Mich. 172; *Shrimpton v. Culver*, 109 Mich. 577.

*Missouri.* — *Petit v. Bouju*, 1 Mo. 64.

*Montana.* — *Great Falls v. Hanks*, 21 Mont. 83.

*New York.* — *Sibley v. Ives*, 21 Barb. (N. Y.) 284; *Moore v. Craig*, (Brooklyn City Ct. Gen. T.) 4 N. Y. Supp. 339; *Starr v. Silverman*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 151; *Parmeter v. American Box Mach. Co.*, 44 N. Y. App. Div. 47. See also *Donohue v. Henry*, 4 E. D. Smith (N. Y.) 162.

*Pennsylvania.* — *Davis v. Thompson*, (Pa. 1888) 14 Atl. Rep. 169; *Aurentz v. Porter*, 56 Pa. St. 115; *Borland v. Stokes*, 120 Pa. St. 278.

*Rhode Island.* — *Larson v. Dawson*, 24 R. I. 317, 96 Am. St. Rep. 716.

*Tennessee.* — *Stott v. Alexander*, 2 Sneed (Tenn.) 650.

Where the plaintiff owed the defendant one hundred and eight dollars and eighty-six cents, and by mistake gave him a draft for one hundred and ninety-eight dollars and eighty-six cents, which was negotiated by the defendant and afterwards paid by the plaintiff before discovering the error, it was held that trover did not lie for the recovery of the ninety dollars excess paid. *Muskegon Booming Co. v. Hendricks*, 89 Mich. 172.

8. **Real Estate.** — *Thweat v. Stamps*, 67 Ala. 96; *Beede v. Lamprey*, 64 N. H. 510, 10 Am. St. Rep. 426; *Glencoe Land, etc., Co. v. Hudson Bros. Commission Co.*, 138 Mo. 439, 60 Am. St. Rep. 560; *Darrah v. Baird*, 101 Pa. St. 265.



tained to recover the value of fixtures annexed to and constituting a part of the freehold;<sup>1</sup> and if fixtures which a tenant might remove during his term be suffered to remain after its expiration, they become inseparable from the freehold, and the tenant cannot afterwards maintain trover against his landlord therefor.<sup>2</sup> So sand or gravel while in its original bed is a part of the realty, and trover is not maintainable for a conversion thereof.<sup>3</sup>

**Wrongful Annexation.** — A defendant cannot through the wrongful annexation of the personal property of another to the freehold so convert such property into real estate as to prevent the owner from maintaining trover therefor;<sup>4</sup> but the personal property of one person may be annexed to the freehold of another by a third person, though wrongfully, so as to become a part of the freehold and cease to be the subject of an action of trover,<sup>5</sup> as where railroad ties belonging to an individual are laid in the roadbed of a railroad company by a contractor,<sup>6</sup> or where stones are quarried from the land of one person and laid as a permanent sidewalk by a third person on the land of another.<sup>7</sup>

**Wrongful Severance.** — If property constituting a part of the freehold is wrongfully severed therefrom by a trespasser, it immediately becomes a personal chattel, the title to which vests in the owner of the land, and he may maintain an action of trover therefor against the wrongdoer,<sup>8</sup> even in a state other than that in which the severance took place.<sup>9</sup> Thus, if fixtures are wrongfully severed from the freehold,<sup>10</sup> ore or minerals<sup>11</sup> or coal mined,<sup>12</sup> standing

**1. Fixtures** — *England.* — *Davis v. Jones*, 2 B. & Ald. 165; *Colegrave v. Dias Santos*, 3 Dowl. & R. 255, 2 B. & C. 76, 9 E. C. L. 30; *Mackintosh v. Trotter*, 3 M. & W. 184; *Longstaff v. Meagoe*, 4 N. & M. 211; *Sheen v. Rickie*, 5 M. & W. 175.

*Canada.* — *Bunnell v. Tupper*, 10 U. C. Q. B. 414; *Cleaver v. Culloden*, 14 U. C. Q. B. 491.

*Connecticut.* — *Woodruff, etc., Iron Works v. Adams*, 37 Conn. 233.

*Illinois.* — *Dewitz v. Shoeneman*, 82 Ill. App. 378.

*Massachusetts.* — *Brown v. Wallis*, 115 Mass. 156; *Raddin v. Arnold*, 116 Mass. 270.

*Michigan.* — *Knowlton v. Johnson*, 37 Mich. 47; *Morrison v. Berry*, 42 Mich. 389, 36 Am. Rep. 446; *Detroit, etc., R. Co. v. Busch*, 43 Mich. 571.

*Nevada.* — *Prescott v. Wells*, 3 Nev. 82.

*Vermont.* — *Jackson v. Walton*, 28 Vt. 43.

And see the title *FIXTURES*, vol. 13, p. 678.

**2. Roffey v. Henderson**, 17 Q. B. 575, 79 E. C. L. 575, 21 L. J. Q. B. 49; 16 Jur. 84; *Darrah v. Baird*, 101 Pa. St. 265.

**3. Glencoe Land, etc., Co. v. Hudson Bros. Commission Co.**, 138 Mo. 439, 60 Am. St. Rep. 560.

**4. Wrongful Annexation.** — *Bartley v. Rogers*, 104 Ill. App. 164; *Dawson v. Powell*, 9 Bush (Ky.) 663, 15 Am. Rep. 745; *Coleman v. Stearns Mfg. Co.*, 38 Mich. 30.

**5. Jackson v. Walton**, 28 Vt. 43.

**6. Detroit, etc., R. Co. v. Busch**, 43 Mich. 571.

**7. Jackson v. Walton**, 28 Vt. 43.

**8. Wrongful Severance.** — *Martin v. Porter*, 5 M. & W. 352; *Sampson v. Hammond*, 4 Cal. 184; *Skinner v. Pinney*, 19 Fla. 42, 45 Am. Rep. 1; *Tyson v. McGuineas*, 25 Wis. 656. See also the title *FIXTURES*, vol. 13, p. 679.

In *New York* it has been held that the right to bring trover for chattels severed from the freehold depends upon whether the severance and the conversion are two distinct acts. If

they are not, the plaintiff's only remedy is an action of trespass. *American Union Tel. Co. v. Middleton*, 80 N. Y. 408.

**9. Severance from Freehold in Another State.** — *Farrant v. Thompson*, 5 B. & Ald. 826, 7 E. C. L. 272; *Clarke v. Holford*, 2 C. & K. 540, 61 E. C. L. 540; *Whidden v. Seelye*, 40 Me. 247, 63 Am. Dec. 661; *Hodge v. Eastern R. Co.*, 70 Minn. 193; *House v. Phelan*, 83 Tex. 595; *Tyson v. McGuineas*, 25 Wis. 656.

**10. Severance of Fixtures.** — *Northam v. Bowden*, 11 Exch. 70, 32 Eng. L. & Eq. 559; *Barff v. Probyn*, 64 L. J. Q. B. 557; *Omaha, etc., Smelting, etc., Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185; *Lyttle v. Petty, etc., Realty Co.*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 405. And see the title *FIXTURES*, vol. 13, p. 679.

**Severance by Tenant.** — In *Farrant v. Thompson*, 5 B. & Ald. 826, 7 E. C. L. 272, where certain mill machinery, together with the mill, had been demised to a tenant, who without permission of his landlord severed the machinery from the mill, it was held that the landlord was entitled to bring trover for the machinery even during the continuance of the term.

**11. Ore and Minerals.** — *Eardley v. Granville*, 3 Ch. D. 826, 45 L. J. Ch. 669; *Gesner v. Gas Co.*, 2 Nova Scotia 72; *Benson Min., etc., Co. v. Alta Min., etc., Co.*, 145 U. S. 428; *Colorado Cent. Consol. Min. Co. v. Turck*, (C. C. A.) 70 Fed. Rep. 294; *New Dunderberg Min. Co. v. Old*, (C. C. A.) 97 Fed. Rep. 150; *St. Clair v. Cash Gold Min., etc., Co.*, 9 Colo. App. 235; *Hartford Iron Min. Co. v. Cambria Min. Co.*, 93 Mich. 90, 32 Am. St. Rep. 488; *Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 665.

**12. Coal.** — *Wood v. Morewood*, 3 Q. B. 440 note, 43 E. C. L. 810 note; *Thomas Pressed Brick Co. v. Herter*, 60 Ill. App. 58; *Sunnyside Coal, etc., Co. v. Reitz*, 14 Ind. App. 478; *Genet v. Delaware, etc., Canal Co.*, 14 N. Y. App. Div. 177; *Forsyth v. Wells*, 41 Pa. St. 291, 80 Am. Dec. 617.

grass<sup>1</sup> or growing crops harvested,<sup>2</sup> fruit taken from trees,<sup>3</sup> trees felled,<sup>4</sup> earth, soil, or gravel removed,<sup>5</sup> turpentine drawn from trees,<sup>6</sup> or manure removed from the land,<sup>7</sup> trover may be maintained therefor by the owner of the land. This rule is subject, however, to the exception that the owner of land in the adverse possession of another cannot maintain trover against the latter for articles wrongfully severed from the freehold, as the maintenance of such an action would permit the title to land to be tried in a transitory action.<sup>8</sup>

**Removable Fixtures.** — Articles of personal property, though actually or con-

1. **Grass.** — *Stevens v. Gordon*, 87 Me. 564; *Donahue v. Shippee*, 15 R. I. 453; *Groveland Imp. Co. v. Farmers' Supply Co.*, 25 Wash. 344, 87 Am. St. Rep. 755.

2. **Crops** — *England.* — *Davis v. Connop*, 1 Price 53.

*Arkansas.* — *Robinson v. Kruse*, 29 Ark. 575.

*Illinois.* — *Simpkins v. Rogers*, 15 Ill. 397.

*Massachusetts.* — *Nelson v. Burt*, 15 Mass. 204.

*Michigan.* — *Jackson v. Evans*, 44 Mich. 510; *Miller v. Havens*, 51 Mich. 482; *Weldon v. Lytle*, 53 Mich. 1; *Van Werden v. Winslow*, 117 Mich. 564.

*Missouri.* — *Davis v. Barnes*, 3 Mo. 137.

*New York.* — *Russell v. Willette*, 80 Hun (N. Y.) 497; *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318.

*North Carolina.* — *Black v. Eason*, 10 Ired. L. (32 N. Car.) 308.

*Pennsylvania.* — *McKay v. Pearson*, 6 Pa. Super. Ct. 529, 41 W. N. C. (Pa.) 516.

3. **Fruit Taken from Trees.** — *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728.

4. **Trees Felled** — *England.* — *Le Fleming v. Simpson*, 2 M. & R. 169, 17 E. C. L. 297; *Eardley v. Granville*, 3 Ch. D. 826, 45 L. J. Ch. 669.

*Canada.* — *St. Paul's Church v. Titus*, 6 N. Bruns. 278; *Hendricks v. Titus*, 13 N. Bruns. 77; *Tucker v. Muirhead*, 11 N. Bruns. 420.

*United States.* — *Bly v. U. S.*, 4 Dill. (U. S.) 464; *Northern Pac. R. Co. v. Paine*, 119 U. S. 561; *Pine River Logging, etc., Co. v. U. S.*, 186 U. S. 279; *Fisher v. Brown*, (C. C. A.) 70 Fed. Rep. 570.

*Alabama.* — *White v. Yawkey*, 108 Ala. 270, 54 Am. St. Rep. 159; *Brooks v. Rogers*, 101 Ala. 111; *Louisville, etc., R. Co. v. Hill*, 115 Ala. 334.

*Arkansas.* — *Nicklase v. Morrison*, 56 Ark. 553; *Central Coal, etc., Co. v. John Henry Shoe Co.*, 69 Ark. 302; *Thornton v. St. Louis Refrigerator, etc., Co.*, 69 Ark. 424; *Kendall v. J. I. Porter Lumber Co.*, 69 Ark. 442.

*California.* — *Sampson v. Hammond*, 4 Cal. 184.

*Florida.* — *Skinner v. Pinney*, 19 Fla. 42, 45 Am. Rep. 1; *Wright v. Skinner*, 34 Fla. 453.

*Maine.* — *Wing v. Milliken*, 91 Me. 387, 64 Am. St. Rep. 238; *Moody v. Whitney*, 34 Me. 563; *Whidden v. Seelye*, 40 Me. 247, 63 Am. Dec. 661; *Powers v. Tilley*, 87 Me. 34, 47 Am. St. Rep. 304; *Fleming v. Katahdin Pulp, etc., Co.*, 93 Me. 110.

*Michigan.* — *Clow v. Plummer*, 85 Mich. 550; *Moret v. Mason*, 106 Mich. 340; *Laird v. Coach*, 112 Mich. 628; *Anderson v. Besser*, (Mich. 1902) 91 N. W. Rep. 737, 9 Detroit Leg. N. 412; *Winchester v. Craig*, 33 Mich.

205; *Thompson v. Moiles*, 46 Mich. 42; *Gates v. Rifle Boom Co.*, 70 Mich. 309; *Ayres v. Hubbard*, 71 Mich. 594; *Wilson v. Hoffman*, 93 Mich. 72, 32 Am. St. Rep. 485.

*Minnesota.* — *Whitney v. Huntington*, 37 Minn. 197; *King v. Merriman*, 38 Minn. 47; *Goss v. Meehan*, 83 Minn. 178; *Hastay v. Bonness*, 84 Minn. 120.

*Missouri.* — *James v. Snelson*, 3 Mo. 393; *Waverly Timber, etc., Co. v. St. Louis Cooperage Co.*, 112 Mo. 383; *Holladay-Klotz Land, etc., Co. v. T. J. Moss Tie Co.*, 87 Mo. App. 167.

*Nevada.* — *Whitman Gold, etc., Min. Co. v. Tritle*, 4 Nev. 494; *Ward v. Carson River Wood Co.*, 13 Nev. 44.

*New Hampshire.* — *Beede v. Lamprey*, 64 N. H. 510, 10 Am. St. Rep. 426; *Howe v. Wadsworth*, 59 N. H. 397.

*New Jersey.* — *Wyckoff v. Bodine*, 65 N. J. L. 95.

*New York.* — *Pierrepont v. Barnard*, 5 Barb. (N. Y.) 364; *Brown v. Sax*, 7 Cow. (N. Y.) 95; *Pierrepont v. Shepard, etc., Lumber Co.*, 11 N. Y. App. Div. 383.

*North Carolina.* — *Gaskins v. Davis*, 115 N. Car. 85, 44 Am. St. Rep. 439.

*Oregon.* — *Hodson v. Goodale*, 22 Oregon 68.

*Pennsylvania.* — *Wright v. Guier*, 9 Watts (Pa.) 172, 36 Am. Dec. 108; *Sanderson v. Haverstick*, 8 Pa. St. 294.

*Vermont.* — *Tilden v. Johnson*, 52 Vt. 628, 36 Am. Rep. 769; *Benton v. Beattie*, 63 Vt. 186.

*Washington.* — *Chappell v. Puget Sound Reduction Co.*, 27 Wash. 63, 91 Am. St. Rep. 820.

*Wisconsin.* — *Tyson v. McGuineas*, 25 Wis. 656.

5. **Earth, Soil, Etc.** — *Riley v. Boston Water Power Co.*, 11 Cush. (Mass.) 11; *Illinois Cent. R. Co. v. Le Blanc*, 74 Miss. 626; *Radway v. Duffy*, 79 N. Y. App. Div. 116; *Mather v. Trinity Church*, 3 S. & R. (Pa.) 509, 8 Am. Dec. 663; *Texas, etc., R. Co. v. White*, 25 Tex. Civ. App. 278.

6. **Turpentine Drawn from Trees.** — *Branch v. Morrison*, 5 Jones L. (50 N. Car.) 16, 60 Am. Dec. 770, 6 Jones L. (51 N. Car.) 16; *Branch v. Campbell*, 7 Jones L. (52 N. Car.) 378.

7. **Manure.** — *Strong v. Doyle*, 110 Mass. 92; *Pinkham v. Gear*, 3 N. H. 484; *Stone v. Proctor*, 2 D. Chip. (Vt.) 116; *Foshay v. Barnes*, 12 N. Bruns. 452; *Thomson v. Walsh*, 7 N. Bruns. 369.

8. **Adverse Possession of Land.** — See the title **FIXTURES**, vol. 13, p. 680 note, and see *infra*, this title, *Title to Maintain Trover* — *Title Dependent on Ownership of Real Estate*.

structively annexed to the freehold, which do not become a part of the freehold, but retain their character of personalty, by virtue of the agreement, express or implied, under which the annexation was made, may be made the subject of an action of conversion.<sup>1</sup> Thus, trover has been held to be maintainable for the conversion of a building erected on land by another than the owner, under an agreement, express or implied, that it should be removable.<sup>2</sup>

**7. Property in Custody of Law.** — Although property of which conversion is alleged is in the custody of a court, trover may nevertheless be maintained therefor, since such an action does not affect the possession of the property or interfere with its custody.<sup>3</sup>

**8. Value.** — In order that trover may be maintained for property it must be shown that the property sued for was of some value.<sup>4</sup>

**III. TITLE TO MAINTAIN TROVER — 1. In General.** — Whoever has the legal title to chattels and the right to their possession may maintain trover for their wrongful conversion.<sup>5</sup>

**Evidences of Indebtedness.** — The owner of evidences of indebtedness, such as bills, notes, bonds, etc., may maintain trover in his own name for their conversion though he could not have maintained in his name an action on the instrument itself.<sup>6</sup> Thus, the owner of a note may maintain trover therefor

**1. Removable Fixtures — England.** — *Denholm v. Commercial Bank*, 1 U. C. Q. B. 369; *Wiltshire v. Cottrell*, 1 El. & Bl. 674, 72 E. C. L. 674; *Davis v. Jones*, 2 B. & Ald. 165; *Wansbrough v. Maton*, 4 Ad. & El. 884, 31 E. C. L. 217; *Sheen v. Rickie*, 5 M. & W. 175; *Fairburn v. Eastwood*, 6 M. & W. 679; *London, etc., Loan, etc., Co. v. Drake*, 6 C. B. N. S. 798, 95 E. C. L. 798, 28 L. J. C. Pl. 297.

*California.* — *Greenebaum v. Taylor*, 102 Cal. 624.

*Illinois.* — *Davis v. Taylor*, 41 Ill. 405.

*Maine.* — *Tapley v. Smith*, 18 Me. 12; *Davis v. Buffum*, 51 Me. 160.

*Minnesota.* — *Shapira v. Barney*, 30 Minn. 59.

*Missouri.* — *Finney v. Watkins*, 13 Mo. 291; *Walsh v. Sichler*, 20 Mo. App. 374 (*distinguishing Bircher v. Parker*, 43 Mo. 443).

*New York.* — *Johnston v. Albany Dry Goods Co.*, 12 N. Y. App. Div. 608; *Bahr v. Boley*, 50 N. Y. App. Div. 577; *Thorn v. Sutherland*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 831, 61 Hun (N. Y.) 627. And see *Beardsley v. Sherman*, 1 Daly (N. Y.) 325.

*Oregon.* — *Rosenau v. Syring*, 25 Oregon 386.

*Pennsylvania.* — *Watts v. Lehman*, 107 Pa. St. 106. Compare *Darrah v. Baird*, 101 Pa. St. 265.

*Vermont.* — *Tobias v. Francis*, 3 Vt. 425, 23 Am. Dec. 217; *Straw v. Straw*, 70 Vt. 240.

*Wisconsin.* — *Vilas v. Mason*, 25 Wis. 310. See also the title **FIXTURES**, vol. 13, p. 679.

**2. Alabama.** — *Powers v. Harris*, 68 Ala. 409.

*Kansas.* — *Rainer v. Cooper*, 44 Kan. 762.

*Maine.* — *Osgood v. Howard*, 6 Me. 452, 20 Am. Dec. 322; *Russell v. Richards*, 11 Me. 371, 26 Am. Dec. 532; *Hilborne v. Brown*, 12 Me. 162; *Pullen v. Bell*, 40 Me. 314; *Adams v. Goddard*, 48 Me. 212.

*Michigan.* — *Osborn v. Potter*, 101 Mich. 300.

*Minnesota.* — *Norman v. Eckern*, 60 Minn. 531.

*New Hampshire.* — *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 195.

*New York.* — *Smith v. Benson*, 1 Hill (N. Y.) 176; *Lewis v. Ocean Nav., etc., Co.*, 125 N. Y. 341; *Fleischmann v. Samuel*, 18 N. Y. App. Div. 97; *Bahr v. Boley*, 50 N. Y. App. Div. 577.

*Oregon.* — *Wheeler v. McFerron*, 33 Oregon 22.

**3. Garabaldi v. Wright**, 52 Ark. 416, wherein it was held that though the property is in the custody of the chancery court, an action for its conversion may be brought in a law court.

**4. Value.** — *Miller v. Reigne*, 2 Hill L. (S. Car.) 592. See also *Barnes v. Taylor*, 31 Me. 329.

**5. Title and Right to Possession — England.** — *De Lizardi v. Pennell*, 6 El. & Bl. 742, 88 E. C. L. 742, 2 Jur. N. S. 1227, 25 L. J. Q. B. 387; *Berry v. Heard*, Cro. Car. 242.

*Canada.* — *Troop v. Hart*, 7 Can. Sup. Ct. 512.

*California.* — *Vidovich v. Scott*, 134 Cal. xx.

*Connecticut.* — *Rix v. Strong*, 1 Root (Conn.) 55.

*Georgia.* — *Pope v. Tucker*, 23 Ga. 484.

*Indiana.* — *Gerard v. Jones*, 78 Ind. 378.

*Maine.* — *Moody v. Whitney*, 38 Me. 174, 61 Am. Dec. 239.

*Maryland.* — *O'Connell v. Kilpatrick*, 64 Md. 122.

*Michigan.* — *Spoon v. Chicago, etc., R. Co.*, 85 Mich. 309.

*Minnesota.* — *Jones v. Rahilly*, 16 Minn. 320.

*Nebraska.* — *Butts v. Kingman*, 60 Neb. 224.

*New York.* — *Yates v. Fassett*, 5 Den. (N. Y.) 21; *Mayer v. Kilpatrick*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 689; *Yardum v. Wolf*, 33 N. Y. App. Div. 247.

**Title Through Confusion of Goods.** — *Hesseltine v. Stockwell*, 30 Me. 237, 50 Am. Dec. 627.

**6. Chose in Action.** — *Donnell v. Thompson*, 13 Ala. 440; *Lowremore v. Berry*, 19 Ala. 130, 54 Am. Dec. 188; *Clowes v. Hawley*, 12 Johns. (N. Y.) 486. Compare *Herring v. Tilghman*, 13 Ired. L. (35 N. Car.) 392.



though there has been no indorsement of the note to him.<sup>1</sup> So the owner of a bond conditioned to make title to land may sue for the conversion thereof though he could not have maintained in his own name an action on the bond against the obligor.<sup>2</sup> In trover for a check, sent by a debtor to his creditor and wrongfully converted by a third person, it is no defense that the check was not received by the plaintiff in absolute payment of the indebtedness.<sup>3</sup>

**Want of Title and Right to Possession.** — On the other hand, one who has neither title to chattels, general or special, nor the right to possession cannot maintain trover for their wrongful conversion,<sup>4</sup> since the plaintiff must recover on the

1. *Donnell v. Thompson*, 13 Ala. 440.

2. *Clowes v. Hawley*, 12 Johns. (N. Y.) 486.

3. *Carter v. Eighth Ward Bank*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 128.

4. **Want of Title and Right to Possession** — *England*. — *Brind v. Hampshire*, 1 M. & W. 365; *Melling v. Kelshaw*, 1 Crompt. & J. 184; *Leake v. Loveday*, 4 M. & G. 972, 43 E. C. L. 500.

*Canada*. — *McLean v. Hannon*, 3 Can. Sup. Ct. 706; *Land v. Woodward*, 5 U. C. Q. B. 190; *Cool v. Mulligan*, 13 U. C. Q. B. 613; *Walsh v. Brown*, 18 U. C. C. P. 60; *Cornish v. Niagara Dist. Bank*, 24 U. C. C. P. 262; *Burnham v. Waddell*, 28 U. C. C. P. 263, *affirmed* 3 Ont. App. 288; *Kent v. Ellis*, 31 Can. Sup. Ct. 110; *Annand v. Merchants' Bank*, 12 Nova Scotia 329; *Morgan v. Rice*, 16 Nova Scotia 368.

*United States*. — *Sevier v. Holliday*, Hempst. (U. S.) 160.

*Alabama*. — *Glaze v. McMillion*, 7 Port. (Ala.) 279; *Whitlock v. Heard*, 13 Ala. 776, 48 Am. Dec. 73; *Kemp v. Thompson*, 17 Ala. 9; *Weil v. Ponder*, 127 Ala. 296; *Kansas City, etc., R. Co. v. Wagand*, 134 Ala. 388.

*Arkansas*. — *Stone v. Waggoner*, 8 Ark. 204; *Danley v. Rector*, 10 Ark. 211, 50 Am. Dec. 243.

*Georgia*. — *Tribble v. Laird*, 92 Ga. 686; *Raines v. Perryman*, 29 Ga. 529.

*Illinois*. — *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206; *Union Stock Yard, etc., Co. v. Mallory, etc., Co.*, 157 Ill. 554, 48 Am. St. Rep. 341.

*Indiana*. — *Picquet v. M'Kay*, 2 Blackf. (Ind.) 465; *Traylor v. Horrall*, 4 Blackf. (Ind.) 317; *Barton v. Dunning*, 6 Blackf. (Ind.) 209; *Grady v. Newby*, 6 Blackf. (Ind.) 442; *Ford v. Griffin*, 100 Ind. 85; *Coffin v. Anderson*, 4 Blackf. (Ind.) 395; *Swope v. Paul*, 4 Ind. App. 463; *Hunter v. Cronkhite*, 9 Ind. App. 470; *Baker v. Born*, 17 Ind. App. 122.

*Kansas*. — *Campbell v. Meyer Bros. Drug Co.*, 7 Kan. App. 501.

*Kentucky*. — *Fightmaster v. Beasley*, 7 J. J. Marsh. (Ky.) 410.

*Maine*. — *Clap v. Glidden*, 39 Me. 448; *Perry v. Dole*, 40 Me. 139; *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271; *Fenlason v. Rackliff*, 50 Me. 362; *Fkstrom v. Hall*, 90 Me. 186.

*Maryland*. — *Dungan v. Mutual Ben. L. Ins. Co.* 38 Md. 242.

*Massachusetts*. — *De Wolf v. Gardner*, 12 Cush. (Mass.) 19, 59 Am. Dec. 165; *Baker v. Seavey*, 163 Mass. 522, 17 Am. St. Rep. 175.

*Michigan*. — *Stephenson v. Little*, 10 Mich. 433; *Ribble v. Lawrence*, 51 Mich. 569; *Janaushek v. Eddy*, 108 Mich. 190.

*Minnesota*. — *Vanderburgh v. Bassett*, 4 Minn. 242; *Kenney v. Goergen*, 36 Minn. 190; *Johnson v. Oswald*, 38 Minn. 550, 8 Am. St. Rep. 698.

*Missouri*. — *Turley v. Tucker*, 6 Mo. 583, 35 Am. Dec. 449; *Chouteau v. Hope*, 7 Mo. 428; *T. J. Moss Tie Co. v. Kreilich*, 80 Mo. App. 304, 2 Mo. App. Rep. 641; *Kirk v. Kane*, 87 Mo. App. 274; *Bower v. Bower*, 97 Mo. App. 674.

*New Hampshire*. — *Odiorne v. Colley*, 2 N. H. 66, 9 Am. Dec. 39; *Colby v. Cressy*, 5 N. H. 237.

*New Jersey*. — *Debow v. Colfax*, 10 N. J. L. 128; *Mercantile Co-operative Bank v. Frost*, 62 N. J. L. 476.

*New York*. — *Green v. Clark*, 5 Den. (N. Y.) 497; *Davis v. Hoppock*, 6 Duer (N. Y.) 254; *Chamberlain v. Darrow*, 46 Hun (N. Y.) 48; *Storm v. Livingston*, 6 Johns. (N. Y.) 44; *Dyer v. Vandenbergh*, 11 Johns. (N. Y.) 149; *Schermerhorn v. Van Valkenburgh*, 11 Johns. (N. Y.) 529; *Hotchkiss v. McVickar*, 12 Johns. (N. Y.) 403; *Sheldon v. Soper*, 14 Johns. (N. Y.) 352; *Lane v. Rosenberg*, 56 N. Y. Super. Ct. 604, 7 N. Y. Supp. 906; *Roehm v. Blanchard*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 396; *Caldwell v. Bodine*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 627, 63 Hun (N. Y.) 635; *Knight v. Sackett, etc., Lithographing Co.*, (N. Y. Super. Ct. Gen. T.) 31 Abb. N. Cas. (N. Y.) 373, 61 N. Y. Super. Ct. 219; *Halliday v. Nicholas*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 111; *Jaquemin v. Finnegan*, (County Ct.) 39 Misc. (N. Y.) 628; *Griffin v. Long Island R. Co.*, 101 N. Y. 348.

*North Carolina*. — *Hoshler v. Skull*, Tayl. (1 N. Car.) 152, 1 Am. Dec. 583; *Hudspeth v. Wilson*, 2 Dev. L. (13 N. Car.) 372, 21 Am. Dec. 344; *Lewis v. Mobley*, 4 Dev. & B. L. (20 N. Car.) 323, 24 Am. Dec. 370; *Brothers v. Hurdle*, 10 Ired. L. (32 N. Car.) 490, 51 Am. Dec. 400; *Francis v. Welch*, 11 Ired. L. (33 N. Car.) 215; *Brazier v. Ansley*, 11 Ired. L. (33 N. Car.) 12, 51 Am. Dec. 408.

*North Dakota*. — *Clendening v. Hawk*, 8 N. Dak. 419; *Omlie v. Farmers' State Bank*, 8 N. Dak. 570.

*Ohio*. — *Wyman v. Hurlburt*, 12 Ohio 81, 40 Am. Dec. 461.

*Pennsylvania*. — *Yoner v. Neidig*, 1 Yeates (Pa.) 19.

*South Carolina*. — *Gage v. Allison*, 1 Brev. (S. Car.) 495, 2 Am. Dec. 682; *Slack v. Littlefield Harp. L. (S. Car.)* 208.

*Texas*. — *Epstein v. Meyer Bros. Drug Co.*, 82 Tex. 572; *Lewis v. Davidson*, (Tex. Civ. App. 1805) 20 S. W. Rep. 403; *Miscellaneous Mills v. Bauman*, 12 Tex. Civ. App. 312; *Beck-*

strength of his own title and right to possession, and not on the defendant's lack thereof;<sup>1</sup> and therefore where the plaintiff was out of possession at the time of the wrongful conversion, the defendant can set up the title of a third person in defense.<sup>2</sup>

**Donor and Donee.** — After an executed gift, divesting the donor of all interest in the chattel, he cannot maintain trover against a third person therefor,<sup>3</sup> nor can the administrator of the donor sue in trover unless the gift was fraudulent as to the donor's creditors.<sup>4</sup> In case of an executed gift the donee may, of course, maintain trover for the chattel.<sup>5</sup>

**Special or Limited Ownership.** — To maintain trover the plaintiff need not be the absolute owner of the converted chattels; a special or limited property in the chattels with the right to possession is sufficient.<sup>6</sup>

**Termination of Title Before Action Brought.** — If the title of the plaintiff and his right to possession at the time of the alleged conversion terminate before the action of trover is instituted, and vest in the defendant, the right to maintain trover for the conversion is defeated.<sup>7</sup>

*ham v. Burney*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1041.

*Vermont.* — *Baxter v. Bush*, 29 Vt. 465, 70 Am. Dec. 429.

1. *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206; *Kreider v. Fanning*, 74 Ill. App. 230; *Van Zandt v. Shuyler*, 2 Kan. App. 118; *Baker v. Seavey*, 163 Mass. 522, 47 Am. St. Rep. 475; *Holmes v. Bailey*, 16 Neb. 300.

2. *Connecticut.* — *Morey v. Hoyt*, 65 Conn. 516.

*Kentucky.* — *Graham v. Warner*, 3 Dana (Ky.) 146, 28 Am. Dec. 65.

*Mississippi.* — *Shirley v. Fearne*, 33 Miss. 653, 69 Am. Dec. 375.

*New Jersey.* — *Legrand v. Swayze*, 4 N. J. L. 326; *Glenn v. Garrison*, 17 N. J. L. 1.

*New York.* — *Schermerhorn v. Van Volkenburgh*, 11 Johns. (N. Y.) 529; *McLaughlin v. Harriot*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 343; *Schryer v. Fenton*, 15 N. Y. App. Div. 158.

*North Carolina.* — *Rose v. Coble*, Phil. L. (61 N. Car.) 517.

*Oklahoma.* — *Robinson v. Peru Plow, etc.*, Co., 1 Okla. 140.

*Oregon.* — *Krewson v. Purdom*, 13 Oregon 563.

*Pennsylvania.* — *Pennsylvania R. Co. v. Hughes*, 39 Pa. St. 521.

*West Virginia.* — *Smoot v. Cook*, 3 W. Va. 172, 100 Am. Dec. 741.

*Canada.* — *McCrary v. McCrary*, 22 U. C. Q. B. 520; *Campbell v. Yeadon*, 17 Nova Scotia 212.

3. **Donor.** — *Hunter v. Westbrook*, 2 C. & P. 578, 12 E. C. L. 272.

4. *Rummens v. Hare*, 1 Ex. D. 169, 46 L. J. Exch. 30, 34 L. T. N. S. 407, 24 W. R. 385.

5. **Donee.** — *Winter v. Winter*, 4 L. T. N. S. 639, 9 W. R. 747; *Collis v. Bowen*, 8 Blackf. (Ind.) 262; *Marsh v. Fuller*, 18 N. H. 360; *Johnson v. Clark*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 346.

6. **Special or Limited Ownership** — *England.* — *Roberts v. Wyatt*, 2 Taunt. 268; *Coxe v. Hardden*, 4 East 211.

*Alabama.* — *McGowen v. Young*, 2 Stew. (Ala.) 276.

*California.* — *Rosenthal v. McMann*, 93 Cal. 505.

*Georgia.* — *Lemon v. Wright*, 31 Ga. 317; *Wallis v. Osteen*, 38 Ga. 250.

*Indiana.* — *McConnell v. Maxwell*, 3 Blackf. (Ind.) 419, 26 Am. Dec. 428.

*Maine.* — *Ripley v. Dolbier*, 18 Me. 382.

*Massachusetts.* — *Hardy v. Reed*, 6 Cush. (Mass.) 252; *Morgan v. Ide*, 8 Cush. (Mass.) 420; *Chamberlain v. Clemence*, 8 Gray (Mass.) 389; *Bryant v. Clifford*, 13 Met. (Mass.) 138; *Dennie v. Harris*, 9 Pick. (Mass.) 364; *Duggan v. Wright*, 157 Mass. 228.

*Mississippi.* — *Baldwin v. McKay*, 41 Miss. 358.

*Nebraska.* — *Butts v. Kingman*, 60 Neb. 224.

*New Hampshire.* — *Colby v. Cressy*, 5 N. H. 237; *Bartlett v. Hoyt*, 29 N. H. 317.

*New Jersey.* — *Brewster v. Vail*, 20 N. J. L. 56, 38 Am. Dec. 547.

*New York.* — *Tuthill v. Wheeler*, 6 Barb. (N. Y.) 362; *Bowen v. Fenner*, 40 Barb. (N. Y.) 383; *Smith v. James*, 7 Cow. (N. Y.) 328; *Gillet v. Fairchild*, 4 Den. (N. Y.) 80; *Dyer v. Vandenberg*, 11 Johns. (N. Y.) 149; *Thorp v. Burling*, 11 Johns. (N. Y.) 285; *Schermerhorn v. Van Volkenburgh*, 11 Johns. (N. Y.) 529; *Hotchkiss v. McVickar*, 12 Johns. (N. Y.) 407; *Sheldon v. Soper*, 14 Johns. (N. Y.) 352; *Everett v. Saltus*, 15 Wend. (N. Y.) 474; *Phillips v. McNab*, 16 Daly (N. Y.) 150; *Simon v. Simon*, 38 N. Y. App. Div. 85; *Blanck v. Nelson*, 39 N. Y. App. Div. 21.

*North Carolina.* — *Hughes v. Giles*, 1 Hayw. (2 N. Car.) 26; *Lewis v. Mobley*, 4 Dev. & B. 1. (20 N. Car.) 323, 34 Am. Dec. 379.

*Pennsylvania.* — *Horn v. Davis*, 155 Pa. St. 57.

*Rhode Island.* — *Hawkins v. Capron*, 17 R. I. 679; *F. A. Thomas Mach. Co. v. Voelker*, 23 R. I. 441.

*South Carolina.* — *Jones v. McNeil*, 2 Bailey 1. (S. Car.) 466.

*Texas.* — *Texas, etc.*, R. Co. v. Beard, 68 Tex. 265.

*Vermont.* — *Buckmaster v. Mower*, 21 Vt. 204.

**Prescriptions Left by Purchasers with Druggist.** — *R. C. Stuart Drug Co. v. Hirsch*, (Tex. Civ. App. 1899) 50 S. W. Rep. 583.

7. **Termination of Title Before Action Brought.** — *Wilcox v. Morten*, (Mich. 1902) 92 N. W. Rep. 777, 9 Detroit Leg. N. 507. See also *Murphy v. Hobbs*, 8 Colo. 130; *Clapp v. Glidden*, 39 Me. 448; *Horne v. Briggs*, 98 Mass.

**Proof of Title.** — Where the title is in issue and the right of possession is to be determined by the title, the burden of proof is upon the plaintiff to show title in himself;<sup>1</sup> but he is only required to establish his title by a preponderance of evidence.<sup>2</sup> Where title is shown in one of the parties it is presumed to continue until the contrary is shown.<sup>3</sup>

**The Admissibility of Evidence** to show title is, of course, governed by the general rules of evidence.<sup>4</sup>

**2. Right to Possession.** — To entitle a person to maintain trover he must not only have a special or general property in the chattel, but must also have been in possession or entitled to immediate possession thereof at the time of the conversion.<sup>5</sup> The gist of the action of trover is the injury to the right

510; *Brady v. Whitney*, 24 Mich. 154. See, however, *Barton v. Dunning*, 6 Blackf. (Ind.) 209; *Babcock v. Caldwell*, 22 Mont. 460; *Moore v. Aldrich*, 25 Tex. Supp. 276; *Stalker v. Wier*, 2 Nova Scotia 248.

**1. Burden of Proof.** — *Gam v. Cordrey*, (Del. 1902) 53 Atl. Rep. 334; *Spaulding v. Jennings*, 173 Mass. 65; *Kipp v. Silverman*, 25 Mont. 296; *Van Leeuwen v. Fish*, (N. Y. City Ct. Gen. T.) 28 Misc. (N. Y.) 443; *Mershon v. Bosley*, (Tex. Civ. App. 1901) 62 S. W. Rep. 799; *Walworth County Bank v. Farmers' L. & T. Co.*, 14 Wis. 325.

**2. Preponderance of Evidence.** — *Kruse v. Seeger, etc., Co.*, (C. Pl. Gen. T.) 16 N. Y. Supp. 529, *affirming* (N. Y. City Ct. Gen. T.) 15 N. Y. Supp. 825.

**Sufficiency of Evidence** — *Alabama*. — *Kennington v. Williams*, 30 Ala. 361; *Patterson v. Irvin*, 132 Ala. 557.

*California*. — *Mortimer v. Marder*, 93 Cal. 172.

*Colorado*. — *Mitchell v. Reed*, 16 Colo. 109; *Benson v. Eli*, 16 Colo. App. 494.

*Kansas*. — *Guernsey v. Fulmer*, 66 Kan. 767.

*Maine*. — *Ewell v. Gillis*, 14 Me. 72.

*Minnesota*. — *Pound v. Pound*, 64 Minn. 428; *Linde v. Gaffke*, 81 Minn. 304.

*Missouri*. — *Summons v. Beaubien*, 36 Mo. 307; *Kirk v. Kane*, 87 Mo. App. 274.

*Montana*. — *Palmer v. McMaster*, 10 Mont. 390.

*New York*. — *Tompkins v. Haile*, 3 Wend. (N. Y.) 406; *Bushman v. Brown*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 1, 57 Hun (N. Y.) 592; *Enggren v. Prinz*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 477; *Boyle v. Williams*, (C. Pl. Gen. T.) 1 Misc. (N. Y.) 112; *Freck v. Hughes*, 90 Hun (N. Y.) 16; *Simar v. Paris*, 52 N. Y. App. Div. 439; *Clark v. Levine*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 598; *Hakes v. Thornton*, 59 N. Y. App. Div. 464; *Arsene v. La Fermina*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 776.

*North Dakota*. — *Slattery v. Donnelly*, 1 N. Dak. 264.

*South Carolina*. — *Prater v. Wilson*, 55 S. Car. 468.

*Tennessee*. — *Bateman v. Ryder*, 106 Tenn. 712, 82 Am. St. Rep. 910.

*Texas*. — *Lewis v. Davidson*, (Tex. Civ. App. 1895) 29 S. W. Rep. 403.

*Vermont*. — *Fullam v. Cummings*, 16 Vt. 697; *Bourne v. Merriitt*, 22 Vt. 429.

*Canada*. — *Brown v. Allen*, 3 U. C. Q. B. 57; *McLean v. Hannon*, 3 Can. Sup. Ct. 706.

**3. Presumption as to Continuance of Title.** — *Gale v. Gale*, 70 Vt. 540; *Laubenheimer v. Bach*, 19 Mont. 177. And see the title *PRESUMPTIONS*, vol. 22, p. 1242.

**4. Admissibility of Evidence** — *Alabama*. — *Steiner v. Trantum*, 98 Ala. 315.

*Colorado*. — *Updegraff v. Lesem*, 15 Colo. App. 297.

*Connecticut*. — *Pettibone v. Phelps*, 13 Conn. 445, 35 Am. Dec. 88; *Watson v. Watson*, 14 Conn. 188; *Greenthal v. Lincoln*, 67 Conn. 372.

*Georgia*. — *Terrell v. McKinny*, 26 Ga. 447. *Massachusetts*. — *Sumner v. McNeil*, 12 Met. (Mass.) 519; *Oliver Ditson Co. v. Bates*, 181 Mass. 455.

*Michigan*. — *Adams v. Kellogg*, 63 Mich. 105; *Grenier v. Hild*, 124 Mich. 222.

*Missouri*. — *Matheny v. Johnson*, 9 Mo. 232; *Carter v. Feland*, 17 Mo. 383.

*Montana*. — *Laubenheimer v. Bach*, 19 Mont. 177; *Kipp v. Silverman*, 25 Mont. 296.

*New Hampshire*. — *Tenney v. Evans*, 14 N. H. 343, 40 Am. Dec. 194.

*New York*. — *Graham v. Harrower*, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 144; *Kilpatrick v. Ludwig Carved Moulding Co.*, (N. Y. City Ct. Gen. T.) 11 Misc. (N. Y.) 639.

*Pennsylvania*. — *Doan v. Briggs*, 4 Binn. (Pa.) 496.

*South Carolina*. — *Bogan v. Wilburn*, 1 Spears L. (S. Car.) 179; *Caldwell v. Wilson*, 2 Spears L. (S. Car.) 75.

*Texas*. — *Land v. Klein*, (Tex. Civ. App. 1895) 29 S. W. Rep. 657; *Puckett v. Irick*, 27 Tex. Civ. App. 466.

*Vermont*. — *Henry v. Huntley*, 37 Vt. 316.

See generally the title *EVIDENCE*, vol. 11, p. 484, and the cross-references there given.

**5. Right to Possession** — *England*. — *Pain v. Whittaker*, R. & M. 99, 21 E. C. L. 390; *Bradley v. Copley*, 1 C. B. 685, 50 E. C. L. 685, 14 L. J. C. Pl. 222; *Clerk v. Adam*, 1 Cl. & F. 242; *Yea v. Field*, 2 T. R. 708, 1 Rev. Rep. 603; *Nicholls v. Bastard*, Tyrw. & G. 156, 2 C. M. & R. 659; *Bloxam v. Sanders*, 4 B. & C. 941, 10 E. C. L. 477, 7 Dowl. & R. 407; *Owen v. Knight*, 4 Bing. N. Cas. 56, 33 E. C. L. 278; *Isaac v. Belcher*, 7 Dowl. 516, 5 M. & W. 139, 8 C. & P. 714, 34 E. C. L. 508; *Webb v. Fox*, 7 T. R. 391; *Gordon v. Harper*, 7 T. R. 9; *Broadbent v. Varley*, 12 C. B. N. S. 214, 104 E. C. L. 214; *Smith v. Plomer*, 15 East 607; *Bridges v. Hawkesworth*, 15 Jur. 1070; *Jefferies v. Great Western R. Co.*, 5 El. & Bl. 802, 85 E. C. L. 802, 34 Eng. L. & Eq. 122; *Lord v.*



of possession.<sup>1</sup> The fact that subsequently to the conversion the plaintiff became entitled to possession does not enable him to maintain trover for the conversion, unless such conversion continued;<sup>2</sup> but if at the time when the plaintiff became entitled to possession the conversion continued, he may maintain trover for such existing conversion.<sup>3</sup> Thus, if the owner hires out chattels for a term, and a sheriff wrongfully levies upon the chattels as the property of the bailee and sells them during the term, the lessor cannot, either during or after the term, maintain trover against the sheriff, because he was not entitled to possession at the time of the conversion.<sup>4</sup>

**3. Necessity for Prior Possession.**—The action of trover is founded on the injury to the property right and right to possession, and not, as in case of the action of trespass *de bonis asportatis*, on the injury to the possession; and therefore, if the general or special owner of a chattel was entitled to the possession, he may maintain trover for its wrongful conversion, though there was no invasion of his possession.<sup>5</sup> In fact, the action is founded on the fictitious

Price, L. R. 9 Exch. 54, 43 L. J. Exch. 49, 30 L. T. N. S. 271,

Canada. — *Ralph v. Link*, 5 U. C. Q. B. 145.

United States. — *Louisville Trust Co. v. Stockton*, 75 Fed. Rep. 62, 41 U. S. App. 434.

Alabama. — *Brooks v. Rogers*, 101 Ala. 111; *Fields v. Brice*, 108 Ala. 632; *Dearman v. Dearman*, 5 Ala. 202; *Elmore v. Simon*, 67 Ala. 526; *Corbitt v. Reynolds*, 68 Ala. 378; *Heflin v. Slay*, 78 Ala. 180; *Street v. Nelson*, 80 Ala. 230.

Arkansas. — *Danley v. Rector*, 10 Ark. 211, 50 Am. Dec. 242.

California. — *Middleworth v. Sedgwick*, 10 Cal. 392; *Scriber v. Masten*, 11 Cal. 303.

Georgia. — *Jaques v. Stewart*, 81 Ga. 81; *Rushin v. Tharpe*, 88 Ga. 779.

Illinois. — *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206; *Forth v. Pursley*, 82 Ill. 152; *Owens v. Weedman*, 82 Ill. 409; *Montgomery v. Brush*, 121 Ill. 513; *Robinson v. Hardy*, 22 Ill. App. 512; *Frink v. Pratt*, 26 Ill. App. 222; *Lapp v. Pinover*, 27 Ill. App. 169; *Poppers v. Peterson*, 33 Ill. App. 384; *Reeve v. Fox*, 40 Ill. App. 127; *Kreider v. Fanning*, 74 Ill. App. 230.

Indiana. — *Picquet v. M'Kay*, 2 Blackf. (Ind.) 465; *Traylor v. Horrall*, 4 Blackf. (Ind.) 317; *Grady v. Newby*, 6 Blackf. (Ind.) 442; *Burton v. Tannehill*, 6 Blackf. (Ind.) 470; *Redman v. Gould*, 7 Blackf. (Ind.) 361.

Iowa. — *Krager v. Pierce*, 73 Iowa 359.

Kansas. — *Kennett v. Peters*, 54 Kan. 119, 45 Am. St. Rep. 274.

Maine. — *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271.

Maryland. — *Baltimore v. Norman*, 4 Md. 358.

Massachusetts. — *Winship v. Neale*, 10 Gray (Mass.) 382; *Foster v. Gorton*, 5 Pick. (Mass.) 185; *Ayer v. Bartlett*, 9 Pick. (Mass.) 156; *Hunt v. Holton*, 13 Pick. (Mass.) 216; *Vincent v. Cornell*, 13 Pick. (Mass.) 294, 23 Am. Dec. 683; *Fairbank v. Phelps*, 22 Pick. (Mass.) 535; *Eaton v. Lynde*, 15 Mass. 242; *Landon v. Emmons*, 97 Mass. 37; *Hardy v. Munroe*, 127 Mass. 64; *Newhall v. Kingsbury*, 131 Mass. 445; *Baker v. Seavey*, 163 Mass. 522, 47 Am. St. Rep. 475.

Michigan. — *Edwards v. Frank*, 40 Mich. 616; *Stevenson v. Fitzgerald*, 47 Mich. 166; *Stearns v. Vincent*, 50 Mich. 209, 45 Am. Rep. 37.

Minnesota. — *Hodge v. Eastern R. Co.*, 70 Minn. 193.

Missouri. — *Citizens' Bank v. Tiger Tail Mill*, etc., 152 Mo. 145.

Nebraska. — *Locke v. Shreck*, 54 Neb. 472.

New Hampshire. — *Jones v. Sinclair*, 2 N. H. 319, 9 Am. Dec. 75; *Drake v. Redington*, 9 N. H. 243; *Clark v. Draper*, 19 N. H. 419.

New Jersey. — *Little v. Gibbs*, 4 N. J. L. 240.

New York. — *Hall v. Daggett*, 6 Cow. (N. Y.) 653; *Todd v. Crookshanks*, 3 Johns. (N. Y.) 432; *Canfield v. Monger*, 12 Johns. (N. Y.) 347; *Genin v. Schwenk*, 62 Hun (N. Y.) 574; *Everett v. Coffin*, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; *Dubois v. Harcourt*, 20 Wend. (N. Y.) 41; *Gunning v. Quinn*, 81 Hun (N. Y.) 522; *Smith v. Smalley*, 19 N. Y. App. Div. 519; *American Exch. v. Robertson*, 52 N. Y. Super. Ct. 44; *Adsit v. Ehmke*, 47 N. Y. App. Div. 223.

North Carolina. — *Andrews v. Shaw*, 4 Dev. L. (15 N. Car.) 70.

North Dakota. — *Parker v. Lisbon First Nat. Bank*, 3 N. Dak. 87.

Pennsylvania. — *Passavant v. Gummey*, 2 Pa. Dist. 389; *Tatum v. Sharpless*, 6 Phila. (Pa.) 18, 22 Leg. Int. (Pa.) 244; *Lehr v. Taylor*, 90 Pa. St. 381; *Duffield v. Miller*, 92 Pa. St. 286; *Moorhead v. Scofield*, 111 Pa. St. 584.

South Carolina. — *Gage v. Allison*, 1 Brev. (S. Car.) 495, 2 Am. Dec. 682.

Tennessee. — *Caldwell v. Cowan*, 9 Yerg. (Tenn.) 262.

Vermont. — *Hart v. Hyde*, 5 Vt. 328; *Swift v. Moseley*, 10 Vt. 208, 33 Am. Dec. 197; *Seward v. Heflin*, 20 Vt. 144; *Benior v. Paquin*, 40 Vt. 199; *Kellogg v. Fox*, 45 Vt. 348.

Virginia. — *Harvey v. Epes*, 12 Gratt. (Va.) 153.

See, however, *Taylor v. Felder*, 5 Tex. Civ. App. 417.

1. *Winner v. Penniman*, 35 Md. 165, 6 Am. Rep. 385; *Clark v. Draper*, 19 N. H. 419.

2. *Caldwell v. Cowan*, 9 Yerg. (Tenn.) 262.

3. *Jones v. Sinclair*, 2 N. H. 319, 9 Am. Dec. 75; *Caldwell v. Cowan*, 9 Yerg. (Tenn.) 262.

4. *Gordon v. Harper*, 7 T. R. 9; *Fairbank v. Phelps*, 22 Pick. (Mass.) 535.

5. *Necessity for Prior Possession.* — *Heine v. Anderson*, 2 Duer (N. Y.) 318; *Van Houten*

basis that the defendant came rightfully into possession and then wrongfully converted the property to his own use.<sup>1</sup>

**4. Life Tenants, Remaindermen, or Reversioners.** — The person having a life estate in a chattel and entitled to its possession may maintain trover for its conversion.<sup>2</sup> But the reversioner or remainderman cannot maintain such action during the existence of the life estate, as he is not entitled to possession;<sup>3</sup> and after he becomes entitled to possession he cannot maintain trover for a conversion during the existence of the life estate unless such conversion continued after the termination of the life estate.<sup>4</sup>

**5. Principal and Agent.** — An agent may be guilty of the conversion of chattels intrusted to him by his principal so as to render him liable in trover to the principal,<sup>5</sup> or the action may be maintained by the principal against third persons who wrongfully acquire the property from the agent.<sup>6</sup> Unless the principal is entitled to possession of the chattels as against the agent he cannot, of course, as against the latter, maintain trover therefor;<sup>7</sup> but a wrongdoer who takes the chattels from a factor cannot set up the lien of the factor in defense to an action of trover against him by the principal.<sup>8</sup>

**Agents** intrusted with the possession of chattels by their principal for the purpose of sale, such as factors, have such a special interest or property in the chattels that they may maintain trover for their conversion.<sup>9</sup> An agent, however, who is not in possession, but has merely authority to sell, has not a sufficient title or right to possession to enable him to maintain trover for the property,<sup>10</sup> and it has been held that mere possession as an agent was not sufficient to entitle him to maintain trover.<sup>11</sup> So it has also been held that a

*v. Pye*, 87 Hun (N. Y.) 19. See also *McNear v. Atwood*, 17 Me. 434; *Williams v. Belthany*, 2 Treadw. (S. Car.) 415.

1. *Fowler v. Down*, 1 B. & P. 44; *Smith v. James*, 7 Cow. (N. Y.) 329. See also *supra*, this title, *Definition, Nature, and Origin of Action*.

2. **Life Tenant.** — *Logan v. Hartford City, etc., Coal Co.*, 9 Heisk. (Tenn.) 689. See also *Strong v. Strong*, 6 Ala. 345.

3. **Remainderman or Reversioner.** — *Nations v. Hawkins*, 11 Ala. 859; *Lewis v. Mobley*, 4 Dev. & B. L. (20 N. Car.) 323, 34 Am. Dec. 379; *Cole v. Robinson*, 1 Ired. L. (23 N. Car.) 541; *Steele v. Williams*, *Dudley L.* (S. Car.) 16, 31 Am. Dec. 546; *Philips v. Martiney*, 10 Gratt. (Va.) 333.

In *Cole v. Robinson*, 1 Ired. L. (23 N. Car.) 541, it was held that an action of trover would not lie, by one who was entitled to a remainder in slaves after the expiration of a life estate, against another remainderman who, during the continuance of the life estate, had removed the slaves to parts unknown so that they could not be found.

4. *Philips v. Martiney*, 10 Gratt. (Va.) 333. See, however, *Speed v. Herrin*, 4 Mo. 356.

Thus, trover cannot be maintained by owners of an estate in remainder in chattels, to recover for a conversion occasioned by an owners of an estate in remainder in chattels by a purchaser from a precedent tenant for life, where such sale was made during the continuance of the particular life estate. *Lewis v. Mobley*, 4 Dev. & B. L. (20 N. Car.) 323, 34 Am. Dec. 379.

5. **Principal Against Agent.** — *Nading v. Howe*, 23 Ind. App. 690.

**Trover Against Factor.** — *Kennedy v. Strong*, 14 Johns. (N. Y.) 128.

6. **Principal Against Third Persons.** — *Ricards v. Wedemeyer*, 75 Md. 10; *Edwards v. Dooley*, 120 N. Y. 540; *Foster v. Smith*, 2 Coldw. (Tenn.) 474, 88 Am. Dec. 604; *Waldo v. Peck*, 7 Vt. 434.

7. *Field v. Davis*, (Tex. Civ. App. 1895) 32 S. W. Rep. 71.

8. *Jones v. Sinclair*, 2 N. H. 319, 9 Am. Dec. 75.

9. **By Agents** — *Alabama*. — *Beyer v. Bush*, 50 Ala. 19.

*Illinois*. — *Hollenback v. Todd*, 19 Ill. App. 452.

*Indiana*. — *Easter v. Feming*, 78 Ind. 116.

*Maryland*. — *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670.

*Massachusetts*. — *Tyler v. Freeman*, 3 Cush. (Mass.) 261; *Taber v. Lewrense*, 134 Mass. 94.

*Minnesota*. — *Chamberlain v. West*, 37 Minn. 54.

*New York*. — *Gorum v. Carey*, (C. Pl. Spec. 1.) 1 Abb. Pr. (N. Y.) 285; *Bass v. Pierce*, 16 Barb. (N. Y.) 595; *Ingersoll v. Van Bokkelen*, 7 Cow. (N. Y.) 680; *Hays v. Riddle*, 1 Sandf. (N. Y.) 248.

*North Carolina*. — *Burnett v. Roberts*, 4 Dev. L. (15 N. Car.) 81.

*Pennsylvania*. — *Harlan v. Harlan*, 15 Pa. St. 507, 53 Am. Dec. 612; *Smith v. McNeal*, 68 Pa. St. 164.

*South Carolina*. — *Bowen v. Coker*, 2 Rich. L. (S. Car.) 13.

*Vermont*. — *Hickok v. Buck*, 22 Vt. 149.

*Canada*. — *Sanford v. Bowles*, 3 Nova Scotia Dec. 304.

10. *Swenson v. Kleinschmidt*, 10 Mont. 473.

11. *Mitchell v. Georgia, etc., R. Co.*, 111 Ga. 760.

forwarding merchant who, as agent for the owner, delivers goods to a carrier to be forwarded to the owner cannot maintain trover against the carrier therefor.<sup>1</sup>

**Servants.** — It seems that a mere servant, though the chattel was in his actual possession, has not such a special property therein as will enable him to maintain trover therefor even against a wrongdoer, as the possession of the servant is regarded as the possession merely of his master.<sup>2</sup>

**6. Owner of Stolen Property.** — While, of course, the owner of stolen property may maintain trover against the thief or a third person for its conversion,<sup>3</sup> and in trover to recover for chattels alleged to have been stolen by the defendant it is not necessary to prove the guilt of the defendant beyond a reasonable doubt,<sup>4</sup> the authorities are in conflict upon the question whether the owner of stolen goods may maintain trover for their conversion before the alleged thief has been prosecuted to conviction or acquittal.<sup>5</sup> But as against innocent third persons who purchase or receive the property from the thief, the action may be maintained without the prior prosecution of the thief, as in the latter case the tort of the defendant is separate and distinct from the felony.<sup>6</sup>

**7. Lienholders.** — A person who has merely a lien upon chattels without any right to their possession cannot maintain trover for their conversion.<sup>7</sup> Thus, a landlord cannot maintain trover for the conversion of crops by reason of his statutory lien on them for rent.<sup>8</sup>

**8. Executors and Administrators.** — Executors and administrators may maintain trover for a conversion of the personal chattels of the decedent, irrespective of the question whether such conversion occurred before or after the death of the decedent.<sup>9</sup> And where no administration had been granted

1. *Green v. Clarke*, 12 N. Y. 343.

2. **Servants.** — *Faulkner v. Brown*, 13 Wend. (N. Y.) 63.

3. **Owner of Stolen Property.** — *Golightly v. Reynolds*, Lofft 88; *Scattergood v. Sylvester*, 15 Q. B. 506, 69 E. C. L. 506, 14 Jur. 977, 19 L. J. Q. B. 447; *Chichester v. Hill*, 52 L. J. Q. B. 160, 48 L. T. N. S. 364, 31 W. R. 245.

4. *Sinclair v. Jackson*, 47 Me. 102, 74 Am. Dec. 476.

5. *England.* — *Markham v. Cob*, Latch 144; *Dawkes v. Coveleigh*, Style 346; *Cooper v. Witham*, 1 Sid. 375; *White v. Spettigue*, 13 M. & W. 603; *Crosby v. Leng*, 12 East 413; *Wells v. Abrahams*, L. R. 7 Q. B. 554, 41 L. J. Q. B. 306, 26 L. T. N. S. 326, 20 W. R. 659. Compare *Pease v. McAloon*, 3 N. Bruns. 111.

*Alabama.* — *Martin v. Martin*, 25 Ala. 201.

*Kentucky.* — *Blassingame v. Graves*, 6 B. Mon. (Ky.) 38.

*Massachusetts.* — *Boston, etc., R. Corp. v. Dana*, 1 Gray (Mass.) 83.

*New Hampshire.* — *Pettingill v. Rideout*, 6 N. H. 454, 25 Am. Dec. 473.

*Ohio.* — *Story v. Hammond*, 4 Ohio 376.

*Pennsylvania.* — *Hutchinson v. Merchants'*, etc., Bank, 41 Pa. St. 44, 80 Am. Dec. 596; *Keyser v. Rodgers*, 50 Pa. St. 275.

*Tennessee.* — *Ballew v. Alexander*, 6 Humph. (Tenn.) 433.

*Virginia.* — *Allison v. Farmers' Bank*, 6 Rand. (Va.) 204.

In *Rhode Island* the statute requires the owner to institute criminal proceedings against the thief. *Struthers v. Peckham*, 22 R. I. 8.

6. *White v. Spettigue*, 13 M. & W. 603, 1 C. & K. 673, 47 E. C. L. 673, 9 Jur. 70, 14 L. J.

Exch. 99, overruling *Gimson v. Woodfull*, 2 C. & P. 41, 12 E. C. L. 20; *Lee v. Bayes*, 18 C. B. 599, 86 E. C. L. 599, 2 Jur. N. S. 1093, 25 L. J. C. Pl. 249. See also *Johnson v. Windle*, 3 Bing. N. Cas. 225, 32 E. C. L. 94, 3 Scott 608, 2 Hodges 202, 6 L. J. C. Pl. 5; *Newkirk v. Dalton*, 17 Ill. 413. See, however, *Pease v. McAloon*, 3 N. Bruns. 111.

7. **Lienholders.** — *Jordan v. Lindsay*, 132 Ala. 567 (lien of cropper); *Heyl v. Burling*, 1 Cai. (N. Y.) 14.

8. **Landlord's Lien on Crops.** — *Folmar v. Cope-land*, 57 Ala. 588; *Corbitt v. Reynolds*, 68 Ala. 378; *Wilson v. Stewart*, 69 Ala. 302; *Anderson v. Bowles*, 44 Ark. 108; *Worrill v. Barnes*, 57 Ga. 404; *Frink v. Pratt*, 130 Ill. 327, 26 Ill. App. 222; *Finney v. Harding*, 136 Ill. 573, reversing 32 Ill. App. 98. See also *Broughton v. Powell*, 52 Ala. 123. But see *Merchants, etc., Bank v. Meyer*, 56 Ark. 499; *Kennard v. Harvey*, 80 Ind. 37; *Campbell v. Bowen*, 22 Ind. App. 562; *Nickelson v. Negley*, 71 Iowa 546; *Ward v. Gibbs*, 10 Tex. Civ. App. 287.

9. **Executors and Administrators** — *Connecticut.* — *Kirby v. Clark*, 1 Root (Conn.) 389.

*Georgia.* — *Parrott v. Dubignon*, T. U. P. Charl. (Ga.) 261.

*Indiana.* — *McFadden v. Schroeder*, 4 Ind. App. 305.

*Massachusetts.* — *Wilson v. Shearer*, 9 Met. (Mass.) 504; *Towle v. Lovet*, 6 Mass. 394.

*Michigan.* — *Morton v. Preston*, 18 Mich. 60, 100 Am. Dec. 146.

*Mississippi.* — *Hoover v. Wells*, 39 Miss. 445.

*New York.* — *Kenyon v. Olney*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 416; *Rogers v. Condé*, 67 N. Y. App. Div. 130.

*North Carolina.* — *Allen v. Watson*, 1 Murph. (5 N. Car.) 189.



upon the decedent's estate a distributee has been permitted to maintain trover for the conversion of his share of the estate.<sup>1</sup>

**9. Assignees in Insolvency and Bankruptcy.** — An assignee in insolvency and bankruptcy may maintain trover against third persons for the conversion of the chattels of the insolvent, irrespective of the question whether the conversion was prior or subsequent to his appointment;<sup>2</sup> and he may maintain such an action against the insolvent himself in case he refuses to deliver possession of chattels.<sup>3</sup>

**Bankrupts — After-acquired Property.** — The title of a bankrupt to after-acquired property, while liable to be defeated by the intervention of the trustee or assignee in bankruptcy, is, until that event occurs, sufficient to maintain trover for any unauthorized taking of or assumption over his property,<sup>4</sup> and this conditional right of property passes to the administrator of the bankrupt.<sup>5</sup>

**10. Receivers.** — Receivers succeed to all rights of property belonging to the party over whose property they have been appointed, and may maintain trover for its conversion.<sup>6</sup> But after the cause in which the receiver was appointed has terminated, and he has been discharged, he has no right to sue in trover for property to the possession of which he was entitled during the receivership.<sup>7</sup>

**11. Equitable Title.** — To maintain trover the plaintiff must have a legal as distinguished from an equitable title; the latter alone is not sufficient to entitle him to maintain the action.<sup>8</sup>

**Cestui Que Trust.** — In case of an express trust, the *cestui que trust* cannot, as

*Pennsylvania.* — *Weiser v. Zeisinger*, 2 Yeates (Pa.) 537.

*South Carolina.* — *Kerby v. Quinn*, Rice L. (S. Car.) 264; *Hill v. Brennan*, Rice L. (S. Car.) 285.

*Tennessee.* — *Cheek v. Wheatley*, 3 Sneed (Tenn.) 484.

*Texas.* — *Cox v. Patten*, (Tex. Civ. App. 1902) 66 S. W. Rep. 64.

**Where One Sues in Trover as Administrator**, he must show title in his representative, not in his individual capacity. *Hoover v. Wells*, 39 Miss. 445.

**1. Distributee.** — *Hyde v. Stone*, 7 Wend. (N. Y.) 354, 22 Am. Dec. 582.

**2. Assignees in Insolvency and Bankruptcy.** — *Bowditch v. Page*, 153 N. Y. 104, affirming 81 Hun (N. Y.) 170; *Jacoby v. Laussatt*, 6 S. & R. (Pa.) 300. See generally the title *INSOLVENCY AND BANKRUPTCY*, vol. 16, p. 721 *et seq.*

**The Trustees of an Absconding Debtor** duly appointed under Stat. 26 Geo. III., c. 13, may obtain trover for the value of goods of the debtor wrongfully converted by the defendant before proceedings taken under the act; such right of action being transferred from the debtor to the trustees by operation of the act. *Ritchie v. Boyd*, 3 N. Bruns. 264.

**3. McLeish v. Tylee**, 4 Strobb. L. (S. Car.) 287.

**4. Webb v. Fox**, 7 T. R. 391, in which case the defendant in an action of trover pleaded the bankruptcy of the plaintiff and a subsequent transfer to the assignee of all the interest in the goods in suit, and the plaintiff replied that after the bankruptcy he became lawfully possessed of the goods and continued so possessed down to the time of suit brought. It was held that the replication was a good answer to the plea and sustained the declaration. See also *Herbert v. Sayer*, 5 Q. B. 965, 48 E. C. L. 965; *Matson v. Cook*, 4 Bing. N. Cas. 392, 33 E. C.

L. 388; *Newnham v. Stevenson*, 10 C. B. 713, 70 E. C. L. 713; *Fyson v. Chambers*, 9 M. & W. 460.

**5. Giles v. Grover**, 6 Bligh N. S. 293; *Wilbraham v. Snow*, 2 Saund. 47.

**6. Receivers.** — *Kirk v. Kane*, 87 Mo. App. 274; *Wilson v. Allen*, 6 Barb. (N. Y.) 542; *Gillet v. Fairchild*, 4 Den. (N. Y.) 80; *Stephens v. Meriden Britannia Co.*, 13 N. Y. App. Div. 268. See generally the title *RECEIVERS*, vol. 23, p. 1073 *et seq.*

**7. Henderson v. Pilley**, 131 Ala. 548.

**8. Equitable Title — United States.** — *Northern Pac. R. Co. v. Paine*, 119 U. S. 561.

*Maine.* — *Haskell v. Jones*, 24 Me. 222.

*Massachusetts.* — *Baker v. Seavey*, 163 Mass. 522, 47 Am. St. Rep. 475.

*Missouri.* — *Webster v. Heylman*, 11 Mo. 428; *Myers v. Hale*, 17 Mo. App. 204. See, however, *Swinney v. Gouty*, 83 Mo. App. 549.

*New York.* — *Fulton v. Fulton*, 48 Barb. (N. Y.) 581; *Deeley v. Dwight*, 132 N. Y. 59, reversing 16 Daly (N. Y.) 300; *Byam v. Hampton*, (Super. Ct. Gen. T.) 10 N. Y. Supp. 372; *Altman v. Weyand*, 66 N. Y. App. Div. 353.

*North Carolina.* — *Herring v. Tilghman*, 13 Ired. L. (35 N. Car.) 392; *Killian v. Carrol*, 13 Ired. L. (35 N. Car.) 431.

See also *Christie v. Thomas*, 15 Nova Scotia 203.

In *Missouri*, however, it has been held that though a chattel mortgage on a crop thereafter to be planted created only an equitable lien on the crop when grown, the mortgagee could maintain trover for the conversion of the crop. *Swinney v. Gouty*, 83 Mo. App. 549.

Thus, an equitable assignment of a chattel mortgage does not confer on the assignee such a legal title as will enable him to sue in trover for the conversion of the mortgaged chattels. *Baker v. Seavey*, 163 Mass. 522, 47 Am. St. Rep. 475.

a general rule, maintain trover based upon his equitable title alone.<sup>1</sup> It has been held, however, that if the trust is executed as distinguished from executory, and the *cestui que trust* is entitled to the possession, he may maintain trover for the conversion of the trust property.<sup>2</sup>

Trustees who have the legal title and the right to the possession of the chattels can maintain trover for their conversion, and it is immaterial that the chattels were in the actual possession of the *cestui que trust*.<sup>3</sup>

**12. Buyer and Seller — a. EXECUTED CONTRACTS OF SALE.** — After an executed contract of sale or barter whereby the title of the seller is divested, he cannot maintain trover for the chattels sold,<sup>4</sup> even though by the terms of the sale he reserved an option to repurchase.<sup>5</sup>

**b. EXECUTORY CONTRACTS OF SALE.** — The Buyer under an executory contract of sale who is not in possession nor by the terms of the contract entitled to possession cannot maintain trover for the conversion of the chattels, either against the seller or those claiming under him,<sup>6</sup> or against a stranger.<sup>7</sup> The property in a chattel sold may, however, vest in the buyer without an actual delivery, so as to entitle the buyer to maintain trover therefor against a third

**1. Cestui Que Trust.** — *Haskell v. Jones*, 24 Me. 222; *Richardson v. Means*, 22 Mo. 495; *Myers v. Hale*, 17 Mo. App. 204.

**2. Pope v. Tucker**, 23 Ga. 484; *Howard v. Snelling*, 28 Ga. 469; *Jones v. Cole*, 2 Bailey L. (S. Car.) 330.

**3. Trustees — England.** — *Barker v. Furlong*, (1891) 2 Ch. 172; *White v. Morris*, 11 C. B. 1015, 73 E. C. L. 1015.

*Alabama.* — *Abercrombie v. Bradford*, 16 Ala. 560.

*Missouri.* — *Richardson v. Means*, 22 Mo. 495; *Lacey v. Giboney*, 36 Mo. 320, 88 Am. Dec. 145; *Myers v. Hale*, 17 Mo. App. 204.

*North Carolina.* — *Thompson v. Ford*, 7 Ired. L. (29 N. Car.) 418.

*Tennessee.* — *Coleson v. Blanton*, 3 Hayw. (Tenn.) 152.

*Texas.* — *Sonnentheil v. Texas Guaranty*, etc., Co., 10 Tex. Civ. App. 274; *White v. Sterzing*, 11 Tex. Civ. App. 553; *Cooper v. Hiner*, (Tex. Civ. App. 1896) 36 S. W. Rep. 915.

*Virginia.* — *Newsom v. Newsom*, 1 Leigh (Va.) 86, 19 Am. Dec. 739.

**4. By Seller — Executed Sale — England.** — *Hornblower v. Proud*, 2 B. & Ald. 327, 20 Rev. Rep. 456; *Wait v. Baker*, 2 Exch. 1, 17 L. J. Exch. 307; *Emanuel v. Dane*, 3 Campb. 299; *Armstrong v. Allen*, 4 Reports 107, 67 L. T. N. S. 738; *Martin v. Reid*, 11 C. B. N. S. 730, 103 E. C. L. 730, 31 L. J. C. Pl. 126, 5 L. T. N. S. 727.

*Alabama.* — *Locke v. Reeves*, 116 Ala. 590.

*Illinois.* — *Union Stock Yard, etc., Co. v. Mallory, etc., Co.*, 157 Ill. 554, 48 Am. St. Rep. 341.

*New Hampshire.* — *Rogers v. Miller*, 62 N. H. 131.

*New York.* — *Feist v. Prince*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 358; *Stoneman v. Van Vechten*, 165 N. Y. 666.

*Texas.* — *International, etc., R. Co. v. Ogburn*, 26 Tex. Civ. App. 217.

**Stoppage in Transitu.** — Where goods are sold and delivered to a carrier for shipment to the buyer, the exercise by the seller of the right of stoppage *in transitu* does not re-vest title and right of possession in the seller so as

to enable him to maintain trover for the conversion of the goods. *Childs v. Northern R. Co.*, 25 U. C. Q. B. 165.

**5. Byam v. Hampton**, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 372; *Moore v. Sibbald*, 29 U. C. Q. B. 487.

**6. By Buyer — Executory Contract of Sale — England.** — *Crocker v. Molyneux*, 3 C. & P. 470, 14 E. C. L. 394; *Mucklow v. Mangles*, 1 Taunt. 318; *Woods v. Russell*, 1 Dowl. & R. 58, 5 B. & Ald. 942, 7 E. C. L. 310; *Austen v. Craven*, 4 Taunt. 644, 1 Marsh 4, note b; *White v. Wilks*, 5 Taunt. 176, 1 E. C. L. 64; *Tripp v. Armitage*, 4 M. & W. 687, 1 H. & H. 442.

*Canada.* — *Richardson v. Twining*, 2 Nova Scotia Dec. 281; *Dunn v. Garrett*, 7 N. Bruns. 218; *Butters v. Stanley*, 21 U. C. C. P. 402; *Moore v. Sibbald*, 29 U. C. Q. B. 487.

*California.* — *Darden v. Callaghan*, (Cal. 1892) 31 Pac. Rep. 263.

*Georgia.* — *Roll v. Black, Dudley* (Ga.) 18; *Reid v. Caldwell*, 110 Ga. 481.

*Illinois.* — *Newlin v. Prevost*, 90 Ill. App. 515.

*Kentucky.* — *Woodcock v. Farrell*, 1 Met. (Ky.) 437.

*Maine.* — *Richards v. Wardwell*, 82 Me. 343.

*Mississippi.* — *Baldwin v. McKay*, 41 Miss. 358.

*Missouri.* — *Thomas v. Ramsey*, 47 Mo. App. 84.

*Nebraska.* — *Holmes v. Bailey*, 16 Neb. 300.

*New York.* — *Whitcomb v. Hungerford*, 42 Barb. (N. Y.) 177; *Tuthill v. Wheeler*, 6 Barb. (N. Y.) 362; *Fitch v. Beach*, 15 Wend. (N. Y.) 221; *Schryer v. Fenton*, 15 N. Y. App. Div. 158; *Binghamton First Nat. Bank v. Peck*, 61 N. Y. App. Div. 258.

*North Carolina.* — *Jones v. Morris*, 7 Ired. L. (29 N. Car.) 370; *Brazier v. Ansley*, 11 Ired. L. (33 N. Car.) 12, 51 Am. Dec. 408; *Hill v. Robison*, 3 Jones L. (48 N. Car.) 501; *Wood v. Atkinson*, 2 Murph. (6 N. Car.) 87.

*Ohio.* — *Woods v. McGee*, 7 Ohio (pt. ii.) 127 30 Am. Dec. 202.

*Pennsylvania.* — *Farmers' Bank v. McKee*, 2 Pa. St. 318; *Purdy v. McCullough*, 3 Pa. St. 466; *Fidler v. Morris*, 6 Whart. (Pa.) 406.

**7. Pollok v. Fisher**, 6 N. Bruns. 515.

person<sup>1</sup> or even against the seller in case the latter wrongfully refuses to deliver possession.<sup>2</sup>

The Seller, in case the contract of sale is executory and he has not parted with his right to possession, may maintain trover for the chattels even against the buyer in case the latter wrongfully detains them from him.<sup>3</sup>

c. **CONDITIONAL SALES.** — Where by the terms of a conditional sale the buyer is entitled to the possession of the chattel sold, the seller cannot maintain trover against either the buyer or a third person, until he acquires the right to the possession of the chattel.<sup>4</sup> If, however, the seller is entitled to the possession of the chattel conditionally sold, he may maintain trover for its wrongful conversion against either the buyer or third persons.<sup>5</sup> Where by the terms of a conditional sale the buyer is entitled to possession, he may maintain trover for the conversion of the chattels sold against either the seller or third persons; and if the buyer is in possession he may maintain trover against a stranger though he was not entitled to possession and did not acquire the title as against the seller.<sup>6</sup> If the seller is entitled to possession of the chattel conditionally sold, the buyer cannot maintain trover against him.<sup>7</sup>

d. **FRAUDULENT SALES.** — Where a sale or exchange of property is procured by fraud or deceit, the seller may, upon a rescission, maintain an action of trover therefor against the buyer or any other person not holding the property as a *bona fide* purchaser;<sup>8</sup> and where the fraud consists in a misrepresentation as to the identity of the buyer, no title whatever passes to him, and the seller may maintain trover therefor even against a *bona fide* purchaser from the buyer.<sup>9</sup> The seller cannot maintain trover unless he rescinds the

1. *Martindale v. Smith*, 1 Gale & D. 1, 1 Q. B. 389, 41 E. C. L. 592, 5 Jur. 932; *Goode v. Langley*, 7 B. & C. 26, 14 E. C. L. 9, 9 Dowl. & R. 791; *Macpherson v. Frederickton Boom Co.*, 12 N. Bruns. 337; *Green v. Burr*, 131 Cal. 236; *Moulton v. Witherell*, 52 Me. 237; *Snell v. Thorp*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 411.

2. *Simmons v. Anderson*, 7 Rich. L. (S. Car.) 67; *Seward v. Heflin*, 20 Vt. 144.

**Auction Sale.** — In *Simmons v. Anderson*, 7 Rich. L. (S. Car.) 67, a purchaser at an auction sale offering to comply with the terms of the sale was held to be entitled to the possession of the property and allowed to maintain trover against the seller for refusal to deliver possession.

3. **By Seller.** — *Bishop v. Shillito*, 2 B. & Ald. 329 note; *Godts v. Rose*, 17 C. B. 229, 84 E. C. L. 229, 25 L. J. C. Pl. 61, 1 Jur. N. S. 1173; *Vanzant v. Hunter*, 1 Mo. 71; *W. Irving Schermerhorn Bros. Co. v. Herold*, 81 Mo. App. 461; *Collins v. Manning*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 927.

4. **Conditional Sales — By Seller.** — *Fairbank v. Phelps*, 22 Pick. (Mass.) 535.

5. *Ross v. McDuffie*, 91 Ga. 120; *Rawson v. Tuel*, 47 Me. 506; *Ham v. Sanborn*, 68 N. H. 19; *Jillson v. Wilbur*, 41 N. H. 106; *Esty v. Graham*, 46 N. H. 169; *Watson v. Goodno*, 66 Vt. 229; *Polson v. Degeer*, 12 Ont. 275.

**Transferee of Purchase-money Note.** — A transfer of the purchase-money note received upon the conditional sale of a chattel does not transfer any title to the chattel so as to enable the transferee to maintain trover therefor. *Burch v. Pedigo*, 113 Ga. 1157. See, however, *Esty v. Graham*, 46 N. H. 169.

6. **By Buyer.** — *Aldrich v. Hodges*, 164 Mass. 570; *Burt v. Dutcher*, 34 N. Y. 493.

7. *Beggs v. Eidlitz*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 763; *Mulliner v. Shumake*, (Tex. Civ. App. 1900) 55 S. W. Rep. 983.

8. **Fraudulent Sales — Action by Seller — England.** — *Noble v. Adams*, 7 Taunt. 59, 2 E. C. L. 59, 2 Marsh 366; *Sheppard v. Shoolbred*, C. & M. 61, 41 E. C. L. 39; *Hollins v. Fowler*, L. R. 7 H. L. 757; *Bristol v. Wilmshire*, 1 B. & C. 514, 8 E. C. L. 218; *Read v. Hutchinson*, 3 Campb. 352; *Ferguson v. Carrington*, 9 B. & C. 59, 17 E. C. L. 330; *Kilby v. Wilson*, R. & M. 178, 21 E. C. L. 409.

*Alabama.* — *Traywick v. Keeble*, 93 Ala. 498.  
*Connecticut.* — *Ayres v. French*, 41 Conn. 153.

*Illinois.* — *Bennet v. Gilbert*, 194 Ill. 403; *Farwell v. Hanchett*, 120 Ill. 573.

*Indiana.* — *Alexander v. Swackhamer*, 105 Ind. 81, 55 Am. Rep. 180.

*Kentucky.* — *Graham v. Warner*, 3 Dana (Ky.) 146, 28 Am. Dec. 65.

*Massachusetts.* — *Rowley v. Bigelow*, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; *Buffington v. Gerrish*, 15 Mass. 156; *Dow v. Sanborn*, 3 Allen (Mass.) 181; *Thurston v. Blanchard*, 22 Pick. (Mass.) 18, 33 Am. Dec. 700.

*New Jersey.* — *Waters v. Van Winkle*, 3 N. J. L. 154.

*New York.* — *Woodworth v. Kissam*, 15 Johns. (N. Y.) 186; *Pinckney v. Darling*, 3 N. Y. App. Div. 553; *Ladd v. Moore*, 3 Sandf. (N. Y.) 589; *Cary v. Hotailing*, 1 Hill (N. Y.) 317, 37 Am. Dec. 323; *Hitchcock v. Covill*, 20 Wend. (N. Y.) 167; *Root v. French*, 13 Wend. (N. Y.) 570, 28 Am. Dec. 482.

*Rhode Island.* — *Duval v. Mowry*, 6 R. I. 479.

*Wisconsin.* — *Gay v. Osborne*, 102 Wis. 641.

9. *Kingsford v. Merry*, 1 H. & N. 503, 26 L. J. Exch. 83; *Stephenson v. Hart*, 4 Bing. 476;



contract of sale, as the sale is not absolutely void, but is merely voidable, giving to the purchaser, until rescission, the title and right to possession.<sup>1</sup> Nor can he maintain such action as against a *bona fide* purchaser from the buyer.<sup>2</sup>

**Action by Buyer.** — The fraudulent purchaser may, as against a stranger, maintain trover for the chattels purchased, and the fact that the sale was voidable at the option of the seller or his creditors is no defense;<sup>3</sup> but he cannot maintain such action against the defrauded seller who rescinds the sale and takes possession of the property,<sup>4</sup> nor, where the sale is in fraud of the seller's creditors, can he maintain trover against the sheriff, or against creditors of the seller who levy on the property and sell it in a suit against the seller, or against a purchaser at such sale.<sup>5</sup>

**In Case of a Sale in Fraud of the Creditors of the Seller,** the seller cannot maintain trover for the chattel;<sup>6</sup> but after the seller's death his personal representative may maintain such an action for the benefit of his creditors.<sup>7</sup>

**13. Husband and Wife.** — At common law, upon marriage, the title to all chattels personal in possession vests absolutely in the husband, and he may maintain trover for their possession;<sup>8</sup> but as regards the separate statutory estate of the wife, the husband cannot maintain trover therefor, as the wife alone can sue for the *corpus* of property thus owned by her, or for damages to the property itself as distinguished from its use.<sup>9</sup>

**14. Mortgagor.** — A mortgagor who was neither in possession of the mortgaged chattels nor entitled to their possession at the time of the conversion cannot maintain trover therefor.<sup>10</sup> On the other hand, if the mortgagor is permitted by the mortgagee to remain in possession, though by the terms of the mortgage the right to possession is not reserved, he may, as against a third person who wrongfully deprives him of possession, maintain trover for such conversion, and such third person cannot set up the title of the mortgagee in defense;<sup>11</sup> and if by the terms of the mortgage the mortgagee is entitled to possession, he may maintain trover as against either the mortgagee<sup>12</sup> or a stranger.<sup>13</sup> Where the mortgagee takes possession of the mortgaged chattels after condition broken, or before condition broken is entitled to pos-

Cundy v. Lindsay, 3 App. Cas. 459, 47 L. J. Q. B. 481; Alexander v. Swackhamer, 105 Ind. 81, 55 Am. Rep. 180; Rogers v. Dutton, 182 Mass. 187.

1. Union Stock Yard, etc., Co. v. Mallory, etc., Co., 157 Ill. 554, 48 Am. St. Rep. 341; Kimball v. Cunningham, 4 Mass. 502, 3 Am. Dec. 230.

2. Sheppard v. Shoolbred, C. & M. 61, 41 E. C. L. 39.

3. **Action by Buyer.** — Tuttle v. Cone, 108 Iowa 468; Pomroy v. Lyman, 10 Allen (Mass.) 468; Terry v. Metevier, 104 Mich. 50; Grenier v. Hild, 124 Mich. 222; Boyle v. Williams, (C. Pl. Gen. T.) 1 Misc. (N. Y.) 112; Keating Imp., etc., Co. v. Terre Haute Carriage, etc., Co., 11 Tex. Civ. App. 216.

4. Graham v. Warner, 3 Dana (Ky.) 146, 28 Am. Dec. 65. See also Green v. Russell, 5 Hill (N. Y.) 183.

5. Hartshorn v. Williams, 31 Ala. 149; Lindsay v. Lamb, 24 Ark. 222.

6. Stewart v. Kearney, 6 Watts (Pa.) 453, 31 Am. Dec. 482.

7. Stewart v. Kearney, 6 Watts (Pa.) 453, 31 Am. Dec. 482.

8. **Husband.** — Pope v. Tucker, 23 Ga. 484. See generally the title HUSBAND AND WIFE, vol. 15, p. 820 *et seq.*

9. Taylor v. Jones, 52 Ala. 78. See also Duggan v. Wright, 157 Mass. 228.

10. **By Mortgagor.** — Middleworth v. Sedgwick, 10 Cal. 392; Dungan v. Mutual Ben. L. Ins. Co., 38 Md. 242; Landon v. Emmons, 97 Mass. 37.

11. Parkhurst v. Jacobs, 17 Mich. 302; Vandiver v. O'Gorman, 57 Minn. 64; Weir Plow Co. v. Armentrout, 9 Tex. Civ. App. 117; Stossel v. Van De Vanter, 16 Wash. 9. See also Tallman v. Jones, 13 Kan. 438; Middleworth v. Robinson, Wright (Ohio) 552.

This rule applies even in jurisdictions which allow the defendant in trover to show title in a third person in defense, though the action is based merely on a possessory title. Parkhurst v. Jacobs, 17 Mich. 302.

12. Burghen v. Purdy, 27 N. Y. App. Div. 460; Hawver v. Bell, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 612; Clark v. Rideout, 39 N. H. 238; Brook v. Bayless, 6 Okla. 568; Humpfner v. Osborne, 2 S. Dak. 310; Niagara Stamping, etc., Co. v. Oliver, (Tex. Civ. App. 1895) 33 S. W. Rep. 689. See also Latusek v. Davies, 79 Minn. 279.

13. Gaines v. Briggs, 9 Ark. 46; Dahill v. Booker, 140 Mass. 308, 54 Am. Rep. 465. See also Hindman v. Askwed Saddlery Co., 9 Kan. App. 98.

session, the mortgagor cannot maintain trover against him;<sup>1</sup> and after condition broken a tender of the mortgage debt does not operate at law so as to revest in the mortgagor the title and right to possession so as to enable him to maintain trover against the mortgagee.<sup>2</sup> In some instances, where a mortgagee entitled to and in possession wrongfully disposed of the property, the courts have permitted the mortgagor to maintain trover against him therefor;<sup>3</sup> and where the value of the mortgaged chattels greatly exceeded the amount of the mortgage indebtedness, trover has been held to be maintainable without a previous tender of the mortgage indebtedness.<sup>4</sup>

**15. Mortgagee.**—It is well settled that after a mortgagee has become entitled to the possession of the mortgaged chattels he may maintain trover for their conversion, either against the mortgagor or persons claiming under him,<sup>5</sup> or against an officer levying on and selling the property for an indebted-

1. *Lucas v. Latour*, 6 Har. & J. (Md.) 100; *Hanson v. Tarbox*, 47 Minn. 433; *Crane v. McGuire*, (Tex. Civ. App. 1901) 64 S. W. Rep. 942.

2. *Blain v. Foster*, 33 Ill. App. 297. But see *Latusek v. Davies*, 79 Minn. 279.

3. *Burton v. Randall*, 4 Kan. App. 593; *Clark v. Rideout*, 39 N. H. 238. See also *Stewart v. Long*, 16 Ind. App. 164; *Peregoy v. Wheeler*, 88 Iowa 732; *Howery v. Hoover*, 97 Iowa 581.

Where a mortgagee took possession of the mortgaged chattels under a claim that he was the absolute owner by virtue of a sale from the mortgagor, the mortgagor was permitted to recover in trover for a conversion of the chattels. *Clark v. Rideout*, 39 N. H. 238.

4. *Burton v. Randall*, 4 Kan. App. 593.

5. **Mortgagee—England.**—*Mulliner v. Florence*, 3 Q. B. Div. 485.

**United States.**—*The Brig Nestor*, 1 Sumn. (U. S.) 73; *Wood v. Weimar*, 104 U. S. 786; *Shapard v. Hynes*, (C. C. A.) 104 Fed. Rep. 449; *Norris v. McCanna*, 29 Fed. Rep. 757.

**Alabama.**—*Jones v. Webster*, 48 Ala. 109; *Mervine v. White*, 50 Ala. 388; *Ellington v. Charleston*, 51 Ala. 166; *Holman v. Lock*, 51 Ala. 287; *Broughton v. Atchison*, 52 Ala. 62; *Nabring v. Mobile Bank*, 58 Ala. 204; *Booker v. Jones*, 55 Ala. 266; *Grant v. Steiner*, 65 Ala. 499; *Rees v. Coats*, 65 Ala. 256; *Evington v. Smith*, 66 Ala. 398; *Elmore v. Simon*, 67 Ala. 526; *Corbitt v. Reynolds*, 68 Ala. 378; *Collier v. Faulk*, 69 Ala. 58; *Gadsden First Nat. Bank v. Sproull*, 105 Ala. 275.

**Arkansas.**—*McClure v. Hill*, 36 Ark. 268.

**Connecticut.**—*Ashmead v. Kellogg*, 23 Conn. 70.

**Georgia.**—*Johnson v. Osborn*, 85 Ga. 664.

**Illinois.**—*Dunning v. Fitch*, 66 Ill. 51.

**Indiana.**—*Burton v. Tannehill*, 6 Blackf. (Ind.) 470; *Stewart v. Long*, 16 Ind. App. 164; *Slifer v. State*, 114 Ind. 291; *Suffers v. Bradley*, 115 Ind. 345.

**Indian Territory.**—*Shapard Grocery Co. v. Hynes*, 3 Indian Ter. 74.

**Iowa.**—*Casey v. Ballou Banking Co.*, 98 Iowa 107.

**Kansas.**—*Brookover v. Esterly*, 12 Kan. 149; *Howard v. Burns*, 44 Kan. 543; *Kennett v. Peters*, 54 Kan. 119, 45 Am. St. Rep. 274.

**Kentucky.**—*Snyder v. Hitt*, 2 Dana (Ky.) 204.

**Maine.**—*Bradley v. Boynton*, 22 Me. 287, 39 Am. Dec. 582; *Brooks v. Briggs*, 32 Me. 447; *Treat v. Gilmore*, 49 Me. 34; *Bowden v. Dugan*, 91 Me. 141.

**Massachusetts.**—*Savage v. Darling*, 151 Mass. 5; *Duggan v. Wright*, 157 Mass. 228; *Rugg v. Barnes*, 2 Cush. (Mass.) 591; *Goodrich v. Willard*, 2 Gray (Mass.) 203; *Chamberlain v. Clemence*, 8 Gray (Mass.) 389; *Clark v. Houghton*, 12 Gray (Mass.) 38; *Alden v. Lincoln*, 13 Met. (Mass.) 204; *Landon v. Emmons*, 97 Mass. 37; *Ring v. Neale*, 114 Mass. 112, 19 Am. Rep. 316; *Leonard v. Hair*, 133 Mass. 455; *Wells v. Connable*, 138 Mass. 513.

**Michigan.**—*Crippen v. Morrison*, 13 Mich. 23; *Cary v. Hewitt*, 26 Mich. 229; *Harvey v. McAdams*, 32 Mich. 473; *Grove v. Wise*, 39 Mich. 161; *Wright v. Starks*, 77 Mich. 221; *McGraw v. Bishop*, 85 Mich. 72; *Brotherton v. Goldman*, 90 Mich. 340.

**Minnesota.**—*Close v. Hodges*, 44 Minn. 204. **Missouri.**—*National Bank of Commerce v. Morris*, 114 Mo. 255, 35 Am. St. Rep. 754.

**Nebraska.**—*Kavanaugh v. Oberfelder*, 37 Neb. 647; *Raymond v. Miller*, 50 Neb. 506.

**New Hampshire.**—*Gage v. Whittier*, 17 N. H. 312.

**New York.**—*Gock v. Keneda*, 29 Barb. (N. Y.) 120; *Bucknam v. Brett*, 35 Barb. (N. Y.) 596; *Champlin v. Johnson*, 39 Barb. (N. Y.) 606; *Johnson v. Crofoot*, 53 Barb. (N. Y.) 574; *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323; *Hall v. Sampson*, 35 N. Y. 274, 91 Am. Dec. 56; *Ford v. Ransom*, (N. Y. Super. Ct. Spec. T.) 39 How. Pr. (N. Y.) 429; *Kleinberger v. Brown*, 58 N. Y. Super. Ct. 4; *Keefer v. Greene*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 498, 62 Hun (N. Y.) 618; *Smith v. Smalley*, 19 N. Y. App. Div. 519; *Smith v. Beattie*, 31 N. Y. 542; *Hall v. Sampson*, 35 N. Y. 277, 91 Am. Dec. 56.

**Oklahoma.**—*Hixon v. Hubbell*, 4 Okla. 224.

**Oregon.**—*Miles v. North Pac. Lumber Co.*, 38 Oregon 556.

**Pennsylvania.**—*Gill v. Weston*, 110 Pa. St. 312.

**Rhode Island.**—*Cook v. Corthell*, 11 R. I. 482, 23 Am. Rep. 518.

**South Carolina.**—*Wolff v. Farrell*, 3 Brev. (S. Car.) 68; *Southworth v. Sebring*, 2 Hill L. (S. Car.) 587; *Bowen v. Coker*, 2 Rich. L. (S. Car.) 13.

ness of the mortgagor,<sup>1</sup> or against strangers.<sup>2</sup> And the fact that the mortgagor may have recovered against the wrongdoer for the conversion of the mortgaged chattels is not a bar to a similar action by the mortgagee.<sup>3</sup> But to enable a mortgagee to maintain trover for the conversion of the mortgaged chattels, he must have been entitled to their possession.<sup>4</sup>

**An Assignee of the Mortgage** may maintain trover for the conversion of the mortgaged property to the same extent as the original mortgagee,<sup>5</sup> and an equitable assignee of a mortgage may maintain such an action in the name of his assignor.<sup>6</sup> But after the mortgagee has assigned his mortgage, he cannot maintain trover for the conversion of the mortgaged property.<sup>7</sup>

**A Second Mortgagee** who did not have the possession of the mortgaged chattels, nor was entitled to the immediate possession of them, cannot sue in trover for their conversion.<sup>8</sup> If, however, the second mortgagee has the right to possession, he may maintain trover for the conversion of the property;<sup>9</sup> and where mortgaged chattels were sold on foreclosure and the senior mortgage was satisfied, the junior mortgagee was allowed to maintain trover for the surplus proceeds.<sup>10</sup>

**Mortgagees as Tenants in Common** of the mortgaged chattels may join in an action of trover. Thus, where several mortgages were simultaneously executed the mortgagees were treated as tenants in common to the same extent as though there had been a single mortgage to them jointly, and were allowed to join in an action of trover.<sup>11</sup>

*South Dakota.*—*La Crosse Boot, etc., Mfg. Co. v. Mons Anderson Co.*, 14 S. Dak. 597.

*Texas.*—*Willis v. Daingerfield Bank*, (Tex. Civ. App. 1895) 30 S. W. Rep. 81; *Fouts v. Ayres*, 11 Tex. Civ. App. 338; *R. F. Scott Grocer Co. v. Carter*, (Tex. Civ. App. 1896) 34 S. W. Rep. 375; *Godair v. Tillar*, 19 Tex. Civ. App. 541; *Jones v. Hess*, (Tex. Civ. App. 1898) 48 S. W. Rep. 46; *Parlin v. Hanson*, 21 Tex. Civ. App. 401.

*Vermont.*—*Drew v. Drew*, 68 Vt. 70.

*Wisconsin.*—*Cotton v. Marsh*, 3 Wis. 221; *Cotton v. Watkins*, 6 Wis. 629; *Bates v. Wilbur*, 10 Wis. 415; *Earl v. Stumpf*, 56 Wis. 50.

*Wyoming.*—*Kinney v. Rock Springs First Nat. Bank*, 10 Wyo. 115.

**Sufficiency of Remaining Security.**—A mortgagee may maintain trover for conversion of part of the mortgaged chattels though the remaining portion of the chattels may be sufficient to secure his claim. *Gadsden First Nat. Bank v. Sproull*, 105 Ala. 275.

**Maturity of Indebtedness.**—Where the mortgagee is entitled to possession his right to maintain trover for the conversion of the chattels is not affected by the fact that the mortgage debt is not due. *National Bank of Commerce v. Morris*, 114 Mo. 255, 35 Am. St. Rep. 754.

**1. Against Levying Officers.**—*Leonard v. Hair*, 133 Mass. 455; *Bigelow v. Capen*, 145 Mass. 270; *Duggan v. Wright*, 157 Mass. 228; *Hull v. Bernatz*, 106 Mich. 551; *Eddy v. McCall*, 77 Mich. 242; *Knapp v. Gregory*, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 21, 65 Hun (N. Y.) 621.

The fact that on the execution sale the property was purchased by the mortgagor does not defeat an action of trover by the mortgagee against the officer. *Leonard v. Hair*, 133 Mass. 455.

**2. Action Against Strangers.**—*Jones v. Kel-*

*logg*, 51 Kan. 263, 37 Am. St. Rep. 278; *Snyder v. Hitt*, 2 Dana (Ky.) 204; *Grainger v. Lindsay*, 123 N. Car. 216; *Sandager v. Northern Pac. Elevator Co.*, 2 N. Dak. 3; *Wolff v. Farrell*, 3 Brev. (S. Car.) 68; *Cotton v. Marsh*, 3 Wis. 221.

**3.** *Grainger v. Lindsay*, 123 N. Car. 216.

**4. Necessity for Right to Possession.**—*Burton v. Tannehill*, 6 Blackf. (Ind.) 470; *Jones v. Cobb*, 84 Me. 153; *Chandler v. West*, 37 Mo. App. 631; *Little Rock Bank v. Fisher*, 55 Mo. App. 51; *Binnian v. Baker*, 6 Wash. 50. See, however, *Fouts v. Ayres*, 11 Tex. Civ. App. 338.

Thus, where the mortgage provides that the mortgagor shall remain in possession until default in the payment of the indebtedness secured, the mortgagee cannot maintain trover for the property prior to such default. *Jones v. Cobb*, 84 Me. 153.

**5. Assignee of Mortgage.**—*Gadsden First Nat. Bank v. Sproull*, 105 Ala. 275; *Duggan v. Wright*, 157 Mass. 228.

**6.** *Crain v. Paine*, 4 Cush. (Mass.) 483, 50 Am. Dec. 807.

**7. By Mortgagee After Assignment.**—*Horne v. Briggs*, 98 Mass. 510.

**8. Second Mortgagee—Necessity for Right to Possession.**—*Baker v. Seavey*, 163 Mass. 522, 47 Am. St. Rep. 475; *Landon v. Emmons*, 97 Mass. 37; *Ring v. Neale*, 114 Mass. 111, 19 Am. Rep. 316; *Clapp v. Campbell*, 124 Mass. 50; *McGraw v. Sampliner*, 107 Mich. 141.

**Setting Up Title of First Mortgagee as Defense.**—*Beyer v. Fields*, 134 Ala. 236.

**9. Second Mortgagee with Right to Possession.**—*Mitchell v. Thomas*, 114 Ala. 459; *Henderson v. Murphree*, 124 Ala. 223; *Treat v. Gilmore*, 49 Me. 34; *Moore v. Prentiss Tool, etc., Co.*, 133 N. Y. 144, 59 N. Y. Super. Ct. 516.

**10.** *Smith v. Donahoe*, 13 S. Dak. 334.

**11.** *Howard v. Chase*, 104 Mass. 249.



A Purchaser at the Mortgage Foreclosure Sale may sue for the conversion of the chattels.<sup>1</sup>

**16. Consignee.** — Trover has frequently been held to be maintainable by the consignee against the carrier for the conversion of the goods shipped.<sup>2</sup>

**17. Tenants in Common** — *a. ACTIONS AGAINST THIRD PERSONS.* — In some cases the right of tenants in common to maintain separate actions against third persons for the wrongful conversion of the common chattel has been upheld;<sup>3</sup> thus, one tenant in common may maintain trover against an officer who levies upon and sells the entire interest in a chattel upon an execution against the cotenant.<sup>4</sup> In other cases, however, it has been held that all tenants in common must join in an action of trover.<sup>5</sup> Still, advantage of a failure to join all tenants in common as plaintiffs can be taken only by a plea in abatement.<sup>6</sup> After one tenant in common has recovered in trover for the conversion of his share in the common chattel, his cotenant may maintain a second action for the conversion of his share, and a plea in abatement cannot be interposed to the second action.<sup>7</sup> One tenant in common in possession of the common chattel, with the right to retain possession, or entitled to the possession under agreement with his cotenant, has such a special property in the entire chattel as will enable him to maintain trover therefor as against a wrongdoer.<sup>8</sup> Joint tenants and tenants in common may, of course, join in trover for the conversion of the common chattel and may recover without showing the proportionate interest of each in the chattel;<sup>9</sup> but where several join as plaintiffs in trover all the parties plaintiff must have an interest in the chattel to enable them to recover.<sup>10</sup>

*b. ACTIONS INTER SE.* — It is undoubtedly the general rule that one tenant in common cannot maintain trover against his cotenant, as the right of possession lies at the foundation of the action and the two are equally entitled to possession; he who has it cannot be guilty of conversion by retaining it.<sup>11</sup> But there may be such a use or rather misuse of the joint prop-

1. *Oxsheer v. Tandy*, 11 Tex. Civ. App. 142.

2. *Consignee.* — *Fowler v. Down*, 1 B. & P. 44, cited in 2 Saund. 47; *Stirling v. Vaughan*, 11 East 626; *Smith v. James*, 7 Cow. (N. Y.) 329; *Everett v. Saltus*, 15 Wend. (N. Y.) 474; *Fitzhugh v. Wiman*, 9 N. Y. 559; *O'Neill v. New York Cent., etc., R. Co.*, 60 N. Y. 138. See also *Perkins v. Dacon*, 13 Mich. 81; *Gibbons v. Farwell*, 58 Mich. 233; *Green v. Clarke*, 12 N. Y. 343.

One to whom goods have been shipped for the specific purpose of placing funds in his hands to meet a bill drawn upon him by the consignor has sufficient property therein to entitle him to maintain trover although no bill of lading is executed, and although he holds merely a receipt signed by the mate of the vessel, acknowledging the shipment of the goods to be delivered to him. *Evans v. Nichol*, 3 M. & G. 614, 42 E. C. L. 321, 4 Scott N. R. 43, 11 L. J. C. Pl. 6.

3. *Actions Against Third Persons.* — *Watson v. King*, 4 Campb. 272, 1 Stark. 121, 2 E. C. L. 54, 16 Rev. Rep. 790; *Bleaden v. Hancock*, 4 C. & P. 152, 19 E. C. L. 317; *Howard v. Snelling*, 28 Ga. 469; *Logan v. Hartford City, etc., Coal Co.*, 9 Heisk. (Tenn.) 689; *White v. Morton*, 22 Vt. 15, 52 Am. Dec. 75. See, however, *Nathan v. Buckland*, 2 Moo. 153, 4 E. C. L. 408; *Harper v. Godsell*, 39 L. J. Q. B. 185, L. R. 5 Q. B. 422, 18 W. R. 954.

Two persons jointly interested in a chattel, having made a joint demand for it, may, notwithstanding, maintain separate actions of

trover in respect of it against a person who unjustly detains it. *Bleaden v. Hancock*, 4 C. & P. 152, 19 E. C. L. 317.

4. *Bryant v. Clifford*, 13 Met. (Mass.) 138. See also *White v. Morton*, 22 Vt. 15, 52 Am. Dec. 75. But see *Rooks v. Moore*, Busb. L. (44 N. Car.) 1, 57 Am. Dec. 569; *Ecclestone v. Jarvis*, 1 U. C. Q. B. 370.

5. *Haskell v. Jones*, 24 Me. 222.

6. *Farrar v. Beswick*, 1 M. & W. 682; *Gentry v. Singleton*, (Indian Ter. 1902) 69 S. W. Rep. 898, reversing 3 Indian Ter. 516; *Wing v. Miliken*, 91 Me. 387, 64 Am. St. Rep. 238; *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670; *Wheelwright v. Depeyster*, 1 Johns. (N. Y.) 471, 3 Am. Dec. 345. See also *Phillips v. Cummings*, 11 Cush. (Mass.) 460.

7. *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670; *Sedgworth v. Overend*, 7 T. R. 275.

8. *Nyberg v. Handelaar*, (1892) 2 Q. B. 202; *Hyde v. Noble*, 13 N. H. 494, 38 Am. Dec. 508.

Thus, one who is part owner of personal property and has possession and control of it, with power to sell, may maintain trover for its conversion by a wrongdoer. *Hyde v. Noble*, 13 N. H. 494, 38 Am. Dec. 508.

9. *Robertson v. Gourley*, 84 Tex. 575.

10. *Pettibone v. Phelps*, 13 Conn. 445, 35 Am. Dec. 88.

11. *Actions Inter Se* — *Holliday v. Camsell*, 1 T. R. 658; *Camp v. Casey*, 110 Ga. 262; *Winner v. Penniman*, 35 Md. 163, 6 Am. Rep. 385; *St. John v. Standring*, 2 Johns. (N. Y.) 468; *Clowes v. Hawley*, 12 Johns. (N. Y.) 484; *Lu-*

erty by one cotenant as will constitute a conversion and enable the other cotenant to maintain trover against the former<sup>1</sup> or against persons claiming under him.<sup>2</sup>

**Tenants in Common of Divisible Mass.** — In a number of cases one tenant in common of an undivided mass of the same general quality, such as grain, which is capable of division by weight or measure, has been permitted to recover against a wrongdoer in a separate action for the conversion of his share. Thus, the owner of an undivided share of grain stored in a warehouse or elevator has been permitted to recover in trover for his share against a wrongdoer who converted the entire mass,<sup>3</sup> and one tenant in common of such a divisible mass has been allowed to maintain trover for his share against his cotenant, who, being in possession, refused to permit a division.<sup>4</sup>

**18. Title Dependent on Ownership of Real Estate — Adverse Possession.** — It is recognized as a general rule that where the title to property which has become personalty by reason of its severance from the soil or freehold, as in case of timber felled, ore mined, stone quarried, etc., depends upon the ownership of the real estate from which it was severed, the owner of the real estate, if out of possession, cannot maintain trover for such property where the severance was made by a person holding adversely to such owner and in good faith under claim and color of title, since such an action, if permitted, would result in a determination of the title to real estate between conflicting claimants in a transitory action.<sup>5</sup> The remedy of the true owner in such a case is by

*cas v. Wasson*, 3 Dev. L. (14 N. Car.) 398, 24 Am. Dec. 266; *Campbell v. Campbell*, 2 Murph. (6 N. Car.) 65; *Cole v. Terry*, 2 Dev. & B. L. (19 N. Car.) 252; *Cowan v. Buyers*, *Cooke* (Tenn.) 53, 5 Am. Dec. 668.

1. *England*. — *Jacobs v. Seward*, L. R. 5 H. L. 464.

*Canada*. — *Brady v. Arnold*, 19 U. C. C. P. 42; *McIntosh v. Port Huron Petrified Brick Co.*, 27 Ont. App. 262.

*Alabama*. — *Steiner v. Tranum*, 98 Ala. 315.

*Illinois*. — *Boyle v. Levings*, 28 Ill. 314.

*Maryland*. — *Winner v. Penniman*, 35 Md. 163, 6 Am. Rep. 385.

*Massachusetts*. — *Burbank v. Crooker*, 7 Gray (Mass.) 158, 66 Am. Dec. 470; *Weld v. Oliver*, 21 Pick. (Mass.) 559; *Daniels v. Daniels*, 7 Mass. 135; *Delaney v. Root*, 99 Mass. 546, 97 Am. Dec. 52.

*Michigan*. — *Crow v. Plummer*, 85 Mich. 550.

*New York*. — *Nowlen v. Colt*, 6 H.L. (N. Y.) 461, 41 Am. Dec. 756; *Lobdell v. Stowell*, (County Ct.) 37 How. Pr. (N. Y.) 88; *Rightmyer v. Raymond*, 12 Wend. (N. Y.) 51; *White v. Osborn*, 21 Wend. (N. Y.) 72; *Adams v. Loomis*, 4 Silv. Sup. (N. Y.) 558.

*North Carolina*. — *Lowthrop v. Smith*, 1 Hayw. (2 N. Car.) 255; *Waller v. Bowlings*, 108 N. Car. 289.

*Pennsylvania*. — *Rank v. Rank*, 5 Pa. St. 211; *Stafford v. Ames*, 9 Pa. St. 343.

*Wisconsin*. — *Sullivan v. Sherry*, 111 Wis. 476, 87 Am. St. Rep. 890.

See also *infra*, this title, *Conversion — Conversion by Cotenant*.

2. *King v. Neel*, 98 Ga. 438, 58 Am. St. Rep. 311; *Fleming v. Katahdin Pulp, etc., Co.*, 93 Me. 110.

**3. Tenants in Common of Divisible Mass.** — *German Nat. Bank v. Meadowcroft*, 95 Ill. 124, 35 Am. Rep. 137; *National Bank v. Langan*, 28 Ill. App. 401; *Howe v. Munson*, 65 Ill. App.

674. See also *Dolliff v. Robbins*, 83 Minn. 498, 85 Am. St. Rep. 466.

4. *Gates v. Bowers*, 169 N. Y. 14, 88 Am. St. Rep. 530, reversing 41 N. Y. App. Div. 612. See also *Wood v. Noack*, 84 Wis. 398.

**5. Adverse Possession** *Michigan*. — *Anderson v. Besser*, 131 Mich. 481.

*New Jersey*. — *Lehigh Zinc, etc., Co. v. New Jersey Zinc, etc., Co.*, 55 N. J. L. 350.

*Pennsylvania*. — *Mather v. Trinity Church*, 3 S. & R. (Pa.) 509, 8 Am. Dec. 663; *Baker v. Howell*, 6 S. & R. (Pa.) 478; *Brown v. Caldwell*, 10 S. & R. (Pa.) 114, 13 Am. Dec. 660; *Berry v. McMullen*, 17 S. & R. (Pa.) 85; *Colwell v. Peden*, 3 Watts (Pa.) 327; *Grubb v. Guilford*, 4 Watts (Pa.) 241; *Wright v. Guier*, 9 Watts (Pa.) 174, 36 Am. Dec. 108; *Lewis v. Robinson*, 10 Watts (Pa.) 342; *Elliott v. Powell*, 10 Watts (Pa.) 453, 36 Am. Dec. 200; *King v. Richards*, 6 Whart. (Pa.) 424, 37 Am. Dec. 420; *Porter v. McGINNIS*, 1 Pa. St. 413; *Stafford v. Ames*, 9 Pa. St. 343; *Heaton v. Findlay*, 12 Pa. St. 304; *Harlan v. Harlan*, 15 Pa. St. 513, 53 Am. Dec. 612; *Hannen v. Ewalt*, 18 Pa. St. 9; *Baker v. King*, 18 Pa. St. 138; *Clark v. Smith*, 25 Pa. St. 137; *Hole v. Rittenhouse*, 25 Pa. St. 491; *Cromelien v. Brink*, 29 Pa. St. 526; *Forsyth v. Wells*, 41 Pa. St. 294, 80 Am. Dec. 617; *Kier v. Peterson*, 41 Pa. St. 363; *Brewer v. Fleming*, 51 Pa. St. 102; *Green v. Ashland Iron Co.*, 62 Pa. St. 97; *Lehman v. Kellerman*, 65 Pa. St. 489; *National Transit Co. v. Weston*, 121 Pa. St. 485.

Act Pa., May 15, 1871, authorizing replevin for chattels severed from realty though the title is in dispute, is limited to that form of action alone, and does not authorize an action of trover for such chattels. *National Transit Co. v. Weston*, 121 Pa. St. 485.

**Reasons for Doctrine.** — See *Lehigh Zinc, etc., Co. v. New Jersey Zinc, etc., Co.*, 55 N. J. L. 350.

In *Wright v. Guier*, 9 Watts (Pa.) 172, 36

ejectionment to recover possession and trespass for mesne profits.<sup>1</sup>

**After Ejectionment.** — It is generally held that after a recovery of possession in ejectionment the true owner may maintain trover for property severed from the freehold by the disseizor while holding adversely.<sup>2</sup> In *North Carolina* the title of one in adverse possession of real estate to property severed therefrom, such as turpentine drawn from trees, has been upheld to such an extent as to allow such person to maintain trover against the true owner who deprives him of the possession of the turpentine.<sup>3</sup>

**As Against a Mere Trespasser or One Not Acting under a Bona Fide Claim of Title,** the owner of land remains the owner of all property severed from the freehold, such as timber felled and removed, ore or coal mined, hay harvested, fixtures severed, etc.; and therefore he is entitled to immediate possession of such property and may maintain trover therefor.<sup>4</sup>

**Possession Not Adverse.** — The right of the owner to maintain trover for property severed from the freehold has also been upheld where the possession of the occupant was not adverse to the owner of the land.<sup>5</sup> Thus, where fix-

Am. Dec. 108, Gibson, C. J., said: "The true reason why trover or replevin lies not against an actual occupant is not any supposed locality of the question, but the impolicy of suffering him to be harassed with a separate action for each bushel of wheat consumed or stick of firewood burnt on the premises instead of having the matter settled at once by an action to recover the possession."

**Defendant Holding under Tax Deed.** — *Anderson v. Besser*, 131 Mich. 481, 9 Detroit Leg. N. St. 412.

1. *National Transit Co. v. Weston*, 121 Pa. St. 485.

2. **After Recovery in Ejectionment.** — *Anderson v. Hapler*, 34 Ill. 436, 85 Am. Dec. 325; *Wilson v. Hoffman*, 93 Mich. 72, 32 Am. St. Rep. 485; *Alliance Trust Co. v. Nettleton* *Hardwood Co.*, 74 Miss. 584, 60 Am. St. Rep. 531; *Heath v. Ross*, 12 Johns. (N. Y.) 140; *Morgan v. Varick*, 8 Wend. (N. Y.) 587. See, however, *Brothers v. Hurdle*, 10 Ired. L. (32 N. Car.) 490, 51 Am. Dec. 400.

A plaintiff in ejectionment, after the title to the land has been determined in his favor, may maintain an action in trover for logs cut by the defendant from standing timber and moved from the land during the pendency of the suit, and while the defendant was in possession of the land under a *bona fide* claim of title adverse to the plaintiff. *Wilson v. Hoffman*, 93 Mich. 72, 32 Am. St. Rep. 485.

3. *Branch v. Morrison*, 6 Jones L. (51 N. Car.) 16; *Branch v. Campbell*, 7 Jones L. (52 N. Car.) 378.

4. **Action Against Trespasser** — *United States*. — *Potts v. Gilbert*, 3 Wash. (U. S.) 475.

*Alabama*. — *White v. Yawkey*, 108 Ala. 270, 54 Am. St. Rep. 159; *Louisville, etc., R. Co. v. Hill*, 115 Ala. 334.

*Arkansas*. — *Thornton v. St. Louis Refrigerator, etc., Co.*, 69 Ark. 424.

*Colorado*. — *Omaha, etc., Smelting etc., Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185.

*Maine*. — *Whidden v. Seelye*, 40 Me. 247, 63 Am. Dec. 661; *Stevens v. Gordon*, 98 Me. 564.

*Michigan*. — *Hartford Iron Min. Co. v. Cambria Min. Co.*, 93 Mich. 90, 32 Am. St. Rep. 488; *Moret v. Mason*, 106 Mich. 340; *Laird v. Coach*, 112 Mich. 628.

*New York*. — *Wedge v. McMahon*, 58 Hun (N. Y.) 602, 11 N. Y. Supp. 459.

*Oregon*. — *Hodson v. Goodale*, 22 Oregon 68.

*Pennsylvania*. — *Mather v. Trinity Church*, 3 S. & R. (Pa.) 509, 8 Am. Dec. 663; *Wright v. Guier*, 9 Watts (Pa.) 174, 36 Am. Dec. 108; *Sorber v. Willing*, 10 Watts (Pa.) 141; *Adams v. Robinson*, 6 Pa. St. 271; *Hole v. Rittenhouse*, 25 Pa. St. 491.

*Wisconsin*. — *Yates v. French*, 25 Wis. 661.

*Canada*. — *Segee v. Perley*, 3 N. Bruns. 439; *Le Bel v. Fredericton Boom Co.*, 9 N. Bruns. 198; *Coates v. M'Auley*, 9 N. Bruns. 521.

If a landlord, under distress for rent in arrear, severs fixtures from the freehold and disposes of them, he is liable in trover to the tenant. *Dalton v. Whitem*, 3 Q. B. 961, 43 E. C. L. 1056, 3 Gale & D. 260, 12 L. J. Q. B. 55.

An action of trover will lie by the owner of the legal title to land to recover the value of wood cut upon it by a trespasser; and he who purchased the land at a sheriff's sale as the property of one who had trespassed upon it by cutting timber, and in pursuance of his purchase continued to cut timber also, at the same time owning and occupying adjoining lands, included in the same deed from the sheriff, has not such a colorable title of possession as will protect him from this form of action. *Wright v. Guier*, 9 Watts (Pa.) 172, 36 Am. Dec. 108.

**Temporary Occupancy for the Purpose of Removing Timbers** not such an adverse possession as to defeat an action of trover for the timber. *Thornton v. St. Louis Refrigerator, etc., Co.*, 69 Ark. 424.

**Possession for Purpose of Cutting Timber by Person Claiming under Void Tax Deed.** — *Moret v. Mason*, 106 Mich. 340.

5. **Possession Not Adverse.** — *Hutchins v. King*, 1 Wall. (U. S.) 53.

**The Leading Case of Player v. Roberts**, 1 Jones 243, was thus explained by Tilghman, C. J., in *Mather v. Trinity Church*, 3 S. & R. (Pa.) 509, 8 Am. Dec. 663: "A, the lord of a manor, leased to B all the coal and coal mines open or to be found in the manor. C was a copyholder of parcel of the manor for term of his life. A entered on the copyhold during C's life and dug



tures, etc., are severed by a tenant or by third persons the landlord may, during the term, maintain trover therefor,<sup>1</sup> and where fixtures are severed by a vendee in possession under a contract of purchase which has been forfeited, trover by the vendor will lie.<sup>2</sup> So it has been held that where timber, etc., is severed by a mortgagor while in possession, the mortgagee may sue in trover and recover for the conversion.<sup>3</sup>

**One Who Wrongfully Severs Property from the Freehold**, such as timber, hay, ore, coal, etc., cannot, as against the owner of the land or those claiming under him who take possession thereof, maintain trover therefor;<sup>4</sup> but as against a mere wrongdoer not claiming under the owner of the land, his possession is sufficient to enable him to maintain trover for the property in case he is deprived of its possession.<sup>5</sup>

**Crops.** — Crops raised and severed by one in possession of land, though without title, are his property, and the owner of the land cannot maintain trover for them.<sup>6</sup> But if a trespasser enters upon land while the owner is in possession, and harvests and carries away crops, he is liable in trover though such crops may have been planted by him while in possession.<sup>7</sup> So the owner of the land has been allowed to recover in trover against the planter for crops planted and harvested by one in possession as a mere trespasser without claim or color of title;<sup>8</sup> and *a fortiori* a mere trespasser cannot maintain trover as against the owner of the land for crops planted and harvested by the former but taken into possession by the latter.<sup>9</sup>

**Cotenants.** — One tenant in possession of the common property who plants and harvests crops thereon becomes the absolute owner thereof and may maintain trover therefor against his cotenants.<sup>10</sup> So one tenant has been allowed to recover in trover against his cotenant for timber wrongfully cut and converted by the latter.<sup>11</sup>

**Sufficiency of Title to Land.** — To entitle the plaintiff, by virtue of his ownership

coals, which he converted to his own use. B recovered against him in trover, although neither A nor B could enter into the copyhold without being trespassers. But it must be remarked that the title and possession of the copyholder were not adverse to B, because he claimed no right to the coals; so that although B could not have entered to dig those coals, yet, being dug, A did him wrong by converting them to his own use, because A had leased to him all the coals in the manor. There was no contest about the title of the land, but only about the coals. The title was confessed by both A and B to be in C, so that between A and B it was proper to consider the possession of the coals in B."

**1. Fixtures Severed by Tenant.** — *Farrant v. Thompson*, 5 B. & Ald. 826, 7 E. C. L. 272, 2 Dowl. & R. 1, 16 E. C. L. 61; *Eardley v. Granville*, 3 Ch. D. 826, 45 L. J. Ch. 669, 34 L. T. N. S. 609, 24 W. R. 528; *Le Fleming v. Simpson*, 2 M. & R. 169, 17 E. C. L. 297, 6 L. J. K. B. 207; *Jackson v. Klinger*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 758.

**2. Fixtures Severed by Vendee in Possession.** — *Reynolds v. Dechman*, 14 Nova Scotia 459. See also *Willis v. Adams*, 66 Vt. 223.

**3. Severance by Mortgagor.** — *Mann v. English*, 38 U. C. Q. B. 240.

**4. Right of Trespasser to Maintain Action.** — *McDonald v. Bonfield*, 20 U. C. C. P. 73. See also *Vanness v. Nafe*, 5 N. J. L. 786.

**5. Putnam v. Lewis**, 133 Mass. 264; *James v. Snelson*, 3 Mo. 393; *Branch v. Morrison*, 5 Jones L. (50 N. Car.) 16, 69 Am. Dec. 770;

*Grubb v. Guilford*, 4 Watts (Pa.) 223, 28 Am. Dec. 700; *Winlack v. Geist*, 107 Pa. St. 297, 52 Am. Rep. 473; *McDougall v. Smith*, 30 U. C. Q. B. 607. See, however, *Turley v. Tucker*, 6 Mo. 583, 35 Am. Dec. 449; *Russell v. Hill*, 125 N. Car. 470.

**6. Crops.** — *Brothers v. Hurdle*, 10 Ired. L. (32 N. Car.) 490, 51 Am. Dec. 400. See also *Bromley v. Miles*, 51 N. Y. App. Div. 95.

In *Brothers v. Hurdle*, 10 Ired. L. (32 N. Car.) 490, 51 Am. Dec. 400, the court, in denying the right of the owner of land to maintain trover for corn severed while the defendant was in possession, said that the effect of such an action would be that "when one who has been evicted regains possession, he may maintain trover against every one who has bought a bushel of corn or a load of wood from the trespasser, at any time while he was in possession. This, especially in a country where there are no markets overt, would be inconvenient, and no person could safely buy of one whose title admitted of question."

**7. Davis v. Connop**, 1 Price 53, 15 Rev. Rep. 693.

**8. Simpkins v. Rogers**, 15 Ill. 397. See also *Black v. Eason*, 10 Ired. L. (32 N. Car.) 308.

**9. Thomas v. Moody**, 11 Me. 130.

**10. Le Barron v. Babcock**, 122 N. Y. 153, 19 Am. St. Rep. 488, reversing 46 Hun (N. Y.) 598.

**11. Clow v. Plummer**, 85 Mich. 550; *Sullivan v. Sherry*, 111 Wis. 476, 87 Am. St. Rep. 890. See also *Fleming v. Katahdin Pulp, etc., Co.*, 93 Me. 110.

of land, to recover in trover for property severed therefrom, he must prove title to the land at the time of the severance.<sup>1</sup> The mere production of a deed to the land to the plaintiff from a third person is insufficient unless further proof of title in the grantor is produced.<sup>2</sup> To entitle one to maintain trover for property severed from the freehold, he need not be the owner of the fee. Thus, the action has been held to be maintainable by the lessee of a mine with the exclusive privilege of mining,<sup>3</sup> and by a mortgagee for timber felled, fixtures severed, etc.<sup>4</sup> Actual possession of land is *prima facie* proof of title so as to entitle the person in possession to recover in trover against a trespasser,<sup>5</sup> and ownership of the land without actual possession is sufficient as against one not holding adversely.<sup>6</sup>

**19. Purchaser of Property Held Adversely to Owner.** — The owner of personal chattels which are withheld from him by a wrongdoer may sell such chattels so as to pass all his title to the purchaser and enable the latter to maintain trover against such wrongdoer for a subsequent conversion.<sup>7</sup> The common-law rule which prohibited the assignment of choses in action *ex delicto* did not prohibit such a transaction.<sup>8</sup> A sale of property held adversely to the owner does not, however, authorize the purchaser to maintain trover for a conversion prior to such sale, as he did not at the time of the conversion have any title or right to possession; the action must be based on a conversion subsequent to the sale.<sup>9</sup> The question whether a cause of action for a wrongful conversion could, as such, be assigned either at common law or under the several statutes relating to the assignment of choses in action has been heretofore fully treated.<sup>10</sup>

**1. Sufficiency of Title to Land** — *California.* — Gray v. Eschen, 125 Cal. 1.

*Kansas.* — Wisner v. Bias, 43 Kan. 458.

*Massachusetts.* — Parks v. Loomis, 6 Gray (Mass.) 467.

*Michigan.* — Clink v. Gunn, 90 Mich. 135; Smith v. Ryerson, 98 Mich. 588; Laird v. Coach, 112 Mich. 628.

*Minnesota.* — Goss v. Meehan, 83 Minn. 178.

*Mississippi.* — Shirley v. Fearn, 33 Miss. 653, 69 Am. Dec. 375.

*Missouri.* — Holladay-Klotz Land, etc., Co. v. T. J. Moss Tie Co., 87 Mo. App. 167.

*New York.* — Wedge v. McMahon, 58 Hun (N. Y.) 602, 11 N. Y. Supp. 459.

*Washington.* — Groveland Imp. Co. v. Farmers' Supply Co., 25 Wash. 344, 87 Am. St. Rep. 755; Jordan v. Coulter, 30 Wash. 116.

**Timber License on Crown Land.** — Kerr v. Connell, 2 N. Bruns. 133; Leighton v. Bohan, 11 N. Bruns. 440; Carman v. McLeod, 13 N. Bruns. 66.

**Claim under Federal Grant.** — Goss v. Meehan, 83 Minn. 178.

**Claim under Tax Deed.** — Holladay-Klotz Land, etc., Co. v. T. J. Moss Tie Co., 87 Mo. App. 167.

**Action by Heirs of Intestate.** — Louisville, etc., R. Co. v. Hill, 115 Ala. 334.

**2. Solomon v. Widner,** 117 Mich. 524.

**3. Hartford Iron Min. Co. v. Cambria Min. Co.,** 93 Mich. 90, 32 Am. St. Rep. 488.

**4. Whidden v. Seelye,** 40 Me. 247, 63 Am. Dec. 661. See also Mann v. English, 38 U. C. Q. B. 240.

In jurisdictions in which the mortgage is treated merely as a security the mortgagee has not such a title or right to the possession prior to foreclosure as to enable him to maintain trover for property severed from the freehold,

Rowland v. Sprauls, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 895.

**5. Stevens v. Gordon,** 87 Me. 564; Russell v. Willette, 80 Hun (N. Y.) 497; Coates v. M'Auley, 9 N. Bruns. 521.

**6. White v. Yawkey,** 108 Ala. 270, 54 Am. St. Rep. 159.

**7. Purchaser of Property Held Adversely to Owner** — *United States.* — Lincoln Sav. Bank, etc., Co. v. Allen, 82 Fed. Rep. 148, 49 U. S. App. 498. See also The Brig Sarah Ann, 2 Sumn. (U. S.) 211.

*Maine.* — Jewett v. Patridge, 12 Me. 243, 28 Am. Dec. 173; Cartland v. Morrison, 32 Me. 190.

*New York.* — Carver v. Creque, 46 Barb. (N. Y.) 507; McGinn v. Worden, 3 E. D. Smith (N. Y.) 355; Hall v. Robinson, 2 N. Y. 293; Mahaney v. Walsh, 16 N. Y. App. Div. 601; Lawrence v. Wilson, 64 N. Y. App. Div. 562.

*North Carolina.* — Morgan v. Bradley, 3 Hawks (10 N. Car.) 559. See, however, Stedman v. Riddick, 4 Hawks (11 N. Car.) 29.

*Canada.* — Jack v. Eagles, 7 N. Bruns. 95. See also Carpenter v. Hale, 8 Gray (Mass.) 157.

The owner of personal property is not obliged to treat every act of a third person who infringes his right of property or possession as constituting a tortious conversion, but may, if he sees fit, waive the tort, and sell the property and convey a good title, and his vendee may, upon demand and refusal, maintain trover therefor. Tome v. Dubois, 6 Wall. (U. S.) 548.

**8. Tome v. Dubois,** 6 Wall. (U. S.) 548.

**9. Gaskill v. Barbour,** 62 N. J. L. 530. See also Hodges v. Lathrop, 1 Sandf. (N. Y.) 46; Lawrence v. Wilson, 64 N. Y. App. Div. 552.

**10. See the title ASSIGNMENTS,** vol. 2, p. 1020

**20. Possessory Title — General Rule.** — It is very generally recognized that the possession of chattels, conferring, as it does, title good as against every one but the true owner, will enable the person in possession to maintain trover therefor against a wrongdoer who takes the chattels from his possession and wrongfully converts them, and the wrongdoer cannot set up the title of the true owner in defense to the action,<sup>1</sup> or even in mitigation of damages.<sup>2</sup> The fact that the person in possession acquired the possession from the true owner by a wrongful or tortious act does not change the rule,<sup>3</sup> and it seems equally immaterial that the possession was obtained by a felonious or criminal act.<sup>4</sup>

**Minority Rule.** — In some cases, however, it has been held that title and right to possession in a third person constitute a good defense to an action of trover

*et seq.* See also *Robinson v. Kaplan*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 686; *Gulf, etc., R. Co. v. Humphries*, 4 Tex. Civ. App. 333.

**1. Possessory Title — England.** — *Barker v. Furlong*, (1891) 2 Ch. 172; *Haggan v. Pasley*, 2 L. R. Ir. 573; *Sutton v. Buck*, 2 Taunt. 302; *Rackham v. Jessup*, 3 Wils. C. Pl. 332, 338; *Jefferies v. Great Western R. Co.*, 5 El. & Bl. 802, 85 E. C. L. 802; *Newnham v. Stevenson*, 10 C. B. 713, 70 E. C. L. 713; *Bourne v. Fosbrooke*, 18 C. B. N. S. 515, 114 E. C. L. 515; *Northam v. Bowden*, 11 Exch. 70, 24 L. J. Exch. 237; *Buckley v. Gross*, 3 B. & S. 566, 113 E. C. L. 566, 32 L. J. Q. B. 129. Compare *Sherriff v. Cadell*, 2 Esp. 617.

*Canada.* — *Clarke v. Fullerton*, 2 Nova Scotia Dec. 348; *Coombes v. Hatheway*, 5 N. Bruns. 592; *Williams v. Thomas*, 25 Ont. 536.

*United States.* — *Guttner v. Pacific Steam Whaling Co.*, 96 Fed. Rep. 617; *Stanley v. Sierra Nevada Silver Min. Co.*, 118 Fed. Rep. 931.

*Alabama.* — *Hare v. Fuller*, 7 Ala. 717; *Donnell v. Thompson*, 13 Ala. 440; *Kemp v. Thompson*, 17 Ala. 9; *Lowremore v. Berry*, 19 Ala. 130, 54 Am. Dec. 188; *Brown v. Beason*, 24 Ala. 466; *Barnes v. Mobley*, 21 Ala. 232; *Cook v. Patterson*, 35 Ala. 102.

*Connecticut.* — *Haslem v. Lockwood*, 37 Conn. 500, 9 Am. Rep. 350.

*Florida.* — *Carter v. Bennett*, 4 Fla. 283.

*Georgia.* — *Gillespie v. Chastain*, 57 Ga. 218.

*Illinois.* — *Montgomery v. Brush*, 121 Ill. 513; *Robison v. Hardy*, 22 Ill. App. 512; *Lapp v. Pinover*, 27 Ill. App. 169.

*Indiana.* — *Coffin v. Anderson*, 4 Blackf. (Ind.) 395; *Grady v. Newby*, 6 Blackf. (Ind.) 442.

*Kentucky.* — *Geohagan v. Baker*, 3 Bibb (Ky.) 284.

*Maine.* — *Brown v. Ware*, 25 Me. 411; *Vinling v. Baker*, 53 Me. 544. Compare *Clapp v. Glidden*, 39 Me. 448.

*Maryland.* — *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670.

*Massachusetts.* — *Cheney v. Pierce*, 7 Allen (Mass.) 485; *Burke v. Savage*, 13 Allen (Mass.) 408.

*Michigan.* — *Kane v. Hutchisson*, 93 Mich. 488. See also *Eureka Iron, etc., Works v. Bresnahan*, 66 Mich. 494. Compare *Ribble v. Lawrence*, 51 Mich. 569.

*Minnesota.* — *Derby v. Gallup*, 5 Minn. 119.

*Missouri.* — *Deland v. Vanstone*, 26 Mo. App. 297.

*Nebraska.* — *Grand Island Banking Co. v. Grand Island First Nat. Bank*, 34 Neb. 93; *Miller v. Waite*, 60 Neb. 431.

*New Hampshire.* — *Jones v. Sinclair*, 2 N. H. 319, 9 Am. Dec. 75; *Pinkham v. Gear*, 3 N. H. 484; *Bartlett v. Hoyt*, 29 N. H. 317. But see *Odiorne v. Colley*, 2 N. H. 66, 9 Am. Dec. 39.

*New York.* — *Sheldon v. Hoy*, (Supm. Ct. Gen. T.) 11 How. Pr. (N. Y.) 11; *Lyon v. Sellow*, 34 Hun (N. Y.) 124; *Goodrich v. Houghton*, 55 Hun (N. Y.) 526; *Duncan v. Spear*, 11 Wend. (N. Y.) 54; *Rogers v. Arnold*, 12 Wend. (N. Y.) 30; *Adelberg v. Horowitz*, 32 N. Y. App. Div. 408; *Smith v. Holt*, 37 N. Y. App. Div. 24; *Griffith v. Friendly*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 393; *Vogel v. Banks*, 60 N. Y. App. Div. 459. Compare *Schermerhorn v. Van Volkenburgh*, 11 Johns. (N. Y.) 529; *Kennedy v. Strong*, 14 Johns. (N. Y.) 128; *Rotan v. Fletcher*, 15 Johns. (N. Y.) 207; *Aiken v. Buck*, 1 Wend. (N. Y.) 466, 19 Am. Dec. 535.

*North Carolina.* — *Branch v. Morrison*, 5 Jones L. (50 N. Car.) 16, 69 Am. Dec. 770; *Barwick v. Wood*, 3 Jones L. (48 N. Car.) 306. See also *Craig v. Miller*, 12 Ired. L. (31 N. Car.) 375. See, however, *Laspeyre v. McFarland*, Term (4 N. Car.) 187, 7 Am. Dec. 705; *Barwick v. Barwick*, 11 Ired. L. (33 N. Car.) 80; *Herring v. Tilghman*, 13 Ired. L. (35 N. Car.) 392.

*Tennessee.* — *Grady v. Sharron*, 6 Yerg. (Tenn.) 320.

*Texas.* — *O'Brien v. Hilburn*, 22 Tex. 616; *Wagner v. Marple*, 10 Tex. Civ. App. 505; *Stockbridge v. Crockett*, 15 Tex. Civ. App. 69.

*Vermont.* — *White v. Bascom*, 28 Vt. 268.

*Wisconsin.* — *Weymouth v. Chicago, etc., R. Co.*, 17 Wis. 550, 84 Am. Dec. 763; *Gauche v. Milbrath*, 94 Wis. 674.

Though a wife living apart from her husband cannot lawfully dispose by gifts of chattels acquired during coverture, it is not competent for the defendant to set up the title of the husband in an action by the donee against a wrongdoer for the conversion of chattels so given. *Bourne v. Fosbrooke*, 18 C. B. N. S. 515, 114 E. C. L. 515.

**2.** *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670.

**3.** *Carter v. Bennett*, 4 Fla. 283; *Knapp v. Winchester*, 11 Vt. 351. Compare *Turley v. Tucker*, 6 Mo. 583, 35 Am. Dec. 449.

**4.** *Carter v. Bennett*, 4 Fla. 283. Compare *Coffin v. Anderson*, 4 Blackf. (Ind.) 395.



though the chattel was wrongfully taken from the possession of the plaintiff; as otherwise the true owner could immediately bring a second action against the defendant and force him to pay the value of the chattel a second time, the fact that he had paid such value in the former suit being no defense, and therefore trover should not be brought unless the satisfaction of the judgment would vest a good title in the defendant.<sup>1</sup>

**Action Against Owner.** — Of course, possession unconnected with any special interest in the chattel is not sufficient to sustain an action against the true owner or person claiming or holding under the true owner.<sup>2</sup> Thus, when a debtor conveys his chattels in fraud of his creditors, the possession of such transferee is not sufficient to maintain trover against an officer levying thereon at the suit of the creditors of the debtor,<sup>3</sup> nor is it sufficient to maintain trover against the assignee in insolvency of the debtor.<sup>4</sup> So though the defendant was in the first instance a wrongdoer in taking property from one in possession, still, where the true owner makes a demand upon him for the chattels and he turns them over to such owner or agrees to hold them for him, he may set up the title of such owner in defense of an action of trover by the person from whose possession he took them.<sup>5</sup>

**Necessity for Actual Possession.** — To entitle a person to maintain trover based on a possessory title alone, as against an actual wrongdoer, it seems that he must have been in the actual possession of the chattels,<sup>6</sup> and where the prior possession has become lawfully divested, the person who had such possession cannot revert thereto so as to entitle him to maintain trover.<sup>7</sup> The courts will not imply a constructive possession in a wrongdoer, so as to enable him by virtue of such constructive possession to maintain trover against a third person who takes the property. Thus, where a trespasser on the public domain felled timber, but did not remove it, it was held that he did not have a sufficient possession to enable him to maintain trover therefor against a third person who took the property.<sup>8</sup> So where a trespasser placed a box on another's land for bees to hive in, he was held not to have such possession of bees hiving in the box as to enable him to maintain trover against a third person who removed them from the box.<sup>9</sup>

**21. Bailor.** — A bailor, if entitled to the immediate possession of the chattels bailed, may maintain trover for their conversion either against the bailee<sup>10</sup> or

1. *Stephenson v. Little*, 10 Mich. 433; *Barwick v. Barwick*, 11 Ired. L. (33 N. Car.) 80; *Boyce v. Williams*, 84 N. Car. 275, 37 Am. Rep. 618.

2. **Action Against Owner.** — *Morris v. Hall*, 41 Ala. 510; *Palmtag v. Doutrick*, 59 Cal. 154, 43 Am. Rep. 245; *Elliott v. Keith*, 102 Ga. 117; *Huntington v. Douglass*, 1 Robt. (N. Y.) 204; *Thompson v. Andrews*, 8 Jones L. (53 N. Car.) 125; *Hopkins v. Dipert*, 11 Okla. 630; *Wheeler v. Selden*, 62 Vt. 310.

3. *Kerwood v. Ayres*, 59 Kan. 343.

4. *Snarr v. Smith*, 45 U. C. Q. B. 156.

5. *Leake v. Loveday*, 4 M. & G. 972, 43 E. C. L. 500.

6. *Schryer v. Fenton*, 15 N. Y. App. Div. 158; *McCrary v. McCrary*, 22 U. C. Q. B. 520.

7. *Buckley v. Gross*, 3 B. & S. 566, 113 E. C. L. 566; *Wallis v. Osteen*, 38 Ga. 250; *Geohagan v. Baker*, 3 Bibb (Ky.) 284; *Knapp v. Winchester*, 11 Vt. 351; *Smoot v. Cook*, 3 W. Va. 172, 100 Am. Dec. 741.

**Timber Cut by the Plaintiff Without License, Was Seized by an Officer for the crown and marked; no proceedings were taken towards condemnation; the officer kept no possession of**

it, and was afterwards ordered by the government not to proceed to condemnation; but there was no act of the government by which constructive possession was vested in the plaintiff, nor any actual possession of the plaintiff subsequent to the seizure. It was held that the plaintiff had no property in the timber to enable him to maintain trover against a person who took it wrongfully, subsequent to the seizure by the crown. *Tobin v. Hutchinson*, 5 N. Bruns. 233.

8. *Turley v. Tucker*, 6 Mo. 583, 35 Am. Dec. 449.

9. *Rexroth v. Coon*, 15 R. I. 35, 2 Am. St. Rep. 863.

**10. By Bailor Against Bailee — England.** — *Dewell v. Moxon*, 1 Taunt. 301; *Nicholls v. Bastard*, Tyrw. & G. 156, 2 C. M. & R. 659; *Bryant v. Wardell*, 2 Exch. 479.

*Illinois.* — *Reeve v. Fox*, 40 Ill. App. 127.

*Kansas.* — *Bryan v. Congdon*, 54 Kan. 109.

*Maine.* — *Ripley v. Dolbier*, 18 Me. 382; *Crocker v. Gullifer*, 44 Me. 491, 69 Am. Dec. 118.

*Maryland.* — *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670.

against a third person.<sup>1</sup> But in the case of a bailment for hire, the bailor, during the term of the bailment and before he is entitled to the immediate possession of the chattels, cannot maintain trover therefor against the bailee<sup>2</sup> or another.<sup>3</sup> Where a bailee for hire for a specific term uses the property bailed for purposes variant from those for which, by the contract of bailment, they were to be used, the bailee's right to possession is terminated and reverts in the bailor so as to enable him to maintain trover therefor.<sup>4</sup>

**Pledgor.** — Where a pledgor is entitled to a return of the pledge he may maintain trover for its conversion against either the pledgee<sup>5</sup> or a third person.<sup>6</sup> Of course, until the pledgor is entitled to the possession of the chattels pledged, he cannot maintain trover for their conversion.<sup>7</sup>

**22. Bailee.** — A bailee is universally recognized as having such a special property in the chattels bailed as will enable him to maintain trover therefor against third persons who wrongfully deprived him of possession,<sup>8</sup> or against

*Massachusetts.* — *Briggs v. Boston, etc., R. Co.*, 6 Allen (Mass.) 246, 83 Am. Dec. 626; *Doane v. Russell*, 3 Gray (Mass.) 382.

*Michigan.* — *Erwin v. Clark*, 13 Mich. 10.

*Minnesota.* — *State v. Rieger*, 59 Minn. 151.

*Missouri.* — *Sherman v. Commercial Printing Co.*, 29 Mo. App. 31.

*New York.* — *Murray v. Roosevelt*, Anth. N. P. (N. Y.) 101; *Mechanics, etc., Bank v. Farmers, etc., Nat. Bank*, 60 N. Y. 40.

*South Carolina.* — *West v. Tupper*, 1 Bailey L. (S. Car.) 193; *M'Neil v. Philip*, 1 McCord L. (S. Car.) 392.

*Texas.* — *Wagner v. Marple*, 10 Tex. Civ. App. 505.

*Vermont.* — *Vickery v. Taft*, 1 D. Chip. (Vt.) 241; *Swift v. Moseley*, 10 Vt. 208, 33 Am. Dec. 197; *Buckmaster v. Mower*, 21 Vt. 204; *Downer v. Rowell*, 22 Vt. 347; *White v. Bascom*, 28 Vt. 268; *Hyde Park Lumber Co. v. Shepardson*, 72 Vt. 188.

**1. Against Third Persons — England.** — *Cooper v. Willomatt*, 1 C. B. 672, 50 E. C. L. 672.

*Maine.* — *Crocker v. Gullifer*, 44 Me. 491, 69 Am. Dec. 118.

*Massachusetts.* — *Hardy v. Reed*, 6 Cush. (Mass.) 252; *Morgan v. Ide*, 8 Cush. (Mass.) 420; *Robinson v. Bird*, 158 Mass. 357, 35 Am. St. Rep. 495; *Raymond Syndicate v. Guttentag*, 177 Mass. 562; *Oliver Ditson Co. v. Bates*, 181 Mass. 455.

*New Hampshire.* — *Sanborn v. Colman*, 6 N. H. 14, 23 Am. Dec. 703; *Drake v. Redington*, 9 N. H. 243; *Batchelder v. Lake*, 11 N. H. 360.

*New York.* — *Thorp v. Burling*, 11 Johns. (N. Y.) 285; *Everett v. Saltus*, 15 Wend. (N. Y.) 474.

*Vermont.* — *Batchelder v. Warren*, 19 Vt. 371; *Buckmaster v. Mower*, 21 Vt. 204.

**2. Necessity for Right to Possession.** — *McDuff v. McDougall*, 21 Nova Scotia 251.

**3.** *Gordon v. Harper*, 7 T. R. 9, 2 Esp. 465, 4 Rev. Rep. 369; *Fairbank v. Phelps*, 22 Pick. (Mass.) 535; *Andrews v. Shaw*, 4 Dev. L. (15 N. Car.) 70.

**4.** *Cooper v. Willomatt*, 1 C. B. 672, 50 E. C. L. 672; *Crocker v. Gullifer*, 44 Me. 491, 69 Am. Dec. 118; *Swift v. Moseley*, 10 Vt. 208, 33 Am. Dec. 197. See, however, *Andrews v. Shaw*, 4 Dev. L. (15 N. Car.) 70.

**5, By Pledgor.** — *Ratcliff v. Davis*, 1 Bulst. 29;

*Nelson v. Owen*, 113 Ala. 372; *Meyer Bros. Drug Co. v. Matthews*, 69 Ark. 483; *Hancock v. Franklin Ins. Co.*, 114 Mass. 155; *Stephens v. Hartley*, 2 Mont. 504; *White Mountains R. Co. v. Bay State Iron Co.*, 50 N. H. 57; *Cortellou v. Lansing*, 2 Cai. Cas. (N. Y.) 200; *Reynolds v. Witte*, 13 S. Car. 5, 36 Am. Rep. 678.

**6.** *Scott v. Newington*, 1 M. & Rob. 252; *Whitaker v. Sumner*, 20 Pick. (Mass.) 399.

**7.** *Pothonier v. Dawson*, Holt 383, 3 E. C. L. 154; *Cushing v. Breck*, 10 N. H. 111; *Genin v. Schwenk*, 62 Hun (N. Y.) 574; *Clark v. Costello*, 79 Hun (N. Y.) 588; *Lyons v. Rogers*, 1 Brev. (S. Car.) 5.

**8. By Bailee — England.** — *Burton v. Hughes*, 2 Bing. 173, 9 E. C. L. 368; *Sutton v. Buck*, 2 Taunt. 302; *Leg v. Evans*, 6 M. & W. 36; *Gordon v. Harper*, 7 T. R. 9; *Nicolls v. Bastard*, 2 C. M. & R. 659; *Swire v. Leach*, 18 C. B. N. S. 479, 114 E. C. L. 479.

*Alabama.* — *Baker v. Troy Compress Co.*, 114 Ala. 415; *Spence v. Mitchell*, 9 Ala. 744; *Nations v. Hawkins*, 11 Ala. 859; *Steamboat Farmer v. McCraw*, 26 Ala. 189, 62 Am. Dec. 718; *Cook v. Patterson*, 35 Ala. 102; *Bird v. Womack*, 69 Ala. 390.

*Arkansas.* — *Overby v. McGee*, 15 Ark. 459, 63 Am. Dec. 49; *Smith v. Maberry*, 61 Ark. 515.

*Georgia.* — *Booth v. Terrell*, 16 Ga. 20; *Clark v. Bell*, 61 Ga. 147.

*Illinois.* — *Benjamin v. Stremple*, 13 Ill. 467; *Gilson v. Wood*, 20 Ill. 37; *McGraw v. Patterson*, 47 Ill. App. 87.

*Indiana.* — *M'Connell v. Maxwell*, 3 Blackf. (Ind.) 419, 26 Am. Dec. 428.

*Maine.* — *Maine Stage Co. v. Longley*, 14 Me. 444; *Brown v. Ware*, 25 Me. 411; *Moran v. Portland Steam Packet Co.*, 35 Me. 55; *Adams v. McGlinchy*, 66 Me. 474.

*Massachusetts.* — *Morgan v. Ide*, 8 Cush. (Mass.) 420; *Bryant v. Clifford*, 13 Met. (Mass.) 138; *Ayer v. Bartlett*, 9 Pick. (Mass.) 156; *Vincent v. Cornell*, 13 Pick. (Mass.) 294, 23 Am. Dec. 683; *Fairbank v. Phelps*, 22 Pick. (Mass.) 535; *Waterman v. Robinson*, 5 Mass. 303; *Ludden v. Leavitt*, 9 Mass. 104, 6 Am. Dec. 45; *Warren v. Leland*, 9 Mass. 265; *Com. v. Morse*, 14 Mass. 217; *Eaton v. Lynde*, 15 Mass. 242.

*Michigan.* — *Final v. Backus*, 18 Mich. 218.

*New Hampshire.* — *Jones v. Sinclair*, 2 N. H. 319, 9 Am. Dec. 75; *Drake v. Redington*,

the bailor if as against the latter the bailee is entitled to possession.<sup>1</sup> And the rule permitting a bailee to maintain trover against a wrongdoer applies to gratuitous bailees as well as to bailees for hire.<sup>2</sup>

**Pledgee.** — A pledgee has such a special property in the chattels pledged as will enable him to maintain trover against either a third person<sup>3</sup> or the pledgor,<sup>4</sup> in case he is wrongfully deprived of the possession of the chattels pledged. The pledgee does not, by returning the pledge to the pledgor for a special purpose, lose his special property in the chattels pledged so as to deprive him of the right to maintain trover therefor.<sup>5</sup>

**Agistor.** — An agistor may maintain trover for the cattle bailed.<sup>6</sup>

**23. Finder of Lost Property.** — Though a finder of a personal chattel does not acquire any title thereto as against the original owner, he acquires title as against all others, and may maintain trover for its subsequent conversion by a third person.<sup>7</sup> The court in at least one state has, however, refused to extend this rule to the finder of choses in action or evidences of indebtedness,<sup>8</sup>

9 N. H. 243; *Hyde v. Noble*, 13 N. H. 494, 38 Am. Dec. 508.

*New York.* — *Bowen v. Fenner*, 40 Barb. (N. Y.) 383; *Smith v. James*, 7 Cow. (N. Y.) 329; *Hurd v. West*, 7 Cow. (N. Y.) 752; *Ingersoll v. Van Bokkelin*, 7 Cow. (N. Y.) 670; *Barker v. Miller*, 6 Johns. (N. Y.) 195; *Demick v. Chapman*, 11 Johns. (N. Y.) 132; *Thorp v. Burling*, 11 Johns. (N. Y.) 285; *Hoyt v. Gelston*, 13 Johns. (N. Y.) 141; *Cook v. Howard*, 13 Johns. (N. Y.) 276; *Moore v. Hitchcock*, 4 Wend. (N. Y.) 292; *Van Bokkelin v. Ingersoll*, 5 Wend. (N. Y.) 315; *Root v. Chandler*, 10 Wend. (N. Y.) 110, 25 Am. Dec. 546; *Faulkner v. Brown*, 13 Wend. (N. Y.) 64; *Everett v. Saltus*, 15 Wend. (N. Y.) 474; *Leoncini v. Post*, (C. Pl. Gen. T.) 13 N. Y. Supp. 825; *Katz v. Diamond*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 577.

*North Carolina.* — *Hughes v. Giles*, 1 Hayw. (2 N. Car.) 26; *Smith v. Davis*, 8 Ired. L. (30 N. Car.) 508; *Hopper v. Miller*, 76 N. Car. 402.

*Pennsylvania.* — *Cheney v. Dallett*, 1 Del. Co. Rep. (Pa.) 225; *Brown v. Dempsey*, 95 Pa. St. 243.

*South Carolina.* — *Jones v. McNeil*, 2 Bailey L. (S. Car.) 466; *Kentucky Bank v. Shier*, 4 Rich. L. (S. Car.) 233.

*Vermont.* — *Downer v. Rowell*, 22 Vt. 347; *Hart v. Hyde*, 5 Vt. 330; *Strong v. Adams*, 30 Vt. 221, 73 Am. Dec. 305.

1. *McConnell v. Maxwell*, 3 Blackf. (Ind.) 419, 26 Am. Dec. 428; *Chamberlain v. Neale*, 9 Allen (Mass.) 410; *Hudson River R. Co. v. Lounsbury*, 25 Barb. (N. Y.) 597; *Bowen v. Coker*, 2 Rich. L. (S. Car.) 13; *Hickok v. Buck*, 22 Vt. 149.

One who leases a house and furniture, agreeing to board the lessor and allow him to use the furniture in return for a fixed weekly compensation, may maintain trover against the lessor for any conversion of the furniture, although he has refused to board the lessor, when it appears that the lessor failed to pay the sum agreed upon for board. *Chamberlain v. Neale*, 9 Allen (Mass.) 410.

A bailee who is entitled to the temporary possession of a chattel, and delivers it back to the owner for any special purpose, may, after that purpose is satisfied and during his temporary right, maintain trover for it against the owner. *Roberts v. Wyatt*, 2 Taunt. 268.

2. *Burton v. Hughes*, 2 Bing. 173, 9 E. C. L. 368; *Poole v. Symonds*, 1 N. H. 289, 8 Am. Dec. 71; *Bowen v. Fenner*, 40 Barb. (N. Y.) 383; *Faulkner v. Brown*, 13 Wend. (N. Y.) 63; *Thayer v. Hutchinson*, 13 Vt. 504, 37 Am. Dec. 607.

3. **By Pledgee** — *England.* — *Bristol*, etc., *Bank v. Midland R. Co.*, (1891) 2 Q. B. 653. *United States.* — *Hurst v. Coley*, 15 Fed. Rep. 645.

*Alabama.* — *Carter v. Lehman*, 90 Ala. 126; *Noles v. Marable*, 50 Ala. 366.

*Arkansas.* — *Smith v. Maberry*, 61 Ark. 515.

*California.* — *Treadwell v. Davis*, 34 Cal. 601, 94 Am. Dec. 770.

*Georgia.* — *Johnson v. Osborn*, 85 Ga. 664.

*Illinois.* — *Baldwin v. Bradley*, 69 Ill. 32; *U. S. Express Co. v. Meints*, 72 Ill. 293; *Taylor v. Turner*, 87 Ill. 296.

*Massachusetts.* — *Ullman v. Barnard*, 7 Gray (Mass.) 554; *Adams v. O'Connor*, 100 Mass. 515, 1 Am. Rep. 137.

*New York.* — *Brownell v. Hawkins*, 4 Barb. (N. Y.) 491; *Blanck v. Nelson*, 39 N. Y. App. Div. 21.

*Rhode Island.* — *Fifth Nat. Bank v. Providence Warehouse Co.*, 17 R. I. 112.

*South Carolina.* — *Southworth v. Sebring*, 2 Hill L. (S. Car.) 587.

4. *Roberts v. Wyatt*, 2 Taunt. 268; *Gibson v. Boyd*, 3 N. Bruns. 150; *Hall v. Page*, 4 Ga. 428, 48 Am. Dec. 235; *Way v. Davidson*, 12 Gray (Mass.) 465, 74 Am. Dec. 604; *Beebe v. Latimer*, 59 Neb. 305; *Hays v. Riddle*, 1 Sandf. (N. Y.) 248.

5. *Roberts v. Wyatt*, 2 Taunt. 268, 11 Rev. Rep. 566; *Carter v. Lehman*, 90 Ala. 126; *Hays v. Riddle*, 1 Sandf. (N. Y.) 248.

6. **Agistor.** — *McKeen v. Converse*, 68 N. H. 173; *Betts v. Mouser*, *Wright* (Ohio) 744.

7. **By Finder of Lost Property.** — See *South Staffordshire Water Co. v. Sharman*, (1896) 2 Q. B. 44; *Rex v. Pope*, 6 C. & P. 346, 25 E. C. L. 432; *Cartwright v. Green*, 8 Ves. Jr. 409; *State v. Weston*, 9 Conn. 527, 25 Am. Dec. 46; *Magee v. Scott*, 9 Cush. (Mass.) 148, 55 Am. Dec. 49; *Poole v. Symonds*, 1 N. H. 289, 8 Am. Dec. 71. And see the title *LOST PROPERTY*, vol. 19, p. 580.

8. Thus, where the plaintiff found a lottery ticket and handed it over to the defendants,



though it has been applied to the finder of bank bills which circulate as currency.<sup>1</sup>

**24. Attaching or Levying Officer.** — It is a well-settled and universally recognized rule that a sheriff or constable levying execution upon or attaching personal chattels has such a specific property in the chattels, because of the duty imposed upon him to protect the property and have it forthcoming, that he may maintain trover therefor, either against the execution debtor or the defendant in attachment or a stranger,<sup>2</sup> or against a receptor to whom the property is delivered by the officer after levy for safekeeping,<sup>3</sup> or against another officer who takes the chattels from his possession on other writs against the owner;<sup>4</sup> but if after the levy the officer has so dealt with the property as to render his levy invalid, he cannot, of course, maintain trover against another officer who takes the property on other writs.<sup>5</sup>

**Necessity for Actual Levy.** — The mere right to levy on the property of an execution debtor or a defendant in attachment gives to the officer no interest therein upon which he may maintain trover. He acquires no such interest

and the latter collected money drawn thereby, it was held that the plaintiff could not maintain trover as for a conversion of such lottery ticket, nor assumpsit for the money received thereon. *M'Laughlin v. Waite*, 9 Cow. (N. Y.) 670.

1. *Brandon v. Huntsville Bank*, 1 Stew. (Ala.) 320, 18 Am. Dec. 48. And see the title *LOST PROPERTY*, vol. 19, p. 581.

In *Bridges v. Hawkesworth*, 7 Eng. L. & Eq. 424, 15 Jur. 1179, the plaintiff, having picked up from the floor of the shop of the defendant a parcel containing bank notes, handed them over to the defendant for safekeeping until the owner should claim them. After a lapse of three years, no one appearing to claim the money, the plaintiff requested the defendant to return it. It was held that upon the defendant's refusal the plaintiff could maintain trover for its conversion.

**2. By Attaching or Levying Officer** — *Connecticut*. — *Huntley v. Bacon*, 15 Conn. 267.

*Illinois*. — *Minor v. Herriford*, 25 Ill. 344; *Havely v. Lowry*, 30 Ill. 446; *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206; *Clow v. Gilbert*, 54 Ill. App. 134.

*Indiana*. — *Grady v. Newby*, 6 Blackf. (Ind.) 442.

*Kentucky*. — *Williams v. Herndon*, 12 B. Mon. (Ky.) 484, 54 Am. Dec. 551.

*Maine*. — *Carr v. Farley*, 12 Me. 328.

*Massachusetts*. — *Polley v. Lenox Iron Works*, 15 Pick. (Mass.) 513; *Brownell v. Manchester*, 1 Pick. (Mass.) 232; *Hovey v. Lovell*, 9 Pick. (Mass.) 68; *Caldwell v. Eaton*, 5 Mass. 399; *Gibbs v. Chase*, 10 Mass. 125; *Bond v. Padelford*, 13 Mass. 394. See also *Badlam v. Tucker*, 1 Pick. (Mass.) 389, 11 Am. Dec. 202.

*Michigan*. — *Vanosdall v. Hamilton*, 118 Mich. 533.

*New Hampshire*. — *Kittredge v. Warren*, 14 N. H. 509; *Lathrop v. Blake*, 23 N. H. 46; *Johnson v. Grand Trunk R. Co.*, 44 N. H. 626.

*New Jersey*. — *Tuttle v. Jackson*, 4 N. J. L. 128.

*New York*. — *Hankins v. Kingsland*, 2 Hall (N. Y.) 425; *Lockwood v. Bull*, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539; *Wintringham v. Lafoy*, 7 Cow. (N. Y.) 735; *Norton v. People*, 8 Cow.

(N. Y.) 137; *Barker v. Miller*, 6 Johns. (N. Y.) 195; *Blackley v. Sheldon*, 7 Johns. (N. Y.) 32; *Schermerhorn v. Van Volkenburgh*, 11 Johns. (N. Y.) 529; *Spoor v. Holland*, 8 Wend. (N. Y.) 445, 24 Am. Dec. 37; *Phillips v. Hall*, 8 Wend. (N. Y.) 610, 24 Am. Dec. 108; *Van Rensselaer v. Quackenboss*, 17 Wend. (N. Y.) 34; *Connah v. Hale*, 23 Wend. (N. Y.) 466.

*North Carolina*. — *Mangum v. Hamlet*, 8 Ired. L. (30 N. Car.) 44.

*Pennsylvania*. — *Weidensaul v. Reynolds*, 49 Pa. St. 73.

*Vermont*. — *Lowry v. Walker*, 5 Vt. 181; *Blodgett v. Adams*, 24 Vt. 23; *Taylor v. Rhodes*, 26 Vt. 57.

**Removal of Property to Another State.** — An officer's special property in goods which he has attached, enabling him to bring trover for their conversion, is not lost by his taking them into another state and there delivering them to a bailee, nor as against the owner by the bailee delivering them to the owner. *Brownell v. Manchester*, 1 Pick. (Mass.) 232; *Bond v. Padelford*, 13 Mass. 394.

**The Executor of a Deputy Sheriff** may maintain trover against one who converts property attached by the deputy sheriff on mesne process. *Badlam v. Tucker*, 1 Pick. (Mass.) 389, 11 Am. Dec. 202.

**Proof of Levy — Parol.** — Where the officer levying execution on property brings trover against a stranger for its conversion, he may prove the levy by parol evidence. *Hovey v. Lovell*, 9 Pick. (Mass.) 68.

**No Joint Rights Can Exist in Two Constables** in consequence of separate levies made by them on the goods in virtue of separate executions, and therefore they cannot maintain a joint action of trover therefor. *Warne v. Rose*, 5 N. J. L. 932.

3. *Holt v. Burbank*, 47 N. H. 164; *Dezell v. Odell*, 3 Hill (N. Y.) 215, 38 Am. Dec. 628; *Sibley v. Story*, 8 Vt. 15; *Pettes v. Marsh*, 15 Vt. 454, 40 Am. Dec. 689; *Brown v. Gleed*, 33 Vt. 147.

4. *Polley v. Lenox Iron Works*, 15 Gray (Mass.) 513; *Pengland v. Leatherwood*, 101 N. Car. 509, 9 Am. St. Rep. 38.

5. *Bagley v. White*, 4 Pick. (Mass.) 395, 16 Am. Dec. 353; *Caldwell v. Eaton*, 5 Mass. 399.

until he has actually levied on the property.<sup>1</sup>

**The Attachment or Execution Creditor** does not by virtue of the levy of the attachment or execution acquire such an interest in the chattels levied upon as will enable him to maintain trover therefor.<sup>2</sup>

**The Receiptor** to whom property levied upon is delivered for safekeeping to be returned to the officer on demand is recognized, because of his liability to return the property, as having a sufficient interest in the property to enable him to maintain trover therefor against a wrongdoer.<sup>3</sup>

**The Defendant in Attachment**, where the property is left in his possession, may, pending the action against him, maintain trover against a third person therefor.<sup>4</sup>

**The Purchaser at a Valid Execution Sale** may, of course, maintain trover for the conversion of the property sold.<sup>5</sup>

**IV. CONVERSION — 1. In General.** — It may be stated as a general rule that every act of control or dominion over personal property without the owner's authority, and in disregard and violation of his rights, is, in contemplation of law, a conversion.<sup>6</sup> But not every tortious act affecting the property of

**1. Necessity for Actual Levy.** — Davidson v. Waldron, 31 Ill. 120, 83 Am. Dec. 206; Mulheisen v. Lane, 82 Ill. 117; Dennie v. Harris, 9 Pick. (Mass.) 364; Hotchkiss v. M'Vickar, 12 Johns. (N. Y.) 403; Dubois v. Harcourt, 20 Wend. (N. Y.) 41; Brian v. Strait, Dudley L. (S. Car.) 19.

**After the Teste of a Fieri Facias**, but before an actual levy, the sheriff has not such a property in the goods of the defendant as will enable him to maintain trover against a person who tortiously takes them away and converts them. The statute of frauds, by which the goods of the debtor are bound from the delivery of the writ of execution to the sheriff, does not alter the property in the goods. Hotchkiss v. M'Vickar, 12 Johns. (N. Y.) 403.

**2. Attachment or Execution Creditor.** — Baker v. Beers, 64 N. H. 102; Tuttle v. Jackson, 4 N. J. L. 128. See also Van Rensselaer v. Quackenboss, 17 Wend. (N. Y.) 34.

**3. Receiptor.** — Poole v. Symonds, 1 N. H. 289, 8 Am. Dec. 71; Thayer v. Hutchinson, 13 Vt. 505, 37 Am. Dec. 607. See, however, Ludden v. Leavitt, 9 Mass. 104, 6 Am. Dec. 45.

Where a sheriff seized goods under an attachment and delivered them to the plaintiff to be taken out of the district and sold, it was held that though the delivery to the plaintiff was irregular, yet he might maintain trover against a wrongdoer who took the goods out of his possession. Kentucky Bank v. Shier, 4 Rich. L. (S. Car.) 233.

**4. Defendant in Attachment.** — Mussey v. Perkins, 36 Vt. 690, 86 Am. Dec. 688.

**5. Purchaser at Sheriff's Sale.** — Jewett v. Patridge, 12 Me. 243, 28 Am. Dec. 173; Yates v. St. John, 12 Wend. (N. Y.) 74; Geo. R. Dickinson Paper Co. v. Mail Pub. Co., (Tex. Civ. App. 1895) 31 S. W. Rep. 1083; Brown v. Pratt, 4 Wis. 513, 65 Am. Dec. 330.

**6. What Constitutes Conversion — England.** — Forsdick v. Colins, 1 Stark. 173, 2 E. C. L. 73; Burroughes v. Bayne, 5 H. & N. 206; Fowler v. Hollins, L. R. 7 Q. B. 626; Needham v. Rawbone, 6 Q. B. 771, note b, 51 E. C. L. 771, note b; Hiort v. Bott, L. R. 9 Exch. 86.

**Alabama.** — St. John v. O'Connell, 7 Port. (Ala.) 466; Conner v. Allen, 33 Ala. 515; Davis v. Hurt, 114 Ala. 146.

**Arkansas.** — Sadler v. Sadler, 16 Ark. 628. **Colorado.** — Atchison, etc., R. Co. v. Tanner, 19 Colo. 559.

**Connecticut.** — Clark v. Whitaker, 19 Conn. 319, 48 Am. Dec. 160.

**Georgia.** — Liptrot v. Holmes, 1 Ga. 381; Maxwell v. Harrison, 8 Ga. 61, 52 Am. Dec. 385; Adams v. Mizell, 11 Ga. 106; Collier v. Lyons, 18 Ga. 648.

**Illinois.** — Monmouth First Nat. Bank v. Dunbar, 19 Ill. App. 558.

**Iowa.** — Stuart v. Phelps, 39 Iowa 14.

**Kansas.** — Foster Lumber Co. v. Kelly, 9 Kan. App. 377.

**Kentucky.** — Marcum v. Beime, 6 J. J. Marsh. (Ky.) 603; Hale v. Ames, 2 T. B. Mon. (Ky.) 143, 15 Am. Dec. 150.

**Louisiana.** — Corning v. Elliott, 10 La. Ann. 753.

**Maine.** — Scott v. Perkins, 28 Me. 22, 48 Am. Dec. 470; Dickey v. Franklin Bank, 32 Me. 572; Fuller v. Tabor, 39 Me. 519; Webber v. Davis, 44 Me. 147, 69 Am. Dec. 87; Woodis v. Jordan, 62 Me. 490; McPheters v. Page, 83 Me. 234, 23 Am. St. Rep. 772.

**Maryland.** — Bonaparte v. Clagett, 78 Md. 87; Thomson v. Gortner, 73 Md. 474.

**Massachusetts.** — Plumer v. Brown, 8 Met. (Mass.) 578; Bray v. Bates, 9 Met. (Mass.) 237; Guthrie v. Jones, 108 Mass. 191; Strong v. Doyle, 110 Mass. 92; Savage v. Darling, 151 Mass. 5.

**Minnesota.** — Reynolds v. St. Paul Trust Co., 51 Minn. 236.

**Mississippi.** — Platner v. Johnson, 26 Miss. 142.

**Missouri.** — Banking House v. Brooks, 52 Mo. App. 364.

**Nebraska.** — State v. Omaha Nat. Bank, 59 Neb. 483.

**New Hampshire.** — Walcott v. Keith, 22 N. H. 196; Lathrop v. Blake, 23 N. H. 46; Woodman v. Hubbard, 25 N. H. 67, 57 Am. Dec. 310; Gilman v. Hill, 36 N. H. 311; Baker v. Beers, 64 N. H. 102; Western Union Tel. Co. v. Franklin Constr. Co., 70 N. H. 37.

**New Jersey.** — West Jersey R. Co. v. Trenton Car Works Co., 32 N. J. L. 517.

**New York.** — Reynolds v. Shuler, 5 Cow. (N. Y.) 323; Miller v. Plumb, 6 Cow. (N. Y.) 665,

another is conversion.<sup>1</sup> Thus, an interference with the owner's use of his

16 Am. Dec. 456; *Bristol v. Burt*, 7 Johns. (N. Y.) 254, 5 Am. Dec. 264; *Murray v. Burling*, 10 Johns. (N. Y.) 172; *Everett v. Coffin*, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; *Spencer v. Blackman*, 9 Wend. (N. Y.) 167; *Allen v. Crary*, 10 Wend. (N. Y.) 349, 25 Am. Dec. 566; *Chambers v. Lewis*, 28 N. Y. 454; *Boyce v. Brockway*, 31 N. Y. 490; *Sprights v. Hawley*, 39 N. Y. 441, 100 Am. Dec. 452; *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184; *Powell v. Powell*, 71 N. Y. 71, *reversing* 3 Hun (N. Y.) 413; *Miller v. Miles*, 171 N. Y. 675, *affirming* 58 N. Y. App. Div. 103; *Smith v. Hartog*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 353; *Corotinsky v. Cooper*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 138; *Van Brunt v. Oestreicher*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 340; *Schechter v. Watson*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 43; *Field v. Sibley*, 74 N. Y. App. Div. 81; *Mahaney v. Walsh*, 16 N. Y. App. Div. 601; *Industrial, etc.*, *Trust v. Tod*, 170 N. Y. 233.

*North Carolina*.—*Hare v. Pearson*, 4 Ired. L. (26 N. Car.) 76; *Ragsdale v. Williams*, 8 Ired. L. (30 N. Car.) 498, 49 Am. Dec. 406; *Asher v. Reizenstein*, 105 N. Car. 213; *Gossler v. Wood*, 120 N. Car. 69.

*Ohio*.—*Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489, 34 Am. St. Rep. 579.

*Oregon*.—*Ramsby v. Beezley*, 11 Oregon 49.

*South Carolina*.—*Hutchinson v. Bobo*, 1 Bailey L. (S. Car.) 546; *Reid v. Colcock*, 1 Nott & M. (S. Car.) 592, 9 Am. Dec. 729; *Miller v. Reigne*, 2 Hill L. (S. Car.) 593.

*Tennessee*.—*Crocket v. Beaty*, 8 Humph. (Tenn.) 20.

*Texas*.—*Land v. Klein*, 21 Tex. Civ. App. 3; *Thomas v. Morse*, 80 Tex. 289.

*Vermont*.—*Tinker v. Morrill*, 31 Vt. 477, 94 Am. Dec. 345; *Leonard v. Belknap*, 47 Vt. 602.

*West Virginia*.—*Arnold v. Kelly*, 4 W. Va. 646.

**Sawing Trees Belonging to Another into Logs** is a conversion. *Baker v. Wheeler*, 8 Wend. (N. Y.) 505, 24 Am. Dec. 66.

**Making Wheat into Flour** is a conversion. *Mayer v. Springer*, 192 Ill. 270.

**Adulteration of Liquor by a carrier** is a conversion. *Dench v. Walker*, 14 Mass. 500.

**Working a Slave of Another Against the Owner's Wish** was held to constitute a conversion. *Tharp v. Anderson*, 31 Ga. 293.

Where a slave put on board a steamboat for transportation was set to "wooding" by one of the officers of the boat, without permission of the master, and while so employed fell overboard and was drowned, the boat was held to be liable for conversion if the employment contributed to the loss. *Johnson v. Steamboat Arabia*, 24 Mo. 86. See also *Scruggs v. Davis*, 5 Sneed (Tenn.) 261.

But proof that the plaintiff's slave was at work in the defendant's field when the latter was not present, and that he was once or twice with the defendant when not at work, was held not to be sufficient evidence of a conversion. *Hoover v. Alexander*, 1 Bailey L. (S. Car.) 510.

In *Jones v. Allen*, 1 Head (Tenn.) 626 where a slave from a neighboring plantation came to the defendant's plantation without his master's

consent, and there helped the defendant's slaves in husking corn, and the defendant knew of his presence, and acquiesced in his remaining and his continuing to assist in husking corn, this was held not to be a conversion.

**Bottling Wine from Cask**.—A pipe of wine belonging to A was deposited in B's cellar, and was bottled at a time during which there were conflicting claims to it on the part of A and the assignees of the party to whom it was sent, and who resided in B's house. By whom or by whose orders the wine was bottled did not appear, though there was some evidence that it was likely to be injured from not being bottled. It was held that it was a question for the jury whether the act of bottling operated as a conversion. *Philpott v. Kelley*, 4 N. & M. 611, 3 Ad. & El. 106, 30 E. C. L. 40, 1 Hurl. & W. 134.

**Interfering with Testator's Effects**.—Trover lies against a person for wrongfully interfering with a testator's effects. *Bear v. Soper*, 2 Ken. K. B. 441.

**Possession with a Claim of Title Adverse** to that of the true owner is sufficient to constitute conversion. *Maxwell v. Harrison*, 8 Ga. 61, 52 Am. Dec. 385; *Dowd v. Wadsworth*, 2 Dev. L. (13 N. Car.) 130, 18 Am. Dec. 567.

**Collecting Note, Bill, etc.**—*Donnell v. Thompson*, 13 Ala. 440; *Allison v. King*, 25 Iowa 56; *State v. Omaha Nat. Bank*, 59 Neb. 483; *Schroepel v. Corning*, 5 Den. (N. Y.) 236; *Lawatsch v. Cooney*, 86 Hun (N. Y.) 546; *Graton, etc., Mfg. Co. v. Redelsheimer*, 28 Wash. 370.

**Taking Renewal Note in Name of Defendant**.—*Harlan v. Brown*, 4 Ind. App. 319.

**Suing Note to Judgment**.—*Rushin v. Tharpe*, 88 Ga. 779.

**Satisfaction of Judgment**.—*Johnson v. Dun*, 75 Minn. 533; *De Fino v. Stern*, 5 N. Y. App. Div. 56.

**Cashing a Bill According to the Tenor of a Forged Indorsement** is a conversion. *Kleinwort v. Comptoir Nat., etc.*, (1894) 2 Q. B. 157, 63 L. J. Q. B. 674.

**Cutting Off the Seals of a Deed** is a conversion. *Stranding v. Grundy*, 6 L. J. Exch. 181.

**The Cancellation of a Certificate of Membership in a Board of Trade** amounts to a conversion. *Olds v. Chicago Open Board of Trade*, 33 Ill. App. 445.

**Conversion of Corporate Stock**.—*Condouris v. Imperial Turkish Tobacco, etc., Co.*, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 66.

**Corporation Refusing Transfer of Stock**.—*London, etc., Bank v. Aronstein*, 117 Fed. Rep. 601, 54 C. C. A. 663; *Bank of America v. McNeil*, 10 Bush (Ky.) 54; *Davis v. National Eagle Bank*, (R. I. 1901) 50 Atl. Rep. 530; *McMurrich v. Bond Head Harbour Co.*, 9 U. C. Q. B. 333.

**Wrongful Cancellation of Stock**.—*Carpenter v. American Bldg., etc., Assoc.*, 54 Minn. 403, 40 Am. St. Rep. 345; *Withers v. Lafayette County Bank*, 67 Mo. App. 115.

**Wrongful Refusal of Corporation to Issue Stock Certificate**.—*Withers v. Lafayette County Bank*, 67 Mo. App. 115.

1. **Not Every Tortious Act Conversion**.—*Atter- sol v. Briant*, 1 Campb. 409; *Simmons v. Lilly-*



property where the owner is not deprived of its possession is not a conversion,<sup>1</sup> and there may be an actual, wrongful use of a chattel or exercise of dominion over it without its constituting a conversion if such use or exercise of dominion is not a denial or repudiation of the owner's title or right.<sup>2</sup> To constitute a conversion through the exercise of dominion over a chattel, it is not essential that the defendant should have had at any time the exclusive control or dominion over the chattel or the actual manupcaption of it.<sup>3</sup> But a person who has never had possession of a chattel, actual or constructive, nor exercised control over it cannot be held liable for its conversion.<sup>4</sup> So a rightful interference with the chattels of another cannot constitute a conversion.<sup>5</sup> In trover for a wrongful conversion it is not necessary, as in replevin, to prove that the defendant was in possession of the chattel, the conversion of which is alleged, at the commencement of the action.<sup>6</sup> It has been asserted that all conversions may be divided into four classes: first, by wrongful taking; second, by an illegal assumption of ownership; third, by an illegal user or misuser; and fourth, by a wrongful detention.<sup>7</sup>

**2. Intention.** — In determining whether there has been a conversion, the intent with which the defendant acted is, as a general rule, immaterial.<sup>8</sup>

stone, 8 Exch. 431, 22 L. J. Exch. 217, 1 W. R. 198; *McCann v. Gibson*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 832; *Glover v. Riddick*, 11 Ired. L. (33 N. Car.) 582. See also *Nelson v. Whetmore*, 1 Rich. L. (S. Car.) 318.

**Giving a "Free Certificate" to a Slave** was held not to amount to a conversion in the one giving it. *Glover v. Riddick*, 11 Ired. L. (33 N. Car.) 582.

**1. Interference with Use.** — *England v. Cowley*, L. R. 8 Exch. 126; *Boobier v. Boobier*, 39 Me. 406.

*2. Spooner v. Manchester*, 133 Mass. 270, 43 Am. Rep. 514; *State v. Staed*, 72 Mo. App. 581; *Frome v. Dennis*, 45 N. J. L. 515. See also *Woodside v. Adams*, 40 N. J. L. 417; *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184.

Where an injury has been done to a chattel belonging to another, in endeavoring to do a service to such person out of charity, or to prevent mischief from the act of other persons, trover will not lie. *Drake v. Shorter*, 4 Esp. 165.

**Castrating a Hog** running among one's stock is not necessarily a conversion. *Bryne v. Stout*, 15 Ill. 180.

**3. Necessity for Actual Possession and Control.** — *Shipwick v. Blanchard*, 6 T. R. 298; *Freeman v. Scurlock*, 27 Ala. 407; *Liptrot v. Holmes*, 1 Ga. 381; *Hall v. Amos*, 5 T. B. Mon. (Ky.) 89, 17 Am. Dec. 42; *Webber v. Davis*, 44 Me. 147, 69 Am. Dec. 87; *Brown v. Ela*, 67 N. H. 110; *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323; *Bristol v. Burt*, 7 Johns. (N. Y.) 254, 5 Am. Dec. 264.

**4. Hinchcliffe v. Sharpe**, 77 L. T. N. S. 714; *Flanagan v. O'Brien*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 738; *Tufts v. Park*, 194 Pa. St. 79; *Williams v. Fethers*, 115 Wis. 314.

**5. Barret v. Mobile**, 120 Ala. 179.

**6. Zachary v. Pace**, 9 Ark. 212, 47 Am. Dec. 744.

**7. Glaze v. M'Million**, 7 Port. (Ala.) 279; *Davis v. Hurt*, 114 Ala. 146.

**8 Intent Immaterial** — *England*. — *Benjamin v. Andrews*, 5 C. B. N. S. 299, 94 E. C. L. 299, 27 L. J. M. C. 310; *Burroughes v. Bayne*, 5 H. & N. 310; *M'Combie v. Davies*, 6 East 538;

*Mennie v. Blake*, 6 El. & Bl. 851, 88 E. C. L. 851; *Hollins v. Fowler*, L. R. 7 H. L. 757; *Anonymous*, 12 Mod. 521; *Lee v. Bayes*, 18 C. B. 599, 86 E. C. L. 599; *Crane v. London Dock Co.*, 5 B. & S. 313, 117 E. C. L. 313, 33 L. J. Q. B. 224; *Hiorv v. Bott*, L. R. 9 Exch. 86, 43 L. J. Exch. 81.

*Alabama*. — *White v. Yawkey*, 108 Ala. 270, 54 Am. St. Rep. 159.

*Connecticut*. — *Platt v. Tuttle*, 23 Conn. 233.

*Illinois*. — *Fawcett v. Osborn*, 32 Ill. 411, 83 Am. Dec. 278.

*Indiana*. — *Kidder v. Biddle*, 13 Ind. App. 653.

*Maine*. — *Goulding v. Horbury*, 85 Me. 227, 35 Am. St. Rep. 357.

*Maryland*. — *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670; *Bonaparte v. Clagett*, 78 Md. 87.

*Michigan*. — *Kenney v. Ranney*, 96 Mich. 617.

*Missouri*. — *Mohr v. Langan*, 77 Mo. App. 481; *Waverly Timber, etc., Co. v. St. Louis Cooperage Co.*, 112 Mo. 383.

*Nebraska*. — *State v. Omaha Nat. Bank*, 59 Neb. 483; *State v. Omaha Nat. Bank*, (Neb. 1903) 93 N. W. Rep. 319.

*New Hampshire*. — *Cheshire R. Co. v. Foster*, 51 N. H. 490.

*New York*. — *Cobb v. Dows*, 9 Barb. (N. Y.) 230; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285; *Smith v. Hartog*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 353; *Industrial, etc., Trust v. Tod*, 170 N. Y. 233.

*Ohio*. — *Baltimore, etc., R. Co. v. O'Donnell*, 45 Ohio St. 489, 34 Am. St. Rep. 579.

*South Carolina*. — *Rakestraw v. Floyd*, 54 S. Car. 288.

*Vermont*. — *Alvord v. Davenport*, 43 Vt. 30.

In *Fitzgerald v. Burrill*, 106 Mass. 406, it was shown that the plaintiff delivered a letter to the defendant, a clerk in a post office, to be sent by mail as a registered letter, under a mutual mistaken belief that a letter could be registered to the place to which it was addressed. On discovering the mistake, the defendant sent it by mail unregistered, and it was lost. It was held that he was answerable to the plaintiff in trover.

**3. Advantage Accruing to Defendant.** — Where there has been a wrongful exercise of dominion over personal property so as to constitute conversion, the advantage accruing to the defendant by reason of his wrongful act is immaterial, since the gist of the wrong is the injury resulting to the owner of the property, and not the advantage accruing to the defendant; and therefore to constitute a conversion it is not necessary that the defendant apply the chattels to his own use.<sup>1</sup>

**4. Neglect of Duty.** — Where there is no unlawful taking or exercise of dominion over a chattel, a conversion cannot be based on the fact that the defendant was negligent in regard to the care of the chattel, resulting in its destruction,<sup>2</sup> nor can a conversion be based on the mere failure of the defendant to perform with regard to a chattel some affirmative act which he has by contract assumed; the remedy in such a case is an action on the case for negligence or an action for breach of contract.<sup>3</sup> Thus, it is held that a bailee who so negligently exposes the goods bailed that they are lost is not liable in trover for a conversion,<sup>4</sup> and where personal property is lost through the

**1. Advantage Need Not Accrue to Defendant** — *England*. — *Keyworth v. Hill*, 3 B. & Ald. 685, 5 E. C. L. 422; *Hiorst v. Bott*, L. R. 9 Exch. 86, 43 L. J. Exch. 81, 22 W. R. 414, 30 L. T. N. S. 25.

*Alabama*. — *Freeman v. Scurlock*, 27 Ala. 407.

*Connecticut*. — *Platt v. Tuttle*, 23 Conn. 233.

*Georgia*. — *Liptrot v. Holmes*, 1 Ga. 381.

*Illinois*. — *Davis v. Taylor*, 41 Ill. 405.

*Maine*. — *McPheters v. Page*, 83 Me. 234, 23 Am. St. Rep. 772.

*Michigan*. — *Banner v. Schlesinger*, 109 Mich. 262.

*Nebraska*. — *State v. Omaha Nat. Bank*, 59 Neb. 483.

*New Hampshire*. — *Gilman v. Hill*, 36 N. H. 311; *Baker v. Beers*, 64 N. H. 102.

*New York*. — *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323.

**2. Neglect of Duty** — *England*. — *Mulgrave v. Ogden*, Cro. Eliz. 219; *Heald v. Carey*, 11 C. B. 977, 73 E. C. L. 977, 16 Jur. 197, 21 L. J. C. Pl. 97. See also *Severin v. Keppel*, 4 Esp. 156.

*Alabama*. — *Bolling v. Kirby*, 90 Ala. 215, 24 Am. St. Rep. 789; *Davis v. Hurt*, 114 Ala. 146; *Baker v. Malone*, 126 Ala. 510.

*California*. — *Rogers v. Huie*, 2 Cal. 571, 56 Am. Dec. 363.

*Kansas*. — *Kansas City Stock-yards Co. v. Hawkins*, 8 Kan. App. 155.

*Michigan*. — *Fisher v. Kyle*, 27 Mich. 454.

*Missouri*. — *Duncan v. Fisher*, 18 Mo. 403.

*New Hampshire*. — *Woodman v. Hubbard*, 25 N. H. 67, 57 Am. Dec. 310.

*New York*. — *Fish v. Ferris*, 5 Duer (N. Y.) 49; *Disbrow v. Tenbroeck*, 4 E. D. Smith (N. Y.) 397.

*Tennessee*. — *Angus v. Dickerson*, Meigs (Tenn.) 459; *Horsely v. Branch*, 1 Humph. (Tenn.) 199; *Mullen v. Ensley*, 8 Humph. (Tenn.) 428; *Bell v. Cummings*, 3 Sneed (Tenn.) 276; *Parker v. Thompson*, 5 Sneed (Tenn.) 349; *McNeill v. Brooks*, 1 Yerg. (Tenn.) 73.

**Trespass by Cattle.** — Where the cattle of one person break into the inclosure of another, and eat and destroy the growing corn, his remedy is in trespass, and trover will not lie. There

is no conversion in such a case. *Smith v. Archer*, 53 Ill. 241.

**3. Forehand v. Jones, 84 Ga. 508; *Way v. Dennie*, 174 Mass. 43; *Turnbull v. Widner*, 103 Mich. 509; *Worth v. Buck*, 34 Neb. 703; *Mercantile Co-operative Bank v. Frost*, 62 N. J. L. 476; *Hunt v. Kane*, 40 Barb. (N. Y.) 638; *Industrial, etc., Trust v. Tod*, 170 N. Y. 233, reversing 52 N. Y. App. Div. 195.**

**Delay in Delivery by a Carrier** is no conversion. *Briggs v. New York Cent. R. Co.*, 28 Barb. (N. Y.) 515. See also *The Hattie Palmer*, (C. C. A.) 68 Fed. Rep. 380.

**Transportation by a Carrier over an Improper Route** is not a conversion. *Southern Pac. Co. v. Booth*, (Tex. Civ. App. 1897) 39 S. W. Rep. 585. But if a carrier transports goods to another place than the designated point, in order to place them out of the reach of the owner, it is a conversion. *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489, 34 Am. St. Rep. 579.

**Failure of a Carrier to Return Goods to the Consignor** on refusal of the consignee to accept them is not a conversion. *Louisville, etc., R. Co. v. Heilprin*, 95 Ill. App. 402; *Levy v. Weir*, (Supm. Ct. App. T.) 38 Misc. (N. Y.) 361.

**4. Negligence of Bailee in Care of Goods** — *England*. — *Owen v. Lewyn*, 1 Vent. 223; *Bromley v. Coxwell*, 2 B. & P. 438; *Williams v. Gesse*, 3 Bing. N. Cas. 849, 32 E. C. L. 353; *Ross v. Johnson*, 5 Burr. 2825; *Youl v. Harbottle*, Peake N. P. (ed. 1795); *Heald v. Carey*, 11 C. B. 977, 73 E. C. L. 977; *Mulgrave v. Ogden*, Cro. Eliz. 219; *Rushworth v. Taylor*, 3 Q. B. 699, 43 E. C. L. 932.

*Canada*. — *Murphy v. Dulhanty*, 2 Nova Scotia Dec. 294; *Lovekin v. Podger*, 26 U. C. Q. B. 156.

*Alabama*. — *Davis v. Hurt*, 114 Ala. 146.

*District of Columbia*. — *Whittingham v. Owen*, 19 D. C. 277.

*Maine*. — *Dearbourn v. Union Nat. Bank*, 58 Me. 273.

*Massachusetts*. — *Bowlin v. Nye*, 10 Cush. (Mass.) 416; *Robinson v. Austin*, 2 Gray (Mass.) 564; *Smith v. Westfield First Nat. Bank*, 99 Mass. 605, 97 Am. Dec. 59. See also *Barrett v. Bruffee*, 182 Mass. 229.

negligence of a carrier trover will not lie therefor;<sup>1</sup> so an officer seizing property under an attachment or execution is not liable in trover for its loss through his negligence in failing to keep it safely.<sup>2</sup> But a loss of property by a positive misconduct on the part of the bailee is to be distinguished from a loss through negligence merely, and the former will constitute a conversion.<sup>3</sup>

**5. Assertion of Ownership.**—The mere assertion of title to or an interest in a chattel, unaccompanied with any act of ownership, when the claimant has neither possession nor control over the chattel, does not constitute a conversion,<sup>4</sup> and this is especially true when the assertion of ownership is made to a stranger, and not in the presence of the true owner or within view of the chattel, even though the chattel may be in the constructive possession of the person asserting such ownership.<sup>5</sup> The giving of a bill of sale of a chattel in the possession of a third person who is the owner thereof, without any other interference therewith or delivery thereof, is not, as against such owner, a conversion by either the person giving or him receiving such bill of sale.<sup>6</sup>

**6. Conversion of Part as Conversion of Whole.**—Where a person is in possession of several chattels or a chattel divisible by nature he may be guilty of a conversion of one of the several chattels or of a part of the divisible chattel without being guilty of a conversion of the whole;<sup>7</sup> but if the part of which the defendant is guilty of conversion is an essential part of an entire chattel, such conversion may constitute a conversion of the whole.<sup>8</sup>

**7. Effect of Return to, or Subsequent Acquisition of Possession by, Owner.**—It seems to be well settled that trover for a conversion may be maintained, in case of an unlawful taking or exercise of dominion over the chattels of the plaintiff, though the property may have been returned to the plaintiff and

*Missouri.*—Johnson v. Strader, 3 Mo. 359; Dailey v. Black, 92 Mo. App. 228.

*New Hampshire.*—Moses v. Norris, 4 N. H. 304.

*New York.*—Hawkins v. Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; Packard v. Getman, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166; Scovill v. Griffith, 12 N. Y. 509; Salt Springs Nat. Bank v. Wheeler, 48 N. Y. 493, 8 Am. Rep. 564; Wamsley v. Atlas Steamship Co., 168 N. Y. 533, 85 Am. St. Rep. 699, reversing 50 N. Y. App. Div. 199; Sternberg v. Schein, 63 N. Y. App. Div. 417.

*Vermont.*—Tinker v. Morrill, 39 Vt. 477, 94 Am. Dec. 345.

See, however, Donlin v. McQuade, 61 Mich. 275.

1. Owen v. Lewyn, 1 Vent. 223; Anonymous, 2 Salk. 655. Compare Greenfield Bank v. Leavitt, 17 Pick. (Mass.) 1, 28 Am. Dec. 268.

2. Dorman v. Kane, 5 Allen (Mass.) 38; Abbott v. Kimball, 19 Vt. 551, 47 Am. Dec. 708; Nutt v. Wheeler, 30 Vt. 436, 73 Am. Dec. 316.

3. Phillips v. Brigham, 26 Ga. 617, 71 Am. Dec. 227.

4. Assertion of Ownership. — Fernald v. Chase, 37 Me. 289; Fuller v. Tabor, 39 Me. 519; Davis v. Buffum, 51 Me. 160; Delano v. Curtis, 7 Allen (Mass.) 470; Allen v. American Bldg., etc., Assoc., 49 Minn. 544, 32 Am. St. Rep. 574; Burnside v. Twitchell, 43 N. H. 390; Andrews v. Shattuck, 32 Barb. (N. Y.) 396; Bishop v. Hendrick, 82 Hun (N. Y.) 323; Gillet v. Roberts, 57 N. Y. 32; Shaw v. Swope, 8 Pa. Super. Ct. 491, 43 W. N. C. (Pa.) 167; Lowry v. Walker, 4 Vt. 76. See also Connah v. Hale, 23 Wend. (N. Y.) 466; Nelson v. Whetmore, 1 Rich. L. (S. Car.) 318.

In Lowry v. Walker, 4 Vt. 76, it was held that the fact that a person not in possession of a chattel attached by the sheriff forbade the sheriff to sell the property did not constitute a conversion.

5. Irish v. Cloyes, 8 Vt. 33, 30 Am. Dec. 446.

6. Davis v. Buffum, 51 Me. 160. See also T aylor v. Horrall, 4 Blackf. (Ind.) 317.

**Taking Quitclaim Deed.**—In Fuller v. Tabor, 39 Me. 519, the plaintiff brought trover for a building which had been placed on the land of another by his consent. The defendant, when a demand was made, said he had bought it and paid for it. The court instructed the jury that taking a quitclaim of the land and building and putting it on record would not of itself constitute a conversion on the part of the individual so receiving the deed.

**Taking Mortgage.**—So the mere taking of a chattel mortgage from one having no title to the chattel and recording it, without taking possession of the mortgaged property or interfering with it, constitutes no conversion for which trover will lie. Burnside v. Twitchell, 43 N. H. 390. See also Matteawan Co. v. Bentley, 13 Barb. (N. Y.) 641.

**7. Conversion of Part as Conversion of Whole.**—Philpott v. Kelly, 3 Ad. & El. 106, 30 E. C. L. 40. And see Richardson v. Atkinson, 1 Stra. 576.

8. Bowen v. Fenner, 40 Barb. (N. Y.) 383. See also Corotinsky v. Cooper, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 138, where constituent parts of a machine were removed.

**Feeding Part of Lot of Hay** may constitute a conversion of the whole. Brown v. Ela, 67 N. H. 110.



accepted by him prior to the institution of the action,<sup>1</sup> or though he may have re-acquired possession by purchase from a third person<sup>2</sup> or by means of an action of replevin.<sup>3</sup>

**Offer to Return.** — *A fortiori*, after a person has been guilty of a conversion, he cannot escape liability therefor by a subsequent offer to return the property, which is not accepted.<sup>4</sup>

**Mitigation of Damages.** — Where the property has been returned to and accepted by the plaintiff, this fact is to be considered in mitigation of the damages recoverable for the conversion,<sup>5</sup> and in some instances it has been held that the court had power to permit the defendant to return the chattel in mitigation of damages.<sup>6</sup>

**8. Joint and Several Tortfeasors.** — All persons who assist in the conversion of a chattel are jointly liable for the conversion and may be sued jointly,<sup>7</sup> and

**1. Return of Property** — *England*. — *Hiort v. London, etc., R. Co.*, 4 Ex. D. 188.

*United States*. — *Kansas City First Nat. Bank v. Rush*, (C. C. A.) 85 Fed. Rep. 539.

*District of Columbia*. — *Whittingham v. Owen*, 19 D. C. 277.

*Indiana*. — *Smith v. Downing*, 6 Ind. 374.

*Massachusetts*. — *Greenfield Bank v. Leavitt*, 17 Pick. (Mass.) 1, 28 Am. Dec. 268; *Wheelock v. Wheelwright*, 5 Mass. 104; *Gibbs v. Chase*, 10 Mass. 128.

*Missouri*. — *Easton v. Woods*, 1 Mo. 506; *Sparks v. Purdy*, 11 Mo. 219.

*Nebraska*. — *Watson v. Coburn*, 35 Neb. 492; *Coburn v. Watson*, 48 Neb. 257.

*New York*. — *Hibbard v. Stewart*, 1 Hilt. (N. Y.) 207.

*Vermont*. — *Yale v. Saunders*, 16 Vt. 243; *Stillwell v. Farewell*, 64 Vt. 286.

*West Virginia*. — *Arnold v. Kelly*, 4 W. Va. 646.

*Wisconsin*. — *Cernahan v. Chrisler*, 107 Wis. 645.

*Compare* *Canning v. Owen*, 22 R. I. 624, 84 Am. St. Rep. 858.

**2.** *Hilgert v. Levin*, 72 Mo. App. 48; *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489, 34 Am. St. Rep. 579.

**3.** *Pinckney v. Darling*, 158 N. Y. 728, *affirming* 3 N. Y. App. Div. 553.

**4. Offer to Return.** — *Savage v. Perkins*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 17; *Shotwell v. Wendover*, 1 Johns. (N. Y.) 65; *Robinson v. Lewis*, (N. Y. City Ct. Gen. T.) 6 Misc. (N. Y.) 37; *Kelly v. Mesier*, 21 N. Y. App. Div. 253; *Smith v. Hartog*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 353; *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489, 34 Am. St. Rep. 579; *Hofschulte v. Panhandle Hardware Co.*, (Tex. Civ. App. 1899) 50 S. W. Rep. 608; *Hart v. Skinner*, 16 Vt. 138, 42 Am. Dec. 500; *Green v. Sperry*, 16 Vt. 390, 42 Am. Dec. 519. See also *Rogers v. Crombie*, 4 Me. 274. But see *Pickering v. Truste*, 7 T. R. 50; *Hayward v. Seaward*, 1 Moo. & S. 459; *Trammell v. Mallory*, 115 Ga. 748; *Young Men's Christian Assoc. v. Harmon*, 61 Ill. App. 639; *Wells v. Kelsey*, (Supm. Ct. Gen. T.) 15 Abb. Pr. (N. Y.) 53; *Farr v. State Bank*, 87 Wis. 223, 41 Am. St. Rep. 40.

**5. Mitigation of Damages** — *England*. — *Hiort v. London, etc., R. Co.*, 4 Ex. D. 188, 48 L. J. Exch. 545, 40 L. T. N. S. 674, 27 W. R. 778.

*United States*. — *Kansas City First Nat. Bank v. Rush*, (C. C. A.) 85 Fed. Rep. 539.

*Alabama*. — *King v. Franklin*, 132 Ala. 559.

*Iowa*. — *Bowers v. Bradley*, 112 Iowa 537.

*Kansas*. — *Prinz v. Moses*, (Kan. 1901) 66 Pac. Rep. 1009.

*Massachusetts*. — *Wheelock v. Wheelwright*, 5 Mass. 104.

*Nebraska*. — *Watson v. Coburn*, 35 Neb. 492.

*New York*. — *Hibbard v. Stewart*, 1 Hilt. (N. Y.) 207; *Simon v. Seide*, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 186; *Pinckney v. Darlings*, 3 N. Y. App. Div. 553.

*West Virginia*. — *Arnold v. Kelly*, 4 W. Va. 646.

*Wisconsin*. — *Dishneau v. Newton*, 96 Wis. 531; *Cernahan v. Chrisler*, 107 Wis. 645.

See also *infra*, this title. *Damages Recoverable* — *Mitigation of Damages*.

**6.** *Watts v. Phipps*, Bull. N. P. 49; *Fisher v. Prince*, 3 Burr. 1363; *Rutland, etc., R. Co. v. Middlebury Bank*, 32 Vt. 639. See also *Whiten v. Fuller*, 2 W. Bl. 902.

**7. Joint Tortfeasors** — *England*. — *Atkin v. Slater*, 1 C. & K. 356, 47 E. C. L. 356.

*Canada*. — *Mason v. Bickle*, 2 Ont. App. 291.

*Alabama*. — *Freeman v. Scurlock*, 27 Ala. 407; *Ensley Lumber Co. v. Lewis*, 121 Ala. 94.

*Connecticut*. — *Calkins v. Lockwood*, 17 Conn. 154, 42 Am. Dec. 729; *Clark v. Whitaker*, 19 Conn. 319, 48 Am. Dec. 160.

*Georgia*. — *Anderson v. Foster*, 105 Ga. 563.

*Illinois*. — *Davis v. Taylor*, 41 Ill. 405; *Bane v. Detrick*, 52 Ill. 19; *Loomis v. Barker*, 69 Ill. 360.

*Indiana*. — *Terrell v. Butterfield*, 92 Ind. 1; *Kavanaugh v. Taylor*, 2 Ind. App. 502.

*Maine*. — *Scott v. Perkins*, 28 Me. 22, 48 Am. Dec. 470; *Cram v. Thissell*, 35 Me. 86.

*Massachusetts*. — *Chamberlain v. Shaw*, 18 Pick. (Mass.) 278, 29 Am. Dec. 586; *Parker v. Taylor*, 180 Mass. 258.

*Michigan*. — *Moret v. Mason*, 106 Mich. 340; *Banner v. Schlessinger*, 109 Mich. 262.

*Missouri*. — *Pritchett v. Reynolds*, 21 Mo. App. 674.

*Nebraska*. — *Peckinbaugh v. Quillin*, 12 Neb. 586; *D. M. Osborne Co. v. Plano Mfg. Co.*, 51 Neb. 502; *Hill v. Campbell Commission Co.*, 54 Neb. 59; *Heater v. Penrod*, (Neb. 1902) 89 N. W. Rep. 762.

*New York*. — *Underhill v. Reinor*, 2 Hilt.

property may be converted by two or more persons jointly although the acts of one may have followed the acts of the others at successive periods in producing the result.<sup>1</sup> On the other hand, there may be several acts of conversion by different persons not acting jointly, which, while they may render the tortfeasors severally liable in trover, will not render them jointly liable.<sup>2</sup> Where the chattels of one person pass successively through the hands of several persons, each being liable severally for conversion, a later holder or possessor of the property cannot, in defense of his liability, assert a prior conversion by an earlier holder or possessor.<sup>3</sup>

**Joint and Several Liability.** — Where there has been a conversion by joint tortfeasors they may be sued either jointly or severally,<sup>4</sup> and if they are sued severally the recovery merely of a judgment against one is not a bar to a second action against another;<sup>5</sup> but the satisfaction of such a judgment will constitute a bar to the second action.<sup>6</sup>

**Buyer and Seller.** — As a general rule, where the conversion consisted of a wrongful sale and purchase of the chattels, the buyer and seller are jointly liable and may be sued jointly.<sup>7</sup> In *Alabama*, however, it is held that such joinder is improper where the purchase by the buyer was made in good faith.<sup>8</sup>

**Principal and Agent — Master and Servant.** — Where the property has been converted by an agent or servant under such circumstances as to render the principal or master liable, the latter may be sued jointly with the agent or servant.<sup>9</sup>

**Release of Joint Tortfeasors.** — Where several persons are jointly liable for a conversion, the release of one in satisfaction of the wrong will discharge the liability of the others also;<sup>10</sup> but where the settlement with one of such tort-

(N. Y.) 319; *Shotwell v. Few*, 7 Johns. (N. Y.) 302; *Russell v. McCall*, 141 N. Y. 437.

*Tennessee.* — *Yost v. Stout*, 4 Coldw. (Tenn.) 205, 94 Am. Dec. 194.

*Texas.* — *Blalock v. Joseph Bowling Co.*, (Tex. Civ. App. 1898) 44 S. W. Rep. 305.

*Washington.* — *Jordan v. Coulter*, 30 Wash. 116.

*Wisconsin.* — *Cotton v. Marsh*, 3 Wis. 221.

*Wyoming.* — *Cone v. Ivinson*, 4 Wyo. 203.

**Husband and Wife** may be jointly liable for a conversion. *Davis v. Taylor*, 41 Ill. 405. See also *Keyworth v. Hill*, 3 B. & Ald. 685, 5 E. C. L. 422; *Iler v. Baker*, 82 Mich. 226.

**Liability of Partnership.** — It is not necessary that there should be a joint conversion in fact in order to render partners jointly liable, as such a conversion may arise by construction of law; thus, assent by some of the partners to a conversion by others will make them jointly liable, provided that the conversion was for their use and benefit and they were in a situation to have originally commanded the conversion. *Loomis v. Barker*, 69 Ill. 360. See also *Bane v. Detrick*, 52 Ill. 19; *Hobbs v. Chicago Packing, etc., Co.*, 98 Ga. 576, 58 Am. St. Rep. 320; *Stokes v. Burney*, 3 Tex. Civ. App. 219; *Filter v. Meyer*, 16 Tex. Civ. App. 235.

1. *Cram v. Thissell*, 35 Me. 86.

2. **Several Liability.** — *Nicoll v. Glennie*, 1 M. & S. 588; *Ensley Lumber Co. v. Lewis*, 121 Ala. 94; *White v. Demary*, 2 N. H. 546.

3. *Dickson v. Merchants' Elevator Co.*, 44 Mo. App. 498.

4. **Joint and Several Liability — California.** — *Lewis v. Johns*, 34 Cal. 629.

*Kentucky.* — *Ewing v. Ford*, 1 A. K. Marsh. (Ky.) 457; *Elliot v. Porter*, 5 Dana (Ky.) 299, 39 Am. Dec. 689,

*Massachusetts.* — *Elliott v. Hayden*, 104 Mass. 180.

*Missouri.* — *Pritchett v. Reynolds*, 21 Mo. App. 674.

*New Hampshire.* — *Pattee v. Gilmore*, 18 N. H. 460, 45 Am. Dec. 385.

*Pennsylvania.* — *Fox v. Northern Liberties*, 3 W. & S. (Pa.) 103.

*Wisconsin.* — *Cotton v. Marsh*, 3 Wis. 221.

*Wyoming.* — *Cone v. Ivinson*, 4 Wyo. 203.

If two or more persons have converted the chattels of another, the owner may proceed against any one, and a court of equity will not compel him to pursue one rather than another who is equally culpable. *Paxton v. State*, 59 Neb. 460, 80 Am. St. Rep. 689.

5. *Matthews v. Menedger*, 2 McLean (U. S.) 145; *Hopkins v. Hersey*, 20 Me. 449; *Fox v. Northern Liberties*, 3 W. & S. (Pa.) 103.

6. *Matthews v. Menedger*, 2 McLean (U. S.) 145.

7. **Buyer and Seller.** — *Nickey v. Zonker*, 22 Ind. App. 211; *White v. Wall*, 40 Me. 574; *Chamberlin v. Shaw*, 18 Pick. (Mass.) 278, 29 Am. Dec. 586; *Underhill v. Reinor*, 2 Hilt. (N. Y.) 319; *Smith v. Briggs*, 64 Wis. 497; *Hendricks v. Titus*, 13 N. Bruns. 77; *Kirby v. Cahill*, 6 U. C. Q. B. O. S. 510.

8. *Larkins v. Eckwurz*, 42 Ala. 322, 94 Am. Dec. 651.

9. **Principal and Agent — Master and Servant.** — *Ewbank v. Nutting*, 7 C. B. 797, 62 E. C. L. 797; *Stevens v. Pennock*, 30 U. C. Q. B. 51; *Calkins v. Lockwood*, 17 Conn. 154, 42 Am. Dec. 729; *Kavanaugh v. Taylor*, 2 Ind. App. 502; *Mohr v. Langan*, 77 Mo. App. 481; *Cotton v. Marsh*, 3 Wis. 221.

10. See the title **RELEASE AND DISCHARGE**, vol. 24, p. 306.

feasons was not with respect to the whole conversion, but only as to part of the chattels converted, it will not bar an action against the other tortfeasors to recover for the conversion of the balance of the chattels.<sup>1</sup>

**9. Necessity for Demand.** — Where there has been an actual conversion a demand upon the defendant before the institution of the action of trover is not necessary to render him liable in such action.<sup>2</sup> But where the possession

1. Thus, where chattels were wrongfully taken by two persons and sold, it was held that a settlement by the owner for one half of the chattels would not bar a subsequent action against the other for the conversion of the other half. *McCrillis v. Hawes*, 38 Me. 566.

**2. No Demand Necessary in Case of Actual Conversion — England.** — *Beckwith v. Corral*, 3 Bing. 444, 11 Moo. 335, 2 C. & P. 261, 12 E. C. L. 121; *Bligh v. Darling*, 15 Nova Scotia 248; *Granger v. Hill*, 5 Scott 561, 1 Arn. 42.

*United States.* — *Carr v. Gale, Davies* (U. S.) 328; *Blakely v. Ruddell, Hempst.* (U. S.) 18.

*Alabama.* — *Ensley Lumber Co. v. Lewis*, 121 Ala. 94; *Boutwell v. Parker*, 124 Ala. 341; *Powell v. Olds*, 9 Ala. 861; *Hall v. Chapman*, 35 Ala. 553.

*Arkansas.* — *Gentry v. Madden*, 3 Ark. 127; *Sadler v. Sadler*, 16 Ark. 628; *Dunnahoe v. Williams*, 24 Ark. 264.

*California.* — *Paige v. O'Neal*, 12 Cal. 483; *Black v. Clasby*, 97 Cal. 482; *Daggett v. Gray*, 110 Cal. 169; *Becker v. Feigenbaum*, (Cal. 1896) 45 Pac. Rep. 837; *Davis v. Winona Wagon Co.*, 120 Cal. 244.

*Connecticut.* — *Luckey v. Roberts*, 25 Conn. 486.

*Delaware.* — *Maguyer v. Hawthorn*, 2 Harr. (Del.) 71.

*Florida.* — *Anderson v. Agnew*, 38 Fla. 30.

*Georgia.* — *Miller v. Wilson*, 98 Ga. 567, 58 Am. St. Rep. 319; *Muse v. Wright*, 103 Ga. 783; *Grant v. Miller*, 107 Ga. 804.

*Idaho.* — *Coombs v. Collins*, 6 Idaho 536.

*Illinois.* — *Bruner v. Dyball*, 42 Ill. 34; *Ryan v. Brant*, 42 Ill. 78; *Hardy v. Keeler*, 56 Ill. 152; *Sehnert v. Koenig*, 99 Ill. App. 513; *Freehill v. Hueni*, 103 Ill. App. 118.

*Indiana.* — *Koehring v. Aultman*, 7 Ind. App. 475.

*Iowa.* — *Cutter v. Fanning*, 2 Iowa 580; *Haas v. Damon*, 9 Iowa 589.

*Kansas.* — *Johnson v. Anderson*, 60 Kan. 578.

*Maine.* — *Jewett v. Patridge*, 12 Me. 243, 28 Am. Dec. 173; *Webber v. Davis*, 44 Me. 147, 69 Am. Dec. 87; *State v. Patten*, 49 Me. 383.

*Maryland.* — *Bonaparte v. Clagett*, 78 Md. 87.

*Massachusetts.* — *Gilmore v. Newton*, 9 Allen (Mass.) 171, 85 Am. Dec. 749; *Stanley v. Gaylord*, 1 Cush. (Mass.) 536, 48 Am. Dec. 643; *Chapman v. Cole*, 12 Gray (Mass.) 141, 71 Am. Dec. 739; *Woodbury v. Long*, 8 Pick. (Mass.) 543, 19 Am. Dec. 345; *Baker v. Lothrop*, 155 Mass. 276.

*Michigan.* — *Malachiski v. Stellwagen*, 85 Mich. 41; *Clink v. Gunn*, 90 Mich. 135; *Kane v. Hutchisson*, 93 Mich. 488; *Pierce v. Underwood*, 112 Mich. 186; *Crane Lumber Co. v. Bellows*, 116 Mich. 304; *Yeisley v. Bennett*, 121 Mich. 422.

*Minnesota.* — *Holland v. Bishop*, 60 Minn. 23;

*Adams v. Castle*, 64 Minn. 505; *Hogan v. Atlantic Elevator Co.*, 66 Minn. 344; *Jackson v. Sevaton*, 79 Minn. 275.

*Missouri.* — *Himes v. McKinney*, 3 Mo. 382; *Matheny v. Johnson*, 9 Mo. 232; *Halyard v. Dechelman*, 29 Mo. 459, 77 Am. Dec. 585; *Knipper v. Blumenthal*, 107 Mo. 665; *La Fayette County Bank v. Metcalf*, 40 Mo. App. 494; *Wimberly v. Pitner*, 66 Mo. App. 633, 2 Mo. App. Rep. 1374; *Mohr v. Langan*, 77 Mo. App. 481; *Swinney v. Gouty*, 83 Mo. App. 549.

*Montana.* — *Reynolds v. Fitzpatrick*, 23 Mont. 52.

*Nebraska.* — *Gross v. Scheel*, (Neb. 1903) 93 N. W. Rep. 418.

*New Hampshire.* — *Jillson v. Wilbur*, 41 N. H. 106; *Dudley v. Sawyer*, 41 N. H. 326; *Porcell v. Cavanaugh*, 69 N. H. 364.

*New Jersey.* — *Earle v. Vanburen*, 7 N. J. L. 344.

*New York.* — *Pilsbury v. Webb*, 33 Barb. (N. Y.) 213; *Moses v. Walker*, 2 Hilt. (N. Y.) 536; *Foshav v. Ferguson*, 5 Hill (N. Y.) 154; *Durell v. Mosher*, 8 Johns. (N. Y.) 445; *Farthington v. Payne*, 15 Johns. (N. Y.) 431; *Purves v. Moltz*, 5 Robt. (N. Y.) 653; *Ladd v. Moore*, 3 Sandf. (N. Y.) 589; *Davison v. Donadi*, 2 E. D. Smith (N. Y.) 121; *Tompkins v. Haile*, 3 Wend. (N. Y.) 406; *Everett v. Coffin*, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; *Adams v. Loomis*, 4 Silv. Sup. (N. Y.) 558; *Rodney Hunt Mach. Co. v. Stewart*, 57 Hun (N. Y.) 545; *Clark v. Miller*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 53, 59 Hun (N. Y.) 627; *Fulton v. Lydecker*, (N. Y. City Ct. Gen. T.) 17 N. Y. Supp. 451; *Schmidt v. Garfield Nat. Bank*, 64 Hun (N. Y.) 298; *Thompson v. Vroman*, 66 Hun (N. Y.) 245; *Ruser v. Union Distillery Co.*, (N. Y. City Ct. Gen. T.) 4 Misc. (N. Y.) 268; *Baker v. Moore*, 4 N. Y. App. Div. 234; *Stephens v. Meriden Britannia Co.*, 13 N. Y. App. Div. 268; *Smith v. Smalley*, 19 N. Y. App. Div. 519; *Buckingham v. Vincent*, 23 N. Y. App. Div. 238; *Miller v. Hannan*, 29 N. Y. App. Div. 178; *Stahl v. Dohrman*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 461; *Bahr v. Boley*, 50 N. Y. App. Div. 577; *Bernstein v. Warland*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 280; *Schechter v. Watson*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 43.

*North Carolina.* — *State University v. State Nat. Bank*, 96 N. Car. 280; *Waller v. Bowling*, 108 N. Car. 289.

*Ohio.* — *Baltimore, etc., R. Co. v. O'Donnell*, 40 Ohio St. 489, 34 Am. St. Rep. 579; *Baird v. Howard*, 51 Ohio St. 57, 46 Am. St. Rep. 550.

*Rhode Island.* — *Claffin v. Gurney*, 17 R. I. 185.

*South Carolina.* — *Davis v. Duncan*, 1 McCord L. (S. Car.) 213; *Jones v. Dugan*, 1 McCord L. (S. Car.) 428; *McPherson v. Neuffer*, 11 Rich. L. (S. Car.) 267.

*South Dakota.* — *Consolidated Land, etc., Co.*



of the defendant was lawful and he has been guilty of no acts constituting an actual conversion, the conversion being based on a wrongful detention, a demand is essential to render the defendant's detention unlawful, and, of course, must be shown to prove the conversion.<sup>1</sup> But even if a demand was originally necessary, it is waived if the defendant in his answer sets up title in himself or otherwise shows that a demand would have been futile.<sup>2</sup>

**10. Conversion by Agent — Liability of Principal.** — The liability in trover of the principal for a conversion by his agent is, as in the case of other torts,<sup>3</sup> dependent upon the question whether the agent acted with the authority of his principal, express or implied.<sup>4</sup>

*v. Hawley*, 7 S. Dak. 229; *Rosum v. Hodges*, 1 S. Dak. 308.

*Tennessee*. — *Curd v. Curd*, 9 Humph. (Tenn.) 171; *Garvin v. Luttrell*, 10 Humph. (Tenn.) 16; *Houston v. Dyche, Meigs* (Tenn.) 76, 33 Am. Dec. 130.

*Texas*. — *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 27 Am. St. Rep. 861; *Wagner v. Marple*, 10 Tex. Civ. App. 505; *Gregory v. Montgomery*, 23 Tex. Civ. App. 68.

*Vermont*. — *Albee v. Cole*, 39 Vt. 319.

*Virginia*. — *Newsom v. Newsom*, 1 Leigh (Va.) 86, 19 Am. Dec. 739.

*Wisconsin*. — *Stevens Point First Nat. Bank v. Kickbusch*, 78 Wis. 218.

The purpose in an action of trover of proving a demand and refusal is to show a conversion of the property, and it is wholly unnecessary to prove a demand where the conversion is otherwise shown. *Anderson v. Agnew*, 38 Fla. 30.

**1. When Demand Necessary** — *England*. — *Guntton v. Nurse*, 5 Moo. 259, 2 Brod. & B. 447, 6 E. C. L. 222.

*Canada*. — *Barrett v. Suttis*, 17 Nova Scotia 262.

*United States*. — *Chapin v. Siger*, 4 McLean (U. S.) 378.

*Alabama*. — *Strauss v. Schwab*, 104 Ala. 669; *King v. Franklin*, 132 Ala. 559; *Moore v. Monroe Refrigerator Co.*, 128 Ala. 621.

*Arizona*. — *Hereford v. Pusch*, (Ariz. 1902) 68 Pac. Rep. 547.

*California*. — *Daggett v. Gray*, (Cal. 1895) 40 Pac. Rep. 959.

*Colorado*. — *Moynahan v. Prentiss*, 10 Colo. App. 295; *Salida Bldg., etc., Assoc. v. Davis*, 16 Colo. App. 294.

*Connecticut*. — *Woodruff, etc., Iron Works v. Adams*, 37 Conn. 233.

*Georgia*. — *Smith v. Kershaw*, 1 Ga. 259; *Dunn v. Cox*, 85 Ga. 141; *Baston v. Rabun*, 115 Ga. 378.

*Illinois*. — *Sehnert v. Koenig*, 99 Ill. App. 513.

*Indiana*. — *Sloan v. Lick Creek, etc., Road Co.*, 6 Ind. App. 584; *Sherry v. Picken*, 10 Ind. 375.

*Iowa*. — *Cutter v. Fanning*, 2 Iowa 580; *Burditt v. Hunt*, 25 Me. 419, 43 Am. Dec. 289; *Carleton v. Lovejoy*, 54 Me. 445.

*Maryland*. — *Stewart v. Spedden*, 5 Md. 433; *Dietus v. Fuss*, 8 Md. 148.

*Massachusetts*. — *Bond v. Ward*, 7 Mass. 123, 5 Am. Dec. 28.

*Minnesota*. — *Boxell v. Robinson*, 82 Minn. 26.

*Missouri*. — *Polk v. Allen*, 19 Mo. 467.

*Nebraska*. — *Cummins v. People's Bldg., etc., Assoc.*, 61 Neb. 728.

*New Hampshire*. — *Fletcher v. Fletcher*, 7 N. H. 452, 28 Am. Dec. 359.

*New York*. — *Andrews v. Shattuck*, 32 Barb. (N. Y.) 396; *Hicks v. Cleveland*, 39 Barb. (N. Y.) 573; *Lacker v. Rhoades*, 45 Barb. (N. Y.) 499; *Mitchell v. Williams*, 4 Hill (N. Y.) 13; *Powers v. Bassford*, (C. Pl. Gen. T.) 19 How. Pr. (N. Y.) 309; *Sluyter v. Williams*, (N. Y. Super. Ct. Gen. T.) 37 How. Pr. (N. Y.) 109; *Brown v. Cook*, 9 Johns. (N. Y.) 361; *Wilson v. Cook*, 3 E. D. Smith (N. Y.) 252; *Hallenbake v. Fish*, 8 Wend. (N. Y.) 547, 24 Am. Dec. 88; *Castle v. Corn Exch. Bank*, 148 N. Y. 122, affirming 75 Hun (N. Y.) 89; *Cohnfeld v. Walsh*, 2 N. Y. App. Div. 190; *Katz v. Diamond*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 577; *Williamson v. Seely*, 22 N. Y. App. Div. 389; *Moran v. Abbott*, 26 N. Y. App. Div. 570; *Smith v. Hartog*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 353; *Simon v. Seide*, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 186; *Halbran v. Gray*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 603, reversing (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 771; *National L. Assoc. v. Thompson*, 38 N. Y. App. Div. 445; *Madison v. Gross*, 54 N. Y. App. Div. 129; *Carter v. Eighth Ward Bank*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 128.

*North Dakota*. — *Towne v. St. Anthony, etc., Elevator Co.*, 8 N. Dak. 200; *Fargo First Nat. Bank v. Minneapolis, etc., Elevator Co.*, 11 N. Dak. 280.

*Ohio*. — *Morris v. Bills, Wright* (Ohio) 343.

*Oklahoma*. — *Phelps, etc., Co. v. Halsell*, 11 Okla. 1.

*Pennsylvania*. — *Yeager v. Wallace*, 57 Pa. St. 365.

*South Carolina*. — *Chandler v. Partin*, 2 Mill (S. Car.) 72; *Quay v. McNinch*, 2 Treadw. (S. Car.) 78.

*Tennessee*. — *Weakley v. Evans*, (Tenn. Ch. 1897) 46 S. W. Rep. 1070.

*Texas*. — *Houston, etc., R. Co. v. Garrison*, (Tex. Civ. App. 1896) 37 S. W. Rep. 971.

**Proof of Demand.** — *Hammond v. Plank, Peake* N. P. 166 note; *Saunders v. Payne*, (C. Pl. Gen. T.) 12 N. Y. Supp. 735; *Rector v. Thompson*, 26 Wash. 400.

**2. Waiver of Necessity for Demand.** — *Daggett v. Gray*, 110 Cal. 169; *Hand v. Scodetetti*, 128 Cal. 674; *Grant v. Miller*, 107 Ga. 804; *Reading v. Lamphier*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 596; *Rosenau v. Syring*, 25 Oregon 386.

**3.** See the title AGENCY, vol. 1, p. 1151 *et seq.*

**4. Liability of Principal for Conversion by Agent** — *England*. — *Hilbery v. Hatton*, 2 H. & C.

**11. Liability of Agents or Servants Acting for Principal or Master — a. IN GENERAL.** — An agent or servant who converts the property of a third person is liable in trover for such conversion, and it is no defense that his acts were committed in pursuance of his employment and for the benefit of his principal or master;<sup>1</sup> and this is true though the servant or agent acted under the *bona fide* belief that his master or principal was the owner of the property and in ignorance of the true owner's rights, since one who interferes with personal property must at his peril see that he is protected by the authority of the true owner.<sup>2</sup> Thus, where a broker or agent purchases goods from one having mere possession without authority to sell, and delivers such goods to his princi-

822, 33 L. J. Exch. 190; *Maund v. Monmouthshire Canal Nav. Co.*, 3 R. & Can. Cas. 159, 4 M. & G. 452, 43 E. C. L. 237, 2 Dowl. N. S. 113.

*Canada.* — *Seaman v. Cutter*, 2 Nova Scotia Dec. 455; *O'Rorke v. Great Western R. Co.*, 23 U. C. Q. B. 427.

*Illinois.* — *Campau v. Bemis*, 35 Ill. App. 37; *Grand Pac. Hotel Co. v. Rowland*, 88 Ill. App. 519.

*Michigan.* — *McDonald v. McKinnon*, 92 Mich. 254.

*Minnesota.* — *Hodge v. Eastern R. Co.*, 70 Minn. 193.

*New York.* — *Christopher v. Langdon, etc.*, *Brewing Co.*, 29 N. Y. App. Div. 337.

*South Carolina.* — *Miller v. Reigne*, 2 Hill L. (S. Car.) 593; *Guerrey v. Kerton*, 2 Rich. L. (S. Car.) 507.

*Texas.* — *Blalock v. Joseph Bowling Co.*, (Tex. Civ. App. 1898) 44 S. W. Rep. 305.

**1. Conversion by Agent or Servant — Agency No Defense — England.** — *Cranch v. White*, 1 Bing. N. Cas. 414, 27 E. C. L. 438; *Perkins v. Smith*, 1 Wils. C. Pl. 328; *Parker v. Godin*, 2 Stra. 813; *Stephens v. Elwall*, 4 M. & S. 259.

*United States.* — *Fiedler v. Maxwell*, 2 Blatchf. (U. S.) 552.

*Indiana.* — *Shearer v. Evans*, 89 Ind. 400.

*Iowa.* — *Warder-Bushnell, etc., Co. v. Harris*, 81 Iowa 153.

*Maine.* — *Wing v. Milliken*, 91 Me. 387, 64 Am. St. Rep. 238.

*Massachusetts.* — *Edgerly v. Whalan*, 106 Mass. 307. But see *Wilson v. McLaughlin*, 107 Mass. 587.

*Minnesota.* — *Leuthold v. Fairchild*, 35 Minn. 99. But see *Hodgson v. St. Paul Plow Co.*, 78 Minn. 172.

*Missouri.* — *Koch v. Branch*, 44 Mo. 542, 100 Am. Dec. 324; *Dusky v. Rudder*, 80 Mo. 400; *Arkansas City Bank v. Cassidy*, 71 Mo. App. 186.

*Nebraska.* — *Cook v. Monroe*, 45 Neb. 349; *D. M. Osborne Co. v. Plano Mfg. Co.*, 51 Neb. 502.

*New Hampshire.* — *Gage v. Whittier*, 17 N. H. 312.

*New York.* — *Mayer v. Kilpatrick*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 689; *Thorpe v. Burling*, 11 Johns. (N. Y.) 285; *Everett v. Coffin*, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551.

*North Carolina.* — *Simmons v. Sikes*, 2 Ired. L. (24 N. Car.) 98.

*Pennsylvania.* — *Barton v. Willey*, 2 W. N. C. (Pa.) 157.

*Tennessee.* — *Rains v. McNairy*, 4 Humph. (Tenn.) 356, 40 Am. Dec. 651.

*Texas.* — *Shilling v. Shilling*, (Tex. Civ. App. 1896) 35 S. W. Rep. 420.

See, however, *Murphy v. Dulhanty*, 2 Nova Scotia Dec. 294. And see *Mires v. Solebay*, 2 Mod. 242.

**Collector of Customs.** — Trover will lie against a collector of customs who unlawfully detains the goods of an importer, and it is no defense that the collector acts under the instructions of the secretary of the treasury. *Fiedler v. Maxwell*, 2 Blatchf. (U. S.) 552. See also *Conard v. Pacific Ins. Co.*, 6 Pet. (U. S.) 262; *Tracy v. Swartwout*, 10 Pet. (U. S.) 80.

**An Inferior Military Officer** acting under command of a superior officer has been held to be liable for conversion. *Yost v. Stout*, 4 Coldw. (Tenn.) 205, 94 Am. Dec. 194.

**2. Good Faith of Agent No Defense — England.** — *Perkins v. Smith*, 1 Wils. C. Pl. 328; *Garland v. Carlisle*, 4 Cl. & F. 693; *Stephens v. Elwall*, 4 M. & S. 259; *Hollins v. Fowler*, L. R. 7 H. L. 767.

*Alabama.* — *Perminster v. Kelly*, 18 Ala. 716, 54 Am. Dec. 177; *Camody v. Portlock*, (Ala. 1893) 12 So. Rep. 871.

*California.* — *March v. McKoy*, 56 Cal. 85.

*Dakota.* — *Phillip Best Brewing Co. v. Pillsbury, etc., Elevator Co.*, 5 Dak. 62.

*Georgia.* — *Porter v. Thomas*, 23 Ga. 467; *Miller v. Wilson*, 98 Ga. 567, 58 Am. St. Rep. 359.

*Indiana.* — *Coffin v. Anderson*, 4 Blackf. (Ind.) 395; *Alexander v. Swackhamer*, 105 Ind. 81, 55 Am. Rep. 180.

*Kansas.* — *Huffman v. Parsons*, 21 Kan. 467.

*Maine.* — *Kimball v. Billings*, 55 Me. 147, 92 Am. Dec. 581.

*Massachusetts.* — *McPartland v. Read*, 11 Allen (Mass.) 231; *Coles v. Clark*, 3 Cush. (Mass.) 399; *Edgerly v. Whalan*, 106 Mass. 307; *Robinson v. Bird*, 158 Mass. 357, 35 Am. St. Rep. 495.

*Michigan.* — *Kearney v. Clutton*, 101 Mich. 106, 45 Am. St. Rep. 394.

*Minnesota.* — *Johnson v. Martin*, 87 Minn. 370.

*Missouri.* — *Mohr v. Langan*, 162 Mo. 474, 85 Am. St. Rep. 503; *La Fayette County Bank v. Metcalf*, 40 Mo. App. 494; *Thompson v. Irwin*, 76 Mo. App. 418; *Koch v. Branch*, 44 Mo. 542, 100 Am. Dec. 324.

*Nebraska.* — *Cook v. Monroe*, 45 Neb. 349.

*New Hampshire.* — *Flanders v. Colby*, 28 N. H. 34.

*New York.* — *Cobb v. Dows*, 9 Barb. (N. Y.) 242, reversed 10 N. Y. 335; *Dudley v. Hawley*, 40 Barb. (N. Y.) 397; *Mead v. Jack*, 12 Daly (N. Y.) 65; *Boyce v. Brockway*, 31 N. Y. 490.

pal, he is liable for conversion.<sup>1</sup> So, where an agent, such as an auctioneer,<sup>2</sup> broker, factor, etc.,<sup>3</sup> sells property for one who has no title thereto, and trans-

*North Carolina.*—Sever v. McLaughlin, 79 N. Car. 153.

*Pennsylvania.*—Rice v. Yocum, 155 Pa. St. 538. See, however, Berry v. Vantries, 12 S. & R. (Pa.) 89.

*Rhode Island.*—Singer Mfg. Co. v. King, 14 R. I. 511.

*Texas.*—Liefert v. Galveston, etc., R. Co., (Tex. Civ. App. 1900) 57 S. W. Rep. 899.

*Wisconsin.*—Dahl v. Fuller, 50 Wis. 501.

See, however, Archibque v. Miera, 1 N. Mex. 419.

**Collecting Money on Warrant.**—In Koch v. Branch, 44 Mo. 542, 100 Am. Dec. 324, it was held that an agent who collected the money on a United States commissary voucher for an innocent purchaser thereof after the voucher had been stolen would be liable for its conversion to the original owner. See also Fine Art Soc. v. Union Bank, 17 Q. B. D. 705; Sharland v. Mildon, 10 Jur. 771.

**1. Purchasing Agents.**—Hollins v. Fowler, L. R. 7 H. L. 767, affirming L. R. 7 Q. B. 630; Arkansas City Bank v. Cassidy, 71 Mo. App. 186; McCormick v. Stevenson, 13 Neb. 70; Williams v. Merle, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604; Rice v. Yocum, 155 Pa. St. 538, 32 W. N. C. (Pa.) 356. See also Peckinbaugh v. Quillin, 12 Neb. 586. But see Jackson v. Klinger, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 758.

**2. Selling Agents—Auctioneer—England.**—Consolidated Co. v. Curtis, (1892) 1 Q. B. 495, 61 L. J. Q. B. 325; Hardacre v. Stewart, 5 Esp. 103; Iredale v. Kendall, 40 L. T. N. S. 362; Cochrane v. Rymill, 40 L. T. N. S. 744, 27 W. R. 776; Brown v. Hickinbotham, 50 L. J. Q. B. 426; Barker v. Furlong, (1891) 2 Ch. 172, 60 L. J. Ch. 368, 64 L. T. N. S. 411. See, however, Turner v. Hockey, 56 L. J. Q. B. 301; National Mercantile Bank v. Rymill, 44 L. T. N. S. 767.

*Canada.*—Johnston v. Henderson, 28 Ont. 25.

*Massachusetts.*—Coles v. Clark, 3 Cush. (Mass.) 399; Milliken v. Hathaway, 148 Mass. 69; Robinson v. Bird, 158 Mass. 357, 35 Am. St. Rep. 495.

*Michigan.*—Kearney v. Clutton, 101 Mich. 106, 45 Am. St. Rep. 394.

*Missouri.*—Mohr v. Langan, 162 Mo. 474, 85 Am. St. Rep. 503.

*New York.*—Hoffman v. Carow, 20 Wend. (N. Y.) 21, affirmed 22 Wend. (N. Y.) 285.

But see Rogers v. Huie, 2 Cal. 571, 56 Am. Dec. 363, overruling 1 Cal. 429, 54 Am. Dec. 300. This case, however, was practically overruled in Cerkel v. Waterman, 63 Cal. 34, where a commission merchant who sold a quantity of meat supposing it to be the property of one W. and paid the proceeds to him was held liable to the owner for conversion. And in Swim v. Wilson, 90 Cal. 126, 25 Am. St. Rep. 110, the doctrine laid down in Rogers v. Huie, 2 Cal. 571, 56 Am. Dec. 363, was expressly disapproved, and it was held that a stock broker who sold stolen certificates of stock indorsed in blank, which he had received for sale from

the thief, and paid the proceeds to the latter, was liable to the true owner for conversion. And see Turner v. Hockey, 56 L. J. Q. B. 301.

**3. Brokers, Factors, etc.—England.**—Perkins v. Smith, 1 Wils. C. Pl. 328; Parker v. Godin, 2 Stra. 813; Ganly v. Ledwidge, Ir. R. 10 C. L. 33; Delaney v. Wallis, 15 Cox C. C. 525, 14 L. R. Ir. 31.

*Alabama.*—Perminter v. Kelly, 18 Ala. 716, 54 Am. Dec. 177.

*Arkansas.*—Merchants, etc., Bank v. Meyer, 56 Ark. 499.

*California.*—Cerkel v. Waterman, 63 Cal. 34; Swim v. Wilson, 90 Cal. 126, 25 Am. St. Rep. 110.

*Dakota.*—Phillip Best Brewing Co. v. Pillsbury, etc., Elevator Co., 5 Dak. 62.

*Illinois.*—Cassidy v. Elk Grove Land, etc., Co., 58 Ill. App. 39.

*Indiana.*—Fort v. Wells, 14 Ind. App. 531, 56 Am. St. Rep. 316.

*Kentucky.*—Pool v. Adkisson, 1 Dana (Ky.) 110. See Abernathy v. Wheeler, 92 Ky. 320, 36 Am. St. Rep. 593.

*Maine.*—Kimball v. Billings, 55 Me. 147, 92 Am. Dec. 581; McPheters v. Page, 83 Me. 234, 23 Am. St. Rep. 772; Wing v. Milliken, 91 Me. 387, 64 Am. St. Rep. 238.

*Minnesota.*—Johnson v. Martin, 87 Minn. 370.

*Missouri.*—La Fayette County Bank v. Metcalf, 40 Mo. App. 494; Arkansas City Bank v. Cassidy, 71 Mo. App. 186; Thompson v. Irwin, 76 Mo. App. 418.

*Nebraska.*—Stevenson v. Valentine, 27 Neb. 338.

*Nevada.*—Bercich v. Marye, 9 Nev. 312.

*New Hampshire.*—Gage v. Whittier, 17 N. H. 312.

*New York.*—Dudley v. Hawley, 40 Barb. (N. Y.) 397; Anderson v. Nicholas, 5 Bosw. (N. Y.) 121; Everett v. Coffin, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; Williams v. Merle, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604; Sprights v. Hawley, 39 N. Y. 441, 100 Am. Dec. 452, affirming 40 Barb. (N. Y.) 397.

*Pennsylvania.*—Thum v. Fish, 12 W. N. C. (Pa.) 94.

*Tennessee.*—Taylor v. Pope, 5 Coldw. (Tenn.) 413. See, however, Roach v. Turk, 9 Heisk. (Tenn.) 708, 24 Am. Rep. 360, overruling Taylor v. Pope, 5 Coldw. (Tenn.) 413; Frizzell v. Rundle, 88 Tenn. 396, 17 Am. St. Rep. 908.

**Sale of Coupons.**—In Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491, it was held that a broker who, in good faith, received stolen interest coupons of United States bonds, and transferred them to the buyer, and paid the proceeds to his employer, could not be held liable in trover to the true owner. The court said that the coupons did not stand upon the same ground as chattels; that they were not to be considered as goods, but as representatives of money, and subject to the same rules as bank bills or other negotiable instruments payable in money to the bearer.



fers the possession thereof to the purchaser, he is liable for conversion. It has been held, however, that there is no liability for the conversion on the part of an agent who merely negotiates a sale for his principal without in any way interfering with the property,<sup>1</sup> or who as agent merely collects the purchase money for goods wrongfully sold by his principal.<sup>2</sup>

**b. QUALIFICATIONS OF RULE.** — It has been held that where a person deals with goods as the agent or servant of one who has the actual custody of them, in the *bona fide* belief that such custodian is the true owner, he should be excused for what he does if his act is of such a nature as would be excused if done by the authority of the person in possession if he were a finder of the goods or intrusted by the true owner with the custody of them.<sup>3</sup> Thus, a bailee with whom goods have been deposited is not guilty of conversion by keeping them or restoring them to the person who deposited them with him, though that person turns out to have had no authority from the true owner.<sup>4</sup> So if a bailee, being intrusted with the possession merely, transfers the possession according to the directions of the person from whom he received the chattel, without notice of any better title and without undertaking to convey any title, he is not guilty of a conversion.<sup>5</sup> But where an agent in the actual possession of goods as bailee of his principal refuses to deliver them to the true owner on demand, he is guilty of conversion.<sup>6</sup>

**Servant.** — It has been held that a servant in charge of goods upon his master's premises does not ordinarily have such possession as will render him liable for a refusal to deliver at the request of the owner, of whose rights he is ignorant.<sup>7</sup>

**Carrier.** — So it has been held that one who merely receives goods for transportation, from one in possession, without notice of his want of title, and transports such goods under his direction, is not liable to the true owner for conversion.<sup>8</sup> This rule would seem to be especially applicable to common

1. **Negotiating Sale.** — *Barker v. Furlong*, (1891) 2 Ch. 172; *Fowler v. Hollins*, L. R. 7 Q. B. 627, *per* Brett, J., adopted by Blackburn, J., in *Hollins v. Fowler*, L. R. 7 H. L. 757; *Dickey v. McCaul*, 14 Ont. App. 166.

2. *Leuthold v. Fairchild*, 35 Minn. 99.

3. **Qualifications of Rule.** — *Greenway v. Fisher*, 1 C. & P. 190, 11 E. C. L. 362; *Consolidated Co. v. Curtis*, (1892) 1 Q. B. 495; *Hollins v. Fowler*, L. R. 7 H. L. 767, *per* Blackburn, J. See also *Sheridan v. New Quay Co.*, 4 C. B. N. S. 650, 93 E. C. L. 650; *Alexander v. Southey*, 5 B. & Ald. 247, 7 E. C. L. 85.

4. **Bailee** — *England*. — *National Mercantile Bank v. Rymill*, 44 L. T. N. S. 767. See also *Tope v. Hockin*, 7 B. & C. 101, 14 E. C. L. 22; *Whitworth v. Smith*, 5 C. & P. 250, 24 E. C. L. 304.

*Alabama*. — *Nelson v. Iverson*, 17 Ala. 216; *Morris v. Hall*, 41 Ala. 510.

*California*. — *Steele v. Marsicano*, 102 Cal. 666.

*Indiana*. — *Valentine v. Duff*, 7 Ind. App. 196.

*Massachusetts*. — *Loring v. Mulcahy*, 3 Allen (Mass.) 575; *Leonard v. Tidd*, 3 Met. (Mass.) 6.

*Missouri*. — *La Fayette County Bank v. Metcalf*, 40 Mo. App. 494.

*South Carolina*. — *Parkerson v. Simons*, 2 McMull. L. (S. Car.) 188.

5. *Parker v. Lombard*, 100 Mass. 405. But compare *Phillip Best Brewing Co. v. Pillsbury*, etc., *Elevator Co.*, 5 Dak. 62.

6. *England*. — *Wilson v. Anderton*, 1 B. & Ad. 450, 20 E. C. L. 426; *McDonald v. Stirs-*

*key*, 12 Nova Scotia 520; *Catterall v. Kenyon*, 3 Q. B. 310, 43 E. C. L. 749; *Powell v. Hoyland*, 6 Exch. 67; *Winter v. Bancks*, 84 L. T. N. S. 504.

*Canada*. — *Ruel v. McElroy*, 8 N. Bruns. 212.

*Georgia*. — *Porter v. Thomas*, 23 Ga. 467.

See, however, *Wando Phosphate Co. v. Parker*, 93 Ga. 414.

*Illinois*. — *U. S. Express Co. v. Meints*, 72 Ill. 293.

*Kentucky*. — *Brown v. Noel*, (Ky. 1899) 52 S. W. Rep. 849.

*New Hampshire*. — *Doty v. Hawkins*, 6 N. H. 247, 25 Am. Dec. 459.

*New Jersey*. — *Wykoff v. Stevenson*, 46 N. J. L. 326; *Wheeler*, etc., *Mfg. Co. v. Brookfield*, 68 N. J. L. 478.

*New York*. — *Carroll v. Mix*, 51 Barb. (N. Y.) 212; *Judah v. Kemp*, 2 Johns. Cas. (N. Y.) 411; *Ball v. Liney*, 48 N. Y. 6, 8 Am. Rep. 511; *Barker v. Archer*, 49 N. Y. App. Div. 80.

*Pennsylvania*. — *Berry v. Vantries*, 12 S. & R. (Pa.) 89; *Carey v. Bright*, 58 Pa. St. 70.

*Rhode Island*. — *Singer Mfg. Co. v. King*, 14 R. I. 511.

*Tennessee*. — *Elmore v. Brooks*, 6 Heisk. (Tenn.) 45.

**Common Carrier.** — *Shellenberg v. Fremont*, etc., R. Co., 45 Neb. 487, 50 Am. St. Rep. 561.

7. *Hodgson v. St. Paul Plow Co.*, 78 Minn. 172; *Mount v. Derick*, 5 Hill (N. Y.) 456. See also *McLennan v. Minneapolis*, etc., *Elevator Co.*, 57 Minn. 317; *Alexander v. Southey*, 5 B. & Ald. 247, 7 E. C. L. 85.

8. **Carrier.** — *Barker v. Furlong*, (1891) 2 Ch.

carriers, whose duty it is to carry for all who desire their services,<sup>1</sup> and it has been held that such transportation and delivery to the one from whom the possession was received, after notice of the claim of the true owner, will not render the carrier liable for conversion.<sup>2</sup> Of course, if the carrier assists the wrongdoer in taking the property from the possession of the true owner, he is liable.<sup>3</sup>

**12. Conversion by Wrongful Taking** — *a. IN GENERAL.* — It is a well-settled general rule that the wrongful taking of the property of another with the intent of asserting some right or dominion over it, and in antagonism to the true owner's title, constitutes of itself a conversion, and no demand is necessary before trover may be maintained.<sup>4</sup> It is immaterial that the taking is under the *bona fide* belief that the taker is authorized in so doing,<sup>5</sup> as

172; *Strickland v. Barrett*, 20 Pick. (Mass.) 415; *Metcalf v. McLaughlin*, 122 Mass. 84; *Gurley v. Armstead*, 148 Mass. 267, 12 Am. St. Rep. 555; *Nanson v. Jacob*, 93 Mo. 331, 3 Am. St. Rep. 531; *Gellatly v. Lowery*, 6 Bosw. (N. Y.) 113; *McCarty v. Vickery*, 12 Johns. (N. Y.) 348. See also *Grylls v. Davies*, 2 B. & Ad. 514, 22 E. C. L. 129. See, however, *Gaines v. Briggs*, 9 Ark. 46; *Flanders v. Colby*, 28 N. H. 34.

A servant of a purchaser at an illegal sale who merely carries goods from one shop to another, without knowledge of the owner's claim upon the property, is not liable in an action of trover. *Burditt v. Hunt*, 25 Me. 419, 43 Am. Dec. 289.

1. *Koch v. Branch*, 44 Mo. 542, 100 Am. Dec. 324; *Gurley v. Armstead*, 148 Mass. 267, 12 Am. St. Rep. 555; *Robert C. White Live Stock Commission Co. v. Chicago, etc., R. Co.*, 87 Mo. App. 330.

**A Railway Conductor Merely Permitting a Passenger to Travel on His Train with Goods Which the Conductor Knows to Have Been Stolen** and thus to escape with the goods, is not liable for conversion. *Randlette v. Judkins*, 77 Me. 114, 52 Am. Rep. 747.

2. *Gurley v. Armstead*, 148 Mass. 267, 12 Am. St. Rep. 555, citing *Loring v. Mulcahy*, 3 Allen (Mass.) 575; *Metcalf v. McLaughlin*, 122 Mass. 84.

3. *Smith v. Colby*, 67 Me. 169; *Mead v. Jack*, 12 Daly (N. Y.) 65; *Thorp v. Burling*, 11 Johns. (N. Y.) 285.

**4. Conversion by Wrongful Taking** — *England.* — *Consolidated Co. v. Curtis*, (1892) 1 Q. B. 495; *Grainger v. Hill*, 4 Bing. N. Cas. 212, 33 E. C. L. 328; *Forsdick v. Collins*, 1 Stark. 173, 2 E. C. L. 73, 18 Rev. Rep. 757.

*Canada.* — *M'Millan v. Ritchie*, 7 N. Bruns. 242.

*Arkansas.* — *Sadler v. Sadler*, 16 Ark. 628.

*Colorado.* — *Hughes v. Coors*, 3 Colo. App. 303.

*Connecticut.* — *Clark v. Whitaker*, 19 Conn. 210, 48 Am. Dec. 160; *Hartford Ice Co. v. Greenwood's Co.*, 61 Conn. 166, 29 Am. St. Rep. 180; *Lovell v. Hammond Co.*, 66 Conn. 500.

*Illinois.* — *Bane v. Detrick*, 52 Ill. 19.

*Indiana.* — *Valentine v. Duff*, 7 Ind. App. 196.

*Iowa.* — *Krager v. Pierce*, 73 Iowa 350.

*Kentucky.* — *Pharis v. Carver*, 13 B. Mon. (Ky.) 236.

*Maryland.* — *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670.

*Massachusetts.* — *Coughlin v. Ball*, 4 Allen (Mass.) 334; *McPartland v. Read*, 11 Allen (Mass.) 231; *Bray v. Bates*, 9 Met. (Mass.) 237; *Woodbury v. Long*, 8 Pick. (Mass.) 543, 19 Am. Dec. 345; *Robinson v. Bird*, 158 Mass. 357, 35 Am. St. Rep. 495; *Noyes v. Stone*, 163 Mass. 490.

*Michigan.* — *Carroll v. McCleary*, 19 Mich. 93.

*Minnesota.* — *Vanderburgh v. Bassett*, 4 Minn. 242; *Tickney v. Smith*, 5 Minn. 486; *Reynolds v. St. Paul Trust Co.*, 51 Minn. 236; *Hodge v. Eastern R. Co.*, 70 Minn. 193.

*Missouri.* — *Waverly Timber, etc., Co. v. St. Louis Coöperage Co.*, 112 Mo. 383; *Loeffel v. Pohlman*, 47 Mo. App. 574; *Baker v. Kansas City, etc., R. Co.*, 52 Mo. App. 602.

*Nebraska.* — *Johnson v. Walker*, 23 Neb. 736; *Watson v. Coburn*, 35 Neb. 492; *Murphey v. Virgin*, 47 Neb. 692.

*New Hampshire.* — *Clark v. Rideout*, 39 N. H. 238.

*New York.* — *Huelet v. Reyns*, (Supm. Ct. Spec. T.) 1 Abb. Pr. N. S. (N. Y.) 27; *Washburn v. Cordis*, (Brooklyn City Ct. Gen. T.) 1 Misc. (N. Y.) 427; *Cummings v. Vorce*, 3 Hill (N. Y.) 282; *Otis v. Jones*, 21 Wend. (N. Y.) 394; *Connah v. Hale*, 23 Wend. (N. Y.) 462; *Electric Power Co. v. Metropolitan Telephone, etc., Co.*, 75 Hun (N. Y.) 68; *Electric Power Co. v. New York*, 36 N. Y. App. Div. 383.

*North Carolina.* — *Lee v. McKay*, 3 Ired. L. (25 N. Car.) 29.

*Pennsylvania.* — *Ryman v. Gerlach*, 153 Pa. St. 197; *Williams v. Smith*, 153 Pa. St. 462.

*Rhode Island.* — *Donahue v. Shippee*, 15 R. I. 453.

*Tennessee.* — *Davidson v. Manlove*, 2 Coldw. (Tenn.) 346; *Barnhill v. Phillips*, 4 Coldw. (Tenn.) 1; *Childress v. Ford*, 1 Heisk. (Tenn.) 463.

*Vermont.* — *Holland v. Osgood*, 8 Vt. 281.

*Washington.* — *McClellan v. Gaston*, 18 Wash. 472.

*Wisconsin.* — *Thomas v. Steele*, 22 Wis. 207.

**If One Drive the Cattle of Another upon a Highway in a Direction Known by Him to Be Opposite to the Owner's Residence and they are lost in consequence, he is liable for conversion, although he did not intend it.** *Tobin v. Deal*, 60 Wis. 87, 50 Am. Rep. 345.

**Wrongful Replevin.** — *Butts v. Kingman*, 60 Neb. 224.

5. **Good Faith.** — *Tear v. Freebody*, 4 C. B. N. S. 228, 93 E. C. L. 228.

where it is under a mistake.<sup>1</sup>

**A Mere Asportation**, however, though wrongful, is not necessarily a conversion, if it is not done with intent to assert any right in the chattel or to deny any title of the owner, and does not have the effect of destroying or altering the nature of the chattel.<sup>2</sup> This is true though the taking may have amounted to a technical trespass,<sup>3</sup> and therefore the old dictum that trover may be maintained in all cases where trespass would lie is not correct.

**Consent of Owner to Taking.**—A taking with the consent of the owner is not, of course, sufficient to constitute a conversion.<sup>4</sup>

**An Asportation under Lawful Right**, as in the abatement of a nuisance,<sup>5</sup> is not a conversion.<sup>6</sup>

**b. SEIZURE UNDER JUDICIAL PROCESS.**—The wrongful seizure of chattels belonging to one person, by an officer who is acting under judicial process running against the chattels of another, constitutes a wrongful conversion by the officer.<sup>7</sup> This rule has been applied where property was wrongfully taken under a writ of attachment or execution,<sup>8</sup> or a writ of

**1. Taking by Mistake.**—*Williams v. Deen*, 5 Tex. Civ. App. 575.

Thus, where the defendant carried away from a railroad depot the plaintiff's hay, supposing it to be his own, it was held that trover could be maintained without proof of demand. *Bartlett v. Hoyt*, 33 N. H. 151.

**2. Asportation Not Necessarily Conversion—England.**—*Fouldes v. Willoughby*, 8 M. & W. 540, 1 Dowl. N. S. 86.

*Canada.*—*Gauhan v. St. Lawrence, etc., R. Co.*, 29 U. C. C. P. 102.

*Massachusetts.*—*Wellington v. Wentworth*, 8 Met. (Mass.) 548; *Nelson v. Merriam*, 4 Pick. (Mass.) 249; *Wilson v. McLaughlin*, 107 Mass. 587; *Farnsworth v. Lowery*, 134 Mass. 512; *Shea v. Milford*, 145 Mass. 525. See also *Parker v. Lombard*, 100 Mass. 405.

*Michigan.*—*Mattice v. Brinkman*, 74 Mich. 705.

*Missouri.*—*Sparks v. Purdy*, 11 Mo. 219; *State v. Staed*, 72 Mo. App. 581.

*New York.*—*O. J. Gude Co. v. Farley*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 502.

*Tennessee.*—*Jordan v. Greer*, 5 Sneed (Tenn.) 165.

See also *Tucker v. Housatonic R. Co.*, 39 Conn. 447; *Cutter v. Fanning*, 2 Iowa 580.

Thus, where a lessor, wrongfully evicting a tenant, removed the chattels on the premises to one room, at no time denying the tenant's right to their possession, he was not liable for conversion. *Mattice v. Brinkman*, 74 Mich. 705.

**Estray.**—*Howes v. Carver*, 7 Iowa 491; *Dean v. Lindsey*, 16 Gray (Mass.) 264; *Nelson v. Merriam*, 4 Pick. (Mass.) 249; *Van Valkenburgh v. Thayer*, 57 Barb. (N. Y.) 196.

**The Mere Driving an Estray** from one's close into the highway is not a conversion. *Stevens v. Curtis*, 18 Pick. (Mass.) 227.

**3. Trespass Not Necessarily Conversion.**—*Fouldes v. Willoughby*, 8 M. & W. 540; *Mattice v. Brinkman*, 74 Mich. 705; *Farnsworth v. Lowery*, 134 Mass. 512.

**4. Taking with Consent of Owner.**—*Powell v. Hoyland*, 6 Exch. 67, 20 L. J. Exch. 82; *Powers v. Klenzie*, 15 Mont. 177.

*5. Plumer v. Brown*, 8 Met. (Mass.) 578.

*6. Conway v. Jordan*, 110 Iowa 462; *Thayer v. Wright*, 4 Den. (N. Y.) 180; *Sharp v.*

*Nesmith*, 6 Rich. L. (S. Car.) 31; *Meyer v. Orynski*, (Tex. Civ. App. 1894) 25 S. W. Rep. 655; *Irion v. Bexar County*, 26 Tex. Civ. App. 527.

**Trespassing Animals.**—*Walker v. Wetherbee*, 65 N. H. 656. See also *Carey v. Dazey*, 5 Harr. (Del.) 445; *Drew v. Spaulding*, 45 N. H. 472.

**7. Seizure of Chattels of One on Process Against Another.**—*Goode v. Langley*, 7 B. & C. 26, 14 F. C. L. 9; *Cernahan v. Chrisler*, 107 Wis. 645.

**8. Attachment and Execution—England.**—*Mills v. McLean*, 10 Nova Scotia 379; *Glasspoole v. Young*, 9 B. & C. 696, 17 E. C. L. 474, 7 L. J. K. B. 305; *Smith v. Plomer*, 15 East 607.

*Canada.*—*Harris v. Vail*, 17 N. Bruns. 587. *United States.*—*Shapard v. Hynes*, 104 Fed. Rep. 449, 45 C. C. A. 271.

*Alabama.*—*Abercrombie v. Bradford*, 16 Ala. 560; *Perminter v. Kelly*, 18 Ala. 716, 54 Am. Dec. 177; *Smyth v. Tankersley*, 20 Ala. 212, 56 Am. Dec. 193; *Sheppard v. Shelton*, 34 Ala. 652.

*California.*—*Black v. Clasby*, 97 Cal. 482. *Colorado.*—*Schluter v. Jacobs*, 10 Colo. 449; *Fairbanks v. Kent*, 16 Colo. App. 35.

*Connecticut.*—*Meade v. Smith*, 16 Conn. 346; *Calkins v. Lockwood*, 17 Conn. 154, 42 Am. Dec. 729.

*Georgia.*—*Riley v. Martin*, 35 Ga. 136.

*Illinois.*—*Camp v. Unger*, 54 Ill. App. 653.

*Kansas.*—*Johnson v. Anderson*, 60 Kan. 578.

*Kentucky.*—*Christopher v. Covington*, 2 B. Mon. (Ky.) 357.

*Massachusetts.*—*Bowen v. Sanborn*, 1 Allen (Mass.) 389; *Hubbard v. Lyman*, 8 Allen (Mass.) 520; *Marble v. Keyes*, 9 Gray (Mass.) 219; *Shumway v. Rutter*, 8 Pick. (Mass.) 443, 19 Am. Dec. 340; *Woodbury v. Long*, 8 Pick. (Mass.) 543, 19 Am. Dec. 345; *Blanchard v. Coolidge*, 22 Pick. (Mass.) 151; *Melville v. Brown*, 15 Mass. 82; *Savage v. Darling*, 151 Mass. 5; *St. George v. O'Connell*, 110 Mass. 475; *Dow v. Cheney*, 103 Mass. 181.

*Michigan.*—*Grenier v. Hild*, 124 Mich. 222.

*Missouri.*—*State v. McBride*, 81 Mo. 353;

*Lloyd v. Tracy*, 53 Mo. App. 175.

*Nebraska.*—*Beagle v. Smith*, 50 Neb. 446.

*New Hampshire.*—*Gilman v. Hill*, 36 N. H.



replevin,<sup>1</sup> or a distress warrant;<sup>2</sup> and it has been held to be immaterial that the property was in the possession of the person against whom the process ran at the time of its seizure.<sup>3</sup>

**Seizure on Process Against Plaintiff.** — Of course an officer who seizes goods by virtue of judicial process legal in all its forms and issued against the plaintiff cannot as a general rule be held liable therefor to the plaintiff in trover;<sup>4</sup> but a void writ will not prevent the officer from being liable for the conversion.<sup>5</sup>

**Wrongful Levy of Second Writ.** — Where chattels have been properly taken under a writ of attachment or execution, the fact that the officer, while rightfully in possession, wrongfully levies a second writ upon the chattels does not constitute a conversion.<sup>6</sup>

**Sufficiency of Seizure.** — To constitute a conversion it is not essential that the officer take the chattels into his actual possession, provided there is an interference by him with the owner's right to possession.<sup>7</sup> Thus, a wrongful seizure under an attachment or execution of goods in the hands of a bailee and taking from him a forthcoming bond for their delivery is such a conver-

311; *Ferguson v. Clifford*, 37 N. H. 86; *McFarland v. Farmer*, 42 N. H. 386; *Johnson v. Farr*, 60 N. H. 426.

*New Jersey.* — *Bigelow Co. v. Heintze*, 53 N. J. L. 69.

*New York.* — *Hicks v. Cleveland*, 39 Barb. (N. Y.) 573; *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323; *Wintringham v. Lafoy*, 7 Cow. (N. Y.) 735; *Walsh v. Adams*, 3 Den. (N. Y.) 125; *Wheeler v. McFarland*, 10 Wend. (N. Y.) 318; *Waddell v. Cook*, 2 Hill (N. Y.) 47, 37 Am. Dec. 372; *Smith v. Smalley*, 19 N. Y. App. Div. 519.

*North Carolina.* — *Burgin v. Burgin*, 1 Ired. L. (23 N. Car.) 453.

*Ohio.* — *Case v. Hart*, 11 Ohio 364, 38 Am. Dec. 735; *Sammis v. Sly*, 54 Ohio St. 511, 56 Am. St. Rep. 731.

*Pennsylvania.* — *Hall v. Moor*, Add. (Pa.) 376.

*Rhode Island.* — *Hunt v. Pratt*, 7 R. I. 283. *Tennessee.* — *Rains v. McNairy*, 4 Humph. (Tenn.) 356, 40 Am. Dec. 651.

*Vermont.* — *White v. Morton*, 22 Vt. 15, 52 Am. Dec. 75; *Tinker v. Morrill*, 39 Vt. 483, 94 Am. Dec. 345.

**Confusion of Goods.** — But where the owner of chattels suffers them to be so mixed with those of another person that they cannot be distinguished, an officer will not be liable in trover for attaching them as the property of such other person. *Shumway v. Rutter*, 8 Pick. (Mass.) 443, 19 Am. Dec. 340.

**Process Against Fraudulent Vendee.** — In case of a sale procured by the fraudulent representations on the part of the vendee, the seizure of the goods on process against the vendee before the sale is rescinded is not a conversion. Rescission of sale and demand are essential. *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121.

1. **Replevin.** — *Scott v. Rogers*, 56 Ill. App. 571; *Kane v. Hutchisson*, 93 Mich. 488; *Gilbert v. Peck*, 43 Mo. App. 577; *Benster v. Powell*, 4 Ohio Cir. Dec. 4, 9 Ohio Cir. Ct. 177.

2. **Distress.** — *Shipwick v. Blanchard*, 6 T. R. 298; *Clowes v. Hughes*, L. R. 5 Exch. 160, 39 L. J. Exch. 62; *Fisher v. Algar*, 2 C. & P. 374,

12 E. C. L. 179; *Stevenson v. Newnham*, 13 C. B. 285, 76 E. C. L. 285, 15 Jur. 360; *Spry v. McKenzie*, 18 U. C. Q. B. 161; *Huskinson v. Lawrence*, 26 U. C. Q. B. 570; *Connah v. Hale*, 23 Wend. (N. Y.) 462.

3. **Possession of Attachment or Execution Debtor** — *Bowen v. Sanborn*, 1 Allen (Mass.) 389; *Woodbury v. Long*, 8 Pick. (Mass.) 543, 19 Am. Dec. 345; *McFarland v. Farmer*, 42 N. H. 386; *Bigelow Co. v. Heintze*, 53 N. J. L. 69.

4. **Seizure on Process Against Plaintiff** — *Kentucky.* — *Arthur v. Wilson*, Litt. Sel. Cas. (Ky.) 76.

*Nebraska.* — *Sonneuschein v. Bartels*, 37 Neb. 592.

*New York.* — *Jenner v. Joliffe*, 9 Johns. (N. Y.) 381; *Freeman v. Grant*, 132 N. Y. 22; *Van Curen v. Switzer*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 263, 58 Hun (N. Y.) 602.

*North Carolina.* — *Stewart v. Ray*, 4 Ired. L. (26 N. Car.) 269.

*South Carolina.* — *Pettigru v. Sanders*, 2 Bailey L. (S. Car.) 549.

*Vermont.* — *Nutt v. Wheeler*, 30 Vt. 436, 73 Am. Dec. 316.

*Wisconsin.* — *Weinberg v. Conover*, 4 Wis. 803.

**Neglect to Care for Property.** — Trover will not lie against a sheriff for a mere neglect to take proper care of property which he has regularly attached. *Nutt v. Wheeler*, 30 Vt. 436, 73 Am. Dec. 316. See also *supra*, this section, *Neglect of Duty*.

5. **Seizure on Void Writ.** — *Vaden v. Ellis*, 18 Ark. 355; *Prescott v. Wright*, 6 Mass. 20; *Leise v. Mitchell*, 53 Mo. App. 563; *Lyon v. Yates*, 52 Barb. (N. Y.) 237; *Small v. Pool*, 8 Ired. L. (30 N. Car.) 47; *Martin v. England*, 5 Yerg. (Tenn.) 313; *Marks v. Wright*, 81 Wis. 572.

6. *Page v. Carpenter*, 10 N. H. 77.

7. *Stuart v. Phelps*, 39 Iowa 14.

Thus, where an officer told the owner of the goods, which were in sight, that he had attached them, and forbade him to remove them until the debt was paid, it was held that this was a constructive taking and was sufficient to show a conversion by the officer. *St. George v. O'Connell*, 110 Mass. 475.

sion as will support an action of trover by the owner against the officer.<sup>1</sup> But a mere paper levy of an attachment or execution on chattels, without any interference with the possession of the chattels so as to interrupt the possession of the owner, has been held not to constitute a conversion;<sup>2</sup> and this has been held to be true though an accountable receipt is taken for the chattels, either from the owner or from a third person who does not interfere with the owner's possession.<sup>3</sup>

**A Levy on Real Estate** cannot be considered as a conversion of fixtures on the land.<sup>4</sup>

**Exempt Property.** — Where property belonging to an attachment or execution debtor and exempt from sale on judicial process is wrongfully seized by the officer, the debtor may maintain trover therefor.<sup>5</sup>

**Liability of Attachment or Execution Creditor.** — If the person at whose instance the writ is issued directs that the particular chattels be levied upon or taken, he is jointly liable with the officer for the conversion;<sup>6</sup> and the same is true

1. *Abercrombie v. Bradford*, 16 Ala. 560.

In *Stuart v. Phelps*, 39 Iowa 14, where chattels in the possession of the mortgagor were levied upon as his property and were turned back to the mortgagor to hold as agent of the officer, this was held to constitute a conversion as against the mortgagee.

2. **Paper Levy** — *England*. — *Mallalieu v. Laugher*, 3 C. & P. 551, 14 E. C. L. 443.

*Canada*. — *Pardee v. Glass*, 11 Ont. 275; *Smith v. White*, 18 N. Bruns. 443.

*Maine*. — *Rand v. Sargent*, 23 Me. 326, 39 Am. Dec. 625; *Fernald v. Chase*, 37 Me. 289.

*Massachusetts*. — *Polley v. Lenox Iron Works*, 15 Gray (Mass.) 513.

*New Hampshire*. — *Page v. Carpenter*, 10 N. H. 77.

*New York*. — *Bailey v. Adams*, 14 Wend. (N. Y.) 201; *Freeman v. Grant*, 132 N. Y. 22.

*Vermont*. — *Amadon v. Myers*, 6 Vt. 308.

See also *Bigelow Co. v. Heintze*, 53 N. J. L. 69.

A declaration by an officer that he has attached personal property, without proof that he has taken possession or exercised any dominion or control over it, does not amount to a conversion. *Fernald v. Chase*, 37 Me. 289.

3. *Rand v. Sargent*, 23 Me. 326, 39 Am. Dec. 625, holding that there was no conversion where an officer with a writ in his hands went to the person alleged in the process to be the debtor, and found him in actual possession of the goods, and informed him that he was going to make an attachment, and that he did do so, but did not in fact interfere with the goods or take them into his custody, and the alleged debtor told the officer that the goods belonged to a third person and not to him, but procured a person other than the owner to give a receipt for them.

4. *Bigelow Co. v. Heintze*, 53 N. J. L. 69.

5. **Exempt Property** — *Alabama*. — *Noland v. Wickham*, 9 Ala. 169, 44 Am. Dec. 435; *Ross v. Hannah*, 18 Ala. 125.

*Connecticut*. — *Williams v. Miller*, 16 Conn. 144.

*Indiana*. — *Stephens v. Lawson*, 7 Blackf. (Ind.) 275; *Mandlove v. Burton*, 1 Ind. 39.

*Massachusetts*. — *Clapp v. Thomas*, 5 Allen (Mass.) 158; *Davlin v. Stone*, 4 Cush. (Mass.) 359; *Mulligan v. Newton*, 16 Gray (Mass.) 211;

*Hewes v. Parkman*, 20 Pick. (Mass.) 90; *Baker v. Willis*, 123 Mass. 194, 25 Am. Rep. 61.

*Michigan*. — *Wyckoff v. Wyllis*, 8 Mich. 48; *Town v. Elmore*, 38 Mich. 305; *McCoy v. Brennan*, 61 Mich. 362, 1 Am. St. Rep. 589.

*New Hampshire*. — *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726; *Cooper v. Newman*, 45 N. H. 339.

*New Jersey*. — *Bonnel v. Dunn*, 29 N. J. L. 435.

*New York*. — *Shaw v. Davis*, 55 Barb. (N. Y.) 389.

*South Dakota*. — *Holdridge v. Lee*, 3 S. Dak. 134.

*Tennessee*. — *McCoy v. Dail*, 6 Baxt. (Tenn.) 137; *Pollard v. Thomason*, 5 Humph. (Tenn.) 56; *Hawkins v. Pearce*, 11 Humph. (Tenn.) 44; *Wolfenbarger v. Standifer*, 3 Sneed (Tenn.) 659.

*Texas*. — *House v. Phelan*, 83 Tex. 595.

*Vermont*. — *Waldo v. Peck*, 7 Vt. 434; *Sanborn v. Hamilton*, 18 Vt. 590; *Mundell v. Hammond*, 40 Vt. 641; *Wilkinson v. Wait*, 44 Vt. 508, 8 Am. Rep. 391; *Luce v. Hoisington*, 56 Vt. 436.

*Wisconsin*. — *Below v. Robbins*, 76 Wis. 600, 20 Am. St. Rep. 89.

In *Woods v. Keyes*, 14 Allen (Mass.) 236, 92 Am. Dec. 766, it was held that if the exempt property, such as tools, implements, and fixtures, are plainly distinguishable as articles which are exempt, the owner may maintain trover against the attaching officer without first demanding the articles or pointing them out.

6. **Liability of Attaching or Execution Creditor**

— *Alabama*. — *McConeghy v. Caw*, 31 Ala. 447.

*Colorado*. — *Fairbanks v. Kent*, 16 Colo. App. 35; *Benson v. Eli*, 16 Colo. App. 494.

*Connecticut*. — *Calkins v. Lockwood*, 17 Conn. 154, 42 Am. Dec. 729.

*Kentucky*. — *Hale v. Ames*, 2 T. B. Mon. (Ky.) 143, 15 Am. Dec. 150.

*Maine*. — *Libby v. Soule*, 13 Me. 310.

*Massachusetts*. — *Hubbard v. Lyman*, 8 Allen (Mass.) 520; *Robinson v. Way*, 163 Mass. 212.

*Missouri*. — *Gilbert v. Peck*, 43 Mo. App. 577; *Meyer v. Phoenix Ins. Co.*, 95 Mo. App. 721.

*New York*. — *Phelps v. Delmore*, 69 Hun (N. Y.) 18.

where such person afterwards ratifies the wrongful seizure by the officer, though the prior seizure was made without any directions by him.<sup>1</sup> But if such person does not direct the levy on the particular chattels, and does not subsequently ratify such seizure, he is not liable for the conversion,<sup>2</sup> and if the chattels are sold by the officer, the mere receipt of the proceeds of the sale without knowledge of the illegal seizure is not a ratification thereof,<sup>3</sup> though the contrary has been held where the proceeds were received with knowledge of the illegal seizure.<sup>4</sup> In some jurisdictions statutes have been enacted fixing the liability of the execution or attaching creditor.<sup>5</sup>

**13. Conversion by Wrongful User.** — If a person in the rightful possession of chattels under permission of the owner, with the right to make a particular use of them, makes an unauthorized use of them, this terminates his right to their use and amounts to a conversion.<sup>6</sup> Thus, if a bailee of a horse for hire uses it for work other than that for which it was hired, this constitutes a conversion;<sup>7</sup> and the same was held with regard to the hire of slaves.<sup>8</sup> So the use of a hired chattel at a different place from that authorized constitutes a conversion;<sup>9</sup> for example, where a horse is hired to ride or drive to one place and is ridden or driven beyond that distance.<sup>10</sup> Similarly, where a

*Ohio.* — *Benster v. Powell*, 4 Ohio Cir. Dec. 4, 9 Ohio Cir. Ct. 177.

*South Dakota.* — *Feury v. McCormick Harvesting Mach. Co.*, 6 S. Dak. 396.

*Texas.* — *Allen v. Tyson-Jones Buggy Co.*, (Tex. Civ. App. 1897) 40 S. W. Rep. 740.

*Wisconsin.* — *Marks v. Wright*, 81 Wis. 572.

**Liability of Nominal Plaintiff.** — *Walcott v. Keith*, 22 N. H. 196.

1. *Brainerd v. Dunning*, 30 N. Y. 211.

2. *Freeman v. Rosher*, 13 Q. B. 780, 66 E. C. L. 780; *Averill v. Williams*, 1 Den. (N. Y.) 501.

3. *Freeman v. Rosher*, 13 Q. B. 780, 66 E. C. L. 780.

4. *Brainerd v. Dunning*, 30 N. Y. 211; *Hill v. Haas*, 170 N. Y. 566, *affirming* 46 N. Y. App. Div. 360.

5. *Schluter v. Jacobs*, 10 Colo. 449. And see the local statutes.

**6. Conversion by Wrongful Use — England.** — *Bryant v. Wardell*, 2 Exch. 479; *Palmer v. Jarman*, 2 M. & W. 282; *Stierneland v. Holden*, 4 B. & C. 5, 10 E. C. L. 260; *Lilley v. Doubleday*, 7 Q. B. D. 510, 51 L. J. Q. B. 310. See also *Dufresne v. Hutchinson*, 3 Taunt. 117.

*United States.* — *Ross v. Southern Cotton-Oil Co.*, 41 Fed. Rep. 152.

*Alabama.* — *Moseley v. Wilkinson*, 24 Ala. 411; *Fail v. McArthur*, 31 Ala. 26.

*Connecticut.* — *Clark v. Whitaker*, 19 Conn. 319, 48 Am. Dec. 160.

*Georgia.* — *Malone v. Robinson*, 77 Ga. 719.

*Indiana.* — *Jordan v. Shireman*, 28 Ind. 136.

*Maine.* — *Ripley v. Dolbier*, 18 Me. 382; *Marr v. Barrett*, 41 Me. 403; *Crocker v. Gullifer*, 44 Me. 491, 69 Am. Dec. 118.

*Massachusetts.* — *Homer v. Thwing*, 3 Pick. (Mass.) 492.

*Missouri.* — *Fox v. Young*, 22 Mo. App. 386.

*Nebraska.* — *Butler v. Greene*, 49 Neb. 280.

*New Hampshire.* — *Bissell v. Huntington*, 2 N. H. 142.

*New York.* — *Harris v. Schultz*, 40 Barb. (N. Y.) 315; *Buchanan v. Smith*, 10 Hun (N. Y.) 474; *Murray v. Burling*, 10 Johns. (N. Y.) 172;

*Sarjeant v. Blunt*, 16 Johns. (N. Y.) 74; *Lamb*

*v. O'Reilly*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 212; *Collins v. Bennett*, 46 N. Y. 490.

*North Carolina.* — *Bell v. Bowen*, 1 Jones L. (46 N. Car.) 316; *Martin v. Cuthbertson*, 64 N. Car. 328; *Barringer v. Burns*, 108 N. Car. 606.

*Tennessee.* — *Horsely v. Branch*, 1 Humph. (Tenn.) 199; *Angus v. Dickerson*, Meigs (Tenn.) 459.

*Vermont.* — *Sibley v. Story*, 8 Vt. 15; *Hart v. Skinner*, 16 Vt. 138, 42 Am. Dec. 500; *Green v. Sperry*, 16 Vt. 390, 42 Am. Dec. 519.

*Virginia.* — *Spencer v. Pilcher*, 8 Leigh (Va.) 565. See, however, *Harvey v. Epes*, 12 Gratt. (Va.) 153.

*Wisconsin.* — *Lane v. Cameron*, 38 Wis. 603; *De Voin v. Michigan Lumber Co.*, 64 Wis. 616, 54 Am. Rep. 649.

But see *Johnson v. Weedman*, 5 Ill. 495.

**Infants.** — With regard to the liability of infants in trover for the misuse of chattels received under a contract of bailment, see the title *INFANTS*, vol. 16, pp. 309, 310.

**Subhiring Slave Hired.** — *Bell v. Cummings*, 3 Sneed (Tenn.) 275.

**Removing Constituent Parts of Machine.** — *Corotinsky v. Cooper*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 138.

**Necessity for Tender of Hire Received.** — Where the hirer of a horse uses him to an extent not permitted by the contract of hiring, the owner is not required to tender back the amount received for him before he can maintain trover for such unauthorized use. *Disbrow v. Tenbroeck*, 4 E. D. Smith (N. Y.) 397.

7. *Burnard v. Haggis*, 14 C. B. N. S. 45, 108 E. C. L. 45; *Ledbetter v. Thomas*, 130 Ala. 299; *Fox v. Young*, 22 Mo. App. 386. See, however, *Keith v. De Bussigny*, 179 Mass. 255.

8. *Richardson v. Dingle*, 11 Rich. L. (S. Car.) 405; *Horsely v. Branch*, 1 Humph. (Penn.) 199.

9. *Hart v. Skinner*, 16 Vt. 138, 42 Am. Dec. 500; *Lane v. Cameron*, 38 Wis. 603. See, however, *Harvey v. Epes*, 12 Gratt. (Va.) 153.

**10. Driving Horse Beyond Destination.** — *California.* — *Welch v. Mohr*, 93 Cal. 371.



chattel is hired for a certain time, its use after such time is a conversion.<sup>1</sup> If there has been a wrongful use of a chattel by the bailee, the act of the bailor in receiving payment for such use constitutes a waiver of the conversion arising out of such wrongful use.<sup>2</sup> But a bailee of a chattel, especially where the bailment is involuntary, may make a reasonable use of the chattel without being guilty of a conversion.<sup>3</sup>

**14. Conversion by Wrongful Sale or Disposition** — *a.* IN GENERAL. — A wrongful sale of the chattels of another, coupled with a delivery of possession, is universally recognized as such an exercise of dominion over the chattels as to constitute a conversion by the seller.<sup>4</sup> In such case it is immaterial that

*Georgia.* — *Farkas v. Powell*, 86 Ga. 800.

*Louisiana.* — *Murphy v. Kaufman*, 20 La. Ann. 559.

*Massachusetts.* — *Lucas v. Trumbull*, 15 Gray (Mass.) 306; *Rotch v. Hawes*, 12 Pick. (Mass.) 136, 22 Am. Dec. 414; *Wheelock v. Wheelwright*, 5 Mass. 104; *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30; *Perham v. Coney*, 117 Mass. 102. See also *Adams v. Graves*, 18 Pick. (Mass.) 355.

*New Hampshire.* — *Woodman v. Hubbard*, 25 N. H. 67, 57 Am. Dec. 310; *Wentworth v. McDuffie*, 48 N. H. 402.

*New York.* — *Fish v. Ferris*, 5 Duer (N. Y.) 49; *Disbrow v. Tenbroeck*, 4 E. D. Smith (N. Y.) 397.

*Rhode Island.* — *Freeman v. Boland*, 14 R. I. 39, 51 Am. Rep. 340.

*Vermont.* — *Stillwell v. Farewell*, 64 Vt. 286.

In Iowa, however, it was held that driving beyond the agreed destination a horse hired to travel to a certain point was not necessarily a conversion. *Doolittle v. Shaw*, 92 Iowa 348, 54 Am. St. Rep. 562.

**Deviation by Mistake.** — In *Spooner v. Manchester*, 133 Mass. 270, 43 Am. Rep. 514, it appeared that the defendant hired a horse to go to a particular place, and unintentionally took a wrong road. Discovering his mistake, he endeavored to return by the best road, which was by a circuit through another town. It was held that there had been no conversion.

**Mere Delay**, where a horse was hired to drive to and from a certain place without stopping, does not constitute a conversion. *Evans v. Mason*, 64 N. H. 98.

1. *Ledbetter v. Thomas*, 130 Ala. 299; *Fox v. Pruden*, 3 Daly (N. Y.) 187.

2. *Moseley v. Wilkinson*, 24 Ala. 411; *Moore v. Hill*, 62 Vt. 424.

Thus, if a horse is hired to go to a certain destination and the hirer goes beyond such destination, the receipt of payment by the owner for the whole distance traveled, with full knowledge of the facts, will constitute a waiver of the conversion. *Rotch v. Hawes*, 12 Pick. (Mass.) 136, 22 Am. Dec. 414.

3. *Forrester v. Spencer*, 3 U. C. Q. B. O. S. 47.

Thus, it was held to be no conversion for the vendee of a slave, upon the improper refusal of the vendor to receive her back and rescind the sale, to set her to work instead of abandoning her. *Rand v. Oxford*, 34 Ala. 474.

So if a party turns his horse into the inclosure of another, and refuses to take him away, and the other party uses the horse as an equiv-

alent for feeding him, the owner cannot maintain trover without proving a demand and refusal. *Kennet v. Robinson*, 2 J. J. Marsh. (Ky.) 84.

**4. Wrongful Sale** — *England.* — *Cooper v. Willomatt*, 1 C. B. 672, 50 E. C. L. 672; *Loeschman v. Machin*, 2 Stark. 311, 3 E. C. L. 423; *Down v. Halling*, 4 B. & C. 330, 10 E. C. L. 347; *Lovell v. Martin*, 4 Taunt. 799; *Samuel v. Morris*, 6 C. & P. 620, 25 E. C. L. 565; *Edwards v. Hooper*, 11 M. & W. 363, 7 Jur. 378, 12 L. J. Exch. 304.

*Canada.* — *Marsh v. Boulton*, 4 U. C. Q. B. 354; *Drifill v. McFall*, 41 U. C. Q. B. 313; *Gibson v. McKean*, 16 N. Bruns. 299; *Ford v. Bowser*, 24 N. Bruns. 510. Compare *Scott v. Kelly*, 17 U. C. Q. B. 306.

*United States.* — *Blakely v. Ruddell*, *Hempst.* (U. S.) 18; *Van Amringe v. Peabody*, 1 *Mason* (U. S.) 440; *Hutchins v. King*, 1 *Wall*. (U. S.) 53.

*Alabama.* — *St. John v. O'Connell*, 7 *Port.* (Ala.) 466; *Kyle v. Gray*, 11 Ala. 233; *Moseley v. Wilkinson*, 24 Ala. 411; *Firemen's Ins. Co. v. Cochran*, 27 Ala. 228; *Hooks v. Smith*, 18 Ala. 338; *Fail v. McArthur*, 31 Ala. 26; *May v. O'Neal*, 125 Ala. 620.

*Arkansas.* — *Gentry v. Madden*, 3 *Ark.* 127; *Zachary v. Pace*, 9 *Ark.* 212, 47 *Am. Dec.* 744; *Merchants, etc., Bank v. Meyer*, 56 *Ark.* 499.

*California.* — *Fette v. Lane*, (Cal. 1894) 37 *Pac. Rep.* 914; *Horton v. Jack*, 126 *Cal.* 521.

*Connecticut.* — *Frost v. Plumb*, 40 *Conn.* 111, 16 *Am. Rep.* 18.

*Delaware.* — *Maguyer v. Hawthorn*, 2 *Harr.* (Del.) 71.

*Florida.* — *Robinson v. Hartridge*, 13 *Fla.* 501.

*Georgia.* — *Columbus v. Howard*, 6 *Ga.* 219; *Yeldell v. Shinholster*, 15 *Ga.* 189; *Phillips v. Brigham*, 26 *Ga.* 617, 71 *Am. Dec.* 227; *Seago v. Pomeroy*, 46 *Ga.* 227; *Homes v. Langston*, 110 *Ga.* 861.

*Illinois.* — *Lahner v. Hertzog*, 23 *Ill. App.* 308; *Follett v. Edwards*, 30 *Ill. App.* 386; *Brownback v. Vandever*, 40 *Ill. App.* 149.

*Indiana.* — *Moore v. Baker*, 4 *Ind. App.* 115; 51 *Am. St. Rep.* 203; *Dale v. Jones*, 15 *Ind. App.* 420; *Nickey v. Zonker*, 22 *Ind. App.* 211.

*Iowa.* — *Haas v. Damon*, 9 *Iowa* 589.

*Kansas.* — *Rainer v. Cooper*, 44 *Kan.* 762; *Lafeyth v. Emporia Nat. Bank*, 53 *Kan.* 51.

*Kentucky.* — *Coffey v. Wilkerson*, 1 *Met.* (Ky.) 101; *Kelly v. White*, 17 *B. Mon.* (Ky.) 131.

*Maine.* — *Ripley v. Dolbier*, 18 *Me.* 382; *Higgins v. Brown*, 20 *Me.* 332, 37 *Am. Dec.* 54; *White v. Wall*, 40 *Me.* 574; *Webber v. Davis*,

the seller makes the sale under the belief that the property is his own and in ignorance of the true owner's rights,<sup>1</sup> and no demand is necessary before institution of suit.<sup>2</sup> This rule applies not only to an absolute sale, but also

44 Me. 147, 69 Am. Dec. 87; *Morton v. Gloster*, 46 Me. 520.

*Maryland*. — *Thomson v. Gortner*, 73 Md. 474.

*Massachusetts*. — *Simpson v. Carleton*, 1 Allen (Mass.) 109, 79 Am. Dec. 707; *Neale v. Weare Bank*, 3 Allen (Mass.) 202; *Carpenter v. Hale*, 8 Gray (Mass.) 157; *Lucas v. Trumbull*, 15 Gray (Mass.) 306; *Homer v. Twing*, 3 Pick. (Mass.) 492; *Rotch v. Hawes*, 12 Pick. (Mass.) 136, 22 Am. Dec. 414; *Brightman v. Eddy*, 97 Mass. 478; *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30; *Baker v. Lathrop*, 155 Mass. 376; *Bacon v. Hooker*, 173 Mass. 554; *Phelps v. Hendrick*, 105 Mass. 106.

*Michigan*. — *Carroll v. McCleary*, 19 Mich. 93; *Johnston v. Whittemore*, 27 Mich. 463; *Fisher v. Kyle*, 27 Mich. 454; *Eslow v. Mitchell*, 26 Mich. 500.

*Minnesota*. — *Jeserum v. Kent*, 45 Minn. 222.

*Missouri*. — *Bircher v. Parker*, 43 Mo. 443; *Hamlin v. Carruthers*, 19 Mo. App. 567; *Thomas Mfg. Co. v. Huff*, 62 Mo. App. 124.

*Nebraska*. — *Omaha Auction, etc., Co. v. Rogers*, 35 Neb. 61; *Imhoff v. Richards*, 48 Neb. 590; *Pecha v. Kastl*, 64 Neb. 380; *Gore v. Izer*, 64 Neb. 843.

*New Hampshire*. — *White v. Phelps*, 12 N. H. 382; *Woodman v. Hubbard*, 25 N. H. 67, 57 Am. Dec. 310; *Fisk v. Ewen*, 46 N. H. 173.

*New York*. — *Huelet v. Reynolds*, (Supm. Ct. Spec. T.) 1 Abb. Pr. N. S. (N. Y.) 27; *Koon v. Brinkerhoff*, 39 Hun (N. Y.) 130; *Petrie v. Williams*, 68 Hun (N. Y.) 589; *Van Houten v. Pye*, 87 Hun (N. Y.) 19; *Storm v. Livingston*, 6 Johns. (N. Y.) 44; *Murray v. Burling*, 10 Johns. (N. Y.) 172; *Kennedy v. Strong*, 14 Johns. (N. Y.) 128; *Chandler v. Belden*, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193; *Campbell v. Parker*, 9 Bosw. (N. Y.) 322; *Jaroslauski v. Sanderson*, 1 Daly (N. Y.) 232; *Fish v. Ferris*, 5 Duer (N. Y.) 49; *Hope v. Lawrence*, 1 Hun (N. Y.) 317; *Vincent v. Conklin*, 1 E. D. Smith (N. Y.) 203; *Disbrow v. Tenbroeck*, 4 E. D. Smith (N. Y.) 397; *Everett v. Coffin*, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; *Bates v. Conkling*, 10 Wend. (N. Y.) 389; *Covell v. Hill*, 6 N. Y. 374; *Boyce v. Brockway*, 31 N. Y. 490; *Beach v. Raritan, etc., R. Co.*, 37 N. Y. 457; *Strong v. National Mechanical's Banking Assoc.*, 45 N. Y. 718; *Kleinberger v. Brown*, 58 N. Y. Super. Ct. 4; *Rodney Hunt Mach. Co. v. Stewart*, 57 Hun (N. Y.) 545; *McClellan v. Wyatt*, (N. Y. City Ct. Gen. T.) 26 Abb. N. Cas. (N. Y.) 144; *Gregory v. Fichtner*, (C. Pl. Gen. T.) 27 Abb. N. Cas. (N. Y.) 86, 21 Civ. Pro. (N. Y.) 1; *Kruse v. Seeger, etc., Co.*, (N. Y. City Ct. Gen. T.) 15 N. Y. Supp. 835; *Killick v. Hooker*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 485; *Petrie v. Williams*, 68 Hun (N. Y.) 589; *Tobin v. Kirk*, 73 Hun (N. Y.) 229; *Caywood v. Van Ness*, 74 Hun (N. Y.) 28; *Sage v. Shepard, etc., Lumber Co.*, 4 N. Y. App. Div. 290; *Ranous v. Hughes*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 46; *Boyer v. Fenn*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 128;

*Mahaney v. Walsh*, 16 N. Y. App. Div. 601; *Goodsell Fruit Co. v. Greco*, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 403; *Pease Piano Co. v. Waterloo Organ Co.*, 36 N. Y. App. Div. 627; *Keiner v. Folsom*, (Supm. Ct. App. T.) 79 N. Y. Supp. 1099; *Ogden v. Lathrop*, 35 N. Y. Super. Ct. 73.

*North Carolina*. — *Carraway v. Burbank*, 1 Dev. L. (12 N. Car.) 306; *Lee v. McKay*, 3 Ired. L. (25 N. Car.) 29; *Asher v. Reizenstein*, 105 N. Car. 213; *Brown v. Miller*, 108 N. Car. 395.

*Oregon*. — *Goltra v. Penland*, 42 Oregon 18. *Pennsylvania*. — *Etter v. Bailey*, 8 Pa. St. 442; *Croft v. Jennings*, 173 Pa. St. 216.

*South Carolina*. — *Robertson v. Wurdeman*, *Dudley L.* (S. Car.) 234; *Guerry v. Kerton*, 2 Rich. L. (S. Car.) 507; *Harris v. Saunders*, 2 Strobb. Eq. (S. Car.) 370; *Girardeau v. Southern Express Co.*, 48 S. Car. 421; *Rakestraw v. Floyd*, 54 S. Car. 288.

*South Dakota*. — *La Crosse Boot, etc., Mfg. Co. v. Mons Anderson Co.*, 13 S. Dak. 301.

*Tennessee*. — *Garvin v. Luttrell*, 10 Humph. (Tenn.) 16; *Parker v. Thompson*, 5 Sneed (Tenn.) 349; *M'Neill v. Brooks*, 1 Yerg. (Tenn.) 73.

*Texas*. — *Robertson v. Hunt*, 77 Tex. 321.

*Vermont*. — *Buck v. Kent*, 3 Vt. 99, 21 Am. Dec. 576; *Downer v. Rowell*, 22 Vt. 347; *Courtis v. Cane*, 32 Vt. 232, 76 Am. Dec. 174; *Morrill v. Moulton*, 40 Vt. 242; *Johnson v. Powers*, 40 Vt. 611; *Roberts v. Hunt*, 61 Vt. 612; *Smith v. Wood*, 63 Vt. 534.

*Washington*. — *Kahaley v. Haley*, 15 Wash. 678.

*Wisconsin*. — *Ainsworth v. Bowen*, 9 Wis. 348; *Cauillard v. Johnson*, 24 Wis. 533; *Boldewahn v. Schmidt*, 89 Wis. 444; *Owen v. Long*, 97 Wis. 78; *Lyle v. McCormick Harvesting Mach. Co.*, 108 Wis. 81.

Where a person wrongfully sold a chiffonier in which were locked up various articles belonging to the owner, he was held to be liable for the conversion of those articles irrespective of the question whether he knew that they were there. *Jesurum v. Kent*, 45 Minn. 222.

**Wrongful Sale by Municipality.** — *Electric Power Co. v. New York*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 48.

**1. Good Faith.** — *Lahner v. Hertzog*, 23 Ill. App. 308; *Lafeyth v. Emporia Nat. Bank*, 53 Kan. 51; *Imhoff v. Richards*, 48 Neb. 590; *Gore v. Izer*, 64 Neb. 843; *Van Houten v. Pye*, 87 Hun (N. Y.) 19; *Sage v. Shepard, etc., Lumber Co.*, 4 N. Y. App. Div. 290; *Lee v. McKay*, 3 Ired. L. (25 N. Car.) 29; *Harris v. Saunders*, 2 Strobb. Eq. (S. Car.) 370; *Morrill v. Moulton*, 40 Vt. 242.

**2. No Demand Necessary.** — *Kyle v. Gray*, 11 Ala. 233; *May v. O'Neal*, 125 Ala. 620; *Simpson v. Carleton*, 1 Allen (Mass.) 109, 79 Am. Dec. 707; *Baker v. Lathrop*, 155 Mass. 376; *Gore v. Izer*, 64 Neb. 843; *Fisk v. Ewen*, 46 N. H. 173; *Everett v. Coffin*, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; *Ranous v. Hughes*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 46; *Girardeau*

to any disposition of the chattel purporting to create therein an interest adverse to that of the true owner,<sup>1</sup> such as a pledge<sup>2</sup> or chattel mortgage.<sup>3</sup> The rule applies fully to wrongful sales of chattels by public officers,<sup>4</sup> such as a sale on execution by a sheriff or constable<sup>5</sup> or a sale by a tax collector,<sup>6</sup> and also to a wrongful sale or disposition of goods by an agent.<sup>7</sup>

**Participation in Sale.**—Where one sells property of his own stored with a warehouseman, the fact that the warehouseman, on the order of the seller, delivers to the purchaser property of a third person does not render the seller guilty of the conversion of such property;<sup>8</sup> and the fact that one stands by while another wrongfully sells property, and fails to disclose the latter's want of title, of which he is aware, does not render him liable for a conversion to the true owner.<sup>9</sup>

*v. Southern Express Co.*, 48 S. Car. 421; *Courtis v. Cane*, 32 Vt. 232, 76 Am. Dec. 174.

**Sale by Purchaser of Stolen Goods.**—No demand on an innocent purchaser for the possession of stolen goods is necessary after he has sold them to another person, for the reason that such sale is an actual conversion, and in such cases a demand is not necessary. *Courtis v. Cane*, 32 Vt. 232, 76 Am. Dec. 174.

1. *Gentry v. Madden*, 3 Ark. 127.

**Disposition by Will.**—*Moran v. Morrill*, 78 N. Y. App. Div. 440.

2. **Pledge**—*Dakota*.—*Knapp v. Sioux Falls Nat. Bank*, 5 Dak. 378.

*Georgia*.—*Loveless v. Fowler*, 79 Ga. 134, 11 Am. St. Rep. 407.

*Kentucky*.—*Newcomb-Buchanan Co. v. Baskett*, 14 Bush (Ky.) 658.

*Maine*.—*Hotchkiss v. Hunt*, 49 Me. 213.

*Massachusetts*.—*Carpenter v. Hale*, 8 Gray (Mass.) 157; *Com. v. Tenney*, 97 Mass. 50; *Shea v. Milford*, 145 Mass. 525.

*New York*.—*Keutgen v. Parks*, 2 Sandf. (N. Y.) 60; *Bryan v. Baldwin*, 52 N. Y. 232; *Lawrence v. Maxwell*, 53 N. Y. 19; *Muller v. Ryan*, (N. Y. City Ct. Gen. T.) 2 N. Y. Supp. 736; *Matter of Pierson*, 19 N. Y. App. Div. 478.

*Tennessee*.—*Stump v. Roberts*, *Cooke* (Tenn.) 352.

*Vermont*.—*Thrall v. Lathrop*, 30 Vt. 307, 73 Am. Dec. 306.

3. **Mortgage**—*Halsey v. Bird*, 99 Fed. Rep. 525, 39 C. C. A. 638; *Kitchell v. Vanadar*, 1 Blackf. (Ind.) 356, 12 Am. Dec. 249; *Richardson v. Ashby*, 132 Mo. 238; *Rodney Hunt Mach. Co. v. Stewart*, 57 Hun (N. Y.) 545; *Douglas v. Carpenter*, 17 N. Y. App. Div. 329; *Thrall v. Lathrop*, 30 Vt. 307, 73 Am. Dec. 306.

4. **Sale by Public Officers.**—*Tripp v. Grouner*, 60 Ill. 474; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356, 25 Am. Dec. 396.

5. **Sheriff's Sales**—*England*.—*Aldred v. Constable*, 6 Q. B. 370, 51 E. C. L. 370.

*Canada*.—*Morrison v. Carrall*, 1 U. C. C. P. 226; *Snider v. Frontenac County*, 30 U. C. Q. B. 275; *Miller v. Weldon*, 13 N. Bruns. 188.

*Alabama*.—*Wright v. Spencer*, 1 Stew. (Ala.) 576, 18 Am. Dec. 76; *McConeghy v. McCaw*, 31 Ala. 447.

*Georgia*.—*Riley v. Martin*, 35 Ga. 136.

*Illinois*.—*Camp v. Unger*, 54 Ill. App. 653.

*Iowa*.—*Nutter v. Ricketts*, 6 Iowa 92; *Osborne v. Metcalf*, 112 Iowa 540.

*Kentucky*.—*Christopher v. Covington*, 2 B. Mon. (Ky.) 357.

*Massachusetts*.—*Pierce v. Benjamin*, 14 Pick. (Mass.) 356, 25 Am. Dec. 396.

*Michigan*.—*Scudder v. Anderson*, 54 Mich. 122.

*Missouri*.—*Burk v. Baxter*, 3 Mo. 207.

*New Hampshire*.—*Perkins v. Thompson*, 3 N. H. 144; *McFarland v. Farmer*, 42 N. H. 386; *Gilman v. Hill*, 36 N. H. 311.

*New York*.—*Brainerd v. Dunning*, 30 N. Y. 211.

6. **Tax Sale.**—*Thompson v. Currier*, 24 N. H. 237.

7. **Sale by Agents**—*United States*.—*Chew v. Louchheim*, 80 Fed. Rep. 500, 39 U. S. App. 619.

*Indiana*.—*Lindley v. Downing*, 2 Ind. 418.

*Iowa*.—*M. M. Walker Co. v. Dubuque Fruit, etc., Co.*, 106 Iowa 245.

*Kentucky*.—*Marriam v. Yeager*, 2 B. Mon. (Ky.) 339.

*Maine*.—*Melody v. Chandler*, 12 Me. 282; *Crocker v. Gullifer*, 44 Me. 491, 69 Am. Dec. 118; *Badger v. Hatch*, 71 Me. 562.

*Massachusetts*.—*Hill v. Freeman*, 3 Cush. (Mass.) 257.

*New York*.—*Laverty v. Snethen*, 68 N. Y. 526, 23 Am. Rep. 184; *Comley v. Dazian*, 114 N. Y. 166.

*Pennsylvania*.—*Etter v. Bailey*, 8 Pa. St. 442.

*Vermont*.—*Grant v. King*, 14 Vt. 367.

An agent authorized to invest funds in the name of his principal is liable for conversion if he invests in his own name. *Farrand v. Hurlburt*, 7 Minn. 477.

In *McMorris v. Simpson*, 21 Wend. (N. Y.) 610, *Bronson, J.*, said: "That action [trover] may be maintained whenever the agent has wrongfully converted the property of his principal to his own use; and the fact of conversion may be made out by showing either a demand and refusal or that the agent has without necessity sold or otherwise disposed of the property contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own, and may be treated as a tortfeasor."

8. *Cobb v. Dows*, 9 Barb. (N. Y.) 230.

9. *Oxley v. Freeman*, 4 Dev. L. (15 N. Car.) 472. In this case *Daniel, J.*, said: "The owner, being present when the sale of his property is made by another, if he makes no objection, and fails to disclose his title, may rightfully be precluded from setting it up after-



**b. SALE BY OWNER OF SPECIAL PROPERTY IN CHATTEL.** — Where one having only a limited interest in chattels wrongfully sells them with intent to transfer the absolute property, he is guilty of a conversion, as, for example, where the mortgagor sells to the exclusion of the rights of the mortgagee,<sup>1</sup> or where a conditional vendee makes such a sale.<sup>2</sup> So a wrongful sale by a conditional vendor,<sup>3</sup> a mortgagee,<sup>4</sup> a bailee,<sup>5</sup> or a pledgee<sup>6</sup> will, as against the

wards. But the law does not go farther, and from that circumstance declare that he makes the sale, particularly if that sale is to be held a tortious and illegal act, as relating to the rights of third and absent persons."

**1. Sale by Mortgagor.** — *Ashmead v. Kellogg*, 23 Conn. 70; *White v. Phelps*, 12 N. H. 382; *Cone v. Ivinston*, 4 Wyo. 203.

**2. Sale by Conditional Vendee.** — *Johnston v. Whittemore*, 27 Mich. 463; *Bryant v. Kenyon*, 123 Mich. 151; *Rodney Hunt Mach. Co. v. Stewart*, 57 Hun (N. Y.) 545.

**3. Sale by Conditional Vendor.** — *Smith v. Wood*, 63 Vt. 534.

**4. Sale by Mortgagee** — *Iowa*. — *Colby v. W. W. Kimball Co.*, 99 Iowa 321; *Johnston v. Robuck*, 104 Iowa 523; *Gravel v. Clough*, 81 Iowa 272; *Frick v. Kabaker*, 116 Iowa 494.

*Kansas*. — *Burton v. Randall*, 4 Kan. App. 593.

*Massachusetts*. — *Spaulding v. Barnes*, 4 Gray (Mass.) 330.

*Michigan*. — *Eslow v. Mitchell*, 26 Mich. 500; *Brink v. Freoff*, 40 Mich. 610, 44 Mich. 69; *Iler v. Baker*, 82 Mich. 226; *Schmittiel v. Moore*, 101 Mich. 590. See also *Brown v. Mynard*, 107 Mich. 401.

*Nebraska*. — *Omaha Auction, etc., Co. v. Rogers*, 35 Neb. 61.

*New York*. — *Rodney Hunt Mach. Co. v. Stewart*, 57 Hun (N. Y.) 545.

*North Carolina*. — *Barbee v. Scoggins*, 121 N. Car. 135.

*Wisconsin*. — *Harder v. Hosp*, 69 Wis. 288; *Rice v. Kahn*, 70 Wis. 323.

**5. Sale by Bailee** — *England*. — *Fenn v. Bittleston*, 7 Exch. 152, 21 L. J. Exch. 41; *Loeschman v. Machin*, 2 Stark. 311, 3 E. C. L. 423.

*Canada*. — *Benedict v. Ker*, 29 U. C. C. P. 410; *In re Williams*, 31 U. C. Q. B. 143.

*Indiana*. — *Jordan v. Shireman*, 28 Ind. 136.

*Minnesota*. — *Jesurun v. Kent*, 45 Minn. 222.

*Missouri*. — *Knipper v. Blumenthal*, 107 Mo. 665.

*New Hampshire*. — *Sanborn v. Colman*, 6 N. H. 14, 23 Am. Dec. 703.

*New York*. — *Spencer v. Blackman*, 9 Wend. (N. Y.) 167; *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; *Kruse v. Seeger, etc., Co.*, (C. Pl. Gen. T.) 16 N. Y. Supp. 529, affirming (N. Y. City Ct. Gen. T.) 15 N. Y. Supp. 825.

*Ohio*. — *Roland v. Gundy*, 5 Ohio 202.

*South Carolina*. — *Girardeau v. Southern Express Co.*, 48 S. Car. 421.

*Tennessee*. — *Stump v. Roberts*, *Cooke* (Tenn.) 352; *Bell v. Cummings*, 3 Sneed (Tenn.) 275.

*Texas*. — *Hagood v. Elson*, 21 Tex. 506.

*Vermont*. — *Swift v. Moseley*, 10 Vt. 208, 33 Am. Dec. 197; *Grant v. King*, 14 Vt. 367; *Turner v. Waldo*, 40 Vt. 51. Compare *Walker v. McNaughton*, 16 Vt. 388.

**Attempt to Sell Is Conversion.** — *Follett v. Edwards*, 30 Ill. App. 386.

**Animal Accidentally Killed in Transit — Sale of Carcass.** — One of the defendant's cattle sent over the plaintiff's line from Ireland to England having been accidentally killed in the sea transit, without any fault of the plaintiff, and the carcass not being claimed by the defendant's agent, who was present at the arrival of the steamer, the plaintiff sold the carcass to the best advantage. It was held that this did not amount to a conversion. *London, etc., R. Co. v. Hughes*, 26 L. R. Ir. 165.

**6. Sale by Pledgee** — *England*. — *Johnson v. Stear*, 15 C. B. N. S. 330, 109 E. C. L. 330, 10 Jur. N. S. 99; *Pigot v. Cubley*, 15 C. B. N. S. 701, 109 E. C. L. 701, 10 Jur. N. S. 318; *Halliday v. Holgate*, L. R. 3 Exch. 299, 37 L. J. Exch. 174.

*Alabama*. — *Nelson v. Owen*, 113 Ala. 372.

*California*. — *Haber v. Brown*, 101 Cal. 445.

*Colorado*. — *E. F. Hallack Lumber, etc., Mfg. Co. v. Gray*, 19 Colo. 149; *Moffat v. Williams*, 5 Colo. App. 184.

*Georgia*. — *Waring v. Gaskill*, 95 Ga. 731; *Harrell v. Citizens Banking Co.*, 111 Ga. 846.

*Iowa*. — *Greenwald v. Metcalf*, 28 Iowa 363.

*Louisiana*. — *Romero v. Newman*, 50 La. Ann. 80.

*Massachusetts*. — *Hancock v. Franklin Ins. Co.*, 114 Mass. 155; *Stevens v. Wiley*, 165 Mass. 402.

*Michigan*. — *Allen v. Dubois*, 117 Mich. 115, 72 Am. St. Rep. 557; *Feige v. Burt*, 118 Mich. 243, 74 Am. St. Rep. 390.

*Minnesota*. — *Upham v. Barbour*, 65 Minn. 364.

*Missouri*. — *Greer v. Lafayette County Bank*, 128 Mo. 559; *Schaaf v. Fries*, 90 Mo. App. 111.

*Montana*. — *Stevens v. Hartley*, 2 Mont. 504.

*Nebraska*. — *Cortelyou v. Hiatt*, 36 Neb. 584; *Woodworth v. Hascall*, 59 Neb. 124.

*New Hampshire*. — *White Mountains R. Co. v. Bay State Iron Co.*, 50 N. H. 57.

*New York*. — *Campbell v. Parker*, 9 Bosw. (N. Y.) 322; *Hope v. Lawrence*, 1 Hun (N. Y.) 317; *Bryan v. Baldwin*, 52 N. Y. 232; *Lawrence v. Maxwell*, 53 N. Y. 19; *Sheridan v. Presas*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 180; *Barber v. Hathaway*, 47 N. Y. App. Div. 165; *Usher v. Van Vranken*, 48 N. Y. App. Div. 413.

*Ohio*. — *Leighton v. Burkham*, 4 Ohio Cir. Dec. 692, 7 Ohio Cir. Ct. 487.

*Pennsylvania*. — *Blood v. Erie Dime Sav., etc., Co.*, 164 Pa. St. 95.

*South Carolina*. — *Reynolds v. White*, 13 S. Car. 5, 36 Am. Rep. 678.

*Utah*. — *Walley v. Deseret Nat. Bank*, 14 Utah 305.

*Washington*. — *Howard v. Seattle Nat. Bank*, 10 Wash. 280.

vendee, mortgagor, or pledgor, constitute a conversion. But a person having merely a limited interest in a chattel may sell such interest without being guilty of a conversion.<sup>1</sup>

*c. PAPER SALE WITHOUT TRANSFER OF POSSESSION.* — A mere paper sale of a chattel without depriving the owner of possession is not sufficient to constitute a conversion.<sup>2</sup>

*d. RECEIVING PROCEEDS OF SALE.* — One who merely receives from another, who has wrongfully sold the property of a third person, the proceeds of such sale is not guilty of conversion,<sup>3</sup> though such proceeds are received with knowledge that they are the result of such wrongful sale;<sup>4</sup> but if the person receiving the proceeds of the wrongful sale instigates and participates in the sale, he is liable for the conversion equally with the seller.<sup>5</sup>

*e. SALE WITH CONSENT OF OWNER.* — A sale made with the consent or by the authority of the owner cannot be treated by him as a conversion.<sup>6</sup> Thus, an agent selling by the authority of his principal is not liable to his principal for a conversion<sup>7</sup> though he sells for a lower price than that authorized,<sup>8</sup> or though he takes insufficient security in a case where he was authorized to sell on credit taking sufficient security.<sup>9</sup> So the mere failure of an agent,

An Agreement to Sell executed prior to the time when a right to sell accrues is not a conversion. *Taft v. Church*, 162 Mass. 527.

**Surrender to Insurance Company of Policy Pledged.** — *Toplitz v. Bauer*, 161 N. Y. 325, affirming 38 N. Y. App. Div. 623; *Bailey v. American Deposit, etc., Co.*, 165 N. Y. 672, affirming 52 N. Y. App. Div. 402.

1. *Comfort v. Creelman*, 52 Minn. 280.

2. **Paper Sale Without Transfer of Possession.** — *Traylor v. Horrall*, 4 Blackf. (Ind.) 317; *Davis v. Buffum*, 51 Me. 160; *Dietus v. Fuss*, 8 Md. 148; *Heighes v. Dollarville Lumber Co.*, 113 Mich. 518; *Burnside v. Twitchell*, 43 N. H. 390; *Thorp v. Robbins*, 68 Vt. 53; *Smith v. White*, 18 N. Bruns. 443. Compare *Webber v. Davis*, 44 Me. 147, 69 Am. Dec. 87.

Thus, the mere giving of a deed to land, the lessee continuing in quiet possession, is not a conversion of fixtures which the lessee has the right to remove during his term. *Burnside v. Twitchell*, 43 N. H. 390.

In *Davis v. Buffum*, 51 Me. 160, the facts were that the defendant leased his sawmill to one M., who, after putting in the machinery which was the subject-matter of the action, assigned the lease and sold the machinery to the plaintiffs, who thereupon entered the mill and occupied it. During their occupation the defendant conveyed the mill, together with "the privileges and appurtenances thereto belonging," by deed, to third persons, to whom the plaintiff attorned, paying to them rent during the residue of the term. It was held that the giving of the deed by the defendant did not of itself constitute a conversion. See also *Horak v. Thompson*, (Iowa 1900) 83 N. W. Rep. 889.

3. **Receiving Proceeds of Sale.** — *Polley v. Lenox Iron Works*, 2 Allen (Mass.) 182; *Blacklock v. Joseph Bowling Co.*, (Tex. Civ. App. 1898) 44 S. W. Rep. 305; *Pierce v. O'Keefe*, 11 Wis. 180.

4. *Polley v. Lenox Iron Works*, 2 Allen (Mass.) 182.

5. *Hill v. White*, 46 N. Y. App. Div. 360; *Perkins v. McCullough*, 36 Oregon 146; *Cone v. Ivins*, 4 Wyo. 203.

6. **Sale with Consent of Owner.** — *Robison v. Hardy*, 22 Ill. App. 512; *Chase v. Blaisdell*, 4 Minn. 90; *Mann v. Lamb*, 83 Minn. 14; *McClintock v. Central Bank*, 120 Mo. 127; *Bentley v. Vette*, 1 Mo. App. Rep. 379; *Gruard v. O'Reilly*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 710; *Van Dusen v. Arnold*, 5 S. Dak. 588; *McLachlan v. Kennedy*, 21 Nova Scotia 271.

**Sale to Owner.** — Thus if A sold to B sheep that B had previously leased to A, and at the time of the sale B knew that they were the same sheep he had leased to A, there is no conversion of the sheep so sold, and B cannot maintain trover against A. *Downer v. Rowell*, 24 Vt. 343.

7. *Herron v. Hughes*, 25 Cal. 555; *Clark v. Whitaker*, 18 Conn. 543, 46 Am. Dec. 337; *Wood v. Worthington*, 4 J. J. Marsh. (Ky.) 174; *Dickinson v. Dudley*, 17 Hun (N. Y.) 569; *McMorris v. Simpson*, 21 Wend. (N. Y.) 614; *Standard Fertilizer Co. v. Van Valkenburgh*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 559; *Stoneman v. Lyons*, 24 R. I. 539; *Hughes v. Sutherland*, 3 N. Bruns. 574.

8. **Sale for Lower Price than Authorized.** — *Dufresne v. Hutchinson*, 3 Taunt. 117; *Moore v. McKibbin*, 33 Barb. (N. Y.) 246; *Cairnes v. Bleecker*, 12 Johns. (N. Y.) 300; *Sarjeant v. Blunt*, 16 Johns. (N. Y.) 74; *McMorris v. Simpson*, 21 Wend. (N. Y.) 610. See, however, *Priestman v. Kendrick*, 3 U. C. Q. B. O. S. 66.

In *Sarjeant v. Blunt*, 16 Johns. (N. Y.) 74, an agent who, under authority to sell, sold a chronometer deposited with him for three hundred dollars, when told not to sell it for less than five hundred dollars, was held to be guilty of a breach of trust, not conversion. *Spencer, J.*, said: "If every departure from instructions is to expose a party to an action of trover, I should consider it as introducing a new rule which might operate injuriously."

9. **Failure to Take Sufficient Security.** — In *Cairnes v. Bleecker*, 12 Johns. (N. Y.) 300, where an agent authorized to deliver goods to a third person on receiving sufficient security for the amount took security which was inadequate, it was held that trover did not lie

authorized to sell and collect, to account for the proceeds received is not a conversion.<sup>1</sup> But if the agent sells after the time at which he is instructed to sell,<sup>2</sup> or sells at a different place,<sup>3</sup> or sells the property as belonging to another person than his principal,<sup>4</sup> or sells on credit where his authority is to sell for cash,<sup>5</sup> or sells without authority through a subagent, thereby improperly delegating his power,<sup>6</sup> or barter or exchanges the goods where his authority is merely to sell,<sup>7</sup> or pledges the chattels,<sup>8</sup> he is liable in trover for the conversion.

*f. MISDELIVERY OF CHATTEL BY BAILEE.* — A bailee of a chattel is required to deliver the chattel to his bailor, and is guilty of a conversion by wrongful disposition if he makes a misdelivery to a third person.<sup>9</sup> But if the

against the agent, but that the proper remedy was an action on the case.

**1. Failure to Account for Proceeds of Sale.** — *Gilbert v. Walker*, 64 Conn. 390; *Lewis v. Metcalf*, 53 Kan. 217; *Floyd v. Day*, 3 Mass. 405, 3 Am. Dec. 171; *Greentree v. Rosenstock*, 61 N. Y. 583; *Stoneman v. Van Vechten*, 46 N. Y. App. Div. 370; *Vandelle v. Rohan*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 239; *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184.

In *Palmer v. Jarman*, 2 M. & W. 282, it was held that where one authorized by the holder of a bill of exchange to get it discounted and to apply the proceeds in a particular way does get it discounted, but misapplies part of the proceeds, he cannot be sued in trover, but must be sued for money had and received.

**2. Sale After Time.** — *Scott v. Rogers*, 31 N. Y. 676.

**3. Sale at Wrong Place.** — *Galbreath v. Epperson*, (Tenn. 1886) 1 S. W. Rep. 157.

**4. Covell v. Hill**, 6 N. Y. 374.

**5. Sale on Credit.** — *Hobbs v. Chicago Packing, etc., Co.*, 98 Ga. 576, 58 Am. St. Rep. 320.

**6. Sale through Subagent.** — *Campbell v. Reeves*, 3 Head (Tenn.) 226. See also *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184. *Compare Bromley v. Coxwell*, 2 B. & P. 438.

**7. Barter or Exchange.** — *Ainsworth v. Parrillo*, 13 Ala. 460; *Haas v. Damon*, 9 Iowa 589. **8. Pledge.** — *Kelly v. Smith*, 1 Blatchf. (U. S.) 290; *Halsey v. Bird*, 99 Fed. Rep. 525, 39 C. C. A. 638; *Nichols v. Gage*, 10 Oregon 82.

**9. Misdelivery of Chattel by Bailee — England.** — *Devereux v. Barclay*, 2 B. & Ald. 702; *Stephenson v. Hart*, 4 Bing. 476, 1 M. & P. 357; *Mills v. Ball*, 2 B. & P. 457; *Crouch v. Great Northern R. Co.*, 11 Exch. 756; *Youl v. Harbottle*, Peake N. P. (ed. 1795) 49; *Lubbock v. Inglis*, 1 Stark. 104, 2 E. C. L. 48; *Hartop v. Hoare*, 2 Stra. 1187; *Syeds v. Hay*, 4 T. R. 260. See also *Glynn v. East*, etc., *Dock Co.*, 7 App. Cas. 591, 52 L. J. Q. B. 146, 47 L. T. N. S. 309.

*Canada.* — *Leslie v. Canada Cent. R. Co.*, 44 U. C. Q. B. 21.

*United States.* — *Rosenfield v. Express Co.*, 1 Woods (U. S.) 136.

*Alabama.* — *Bullard v. Young*, 3 Stew. (Ala.) 46; *Louisville, etc., R. Co. v. Barkhouse*, 100 Ala. 543; *Alabama, etc., Rivers R. Co. v. Kidd*, 35 Ala. 209.

*Arkansas.* — *Fagan v. North Missouri Ins. Co.*, 31 Ark. 54; *Wear v. Gleason*, 52 Ark. 364, 20 Am. St. Rep. 186.

*California.* — *Adams v. Blankenstein*, 2 Cal. 413, 56 Am. Dec. 350; *Hanna v. Flint*, 14 Cal. 73; *Newlove v. Pond*, 130 Cal. 342.

*Illinois.* — *Illinois Cent. R. Co. v. Parks*, 54 Ill. 294.

*Kentucky.* — *Louisville, etc., R. Co. v. Lawson*, 88 Ky. 496.

*Maryland.* — *Barton v. White*, 1 Har. & J. (Md.) 579; *Hay v. Conner*, 2 Har. & J. (Md.) 347.

*Massachusetts.* — *Claffin v. Boston, etc., R. Co.*, 7 Allen (Mass.) 341; *Gilmore v. Newton*, 9 Allen (Mass.) 171, 85 Am. Dec. 749; *Stanley v. Gaylord*, 1 Cush. (Mass.) 546, 48 Am. Dec. 643; *Lichtenhein v. Boston, etc., R. Co.*, 11 Cush. (Mass.) 70; *Baker v. Fuller*, 21 Pick. (Mass.) 318; *Jenkins v. Bacon*, 111 Mass. 373, 15 Am. Rep. 33.

*Michigan.* — *Gibbons v. Farwell*, 63 Mich. 344, 6 Am. St. Rep. 301.

*Minnesota.* — *Coleman v. Pearce*, 26 Minn. 123.

*Missouri.* — *Smith v. Bell*, 9 Mo. 873; *Dufour v. Mephram*, 31 Mo. 577; *Loeffel v. Pohlman*, 47 Mo. App. 574.

*New Hampshire.* — *Doty v. Hawkins*, 6 N. H. 247, 25 Am. Dec. 459; *Hyde v. Noble*, 13 N. H. 494, 38 Am. Dec. 508; *Lovejoy v. Jones*, 30 N. H. 164; *Cooper v. Newman*, 45 N. H. 339; *Cheshire R. Co. v. Foster*, 51 N. H. 491.

*New York.* — *Willard v. Bridge*, 4 Barb. (N. Y.) 361; *Esmay v. Fanning*, 9 Barb. (N. Y.) 176; *Lockwood v. Bull*, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539; *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; *Bush v. Romer*, 2 Thomp. & C. (N. Y.) 597; *Compton v. Shaw*, 3 Thomp. & C. (N. Y.) 761; *Nauman v. Caldwell*, 2 Sweeny (N. Y.) 212; *Packard v. Getman*, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166; *Everett v. Coffin*, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; *Powell v. Myers*, 26 Wend. (N. Y.) 591; *Ostrander v. Brown*, 15 Johns. (N. Y.) 39, 8 Am. Dec. 211; *Boyce v. Brockway*, 31 N. Y. 490; *Guillaume v. Hamburg*, etc., *Packet Co.*, 42 N. Y. 212, 1 Am. Rep. 512; *Viner v. New York, etc., Steamship Co.*, 50 N. Y. 23; *Fulton v. Lydecker*, (N. Y. City Ct. Gen. T.) 17 N. Y. Supp. 451; *Pashinska v. Selt*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 665; *Markoe v. Tiffany*, 26 N. Y. App. Div. 95; *Security Trust Co. v. Wells, etc., Co. Express*, 81 N. Y. App. Div. 426.

*North Dakota.* — *Willard v. Monarch Elevator Co.*, 10 N. Dak. 400.

*Ohio.* — *Gaff v. O'Neil*, 2 Cinc. Super. Ct. 246; *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489, 34 Am. St. Rep. 579.



chattel is stolen or forcibly taken from the bailee by a third person, against the bailee's consent, this is not a misdelivery so as to constitute a conversion by him.<sup>1</sup>

**15. Conversion by Purchase.** — One who, though acting in good faith, purchases a chattel from a person in possession but without title or authority or indicia of authority from the true owner to sell, acquires, as against the true owner, no title, and the latter may maintain trover for its conversion;<sup>2</sup> and if a person purchases chattels from one in possession but without title or

*Pennsylvania.* — *Clark v. Spence*, 10 Watts (Pa.) 335; *Goodman v. Merchants' Despatch Transp. Co.*, 3 Pa. Super. Ct. 282, 40 W. N. C. (Pa.) 232.

*Tennessee.* — *Erie Dispatch v. Johnson*, 87 Tenn. 490.

*Texas.* — *Nelson v. King*, 25 Tex. 655; *Missouri*, etc., *R. Co. v. Seley*, (Tex. Civ. App. 1903) 72 S. W. Rep. 89.

*Vermont.* — *Pratt v. Bryant*, 20 Vt. 333.

*West Virginia.* — *Arnold v. Kelly*, 4 W. Va. 646.

*Wisconsin.* — *Graves v. Smith*, 14 Wis. 5, 80 Am. Dec. 762.

Where the owner of goods on board a vessel directed the captain not to land them on the wharf against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use, under the idea that the wharfinger had a lien thereon for the wharfage fees, because the vessel was unloaded against the wharf, it was held that the owner might upon demand and refusal maintain trover against the captain, unless the latter could maintain the wharfinger's right. *Syeds v. Hay*, 4 T. R. 260.

**Misdelivery Caused by Negligence of Bailor.** — In *Morrison v. Buchanan*, 6 C. & P. 20, 25 E. C. L. 260, it was held that since it is the regular and usual course of business in commercial transactions to deliver a bill of exchange left for acceptance, to any person who mentions the amount and describes any private mark or number upon it, if the clerk of the party leaving it, by his conduct enables a stranger to discover the mark or number, in consequence of which the bill is delivered to him, the party leaving it cannot maintain trover for the bill against the party who so delivered it.

1. *Traylor v. Hughes*, 83 Ala. 617; *Barnhart v. Edwards*, (Cal. 1896) 47 Pac. Rep. 251; *Kearney v. Clutton*, 101 Mich. 106, 45 Am. St. Rep. 394; *Hett v. Boston*, etc., R. Co., 69 N. H. 139. See also *Decker v. Shelton*, 1 Thomp. & C. (N. Y.) 224.

2. **Conversion by Purchase — England.** — *Cooper v. Willomatt*, 1 C. B. 672, 50 E. C. L. 672, 9 Jur. 598; *Donald v. Suckling*, L. R. 1 Q. B. 585; *Wilkinson v. King*, 2 Cambp. 335; *Cuckson v. Winter*, 2 M. & R. 313, 17 E. C. L. 306; *Hoare v. Parker*, 2 T. R. 376; *Hurst v. Gwennap*, 2 Stark. 306, 3 E. C. L. 420; *Cundy v. Lindsay*, 3 App. Cas. 463; *Hartop v. Hoare*, 3 Atk. 49; *Halliday v. Holgate*, L. R. 3 Exch. 299; *Farrant v. —*, 3 Stark. 130, 14 E. C. L. 166; *Stephens v. Elwall*, 4 M. & S. 259; *Burroughes v. Bayne*, 5 H. & N. 296; *Maher v. Hubley*, 17 Nova Scotia 295; *Baldwin v. Cole*, 6 Mod. 212; *Hollins v. Fowler*, L. R. 7 H. L.

757; *Lee v. Bayes*, 18 C. B. 599, 86 E. C. L. 599.

*Canada.* — *Sibley v. Sibley*, 2 Nova Scotia Dec. 325; *Francis v. Turner*, 25 Can. Sup. Ct. 110; *Garden v. Neily*, 31 Nova Scotia 89.

*United States.* — *Talty v. Freedman's Sav. etc., Co.*, 93 U. S. 321; *Mann v. Arkansas Valley Land, etc., Co.*, 24 Fed. Rep. 261.

*Alabama.* — *Blackman v. Lehman*, 63 Ala. 547, 35 Am. Rep. 57.

*Arkansas.* — *Swantz v. Pillow*, 50 Ark. 300, 7 Am. St. Rep. 98.

*California.* — *Wright v. Solomon*, 19 Cal. 64, 79 Am. Dec. 196; *Herron v. Hughes*, 25 Cal. 555; *Sherwood v. Meadow Valley Min. Co.*, 50 Cal. 412; *Winter v. Belmont Min. Co.*, 53 Cal. 428; *Arnaz v. Gassen*, 73 Cal. 618; *Horton v. Jack*, 126 Cal. 521.

*Colorado.* — *Omaha, etc., Smelting, etc., Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185.

*Connecticut.* — *Williams v. Miller*, 16 Conn. 143; *Hart v. Carpenter*, 24 Conn. 427.

*Dakota.* — *Phillip Best Brewing Co. v. Pillsbury, etc., Elevator Co.*, 5 Dak. 62.

*Georgia.* — *Rhodes v. Dickinson*, 79 Ga. 724; *Harris Loan Co. v. Elliott, etc., Book Type-writer Co.*, 110 Ga. 302.

*Illinois.* — *Ogden v. Lucas*, 48 Ill. 492; *Sharp v. Parks*, 48 Ill. 511, 95 Am. Dec. 565; *St. Louis, etc., R. Co. v. Kaulbrumer*, 59 Ill. 152.

*Indiana.* — *Robinson v. Skipworth*, 23 Ind. 311; *Breckenridge v. McAfee*, 54 Ind. 141; *Jonsson v. Lindstrom*, 114 Ind. 152.

*Iowa.* — *Haas v. Damon*, 9 Iowa 589.

*Kentucky.* — *Newcomb-Buchanan Co. v. Baskett*, 14 Bush (Ky.) 658.

*Maine.* — *Parsons v. Webb*, 8 Me. 38, 22 Am. Dec. 220; *Galvin v. Bacon*, 11 Me. 28, 25 Am. Dec. 258; *Carr v. Farley*, 12 Me. 328; *Porter v. Foster*, 20 Me. 391, 37 Am. Dec. 59; *Miller v. Thompson*, 60 Me. 322; *Freeman v. Underwood*, 66 Me. 229; *Rodick v. Coburn*, 68 Me. 170.

*Massachusetts.* — *Gilmore v. Newton*, 9 Allen (Mass.) 171, 85 Am. Dec. 749; *Stanley v. Gaylord*, 1 Cush. (Mass.) 536, 48 Am. Dec. 643; *Nowell v. Pratt*, 5 Cush. (Mass.) 111; *Riley v. Boston Water Power Co.*, 11 Cush. (Mass.) 11; *Billings v. Tucker*, 6 Gray (Mass.) 368; *Chapman v. Cole*, 12 Gray (Mass.) 141, 71 Am. Dec. 739; *Dame v. Baldwin*, 8 Mass. 518; *Heckle v. Lurvey*, 101 Mass. 344, 3 Am. Rep. 366; *Hills v. Snell*, 104 Mass. 173, 6 Am. Rep. 216; *Scollans v. Rollins*, 179 Mass. 346, 88 Am. St. Rep. 386; *Rogers v. Dutton*, 182 Mass. 187.

*Michigan.* — *Mills v. Van Camp*, 41 Mich. 645; *Tuttle v. Campbell*, 74 Mich. 652, 16 Am. St. Rep. 652.

*Minnesota.* — *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491.

authority from the owner to sell, and sells them again,<sup>1</sup> or otherwise actually converts them to his own use,<sup>2</sup> as by refusing to return them to the owner on demand,<sup>3</sup> he is unquestionably liable for conversion though at the time of the purchase he was unaware of the rights of the true owner.

*Missouri.*—Wilson v. Crocket, 43 Mo. 216, 97 Am. Dec. 389.

*Nevada.*—Whitman Gold, etc., Min. Co. v. Tritle, 4 Nev. 494.

*New Hampshire.*—Sanborn v. Colman, 6 N. H. 14, 23 Am. Dec. 703; Sargent v. Gile, 8 N. H. 325; Hyde v. Noble, 13 N. H. 494, 38 Am. Dec. 508; Bailey v. Shaw, 24 N. H. 297, 55 Am. Dec. 241; Bailey v. Colby, 3; N. H. 29, 66 Am. Dec. 752; Cooper v. Newman, 45 N. H. 339.

*New York.*—Malcom v. Loveridge, 13 Barb. (N. Y.) 372; Tallman v. Turck, 26 Barb. (N. Y.) 167; Linnen v. Cruger, 40 Barb. (N. Y.) 633; Allen v. Bridges, 52 Barb. (N. Y.) 604; McNeil v. New York Tenth Nat. Bank, 55 Barb. (N. Y.) 59; Mowrey v. Walsh, 8 Cow. (N. Y.) 238; Roberts v. Dillon, 3 Daly (N. Y.) 50; Covill v. Hill, 4 Den. (N. Y.) 323; Roe v. Campbell, 40 Hun. (N. Y.) 49; Wheelwright v. Depeyster, 1 Johns. (N. Y.) 471, 3 Am. Dec. 345; Prescott v. De Forest, 16 Johns. (N. Y.) 159; Sarjeant v. Blunt, 16 Johns. (N. Y.) 74; Florence Sewing Mach. Co. v. Warford, 1 Sweeny (N. Y.) 433; Williams v. Merle, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604; Andrew v. Dieterich, 14 Wend. (N. Y.) 34; Saltus v. Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541; Scofield v. Kreiser, (N. Y. City Ct. Gen. T.) 3 N. Y. Supp. 803; Lovell v. Shea, 60 N. Y. Super. Ct. 412; Schmidt v. Garfield Nat. Bank, 64 Hun. (N. Y.) 298; Altman v. McCall, (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 804.

*North Carolina.*—Hoffman v. Kramer, 123 N. Car. 566.

*North Dakota.*—Fargo First Nat. Bank v. Minneapolis, etc., Elevator Co., 11 N. Dak. 280.

*Ohio.*—Roland v. Gundy, 5 Ohio 202.

*Pennsylvania.*—Biddle v. Bayard, 13 Pa. St. 150; Garrard v. Pittsburgh, etc., R. Co., 29 Pa. St. 154; Chamberlain v. Smith, 44 Pa. St. 431; Rice v. Yocum, 155 Pa. St. 538, 32 W. N. C. (Pa.) 356.

*South Carolina.*—Harris v. Saunders, 2 Strobh. Eq. (S. Car.) 370 note.

*Tennessee.*—Parham v. Riley, 4 Coldw. (Tenn.) 9; Wells v. Ragland, 1 Swan (Tenn.) 501; McDaniel v. Adams, 87 Tenn. 756.

*Texas.*—Dodd v. Arnold, 28 Tex. 97; Robertson v. Hunt, 77 Tex. 321.

*Vermont.*—Riford v. Montgomery, 7 Vt. 411; Heacock v. Walker, 1 Tyler (Vt.) 338; Grant v. King, 14 Vt. 367; Griffith v. Fowler, 18 Vt. 390; Buckmaster v. Mower, 21 Vt. 204; Thrall v. Lathrop, 30 Vt. 307, 73 Am. Dec. 306; Clark v. Wells, 45 Vt. 4, 12 Am. Rep. 187.

*Virginia.*—Wilson v. Rucker, 1 Call (Va.) 500; Williams v. Given, 6 Gratt. (Va.) 268.

*Washington.*—U. S. v. Kelly, 3 Wash. Ter. 421.

**1. Sale by Purchaser.**—*England.*—Hardman v. Booth, 1 H. & C. 803; Hollins v. Fowler, L. R. 7 H. L. 757; White v. Spettigue, 13 M. & M. 603.

*Connecticut.*—Terry v. Bamberger, 44 Conn. 558.

*Indiana.*—Robinson v. Skipworth, 23 Ind. 311; Shearer v. Evans, 89 Ind. 400.

*Maryland.*—Levi v. Booth, 58 Md. 305, 42 Am. Rep. 332.

*Massachusetts.*—Carter v. Kingman, 103 Mass. 517.

*Missouri.*—La Fayette County Bank v. Metcalf, 40 Mo. App. 494.

*Nebraska.*—Pacha v. Kastl, 64 Neb. 380.

*New York.*—Babcock v. Gill, 10 Johns. (N. Y.) 287; Keutgen v. Parks, 2 Sandf. (N. Y.) 60; Everett v. Coffin, 6 Wend. (N. Y.) 604, 22 Am. Dec. 551; Anderson v. Nicholas, 28 N. Y. 600; Smith v. Savin, 141 N. Y. 315.

*Pennsylvania.*—Ryman v. Gerlach, 153 Pa. St. 197.

*South Carolina.*—Guerry v. Kerton, 2 Rich. L. (S. Car.) 507.

*Texas.*—Robertson v. Hunt, 77 Tex. 321.

*Vermont.*—Courtis v. Cane, 32 Vt. 232, 76 Am. Dec. 174.

**2. England.**—Peer v. Humphrey, 2 Ad. & El. 495, 29 E. C. L. 158, 4 N. & M. 430, 1 Hurl. & W. 28.

*Canada.*—Ford v. Bowser, 24 N. Bruns. 510.

*Colorado.*—Pedroni v. Eppstein, (Colo. App. 1902) 68 Pac. Rep. 794.

*Indiana.*—Harlan v. Brown, 4 Ind. App. 319.

*Kansas.*—Oakley v. Randolph, 54 Kan. 779.

*Massachusetts.*—Gilmore v. Newton, 9 Allen (Mass.) 171, 85 Am. Dec. 749; Riley v. Boston Water Power Co., 11 Cush. (Mass.) 11; Champney v. Smith, 15 Gray (Mass.) 512; Scollans v. Rollins, 179 Mass. 346, 88 Am. St. Rep. 386.

*Missouri.*—Beattie Mfg. Co. v. Gerardi, 166 Mo. 142; Wirt v. Schuman, 67 Mo. App. 163, 2 Mo. App. Rep. 1399; Vansandt v. Hobbs, 84 Mo. App. 628.

*New Hampshire.*—Perkins v. Thompson, 3 N. H. 144; Hyde v. Noble, 13 N. H. 494, 38 Am. Dec. 508.

*New York.*—Pierrepont v. Shepard, etc., Lumber Co., 11 N. Y. App. Div. 383.

*Tennessee.*—Wells v. Ragland, 1 Swan (Tenn.) 501.

*Vermont.*—Grant v. King, 14 Vt. 367; Benton v. Beattie, 63 Vt. 186.

**Purchasing Cotton from Wrongdoer and Working It Up into Yarn.**—Hollins v. Fowler, L. R. 7 H. L. Cas. 757.

**Destruction by Fire While in Buyer's Possession.**—Ross v. Menefee, 125 Ind. 432.

**Buying a Horse from One Who Had No Right to Sell Him, and Subsequently Exercising Dominion Over Him** by letting him to another person, will amount to a conversion although the buyer believed his title to the horse to be perfect; and no demand by the owner is necessary before commencing an action for the conversion. Gilmore v. Newton, 9 Allen (Mass.) 171, 85 Am. Dec. 749.

**3. Refusal to Return.**—*England.*—Cooper v. Volume XXVIII.

**Demand.** — It seems to be the better doctrine that the mere purchase and acceptance of possession of chattels and claim of title under the purchase from one without title or authority to sell will constitute a conversion though the buyer acted in good faith and no demand has been made upon him for the property, and though he is without notice of the true owner's rights;<sup>1</sup> and *a fortiori* the purchaser is guilty of conversion if he knew at the time of his purchase of the rights of the true owner,<sup>2</sup> or if before taking possession under his purchase he has notice of the rights of the true owner, and nevertheless takes possession,<sup>3</sup> or if after notice of the true owner's title he still continues to claim title to the chattel by reason of his purchase.<sup>4</sup>

**Minority Rule.** — In some cases it has been held that where a person purchases a chattel in good faith from one in possession but without title, and has not disposed of the chattel or otherwise actually converted it to his own use, a demand must be made upon him for the return of the property before trover can be maintained against him for conversion.<sup>5</sup> This is especially true where

Willomatt, 1 C. B. 672, 50 E. C. L. 672; Metcalfe v. Lumsden, 1 C. & K. 309, 47 E. C. L. 309; Bryant v. Wardell, 2 Exch. 479; Loeschman v. Machin, 2 Stark. 311, 3 E. C. L. 423; M'Combie v. Davies, 6 East 538; Lee v. Bayes, 18 C. B. 599, 86 E. C. L. 599.

Canada. — Trueman v. Bain, 25 N. Bruns. 298.

Maine. — Miller v. Thompson, 60 Me. 322. Massachusetts. — Carpenter v. Hale, 8 Gray (Mass.) 157; Chapman v. Cole, 12 Gray (Mass.) 141, 71 Am. Dec. 739; Moody v. Blake, 117 Mass. 23, 19 Am. Rep. 394.

Minnesota. — Close v. Hodges, 44 Minn. 204.

Missouri. — Foster Woolen Co. v. Wollman, 87 Mo. App. 658.

New Hampshire. — Sanborn v. Colman, 6 N. H. 14, 23 Am. Dec. 703; Sargent v. Gile, 8 N. H. 325; Moore v. Prentiss Tool, etc., Co., 59 N. Y. Super. Ct. 516.

Pennsylvania. — Rice v. Yocum, 155 Pa. St. 538, 32 W. N. C. (Pa.) 356.

South Carolina. — Dealy v. Lance, 2 Spears L. (S. Car.) 487.

Tennessee. — Houston v. Dyche, Meigs (Tenn.) 76, 33 Am. Dec. 130.

Washington. — Rector v. Thompson, 26 Wash. 400.

**1. Demand Not Necessary** — England. — Hilbery v. Hatton, 2 H. & C. 822.

Alabama. — Woods v. Rose, 135 Ala. 297. Compare Williams v. Crum, 27 Ala. 468.

Georgia. — Robinson v. McDonald, 2 Ga. 116.

Maine. — Whipple v. Gilpatrick, 19 Me. 427; Hotchkiss v. Hunt, 49 Me. 213; Freeman v. Underwood, 66 Me. 229.

Massachusetts. — Gilmore v. Newton, 9 Allen (Mass.) 171, 85 Am. Dec. 749; Heckle v. Lurvey, 101 Mass. 344, 3 Am. Rep. 366.

New Hampshire. — Hyde v. Noble, 13 N. H. 494, 38 Am. Dec. 508; Lovejoy v. Jones, 30 N. H. 164.

Pennsylvania. — Rice v. Yocum, 155 Pa. St. 538, 32 W. N. C. (Pa.) 356.

Utah. — Spalding v. Allred, 23 Utah 354.

Vermont. — Deering v. Austin, 34 Vt. 330; Bucklin v. Beals, 38 Vt. 653.

See also Hamet v. Letcher, 37 Ohio St. 356, 41 Am. Rep. 519.

In M'Combie v. Davies, 6 East 538, Lord Ellenborough said: "According to Lord Holt,

in Baldwin v. Cole, 6 Mod. 212, the very assuming to oneself the property and right of disposing of another man's goods is a conversion; and certainly a man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it."

Purchasing fruit wrongfully taken from the plaintiff's land is a conversion. Freeman v. Underwood, 66 Me. 229.

The mere acceptance by a creditor from his debtor of a preferential security, voidable under the insolvent law, is not a conversion without a demand by the assignee in insolvency for a return of the security. Hay v. Tuttle, 67 Minn. 56.

**2. Purchase with Knowledge of Seller's Want of Title** — Indiana. — Nickey v. Zonker, 22 Ind. App. 211; Kavanaugh v. Taylor, 2 Ind. App. 502.

Iowa. — Allison v. King, 25 Iowa 56.

Missouri. — White Sewing-Mach. Co. v. Betting, 46 Mo. App. 417.

New York. — Babcock v. Gill, 10 Johns. (N. Y.) 287.

Tennessee. — Gage v. Epperson, 2 Head (Tenn.) 669; Kramer v. Wood, (Tenn. Ch. 1899) 52 S. W. Rep. 1113.

Texas. — McAnelly v. Chapman, 18 Tex. 198.

Vermont. — Rice v. Clark, 8 Vt. 109.

Wyoming. — Cone v. Iverson, 4 Wyo. 230, affirming 4 Wyo. 212.

Canada. — Haren v. Lyon, Taylor (U. C.) 510. See also Blackley v. Dooley, 18 Ont. 381.

**Constructive Notice.** — Ross v. Menefee, 125 Ind. 432.

**3.** Boutwell v. Parker, 124 Ala. 341; Anderson v. Sutherland, 91 Wis. 585.

Thus, if after the purchase of goods in satisfaction of a debt, the purchaser is informed that his debtor (the seller) holds the goods only as factor, his subsequent taking of them away is a conversion. Scriber v. Masten, 11 Cal. 303.

**4.** Porter v. Foster, 20 Me. 391, 37 Am. Dec. 59; Houston v. Dyche, Meigs (Tenn.) 76, 33 Am. Dec. 130.

**5. Minority Rule** — Illinois. — Metcalfe v. Dickman, 43 Ill. App. 284.

Indiana. — Valentine v. Duff, 7 Ind. App. 196.



the seller had a limited interest in the chattel sold though the sale terminated such interest and operated as a conversion by the seller. Thus it has been held that where a mortgagor in possession sells the absolute property to a purchaser in good faith, the mere purchase and taking possession by the purchaser will not alone constitute a conversion as against the mortgagor.<sup>1</sup>

**One Who Takes Merely a Bill of Sale or Paper Transfer** of a chattel from a person not the owner, where he does not otherwise interfere with the chattel, is not liable for its conversion.<sup>2</sup>

**Joint Tortfeasors.** — One who wrongfully sells the chattels of another and the one who buys, if the latter acts in good faith, have been held not to be liable in a joint action as joint tortfeasors though they may be liable severally;<sup>3</sup> but if the purchase is made with knowledge of the seller's want of authority to sell, the buyer and purchaser are jointly liable for the conversion.<sup>4</sup>

**16. Conversion by Wrongful Detention** — *a. IN GENERAL.* — The wrongful detention of chattels after a demand for them and refusal to deliver possession constitutes a conversion,<sup>5</sup> and, in fact, one of the most frequent ways of

*Minnesota.* — *Plano Mfg. Co. v. Northern Pac. Elevator Co.*, 51 Minn. 167.

*New York.* — *Gurney v. Kenny*, 2 E. D. Smith (N. Y.) 132; *Hovey v. Bromley*, 85 Hun (N. Y.) 540; *Stephens v. Meriden Britannia Co.*, 13 N. Y. App. Div. 268; *Jackson v. Chapman*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 129. Compare *Keefer v. Greene*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 498, 62 Hun (N. Y.) 618.

*Ohio.* — *Pike v. Equitable Nat. Bank*, 2 Ohio Dec. 1, 1 Ohio N. P. 205.

See also *Parker v. Middlebrook*, 24 Conn. 207; *Miller v. Winfree*, 4 Tex. App. Civ. Cas., § 228.

1. *Dean v. Cushman*, 95 Me. 454, *distinguishing* *Hotchkiss v. Hunt*, 49 Me. 213. See also *Sanford v. Duluth, etc., Elevator Co.*, 2 N. Dak. 6. See, however, *Woods v. Rose*, 135 Ala. 297.

2. **Paper Purchaser.** — *Conkey v. Amis*, 13 Ind. 260, 74 Am. Dec. 251; *Plano Mfg. Co. v. Jones*, 8 N. Dak. 315. But see *McCombie v. Davies*, 6 East 540.

**Taking Mortgage.** — *Burnside v. Twitchell*, 43 N. H. 390; *Matteawan Co. v. Bentley*, 13 Barb. (N. Y.) 641.

3. Where A, having stolen a horse, sold it to B, who purchased in good faith, it was held that this did not constitute a joint conversion so as to enable a joint action of trover to be maintained against A and B. *Edwards v. Kerr*, 13 U. C. C. P. 24.

4. *Gibson v. McKean*, 16 N. Bruns. 299; *Ford v. Bowser*, 24 N. Bruns. 510. See also *supra*, this section, *Joint and Several Tortfeasors*.

5. **Conversion by Wrongful Detention—England.** — *Jones v. Cliff*, 1 Crompt. & M. 541; *Catterall v. Kenyon*, 2 Gale & D. 545, 3 Q. B. 310, 43 E. C. L. 749; *Watkins v. Woolley*, Gow 69, 5 E. C. L. 467; *Golightly v. Reynolds*, Lofft 88; *Clark v. Chamberlain*, 2 M. & W. 78; *Lempriere v. Pasley*, 2 T. R. 485; *Morris v. Pugh*, 3 Burr. 1243; *Pillott v. Wilkinson*, 3 H. & C. 345; *Tripp v. Armistage*, 4 M. & W. 687, 1 H. & H. 442; *Clendon v. Dinneford*, 5 C. & P. 18, 24 E. C. L. 193; *Burroughes v. Bayrie*, 5 H. & N. 296, 20 L. J. Exch. 185; *Thompson v. Trail*, 6 B. & C. 36, 13 E. C. L. 103; *Baldwin v. Cole*, 6 Mod. 212; *Davies v. Nicholas*, 7 C. P. 339, 32 E. C.

L. 533; *Counce v. Spanton*, 7 M. & G. 903, 49 E. C. L. 903; *Lee v. Bayes*, 18 C. B. 599, 86 E. C. L. 599.

*Canada.* — *Gould v. Jones*, 3 U. C. Q. B. O. S. 53; *Dixon v. Dalby*, 11 U. C. Q. B. 79; *Moffatt v. Grand Trunk R. Co.*, 15 U. C. C. P. 392; *Llado v. Morgan*, 23 U. C. C. P. 517; *White v. Batty*, 23 U. C. Q. B. 487; *Keithy v. McMurray*, 27 U. C. C. P. 428; *Winchester v. Busby*, 16 Can. Sup. Ct. 336; *Stockton v. Beatty*, 19 N. Bruns. 104.

*United States.* — *Allen v. Ogden*, 1 Wash. (U. S.) 174.

*Alabama.* — *Fryer v. M'Rae*, 8 Port. (Ala.) 187; *Overstreet v. Nunn*, 36 Ala. 649; *Bolling v. Kirby*, 90 Ala. 215, 24 Am. St. Rep. 789.

*Arkansas.* — *Boothe v. Estes*, 16 Ark. 104; *Estes v. Boothe*, 20 Ark. 583; *Sunny South Lumber Co. v. Neimeyer Lumber Co.*, 63 Ark. 268.

*California.* — *Kullman v. Greenebaum*, 92 Cal. 403, 27 Am. St. Rep. 150; *Black v. Clasby*, 97 Cal. 482.

*Connecticut.* — *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121; *McNamara v. McDonald*, 69 Conn. 484, 61 Am. St. Rep. 48.

*Delaware.* — *Vaughan v. Webster*, 5 Harr. (Del.) 256.

*Georgia.* — *Wilson Coal, etc., Co. v. Hall, etc.*, Woodworking Mach. Co., 97 Ga. 330.

*Illinois.* — *Campau v. Bemis*, 35 Ill. App. 37.

*Indiana.* — *Lindley v. Downing*, 2 Ind. 418.

*Iowa.* — *Guest v. Heinly*, 93 Iowa 183.

*Kentucky.* — *Marriam v. Yeager*, 2 B. Mon. (Ky.) 339; *Dawson v. Powell*, 9 Bush (Ky.) 663, 15 Am. Rep. 745; *Lexington, etc., R. Co. v. Kidd*, 7 Dana (Ky.) 245.

*Maine.* — *Moody v. Whitney*, 38 Me. 174, 61 Am. Dec. 239; *Thatcher v. Weeks*, 79 Me. 547.

*Maryland.* — *Barton v. White*, 1 Har. & J. (Md.) 579; *Buel v. Pumphrey*, 2 Md. 261, 56 Am. Dec. 714; *Dietus v. Fuss*, 8 Md. 148; *Miller v. Grove*, 18 Md. 242.

*Massachusetts.* — *Simpson v. Carleton*, 1 Allen (Mass.) 109, 79 Am. Dec. 707; *Hinckley v. Baxter*, 13 Allen (Mass.) 139; *Way v. Davidson*, 12 Gray (Mass.) 465, 74 Am. Dec. 604; *Scollard v. Brooks*, 170 Mass. 445; *Portland Bank v. Stubbs*, 6 Mass. 422, 4 Am. Dec. 151; *Kinder v. Shaw*, 2 Mass. 398.

proving the conversion in actions of trover is by proof of demand and refusal; still, such proof is only *prima facie* evidence of a conversion, and is always open to explanation.<sup>1</sup> If a bailee, upon demand for possession, refuses to deliver, placing his refusal upon other grounds than his right to detain the chattels under a possessory lien, he thereby waives such lien, and the refusal to deliver constitutes a conversion.<sup>2</sup> But, of course, a detention by a bailee

*Michigan*. — *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54; *Willey v. Cox*, 25 Mich. 116; *Kendrick v. Beard*, 90 Mich. 589; *Kane v. Hutchisson*, 93 Mich. 488; *Galvin v. Galvin Brass, etc., Works*, 81 Mich. 16.

*Minnesota*. — *Boxell v. Robinson*, 82 Minn. 26.

*Missouri*. — *O'Donoghue v. Corby*, 22 Mo. 394; *Sherman v. Commercial Printing Co.*, 29 Mo. App. 31; *Banking House v. Brooks*, 52 Mo. App. 364.

*Nebraska*. — *Globe Sav. Bank v. National Bank of Commerce*, 64 Neb. 413.

*New Hampshire*. — *Bradley v. Spofford*, 23 N. H. 444, 55 Am. Dec. 205; *Stone v. Clough*, 41 N. H. 290; *Nutter v. Varney*, 64 N. H. 611.

*New York*. — *Coller v. Shepard*, 19 Barb. (N. Y.) 305; *Latimer v. Wheeler*, 30 Barb. (N. Y.) 485; *Whitcomb v. Hungerford*, 42 Barb. (N. Y.) 177; *McNaughton v. Cameron*, 44 Barb. (N. Y.) 406; *Genet v. Howland*, 45 Barb. (N. Y.) 560; *Cousland v. Davis*, 4 Bosw. (N. Y.) 619; *Lockwood v. Bull*, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539; *Phillips v. McNab*, 16 Daly (N. Y.) 150; *Dezell v. Odell*, 3 Hill (N. Y.) 215, 38 Am. Dec. 628; *Solomon v. Waas*, 2 Hilt. (N. Y.) 179; *Fry v. Clow*, 50 Hun (N. Y.) 574; *Judah v. Kemp*, 2 Johns. Cas. (N. Y.) 411; *Moore v. Prentiss Tool, etc., Co.*, 133 N. Y. 144, 59 N. Y. Super. Ct. 516; *Richmond v. Soportos*, (N. Y. City Ct. Gen. T.) 18 N. Y. Supp. 433; *Tobin v. Kage*, 64 Hun (N. Y.) 331; *Haas v. Altieri*, (N. Y. City Ct. Gen. T.) 19 N. Y. Supp. 687; *Montanye v. Montgomery*, (C. Pl. Gen. T.) 19 N. Y. Supp. 655; *Gleason v. Morrison*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 320; *Robinson v. Kaplan*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 686; *Simon v. Simon*, 38 N. Y. App. Div. 85; *Lyttle v. Petty, etc., Realty Co.*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 405; *Schreiber v. Finan*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 560; *Murr v. Western Assur. Co.*, 50 N. Y. App. Div. 4; *Smith v. Hart*, (N. Y. City Ct. Gen. T.) 34 Misc. (N. Y.) 214; *Precker v. London* (Supm. Ct. App. T.) 36 Misc. (N. Y.) 197; *Bain v. Ganzer*, 74 N. Y. App. Div. 621; *McKillop v. Reich*, 76 N. Y. App. Div. 334.

*North Carolina*. — *Smith v. Durham*, 127 N. Car. 417.

*North Dakota*. — *Henney Buggy Co. v. Higham*, 7 N. Dak. 45; *Marshall v. Andrews*, 8 N. Dak. 364.

*Oklahoma*. — *Oklahoma City v. T. M. Richardson Lumber Co.*, 3 Okla. 5.

*Oregon*. — *Sovern v. Yoran*, 15 Oregon 644.

*Pennsylvania*. — *Wagenblast v. M'Kean*, 2 Grant Cas. (Pa.) 393; *Prentiss v. Hannay*, 4 Whart. (Pa.) 508; *Jacoby v. Laussatt*, 6 S. & R. (Pa.) 300; *McKay v. Pearson*, 6 Pa. Super. Ct. 529, 41 W. N. C. (Pa.) 516; *Elder v. Corr*, 9 Pa. Super. Ct. 228; *Alexander v. Goldstein*, 13 Pa. Super. Ct. 518.

*Rhode Island*. — *Royce v. Oakes*, 20 R. I. 252.

*South Carolina*. — *Fowler v. Stuart*, 1 McCord L. (S. Car.) 504; *Ewart v. Kerr*, Rice L. (S. Car.) 204; *Ratcliffe v. Vance*, 2 Treadw. (S. Car.) 239; *Parkerson v. Simons*, 2 McMull. L. (S. Car.) 188; *Abrahams v. South-western R. Bank*, 1 S. Car. 441, 7 Am. Rep. 33.

*Tennessee*. — *Weakley v. Evans*, (Tenn. Ch. 1897) 46 S. W. Rep. 1070.

*Texas*. — *Nelson v. King*, 25 Tex. 655; *Jones v. Hunt*, 74 Tex. 657; *Dozier v. Pillot*, 79 Tex. 224; *Hearn v. Bitterman*, (Tex. Civ. App. 1894) 27 S. W. Rep. 158.

*Vermont*. — *Irish v. Cloyes*, 8 Vt. 33, 30 Am. Dec. 446; *Stearns v. Houghton*, 38 Vt. 583; *Straw v. Straw*, 70 Vt. 240.

**1. Demand and Refusal Only Prima Facie Evidence of Conversion** — *England*. — *Eason v. Newman*, Cro. Eliz. 495; *Oxford University Case*, 10 Coke 566; *Isaack v. Clark*, 2 Bulst. 308; *Morris v. Pugh*, 3 Burr. 1243.

*California*. — *Beckman v. McKay*, 14 Cal. 250; *Ashton v. Heydenfeldt*, 124 Cal. 14.

*Illinois*. — *Rosenbaum v. Dawes*, 77 Ill. App. 295.

*Iowa*. — *Cutter v. Fanning*, 2 Iowa 580.

*Maine*. — *Webber v. Davis*, 44 Me. 147, 69 Am. Dec. 87.

*Maryland*. — *Dietus v. Fuss*, 8 Md. 148.

*Massachusetts*. — *Magee v. Scott*, 9 Cush. (Mass.) 148, 55 Am. Dec. 49.

*New Hampshire*. — *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345; *Hett v. Boston, etc., R. Co.*, 69 N. H. 139.

*New York*. — *Wells v. Kelsey*, (Supm. Ct. Gen. T.) 15 Abb. Pr. (N. Y.) 53; *Munger v. Hess*, 28 Barb. (N. Y.) 75; *Lockwood v. Bull*, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539; *Packard v. Getman*, 6 Cow. (N. Y.) 757, 16 Am. Dec. 475; *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; *Powers v. Bassford*, (C. Pl. Gen. T.) 19 How. Pr. (N. Y.) 309; *Hill v. Covell*, 1 N. Y. 522.

*Rhode Island*. — *Buffington v. Clarke*, 15 R. I. 437.

*Tennessee*. — *Cobb v. Wallace*, 5 Coldw. (Tenn.) 539, 98 Am. Dec. 435.

*Vermont*. — *Irish v. Cloyes*, 8 Vt. 30, 30 Am. Dec. 446.

**2. By Bailee**. — *Boardman v. Sill*, 1 Campb. 410, note; *Thompson v. Trail*, 6 B. & C. 36, 13 E. C. L. 103, 9 Dowl. & R. 31; *Weeks v. Goode*, 6 C. B. N. S. 367, 95 E. C. L. 367; *Cannee v. Spanton*, 8 Scott N. R. 714, 7 M. & G. 903, 49 E. C. L. 903; *Jones v. Tarleton*, 9 M. & W. 675; *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121; *Hartford Ice Co. v. Greenwoods Co.*, 61 Conn. 166, 29 Am. St. Rep. 189; *Bowden v. Dugan*, 91 Me. 141; *Andrews v. Wade*, (Pa. 1886) 6 Atl. Rep. 48; *Bean v. Bolton*, 3 Phila. (Pa.) 87, 15 Leg. Int. (Pa.) 77; *Williams v. Smith*, 153 Pa. St. 462; *West v. Tupper*, 1 Bailey L. (S. Car.) 193.

entitled to a possessory lien, on the ground that he has such a lien, is not wrongful and does not constitute a conversion.<sup>1</sup>

**b. DEMAND.** — Where the possession of the defendant was originally lawful, the demand for the chattel, in order to support a claim for conversion based on such demand and refusal to deliver possession, should be made in such a manner as to allow the person in possession immediately to comply therewith.<sup>2</sup> Thus, the demand should, as a rule, be made at the place where the chattel is deposited;<sup>3</sup> but if it is made at a distance from that place, an absolute refusal to deliver up the chattel will constitute a waiver of any informality in the demand, and will render the defendant liable for conversion.<sup>4</sup> The demand should also, as a general rule, be made personally on the defendant.<sup>5</sup> It should merely involve a request for the delivery of possession, and should not require the defendant to perform other acts with respect to the chattel.<sup>6</sup> Thus, a demand which requires the person upon whom it is made to transport or carry the chattel to the demandant is insufficient;<sup>7</sup> but if, in such case, the defendant not only refuses to carry the chattel to the place designated for delivery, but also refuses unconditionally to deliver it up, he cannot afterwards object to the form of the demand.<sup>8</sup> The demand may be made verbally; a written demand is not essential.<sup>9</sup>

1. *Commercial Nat. Bank v. Pirie*, 82 Fed. Rep. 799, 49 U. S. App. 596; *Coller v. Shepard*, 19 Barb. (N. Y.) 305; *Hollins v. Hubbard*, 165 N. Y. 534, *affirming* 38 N. Y. App. Div. 629, 56 N. Y. Supp. 711; *Manda v. Wells*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 308; *Williams v. Smith*, 153 Pa. St. 462; *Webber v. Cogswell*, 2 Can. Sup. Ct. 15, *affirming* 11 Nova Scotia 47; *Nevius v. Schofield*, 21 N. Bruns. 124.

2. **Demand.** — *Durgin v. Gage*, 40 N. H. 302; *Phelps v. Gilchrist*, 28 N. H. 277; *Zimmer v. Bantel*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 374.

3. **Place of Demand.** — *Durgin v. Gage*, 40 N. H. 302; *Parmenter v. American Box Mach. Co.*, 44 N. Y. App. Div. 47; *McLean v. Graham*, 5 U. C. Q. B. O. S. 741. See also *Breese v. Bange*, 2 E. D. Smith (N. Y.) 474; *Wells v. Crew*, 5 U. C. Q. B. O. S. 209.

4. *Clark v. Hale*, 34 Conn. 398.

5. **Personal Demand.** — *Pattee v. Gilmore*, 18 N. H. 460, 45 Am. Dec. 385; *Durgin v. Gage*, 40 N. H. 302; *Phelps v. Gilchrist*, 28 N. H. 277; *Amberg v. Philbrick*, 33 Ill. App. 200.

**A Demand by Letter** for the restoration of goods belonging to the writer is not sufficient to support an action for conversion, if no notice is taken of it; but if an answer is sent, falsely denying the possession of such goods, the demand becomes sufficient. *Pattee v. Gilmore*, 18 N. H. 460, 45 Am. Dec. 385.

**A Demand at the House of a Person** is insufficient unless under such circumstances as to raise a presumption of actual notice to him before the commencement of the suit. *White v. Demary*, 2 N. H. 546. Compare *Logan v. Houlditch*, 1 Esp. 22, wherein a demand in writing left at the defendant's house was held to be sufficient.

**Demand by Agent or Servant.** — Whether a demand on an agent or servant is sufficient to render the principal liable depends upon the authority of the agent or servant to act for his master. *Pothonier v. Dawson*, Holt N. P. 383, 3 E. C. L. 154; *Amberg v. Philbrick*, 33 Ill. App. 200; *Delano v. Curtis*, 7 Allen (Mass.) 470; *Cass v. New York, etc., R. Co.*, 1 E. D.

*Smith* (N. Y.) 522; *Baumann v. Jefferson*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 147; *Cushman v. Oothout*, 88 Hun (N. Y.) 54; *Delahunty v. Hake*, 20 N. Y. App. Div. 430; *Seymour v. Car-gill Elevator Co.*, 6 N. Dak. 444.

**Demand on One of Two Persons in Joint Possession.** — *Ball v. Larkin*, 3 E. D. Smith (N. Y.) 555.

**Demand on One Member of a Firm After Its Dissolution** is not sufficient to charge the other members with conversion of property delivered to the firm. *Pattee v. Gilmore*, 18 N. H. 460, 45 Am. Dec. 385.

**6. Demand Involving Other Acts than Delivery of Possession.** — *Rushworth v. Taylor*, 3 Q. B. 699, 43 E. C. L. 932, 3 Gale & D. 3; *Wells v. Crew*, 5 U. C. Q. B. O. S. 209.

Thus, in *Rushworth v. Taylor*, 3 Q. B. 699, 43 E. C. L. 932, where the bailee of a gun over-charged it and burst it, and the owner demanded him to deliver it back in the same condition in which he received it, it was held that such a demand was not one on which, in case of refusal, a charge of conversion could be founded.

So where A lent a horse to B, and while B was using him consistently with such lending the horse was accidentally hurt, a demand by A for the delivery of the horse in as sound a condition as received was held not to be a sufficient demand on which to base a charge of conversion by reason of the failure of B to make delivery. *Wells v. Crew*, 5 U. C. Q. B. O. S. 209.

7. *Phelps v. Gilchrist*, 28 N. H. 277; *Durgin v. Gage*, 40 N. H. 302.

8. *Sharp v. Pratt*, 3 C. & P. 34, 14 E. C. L. 197.

9. **Verbal Demand.** — *Smith v. Young*, 1 Campb. 439; *McLean v. Graham*, 5 U. C. Q. B. O. S. 741.

If a verbal demand and a demand in writing are made at the same time, for the purpose of bringing an action, and the one has no reference to the other, evidence of the verbal demand is sufficient without the production of the writing. *Smith v. Young*, 1 Campb. 439.



**Form of Demand.** — Though no technical form of demand is necessary, any language or acts which are understood by the defendant to be a demand on the part of the plaintiff being sufficient,<sup>1</sup> still there should be a plain and unequivocal request for the present delivery of the property.<sup>2</sup>

**Excessive Demand.** — Where, in making the demand, the plaintiff claims more property than he is entitled to, the defendant, if he refuses to deliver any, cannot object to the sufficiency of the demand.<sup>3</sup>

**By Whom Demand to Be Made.** — The demand need not be made personally by the owner, but may be made by his agent.<sup>4</sup> But the person making the demand as agent must have been authorized to do so,<sup>5</sup> and it has been held that he must at the time show his authority.<sup>6</sup> If, however, the refusal is absolute when demand is made by an agent, and not on the ground of a want of authority on the part of the agent to receive the property, the defendant cannot afterwards object that the agent, at the time of making the demand, did not show his authority.<sup>7</sup>

**Time of Demand.** — The demand, when necessary, should of course be made before the action for the conversion based thereon is instituted; but a demand at any time before the institution of the action is in time, though made on the day on which the action is instituted.<sup>8</sup>

**Demand as Waiver of Prior Conversion.** — If there has been a tortious use or taking of a chattel which of itself amounts to a conversion, a subsequent demand will not amount to a waiver of the right to sue for such actual conversion<sup>9</sup> so as to enable the defendant to escape liability by showing an offer to return upon such demand.<sup>10</sup>

**c. REFUSAL.** — Where the claim of conversion is based on a wrongful detention, as evidenced by a demand and refusal to deliver possession, the refusal should, in order to constitute a conversion, amount to a denial of the demandant's right to the possession, since a reasonable refusal to deliver possession does not necessarily constitute a conversion.<sup>11</sup> Thus, a refusal based

1. **Sufficiency of Demand.** — *Thompson v. Shirley*, 1 Esp. 31; *Kendrick v. Beard*, 90 Mich. 589; *Shapira v. Barney*, 30 Minn. 59; *La Place v. Apupo*, 1 Johns. Cas. (N. Y.) 406; *Ratcliffe v. Vance*, 2 Treadw. (S. Car.) 239.

**Description of Property on Demand.** — *Harris v. Hackley*, 127 Mich. 46, 8 Detroit Leg. N. 230.

2. **Demand for Present Delivery.** — *Monnot v. Ibert*, 33 Barb. (N. Y.) 24. See also *Breese v. Bange*, 2 E. D. Smith (N. Y.) 474.

In *Monnot v. Ibert*, 33 Barb. (N. Y.) 24, where the defendant purchased mortgaged property from the mortgagor, a statement by the mortgagee in the words, "I shall have to take them [the mortgaged chattels] from you, if I cannot get my money any other way," was held to be insufficient, as it was not an unequivocal demand, but merely expressed the purpose to make a demand in the future, and that apparently only in a certain contingency.

3. **Demand for Too Much Property.** — *Galvin v. Galvin Brass, etc., Works*, 81 Mich. 16.

4. **Demand by Agent.** — *Spence v. Mitchell*, 9 Ala. 744; *Hudson v. Bauer Grocery Co.*, 105 Ala. 200; *Buel v. Pumphrey*, 2 Md. 261, 56 Am. Dec. 714; *Kendrick v. Beard*, 90 Mich. 589.

5. **Authority of Agent.** — *Gunton v. Nurse*, 5 Moo. 259, 2 Brod. & B. 447; *Griffin v. Alsop*, 4 Cal. 406.

6. *Solomons v. Dawes*, 1 Esp. 83; *Watt v. Potter*, 2 Mason (U. S.) 77; *Griffin v. Alsop*, 4 Cal. 406; *Dowd v. Wadsworth*, 2 Dev. L. (13 N. Car.) 130, 18 Am. Dec. 567; *Jacoby v.*

*Laussatt*, 6 S. & R. (Pa.) 300; *Beckley v. Howard*, 2 Brev. (S. Car.) 94.

7. *Watt v. Potter*, 2 Mason (U. S.) 77; *Spence v. Mitchell*, 9 Ala. 744; *Robertson v. Crane*, 27 Miss. 362, 61 Am. Dec. 520. See also *Ingalls v. Bulkeley*, 15 Ill. 224; *West v. Tupper*, 1 Bailey L. (S. Car.) 193.

While the general rule certainly is that if the demand is made by an agent the plaintiff must prove his authority to make it, otherwise the refusal will not be evidence of a conversion, still the conduct of the defendant may be a recognition of the authority of the agent and the sufficiency of the demand. Thus, where, upon demand made, the defendant said that he would retain the goods, and that he knew a suit would be brought against him, this is evidence of a conversion sufficient to maintain an action. *Robertson v. Crane*, 27 Miss. 362, 61 Am. Dec. 520.

8. **Time of Demand.** — *Prentiss v. Hannay*, 4 Whart. (Pa.) 508.

9. **Demand as Waiver of Prior Conversion.** — *Clark v. Hale*, 34 Conn. 398; *Cobb v. Wallace*, 5 Coldw. (Tenn.) 539, 98 Am. Dec. 435.

10. *Manwell v. Briggs*, 17 Vt. 176.

11. **Refusal — England.** — *Gunton v. Nurse*, 2 Brod. & B. 447, 6 E. C. L. 222; *Philpott v. Kelley*, 4 N. & M. 611, 3 Ad. & El. 106, 30 E. C. L. 40; *Glover v. London, etc., R. Co.*, 5 Exch. 66, 19 L. J. Exch. 172; *Jones v. Yates*, 9 B. & C. 532, 17 E. C. L. 436.

*Canada.* — *McLean v. Graham*, 5 U. C. Q. B. O. S. 741; *Stimson v. Block*, 11 Ont. 96.

on the defendant's honest though mistaken belief that the property has been destroyed is insufficient to establish a conversion.<sup>1</sup> Similarly, where the refusal is only for a time, for the purpose of ascertaining the ownership, no conversion can be inferred therefrom unless the refusal is unreasonably prolonged;<sup>2</sup> and this principle has frequently been applied where a demand by a third person was made upon a bailee or agent receiving property from his bailor or principal. So where the demand is made by an agent of the owner, a refusal to deliver to the agent based solely on the want of proof of the agent's authority to receive the goods does not constitute a conversion.<sup>3</sup> A refusal merely to transport the chattel to the demandant, and not an absolute refusal to permit him to take possession, is not sufficient upon which to base a charge of conversion;<sup>4</sup> and the same rule applies with regard to a refusal

*Alabama.*—*Dent v. Chiles*, 5 Stew. & P. (Ala.) 383, 26 Am. Dec. 350.

*Illinois.*—*Economy Furniture Co. v. Chapman*, 54 Ill. App. 122.

*Michigan.*—*Felcher v. McMillan*, 103 Mich. 494.

*Missouri.*—*Ward v. Moffett*, 38 Mo. App. 395.

*New Hampshire.*—*Robinson v. Burleigh*, 5 N. H. 225; *Fletcher v. Fletcher*, 7 N. H. 452, 28 Am. Dec. 359; *Durgin v. Gage*, 40 N. H. 306; *Hett v. Boston, etc., R. Co.*, 69 N. H. 139; *Stahl v. Boston, etc., R. Co.*, 71 N. H. 57.

*New York.*—*Carroll v. Mix*, 51 Barb. (N. Y.) 212; *Thomson v. Sixpenny Sav. Bank*, 5 Bosw. (N. Y.) 293; *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34, 6 Am. Rep. 28; *Wamsley v. Atlas Steamboat Co.*, 50 N. Y. App. Div. 199.

*North Carolina.*—*Ragsdale v. Williams*, 8 Ired. L. (30 N. Car.) 498, 49 Am. Dec. 406; *Finch v. Clarke, Phil. L.* (61 N. Car.) 335.

*Rhode Island.*—*Buffington v. Clarke*, 15 R. I. 437.

*Tennessee.*—*Weakley v. Evans*, (Tenn. Ch. 1897) 46 S. W. Rep. 1070.

**A Refusal from Misapprehension of the Law** may be reasonable, and so relieve from the effect of a conversion. Thus, where one intrusted with notes for collection was summoned by trustee process, in an action instituted against his principal, and because of such process refused to deliver the notes upon order from his principal, it was held that such refusal was not necessarily a conversion, though such notes were not within the meaning of the act authorizing trustee process. *Fletcher v. Fletcher*, 7 N. H. 452, 28 Am. Dec. 359.

A defendant is not guilty of conversion where a wagon belonging to the plaintiff was brought to his premises and left there, and the plaintiff made a demand for it, but of no one in particular, and there was no assertion of title on the part of the defendant, and no refusal to deliver the wagon, nor offer or threat to prevent the plaintiff from taking possession; where, in fact, throughout the whole transaction the defendant was entirely passive. *Ragsdale v. Williams*, 8 Ired. L. (30 N. Car.) 498, 49 Am. Dec. 406.

**Right of Defendant to Reasonable Time to Make Reply to Demand.**—*Felcher v. McMillan*, 103 Mich. 494.

**1. Refusal in Belief of Destruction of Property.**—*McDonald v. McKinnon*, 104 Mich. 428.

See also *Salt Springs Nat. Bank v. Wheeler*, 48 N. Y. 492, 8 Am. Rep. 564. But see *McKewen v. Cutching*, 27 L. J. Exch. 41.

**2. Refusal for Purpose of Ascertaining Ownership**—*England.*—*Green v. Dunn*, 3 Campb. 215 note; *Pillott v. Wilkinson*, 3 H. & C. 345. Compare *Atkinson v. Marshall*, 12 L. J. Exch. 117.

*Canada.*—*Gilpin v. Royal Canadian Bank*, 27 U. C. Q. B. 310; *Sharp v. Lawrence*, Mich. T. 1865, N. Bruns. Dig. 1227. See also *Schaffer v. Dumble*, 5 Ont. 716.

*Alabama.*—*Dent v. Chiles*, 5 Stew. & P. (Ala.) 383, 26 Am. Dec. 350; *Bolling v. Kirby*, 90 Ala. 215, 24 Am. St. Rep. 789.

*Arkansas.*—*Zachary v. Pace*, 9 Ark. 212, 47 Am. Dec. 744.

*Connecticut.*—*Mills v. Britton*, 64 Conn. 4. *New Hampshire.*—*Robinson v. Burleigh*, 5 N. H. 225.

*North Carolina.*—*Dowd v. Wadsworth*, 2 Dev. L. (13 N. Car.) 130, 18 Am. Dec. 567.

*Pennsylvania.*—*Jacoby v. Laussatt*, 6 S. & R. (Pa.) 300.

*Rhode Island.*—*Singer Mfg. Co. v. King*, 14 R. I. 511; *Buffington v. Clarke*, 15 R. I. 437.

In *Buffington v. Clarke*, 15 R. I. 437, the facts were that a watch had been in the possession of B, a woman who had lived and died in the house of her brother, and A, after her death, demanded the watch from the brother, who replied that it was safe, that he did not feel at liberty to deliver it to any one until B's will was proved, and that as soon as possible he would attend to the proof. It appeared further that the watch, though lent by A to B, had been treated by B as her watch and was in the house of the brother with her other effects. It was held that the refusal did not constitute a conversion.

**3. Refusal of Demand by Agent.**—*Solomons v. Dawes*, 1 Esp. 83; *Watt v. Potter*, 2 Mason (U. S.) 77; *Dowd v. Wadsworth*, 2 Dev. L. (13 N. Car.) 130, 18 Am. Dec. 567; *Jacoby v. Laussatt*, 6 S. & R. (Pa.) 300; *Beckley v. Howard*, 2 Brev. (S. Car.) 94; *Blankenship v. Berry*, 28 Tex. 448.

**4. Refusal to Carry Chattel.**—*Davis v. Hurt*, 114 Ala. 146; *Trammell v. Mallory*, 115 Ga. 748; *Forehand v. Jones*, 84 Ga. 508; *Fifield v. Maine Cent. R. Co.*, 62 Me. 77; *O'Connell v. Jacobs*, 115 Mass. 21; *Ware v. Georgetown First Cong. Soc.*, 125 Mass. 584; *Durgin v. Gage*, 40 N. H. 302; *Town v. Hazen*, 51 N. H. 596; *Munger v. Hess*, 28 Barb. (N. Y.) 75;

to repair a chattel and deliver it in the repaired condition.<sup>1</sup> Of course, no express form of refusal is necessary to consummate the conversion. It is sufficient if the acts and language of the defendant show an intention to retain possession in defiance of the plaintiff's rights.<sup>2</sup>

**Demanding Receipt.** — A custodian of chattels has no right to demand a receipt as the condition upon which he will deliver possession, and an offer to deliver possession coupled with such a condition will not prevent the custodian from being liable for a conversion.<sup>3</sup> But where a custodian, upon receiving chattels, gave a written receipt therefor, a refusal to return the chattels unless the receipt given therefor should be returned was held to be reasonable and not to amount to a conversion.<sup>4</sup>

**Refusal to Permit Entry on Land for Purpose of Removal.** — Where the chattels of one person are on the land of another, merely forbidding the owner to enter upon the land or refusing to give permission to him to enter to remove such chattels will not of itself constitute a conversion thereof.<sup>5</sup> But a conversion is worked if such prohibition or refusal is under a claim of title to the chattels,<sup>6</sup> or if the owner of the land actually exercises dominion over such chattels.<sup>7</sup> Thus, where, in case of an outgoing tenant, the landlord or the incoming tenant wrongfully prevents the tenant from recovering his property, under a wrongful claim of a lien thereon or some other interest therein, he is guilty of a conversion.<sup>8</sup>

*Richards v. Pitts Agricultural Works*, 37 Hun (N. Y.) 1; *Gillet v. Roberts*, 57 N. Y. 28; *Farrar v. Rollins*, 37 Vt. 295; *Straw v. Straw*, 70 Vt. 240. And see *Houghton v. Butler*, 4 T. R. 364.

Where the plaintiff lent a sled to the defendant, and, upon demanding it, insisted that the defendant should carry it back to the plaintiff's house, and the defendant offered to return the chattel, but refused to carry it back, it was held that there was no conversion. *Farrar v. Rollins*, 37 Vt. 295.

**1. Refusal to Repair Chattel.** — *Rushworth v. Taylor*, 3 Q. B. 699, 43 E. C. L. 932.

**2. Intention.** — *Atkin v. Slater*, 1 C. & K. 356, 47 E. C. L. 356; *Davies v. Nicholas*, 7 C. & P. 339, 32 E. C. L. 533; *McDonell v. Bank of Upper Canada*, 7 U. C. Q. B. 252; *Mitchell v. Thomas*, 114 Ala. 459; *Gregory v. Fichtner*, (C. Pl. Gen. T.) 27 Abb. N. Cas. (N. Y.) 86, 21 Civ. Pro. (N. Y.) 1, *reversing* (N. Y. City Ct. Gen. T.) 13 N. Y. Supp. 593; *Ryerson v. Ryerson*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 738.

Thus, where a person, when served with notice of demand for certain deeds, merely said that he would consult his attorney, it was held that this expression, coupled with his subsequent conduct in not giving up the deeds, amounted to evidence of a conversion. *Atkin v. Slater*, 1 C. & K. 356, 47 E. C. L. 356.

**3. Demanding Receipt.** — *Cobbett v. Clutton*, 2 C. & P. 471, 12 E. C. L. 221; *Smith v. Hartog*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 353. See also *Clark v. Cullen*, (Tenn. Ch. 1897) 44 S. W. Rep. 204.

Thus, where A had in his possession a box containing papers belonging to a person deceased, and sent the box, with its contents, to his solicitors with directions to deliver the box and papers to the executor of the owner on his giving an inventory of them and a receipt, it was held that trover would lie against the solicitors if they refused to deliver the box

and papers to the executors, the latter refusing to give an inventory and receipt. *Cobbett v. Clutton*, 2 C. & P. 471, 12 E. C. L. 221.

For a discussion of the analogous question as to the effect of a demand for a receipt upon the validity of a tender, see the title *TENDER*, *ante*, p. 1.

**4. Arsene v. La Fermina** (Supm. Ct. App. T.) 38 Misc. (N. Y.) 776.

**5. Refusal to Permit Entry on Land.** — *Thoroughgood v. Robinson*, 6 Q. B. 769, 51 E. C. L. 769; *Smalley v. Gallagher*, 26 U. C. C. P. 531; *Platner v. Johnson*, 26 Miss. 142; *Stackpole v. Eastern R. Co.*, 62 N. H. 493; *Town v. Hazen*, 51 N. H. 596. See also *Woodis v. Jordan*, 62 Me. 490. But see *Nichols v. Newsom*, 2 Murph. (6 N. Car.) 302; *McKay v. Pearson*, 6 Pa. Super. Ct. 529, 41 W. N. C. (Pa.) 516.

**6. Wilde v. Waters**, 16 C. B. 637, 81 E. C. L. 637, 24 L. J. C. Pl. 193; *Hedley v. Scissons*, 33 U. C. Q. B. 215; *Badger v. Batavia Paper Mfg. Co.*, 70 Ill. 302; *Ersine v. Savage*, 96 Me. 57; *Woodis v. Jordan*, 62 Me. 490; *Guthrie v. Jones*, 108 Mass. 191; *Shapira v. Barney*, 30 Minn. 59; *Straw v. Straw*, 70 Vt. 240.

**7. Hughes v. Coors**, 3 Colo. App. 303; *Davis v. Taylor*, 41 Ill. 405; *Bartley v. Rogers*, 104 Ill. App. 164; *Pullen v. Bell*, 40 Me. 314; *Hinckley v. Baxter*, 13 Allen (Mass.) 139; *Burgess v. Isherwood*, 101 Mich. 319; *Sherman v. Way*, 56 Barb. (N. Y.) 188; *Wilson v. Cummings*, (N. Y. Super. Ct. Gen. T.) 4 Misc. (N. Y.) 429; *Hare v. Pearson*, 4 Ired. L. (26 N. Car.) 76; *Crocket v. Beaty*, 8 Humph. (Tenn.) 20.

Thus, where the sawlogs belonging to one person were lying upon the land of another, and the latter refused to permit the former to take them away, threatening to sue him if he did so, this conduct, followed by a sale of a part of the logs, was held to constitute a conversion of all. *Sherman v. Way*, 56 Barb. (N. Y.) 188.

**8. Forbidding Removal by Tenant.** — *Parker v. Goddard*, 39 Me. 144; *Adams v. Goddard*, 48



**Inability to Comply with Demand.** — Where the refusal to deliver possession is based on the inability of the person upon whom the demand is made to comply with it,<sup>1</sup> as where the chattels are not at the time in his possession,<sup>2</sup> the refusal does not constitute a conversion; and in such case it has been held to be immaterial that at the time of the refusal the defendant claimed title to the property<sup>3</sup> or stated that he would not give it up if he had possession,<sup>4</sup> though in other cases it has been held that where the defendant refuses delivery on demand under a claim of title in himself, he cannot in defense of an action for conversion show justification for his refusal on the ground of want of possession at the time of the demand.<sup>5</sup> So if the property of the

Me. 212; *Osborn v. Potter*, 101 Mich. 300; *Smith v. Boyle*, (Neb. 1902) 92 N. W. Rep. 1018; *Lewis v. Ocean Nav., etc., Co.*, 125 N. Y. 341, *affirming* (Supm. Ct. Gen. T.) 3 N. Y. Supp. 911; *Johnston v. Ross*, 22 N. Y. App. Div. 631; *Bahr v. Boley*, 50 N. Y. App. Div. 577; *Voss v. Bassett*, 4 Tex. App. Civ. Cas., § 116; *Denholm v. Commercial Bank*, 1 U. C. Q. B. 369; *Ruel v. McElroy*, 8 N. Bruns. 212.

1. **Inability to Comply with Demand.** — *Mires v. Solebay*, 2 Mod. 242; *Stiles v. Davis*, 1 Black (U. S.) 101; *State v. Staed*, 65 Mo. App. 487; *Greene v. Mead*, 18 N. H. 505; *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345; *Jenner v. Jolliffe*, 9 Johns. (N. Y.) 381.

In *Ross v. Johnson*, 5 Burr. 2825, it was shown that goods belonging to the plaintiff were delivered by the captain of a vessel to the defendants as wharfingers, for the use and account of the plaintiff, but were lost or stolen out of their possession. A demand was made before the commencement of this action, and the wharfage was tendered, but the goods were not delivered. Lord Mansfield said: "This is not to be esteemed a refusal to deliver the goods. They can't deliver them. It is not in their power to do it. It is a bare omission."

**Attachment.** — In an action of trover for a chaise, it appeared that one B had hired the chaise in question from the plaintiff and had placed it at livery with the defendant, and that while it was in the defendant's possession it was attached by process out of the sheriff's court as the property of B. The plaintiff demanded the chaise, but the defendant, alleging that it had been attached, refused to deliver. It was held that there was no evidence of a conversion by the defendant, the chaise being at the time of the demand in the custody of the law, and not in that of the defendant. *Verrall v. Robinson*, 2 C. M. & R. 495.

In *Catterall v. Kenyon*, 3 Q. B. 310, 43 E. C. L. 749, certain cattle of the plaintiff had been wrongfully taken in execution by means of process directed against the goods of her father, and lodged by the attaching officer in the stable of an inn. The plaintiff demanded them several times of the wife of the defendant, who refused to deliver them. It was held that the facts did not show that the goods were in the custody of the law, and that *Verrall v. Robinson*, 2 C. M. & R. 495, did not apply.

2. **Refusal for Want of Possession** — *England.* — *Smith v. Young*, 1 Campb. 439; *Owen v. Lewyn*, 1 Vent. 223; *Canot v. Hughes*, 2 Bing.

N. Cas. 448, 29 E. C. L. 391, 2 Scott 663; *Walker v. Cunningham*, 12 Nova Scotia 1. See, however, *Wansbrough v. Maton*, 4 Ad. & El. 884, 31 E. C. L. 317; *M'Combie v. Davis*, 6 East 538.

*California.* — *Beckman v. McKay*, 14 Cal. 250.

*Illinois.* — *Newlin v. Prevo*, 90 Ill. App. 515. *Indiana.* — *Cleveland, etc., R. Co. v. Wright*, 25 Ind. App. 525.

*Maine.* — *Boobier v. Boobier*, 39 Me. 406; *Davis v. Buffum*, 51 Me. 160; *Dearbourn v. Union Nat. Bank*, 58 Me. 273.

*Maryland.* — *Dietus v. Fuss*, 8 Md. 148.

*Massachusetts.* — *Johnson v. Couillard*, 4 Allen (Mass.) 446.

*Missouri.* — *Johnson v. Strader*, 3 Mo. 359. *New Hampshire.* — *Goss v. Emerson*, 23 N. H. 38. *Compare Ferguson v. Clifford*, 37 N. H. 86.

*New Jersey.* — *Frome v. Dennis*, 45 N. J. L. 515.

*New York.* — *Kelsey v. Griswold*, 6 Barb. (N. Y.) 436; *Bowman v. Eaton*, 24 Barb. (N. Y.) 528; *Whitney v. Slauson*, 30 Barb. (N. Y.) 276; *Hunt v. Kane*, 40 Barb. (N. Y.) 638; *Packard v. Getman*, 6 Cow. (N. Y.) 757, 16 Am. Dec. 475, 4 Wend. (N. Y.) 613, 21 Am. Dec. 166; *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; *Duell v. Cudlipp*, 1 Hilt. (N. Y.) 166; *Fillmore v. Horton*, (Supm. Ct. Gen. T.) 31 How. Pr. (N. Y.) 424; *Hallenbake v. Fish*, 8 Wend. (N. Y.) 547, 24 Am. Dec. 88; *Hartman v. Hicks*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 527; *Herrmann Furniture, etc., Works v. Hyman*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 567; *Goldberg v. Shapiro*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 724; *Temerson v. Grau*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 471; *Race v. Moore*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 170. See also *Krakower v. Krakower*, 79 N. Y. App. Div. 633.

*Rhode Island.* — *Canning v. Owen*, 22 R. I. 624, 84 Am. St. Rep. 858.

*South Carolina.* — *Morris v. Thomson*, 1 Rich. (S. Car.) 65.

*Texas.* — *Dozier v. Pillot*, 79 Tex. 224.

*Vermont.* — *Adams v. Abbott*, 2 Vt. 383; *Irish v. Cloyes*, 8 Vt. 30, 30 Am. Dec. 446; *Buck v. Ashley*, 37 Vt. 475.

See also *Phelps, etc., Co. v. Halsell*, 11 Okla. 1.

3. *Andrews v. Shattuck*, 32 Barb. (N. Y.) 396.

4. *Smith v. Young*, 1 Campb. 439.

5. *Topeka Bank v. Miller*, 7 Kan. App. 55. See also *Oakley v. Randolph*, 54 Kan. 779.

plaintiff becomes, through his own fault, so mixed with the property of the defendant that it cannot be distinguished, the refusal of the latter to separate the property of the plaintiff from his own and deliver possession does not constitute a conversion.<sup>1</sup> A demand and refusal not only constitute evidence to prove a conversion at the time when the demand is made, but may be made the basis of an inference from which the jury may find a conversion at a time prior to the demand and during the defendant's possession;<sup>2</sup> and if the defendant, though in possession, bases his refusal to deliver on a claim of title in himself, and not on his inability, he is liable for conversion.<sup>3</sup> Where it is shown that the chattel was in the defendant's possession at a time prior to the demand, and that upon demand therefor he refused delivery, this is *prima facie* evidence of a conversion, and the burden is on the defendant to show excuse for such refusal, such as his want of possession at the time of demand or inability otherwise to deliver.<sup>4</sup>

**17. Conversion by Cotenant.** — One joint tenant or tenant in common may unquestionably be guilty of a conversion of the interest of his cotenant in trover; but while it is sufficiently clear on principle when and for what cause one tenant may maintain trover against his cotenant, the principles are not easy of application to confused and varying facts.<sup>5</sup>

**Detention and Use.** — Since the right of each cotenant to the use and possession of a chattel used in common is precisely the same, and neither can have or exercise a superior authority over the other, it necessarily follows that the mere fact of exclusive possession and use of the chattel by one cotenant, even though it prevent the use and possession of the other, does not constitute a conversion for which trover may be maintained.<sup>6</sup> And the fact that there is

1. *Levy v. Clements*, 175 Mass. 376.

2. Thus, in *Wilton v. Girdlestone*, 5 B. & Ald. 847, 7 E. C. L. 278, it was held that a demand and refusal constituted evidence of a prior conversion; and therefore where deeds were in the defendant's possession prior to Michaelmas term, and the demand and refusal proved were on the day after that term, it was held that this was evidence of a conversion before the term, to be determined by the jury.

3. *Hartford Ice Co. v. Greenwoods Co.*, 61 Conn. 166, 29 Am. St. Rep. 189.

4. *Magee v. Scott*, 9 Cush. (Mass.) 148, 55 Am. Dec. 49; *Folsom v. Manchester*, 11 Cush. (Mass.) 334.

5. **Conversion by Cotenant.** — *Osborn v. Schenck*, 83 N. Y. 201.

6. **Detention and Use** — *England*. — *Fennings v. Grenville*, 1 Taunt. 241; *Jacobs v. Seward*, L. R. 4 C. P. 328, 17 W. R. 735, 20 L. T. N. S. 448; *Jones v. Brown*, 25 L. J. Exch. 345.

*Canada*. — *Wiggins v. White*, 2 N. Bruns. 97; *McFtridge v. Holstead*, 21 Nova Scotia 325.

*Alabama*. — *Perminter v. Kelly*, 18 Ala. 716, 54 Am. Dec. 177; *Allen v. Harper*, 26 Ala. 686; *Williams v. Nolen*, 34 Ala. 167; *Moore v. Walker*, 124 Ala. 109.

*California*. — *Balch v. Jones*, 61 Cal. 234.

*Georgia*. — *Hall v. Page*, 4 Ga. 428, 48 Am. Dec. 235. See also *Camp v. Casey*, 110 Ga. 262.

*Maine*. — *Dain v. Cowing*, 22 Me. 347, 39 Am. Dec. 585.

*Maryland*. — *Winner v. Penniman*, 35 Md. 165, 6 Am. Rep. 385.

*Michigan*. — *Ripley v. Davis*, 15 Mich. 75,

90 Am. Dec. 262; *McElroy v. O'Callaghan*, 112 Mich. 124.

*Minnesota*. — *Strong v. Colter*, 13 Minn. 82.

*Missouri*. — *Sheffler v. Mudd*, 71 Mo. App. 78.

*New Hampshire*. — *Ballou v. Hale*, 47 N. H. 347, 93 Am. Dec. 438.

*New Jersey*. — *Roston v. Morris*, 25 N. J. L. 173.

*New York*. — *St. John v. Standring*, 2 Johns. (N. Y.) 468; *Gilbert v. Dickerson*, 7 Wend. (N. Y.) 449, 22 Am. Dec. 592; *Farr v. Smith*, 9 Wend. (N. Y.) 338, 24 Am. Dec. 162; *Adams v. Loomis*, 4 Silv. Sup. (N. Y.) 558; *Button v. Kinnetz*, 88 Hun (N. Y.) 35; *Osborn v. Schenck*, 83 N. Y. 201.

*North Carolina*. — *Cole v. Terry*, 2 Dev. & B. L. (19 N. Car.) 252; *Lucas v. Wasson*, 3 Dev. L. (14 N. Car.) 398, 24 Am. Dec. 266; *Boner v. Latham*, 1 Ired. L. (23 N. Car.) 271; *Pitt v. Petway*, 12 Ired. L. (34 N. Car.) 69; *Campbell v. Campbell*, 2 Murph. (6 N. Car.) 65; *Grim v. Wicker*, 80 N. Car. 343; *Shearin v. Riggsbee*, 97 N. Car. 216; *Newby v. Harrell*, 99 N. Car. 149, 6 Am. St. Rep. 503; *Waller v. Bowling*, 108 N. Car. 289.

*Pennsylvania*. — *Heller v. Hufsmith*, 102 Pa. St. 533.

*Tennessee*. — *Cowan v. Buyers*, *Cooke (Tenn.)* 53, 5 Am. Dec. 668.

*Texas*. — *Trammell v. McDade*, 29 Tex. 360; *Kean v. Zundelwitz*, 9 Tex. Civ. App. 350.

*Utah*. — *Spalding v. Allred*, 23 Utah 354.

*Vermont*. — *Hurd v. Darling*, 14 Vt. 214.

**Possession and Claim of Ownership by a Purchaser at an Execution Sale** of property owned in cotenancy, to satisfy a judgment against one cotenant, where only the interest of the judg-

a change in the form of the substance of the chattel does not necessarily constitute a conversion.<sup>1</sup> In some few cases, however, it has been held that where one cotenant assumes exclusive possession of the chattel owned in common, under a claim of entire ownership, and refuses to recognize the rights of his cotenant, it constitutes a conversion rendering him liable in trover;<sup>2</sup> and the tendency of the later cases seems to be to extend rather than contract the use of the action of trover as a remedy between cotenants.<sup>3</sup>

**Destruction of Cotenant's Possibility of Enjoyment.** — If one tenant appropriates the chattel owned in common to his own use so as to render impossible any further enjoyment of it by his cotenant, this will constitute a conversion rendering him liable to the latter in trover;<sup>4</sup> and this rule does not require an actual destruction of the chattel itself.<sup>5</sup> So there may be a conversion if one cotenant assumes the chattel by use;<sup>6</sup> and in case of a cotenancy in logs,

ment debtor was sold, is not a conversion of the property. *Spalding v. Allred*, 23 Utah 354.

**The Secret Removal of Entire Chattels** by one tenant in common, without the consent or knowledge of the other, and for the purpose of selling them and applying the proceeds to his own use, does not amount to a conversion for which the cotenant can maintain trover, even though the removal has created a lien on the chattels by a third party. *Jones v. Brown*, 25 L. J. Exch. 345.

**The Use of Goods by a Stranger in Common with One Part Owner** is not a conversion by the stranger of the other part owner's share. *Bell v. Layman*, 1 T. B. Mon. (Ky.) 39, 15 Am. Dec. 83.

1. *Fennings v. Grenville*, 1 Taunt. 241, wherein it was held that one tenant in common of a whale may convert the blubber into oil without being guilty of a conversion.

2. *Bray v. Bray*, 30 Mich. 479; *Grove v. Wise*, 39 Mich. 161.

3. *Waller v. Bowling*, 108 N. Car. 294.

4. **Destruction of Possibility of Enjoyment** — *England*. — *Barnardiston v. Chapman*, cited in *Heath v. Hubbard*, 4 East 121.

*Canada*. — *Brady v. Arnold*, 19 U. C. C. P. 42; *McIntosh v. Port Huron Petrified Brick Co.*, 27 Ont. App. 262.

*Alabama*. — *Allen v. Harper*, 26 Ala. 687; *Russell v. Russell*, 62 Ala. 50; *Sullivan v. Lawler*, 72 Ala. 74; *Marlowe v. Rogers*, 102 Ala. 510. See also *Shepherd v. Taylor*, 105 Ala. 507.

*Kentucky*. — *Bell v. Layman*, 1 T. B. Mon. (Ky.) 39, 15 Am. Dec. 83.

*Maine*. — *Herrin v. Eaton*, 13 Me. 193, 29 Am. Dec. 499; *Dain v. Cowing*, 22 Me. 347, 39 Am. Dec. 585.

*Maryland*. — *Winner v. Penniman*, 35 Md. 165.

*Massachusetts*. — *Burbank v. Crooker*, 7 Gray (Mass.) 158, 66 Am. Dec. 470; *Reed v. Howard*, 2 Met. (Mass.) 36; *Weld v. Oliver*, 21 Pick. (Mass.) 559; *Daniels v. Daniels*, 7 Mass. 135; *Delaney v. Root*, 99 Mass. 546, 97 Am. Dec. 52; *Warner v. Abbey*, 112 Mass. 355; *Goell v. Morse*, 126 Mass. 480; *Needham v. Hill*, 127 Mass. 133.

*Michigan*. — *Webb v. Mann*, 3 Mich. 139; *Bray v. Bray*, 30 Mich. 479; *Grove v. Wise*, 39 Mich. 161; *Baylis v. Cronkhite*, 39 Mich. 413; *Sutherland v. Carter*, 52 Mich. 471; *McClure v. Thorpe*, 68 Mich. 35.

*Minnesota*. — *Person v. Wilson*, 25 Minn. 189.

*New York*. — *Tyler v. Taylor*, 8 Barb. (N. Y.) 585; *Dinehart v. Wilson*, 15 Barb. (N. Y.) 595; *Tanner v. Hills*, 44 Barb. (N. Y.) 428; *Green v. Edick*, 66 Barb. (N. Y.) 564; *Hyde v. Stone*, 9 Cow. (N. Y.) 230, 18 Am. Dec. 501; *Wilson v. Reed*, 3 Johns. (N. Y.) 175; *Oatfield v. Waring*, 14 Johns. (N. Y.) 192; *Sheldon v. Skinner*, 4 Wend. (N. Y.) 525, 21 Am. Dec. 161; *Gilbert v. Dickerson*, 7 Wend. (N. Y.) 449, 22 Am. Dec. 592; *Mumford v. McKay*, 8 Wend. (N. Y.) 442, 24 Am. Dec. 34; *Rightmyer v. Raymond*, 12 Wend. (N. Y.) 51; *Harris v. Gregg*, 17 N. Y. App. Div. 210.

*North Carolina*. — *Guyther v. Pettijohn*, 6 Ired. L. (28 N. Car.) 388, 45 Am. Dec. 499.

*Oregon*. — *Yamhill Bridge Co. v. Newby*, 1 Oregon 175; *Rosenau v. Syring*, 25 Oregon 386.

*Pennsylvania*. — *Coursin's Appeal*, 79 Pa. St. 220; *Agnew v. Johnson*, 17 Pa. St. 373, 55 Am. Dec. 565.

*South Dakota*. — *Wood v. Steinau*, 9 S. Dak. 110.

*Tennessee*. — *Cowan v. Buyers*, *Cooke (Tenn.)* 53, 5 Am. Dec. 668.

*Vermont*. — *Tubbs v. Richardson*, 6 Vt. 442, 27 Am. Dec. 570; *Lewis v. Clark*, 59 Vt. 363.

*Virginia*. — *Lowe v. Miller*, 3 Gratt. (Va.) 196.

*Wisconsin*. — *Bulger v. Woods*, 3 Pin. (Wis.) 463.

**If a Cotenant Mutilates a Printing Press** by taking essential parts from it, he is liable in trover for conversion. *Needham v. Hill*, 127 Mass. 133.

**Turning Hogs into Street.** — In *Sheldon v. Skinner*, 4 Wend. (N. Y.) 525, 21 Am. Dec. 161, a cotenant was held liable in trover as for the destruction of hogs owned in common where he had turned them into the street and they were lost.

**Surrendering Note to Maker for Cancellation.** — A joint owner of a note who takes it and without authority surrenders it to the maker for cancellation is liable to his co-owner in trover. *Winner v. Penniman*, 35 Md. 163, 6 Am. Rep. 385. See also *Thomas v. Morse*, 80 Tex. 280.

5. *Mayhew v. Herrick*, 7 C. B. 229, 62 E. C. L. 229; *McIntosh v. Port Huron Petrified Brick Co.*, 27 Ont. App. 262.

6. **Consumption by Use.** — *Lewis v. Clark*, 59 Vt. 363 (consumption of hay by use); *Brady v. Arnold*, 19 U. C. C. P. 42; *McLellan v. McDougall*, 28 Nova Scotia 237.



it was held that a conversion was worked by sawing up the logs and mixing the lumber therefrom with other lumber,<sup>1</sup> or by making the logs into pulp.<sup>2</sup> The removal of the chattel to a foreign jurisdiction has also been held to constitute a conversion.<sup>3</sup>

**Severance of Fixtures, etc., from Land.** — It has been held that where fixtures attached to the freehold and forming a part thereof are wrongfully severed and removed by a cotenant of the land, there is a conversion for which trover may be maintained;<sup>4</sup> but the harvesting of crops by one cotenant<sup>5</sup> or the cutting of hay<sup>6</sup> is not a conversion for which trover may be maintained.

**Sale by Cotenant.** — In some jurisdictions in the *United States* the rule has been adopted that a sale by one tenant of the whole property in the chattel, which ignores and denies the right of his cotenant, constitutes a conversion for which trover may be maintained.<sup>7</sup> In *England* and *Canada*, however, and in some of the *United States*, it is held that a mere sale by one tenant of the

1. **Sawing Up Logs.** — *McKay v. Crocker*, 10 N. Bruns. 20.

2. **Making Logs into Pulp.** — *Fleming v. Kattahdin Pulp, etc., Co.*, 93 Me. 110.

3. **Removal to Foreign Jurisdiction.** — *McIntosh v. Port Huron Petrified Brick Co.*, 27 Ont. App. 262. See also *Grim v. Wicker*, 80 N. Car. 343; *Bates v. Marsh*, 33 Vt. 122.

**Sending Vessel to Sea.** — Thus, if one cotenant in a vessel sends her to sea against the will of the other, and the vessel is lost, he is liable for conversion. *Lowthorp v. Smith*, 1 Hayw. (2 N. Car.) 255.

In *Barnardiston v. Chapman*, cited in *Heath v. Hubbard*, 4 East 121, a verdict for the plaintiff was not disturbed where it was shown that the plaintiffs and the defendants were tenants in common of a ship, and that defendants took such ship to another part of the kingdom, changed its name, altered its appearance, and then delivered it to a third party, who sent it on a voyage whereon it was lost. Whether the destruction was by means of the tenants in common was left to the jury.

4. **Severance of Fixtures.** — *Strickland v. Parker*, 54 Me. 263; *Benedict v. Howard*, 31 Barb. (N. Y.) 569; *Waller v. Bowling*, 108 N. Car. 294.

In *Strickland v. Parker*, 54 Me. 263, it appeared that a purchaser at execution sale of an undivided interest in a tract of land removed the superstructure of a marine railway located on the land, consisting of iron and wooden railways and sleepers, etc., and placed it upon another tract of land. It was held that the cotenant of the purchaser might maintain trover against him for removing it.

5. **Harvesting Crops.** — *Brady v. Arnold*, 19 U. C. C. P. 42.

6. **Cutting Hay.** — *Jacobs v. Seward*, L. R. 5 H. L. 464, 41 L. J. C. P. 221, 27 L. T. N. S. 185, affirming L. R. 4 C. P. 328, 38 L. J. C. Pl. 252, 22 L. T. N. S. 690.

7. **Sale by Tenant — General American Rule.** — *Alabama.* — *Perminster v. Kelly*, 18 Ala. 716, 54 Am. Dec. 177; *Smyth v. Tankersley*, 20 Ala. 212, 56 Am. Dec. 193; *Williams v. Nolan*, 34 Ala. 169; *Arthur v. Gayle*, 38 Ala. 259; *Sullivan v. Lawler*, 72 Ala. 74; *Steiner v. Trantum*, 98 Ala. 315.

*Georgia.* — *King v. Neel*, 98 Ga. 438, 58 Am. St. Rep. 311. See also *Hall v. Page*, 4 Ga. 428, 48 Am. Dec. 235.

*Maine.* — *Wheeler v. Wheeler*, 33 Me. 348; *McCrillis v. Hawes*, 38 Me. 567.

*Massachusetts.* — *Weld v. Oliver*, 21 Pick. (Mass.) 564; *Daniels v. Daniels*, 7 Mass. 135; *Brightman v. Eddy*, 97 Mass. 478; *Delaney v. Root*, 99 Mass. 546, 97 Am. Dec. 52; *Needham v. Hill*, 127 Mass. 133.

*Michigan.* — *Webb v. Mann*, 3 Mich. 139; *Crow v. Plummer*, 85 Mich. 550.

*Minnesota.* — *Person v. Wilson*, 25 Minn. 189; *Shepard v. Pettit*, 30 Minn. 119.

*New Hampshire.* — *Carr v. Dodge*, 40 N. H. 403; *White v. Brooks*, 43 N. H. 402.

*New York.* — *Tyler v. Taylor*, 8 Barb. (N. Y.) 585; *Hyde v. Stone*, 9 Cow. (N. Y.) 230, 18 Am. Dec. 501; *Walsh v. Adams*, 3 Den. (N. Y.) 125; *Nowlen v. Colt*, 6 Hill (N. Y.) 461, 41 Am. Dec. 756; *Van Doren v. Balty*, 11 Hun (N. Y.) 239; *Mumford v. McKay*, 8 Wend. (N. Y.) 444, 24 Am. Dec. 34; *Farr v. Smith*, 9 Wend. (N. Y.) 338, 24 Am. Dec. 162; *Rightmyer v. Raymond*, 12 Wend. (N. Y.) 51; *White v. Osborn*, 21 Wend. (N. Y.) 75; *Dyckman v. Valiente*, 42 N. Y. 560; *Osborn v. Schenck*, 83 N. Y. 201; *Phelps v. Delmore*, 69 Hun (N. Y.) 18; *Felts v. Collins*, 67 N. Y. App. Div. 430.

*Oregon.* — *Yamhill Bridge Co. v. Newby*, 1 Oregon 174.

*Pennsylvania.* — *Coursin's Appeal*, 79 Pa. St. 220.

*South Dakota.* — *Grigsby v. Day*, 9 S. Dak. 585.

*Tennessee.* — *Rains v. McNairy*, 4 Humph. (Tenn.) 356, 40 Am. Dec. 651.

*Texas.* — *Worsham v. Vignal*, 14 Tex. Civ. App. 324.

See also *Sylvester v. Craig*, 18 Colo. 44.

In *New York* the earlier cases hesitated to decide that a mere sale of the whole common property by one of the cotenants was sufficient proof of a conversion, and the loss or destruction of the property so that it had passed out of the reach of the injured party was to some extent coupled with the fact of the sale as furnishing ground for maintaining trover. *Wilson v. Reed*, 3 Johns. (N. Y.) 176; *Hyde v. Stone*, 9 Cow. (N. Y.) 230, 18 Am. Dec. 501; *Mumford v. McKay*, 8 Wend. (N. Y.) 444, 24 Am. Dec. 34. But in *White v. Osborn*, 21 Wend. (N. Y.) 75, the rule freed itself from any such incumbrance, and it was decided that a sale of the property which ignored and denied the right of the cotenant furnished sufficient proof of conversion.

whole property, though in denial of the rights of his cotenant, does not constitute a conversion.<sup>1</sup>

**Liability of Purchaser.** — A purchaser from one tenant of a chattel held in common becomes a claimant with the other cotenants, and his mere purchase from one cotenant (though the sale purports to transfer the whole property in the chattel) and retention of possession under claim of entire ownership does not constitute a conversion by him as against the other cotenant, even in the jurisdictions in which the cotenant making the sale would be liable in trover by reason of such sale.<sup>2</sup> Of course, if such purchaser resells the chattel by a sale which ignores and denies the right of his cotenant, he becomes liable in trover for a conversion by reason of such sale, in the jurisdictions in which a sale by a cotenant is considered to be a conversion.<sup>3</sup>

**Property of Divisible Nature.** — In a number of cases the courts have made an exception to the general rule with regard to the detention of a chattel by one cotenant, and have held that where a chattel owned in common is separable in respect to quantity and quality by weight or measure, one cotenant may demand his share from his cotenant in possession, and on his refusal to deliver it may maintain trover for the conversion;<sup>4</sup> and in at least one jurisdiction

This case has been steadily followed, and the doctrine is now well established. *Osborn v. Schenck*, 83 N. Y. 201; *Tyler v. Taylor*, 8 Barb. (N. Y.) 585; *Van Doren v. Balty*, 11 Hun (N. Y.) 239; *Dyckman v. Valiente*, 42 N. Y. 560.

**Assignment of Note and Mortgage.** — *Grigsby v. Day*, 9 S. Dak. 585.

**Necessity for Removal Beyond Reach of Cotenant.** — One tenant in common may maintain trover against his cotenant if the latter sells the whole property held in common, although it is not removed beyond the reach of the plaintiff. *White v. Osborn*, 21 Wend. (N. Y.) 72.

**Division and Sale of Herd of Cattle.** — In *Felts v. Collins*, 67 N. Y. App. Div. 430, where the plaintiff and the defendant were cotenants in a herd of cattle and the defendant took the cattle and divided them into two herds, and after offering to allow his cotenant to choose either herd drove off one herd and sold it, he was held liable for a conversion of the herd so sold.

**Sale on Execution — Liability of Sheriff and Creditor.** — In the jurisdictions where a sale by one cotenant is recognized as a conversion, a sheriff who levies upon the common property under execution against one of the cotenants and sells the entire interest is liable to the other tenant. *Walsh v. Adams*, 3 Den. (N. Y.) 125. And where an execution creditor instigates such a seizure and sale by the sheriff, he is also liable in trover for conversion. *Phelps v. Delmore*, 69 Hun (N. Y.) 18.

**If the Sale Is Made Without Intent to Ignore the Rights of the Cotenant,** it does not constitute a conversion; thus, if the sale is made with the consent of the cotenant, or where the chattel is not divisible in its nature and the sale is made in order to divide the property, there is no conversion. *Brown v. Burnap*, 17 N. Y. App. Div. 129.

**The Mere Renting** by one cotenant of the chattel owned in common, if this is the only use to which it is suited, does not constitute a conversion. *Hayes v. Kerr*, 40 N. Y. App. Div. 348 (rental of furniture of a hotel).

**1. English and Minority American Rule** — *England.* — *Farrar v. Beswick*, 1 M. & W. 688; *Mayhew v. Herrick*, 7 C. B. 229, 62 E.

C. L. 229; *Williams v. Barton*, 3 Bing. 139, 11 E. C. L. 70.

*Canada.* — *Ecclestone v. Jarvis*, 1 U. C. Q. B. 370; *Brady v. Arnold*, 19 U. C. C. P. 46; *Rourke v. Union Ins. Co.*, 23 Can. Sup. Ct. 344. See, however, *McNabb v. Howland*, 11 U. C. C. P. 434 (sale of vessel in foreign country); *Rathwell v. Rathwell*, 26 U. C. Q. B. 179; *McLellan v. McDougall*, 28 Nova Scotia 237.

*Connecticut.* — *Oviatt v. Sage*, 7 Conn. 95.

*Kentucky.* — *Ballentine v. Joplin*, 105 Ky. 70.

*Vermont.* — *Tubbs v. Richardson*, 6 Vt. 442, 27 Am. Dec. 570; *Welch v. Clark*, 12 Vt. 681, 36 Am. Dec. 368; *Hurd v. Darling*, 14 Vt. 214; *Sanborn v. Morrill*, 15 Vt. 700, 40 Am. Dec. 701; *Bates v. Marsh*, 33 Vt. 122; *Lewis v. Clark*, 59 Vt. 363. Compare *Vickery v. Taft*, 1 D. Chip. (Vt.) 241.

**Sale in Market Overt.** — In *England* it would seem that a sale of the chattel by one cotenant in market overt is a complete destruction of the cotenant's interest and constitutes a conversion. *Mayhew v. Herrick*, 7 C. B. 229, 62 E. C. L. 229. See also *Farrar v. Beswick*, 1 M. & W. 682.

**Sale by Sheriff on Execution.** — Where a chattel owned in common is levied on by a sheriff on execution against one cotenant and the entire interest in the chattel is sold, this does not constitute a conversion by the sheriff. *Mayhew v. Herrick*, 7 C. B. 229, 62 E. C. L. 229. See also *Farrar v. Beswick*, 1 M. & W. 688; *Ecclestone v. Jarvis*, 1 U. C. Q. B. 370.

**2. Liability of Purchaser.** — *Dain v. Cowing*, 22 Me. 347, 39 Am. Dec. 585; *Kilgore v. Wood*, 56 Me. 150, 96 Am. Dec. 440; *Ruckham v. Decker*, 23 N. J. Eq. 283; *Gilbert v. Dickerson*, 7 Wend. (N. Y.) 449, 22 Am. Dec. 592; *Osborn v. Schenck*, 83 N. Y. 201; *Trammell v. McDade*, 29 Tex. 367; *Worsham v. Vignal*, 5 Tex. Civ. App. 471.

**3. Weld v. Oliver**, 21 Pick. (Mass.) 559.

**4. Property of Divisible Nature** — *California.* — *Balch v. Jones*, 61 Cal. 234.

*Illinois.* — *German Nat. Bank v. Meadowcroft*, 95 Ill. 124, 35 Am. Rep. 137.

this rule has been expressly recognized by statute.<sup>1</sup> So with regard to such property one cotenant may make a division and sell his share without becoming liable thereby for the conversion of the part sold.<sup>2</sup> In order that this rule may be applied, however, there must be no doubt as to the divisibility of the chattel as to quantity and quality.<sup>3</sup>

**Statutory Provisions.** — In *Illinois* the common-law rule with regard to conversion by cotenants has been modified so as to allow one tenant to maintain trover against his cotenant who assumes exclusive control over the chattel owned in common.<sup>4</sup>

**V. DAMAGES RECOVERABLE — 1. In General.** — In trover the plaintiff does not seek to recover the property *in specie*, but seeks damages for the wrongful conversion.<sup>5</sup> The object in determining the measure of damages is to give to the plaintiff a full indemnity for the injury sustained by the wrongful conversion and to prevent the defendant from deriving any benefit from his own wrongful act.<sup>6</sup> But no greater damages should be allowed than have in truth been sustained, except in those cases where the law permits, by way of punitive justice, the recovery of exemplary or vindictive damages.<sup>7</sup> The rule of damages in trover is a question of law, and the jury is to ascertain the quantum of damages according to such rule.<sup>8</sup>

**2. Value of Property Converted — a. IN GENERAL.** — As a general rule the plaintiff is entitled to recover the value of the property wrongfully converted.<sup>9</sup>

*Kansas.* — *Piazzek v. White*, 23 Kan. 621, 33 Am. Rep. 211.

*Michigan.* — *Fiquet v. Allison*, 12 Mich. 328, 86 Am. Dec. 54; *Erwin v. Clark*, 13 Mich. 10; *Loomis v. O'Neal*, 73 Mich. 582.

*New Hampshire.* — *Pickering v. Moore*, 67 N. H. 533, 68 Am. St. Rep. 695. See, however, *Daniels v. Brown*, 34 N. H. 454, 69 Am. Dec. 505.

*New York.* — *Lobdell v. Stowell* (County Ct.) 37 How. Pr. (N. Y.) 88, *affirmed* 51 N. Y. 70; *Burns v. Winchell*, 44 Hun (N. Y.) 261; *Channon v. Lusk*, 2 Lans. (N. Y.) 211; *Stall v. Wilbur*, 77 N. Y. 158; *Gates v. Bowers*, 169 N. Y. 14, *reversing* 41 N. Y. App. Div. 612, 58 N. Y. Supp. 287.

See also *Stafford v. Ames*, 9 Pa. St. 343. But see *Hill v. Robison*, 3 Jones L. (48 N. Car.) 501; *Powell v. Hill*, 64 N. Car. 169; *Shearin v. Riggsbee*, 97 N. Car. 216; *Lehr v. Taylor*, 90 Pa. St. 381.

1. *George v. McGovern*, 83 Wis. 558, 35 Am. St. Rep. 77; *Wood v. Noack*, 84 Wis. 401.

2. *Fobes v. Shattuck*, 22 Barb. (N. Y.) 568; *Tripp v. Riley*, 15 Barb. (N. Y.) 334.

3. *Dear v. Reed*, 37 Hun (N. Y.) 594; *Felts v. Collins*, 67 N. Y. App. Div. 430; *Gates v. Bowers*, 169 N. Y. 14, 88 Am. St. Rep. 530.

4. *Benjamin v. Stremple*, 13 Ill. 469.

5. *Finch v. Blount*, 7 C. & P. 478, 32 E. C. L. 590; *Foster v. Brooks*, 6 Ga. 287; *McBain v. Smith*, 13 Ga. 315; *Evans v. Lipscomb*, 31 Ga. 71; *Malsby v. Young*, 104 Ga. 205. See also *supra*, this title, *Definition, Nature, and Origin of Action*.

6. *Ewart v. Kerr*, 2 McMull. L. (S. Car.) 141. See also *De Clerq v. Mungin*, 46 Ill. 112.

7. *Cook v. Loomis*, 26 Conn. 483; *Moffat v. Grand Trunk R. Co.*, 15 U. C. C. P. 392.

8. *Baker v. Wheeler*, 8 Wend. (N. Y.) 505, 24 Am. Dec. 66.

9. **Value of Property Converted — England.** — *Johnson v. Lancashire, etc.*, R. Co., 3 C. P. D.

499; *Mulliner v. Florence*, 3 Q. B. D. 484; *Sowell v. Champion*, 6 Ad. & El. 407, 33 E. C. L. 92; *Edmondson v. Nuttall*, 17 C. B. N. S. 280, 112 E. C. L. 280; *Wood v. Morewood*, 3 Q. B. 440, 43 E. C. L. 810; *Ewbank v. Nutting*, 7 C. B. 797, 62 E. C. L. 797; *Reid v. Fairbanks*, 13 C. B. 692, 76 E. C. L. 692; *Falk v. Fletcher*, 18 C. B. N. S. 403, 114 E. C. L. 403.

*Canada.* — *Rankin v. Mitchell*, 12 N. Bruns. 499.

*United States.* — *Bourne v. Ashley*, 1 Lowell (U. S.) 27; *Watt v. Potter*, 2 Mason (U. S.) 77; *Scull v. Briddle*, 2 Wash. (U. S.) 150.

*Alabama.* — *Lee v. Mathews*, 10 Ala. 682, 44 Am. Dec. 498; *Williams v. Crum*, 27 Ala. 468.

*Arkansas.* — *Ryburn v. Pryor*, 14 Ark. 505; *Jefferson v. Hale*, 31 Ark. 286.

*California.* — *Douglass v. Kraft*, 9 Cal. 562; *Cassin v. Marshall*, 18 Cal. 689; *Hamer v. Hathaway*, 33 Cal. 117; *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462; *Barrante v. Garratt*, 50 Cal. 112; *McCray v. Burr*, 125 Cal. 636.

*Colorado.* — *Sutton v. Dana*, 15 Colo. 98; *Mouat v. Wood*, 4 Colo. App. 118.

*Connecticut.* — *Clark v. Whitaker*, 19 Conn. 319, 48 Am. Dec. 160; *Curtis v. Ward*, 20 Conn. 204; *Swift v. Barnum*, 23 Conn. 523; *Cook v. Loomis*, 26 Conn. 483; *Hurd v. Hubbell*, 26 Conn. 389.

*Delaware.* — *Vaughan v. Webster*, 5 Harr. (Del.) 256.

*Florida.* — *Robinson v. Hartridge*, 13 Fla. 501.

*Georgia.* — *Riley v. Martin*, 35 Ga. 136.

*Illinois.* — *Keaggy v. Hite*, 12 Ill. 99; *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28; *Bernstein v. Walker*, 25 Ill. App. 224.

*Indiana.* — *Yater v. Mullen*, 24 Ind. 277; *Nickey v. Zonker*, 22 Ind. App. 211.

*Iowa.* — *Cutter v. Fanning*, 2 Iowa 580; *Robinson v. Hurley*, 11 Iowa 410, 79 Am. Dec. 497; *Russell v. Huiskamp*, 77 Iowa 727.



**Fixtures.** — It has been held that where fixtures constituting a part of the freehold are wrongfully severed and converted, the plaintiff is entitled to recover only their value in their severed condition, and not their value as annexed to and a part of the freehold;<sup>1</sup> and in an action by a tenant for the conversion of movable fixtures, arising out of the wrongful refusal of the landlord to permit their removal, the tenant is entitled to recover only their value after removal, without reference to their value in position.<sup>2</sup>

**Property under Contract of Sale.** — Where there is a contract for the sale of a chattel by the plaintiff to the defendant, and the defendant wrongfully takes the chattel before the sale is executed, the plaintiff is not, in an action of trover for such conversion, entitled to recover the contract price at which the chattel was to be sold, in case such price exceeds the market value, but is restricted to a recovery of the market value.<sup>3</sup> And a buyer who repudiates the possession acquired under a contract of purchase is not, when sued for the wrongful conversion, entitled to the benefits of the contract in shielding him from liability for the full value of the property.<sup>4</sup> So where the buyer in an executory contract for the sale of a chattel is sued by a third person for its

*Kansas.* — *Prinz v. Moses*, (Kan. 1901) 66 Pac. Rep. 1009.

*Kentucky.* — *Freeman v. Luckett*, 2 J. J. Marsh. (Ky.) 390; *Daniel v. Holland*, 4 J. J. Marsh. (Ky.) 26; *Lillard v. Whittaker*, 3 Bibb (Ky.) 92; *Sanders v. Vance*, 7 T. B. Mon. (Ky.) 209, 18 Am. Dec. 167; *Justice v. Mendell*, 14 B. Mon. (Ky.) 12.

*Louisiana.* — *Chamberlain v. Worrell*, 38 La. Ann. 347.

*Maine.* — *Winslow v. Norton*, 29 Me. 419, 50 Am. Dec. 601; *Hayden v. Bartlett*, 35 Me. 203; *Robinson v. Barrows*, 48 Me. 186.

*Maryland.* — *Stirling v. Garritee*, 18 Md. 468; *Hopper v. Haines*, 71 Md. 64.

*Massachusetts.* — *King v. Ham*, 6 Allen (Mass.) 298; *Selkirk v. Cobb*, 13 Gray (Mass.) 313; *Beecher v. Denniston*, 13 Gray (Mass.) 354; *Johnson v. Sumner*, 1 Met. (Mass.) 172; *Barry v. Bennett*, 7 Met. (Mass.) 354; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356, 25 Am. Dec. 396.

*Michigan.* — *Ripley v. Davis*, 15 Mich. 75, 90 Am. Dec. 262; *Allen v. Kinyon*, 41 Mich. 281.

*Minnesota.* — *Murphy v. Sherman*, 25 Minn. 196.

*Missouri.* — *Polk v. Allen*, 19 Mo. 467; *Spencer v. Vance*, 57 Mo. 427; *Charles v. St. Louis, etc., R. Co.*, 58 Mo. 458; *Davis v. Fairclough*, 63 Mo. 61; *Reamer v. Morrison Express Co.*, 93 Mo. App. 501; *Thomas Mfg. Co. v. Huff*, 62 Mo. App. 124.

*Nebraska.* — *Bennett v. McDonald*, 59 Neb. 234.

*Nevada.* — *Carlyon v. Lannan*, 4 Nev. 156; *Newman v. Kane*, 9 Nev. 234.

*New Hampshire.* — *Kingsbury v. Smith*, 13 N. H. 109.

*New Jersey.* — *Wyckoff v. Bodine*, 65 N. J. L. 95.

*New York.* — *Dillenback v. Jerome*, 7 Cow. (N. Y.) 208; *Wilson v. Conine*, 2 Johns. (N. Y.) 280; *Hyde v. Stone*, 7 Wend. (N. Y.) 354, 22 Am. Dec. 582; *Andrews v. Durant*, 18 N. Y. 496; *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623; *Tyng v. Commercial Warehouse Co.*, 58 N. Y. 308; *Mechanics, etc., Bank v.*

*Farmers, etc., Nat. Bank*, 60 N. Y. 40; *Wehle v. Haviland*, 69 N. Y. 448; *Parmenter v. Fitzpatrick*, 135 N. Y. 190; *Cohen v. Salet*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 51.

*North Carolina.* — *Waller v. Bowling*, 108 N. Car. 289.

*Ohio.* — *Dixon v. Caldwell*, 15 Ohio St. 412.

*Pennsylvania.* — *Jacoby v. Laussatt*, 6 S. & R. (Pa.) 300; *Dennis v. Barber*, 6 S. & R. (Pa.) 420; *McConnell v. Linton*, 4 Watts (Pa.) 357; *Agnew v. Johnson*, 22 Pa. St. 471, 62 Am. Dec. 303; *Lyon v. Gormley*, 53 Pa. St. 261.

*South Carolina.* — *Buford v. Fannen*, 1 Bay (S. Car.) 273, 1 Am. Dec. 615; *Huff v. Huff*, 1 Bailey L. (S. Car.) 456; *Morris v. Berkley*, 2 Treadw. (S. Car.) 228; *Banks v. Hattan*, 1 Nott & M. (S. Car.) 221; *M'Dowell v. Murdock*, 1 Nott & M. (S. Car.) 237, 9 Am. Dec. 684; *Burney v. Pledger*, 3 Rich. L. (S. Car.) 191.

*Tennessee.* — *Jones v. Allen*, 1 Head (Tenn.) 626.

*Texas.* — *Moore v. Aldrich*, 25 Tex. Supp. 276; *Hatcher v. Pelham*, 31 Tex. 201; *Schoolher v. Hutchins*, 66 Tex. 324; *Hull v. Davidson*, 6 Tex. Civ. App. 588.

*Vermont.* — *Thrall v. Lathrop*, 30 Vt. 307, 73 Am. Dec. 306; *Crumb v. Oaks*, 38 Vt. 566.

*Washington.* — *Chappell v. Puget Sound Reduction Co.*, 27 Wash. 63, 91 Am. St. Rep. 820.

*West Virginia.* — *Cecil v. Clark*, 49 W. Va. 459.

*Wisconsin.* — *Ingram v. Rankin*, 47 Wis. 406, 32 Am. Rep. 762; *La Chapelle v. Warehouse, etc., Supply Co.*, 95 Wis. 518.

**Conversion of Gold Coin.** — *Phillips v. Speyers*, 49 N. Y. 653.

**1. Fixtures Wrongfully Severed.** — *Clarke v. Holford*, 2 C. & K. 540, 61 E. C. L. 540; *McGregor v. High*, 21 L. T. N. S. 803. See also *Barff v. Probyn*, 64 L. J. Q. B. 557.

**2. Johnston v. Albany Dry Goods Co.**, 12 N. Y. App. Div. 608.

**3. Property under Contract of Sale.** — *Nickey v. Zonker*, 22 Ind. App. 211.

**4. Backenstoss v. Stahler**, 33 Pa. St. 251, 75 Am. Dec. 592.

wrongful conversion, the actual value of the chattel is recoverable, and not merely the price which the buyer agreed to pay for it.<sup>1</sup> Where the plaintiff in good faith purchased a chattel from a third person who had procured it from the defendant by fraudulent representation, it was held that the plaintiff might recover from the defendant, on his repossessing himself of it, the actual value of the chattel, and not merely the price paid by him therefor.<sup>2</sup> Again, in trover for a chattel left with the defendant by the plaintiff to be sold, a minimum price being fixed, the plaintiff is not entitled to recover such price as the value of the chattel, but only its actual value.<sup>3</sup>

*b. TIME OF ESTIMATING VALUE* — (1) *In General*. — Ordinarily, the value of the chattels converted, for the purpose of recovery in trover, is to be estimated as of the time of the conversion.<sup>4</sup> The liability of the defendant

1. *Andrews v. Durant*, 18 N. Y. 496.

2. *Kingsbury v. Smith*, 13 N. H. 109.

3. *Sinnette v. Hoddick*, (Buffalo Super. Ct. Gen. T.) 10 Misc. (N. Y.) 586.

4. *Time of Estimating Value* — *England*. — *Edmondson v. Nuttall*, 17 C. B. N. S. 280, 112 E. C. L. 280, 34 L. J. C. Pl. 102; *Falk v. Fletcher*, 18 C. B. N. S. 405, 114 E. C. L. 405. See, however, *Johnson v. Hook*, 1 Cab. & El. 89, 31 W. R. 812.

*Canada*. — *Scott v. McAlpine*, 6 U. C. C. P. 302.

*United States*. — *Bourne v. Ashley*, 1 Lowell (U. S.) 27; *Watt v. Potter*, 2 Mason (U. S.) 77; *Edmunds v. Nolan*, 86 Fed. Rep. 564.

*Alabama*. — *Lee v. Mathews*, 10 Ala. 682, 44 Am. Dec. 498; *Williams v. Crum*, 27 Ala. 468; *Linam v. Reeves*, 68 Ala. 89; *Burks v. Hubbard*, 69 Ala. 379; *Street v. Nelson*, 80 Ala. 230.

*Arkansas*. — *Ryburn v. Pryor*, 14 Ark. 505; *Peterson v. Gresham*, 25 Ark. 380; *Jefferson v. Hale*, 31 Ark. 286.

*California*. — *Cassin v. Marshall*, 18 Cal. 689; *Sherman v. Finch*, 71 Cal. 68. See, however, *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462.

*Colorado*. — *Sutton v. Dana*, 15 Colo. 98; *Hannan v. Connett*, 10 Colo. App. 171.

*Connecticut*. — *Clark v. Whitaker*, 19 Conn. 319, 48 Am. Dec. 160; *Curtis v. Ward*, 20 Conn. 204; *St. Peter's Church v. Beach*, 26 Conn. 356; *Hurd v. Hubbell*, 26 Conn. 389; *Cook v. Loomis*, 26 Conn. 483.

*Delaware*. — *Vaughan v. Webster*, 5 Harr. (Del.) 256; *Stewart v. Bright*, 6 Houst. (Del.) 344.

*Florida*. — *Robinson v. Hartridge*, 13 Fla. 501; *Skinner v. Pinney*, 19 Fla. 42, 45 Am. Rep. 1.

*Georgia*. — *Schley v. Lyon*, 6 Ga. 530; *Garrard v. Dawson*, 49 Ga. 434.

*Illinois*. — *Keaggy v. Hite*, 12 Ill. 99; *Northern Transp. Co. v. Sellick*, 52 Ill. 249; *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28; *Janeway v. Burton*, 201 Ill. 78; *Monmouth First Nat. Bank v. Strang*, 28 Ill. App. 325; *Cassidy v. Elk Grove Land, etc., Co.*, 58 Ill. App. 39.

*Indiana*. — *Yater v. Mullen*, 23 Ind. 562, 24 Ind. 277.

*Iowa*. — *Cutter v. Fanning*, 2 Iowa 580; *Robinson v. Hurley*, 11 Iowa 410, 79 Am. Dec. 497; *Brown v. Allen*, 35 Iowa 306; *Gravel v. Clough*, 81 Iowa 272; *Gensburg v. Field*, 104 Iowa 599.

*Kansas*. — *Prinz v. Moses*, (Kan. 1901.) 66 Pac. Rep. 1009; *Shepard v. Pratt*, 16 Kan. 209;

*Simpson v. Alexander*, 35 Kan. 225; *Gentry v. Kelley*, 49 Kan. 82.

*Kentucky*. — *Freeman v. Luckett*, 2 J. J. Marsh. (Ky.) 390; *Lillard v. Whittaker*, 3 Bibb (Ky.) 92; *Daniel v. Holland*, 4 J. J. Marsh. (Ky.) 26; *Sanders v. Vance*, 7 T. B. Mon. (Ky.) 209, 18 Am. Dec. 167; *Rogers v. Twyman*, (Ky. 1900) 56 S. W. Rep. 665.

*Louisiana*. — *Arrowsmith v. Gordon*, 3 La. Ann. 110; *Badillo v. Tio*, 7 La. Ann. 487; *Vance v. Tourné*, 13 La. 225.

*Maine*. — *Hayden v. Bartlett*, 35 Me. 203; *Moody v. Whitney*, 38 Me. 174, 61 Am. Dec. 239; *McKenney v. Haines*, 63 Me. 74; *Robinson v. Barrows*, 48 Me. 186.

*Maryland*. — *Hepburn v. Sewell*, 5 Har. & J. (Md.) 211, 9 Am. Dec. 512; *Stirling v. Garritte*, 18 Md. 468; *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269; *Baltimore Third Nat. Bank v. Boyd*, 44 Md. 47, 22 Am. Rep. 35; *Franklin Bank v. Harris*, 77 Md. 423; *Hopper v. Haines*, 71 Md. 64; *Heinekamp v. Beaty*, 74 Md. 388. See, however, *Andrews v. Clark*, 72 Md. 396.

*Massachusetts*. — *King v. Ham*, 6 Allen (Mass.) 298; *Wyman v. American Powder Co.*, 8 Cush. (Mass.) 168; *Henshaw v. Bellows Falls Bank*, 10 Gray (Mass.) 568; *Selkirk v. Cobb*, 13 Gray (Mass.) 313; *Johnson v. Sumner*, 1 Met. (Mass.) 172; *Barry v. Bennett*, 7 Met. (Mass.) 354; *Kennedy v. Whitwell*, 4 Pick. (Mass.) 466; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356, 25 Am. Dec. 396; *Greenfield Bank v. Leavitt*, 17 Pick. (Mass.) 1, 28 Am. Dec. 268; *Coolidge v. Choate*, 11 Met. (Mass.) 79; *Fisher v. Brown*, 104 Mass. 259, 6 Am. Rep. 235.

*Michigan*. — *Ripley v. Davis*, 15 Mich. 75, 90 Am. Dec. 262; *Bates v. Stansell*, 19 Mich. 91; *Greeley v. Stilson*, 27 Mich. 153; *Dalton v. Laudahn*, 27 Mich. 529; *Burk v. Webb*, 32 Mich. 173; *Allen v. Kinyon*, 41 Mich. 281; *Tuttle v. White*, 46 Mich. 485, 41 Am. Rep. 175; *Hubbell v. Blandy*, 87 Mich. 209, 24 Am. St. Rep. 154; *Davidson v. Kolb*, 95 Mich. 469.

*Minnesota*. — *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491; *Dolliff v. Robbins*, 83 Minn. 498.

*Missouri*. — *Carter v. Feland*, 17 Mo. 383; *Polk v. Allen*, 19 Mo. 467; *Walker v. Borland*, 21 Mo. 289; *Funk v. Dillon*, 21 Mo. 294; *Spencer v. Vance*, 57 Mo. 427; *Hendricks v. Evans*, 46 Mo. App. 313; *Thomas Mfg. Co. v. Huff*, 62 Mo. App. 124; *Horine v. Bone*, 69 Mo. App. 481. *Compare Davis v. Fairclough*, 63 Mo. 61.

for the value of the property at the time of the conversion is not affected by the fact that there has been a subsequent decline in the value of the property,<sup>1</sup> nor by the fact that after conversion the chattel became worthless through no fault of the defendant, or from unavoidable causes.<sup>2</sup> Thus, where slaves were converted the plaintiff was allowed to recover their value at the time of the conversion, though at the time when the action was brought or at the time of trial they had been emancipated.<sup>3</sup>

(2) *Fluctuations in Value*. — In many cases, however, in trover for conversion by reason of the wrongful taking, detention, or disposition of chattels, the plaintiff has been allowed to recover, where the value of the chattel fluctuated between the time of such conversion and the time of trial, the highest market value during such time.<sup>4</sup> Even where this rule is applied, how-

*Nebraska*. — *Bennett v. McDonald*, 59 Neb. 234.

*Nevada*. — *O'Meara v. North American Min. Co.*, 2 Nev. 112; *Carlyon v. Lannan*, 4 Nev. 156; *Bowker v. Goodwin*, 7 Nev. 135; *Boylan v. Huguet*, 8 Nev. 345; *Newman v. Kane*, 9 Nev. 234.

*New Hampshire*. — *Frothingham v. Morse*, 45 N. H. 545.

*New York*. — *New York Guaranty, etc., Co. v. Flynn*, 65 Barb. (N. Y.) 365; *Dillenback v. Jerome*, 7 Cow. (N. Y.) 294; *King v. Orser*, 4 Duer (N. Y.) 431; *Wilson v. Conine*, 2 Johns. (N. Y.) 280; *Hyde v. Stone*, 7 Wend. (N. Y.) 354, 22 Am. Dec. 582; *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507; *Tyng v. Commercial Warehouse Co.*, 58 N. Y. 308; *Mechanics, etc., Bank v. Farmers, etc., Nat. Bank*, 60 N. Y. 40; *Wehle v. Haviland*, 69 N. Y. 448; *Sonneberg v. Levy*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 154; *Prior v. Morton Boarding Stables*, 43 N. Y. App. Div. 140.

*North Carolina*. — *Arrington v. Wilmington, etc., R. Co.*, 6 Jones L. (51 N. Car.) 68, 72 Am. Dec. 559; *Waller v. Bowling*, 108 N. Car. 289.

*Ohio*. — *Dixon v. Caldwell*, 15 Ohio St. 412; *Fosdick v. Greene*, 27 Ohio St. 484, 22 Am. Rep. 328; *Baltimore, etc., R. Co. v. O'Donnell*, 49 Ohio St. 489, 34 Am. St. Rep. 579.

*Oklahoma*. — *Robinson v. Peru Plow, etc., Co.*, 1 Okla. 140.

*Oregon*. — *Fleckenstein v. Inman*, 27 Oregon 328.

*Pennsylvania*. — *Lyon v. Gormley*, 53 Pa. St. 261; *Neiler v. Kelley*, 69 Pa. St. 403; *Work v. Bennett*, 70 Pa. St. 484; *Huntington, etc., R., etc., Co. v. English*, 86 Pa. St. 247; *North v. Phillips*, 89 Pa. St. 250; *Pennsylvania L. Ins. Co. v. Philadelphia, etc., R. Co.*, 153 Pa. St. 160; *Jamison's Estate*, 163 Pa. St. 143; *Hart's Estate*, 203 Pa. St. 488. See also *Van Voorhis v. Rea*, 153 Pa. St. 19.

*South Carolina*. — *Burney v. Pledger*, 3 Rich. L. (S. Car.) 191.

*Texas*. — *Hatcher v. Pelham*, 31 Tex. 201; *Tucker v. Hamlin*, 60 Tex. 171; *Block v. Sweeney*, 63 Tex. 419; *Schooller v. Hutchins*, 66 Tex. 324; *Douglass v. Coffin*, (Tex. 1886) 1 S. W. Rep. 270; *Barber v. Hutchins*, 66 Tex. 319; *Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52; *Hull v. Davidson*, 6 Tex. Civ. App. 588; *Smith v. Bates*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1044; *Houghton v. Puryear*, 10 Tex. Civ. App. 383; *Reynolds v. Weinman*, (Tex. Civ. App. 1897) 40 S. W. Rep. 560; *Temple Grocery Co. v. Sullivan*, 18 Tex. Civ.

App. 281; *Waller v. Hail*, (Tex. Civ. App. 1898) 46 S. W. Rep. 82; *Ellis v. Stine*, (Tex. Civ. App. 1900) 55 S. W. Rep. 758. See, however, *Calvit v. McFadden*, 13 Tex. 324; *Stephenson v. Price*, 30 Tex. 715; *Brasher v. Davidson*, 31 Tex. 190, 98 Am. Dec. 525.

*Vermont*. — *Grant v. King*, 14 Vt. 367; *Thrall v. Lathrop*, 30 Vt. 307, 73 Am. Dec. 306.

*Washington*. — *Fish v. Nethercutt*, 14 Wash. 582, 53 Am. St. Rep. 892; *Zindorf v. Western American Co.*, 26 Wash. 695.

*Wisconsin*. — *Ingram v. Rankin*, 47 Wis. 406, 32 Am. Rep. 762.

But see *Morris v. Wood*, (Tenn. Ch. 1896) 35 S. W. Rep. 1013. *Compare Mercer v. Jones*, 3 Campb. 477, and *Greening v. Wilkinson*, 1 C. & P. 625, 11 E. C. L. 499, which latter case was an action of trover for cotton, where it appeared that, at the time of the conversion, the cotton was worth sixpence per pound, and at the time of the trial it was worth ten and one-half pence. *Abbott, C. J.*, ruled that the jury was not limited to the former value, saying: "The jury \* \* \* may give the value at the time of the conversion or at any subsequent time in their discretion, because the plaintiff might have had a good opportunity of selling the goods if they had not been detained."

1. *Decline in Value*. — *Sharpe v. Barney*, 114 Ala. 361; *Boutwell v. Parker*, 124 Ala. 341; *Kingsbury v. Smith*, 13 N. H. 109; *Mott v. Pettit*, 1 N. J. L. 344; *Devlin v. Pike*, 5 Daly (N. Y.) 85.

2. *Carter v. Feland*, 17 Mo. 383 (death of slave); *Burney v. Pledger*, 3 Rich. L. (S. Car.) 191 (death of slave).

3. *Riley v. Martin*, 35 Ga. 136. See also *Craufurd v. Smith*, 93 Va. 623.

4. *Fluctuations in Value*. — *California*. — *Douglass v. Kraft*, 9 Cal. 562; *Hamer v. Hathaway*, 33 Cal. 117; *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462.

*Indiana*. — *Ellis v. Wire*, 33 Ind. 127, 5 Am. Rep. 189; *Citizens' St. R. Co. v. Robbins*, 144 Ind. 671.

*Louisiana*. — *Gragard's Succession*, 106 La. 298.

*New Jersey*. — *Dimock v. U. S. National Bank*, 55 N. J. L. 296, 39 Am. St. Rep. 643.

*New York*. — *Wilson v. Mathews*, 24 Barb. (N. Y.) 298; *West v. Wentworth*, 3 Cow. (N. Y.) 82; *Clark v. Pinney*, 7 Cow. (N. Y.) 681; *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614; *Bennett v. Lockwood*, 20 Wend. (N. Y.) 223, 32 Am. Dec. 532; *Romaine v. Van Allen*, 26 N. Y. 309; *Wright v. Bank of Metropolis*, 110 N. Y.



ever, the plaintiff should be allowed to receive the benefits of a fluctuation in the value of the chattel for a reasonable time only after the conversion.<sup>1</sup> In some jurisdictions statutes have been enacted expressly authorizing the plaintiff to recover in trover the highest market value of the chattels converted at any time between the conversion and the verdict,<sup>2</sup> provided the action for the conversion is commenced and prosecuted within a reasonable time.<sup>3</sup>

**What Is a Reasonable Time** within the meaning of the statute is a question of law for the court where there is no dispute as to the facts.<sup>4</sup>

**c. PLACE OF ESTIMATING VALUE.** — The value of the property converted should be estimated according to its value at the place of conversion,<sup>5</sup> but in

237, 6 Am. St. Rep. 356; *Smith v. Savin*, 141 N. Y. 315; *Griggs v. Day*, 158 N. Y. 1. See, however, *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507.

*Pennsylvania.* — *Jamison's Estate*, 3 Pa. Dist. 217.

*South Carolina.* — *Kid v. Mitchell*, 1 Nott & M. (S. Car.) 334, 9 Am. Dec. 702.

*Washington.* — *Fish v. Nethercutt* 14 Wash. 582, 53 Am. St. Rep. 892.

*Wyoming.* — *Hilliard Flume, etc., Co. v. Woods*, 1 Wyo. 396.

See also *Greening v. Wilkinson*, 1 C. & P. 626, 11 E. C. L. 499; *Galigher v. Jones*, 129 U. S. 193; *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 30 Am. St. Rep. 87. But see *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28.

**In Mississippi** it was declared that where no fraud, malice, or oppression intervenes, the law limits the relief to compensation, as that term is legally understood, and the rule of the higher intermediate value was expressly rejected after a careful review of the English and New York cases. A compromise is, however, effected by making the damages discretionary with the jury when any of the following elements appear: first, in all cases where the original act was wilful and wrongful; second, where the original act was *bona fide*, but the subsequent detention, sale, or other disposition of the property, after a knowledge of the plaintiff's claim, was wilful and injurious; third, where the original act and subsequent disposition of the property for a greater price than its market value, at the time of the original taking, were all in ignorance of the plaintiff's rights, but the defendant seeks to retain the difference, as a speculation resulting from his original, unintentional wrong; fourth, where the property in controversy has some peculiar value to the plaintiff, and is wilfully withheld from the rightful owner, or he has been deprived thereof by the wilful and wrongful act of the defendant. *Whitfield v. Whitfield*, 40 Miss. 352.

**In Florida** the allowance of the highest intermediate value, in the discretion of the jury, seems to be authorized. See *Moody v. Caulk*, 14 Fla. 50.

1. *Galigher v. Jones*, 129 U. S. 193; *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462; *Citizens' St. R. Co. v. Robbins*, 144 Ind. 671; *Dimock v. U. S. National Bank*, 55 N. J. L. 296, 39 Am. St. Rep. 643; *Scott v. Rogers*, 31 N. Y. 676; *Markham v. Jaudon*, 41 N. Y. 235; *Matthews v. Coe*, 49 N. Y. 57; *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80; *Grunnan v. Smith*, 81 N. Y. 25; *Wright v. Bank of Metropolis*, 110 N. Y. 237, 6 Am. St. Rep. 356; *Barnes v. Brown*,

130 N. Y. 372; *Smith v. Savin*, 141 N. Y. 315; *Griggs v. Day*, 158 N. Y. 1; *Morris v. Wood*, (Tenn. Ch. 1896) 35 S. W. Rep. 1013.

**2. Statutory Provisions.** — *Barrante v. Garratt*, 50 Cal. 112; *Dent v. Holbrook*, 54 Cal. 145; *Fromm v. Sierra Nevada Silver Min. Co.*, 61 Cal. 629; *Niles v. Edwards*, 90 Cal. 10; *Barnett v. Thompson*, 37 Ga. 335; *Central R., etc., Co. v. Atlantic, etc., R. Co.*, 50 Ga. 444; *Ware v. Simmons*, 55 Ga. 94; *Tuller v. Carter*, 59 Ga. 395; *Jaques v. Stewart*, 81 Ga. 81; *Pickert v. Rugg*, 1 N. Dak. 230; *Fargo First Nat. Bank v. Red River Valley Nat. Bank*, 9 N. Dak. 319; *Rosum v. Hodges*, 1 S. Dak. 308.

**Corner by Speculation.** — Under the *North Dakota* statute authorizing the plaintiff in trover to recover the highest market value of the property at any time between the conversion and the verdict, without interest, the plaintiff is entitled to recover such highest value though it is an unnatural price due to a corner by speculators, and is at least twice the value of the property at the date of the conversion. *Fargo First Nat. Bank v. Red River Valley Nat. Bank*, 9 N. Dak. 319.

3. *Niles v. Edwards*, 90 Cal. 10; *Pickert v. Rugg*, 1 N. Dak. 230.

4. *Fromm v. Sierra Nevada Silver Min. Co.*, 61 Cal. 629; *Fargo First Nat. Bank v. Red River Valley Nat. Bank*, 9 N. Dak. 319.

In *Rosum v. Hodges*, 1 S. Dak. 308, where the conversion occurred on Nov. 22, 1888, during the plaintiff's absence from the state, which absence continued until December 16, an action begun on Feb. 26, 1889, and tried at the ensuing term was held to have been prosecuted with "reasonable diligence," within the meaning of the statute, so as to entitle the plaintiff to recover the highest market value of the property at any time between the conversion and the verdict.

**An Unexplained Delay of Eleven Months in Beginning the Action** for the conversion is not, as a matter of law, reasonable diligence. *Pickert v. Rugg*, 1 N. Dak. 230; *Fargo First Nat. Bank v. Minneapolis, etc., Elevator Co.*, 8 N. Dak. 430.

**5. Place at Which Value Is to Be Estimated.** — *Falk v. Fletcher*, 18 C. B. N. S. 403, 114 E. C. L. 403; *Bourne v. Ashley*, 1 Lowell (U. S.) 27; *Hamer v. Hathaway*, 33 Cal. 117; *Hisler v. Carr*, 34 Cal. 645; *Robinson v. Hart-ridge*, 13 Fla. 501; *Skinner v. Pinney*, 19 Fla. 42, 45 Am. Rep. 1; *Gensburg v. Field*, 104 Iowa 596; *Gentry v. Kelley*, 49 Kan. 82; *Davidson v. Kolb*, 95 Mich. 469; *Bennett v. McDonald*, 59 Neb. 234; *Spicer v. Waters*, 65 Barb. (N. Y.) 227; *Fleischmann v. Samuel*, 18 N. Y. App. Div. 97.

case there is no market value at such place, it may be estimated by considering its value at the nearest place at which there is a market,<sup>1</sup> adding<sup>2</sup> or deducting,<sup>3</sup> as the case may require, the cost of transportation from or to such place.

**Goods in Transit.** — In the case of goods converted at an intermediate point, during transportation, it is held that the value at the place of destination should afford the measure of damages.<sup>4</sup>

**d. MARKET VALUE.** — The value of the property is to be estimated at its market value.<sup>5</sup> Thus, in trover for the conversion of household goods at a place where second-hand goods of such character are sold, and as such have a market value, the plaintiff is entitled to recover only their market value as second-hand goods, and not their value to him, in the absence of evidence showing a peculiar value in the goods to him.<sup>6</sup> Of course, the defendant cannot, by showing the absence of a market value, escape the payment of damages for the conversion of a chattel which is of value to the owner;<sup>7</sup> and where the chattels converted have no market value, the plaintiff is entitled to recover the value of the goods to himself,<sup>8</sup> as, for example, in case of the

1. *Selkirk v. Cobb*, 13 Gray (Mass.) 317; *Coolidge v. Choate*, 11 Met. (Mass.) 79; *Spicer v. Waters*, 65 Barb. (N. Y.) 227; *Brizsee v. Maybee*, 21 Wend. (N. Y.) 144.

2. *Fairbanks v. Kent*, 16 Colo. App. 35; *Sears v. Lydon*, 5 Idaho 358.

3. *Bourne v. Ashley*, 1 Lowell (U. S.) 27; *Hallett v. Novion*, 14 Johns. (N. Y.) 273; *Boylston Ins. Co. v. Davis*, 70 N. Car. 485; *Hodson v. Goodale*, 22 Oregon 68.

In *Boylston Ins. Co. v. Davis*, 70 N. Car. 485, where certain iron was wrongfully seized, converted, and left at a point in North Carolina, it was held that the measure of damages might be the price of the iron in any other Atlantic port where there was a market for it at the time of the conversion, less the cost of getting it there.

In *Bourne v. Ashley*, 1 Lowell (U. S.) 27, where trover was brought for the conversion of a whale in the Okhotsk sea, the measure of damages was held to be the value of the whale at the time and place of conversion, which could be found by taking the value of the oil and bone at New Bedford, the ruling market of the United States at the time and the home port of both vessels, and deducting therefrom the expense of cutting, boiling, freight, and insurance.

4. *The Joshua Barker*, 1 Abb. Adm. 218; *Farwell v. Price*, 30 Mo. 587.

5. **Market Value** — *United States*. — *Bourne v. Ashley*, 1 Lowell (U. S.) 27; *Watt v. Potter*, 2 Mason (U. S.) 77.

*California*. — *Fox v. Hale*, etc., *Silver Min. Co.*, 108 Cal. 369.

*Colorado*. — *Burchinell v. Butters*, 7 Colo. App. 294.

*Illinois*. — *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28.

*Iowa*. — *Gensburg v. Field*, 104 Iowa 599.

*Kansas*. — *Prinz v. Moses*, (Kan. 1901) 66 Pac. Rep. 1009.

*Louisiana*. — *Badillo v. Tio*, 7 La. Ann. 487.

*Michigan*. — *Iler v. Baker*, 82 Mich. 226.

*Missouri*. — *Spencer v. Vance*, 57 Mo. 427.

*Nebraska*. — *Bennett v. McDonald*, 59 Neb. 234.

*New York*. — *Spicer v. Waters*, 65 Barb. (N.

Y.) 234; *Wehle v. Haviland*, 69 N. Y. 448; *Parmenter v. Fitzpatrick*, 135 N. Y. 190.

*Texas*. — *Tucker v. Hamlin*, 60 Tex. 171; *Hull v. Davidson*, 6 Tex. Civ. App. 588; *Reynolds v. Weinman*, (Tex. Civ. App. 1897) 40 S. W. Rep. 560; *Lincoln v. Packard*, 25 Tex. Civ. App. 22.

*Wisconsin*. — *La Chapelle v. Warehouse*, etc., *Supply Co.*, 95 Wis. 518.

The market value in case of merchandise held for sale is the price for which the goods can be replaced for money in the market, not the retail value or price for which they are sold. *Wehle v. Haviland*, 69 N. Y. 448.

6. *Iler v. Baker*, 82 Mich. 226.

7. **Absence of Market Value.** — *Bourne v. Ashley*, 1 Lowell (U. S.) 27; *Stickney v. Allen*, 10 Gray (Mass.) 352.

8. *Gensburg v. Field*, 104 Iowa 599; *Stickney v. Allen*, 10 Gray (Mass.) 352; *Suydam v. Jenkins*, 3 Sandf. (N. Y.) 614; *Heald v. Macgowan*, 15 Daly (N. Y.) 233; *Leoncini v. Post*, (C. Pl. Gen. T.) 13 N. Y. Supp. 825; *Johnston v. Albany Dry Goods Co.*, 12 N. Y. App. Div. 608; *Bateman v. Ryder*, 106 Tenn. 712.

The plaintiff bought champagne, lying at a wharf, at fourteen shillings per dozen, and resold it at twenty-four shillings to the captain of a ship about to leave the country. The wharfinger refused to deliver the wine, and the plaintiff was unable to fulfil his contract. In an action for the conversion, it was held that the plaintiff was entitled, as damages, to the price at which he had sold the champagne, that being its real value at the time of the conversion. *France v. Gaudet*, L. R. 6 Q. B. 199, 40 L. J. Q. B. 121.

**Pictures and Unpublished Manuscript.** — *Bateman v. Rydel*, 106 Tenn. 712.

**Family Portrait.** — *Green v. Boston*, etc., R. Co., 128 Mass. 221, 35 Am. Rep. 370.

**Solicitor's Docket.** — *Doyle v. Eccles*, 17 U. C. C. P. 644.

**Electrotype Plates for Books.** — See *Heald v. Macgowan*, 15 Daly (N. Y.) 233.

**In an Action for the Conversion of a Dress Suit,** its value to the plaintiff, whom it fitted, was

conversion of sheet music annotated by the plaintiff.<sup>1</sup>

*e. VALUE INCREASED BY LABOR OF DEFENDANT* — (1) *In General.* — It frequently happens that chattels wrongfully taken by the defendant are afterwards increased in value by his expenditure of money or labor thereon. In such a case the owner may, by an action of replevin, recover the chattel in its improved condition, provided, of course, there has not been such a change in its nature as to defeat his title.<sup>2</sup> If, however, instead of bringing replevin for the chattel he brings trover for its conversion, the question arises whether he can, by making a demand for the chattel in its improved condition, base thereon the right to recover its value in such condition, or whether the original wrongful taking or detention is to be regarded as the conversion and the plaintiff limited to a recovery for its value at such time and in its unimpaired condition. On this question the decisions are in conflict. In some cases the courts, recognizing the title of the owner to the chattel as improved, have permitted him to recover its value in such condition,<sup>3</sup> reasoning that it would be absurd to say that the original owner may retake the chattel by an action of replevin in its improved condition and yet that he may not, if put to his action of trover, recover its improved value.<sup>4</sup> Thus, where logs were wrongfully taken from the plaintiff's land and transported to market, the plaintiff was allowed to recover their value at the market to which they were transported;<sup>5</sup> and where corn was wrongfully taken and converted into whiskey the owner of the corn was allowed in trover to recover the value of the whiskey.<sup>6</sup> In other cases, however, it is held that where a chattel is wrongfully taken by the defendant and its condition is improved by him by the expenditure of money or labor, the plaintiff, in case he resorts to the action of trover, can recover only the value of the property in its unimproved condition.<sup>7</sup> The better rule, which is now most generally recognized, is that where the original taking is without wrongful purpose or intent, and under the belief that the taker has a right to the property, the owner can recover only the unimproved value of the property;<sup>8</sup> but where the original taking was wilful and without color or claim of right, the owner is entitled to recover the value of the property at the time of demand for its return and in its condition at that time,

held to be recoverable. *Sell v. Ward*, 81 Ill. App. 675.

1. *Leoncini v. Post*, (C. Pl. Gen. T.) 13 N. Y. Supp. 825.

2. See the title REPLEVIN, vol. 24, p. 482.

3. *Recovery of Value of Chattel in Improved Condition.* — *Robertson v. Jones*, 71 Ill. 405; *McLean County Coal Co. v. Long*, 81 Ill. 359; *Illinois, etc., R., etc., Co. v. Ogle*, 82 Ill. 627, 25 Am. Rep. 342; *Moody v. Whitney*, 38 Me. 174, 61 Am. Dec. 239; *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491; *Hendricks v. Evans*, 46 Mo. App. 313; *Brown v. Sax*, 7 Cow. (N. Y.) 95; *Pierce v. Schenck*, 3 Hill (N. Y.) 28; *Baker v. Wheeler*, 8 Wend. (N. Y.) 505, 24 Am. Dec. 66; *Silsbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307.

4. *Silsbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307.

5. *Wooden-Ware Co. v. U. S.*, 106 U. S. 432; *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491.

6. *Silsbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307.

7. *Recovery of Value in Unimproved Condition.* — *Green v. Farmer*, 4 Burr. 2214; *Reid v. Fairbanks*, 13 C. B. 729, 76 E. C. L. 729; *Aborn v. Mason*, 14 Blatchf. (U. S.) 405; *Omaha, etc., Smelting, etc., Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185; *Dresser Mfg. Co. v.*

*Waterston*, 3 Met. (Mass.) 9; *Ward v. Carson River Wood Co.*, 13 Nev. 62; *Single v. Schneider*, 30 Wis. 570.

8. *Improvement in Good Faith* — *England.* — *Jegon v. Vivian*, L. R. 6 Ch. 742.

*Canada.* — *Morton v. McDowell*, 7 U. C. Q. B. 338.

*United States.* — *Fisher v. Brown*, 70 Fed. Rep. 570, 37 U. S. App. 407.

*Alabama.* — *White v. Yawkey*, 108 Ala. 270, 54 Am. St. Rep. 159.

*Florida.* — *Wright v. Skinner*, 34 Fla. 453.

*Michigan.* — *Winchester v. Craig*, 33 Mich. 205; *Clink v. Gunn*, 90 Mich. 135.

*Minnesota.* — *Hinman v. Heyderstadt*, 32 Minn. 250; *Dolliff v. Robbins*, 83 Minn. 498, 83 Am. St. Rep. 466.

*Nebraska.* — *Carpenter v. Lingenfelter*, 42 Neb. 728.

*New Hampshire.* — *Beede v. Lamprey*, 64 N. H. 513, 10 Am. St. Rep. 426.

*New York.* — *Hyde v. Cookson*, 21 Barb. (N. Y.) 92; *Penfield v. Sage*, 71 Hun (N. Y.) 573.

*Pennsylvania.* — *Herdie v. Young*, 55 Pa. St. 176, 93 Am. Dec. 739; *Hill v. Canfield*, 56 Pa. St. 454.

*Vermont.* — *Tilden v. Johnson*, 52 Vt. 628, 36 Am. Rep. 769.

*Wisconsin.* — *Weymouth v. Chicago, etc., R. Co.*, 17 Wis. 550, 84 Am. Dec. 763.



and in such a case it is not material that the wrongdoer has changed its character or by improvements greatly enhanced its value.<sup>1</sup> Where trover is brought against a *bona fide* purchaser from one who wrongfully and in bad faith took chattels and increased their value by the expenditure of money or labor thereon, the owner is still allowed to recover the value of the property as improved by the wrongdoer, as the purchaser's liability must necessarily be the same as that of his vendor;<sup>2</sup> and *a fortiori* one who is not a *bona fide* purchaser is liable for such value.<sup>3</sup>

(2) *Severance from Realty*. — In trover for the conversion of severed portions of realty, where the wrongful act has been through ignorance, and not wilful, as where there has been an honest dispute as to title, the property is to be valued at the time of the wrongful act, that is, at the same rate as if it had been purchased *in situ* by the defendant; but where the wrongdoer has acted wilfully or in bad faith, the benefit of his labor or expense will not be allowed to him.<sup>4</sup>

**Mining Coal or Ore.** — Thus it has been held that where one person mines coal or ore on the land of another under the *bona fide* belief that he has the right to do so, in trover for the coal or ore so mined the plaintiff may recover only the value of the mineral in the bed or its value where mined, deducting the cost of mining.<sup>5</sup> On the other hand, where the defendant did not act in

**1. Improvement in Bad Faith.** — *Bly v. U. S.*, 4 Dill. (U. S.) 464; *Wooden-Ware Co. v. U. S.*, 106 U. S. 432; *Central Coal, etc., Co. v. John Henry Shoe Co.*, 69 Ark. 302; *Wright v. Skinner*, 34 Fla. 453; *Everson v. Seller*, 105 Ind. 266; *Stuart v. Phelps*, 39 Iowa 18; *Dolliff v. Robbins*, 83 Minn. 498 85 Am. St. Rep. 466; *Smith v. Baechler*, 18 Ont. 293.

**2. Purchaser from Person Improving in Bad Faith** — *United States*. — *Wooden-Ware Co. v. U. S.*, 106 U. S. 432; *Duff v. Bindley*, 16 Fed. Rep. 178.

*Arizona*. — *Alta Min., etc., Co. v. Benson Min., etc., Co.*, (Ariz. 1888) 16 Pac. Rep. 565. *Arkansas*. — *Central Coal, etc., Co. v. John Henry Shoe Co.*, 69 Ark. 302.

*Florida*. — *Wright v. Skinner*, 34 Fla. 453.

*Georgia*. — *Parker v. Waycross, etc., R. Co.*, 81 Ga. 387.

*Maine*. — *Powers v. Tilley*, 87 Me. 34, 47 Am. St. Rep. 304.

*Michigan*. — *Tuttle v. White*, 46 Mich. 485, 41 Am. Rep. 175.

*Minnesota*. — *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548; *Hastay v. Bonness*, 84 Minn. 120.

*New York*. — *Silisbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307.

**3. Pine River Logging, etc., Co. v. U. S.**, 186 U. S. 279, *affirming* 105 Fed. Rep. 1004; *Smith v. Baechler*, 18 Ont. 293.

**4. Severance from Realty** — *United States*. — *Wooden-Ware Co. v. U. S.*, 106 U. S. 432; *Cheaney v. Nebraska, etc., Stone Co.*, 41 Fed. Rep. 740.

*Alabama*. — *Riddle v. Driver*, 12 Ala. 590.

*Arizona*. — *Alta Min., etc., Co. v. Benson Min., etc., Co.*, (Ariz. 1888) 16 Pac. Rep. 565.

*Colorado*. — *Omaha, etc., Smelting, etc., Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185.

*Connecticut*. — *Baldwin v. Porter*, 12 Conn. 484.

*Florida*. — *Skinner v. Pinney*, 19 Fla. 42, 45 Am. Rep. 1.

*Georgia*. — *Parker v. Waycross, etc., R. Co.*, 81 Ga. 396.

*Indiana*. — *Ellis v. Wire*, 33 Ind. 127, 5 Am. Rep. 189.

*Louisiana*. — *Eastman v. Harris*, 4 La. Ann. 193.

*Maine*. — *Moody v. Whitney*, 38 Me. 174, 61 Am. Dec. 239.

*Michigan*. — *Symes v. Oliver*, 13 Mich. 9; *Ripley v. Davis*, 15 Mich. 75, 90 Am. Dec. 262; *Winchester v. Craig*, 33 Mich. 205.

*Mississippi*. — *Heard v. James*, 49 Miss. 236; *Illinois Cent. R. Co. v. Le Blanc*, 74 Miss. 626.

*Missouri*. — *Mueller v. St. Louis, etc., R. Co.*, 31 Mo. 262; *Gray v. Parker*, 38 Mo. 160.

*New Hampshire*. — *Beede v. Lamprey*, 64 N. H. 510, 10 Am. St. Rep. 426. See also *Foot v. Merrill*, 54 N. H. 490, 20 Am. Rep. 151.

*North Carolina*. — *Bennett v. Thompson*, 13 Ired. L. (35 N. Car.) 146.

*Ohio*. — *Lake Shore, etc., R. Co. v. Hutchins*, 32 Ohio St. 584.

*Texas*. — *Texas, etc., R. Co. v. White*, 25 Tex. Civ. App. 278.

*Vermont*. — *Tilden v. Johnson*, 52 Vt. 628, 36 Am. Rep. 769.

**5. Mining Coal or Ore in Good Faith** — *England*. — *Morgan v. Powell*, 3 Q. B. 278, 43 E. C. L. 734; *Wood v. Morewood*, 3 Q. B. 440, 43 E. C. L. 810; *Hilton v. Woods*, L. R. 4 Eq. 432; *Martin v. Porter*, 5 M. & W. 352; *Livingstone v. Rawyards Coal Co.*, 5 App. Cas. 25; *Jegon v. Vivian*, L. R. 6 Ch. 742; *In re United Merthyr Collieries Co., L. R. 15 Eq. 46*; *Templemore v. Moore*, 15 Ir. C. L. 14.

*United States*. — *Colorado Cent. Consol. Min. Co. v. Turck*, 70 Fed. Rep. 294, 36 U. S. App. 208.

*Colorado*. — *Omaha, etc., Smelting, etc., Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185; *St. Clair v. Cash Gold Min., etc., Co.*, 9 Colo. App. 235.

*Maryland*. — *Franklin Coal Co. v. McMillan*, 49 Md. 549, 33 Am. Rep. 280; *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403, 43 Am. Rep. 560.

good faith, the plaintiff has been allowed to recover the value of the mineral as mined without any deduction for the cost of mining.<sup>1</sup>

**Cutting Timber.** — So where standing trees are cut by a wrongdoer not acting in good faith, the owner of the land is entitled to recover the value of the logs, and is not limited to a recovery for the value of the standing trees.<sup>2</sup> Where, however, the defendant acted in good faith, the owner of the land has been allowed to recover only the value of the standing trees, or stumpage value, or the value of the logs deducting the cost of felling the timber, thereby giving to the defendant the benefit of his labor,<sup>3</sup> or the value of the trees immediately after they had been severed from the land so as to become chattels and the subject of conversion.<sup>4</sup>

*f.* **PROOF OF VALUE — Burden of Proof.** — The burden of proving the value of the property for the purpose of recovery in trover is upon the plaintiff,<sup>5</sup> but even without any evidence of value the plaintiff is entitled to nominal damages.<sup>6</sup>

*Massachusetts.* — *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 86.

*Michigan.* — *Hartford Iron Min. Co. v. Cambria Min. Co.*, 93 Mich. 90, 32 Am. St. Rep. 488.

*Montana.* — *Fitzgerald v. Clark*, 17 Mont. 100, 52 Am. St. Rep. 665.

*Nevada.* — *Waters v. Stevenson*, 13 Nev. 157, 29 Am. Rep. 293.

*New York.* — *Genet v. Delaware, etc., Canal Co.*, 14 N. Y. App. Div. 177.

*Pennsylvania.* — *Forsyth v. Wells*, 41 Pa. St. 291, 80 Am. Dec. 617; *Kier v. Peterson*, 41 Pa. St. 357; *Lykens Valley Coal Co. v. Dock*, 62 Pa. St. 232; *Ege v. Kille*, 84 Pa. St. 333.

*Tennessee.* — *Ross v. Scott*, 15 Lea (Tenn.) 479. See also *Coal Creek Min., etc., Co. v. Moses*, 15 Lea (Tenn.) 300, 54 Am. Rep. 415.

And see *Chamberlain v. Collinson*, 45 Iowa 429; *Austin v. Huntsville Coal, etc., Co.*, 72 Mo. 535, 37 Am. Rep. 446.

**1. Mining Coal or Ore in Bad Faith — England.** — *Wood v. Morewood*, 3 Q. B. 440, 43 E. C. L. 810; *Livingstone v. Rawyards Coal Co.*, 5 App. Cas. 25.

*United States.* — *Benson Min., etc., Co. v. Alta Min., etc., Co.*, 145 U. S. 428.

*Colorado.* — *St. Clair v. Cash Gold Min., etc., Co.*, 9 Colo. App. 235.

*Illinois.* — *McLean County Coal Co. v. Long*, 81 Ill. 359; *Illinois, etc., R., etc., Co. v. Ogle*, 82 Ill. 627, 25 Am. Rep. 342; *McLean County Coal Co. v. Lennon*, 91 Ill. 561, 33 Am. Rep. 64; *Thomas Pressed Brick Co. v. Herter*, 60 Ill. App. 58.

*Indiana.* — *Sunnyside Coal, etc., Co. v. Reitz*, 14 Ind. App. 478.

*Washington.* — *Jordan v. Coulter*, 30 Wash. 116.

See also *Lyon v. Gormley*, 53 Pa. St. 261.

**2. Cutting Timber in Bad Faith — United States.** — *Bly v. U. S.*, 4 Dill. (U. S.) 464; *Pine River Logging, etc., Co. v. U. S.*, 186 U. S. 279, affirming 105 Fed. Rep. 1004; *Wooden-Ware Co. v. U. S.*, 106 U. S. 432; *Duff v. Bindley*, 16 Fed. Rep. 178.

*Alabama.* — *Brooks v. Rogers*, 101 Ala. 111.

*Arkansas.* — *Nicklase v. Morrison*, 56 Ark. 553; *Central Coal, etc., Co. v. John Henry Shoe Co.*, 69 Ark. 302.

*Florida.* — *Skinner v. Pinney*, 19 Fla. 42, 45 Am. Rep. 1.

*Indiana.* — *Everson v. Seller*, 105 Ind. 266.

*Maine.* — *Powers v. Tilley*, 87 Me. 34, 47 Am. St. Rep. 304; *Wing v. Milliken*, 91 Me. 387, 64 Am. St. Rep. 238; *Moody v. Whitney*, 34 Me. 563.

*Michigan.* — *Tuttle v. White*, 46 Mich. 485, 41 Am. Rep. 175.

*Minnesota.* — *Nesbitt v. St. Paul Lumber Co.*, 21 Minn. 491; *Hastay v. Bonness*, 84 Minn. 120.

*Compare* *Single v. Schneider*, 30 Wis. 570.

**3. Cutting Timber in Good Faith — Arkansas.** — *Central Coal, etc., Co. v. John Henry Shoe Co.*, 69 Ark. 302.

*Michigan.* — *Winchester v. Craig*, 33 Mich. 205; *Ayres v. Hubbard*, 57 Mich. 322, 58 Am. Rep. 361, 71 Mich. 594; *Anderson v. Besser*, (Mich. 1902) 91 N. W. Rep. 737, 9 Detroit Leg. N. 412. *Compare* *Grant v. Smith*, 26 Mich. 201.

*Minnesota.* — *Hinman v. Heyderstadt*, 32 Minn. 250; *Whitney v. Huntington*, 37 Minn. 197; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548.

*Mississippi.* — *Heard v. James*, 49 Miss. 236.

*Pennsylvania.* — *Herdie v. Young*, 55 Pa. St. 176, 93 Am. Dec. 739; *Morrison v. Robinson*, 31 Pa. St. 458.

*Tennessee.* — *Ross v. Scott*, 15 Lea (Tenn.) 479.

*Washington.* — *Chappell v. Puget Sound Reduction Co.*, 27 Wash. 63, 91 Am. St. Rep. 820.

*Wisconsin.* — *Hungerford v. Redford*, 29 Wis. 345; *Single v. Schneider*, 30 Wis. 570; *Tuttle v. Wilson*, 52 Wis. 643.

**4. White v. Yawkey**, 108 Ala. 270, 54 Am. St. Rep. 159; *Wright v. Skinner*, 34 Fla. 453; *Beede v. Lamprey*, 64 N. H. 513, 10 Am. St. Rep. 426.

**5. Proof of Value — Burden of Proof.** — *Electric Lighting Co. v. Rust*, 131 Ala. 484; *Nickey v. Zonker*, 22 Ind. App. 211; *Hall v. Burgess*, 5 Gray (Mass.) 12; *Greenville First Nat. Bank v. Montgomery*, 70 Miss. 550; *New Jersey Adamant Mfg. Co. v. Barth*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 784; *Liebman v. Abramson*, (N. Y. City Ct. Gen. T.) 38 Misc. (N. Y.) 807; *Canning v. Owen*, 22 R. I. 624, 84 Am. St. Rep. 858; *Williams v. Deen*, 5 Tex. Civ. App. 575; *Sabine Land, etc., Co. v. Perry*, (Tex. Civ. App. 1899) 54 S. W. Rep. 327.

**6. Douglass v. Hobe**, 36 N. Y. App. Div.

**Presumptions.** — It has been held that where the defendant fails to produce the chattels converted by him or show them not to be of the best quality of their class, the jury may fairly hold the strongest presumptions against him, that is, that the chattels were of the best quality of their class, and fix the value accordingly.<sup>1</sup>

**Admissibility of Evidence.** — The general rules of evidence with regard to admissibility and competency to prove the value of the chattels converted apply, of course, in actions of trover, and all evidence tending to show the value should, as a general rule, be admitted.<sup>2</sup> Thus, evidence of the price at which the goods have been disposed of at private or public sale is admissible.<sup>3</sup> But

638. See also *Kellogg v. Hamilton*, (Miss. 1891) 10 So. Rep. 479.

1. **Presumption as to Quality.** — *Armory v. Delamirie*, 1 Stra. 505; *Ryburn v. Pryor*, 14 Ark. 505; *Harris v. Rosenberg*, 43 Conn. 227; *Kavanaugh v. Taylor*, 2 Ind. App. 502; *Beecher v. Denniston*, 13 Gray (Mass.) 354; *Bailey v. Shaw*, 24 N. H. 297, 55 Am. Dec. 241; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62; *Clark v. Miller*, 4 Wend. (N. Y.) 628. See, however, *Clunnes v. Pezzey*, 1 Campb. 8. *Compare Goltra v. Penland*, 42 Oregon 18.

In an action for converting goods received, but not produced by the defendant, effect may properly be given to slight evidence of the value. *Great Western R. Co. v. Gurton*, 1 F. & F. 359.

In *Tea v. Gates*, 10 Ind. 164, the property converted, although not shown to be in the possession of the defendant, was traced to him, and was of a kind that probably would not remain long in his possession, yet in taking it he could have ascertained its precise quality. It was held that, the defendant having failed to ascertain the quality, the jury was properly instructed to solve all doubts in relation to the amount and value against him.

2. **Admissibility of Evidence** — *California*. — *Lehmann v. Schmidt*, 87 Cal. 15; *Mortimer v. Marder*, 93 Cal. 172.

*Georgia*. — *Simpson v. Cincinnati, etc., R. Co.*, 81 Ga. 495.

*Indiana*. — *Stewart v. Long*, 16 Ind. App. 164.

*Iowa*. — *Frick v. Kabaker*, 116 Iowa 494.

*Michigan*. — *Adams v. Elseffer*, (Mich. 1902) 92 N. W. Rep. 772, 9 Detroit Leg. N. 531.

*New York*. — *Merchant v. Jordan*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 468; *Hicks v. Monarch Cycle Mfg. Co.*, 68 N. Y. App. Div. 134.

*Texas*. — *Lincoln v. Packard*, 25 Tex. Civ. App. 22.

*Vermont*. — *Waters v. Langdon*, 16 Vt. 570; *Stillwell v. Farewell*, 64 Vt. 286.

**Action for Conversion of Railroad Stock.** — *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28.

In *Trover for the Conversion of a Large Number of Watches*, testimony as to their average value is competent. *Illingworth v. Greenleaf*, 11 Minn. 235.

**Custom-house Valuation.** — In *Caffe v. Bertrand*, How. App. Cas. (N. Y.) 224, it was held that where foreign goods had been passed through the custom house, the valuation put upon them there could be introduced as evidence.

**Comparison with Similar Property.** — The market value may be ascertained from the value of the same quantity of like property. *Lawton v. Chase*, 108 Mass. 238.

**Admissions by Plaintiff — Bill of Sale.** — A bill of sale executed by the plaintiff to a third person may be given in evidence by the defendant. *Scott v. Burch*, 6 Har. & J. (Md.) 67.

**Offers Made by Would-be Purchasers.** — *Illinois Cent. R. Co. v. Le Blanc*, 74 Miss. 626.

**The Dividend-earning Capacity of Stock** has been held to be admissible to prove value. *Greer v. Lafayette County Bank*, 128 Mo. 559.

3. **Price at Sales.** — *Beach v. Raritan, etc., R. Co.*, 37 N. Y. 470; *Parmenter v. Fitzpatrick*, 135 N. Y. 190.

**Title in Dispute at Time of Sale.** — If at the time of the public sale of the chattel the title was in dispute, and the question whether the purchaser at such sale would acquire a title depended upon the determination of that dispute, evidence as to the price received at such sale is not admissible to show the value of the property. *Steiner v. Trantum*, 98 Ala. 315.

**Private Sale.** — *Brown v. Lawton*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 137, 53 Hun (N. Y.) 636; *Keiley v. Mechanics, etc., Bank*, 72 Hun (N. Y.) 168; *Bowdish v. Page*, 81 Hun (N. Y.) 170. See also *Levy v. Scott*, 115 Cal. 39; *Murray v. Okanogan Live Stock, etc., Co.*, 12 Wash. 259. *Compare Whitmark v. Lorton*, 15 Daly (N. Y.) 548.

In *Parmenter v. Fitzpatrick*, 135 N. Y. 190, it was held that the price obtained at an actual *bona fide* sale of the property, fairly conducted and not forced, whether at auction or at private sale, was competent upon the question of the market value.

**Purchase by Plaintiff in Open Market — Amount Paid Held to Be Evidence of Value.** — *Gauche v. Milbrath*, 94 Wis. 674. *Compare Lincoln v. Packard*, 25 Tex. Civ. App. 22.

**Public Sale.** — *Whitehouse v. Atkinson*, 3 C. & P. 344, 14 E. C. L. 339; *Baker v. Seavey*, 163 Mass. 522, 47 Am. St. Rep. 475; *Smith v. Mitchell*, 12 Mich. 180; *Davis v. Zimmerman*, 40 Mich. 28; *Dyer v. Rosenthal*, 45 Mich. 590; *Hutchinson v. Poyer*, 78 Mich. 337. *Compare Showman v. Lee*, 79 Mich. 653.

Evidence of the price for which the goods sold at auction should be received for the consideration of the jury, to be compared with the other evidence of value that may be offered, and should be allowed such weight as it is entitled to in view of the circumstances of the sale and the degree of competition actually exhibited. *Campbell v. Woodworth*, 20 N. Y.



statements of prospective buyers at a public sale as to the value of the chattels are not admissible.<sup>1</sup> Expert testimony of witnesses acquainted with the value of similar property is admissible.<sup>2</sup> And in order to show the value of the property at the time of the conversion, evidence may be admissible to show its value at a period prior or subsequent thereto, where there is no more direct way of showing the value at the time of the conversion;<sup>3</sup> but it would seem proper to exclude such evidence in the absence of any assurance that there is no more direct method of proof,<sup>4</sup> and evidence of value at a time other than the time of the conversion does not of itself, it seems, sufficiently prove its value at the time of conversion.<sup>5</sup>

**3. Choses in Action — a. IN GENERAL.** — In trover for the conversion of a chose in action, such as a bill, note, bond, or other evidence of indebtedness, the plaintiff is entitled to recover the value of the thing converted,<sup>6</sup> and *prima facie* the true value is the face value of the chose in action or the amount of the indebtedness evidenced thereby;<sup>7</sup> but as the plaintiff is entitled to recover

500; *Gill v. McNamee*, 42 N. Y. 46; *Heinmuller v. Abbott*, 34 N. Y. Super. Ct. 228.

**Reports of Prices.** — The market value of stocks may be ascertained from reports of prices current at the time of the conversion. *Seligman v. Rogers*, 113 Mo. 642; *Whelan v. Lynch*, 60 N. Y. 469, 19 Am. Rep. 202.

1. *Wessels v. Beeman*, 87 Mich. 481.

2. **Expert Testimony** — *California*. — *Mortimer v. Murder*, 93 Cal. 172.

*Massachusetts*. — *Beecher v. Denniston*, 13 Gray (Mass.) 354; *Lawton v. Chase*, 108 Mass. 238; *Munro v. Stowe*, 175 Mass. 169; *Vandine v. Burpee*, 13 Met. (Mass.) 288, 46 Am. Dec. 733. See also *Brady v. Brady*, 8 Allen (Mass.) 101; *Fitchburg R. Co. v. Freeman*, 12 Gray (Mass.) 401, 74 Am. Dec. 600; *Cornell v. Dean*, 105 Mass. 435; *Miller v. Smith*, 112 Mass. 470.

*Michigan*. — *Dalton v. Stiles*, 74 Mich. 726; *Hutchinson v. Poyer*, 78 Mich. 337.

*Nebraska*. — *Clements v. Eiseley*, 63 Neb. 651.

*Oklahoma*. — *Robinson v. Peru Plow*, etc., Co., 1 Okla. 140.

*Washington*. — *Lines v. Alaska Commercial Co.*, 29 Wash. 133.

See also *Carr v. Moore*, 41 N. H. 131; *Smith v. Hill*, 22 Barb. (N. Y.) 656; *Brill v. Flagler*, 23 Wend. (N. Y.) 354.

**3. Evidence of Value Prior or Subsequent to Conversion.** — *Kendrick v. Beard*, 90 Mich. 589; *Lamb v. O'Reilly*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 212; *Prior v. Morton Boarding Stables*, 43 N. Y. App. Div. 140; *Pitt v. Texas Storage Co.*, 4 Tex. App. Civ. Cas., § 295; *Gauche v. Milbrath*, 94 Wis. 674. *Compare Storrs v. Robinson*, 74 Conn. 443; *Showman v. Lee*, 79 Mich. 653.

4. *Yater v. Mullen*, 23 Ind. 562.

5. *O'Neil v. Patterson*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 3; *Towne v. St. Anthony*, etc., Elevator Co., 8 N. Dak. 200.

**6. Choses in Action.** — *Ennor v. Galena*, etc., R. Co., 23 Ill. App. 124; *Monmouth First Nat. Bank v. Strang*, 28 Ill. App. 325; *Richardson v. Ashby*, 132 Mo. 238; *Taylor v. Morgan*, 3 Watts (Pa.) 333; *Walley v. Deseret Nat. Bank*, 14 Utah 305; *Doyle v. Eccles*, 17 U. C. C. P. 644.

**7. Prima Facie Face Value** — *England*. — *Paine v. Pritchard*, 2 C. & P. 558, 12 E. C. L. 261; *Mercer v. Jones*, 3 Campb. 477; *M'Leod v. M'Ghie*, 2 Scott N. R. 604, 2 M. & G. 326, 40

E. C. L. 394; *Delegal v. Naylor*, 7 Bing. 460, 20 E. C. L. 199; *Alsager v. Close*, 10 M. & W. 576.

*Alabama*. — *St. John v. O'Connel*, 7 Port. (Ala.) 466; *Mobile Bank v. Marston*, 7 Ala. 108; *Walker v. Forbes*, 25 Ala. 139, 60 Am. Dec. 498; *McPeters v. Phillips*, 46 Ala. 496.

*Arkansas*. — *Ray v. Light*, 34 Ark. 421.

*California*. — *Survey v. Wells*, 5 Cal. 125.

*Connecticut*. — *Lovell v. Hammond Co.*, 66 Conn. 500.

*Dakota*. — *Los Angeles First Nat. Bank v. Dickson*, 5 Dak. 286.

*Georgia*. — *Merchants', etc., Nat. Bank v. Masonic Hall*, 62 Ga. 271.

*Illinois*. — *Keaggy v. White*, 12 Ill. 99; *Garvin v. Wiswell*, 83 Ill. 215.

*Iowa*. — *Griffith v. Burden*, 35 Iowa 138; *Sadler v. Bean*, 37 Iowa 439.

*Kansas*. — *Davies v. Stevenson*, 59 Kan. 648.

*Kentucky*. — *Murray v. Pate*, 6 Dana (Ky.) 335.

*Michigan*. — *Burrows v. Keays*, 37 Mich. 430.

*Minnesota*. — *Hersey v. Walsh*, 38 Minn. 521, 8 Am. St. Rep. 689.

*Missouri*. — *O'Donoghue v. Corby*, 22 Mo. 393.

*New Hampshire*. — *Exeter Bank v. Gordon*, 8 N. H. 66.

*New York*. — *Walrod v. Ball*, 9 Barb. (N. Y.) 271; *Ingalls v. Lord*, 1 Cow. (N. Y.) 240; *Loomis v. Mowry*, 8 Hun (N. Y.) 311; *Outhouse v. Outhouse*, 13 Hun (N. Y.) 130; *Decker v. Mathews*, 12 N. Y. 313; *Potter v. Merchants' Bank*, 28 N. Y. 655, 86 Am. Dec. 273; *Booth v. Powers*, 56 N. Y. 22; *Tyng v. Commercial Warehouse Co.*, 58 N. Y. 308; *Western R. Co. v. Bayne*, 75 N. Y. 1; *Metropolitan El. R. Co. v. Kneeland*, 120 N. Y. 134, 17 Am. St. Rep. 619; *Griggs v. Day*, 136 N. Y. 152, 32 Am. St. Rep. 704. See, however, *Newman v. Munk*, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 639.

*Ohio*. — *Woodborne v. Scarborough*, 20 Ohio St. 57.

*Pennsylvania*. — *Romig v. Romig*, 2 Rawle (Pa.) 241.

*South Dakota*. — *Grisby v. Day*, 9 S. Dak. 585.

*Tennessee*. — *Clark v. Cullen*, (Tenn. Ch. 1897) 44 S. W. Rep. 204.

the actual value only, the defendant may show in mitigation of the damages any matter which will legitimately affect and diminish the face value,<sup>1</sup> such as the insolvency of the maker or obligor in the bill, note, or bond converted,<sup>2</sup> or that the chose in action had been invalidated by reason of a material alteration therein by the plaintiff,<sup>3</sup> or was otherwise invalid.<sup>4</sup> The fact that the obligor in the chose in action converted became insolvent after the conversion does not relieve the defendant from liability for the face value where at the time of the conversion such obligor was solvent.<sup>5</sup> And the defendant in trover for a chose in action cannot object to being charged with the amount of money received by him thereon.<sup>6</sup>

**Insurance Policies.** — Where an insurance policy which has matured, or on which the liability has attached, is converted, the measure of damages is *prima facie* its face value with interest;<sup>7</sup> but in the case of the conversion of an insurance policy still current, this rule is, of course, applicable, but the value

*Vermont.* — *Robbins v. Packard*, 31 Vt. 570, 76 Am. Dec. 134.

*Wisconsin.* — *H. S. Benjamin Wagon, etc., Co. v. Merchants' Exch. Bank*, 63 Wis. 470.

1. **Evidence to Diminish Face Value.** — *Fisher v. George S. Jones Co.*, 108 Ga. 490; *Baltimore v. Norman*, 4 Md. 352; *Griggs v. Day*, 136 N. Y. 152, 32 Am. St. Rep. 704, 137 N. Y. 542, reversing 58 N. Y. Super. Ct. 385; *Ferrier v. Manning*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 531; *Booth v. Powers*, 56 N. Y. 22; *Industrial, etc., Trust v. Tod*, 52 N. Y. App. Div. 195; *Reynolds v. Cridge*, 131 Pa. St. 189, 25 W. N. C. (Pa.) 341; *Walley v. Deseret Nat. Bank*, 14 Utah 305.

2. **Insolvency** — *Alabama.* — *McPeters v. Phillips*, 46 Ala. 496.

*Dakota.* — *Los Angeles First Nat. Bank v. Dickson*, 5 Dak. 286.

*Iowa.* — *Callanan v. Brown*, 31 Iowa 333.

*New Hampshire.* — *Exeter Bank v. Gordon*, 8 N. H. 66.

*New York.* — *Ingalls v. Lord*, 1 Cow. (N. Y.) 240; *Potter v. Merchants' Bank*, 28 N. Y. 655, 86 Am. Dec. 273; *Cothran v. Hanover Nat. Bank*, 40 N. Y. Super. Ct. 405; *Booth v. Powers*, 56 N. Y. 22; *Western R. Co. v. Bayne*, 75 N. Y. 1; *Griggs v. Day*, 136 N. Y. 152, 32 Am. St. Rep. 704.

*Utah.* — *Walley v. Deseret Nat. Bank*, 14 Utah 305.

**Parol Evidence** is admissible to show the insolvency of the debtor in the chose in action. *McPeters v. Phillips*, 46 Ala. 496.

In trover for the conversion of certificates of deposit, evidence that the certificates had been presented to the bank for payment and that payment had been refused is admissible to show the insolvency of the bank and the diminished value of such certificates. *Los Angeles First Nat. Bank v. Dickson*, 5 Dak. 286. See also *Booth v. Powers*, 56 N. Y. 22.

But the insolvency of the maker of the note converted at the time of the conversion does not limit the recovery to nominal damages, where subsequently he became solvent. *Rivinus v. Langford*, 75 Fed. Rep. 959, 45 U. S. App. 79.

**Value as Set-off.** — Proof that the maker of the note converted has no property from which collection may be enforced by execution will not be considered in mitigation of damages, if the court is satisfied that the note was available for

its nominal value to the plaintiff, as where the plaintiff is indebted to the maker, since in such case it may be as valuable to him by way of set-off as if the maker were of sound credit and able to pay. *Rose v. Lewis*, 10 Mich. 483.

3. **Invalidity of Chose in Action.** — *Booth v. Powers*, 56 N. Y. 22.

4. *Wills v. Wells*, 2 Moo. 247, 8 Taunt. 264, 4 E. C. L. 98; *Zeigler v. Wells*, 23 Cal. 179, 83 Am. Dec. 87.

A effected insurance on the life of B, and, after an act of bankruptcy, assigned the policy to C, who was aware of A's circumstances at the time. On the death of B it was discovered that his life was not insurable. On a memorial presented by A, the company ordered that half the sum for which B's life was insured be paid as a gratuity, which C received, and the policy was then canceled and remained in the hands of the company's officer. In an action by the assignee of A against C to recover the value of the policy, it was held that A was entitled only to the parchment on which the policy was written, and not to the sum paid by the company to C, as it was a mere gratuitous and voluntary payment. *Wills v. Wells*, 2 Moo. 247, 8 Taunt. 264, 4 E. C. L. 98.

5. **Subsequent Insolvency.** — *King v. Ham*, 6 Allen (Mass.) 298.

6. *Watson v. McLean*, El. Bl. & El. 78, 96 E. C. L. 78 (trover for insurance policy); *Halbert v. Rosenbalm*, 49 Neb. 498.

7. **Insurance Policy.** — Thus, an insurance broker, who without authority compromised with the insurers for less than the amount recoverable, and gave up the policy, was held liable to the owner for the whole sum. *Sharp v. Whipple*, 1 Bosw. (N. Y.) 557. See also *Hayes v. Massachusetts Mut. L. Ins. Co.*, 125 Ill. 626.

In *Watson v. McLean*, El. Bl. & El. 75, 96 E. C. L. 75, it appeared that a debtor made an assignment of his property to trustees for the benefit of creditors. He was possessed at the time of a policy of insurance on his life, the existence of which was unknown to the trustees. The executor of the debtor having secured possession of the policy and collected it as an asset of his estate, it was held that trover would lie by the assignee for the benefit of creditors, and that the measure of damages was the face value of the policy.

of the policy must be determined from all the circumstances of the case.<sup>1</sup>

*b. ACTION AGAINST MAKER OF BILL, NOTE, BOND, ETC.* — Where the action is against the maker of a bill, note, bond, or other evidence of indebtedness, the defendant is under all circumstances liable for the face value of the chose in action,<sup>2</sup> and he cannot lessen the damages by showing his own insolvency,<sup>3</sup> or even, it has been held, that the note was barred by the statute of limitations.<sup>4</sup>

*c. ACTION BY MAKER OF BILL, NOTE, BOND, ETC.* — Where the action is brought by the maker of a bill or note against a third person for its conversion, as where the bill or note has been wrongfully negotiated by such third person, the plaintiff has been allowed to recover the face value of the instrument<sup>5</sup> though he had not paid it;<sup>6</sup> but where the maker of the bill or note satisfies his liability thereon to the person to whom it was negotiated by the defendant for a sum less than the face of the instrument, he can recover from the defendant only the amount so paid by him, and not the full face value.<sup>7</sup> And where the defendant had destroyed the evidences of indebtedness, the plaintiff was held to be entitled to recover nominal damages only.<sup>8</sup> The maker of a note cannot recover in an action for its conversion the expenses of unsuccessfully defending an action thereon against himself by a *bona fide* holder of the note.<sup>9</sup>

**Return of Chose in Action.** — The courts have frequently adopted the practice of allowing the defendant, if in his power, to return to the plaintiff the choses in action alleged to have been converted, and thereby to escape liability, except for nominal damages, where it does not appear that the plaintiff has suffered any special damage.<sup>10</sup> And where the action is by the maker of a bill, note, or bond for its conversion, to avoid circuity of action it is proper to permit the defendant to return the instrument in satisfaction of the damages.<sup>11</sup>

**4. Muniments of Title.** — In Trover for the Conversion of Title Deeds to land,

1. See *Woodworth v. Hascall*, 59 Neb. 124; *Bailey v. American Deposit, etc., Co.*, 52 N. Y. App. Div. 402; *Wheeler v. Pereles*, 43 Wis. 333; *Barney v. Dudley*, 42 Kan. 212, 16 Am. St. Rep. 476.

If the policy of insurance converted had no market value its value to the plaintiff may be recovered. *Woodworth v. Hascall*, 59 Neb. 124.

2. **Action Against Maker or Obligor.** — *Outhouse v. Outhouse*, 13 Hun (N. Y.) 130; *Pawson v. Miller*, 66 N. Y. App. Div. 12; *Craig v. McHenry*, 35 Pa. St. 120; *Bank of Upper Canada v. Widmer*, 2 U. C. Q. B. O. S. 222.

3. *Stephenson v. Thayer*, 63 Me. 143; *Robbins v. Packard*, 31 Vt. 570, 76 Am. Dec. 134.

In *Stephenson v. Thayer*, 63 Me. 143, *Barrows, J.*, said: "A debtor cannot, after wrongfully depriving his creditors of the evidence of his indebtedment, mitigate the damages to be recovered against him for this act by setting up his own worthlessness. The sum which the defendant himself realizes by the act of conversion must surely be the lowest measure of damages. If a man takes up his own paper in that manner, the amount which he would have been legally bound to pay to retire it regularly is surely the amount which he has realized by its conversion."

4. *Outhouse v. Outhouse*, 13 Hun (N. Y.) 130.

5. **Action by Maker or Obligor.** — *Delaware Bank v. Smith*, 1 Edm. Sel. Cas. (N. Y.) 351; *Thayer v. Manley*, 73 N. Y. 305; *Farnham v.*

*Benedict*, 107 N. Y. 159; *Metropolitan El. R. Co. v. Kneeland*, 120 N. Y. 134, 17 Am. St. Rep. 619; *Gillespie v. Evans*, 10 S. Dak. 234. See also *Decker v. Mathews*, 12 N. Y. 313; *Robinson v. Ferguson*, 23 N. Bruns. 332.

6. *Metropolitan El. R. Co. v. Kneeland*, 120 N. Y. 134, 17 Am. St. Rep. 619.

7. *Hynes v. Patterson*, 95 N. Y. 1.

8. *Delaware Bank v. Smith*, 1 Edm. Sel. Cas. (N. Y.) 351, in which case, an action of trover by a bank against a carrier for the nondelivery of its own notes, the measure of damages was held to be merely nominal if the bills were destroyed.

9. *Dean v. Nichols, etc., Co.*, 95 Iowa 89.

10. **Return of Chose in Action.** — *Alsager v. Close*, 10 M. & W. 576; *Driffill v. McFall*, 41 U. C. Q. B. 313; *Churchill v. Welsh*, 47 Wis. 39.

11. In *Thayer v. Manley*, 73 N. Y. 305, in an action for the conversion of several notes made by the plaintiff, where it appeared that after the action was begun, but before trial, one of the notes became due, and that all were still in the possession of the defendant, it was held that the plaintiff was entitled to recover full value, but that the judgment should give to the defendant the right to cancel and return the notes as a satisfaction of damages.

In *Stone v. Clough*, 41 N. H. 290, which was an action of trover against one who wrongfully withheld a note which had been fully paid, upon surrender of the note only nominal damages were allowed.



damages to the full value of the land have been allowed,<sup>1</sup> but the defendant has been permitted to reduce the amount to nominal damages upon a surrender of the title deeds.<sup>2</sup>

In *Trover for the Conversion of Certificates of Stock* in a corporation, recovery for the market value of the stock is allowed.<sup>3</sup>

For the *Conversion of a Certificate of Membership* in a board of trade recovery for the value of the membership has been allowed.<sup>4</sup>

**5. Where Plaintiff Has Special Interest Only** — *a. ACTION AGAINST STRANGER.* — Though the plaintiff has only a special or limited interest in the chattels converted, the general ownership being in a third person, he may still recover, as against a stranger to the title, the full value of the chattels, and is not limited to recovery for the value of his special or limited interest.<sup>5</sup> This rule is fully applicable to recovery by a bailee,<sup>6</sup> such as a pledgee,<sup>7</sup> by a conditional vendor<sup>8</sup> or vendee entitled to possession,<sup>9</sup> and by an officer hold-

**1. Muniments of Title.** — *Burr v. Munro*, 6 U. C. Q. B. O. S. 57. But see *Mowry v. Wood*, 12 Wis. 422.

**Conversion of Lease.** — *Parry v. Frame*, 2 B. & P. 451.

**Bond for Title.** — In *Clowes v. Hawley*, 12 Johns. (N. Y.) 484, which was an action for the conversion of a title bond executed by the defendant himself, the plaintiff was held to be entitled to recover the full value of the land to which he was entitled under the bond, the defendant remaining the owner.

**2. Coombe v. Sansom**, 1 Dowl. & R. 201, 16 E. C. L. 32.

**3. Conversion of Certificates of Stock** — *Colorado*. — *Continental Divide Min. Invest. Co. v. Bliley*, 23 Colo. 160.

*Delaware.* — *Stewart v. Bright*, 6 Houst. (Del.) 344.

*Illinois.* — *McDonald v. Danahy*, 96 Ill. App. 380, affirmed 196 Ill. 133.

*Indiana.* — *Citizens' St. R. Co. v. Robbins*, 144 Ind. 671.

*Iowa.* — *Loetscher v. Dillon*, 119 Iowa 202.

*Maryland.* — *Franklin Bank v. Harris*, 77 Md. 423.

*Michigan.* — *Morton v. Preston*, 18 Mich. 60, 100 Am. Dec. 146; *Feige v. Burt*, 124 Mich. 565. Compare *Daggett v. Davis*, 53 Mich. 35, 51 Am. Rep. 91.

*New York.* — *Gillett v. Gillett*, 54 N. Y. Super. Ct. 525.

*Texas.* — *Gresham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52.

See further *supra*, this section, *Value of Property Converted* — *Fluctuations in Value*.

**4. Olds v. Chicago Open Board of Trade**, 33 Ill. App. 445.

**5. Action Against Stranger to Title** — *England.* — *Johnson v. Lancashire, etc., R. Co.*, 3 C. P. D. 409; *Green v. Farmer*, 4 Burr. 2214; *Heydon v. Smith*, 13 Coke 489; *Swire v. Leach*, 18 C. B. N. S. 479, 114 E. C. L. 479.

*United States.* — *Guttner v. Pacific Steam Whaling Co.*, 96 Fed. Rep. 617.

*Arkansas.* — *St. Louis, etc., R. Co. v. Biggs*, 50 Ark. 173.

*Connecticut.* — *White v. Webb*, 15 Conn. 302.

*Georgia.* — *Schley v. Lyon*, 6 Ga. 530.

*Illinois.* — *Benjamin v. Stremple*, 13 Ill. 467; *Atkins v. Moore*, 82 Ill. 240.

*Maine.* — *Warren v. Kelley*, 80 Me. 512.

*Maryland.* — *Harker v. Dement*, 9 Gill (Md.) 7, 52 Am. Dec. 670.

*Massachusetts.* — *Angier v. Taunton Paper Mfg. Co.*, 1 Gray (Mass.) 621, 61 Am. Dec. 436; *Kennedy v. Whitwell*, 4 Pick. (Mass.) 466; *Caswell v. Howard*, 16 Pick. (Mass.) 562.

*Michigan.* — *Davidson v. Gunsolly*, 1 Mich. 388; *Burk v. Webb*, 32 Mich. 173.

*New York.* — *Smith v. James*, 7 Cow. (N. Y.) 329; *Ingersoll v. Van Bokkelen*, 7 Cow. (N. Y.) 670; *Baker v. Hart*, 52 Hun (N. Y.) 363; *Leoncini v. Post*, (C. Pl. Gen. T.) 13 N. Y. Supp. 825; *Brizsee v. Maybee*, 21 Wend. (N. Y.) 144.

*Texas.* — *Sanger v. Henderson*, 1 Tex. Civ. App. 412. Compare *Mississippi Mills v. Meyer*, 83 Tex. 433.

See, however, *Strong v. Strong*, 6 Ala. 345.

*Caswell v. Howard*, 16 Pick. (Mass.) 562; *Pomeroy v. Smith*, 17 Pick. (Mass.) 85.

**7. England.** — *Swire v. Leach*, 18 C. B. N. S. 479, 114 E. C. L. 479.

*California.* — *Treadwell v. Davis*, 34 Cal. 606, 94 Am. Dec. 770; *Thompson v. Toland*, 48 Cal. 117.

*Massachusetts.* — *Ullman v. Barnard*, 7 Gray (Mass.) 554; *Adams v. O'Connor*, 100 Mass. 515, 1 Am. Rep. 137. See also *Codman v. Freeman*, 3 Cush. (Mass.) 306; *Pomeroy v. Smith*, 17 Pick. (Mass.) 85.

*New York.* — *Einstein v. Dunn*, 171 N. Y. 648, affirming 61 N. Y. App. Div. 195; *Mechanics', etc., Bank v. Farmers', etc., Nat. Bank*, 60 N. Y. 40. See also *Kissam v. Roberts*, 6 Bosw. (N. Y.) 154; *Alt v. Weidenberg*, 6 Bosw. (N. Y.) 176; *Clark v. Pinney*, 7 Cow. (N. Y.) 681.

*Pennsylvania.* — *Lyle v. Barker*, 5 Binn. (Pa.) 457.

See also *St. Louis v. Bissell*, 46 Mo. 157.

**Pawnbroker.** — Where goods deposited with a pawnbroker, in the way of his trade, were taken on distress, the measure of damages in an action of trover by the pawnbroker was held to be the full value of the goods and not merely the plaintiff's interest therein. *Swire v. Leach*, 18 C. B. N. S. 479, 114 E. C. L. 479.

**8. Angier v. Taunton Paper Mfg. Co.**, 1 Gray (Mass.) 621, 61 Am. Dec. 436; *Colcord v. McDonald*, 128 Mass. 470.

**9. In Turner v. Hardcastle**, 11 C. B. N. S. 683, 103 E. C. L. 683, in trover by assignees

ing chattels under attachment or execution.<sup>1</sup> So a mortgagor<sup>2</sup> or mortgagee who is entitled to the possession of the chattels converted may, as against a stranger, recover their full value.<sup>3</sup>

*b. ACTION BETWEEN GENERAL AND SPECIAL OWNERS.* — Where the plaintiff has only a special or limited interest in a chattel converted, with the right to possession, and the general property is in the defendant, the plaintiff is entitled to recover only the value of his special or limited interest, and not the full value of the property.<sup>4</sup> Thus, in trover by a bailor against a bailee who had a special interest by way of lien in the chattel superior to the rights of the bailor, the plaintiff can recover only the value of the property less such lien.<sup>5</sup> So in trover by a pledgor against the pledgee, the plaintiff is entitled to recover only the value of the chattel less the amount owed to the pledgee;<sup>6</sup> and in trover by a pledgee against the pledgor, the plaintiff can recover only

of a bankrupt for goods which had been purchased by the bankrupt under an agreement by which the money was to be paid by instalments, and an assignment of the property was to be executed by the vendor when the whole purchase money had been paid, with power to the vendor to retake possession in case of default of payment of the instalments, it was held that the assignees were entitled to recover the full value of such goods against a stranger, notwithstanding default had been made in payment of some of the instalments, and the vendor had, to that extent, an interest in the goods.

1. *Robinson v. Ensign*, 6 Gray (Mass.) 300; *Vinton v. Bradford*, 13 Mass. 114, 7 Am. Dec. 119; *Thompson v. Marsh*, 14 Mass. 269. See also *Gordon v. Jenney*, 16 Mass. 469; *Buck v. Remsen*, 34 N. Y. 383.

2. *White v. Webb*, 15 Conn. 302; *Frankenthal v. Meyer*, 55 Ill. App. 405; *Vandiver v. O'Gorman*, 57 Minn. 64; *Brown v. Carroll*, 16 R. I. 604; *Gallatin, etc., Turnpike Co. v. Fry*, 88 Tenn. 296.

3. *White v. Webb*, 15 Conn. 302; *Densmore v. Mathews*, 58 Mich. 616. See also *Sherman v. Finch*, 71 Cal. 68.

4. *Action Between General and Special Owners — England.* — *Donald v. Suckling*, L. R. 1 Q. B. 585; *Cameron v. Wynch*, 2 C. & K. 264, 61 E. C. L. 264; *Johnson v. Lancashire, etc., R. Co.*, 3 C. P. D. 502; *Chinery v. Viall*, 5 H. & N. 288.

*United States.* — *Nelson v. Killingley First Nat. Bank*, 69 Fed. Rep. 798, 32 U. S. App. 554.

*Alabama.* — *M'Gowen v. Young*, 2 Stew. (Ala.) 276; *Strong v. Strong*, 6 Ala. 345; *Karter v. Fields*, 130 Ala. 430.

*Arkansas.* — *Sunny South Lumber Co. v. Neimeyer Lumber Co.*, 63 Ark. 268; *Cocke v. Cross*, 57 Ark. 87.

*California.* — *Story, etc., Commercial Co. v. Story*, 100 Cal. 30.

*Colorado.* — *Benson v. Eli*, 16 Colo. App. 494.

*Connecticut.* — *White v. Webb*, 15 Conn. 302.

*Georgia.* — *Bigelow v. Young*, 30 Ga. 121; *Sheldon v. Southern Express Co.*, 48 Ga. 625.

*Maine.* — *Tower v. Haslam*, 84 Me. 86.

*Massachusetts.* — *Fowler v. Gilman*, 13 Met. (Mass.) 267; *Forbes v. Parker*, 16 Pick. (Mass.) 462; *King v. Bangs*, 120 Mass. 514; *White v. Allen*, 133 Mass. 423. And see *Chamberlin v. Shaw*, 18 Pick. (Mass.) 278, 29 Am. Dec. 586, *per Shaw, C. J.*

*Michigan.* — *Davidson v. Gunsolly*, 1 Mich. 388.

*Minnesota.* — *Jellett v. St. Paul, etc., R. Co.*, 30 Minn. 265.

*Missouri.* — *Carson v. Smith*, 133 Mo. 606.

*Nebraska.* — *Haverly v. Elliott*, 39 Neb. 201.

*New Hampshire.* — *Harvey v. Morse*, 69 N. H. 475.

*New York.* — *Frost v. Willard*, 9 Barb. (N. Y.) 440; *Spoor v. Holland*, 8 Wend. (N. Y.) 445, 24 Am. Dec. 37; *Cohen v. Salet*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 51; *Meeks v. Simon*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 241; *Moore v. Batten*, (Supm. Ct. Spec. T.) 5 Misc. (N. Y.) 20.

*Ohio.* — *Baird v. Howard*, 51 Ohio St. 57, 46 Am. St. Rep. 550.

*Texas.* — *Brooks v. Lewis*, 83 Tex. 335, 29 Am. St. Rep. 650; *Taylor v. Felder*, 5 Tex. Civ. App. 417; *Grabfelder v. Lockett*, (Tex. Civ. App. 1894) 26 S. W. Rep. 168; *Mississippi Mills v. Meyer*, 83 Tex. 433. *Compare White v. Sterzing*, 11 Tex. Civ. App. 553.

*Vermont.* — *Burdick v. Murray*, 3 Vt. 302; *Hill v. Larro*, 53 Vt. 629.

5. *Ludden v. Buffalo Batting Co.*, 22 Ill. App. 445; *Forbes v. Boston, etc., R. Co.*, 133 Mass. 154.

In *Mulliner v. Florence*, 3 Q. B. D. 485, however, where an innkeeper having a lien upon goods tortiously sold them, it was held that his lien was thereby destroyed, and that in an action for the conversion the plaintiff was entitled to the full value of the goods, and the defendant was not entitled to deduct the amount which was due in respect to the lien.

*Pledge by Bailee.* — *Louisville First Nat. Bank v. Boyce*, 78 Ky. 42, 39 Am. Rep. 198.

*Common Carrier.* — *Briggs v. Boston, etc., R. Co.*, 6 Allen (Mass.) 246, 83 Am. Dec. 626; *Ingledeu v. Northern R. Co.*, 7 Gray (Mass.) 86; *Peebles v. Boston, etc., R. Co.*, 112 Mass. 498; *Forbes v. Boston, etc., R. Co.*, 133 Mass. 154.

6. *England.* — *Chinery v. Viall*, 5 H. & N. 288; *Brierly v. Kendall*, 17 Q. B. 937, 79 E. C. L. 937. *Compare Johnson v. Stear*, 15 C. B. N. S. 330, 109 E. C. L. 330.

*Alabama.* — *Nabring v. Mobile Bank*, 58 Ala. 204.

*Colorado.* — *E. F. Hallack Lumber, etc., Co. v. Gray*, 19 Colo. 149.

*Georgia.* — *McCalla v. Clark*, 55 Ga. 53; *Bradley v. Burkett*, 82 Ga. 255; *Waring v.*

to the extent of the indebtedness owed to him, when such indebtedness is less than the value of the chattels.<sup>1</sup> Where a conditional vendor sues the conditional vendee or those claiming under him for the conversion of the chattels sold, he can recover only the unpaid part of the purchase money;<sup>2</sup> and where the conditional vendee sues the conditional vendor for a conversion, he can recover only the value of the chattel less the unpaid portion of the price.<sup>3</sup> Where property is levied on by an officer under execution or attachment, and is converted by the attachment or execution debtor or those claiming under him, the officer can recover for such conversion, in case the value of the property exceeds the indebtedness for which the levy was made, only the amount of such indebtedness.<sup>4</sup> Again, in trover by a chattel mortgagee against the mortgagor or those claiming under him, the plaintiff can recover only the amount of the mortgage debt, in case the value of the chattels is in excess thereof;<sup>5</sup> and the mortgagor, as against the mortgagee or those claiming under him, is entitled to recover only the value of the property converted less the mortgage debt.<sup>6</sup>

### 6. Special Damages. — Damages beyond the actual value of the chattels

Gaskill, 95 Ga. 731; Harrell v. Citizens' Banking Co., 111 Ga. 846.

Illinois. — Belden v. Perkins, 78 Ill. 449.

Maryland. — Baltimore Marine Ins. Co. v. Dalrymple, 25 Md. 271.

Massachusetts. — Jarvis v. Rogers, 15 Mass. 389; Farrar v. Paine, 173 Mass. 58.

New York. — Stearns v. Marsh, 4 Den. (N. Y.) 227, 47 Am. Dec. 248; Griggs v. Day, 158 N. Y. 1; Van Schaick v. Ramsey, 90 Hun (N. Y.) 550.

Pennsylvania. — Neiler v. Kelley, 69 Pa. St. 403; Work v. Bennett, 70 Pa. St. 487.

Rhode Island. — Fifth Nat. Bank v. Providence Warehouse Co., 17 R. I. 112; Canning v. Owen, 22 R. I. 624, 84 Am. St. Rep. 858.

1. Cramer v. Marsh, 5 Colo. App. 302; Bell v. Ober, etc., Co., 96 Ga. 214; Grabfelder v. Lockett, (Tex. Civ. App. 1894) 26 S. W. Rep. 168.

2. Morton v. Frick Co., 87 Ga. 230; Ross v. McDuffie, 91 Ga. 120; Guilford v. McKinley, 61 Ga. 230; Bradley v. Burkett, 82 Ga. 255; Johnston v. Whittemore, 27 Mich. 463; Rose v. Story, 1 Pa. St. 190, 44 Am. Dec. 121; Woods v. Nichols, 21 R. I. 537. See also Meeks v. Simon, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 241; Little v. Ratliff, 126 N. Car. 262. See, however, Buckmaster v. Smith, 22 Vt. 203; Brown v. Haynes, 52 Me. 581. Compare Sellig v. Dumas, 48 La. Ann. 1494.

In some cases, however, it is held that as the conditional vendor could take possession of the property sold, upon nonperformance of the conditions, without liability to the vendee to repay money received in part payment, he would be entitled as against the vendee or persons claiming under him to recover in trover the full value of the property without deductions for payments made. Brown v. Haynes, 52 Me. 578; Buckmaster v. Smith, 22 Vt. 203.

3. White Sewing Mach. Co. v. Conner, 111 Ky. 827; White v. Allen, 133 Mass. 423. See also Levan v. Wilten, 135 Pa. St. 61, 26 W. N. C. (Pa.) 113.

4. Linville v. Black, 5 Dana (Ky.) 176; Spoor v. Holland, 8 Wend. (N. Y.) 445, 24

Am. Dec. 37. See also Clark v. Dearborn, 103 Mass. 335; Booth v. Ableman, 20 Wis. 21, 88 Am. Dec. 730.

5. Colorado. — Citizens' Coal, etc., Co. v. Stanley, 6 Colo. App. 181.

Dakota. — Straw v. Jenks, 6 Dak. 414.

Massachusetts. — Howe v. Bartlett, 8 Allen (Mass.) 20; Barry v. Bennett, 7 Met. (Mass.) 354; Forbes v. Parker, 16 Pick. (Mass.) 462.

Michigan. — Showman v. Lee, 86 Mich. 556.

Minnesota. — La Crosse, etc., Steam Packet Co. v. Robertson, 13 Minn. 291.

Nebraska. — Coburn v. Watson, 48 Neb. 257; Plummer v. Green, 49 Neb. 316.

New York. — Parish v. Wheeler, 22 N. Y. 494; Allen v. Judson, 71 N. Y. 77; Fowler v. Haynes, 91 N. Y. 346.

Wisconsin. — Ward v. Henry, 15 Wis. 239.

See also Troxler v. Buckner, 126 Cal. 288. Compare Irwin v. McDowell, 91 Cal. 119.

6. England. — Brierly v. Kendall, 17 Q. B. 937, 79 E. C. L. 937.

Alabama. — Street v. Sinclair, 71 Ala. 110.

Arkansas. — McClure v. Hill, 36 Ark. 268; Jones v. Horn, 51 Ark. 19, 14 Am. St. Rep. 17; Cocke v. Cross, 57 Ark. 87.

Iowa. — Gravel v. Clough, 81 Iowa 272.

Kansas. — Burton v. Randall, 4 Kan. App. 593.

Kentucky. — Brown v. Phillips, 3 Bush (Ky.) 656; Gaar v. Lyons, 99 Ky. 672.

Michigan. — Brink v. Freoff, 40 Mich. 610; Rall v. Cook, 77 Mich. 681; Kearney v. Clutton, 101 Mich. 106, 45 Am. St. Rep. 394; Van Werden v. Winslow, 117 Mich. 564.

Minnesota. — Cushing v. Seymour, 30 Minn. 301.

New York. — Russell v. Butterfield, 21 Wend. (N. Y.) 300; Washburn v. Cordis, (Brooklyn City Ct. Gen. T.) 1 Misc. (N. Y.) 427.

North Carolina. — Womble v. Leach, 83 N. Car. 84.

North Dakota. — Lovejoy v. Merchants' State Bank, 5 N. Dak. 623.

Pennsylvania. — Craig v. McHenry, 35 Pa. St. 120.

Wisconsin. — Gauche v. Milbrath, 94 Wis. 674.



converted have been allowed in some instances when by reason of the wrongful act of the defendant the plaintiff has been subjected to some special loss or injury.<sup>1</sup> The damage and injury for which compensation is sought in special damages must be such as are proximate, that is, resulting immediately from the wrong complained of, and not too remote.<sup>2</sup> Thus, the plaintiff cannot recover as special damages the expenses of the litigation to which he was compelled to resort by reason of the wrongful conversion.<sup>3</sup> So the damages must not be speculative and uncertain.<sup>4</sup> In *California* the statute authorizes the plaintiff in trover to recover a fair compensation for time and money expended in pursuit of the property.<sup>5</sup>

**7. Exemplary Damages.** — In trover, as in other actions of tort,<sup>6</sup> where the unlawful act was wilful and malicious, or was accompanied with peculiarly vexatious circumstances, the allowance of exemplary or vindictive damages has been upheld;<sup>7</sup> but, of course, in the absence of evidence of malice or oppression or similar vexatious circumstances, exemplary damages should not be allowed.<sup>8</sup>

**8. Interest.** — It is the generally accepted doctrine that where damages are

**1. Special Damages.** — *France v. Gaudet*, L. R. 6 Q. B. 199; *Davis v. Oswell*, 7 C. & P. 804, 32 E. C. L. 744; *Bodley v. Reynolds*, 8 Q. B. 779, 55 E. C. L. 779; *Cockburn v. Muskoka Mill, etc., Co.*, 13 Ont. 343; *Brown v. Beatty*, 35 U. C. Q. B. 328; *Beall v. Rust*, 68 Ga. 774; *Laughlin v. Barnes*, 76 Mo. App. 258; *Proctor v. Irvin*, 22 Mont. 547. See also *Juchter v. Boehm*, 67 Ga. 534; *Reynolds v. Cridge*, 131 Pa. St. 189, 25 W. N. C. (Pa.) 341; *Mowry v. Wood*, 12 Wis. 413. But see *Hurd v. Hubbell*, 26 Conn. 389; *Seymour v. Ives*, 46 Conn. 109. Compare *Downing v. Outerbridge*, 79 Fed. Rep. 931, 51 U. S. App. 106.

In *Davis v. Oswell*, 7 C. & P. 804, 32 E. C. L. 744, in trover for the conversion of a horse, the plaintiff was allowed to recover the expense to which he had been put for the hire of another horse, deducting from that amount the sum he would have paid for the keep of his own horse during that time.

In *Bodley v. Reynolds*, 8 Q. B. 779, 55 E. C. L. 779, in an action of trover for the conversion of carpenters' tools, the plaintiff was allowed to recover special damages suffered by reason of his inability to work. See, however, *Lott v. French*, 10 U. C. Q. B. 385.

**2.** *Moffatt v. Pratt*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 48.

Where a traveling bag containing the plaintiff's working clothes was converted, he was held not to be entitled to recover special damages from the fact that in consequence of such conversion he was compelled to work in unsuitable clothes which were damaged thereby. *Saunders v. Brosius*, 52 Mo. 50.

**3.** *Hurd v. Hubbell*, 26 Conn. 389. See also *Ross v. Malone*, 97 Ala. 529.

**4.** *Reid v. Fairbanks*, 13 C. B. 692, 76 E. C. L. 692; *Leflingwell v. Gilchrist*, 40 Iowa 416; *Cushing v. Seymour*, 30 Minn. 301; *Farmers' Bank v. McKee*, 2 Pa. St. 318; *Drennen v. Charles*, 12 Pa. Super. Ct. 476, 17 Lanc. L. Rev. 145. See *Juchter v. Boehm*, 67 Ga. 534.

**5.** *Barrant v. Garratt*, 50 Cal. 112; *Sherman v. Finch*, 71 Cal. 68; *Spooner v. Cady*, (Cal. 1896) 44 Pac. Rep. 1018; *Agnew v. Johnson*, 22 Pa. St. 471, 62 Am. Dec. 303.

See also *U. S. v. Pine River Logging, etc., Co.*, (C. C. A.) 89 Fed. Rep. 907; *Laughlin v. Barnes*, 76 Mo. App. 258.

**6.** See the title EXEMPLARY DAMAGES, vol. 12, p. 2.

**7. Exemplary Damages.** — *Brewer v. Dew*, 11 M. & W. 629; *Downing v. Outerbridge*, 79 Fed. Rep. 931, 51 U. S. App. 106; *Lothrop v. Golden*, (Cal. 1899) 57 Pac. Rep. 394; *Bates v. Callender*, 3 Dak. 256; *Reamer v. Morrison Express Co.*, 93 Mo. App. 501; *Brizsee v. Maybee*, 21 Wend. (N. Y.) 144; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Neiler v. Kelley*, 69 Pa. St. 409; *Walters v. Laurens Cotton Mills*, 53 S. Car. 155; *Cone v. Lewis*, 64 Tex. 331, 53 Am. Rep. 767. See also *Arzaga v. Villalba*, 85 Cal. 191; *Gensburg v. Field*, 104 Iowa 599; *M'Dowell v. Murdock*, 1 Nott & M. (S. Car.) 237, 9 Am. Dec. 684.

In *Peckham Iron Co. v. Harper*, 41 Ohio St. 100, it was held that exemplary damages might be allowed where an agent, by false and fraudulent representations to his principal, obtained possession of his principal's goods and converted them to his own use.

In *Cone v. Lewis*, 64 Tex. 331, 53 Am. Rep. 767, it was held that under an averment that the defendant wrongfully and maliciously converted a dray, the property of the plaintiff, who was the head of a family and a licensed drayman, and the owner of no other vehicle, the special injury done to the plaintiff's business as a drayman was sufficient to sustain an allowance of exemplary as well as actual damages.

In *Bates v. Callender*, 3 Dak. 256, where from the evidence it appeared that the defendant, an officer of the law, was guilty of malice and oppression under color of authority, it was held that the jury might give exemplary damages.

**8.** *Waller v. Waller*, 76 Iowa 513; *Vine v. Casmey*, 86 Minn. 74; *Slocum v. Putnam*, (Tex. Civ. App. 1894) 25 S. W. Rep. 52; *Bitterman v. Hearn*, (Tex. Civ. App. 1895) 32 S. W. Rep. 341; *Mulliner v. Shumake*, (Tex. Civ. App. 1900) 55 S. W. Rep. 983.

In *Hill v. Canfield*, 56 Pa. St. 454, it was said that those cases in which more than com-

given for the value of the property at the time of the conversion, the plaintiff is also entitled to recover interest thereon from the time of the conversion,<sup>1</sup> and this is especially true where the defendant sold the property converted

pensation may be allowed in trover as those for the conversion of heirlooms, family pictures, and the like, and where there is fraud, violence, or outrage.

**1. Interest from Time of Conversion** — *England*. — *Elkins v. East India Co.*, 1 P. Wms. 396.

*United States*. — *Bourne v. Ashley*, 1 Lowell (U. S.) 27; *Matthews v. Menedger*, 2 McLean (U. S.) 145; *New Dunderberg Min. Co. v. Old*, 97 Fed. Rep. 150, 38 C. C. A. 89; *Edmunds v. Nolan*, 86 Fed. Rep. 564.

*Alabama*. — *White v. Martin* 1 Port. (Ala.) 215, 26 Am. Dec. 365; *Lee v. Mathews*, 10 Ala. 682, 44 Am. Dec. 498; *Williams v. Crum*, 27 Ala. 468.

*Arkansas*. — *Ryburn v. Pryor*, 14 Ark. 505.

*California*. — *Douglass v. Kraft*, 9 Cal. 562; *Hamer v. Hathaway*, 33 Cal. 117; *Barrante v. Garratt*, 50 Cal. 112; *McCray v. Burr*, 125 Cal. 636.

*Colorado*. — *Sutton v. Dana*, 15 Colo. 98; *Perkins v. Marrs*, 15 Colo. 262; *Hannan v. Connett*, 10 Colo. App. 171; *Updegraff v. Lesem*, 15 Colo. App. 297; *Woodworth v. Gorsline*, 30 Colo. 186.

*Connecticut*. — *Clark v. Whitaker*, 19 Conn. 319, 48 Am. Dec. 160; *Hurd v. Hubbell*, 26 Conn. 389; *Cook v. Loomis*, 26 Conn. 483.

*Delaware*. — *Vaughan v. Webster*, 5 Har. (Del.) 256.

*Florida*. — *Robinson v. Hartridge*, 13 Fla. 501.

*Georgia*. — *Garrard v. Dawson*, 49 Ga. 434; *Tuller v. Carter*, 59 Ga. 395. See, however, *Martin v. Oslin*, 94 Ga. 658.

*Illinois*. — *Chicago, etc., R. Co. v. Ames*, 40 Ill. 249; *Northern Transp. Co. v. Selick*, 52 Ill. 249; *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28; *Janeway v. Burton*, 201 Ill. 78, *affirming* 102 Ill. App. 403.

*Iowa*. — *Cutter v. Fanning*, 2 Iowa 580; *Russell v. Huiskamp*, 77 Iowa 727.

*Kansas*. — *Simpson v. Alexander*, 35 Kan. 225; *Prinz v. Moses*, (Kan. 1901) 66 Pac. Rep. 1009.

*Kentucky*. — *Sanders v. Vance*, 7 T. B. Mon. (Ky.) 209, 18 Am. Dec. 167.

*Louisiana*. — *Chamberlain v. Worrell*, 38 La. Ann. 347.

*Maine*. — *Winslow v. Norton*, 29 Me. 419, 50 Am. Dec. 601; *Hayden v. Bartlett*, 35 Me. 203; *Robinson v. Barrows*, 48 Me. 186.

*Maryland*. — *Hepburn v. Sewell*, 5 Har. & J. (Md.) 211, 9 Am. Dec. 512; *Heinekamp v. Beaty*, 74 Md. 388; *Maury v. Coyle*, 34 Md. 235; *Hopper v. Haines*, 71 Md. 64.

*Massachusetts*. — *King v. Ham*, 6 Allen (Mass.) 298; *Johnson v. Sumner*, 1 Met. (Mass.) 172; *Barry v. Bennett*, 7 Met. (Mass.) 354; *Kennedy v. Whitwell*, 4 Pick. (Mass.) 466; *Scollans v. Rollins*, 170 Mass. 346.

*Michigan*. — *Ripley v. Davis*, 15 Mich. 75, 90 Am. Dec. 262; *Winchester v. Craig*, 33 Mich. 205; *Allen v. Kinyon* 41 Mich. 281.

*Minnesota*. — *Murphy v. Sherman*, 25 Minn. 196.

*Mississippi*. — *Tarpley v. Wilson*, 33 Miss. 467.

*Missouri*. — *Walker v. Borland*, 21 Mo. 289; *Funk v. Dillon*, 21 Mo. 294; *Spencer v. Vance*, 57 Mo. 427; *Charles v. St. Louis, etc., R. Co.*, 58 Mo. 458; *Davis v. Fairclough*, 63 Mo. 61; *Kammerick v. Castleman*, 29 Mo. App. 658; *Thomas Mfg. Co. v. Huff*, 62 Mo. App. 124.

*Nebraska*. — *Bennett v. McDonald*, 59 Neb. 234.

*Nevada*. — *O'Meara v. North American Min. Co.*, 2 Nev. 112; *Carlyon v. Lannan*, 4 Nev. 156; *Newman v. Kane*, 9 Nev. 234.

*New York*. — *McDonald v. North*, 47 Barb. (N. Y.) 530; *Bissell v. Hopkins*, 4 Cow. (N. Y.) 53; *Dillenback v. Jerome*, 7 Cow. (N. Y.) 294; *Wilson v. Conine*, 2 Johns. (N. Y.) 280; *Hyde v. Stone*, 7 Wend. (N. Y.) 354, 22 Am. Dec. 582; *Baker v. Wheeler*, 8 Wend. (N. Y.) 505, 24 Am. Dec. 66; *Andrews v. Durant*, 18 N. Y. 496; *Parrott v. Knickerbocker Ice Co.*, 46 N. Y. 361; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303; *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623; *Tyng v. Commercial Warehouse Co.*, 58 N. Y. 308; *Mechanics, etc., Bank v. Farmers', etc., Nat. Bank*, 60 N. Y. 40; *Prince v. Conner*, 69 N. Y. 608; *Einstein v. Dunn*, 171 N. Y. 648, *affirming* 61 N. Y. App. Div. 195.

*Pennsylvania*. — *Drennen v. Charles*, 12 Pa. Super. Ct. 476; *Agnew v. Johnson*, 22 Pa. St. 471, 62 Am. Dec. 303; *Hill v. Canfield*, 56 Pa. St. 454.

*South Carolina*. — *Buford v. Fannen*, 1 Bay (S. Car.) 273, 1 Am. Dec. 615; *Simpson v. Feltz*, 1 McCord Eq. (S. Car.) 213, 16 Am. Dec. 602; *Ewart v. Kerr*, 2 McMull. L. (S. Car.) 141.

*Texas*. — *Commercial, etc., Bank v. Jones*, 18 Tex. 811; *Hatcher v. Pelham*, 31 Tex. 201; *Schooler v. Hutchins*, 66 Tex. 324; *Douglass v. Coffin*, (Tex. 1886) 1 S. W. Rep. 270; *Barber v. Hutchins*, 66 Tex. 319; *Smith v. Bates*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1044; *Houghton v. Puryear*, 10 Tex. Civ. App. 383; *Texarkana Water Co. v. Kizer*, (Tex. Civ. App. 1901) 63 S. W. Rep. 913.

*Vermont*. — *Grant v. King*, 14 Vt. 367; *Thrall v. Lathrop*, 30 Vt. 307, 73 Am. Dec. 306; *Crumb v. Oakes*, 38 Vt. 566.

*West Virginia*. — *Shepherd v. McQuilkin*, 2 W. Va. 96; *Cecil v. Clark*, 49 W. Va. 459.

*Wisconsin*. — *Bibelow v. Doolittle*, 36 Wis. 115; *Ingram v. Rankin*, 47 Wis. 406, 32 Am. Rep. 762; *Arpin v. Burch*, 68 Wis. 619.

In *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303, *Folger, J.*, said: "In the action of trover, interest is as necessary a part of a complete indemnity as the value itself, and in fixing the damages is not any more in the discretion of the jury than the value."

In *California* it is provided by statute that where the plaintiff elects to take judgment for the highest market value of the property at any time between the conversion and the verdict, he is not entitled to interest thereon. *Barrante v. Garratt*, 50 Cal. 112; *Civ. Code Cal.* (1901), § 3336.

and received the money therefor.<sup>1</sup> In some jurisdictions, however, decisions primarily based on statutory provisions hold that interest is not recoverable,<sup>2</sup> while in other jurisdictions statutes have been enacted leaving the allowance of interest to the discretion of the jury.<sup>3</sup>

**9. Value of Use.** — Where the plaintiff demands judgment for the value of the chattels converted and detained by the defendant, he is not entitled also to the value of the use of the chattels while detained by the defendant.<sup>4</sup>

**10. Mitigation of Damages** — *a. IN GENERAL.* — In ascertaining the damages in many actions of trover, it is allowable to mitigate them by investigating and determining what, for want of a phrase of greater accuracy, may be called the equity of the case.<sup>5</sup>

*b. RETURN OF CHATTEL.* — Where the chattels converted are returned to and accepted by the plaintiff, this fact goes in mitigation of the damages recoverable, and in such case the plaintiff should be allowed to recover only the damages suffered by reason of the detention.<sup>6</sup> And the fact that the

1. *Ewart v. Kerr*, 2 McMull. L. (S. Car.) 141.

2. **Statutory Provisions.** — *Bohm v. Dunphy*, 1 Mont. 333; *Isaacs v. McAndrew*, 1 Mont. 437; *Randall v. Greenwood*, 3 Mont. 506; *Palmer v. Murray*, 8 Mont. 312.

3. *State v. Hope*, 121 Mo. 34; *Carson v. Smith*, 133 Mo. 606; *Wheeler v. McDonald*, 77 Mo. App. 213; *Vermillion v. Le Clare*, 95 Mo. App. 55; *Meyer v. Phoenix Ins. Co.*, 89 Mo. App. 721; *Patapsco Guano Co. v. Magee*, 86 N. Car. 350; *McRae v. Malloy*, 87 N. Car. 196; *Stephens v. Koonce*, 103 N. Car. 266.

4. **Value of Use.** — *Polk v. Allen*, 19 Mo. 467; *Walker v. Borland*, 21 Mo. 289; *Funk v. Dillon*, 21 Mo. 294; *Texarkana Water Co. v. Kizer*, (Tex. Civ. App. 1901) 63 S. W. Rep. 913. See also *Blaisdell v. Scally*, 84 Mich. 149. But see *Electric Lighting Co. v. Rust*, 131 Ala. 484; *Schley v. Lyon*, 6 Ga. 530; *Banks v. Hatton*, 1 Nott & M. (S. Car.) 221; *Pridgin v. Strickland*, 8 Tex. 427, 58 Am. Dec. 124; *Waller v. Hail*, (Tex. Civ. App. 1898) 46 S. W. Rep. 82; *Moore v. King*, 4 Tex. Civ. App. 397.

5. **Mitigation of Damages.** — *Storrs v. Robinson*, 74 Conn. 443; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356, 25 Am. Dec. 396; *Smith v. Mitchell*, 12 Mich. 180; *Collins v. Smith*, 16 Vt. 9; *Gilpin v. Royal Canadian Bank*, 27 U. C. Q. B. 310.

**Partial Satisfaction by Joint Tortfeasor.** — Satisfaction or payment of partial damages by one tortfeasor in an action of trover inures to the benefit of the other tortfeasors, not as a matter of defense, but in mitigation of damages. *Muser v. Lewis*, 50 N. Y. Super. Ct. 431. See also *Heyer v. Flagg*, 6 R. I. 45.

6. **Return of Chattel** — *England.* — *Moon v. Raphael*, 2 Scott 289, 2 Bing. N. Cas. 310, 29 E. C. L. 345; *Hiort v. London, etc., R. Co.*, 4 Ex. D. 188; *Cook v. Hartle*, 8 C. & P. 568, 34 E. C. L. 528.

*United States.* — *Kansas City First Nat. Bank v. Rush*, (C. C. A.) 85 Fed. Rep. 539.

*Alabama.* — *Pollak v. Davidson*, 87 Ala. 551.

*California.* — *Lothrop v. Golden*, (Cal. 1899) 57 Pac. Rep. 394.

*Colorado.* — *Murphy v. Hobbs*, 8 Colo. 17.

*Connecticut.* — *Baldwin v. Porter*, 12 Conn. 473; *Cook v. Loomis*, 26 Conn. 483; *Greenthal v. Lincoln*, 68 Conn. 384.

*Georgia.* — *Woods v. McCall*, 67 Ga. 506.

*Illinois.* — *Barrelett v. Bellgard*, 71 Ill. 280.

*Kansas.* — *Prinz v. Moses*, (Kan. 1901) 66 Pac. Rep. 1009.

*Massachusetts.* — *Delano v. Curtis*, 7 Allen (Mass.) 470; *Harrington v. Lincoln*, 4 Gray (Mass.) 563, 64 Am. Dec. 95; *Long v. Lamkin*, 9 Cush. (Mass.) 361; *Kaley v. Shed*, 10 Met. (Mass.) 317; *Peele v. Suffolk Ins. Co.*, 7 Pick. (Mass.) 254, 19 Am. Dec. 286; *Greenfield Bank v. Leavitt*, 17 Pick. (Mass.) 1, 28 Am. Dec. 268; *Orrok v. Commonwealth Ins. Co.*, 21 Pick. (Mass.) 456, 32 Am. Dec. 271; *Wheelock v. Wheelwright*, 5 Mass. 104; *Gibbs v. Chase*, 10 Mass. 125; *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30; *Perham v. Coney*, 117 Mass. 103.

*Missouri.* — *Sparks v. Purdy*, 11 Mo. 219; *Green v. Stephens*, 37 Mo. App. 641; *Ward v. Moffett*, 38 Mo. App. 395; *Gilbert v. Peck*, 43 Mo. App. 577; *Laughlin v. Barnes*, 6 Mo. App. 258.

*Montana.* — *Proctor v. Irvin*, 22 Mont. 547.

*Nebraska.* — *Coburn v. Watson*, 48 Neb. 257.

*New Hampshire.* — *Gove v. Watson*, 61 N. H. 136.

*New Jersey.* — *Bigelow v. Heintze*, 53 N. J. L. 69; *Hopple v. Higbee*, 23 N. J. L. 342; *McFadden v. Whitney* 51 N. J. L. 391.

*New York.* — *Murray v. Burling*, 10 Johns. (N. Y.) 172; *Dailey v. Crowley*, 5 Lans. (N. Y.) 301; *Hanmer v. Wilsey*, 17 Wend. (N. Y.) 93; *Connah v. Hale*, 23 Wend. (N. Y.) 462; *Bowman v. Teall*, 23 Wend. (N. Y.) 309, 35 Am. Dec. 562; *Meeks v. Simon*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 241; *Brewster v. Silliman*, 38 N. Y. 423; *Hough v. Bowe*, 51 N. Y. Super. Ct. 207; *Torry v. Black*, 58 N. Y. 191; *McCormick v. Pennsylvania Cent. R. Co.*, 80 N. Y. 353.

*Pennsylvania.* — *Rank v. Rank*, 5 Pa. St. 211.

*Vermont.* — *Stillwell v. Farwell*, 64 Vt. 286.

*Wisconsin.* — *Ingram v. Rankin*, 47 Wis. 406, 32 Am. Rep. 762.

**The Burden of Proof** is on the defendants to show acceptance or consent to the return. *Mears v. Cornwall*, 73 Mich. 78.

Where goods taken were inclosed in a box, the mere opening of the box subsequently by the plaintiff to enable a witness to appraise the value of the goods was held not to be such a resumption of the property as would go in mitigation of damages. *Connah v. Hale*, 23 Wend. (N. Y.) 462.



plaintiff, by purchase or through the agency of a third person, regains possession at an expense less than the value of the chattels, should be considered in mitigation of damages.<sup>1</sup> But the plaintiff is entitled to damages for the injury which he has sustained by the detention of the property and by its deterioration in value during the conversion, the measure of damages being usually the difference between the value at the time of the conversion and the value when returned, together with any special damages proved.<sup>2</sup> Thus, where the property is accepted at a place other than that where the conversion occurred, the measure of damages is the difference in its value at the time and place where it was seized and that at the time and place where it was returned to the possession of the plaintiff;<sup>3</sup> and where the plaintiff has been put to expense and trouble in securing the restoration of his property, a reasonable compensation therefor should be allowed to him.<sup>4</sup> An unaccepted offer to restore the chattels after there has been a conversion will not, as a general rule, mitigate the damages,<sup>5</sup> nor will this effect be produced by a mere agreement without consideration to receive the property, if the injured party thinks fit to disregard his agreement and bring suit for the conversion.<sup>6</sup> In some instances, especially in *England*, the courts have adopted the practice of permitting the defendant in trover, where he had not been guilty of any wilful wrong, to return in mitigation of the damages the chattels converted.<sup>7</sup>

**1. Regaining Possession from Third Person.** — *Baldwin v. Porter*, 12 Conn. 473; *Dodson v. Cooper*, 37 Kan. 346; *Hunt v. Haskell*, 24 Me. 339, 41 Am. Dec. 387; *Rogers v. Brown*, 20 N. J. L. 119; *Field v. Munster*, 11 Tex. Civ. App. 341; *Muenster v. Fields*, 89 Tex. 102; *Hurlburt v. Green*, 41 Vt. 490.

**2. Measure of Damages in Case of Return** — *England*. — *M'Grath v. Bourne*, Ir. R. 10 C. L. 160.

*United States*. — *Kansas City First Nat. Bank v. Rush*, 85 Fed. Rep. 539, 56 U. S. App. 556.

*Alabama*. — *Renfro v. Hughes*, 69 Ala. 581.

*Colorado*. — *Murphy v. Hobbs*, 8 Colo. 17.

*Connecticut*. — *Curtis v. Ward*, 20 Conn. 204; *Cook v. Loomis*, 26 Conn. 483; *Lazarus v. Ely*, 45 Conn. 504.

*Illinois*. — *Small v. Brainard*, 44 Ill. 355; *Collins v. People*, 48 Ill. 145; *Barrelett v. Bellgard*, 71 Ill. 280.

*Kansas*. — *Prinz v. Moses*, (Kan. 1901) 66 Pac. Rep. 1009.

*Massachusetts*. — *Lucas v. Trumbull*, 15 Gray (Mass.) 306.

*Missouri*. — *Green v. Stephens*, 37 Mo. App. 641.

*Nebraska*. — *Coburn v. Watson*, 48 Neb. 257.

*New Hampshire*. — *Gove v. Watson*, 61 N. H. 136.

*Pennsylvania*. — *Rank v. Rank*, 5 Pa. St. 211.

*3. Bates v. Clark*, 95 U. S. 204.

*4. Alabama*. — *Ross v. Malone*, 97 Ala. 529; *Ewing v. Blount*, 20 Ala. 694.

*California*. — *Sherman v. Finch*, 71 Cal. 68.

*Missouri*. — *Laughlen v. Barnes*, 76 Mo. App. 258.

*New York*. — *Sprague v. McKinzie*, 63 Barb. (N. Y.) 60; *Murray v. Burling*, 10 Johns. (N. Y.) 172; *Baker v. Freeman*, 9 Wend. (N. Y.) 36, 24 Am. Dec. 117; *Ford v. Williams*, 24 N. Y. 359; *Hough v. Bowe*, 51 N. Y. Super. Ct. 209.

*Vermont*. — *Hurlburt v. Green*, 41 Vt. 490.

*Wisconsin*. — *Paroski v. Goldberg*, 80 Wis. 340. Compare *Collins v. Lowry*, 78 Wis. 329.

**Reward for Return of Property.** — If the restoration of property is obtained from third persons by the payment of a reasonable reward by the plaintiff, the amount so paid and interest thereon should be deducted, in assessing damages, from the estimated value of the goods at the time of the return. *Greenfield Bank v. Leavitt*, 17 Pick. (Mass.) 1, 28 Am. Dec. 268.

**5. Offer to Return.** — *Norman v. Rogers*, 29 Ark. 365; *Carpenter v. Dresser*, 72 Me. 377, 39 Am. Rep. 337; *Stickney v. Allen*, 10 Gray (Mass.) 352; *Bringard v. Stellwagen*, 41 Mich. 54; *Gilbert v. Peck*, 43 Mo. App. 577; *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323; *Carpenter v. Manhattan L. Ins. Co.*, 22 Hun (N. Y.) 49; *Hofschulte v. Panhandle Hardware Co.*, (Tex. Civ. App. 1899) 50 S. W. Rep. 608; *Morgan v. Kidder*, 55 Vt. 367; *Bromley v. Goodrich*, 40 Wis. 131, 22 Am. Rep. 685. See, however, *Tuller v. Carter*, 59 Ga. 395; *Delano v. Curtis*, 7 Allen (Mass.) 470; *Warder v. Baldwin*, 51 Wis. 450.

An officer who wrongfully attaches and takes possession of chattels cannot show, in an action against him by the owner for the conversion, that on the day after the attachment he tendered to the owner a return of the property in the same condition as when it was attached. *Carpenter v. Dresser*, 72 Me. 377, 39 Am. Rep. 337.

*6. Norman v. Rogers*, 29 Ark. 365.

**7. Power of Court to Permit Return in Mitigation of Damages** *England*. — *Gibson v. Humphrey*, 1 Crompt. & M. 544, 3 Tyrw. 588; *Hayward v. Seaward*, 1 Moo. & S. 459, 28 E. C. L. 269; *Brunsdon v. Austin*, 1 Tidd Pr. 545; *Tucker v. Wright*, 3 Bing. 601, 13 E. C. L. 64; *Earle v. Holderness*, 3 Bing. 601, 15 E. C. L. 41; *Hiort v. London*, etc., R. Co., 4 Ex. D. 188; *Pickering v. Truste*, 7 T. R. 49; *Loosemore v. Radford*, 0 M. & W. 659; *Fisher v. Prince*, 3

*c. APPLICATION OF CHATTEL TO PLAINTIFF'S BENEFIT.* — It may also be shown, in mitigation of damages, that the chattel alleged to have been converted was applied by the defendant to the plaintiff's benefit.<sup>1</sup> It has been held in some cases that where a chattel was wrongfully taken by the defendant, a subsequent appropriation of it by him under process in his favor and against the plaintiff would not relieve him from liability for the full value of the property;<sup>2</sup> but the better doctrine is to the contrary.<sup>3</sup> And unquestionably if the chattel is subsequently taken from the defendant on process against the plaintiff in favor of a third person, this is an appropriation of the chattel to the benefit of the plaintiff and may be shown in mitigation of dam-

*Burr.* 1363; *Watts v. Phipps*, Bull. N. P. 49a; *Chilton v. Carrington*, 15 C. B. 730, 80 E. C. L. 730, 24 L. J. C. Pl. 78; *Winfield v. Boothroyd*, 54 L. T. N. S. 574, 34 W. R. 501.

*Canada.* — *Drifill v. McFall*, 41 U. C. Q. B. 313.

*California.* — *Atkins v. Gamble*, 42 Cal. 86, 10 Am. Rep. 282.

*Maine.* — *Rogers v. Crombie*, 4 Me. 274.

*Missouri.* — *Ward v. Moffett*, 38 Mo. App. 395; *Gilbert v. Peck*, 43 Mo. App. 577.

*New Jersey.* — *Bigelow Co. v. Heintze*, 53 N. J. L. 69.

*New York.* — *Shotwell v. Wendover*, 1 Johns. (N. Y.) 65; *Thayer v. Manley*, 8 Hun (N. Y.) 550.

*Pennsylvania.* — *Tracy v. Good*, 1 Pa. L. J. Rep. 472, 3 Pa. L. J. 135.

*Vermont.* — *Rutland, etc., R. Co. v. Middlebury Bank*, 32 Vt. 639. See also *Hart v. Skinner*, 16 Vt. 138, 42 Am. Dec. 500.

*Wisconsin.* — *Churchill v. Welsh*, 47 Wis. 39; *Farr v. State Bank*, 87 Wis. 223, 41 Am. St. Rep. 40.

In trover for a packet of letters, the defendant was allowed to stay the proceedings as to one of the letters upon delivering it up and paying costs. *Earle v. Holderness*, 4 Bing. 462, 15 E. C. L. 41, 1 M. & P. 254.

In *Rutland, etc., R. Co. v. Middlebury Bank*, 32 Vt. 639, in an action of trover for the conversion of certain railroad bonds, the rule of the English courts was said to be a just rule and the defendant was permitted to bring the bonds into court, and, in the absence of evidence showing any special damage beyond the value of the bonds, only nominal damages were allowed.

**1. Application of Chattel to Plaintiff's Benefit.** — *Illinois.* — *Stow v. Yarwood*, 14 Ill. 424; *Bates v. Courtwright*, 36 Ill. 518; *Tripp v. Grouner*, 60 Ill. 474.

*Maryland.* — *Thomson v. Baltimore, etc., Steam Co.*, 33 Md. 312; *Wanamaker v. Bowes*, 36 Md. 42.

*Massachusetts.* — *Squire v. Hollenbeck*, 9 Pick. (Mass.) 551, 20 Am. Dec. 506; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356; 25 Am. Dec. 306; *Dahill v. Booker*, 140 Mass. 308, 54 Am. Dec. 465.

*Michigan.* — *Smith v. Mitchell*, 12 Mich. 191; *Erie Preserving Co. v. Witherspoon*, 49 Mich. 377.

*New Hampshire.* — *Blake v. Johnson*, 1 N. H. 91; *Cooper v. Newman*, 45 N. H. 342.

*New York.* — *Sherry v. Schuyler*, 2 Hill (N. Y.) 204.

*Texas.* — *Koyer v. White*, 6 Tex. Civ. App. 381.

*Vermont.* — *Yale v. Saunders*, 16 Vt. 243.

**Appropriation by Mortgagee.** — In an action by a mortgagor against a third person for the conversion of the mortgaged property, it was held that proof that the mortgagee took possession of the property for a breach of condition should be considered by the jury as an application of the property for the benefit of the mortgagor, although the foreclosure was not complete at the time of the trial, and although the mortgagee had sold a portion of the mortgaged property and transferred another part of it to the defendant. *Dahill v. Booker*, 140 Mass. 308, 54 Am. Rep. 465.

**2. Appropriation under Process Against Plaintiff.**

— *Northrup v. McGill*, 27 Mich. 234; *Dalton v. Laudahn*, 27 Mich. 529; *Bringard v. Stellwagen*, 41 Mich. 54; *Otis v. Jones*, 21 Wend. (N. Y.) 394. See also *Sowell v. Champion*, 6 Ad. & El. 407, 33 E. C. L. 92; *Edmondson v. Nuttall*, 17 C. B. N. S. 280, 112 E. C. L. 280; *Hanmer v. Wilsey*, 17 Wend. (N. Y.) 91. But see *Erie Preserving Co. v. Witherspoon*, 49 Mich. 379.

In *Hanmer v. Wilsey*, 17 Wend. (N. Y.) 91, where the property was taken upon illegal process against the owner, for which taking an action was brought against the creditor who directed it, and afterwards legal process was sued out on the same property, which had not gone back into the owner's possession, and it was seized and sold for the debt, it was held at the defendant could not show this fact in mitigation of damages, it being a mere act of his own.

**3. England.** — *Biggins v. Goode*, 2 Crompt. & J. 364.

*Connecticut.* — *Curtis v. Ward*, 20 Conn. 204; *Lazarus v. Ely*, 45 Conn. 504.

*Kentucky.* — *Board v. Head*, 3 Dana (Ky.) 489.

*Maine.* — *Daggett v. Adams*, 1 Me. 198.

*Massachusetts.* — *Caldwell v. Eaton*, 5 Mass. 404; *Prescott v. Wright*, 6 Mass. 20; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356, 25 Am. Dec. 396.

*New Jersey.* — *Hopple v. Higbee*, 23 N. J. L. 342.

*Oregon.* — *Morrison v. Crawford*, 7 Oregon 472.

*Texas.* — *Mississippi Mills v. Meyer*, 83 Tex. 433.

*Vermont.* — *Irish v. Cloyes*, 8 Vt. 30, 30 Am. Dec. 446; *Lamb v. Day*, 8 Vt. 407, 30 Am. Dec. 479. See also *Stewart v. Martin*, 16 Vt. 397.

ages.<sup>1</sup> Thus, where a collector of taxes illegally seized chattels of the plaintiff and sold them, but applied the proceeds to the payment of taxes owed by the plaintiff, it was held that the amount of taxes so paid should be deducted from the value of the chattels.<sup>2</sup>

**VI. LIMITATION OF ACTIONS.**—The statute of limitations against the maintenance of the action of trover begins to run from the time of the conversion,<sup>3</sup> as, in case of trover against a bailee, from the time of a demand for the return of the chattels and a refusal,<sup>4</sup> or, in case of a wrongful disposition or sale of chattels, from the time of such disposition or sale.<sup>5</sup> But it has been held that if the wrongful disposition is by a bailee, the statute does not begin to run until such disposition is brought to the plaintiff's knowledge.<sup>6</sup> Where the conversion arises out of a purchase from one without title or authority to sell, and claim of title under such purchase, the statute begins to run from the time of the purchase.<sup>7</sup> In jurisdictions which require the prosecution of a thief before trover may be maintained for the conversion of the property stolen,<sup>8</sup> the statute does not begin to run until the disability is removed;<sup>9</sup> but where the criminal prosecution of the thief is not required as a condition precedent to the civil action against him, the statute begins to run from the time of the taking.<sup>10</sup> The period within which an action of trover must be brought is variously fixed by statute at from two to six years.<sup>11</sup> For a discussion of the general principles relating to the limitation of actions the reader is referred to another title, where the subject is fully discussed.<sup>12</sup>

1. *Plevin v. Henshall*, 10 Bing. 24, 25 E. C. L. 17; *George v. Pierce*, 123 Cal. 172; *Jones v. Cobb*, 84 Me. 153; *Wanamaker v. Bowes*, 36 Md. 42; *Dahill v. Booker*, 140 Mass. 308, 54 Am. Rep. 465; *Higgins v. Whitney*, 24 Wend. (N. Y.) 379; *Ball v. Liney*, 48 N. Y. 6, 8 Am. Rep. 511; *Irish v. Cloyes*, 8 Vt. 33, 30 Am. Dec. 446. See also *Koyer v. White*, 6 Tex. Civ. App. 381; *Scott v. Childers*, 24 Tex. Civ. App. 349. But see *Macklem v. Durrant*, 32 U. C. Q. B. 98.

In *Plevin v. Henshall*, 10 Bing. 24, 25 E. C. L. 17, where, after a verdict for the plaintiff, the goods were seized in the hands of the defendant for rent due to A, which the plaintiff was liable to pay, and the defendant paid the rent, the court allowed him to deduct the amount from the verdict.

2. *Pierce v. Benjamin*, 14 Pick. (Mass.) 356, 25 Am. Dec. 396.

3. **Limitation of Actions—England.**—*Philpott v. Kelley*, 4 N. & M. 611, 3 Ad. & El. 106, 30 E. C. L. 40.

**Canada.**—*Scott v. McAlpine*, 6 U. C. C. P. 302.

**United States.**—*Hawkins v. State L. & T. Co.*, 79 Fed. Rep. 50.

**Colorado.**—*People v. Kendall*, 14 Colo. App. 175.

**Maryland.**—*Belt v. Marriott*, 9 Gill (Md.) 331.

**Mississippi.**—*Johnson v. White*, 13 Smed. & M. (Miss.) 584.

**Missouri.**—*Hopper v. Hays*, 82 Mo. App. 494.

**New York.**—*Kelsey v. Griswold*, 6 Barb. (N. Y.) 436.

**North Carolina.**—*Parker v. Harden*, 121 N. Car. 57.

**Ohio.**—*Howk v. Minnick*, 19 Ohio St. 462, 2 Am. Rep. 413.

**South Carolina.**—*Crawley v. Littlefield*, 1

*Strobh. L. (S. Car.)* 138; *Brock v. Sims*, 1 *Spears L. (S. Car.)* 49; *Beadle v. Hunter*, 3 *Strobh. L. (S. Car.)* 331.

**Tennessee.**—*Morris v. Lowe*, 97 Tenn. 243.

**Texas.**—*New York Mut. L. Ins. Co. v. Garland*, 23 Tex. Civ. App. 380.

4. *Northrop v. Smith*, 118 N. Y. 682, 23 N. E. Rep. 571.

5. *Gregory v. Montgomery*, 23 Tex. Civ. App. 68. See also *New York Mut. L. Ins. Co. v. Garland*, 23 Tex. Civ. App. 380.

6. *Wilkinson v. Verity*, L. R. 6 C. P. 206, 40 L. J. C. Pl. 141.

7. *Kinkead v. Holmes, etc., Furniture Co.*, 24 Wash. 216.

8. See *supra*, this title, *Title to Maintain Trover—Owner of Stolen Property*.

9. *Hutchinson v. Merchants', etc., Bank*, 41 Pa. St. 42, 85 Am. Dec. 596.

10. *Howk v. Minnick*, 19 Ohio St. 462, 2 Am. Rep. 413.

11. *Horton v. Jock*, (Cal. 1894) 37 Pac. Rep. 652; *Lowe v. Ozmun*, 137 Cal. 257; *Northrop v. Smith*, 118 N. Y. 682, 23 N. E. Rep. 571; *Gourdine v. Graham*, 1 Brev. (S. Car.) 329; *New York Mut. L. Ins. Co. v. Garland*, 23 Tex. Civ. App. 380; *Texarkana Water Co. v. Kizer*, (Tex. Civ. App. 1901) 63 S. W. Rep. 913. And see the statutes of the various states.

An action of trover is not within Code Civ. Pro. Cal., § 339, subdiv. 1, which provides that "an action upon a contract, obligation, or liability not founded upon an instrument of writing" must be brought within two years, but is within section 338, which provides that there may be commenced "within three years \* \* \* an action for taking, detaining, or injuring any goods or chattels." *Lowe v. Ozmun*, 137 Cal. 257. See also *Horton v. Jack*, (Cal. 1894) 37 Pac. Rep. 652.

12. See the title **LIMITATION OF ACTIONS**, vol. 19, p. 136.



**VII. EFFECT OF RECOVERY ON TITLE TO CHATTELS CONVERTED.** — There is conflict in the decisions with regard to the effect of a recovery in trover upon the title to the chattels converted. In the earlier cases the general rule was announced that a recovery in trover for the value of chattels converted vested of itself the title of the plaintiff in the defendant, without regard to a satisfaction of the judgment.<sup>1</sup> In the later decisions, however, the rule, now generally recognized as the better doctrine, is that the mere recovery of judgment in trover does not vest in the defendant the title of the plaintiff, but the title is divested from the plaintiff and vested in the defendant only by a satisfaction of the judgment;<sup>2</sup> and certainly the mere institution of an action of trover does not vest in the defendant the title to the chattels claimed to have been converted.<sup>3</sup> Upon the satisfaction of the judgment, when rendered for the value of the chattels, the title of the plaintiff passes to the defendant.<sup>4</sup>

**1. Effect of Recovery to Transfer Title — Early Rule — England.** — *Adams v. Broughton*, 2 Stra. 1078; *Buckland v. Johnson*, 15 C. B. 145, 80 E. C. L. 145.

*Kentucky.* — *Ewing v. Ford*, 1 A. K. Marsh. (Ky.) 457.

*Maine.* — *Carlisle v. Burley*, 3 Me. 250; *White v. Philbrick*, 5 Me. 147, 17 Am. Dec. 214.

*Massachusetts.* — *Campbell v. Phelps*, 1 Pick. (Mass.) 62, 11 Am. Dec. 139.

*New Jersey.* — *Wooley v. Carter*, 7 N. J. L. 85, 11 Am. Dec. 520.

*Pennsylvania.* — *Floyd v. Browne*, 1 Rawle (Pa.) 121, 18 Am. Dec. 602; *Marsh v. Pier*, 4 Rawle (Pa.) 273, 26 Am. Dec. 131; *Fox v. Northern Liberties*, 3 W. & S. (Pa.) 103; *Merrick's Estate*, 5 W. & S. (Pa.) 9; *Emery v. Nelson*, 9 S. & R. (Pa.) 12.

*South Carolina.* — *Rogers v. Moore*, Rice L. (S. Car.) 60; *Foreman v. Neilson*, 2 Rich. Eq. (S. Car.) 287; *Bogan v. Wilburn*, 1 Spears L. (S. Car.) 179; *Morris v. Berkley*, 2 Treadw. (S. Car.) 228.

*Virginia.* — *Murrell v. Johnson*, 1 Hen. & M. (Va.) 449.

By obtaining the judgment, the plaintiff in trover acquires a right to demand and receive from the defendant a specific sum of money in lieu and in satisfaction of his right to the property. *Fox v. Northern Liberties*, 3 W. & S. (Pa.) 103.

**2. General Rule — England.** — *Drake v. Mitchell*, 3 East 251; *Brinsmead v. Harrison*, L. R. 6 C. P. 584; *Marston v. Phillips*, 12 W. R. 8, 9 L. T. N. S. 289. See also *Ex p. Drake*, 5 Ch. D. 866; *In re Scarth*, L. R. 10 Ch. 234, 44 L. J. Bankr. 29.

*United States.* — *Lovejoy v. Murray*, 3 Wall. (U. S.) 1. See also *Murray v. Lovejoy*, 2 Cliff. (U. S.) 191.

*Alabama.* — *Spivey v. Morris*, 18 Ala. 254, 52 Am. Dec. 224.

*Arkansas.* — *Dow v. King*, 52 Ark. 282.

*Connecticut.* — *Atwater v. Tupper*, 45 Conn. 144, 29 Am. Rep. 674. See also *Sheldon v. Kibbe*, 3 Conn. 214, 8 Am. Dec. 176; *Morgan v. Chester*, 4 Conn. 387.

*Indiana.* — *Barb v. Fish*, 8 Blackf. (Ind.) 481.

*Maine.* — *Hopkins v. Hersey*, 20 Me. 449; *Jones v. Cobb*, 84 Me. 153.

*Maryland.* — *Hepburn v. Sewell*, 5 Har. & J.

(Md.) 211, 9 Am. Dec. 512. See also *Belt v. Marriott*, 9 Gill (Md.) 331.

*Massachusetts.* — *Elliott v. Hayden*, 104 Mass. 180.

*New Jersey.* — *Singer Mfg. Co. v. Skillman*, 52 N. J. L. 263.

*New Mexico.* — *Pryor v. Portsmouth Cattle Co.*, 6 N. Mex. 44.

*New York.* — *Goff v. Craven*, 34 Hun (N. Y.) 150; *American Medicine Co. v. Keisler*, 44 N. Y. Super. Ct. 557.

*South Carolina.* — *Jones v. M'Neil*, 2 Bailey L. (S. Car.) 466.

*Vermont.* — *Sanderson v. Caldwell*, 2 Aik. (Vt.) 203.

See also *Bell v. Perry*, 43 Iowa 368; *Sharp v. Gray*, 5 B. Mon. (Ky.) 4; *United Soc. of Shakers v. Underwood*, 11 Bush (Ky.) 265, 21 Am. Rep. 214; *Elliot v. Porter*, 5 Dana (Ky.) 299, 30 Am. Dec. 689; *Hyde v. Noble*, 13 N. H. 495, 38 Am. Dec. 508.

**3.** *Hawkins v. Collins*, 61 S. Car. 537.

**4. Satisfaction of Judgment — England.** — *Cooper v. Shepherd*, 3 C. B. 266, 54 E. C. L. 266, 4 Dowl. & L. 214; *Morris v. Robinson*, 3 B. & C. 196, 10 E. C. L. 49; *Lacon v. Barnard*, Cro. Car. 35; *Field v. Jellicus*, 3 Lev. 124; *Holmes v. Wilson*, 10 Ad. & El. 503, note, 37 E. C. L. 161; *Marston v. Phillips*, 12 W. R. 8, 9 L. T. N. S. 289; *Brinsmead v. Harrison*, L. R. 6 C. P. 584.

*Alabama.* — *White v. Martin*, 1 Port. (Ala.) 215, 26 Am. Dec. 365; *Spivey v. Morris*, 18 Ala. 254, 52 Am. Dec. 224; *Griel v. Pollak*, 105 Ala. 249.

*Indiana.* — *McFadden v. Schroeder*, 4 Ind. App. 305.

*Maryland.* — *Hepburn v. Sewell*, 5 Har. & J. (Md.) 211, 9 Am. Dec. 512; *Schindel v. Schindel*, 12 Md. 109; *Stirling v. Garritee*, 18 Md. 468.

*Michigan.* — *Hoag v. Breman*, 3 Mich. 160; *John A. Tolman Co. v. Waite*, 119 Mich. 341, 75 Am. St. Rep. 400.

*Missouri.* — *Mitchell v. Shaw*, 53 Mo. App. 652.

*New Hampshire.* — *Smith v. Smith*, 51 N. H. 571.

*New York.* — *Kelly v. Forty-second St., etc.*, R. Co., 37 N. Y. App. Div. 500; *Thayer v. Manley*, 73 N. Y. 305; *Marsden v. Cornell*, 62 N. Y. 215; *Osterhout v. Roberts*, 8 Cow. (N. Y.) 43; *Curtis v. Groat*, 6 Johns. (N. Y.) 168, 5 Am. Dec. 204.

and vests by relation as of the time of the conversion.<sup>1</sup> This relation back, however, will not operate to render a third person a trespasser for any act done by him between the time of the conversion and the rendition and satisfaction of the judgment.<sup>2</sup> If it is apparent that the recovery in trover was not for the value of the chattel, the satisfaction of such judgment does not vest the title in the defendant.<sup>3</sup> Thus, if the judgment is not for the value of the property, but the damages are mitigated by showing a return of the chattels to the plaintiff, the satisfaction of such a judgment does not give to the defendant any title to the chattel.<sup>4</sup> So where in trover by the maker of a note judgment for nominal damages only is given, the satisfaction of such judgment does not pass title in the note to the defendant, so as to enable him afterwards to enforce it against the plaintiff.<sup>5</sup>

**VIII. WAIVER OF CONVERSION.** — Though the defendant has been guilty of a wrongful conversion, the plaintiff may by his subsequent conduct ratify or waive such wrongful act so as to prevent his maintaining an action of trover therefor,<sup>6</sup> as, for example, where with knowledge of the wrongful disposition

*North Carolina.* — *Brickhouse v. Brickhouse*, 11 Ired. L. (33 N. Car.) 404.

*Ohio.* — *Acheson v. Miller*, 2 Ohio St. 205, 59 Am. Dec. 663.

*South Carolina.* — *Jones v. McNeil*, 2 Bailey L. (S. Car.) 466; *Cook v. Cook*, 2 Brev. (S. Car.) 349; *Thompson v. Rogers*, 2 Brev. (S. Car.) 410; *Morris v. Berkeley*, 2 Treadw. (S. Car.) 228.

*Tennessee.* — *Smith v. Alexander*, 4 Sneed (Tenn.) 482; *Clark v. Cullen*, (Tenn. Ch. 1897) 44 S. W. Rep. 204.

*Texas.* — *Smith v. So Rill*, (Tex. Civ. App. 1899) 54 S. W. Rep. 38; *Greer v. Lafayette County Bank*, (Tex. Civ. App. 1898) 47 S. W. Rep. 737.

See also *Howard v. Smith*, 12 Pick. (Mass.) 202.

**1. England.** — *Cooper v. Shepherd*, 3 C. B. 266, 54 E. C. L. 266; *Adams v. Broughton*, 2 Stra. 1078; *Bishop v. Montague*, Cro. Eliz. 824; *Brinsmead v. Harrison*, L. R. 6 C. P. 584; *Barnett v. Brandao*, 6 M. & G. 640, note, 46 E. C. L. 640; *Buckland v. Johnson*, 15 C. B. 145, 80 E. C. L. 145; *Unwin v. St. Quintin*, 11 M. & W. 277.

*Alabama.* — *White v. Martin*, 1 Port. (Ala.) 215, 26 Am. Dec. 365; *Smith v. Hooks*, 19 Ala. 101; *Griel v. Pollak*, 105 Ala. 249.

*Maryland.* — *Hepburn v. Sewell*, 5 Har. & J. (Md.) 211, 9 Am. Dec. 512; *Stirling v. Garrittee*, 18 Md. 468.

*Michigan.* — *Bacon v. Kimmel*, 14 Mich. 201.

*New Hampshire.* — *Smith v. Smith*, 51 N. H. 571.

*Ohio.* — *Acheson v. Miller*, 2 Ohio St. 203, 59 Am. Dec. 663.

*Texas.* — *Greer v. Lafayette County Bank*, (Tex. Civ. App. 1898) 47 S. W. Rep. 737.

See also *Rembert v. Hally*, 10 Humph. (Tenn.) 513.

In *Atwater v. Tupper*, 45 Conn. 144, 29 Am. Rep. 674, the opinion of Carpenter, J., seemed to combat the theory that the title changes by relation back to the time of the conversion. He said: "There is no substantial reason for holding that the change of title, whenever it occurs, takes effect by relation at the time of the conversion. The only reason that occurs to us is that the plaintiff recovers interest from the time of conversion. But that argument

fails when we consider, as we may, that the interest is an equivalent for the use of the property in the meantime. \* \* \* We are satisfied that the better rule is that the title changes when the judgment is satisfied."

**2.** *Smith v. Milles*, 1 T. R. 480; *Balme v. Hutton*, 9 Bing. 471, 23 E. C. L. 338; *Liford's Case*, 11 Coke 51; *Menville's Case*, 13 Coke 21; *Bacon v. Kimmel*, 14 Mich. 201; *Case v. DeGoes*, 3 Cai. (N. Y.) 261; *Jackson v. Bard*, 4 Johns. (N. Y.) 234, 4 Am. Dec. 267.

**3.** *Holmes v. Wilson*, 10 Ad. & El. 503, 37 E. C. L. 161; *Barb v. Fish*, 8 Blackf. (Ind.) 481; *Dearth v. Spencer*, 52 N. H. 213; *Jones v. McNeil*, 2 Bailey L. (S. Car.) 466.

In *Jones v. McNeil*, 2 Bailey L. (S. Car.) 466, O'Neill, J., said: "It is clear \* \* \* that even in trover, in order to constitute a bar to a second action for the value of the chattel, the verdict must have found a sum intended to cover the value of the chattel; and in trespass the force of this rule is enhanced, and its application is the more immediate, inasmuch as in this form of action the injury done to the possession, and not the right of property, is the gravamen of the action."

**4.** *Brinsmead v. Harrison*, L. R. 6 C. P. 584. See also *Morris v. Robinson*, 3 B. & C. 196, 10 E. C. L. 49.

**5.** *Dearth v. Spencer*, 52 N. H. 213.

**6. Waiver of Conversion — England.** — *Lythgoe v. Vernon*, 5 H. & N. 180; *Brewer v. Sparrow*, 7 B. & C. 310, 14 E. C. L. 50, 1 M. & R. 2.

*Alabama.* — *Singer Mfg. Co. v. Greenleaf*, 100 Ala. 272.

*Maine.* — *Hotchkiss v. Hunt*, 49 Me. 213.

*Massachusetts.* — *Carnes v. Nichols*, 10 Gray (Mass.) 369; *Lucas v. Trumbull*, 15 Gray (Mass.) 306; *Hewes v. Parkman*, 20 Pick. (Mass.) 90; *Tallant v. Stedman*, 176 Mass. 460.

*New York.* — *De Graaf v. Wyckoff*, 118 N. Y. 1; *Ballard v. Beveridge*, 6 N. Y. App. Div. 349.

*Tennessee.* — *Cobb v. Wallace*, 5 Coldw. (Tenn.) 539, 98 Am. Dec. 435; *Weakley v. Evans*, (Tenn. Ch. 1897) 46 S. W. Rep. 1070.

*Vermont.* — *Irish v. Cloyes*, 8 Vt. 30, 30 Am. Dec. 446.

**Taking Bond in Payment for Property.** — *Briggs Iron Co. v. North Adams Iron Co.*, 12 Cush. (Mass.) 114.

of the chattels by the defendant the plaintiff receives the proceeds of the sale.<sup>1</sup> But a waiver is not worked by a mere demand upon the defendant that he return the goods wrongfully converted<sup>2</sup> or that he pay therefor.<sup>3</sup> So the failure of the plaintiff to reply to a letter from the defendant offering to pay for property wrongfully sold is not a waiver of the conversion arising from such sale.<sup>4</sup> The right of the owner of chattels wrongfully converted to waive the tort and resort to his remedy *ex contractu*, as well as the consequences of his election as a bar to a subsequent action of trover, have been discussed elsewhere in this work.<sup>5</sup>

1. *Brewer v. Sparrow*, 7 B. & C. 310, 14 E. C. L. 50; *Appleby v. Withall*, 8 U. C. C. P. 397; *Singer Mfg. Co. v. Greenleaf*, 100 Ala. 272. Compare *Burn v. Morris*, 4 Tyrw. 485.

If an owner of goods, after a tortious sale of them, waives the conversion and claims the proceeds of the sale, part of which is paid to him, he cannot afterwards treat the seller as a wrongdoer and maintain trover against him. *Lythgoe v. Vernon*, 5 H. & N. 180, 29 L. J. Exch. 164. Compare *Burn v. Morris*, 4 Tyrw. 485, 2 Crompt. & M. 579.

In *Smith v. Baker*, L. R. 8 C. P. 350, 42 L. J. C. Pl. 155, it appeared that the defendant sold D.'s goods under a bill of sale. D. became bankrupt, and his trustee petitioned the court of bankruptcy to set aside the sale as fraudulent and void and to order payment of the proceeds (the amount of which he knew) to him. The court so ordered, and the money was paid. The trustee, afterwards being dissatisfied with the amount realized, and desiring to obtain the difference between the value of the goods and the proceeds of the sale, brought trover against the defendant. It was held that he could not maintain the action, as by his acts he had waived the tort.

2. See *supra*, this title, *Conversion—Necessity for Demand*.

3. *Hurst v. Gwennap*, 2 Stark. 306, 3 E. C. L. 420; *Weld v. Oliver*, 21 Pick. (Mass.) 559. A servant of a bankrupt, without authority, sold the bankrupt's goods to the defendant, who had notice of the act of bankruptcy. His assignees delivered to the defendant a bill of parcels as for goods sold and delivered by the bankrupt, and made two several demands for payment, which the defendant refused, and he also refused to deliver up the goods, when they were substantially demanded. It was held that the demand for payment amounted only to a qualified offer by the assignee to adopt the sale, and that they were not thereby precluded from suing in trover. *Valpy v. Sanders*, 5 C. B. 887, 57 E. C. L. 887, 12 Jur. 483, 17 L. J. C. Pl. 249.

4. *McCarty v. Roswald*, 105 Ala. 511.

5. See the title IMPLIED OR QUASI CONTRACTS, vol. 15, p. 1111 *et seq.* See also the following cases:

**Concurrent Remedy Ex Contractu—England.**—*Edmeads v. Newman*, 1 B. & C. 418, 8 E. C. L. 178; *Marsh v. Keating*, 1 Bing. N. Cas. 198, 27 E. C. L. 354; *Lee v. Shore*, 1 B. & C. 94, 8 E. C. L. 41; *Strutt v. Smith*, 1 C. M. & R. 312; *Arnold v. Cheque Bank*, 1 C. P. D. 578; *Abbotts v. Barry*, 2 Brod. & B. 369, 6 E. C. L. 186; *Clarke v. Shee*, 1 Cowp. 197; *Hamblly v. Trott*, 1 Cowp. 375; *King v. Leith*, 2 T. R. 144; *Hitchin v. Campbell*, 2 W. Bl. 827; *Read*

*v. Hutchinson*, 3 Campb. 352; *Hill v. Perrott*, 3 Taunt. 274; *Foster v. Stewart*, 3 M. & S. 191; *Stone v. Marsh*, 6 B. & C. 551, 13 E. C. L. 249; *Hull v. Vaughan*, 6 Price 159; *Ferguson v. Carrington*, 9 B. & C. 738, 17 E. C. L. 486; *Rodgers v. Maw*, 15 M. & W. 448; *Fine Art Soc. v. Union Bank*, 17 Q. B. 705.

*Alabama.*—*Miller v. King*, 67 Ala. 575.

*Arkansas.*—*Howell v. Graves*, 27 Ark. 365.

*Illinois.*—*Dickinson v. Whitney*, 9 Ill. 406; *McDonald v. Brown*, 16 Ill. 32.

*Kansas.*—*Tightmeyer v. Mongold*, 20 Kan. 90.

*Kentucky.*—*Guthrie v. Wickliffe*, 1 A. K. Marsh. (Ky.) 83; *Eversole v. Moore*, 3 Bush (Ky.) 49; *Dietz v. Sutcliffe*, 80 Ky. 650.

*Maine.*—*Foster v. Tucker*, 3 Me. 458, 14 Am. Dec. 243; *Gardiner Mfg. Co. v. Heald*, 5 Me. 381, 17 Am. Dec. 248; *Richardson v. Kimball*, 28 Me. 463; *Simpson v. Bowden*, 33 Me. 549; *Hopkins v. Megquire*, 35 Me. 78; *Howe v. Russell*, 41 Me. 446; *Hall v. Huckins*, 41 Me. 574; *Rogers v. Greenbush*, 57 Me. 441.

*Massachusetts.*—*Ladd v. Rogers*, 11 Allen (Mass.) 209; *Brown v. Holbrook*, 4 Gray (Mass.) 102; *Wilbur v. Gilmore*, 21 Pick. (Mass.) 254; *Cummings v. Noyes*, 10 Mass. 433; *Cravath v. Plympton*, 13 Mass. 454; *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240.

*Michigan.*—*Bowen v. School Dist. No. 9*, 36 Mich. 149; *Coe v. Wager*, 42 Mich. 49; *McLaughlin v. Salley*, 46 Mich. 219; *Loomis v. O'Neal*, 73 Mich. 582.

*Mississippi.*—*Jamison v. Moon*, 43 Miss. 598.

*Missouri.*—*Johnson v. Strader*, 3 Mo. 355; *Gordon v. Bruner*, 49 Mo. 570.

*New Hampshire.*—*Chauncey v. Yeaton*, 1 N. H. 151; *Hill v. Davis*, 3 N. H. 385; *Woodbury v. Woodbury*, 47 N. H. 11, 90 Am. Dec. 555; *Carleton v. Haywood*, 49 N. H. 314.

*New Jersey.*—*Randolph Iron Co. v. Elliott*, 34 N. J. L. 184.

*New York.*—*Ransom v. Wetmore*, 39 Barb. (N. Y.) 104; *Hawk v. Thorn*, 54 Barb. (N. Y.) 164; *Putnam v. Wise*, 1 Hill (N. Y.) 234, 37 Am. Dec. 309; *Cummings v. Vorce*, 3 Hill (N. Y.) 282; *Chambers v. Lewis*, 2 Hilt. (N. Y.) 591; *Cushman v. Jewell*, 7 Hun (N. Y.) 525; *Brown v. Brown*, 40 Hun (N. Y.) 418.

*Pennsylvania.*—*Pearsoll v. Chapin*, 44 Pa. St. 9; *Wilder v. Aldrich*, 2 R. I. 518.

*Vermont.*—*Danforth v. Grant*, 14 Vt. 283, 39 Am. Dec. 224; *Doon v. Ravey*, 49 Vt. 293. And see *Centre Turnpike Co. v. Smith*, 12 Vt. 212.

*Wisconsin.*—*Western Assur. Co. v. Towle*, 65 Wis. 247.

**Effect of Election of Remedy—England.**—*Kitchen v. Campbell*, 3 Wils. C. Pl. 304; *Valpy v. Sanders*, 5 C. B. 886, 57 E. C. L. 886; *Mor-*



**TRUCK ACTS.** — See the title **STORE ORDER ACTS**, vol. 26, p. 1123.

**TRUE.** (See also **COMPLETE**, vol. 5, p. 375.) — “True” means (1) conformable to fact; in accordance with the actual state of things; correct; not false, erroneous, inaccurate, or the like; as, a true relation or narration, a true history. A declaration is true when it states the facts. (2) Right, to precision; conformable to a rule or pattern; exact; accurate; as, a true copy, a true likeness of the original.<sup>1</sup> In one sense that only is true which is con-

ris *v.* Robinson, 3 B. & C. 196, 10 E. C. L. 49, 5 Dowl. & R. 35; Brinsmead *v.* Harrison, L. R. 6 C. P. 589; Smith *v.* Baker, L. R. 8 C. P. 350; Buckland *v.* Johnson, 15 C. B. 145, 80 E. C. L. 145.

*Alabama.* — Firemen's Ins. Co. *v.* Cochran, 27 Ala. 228; Hopkinson *v.* Shelton, 37 Ala. 306.

*Connecticut.* — Bulkley *v.* Morgan, 46 Conn. 393.

*Illinois.* — Gibbs *v.* Jones, 46 Ill. 319.

*Indiana.* — Smith *v.* Scantling, 4 Blackf. (Ind.) 443. And see O'Donald *v.* Constant, 82 Ind. 212.

*Maryland.* — Walsh *v.* Chesapeake, etc., Canal Co., 59 Md. 423.

*Massachusetts.* — Butler *v.* Hildreth, 5 Met. (Mass.) 49.

*Michigan.* — Nield *v.* Burton, 49 Mich. 53. And see Thompson *v.* Howard, 31 Mich. 309; Farwell *v.* Myers, 59 Mich. 179.

*Mississippi.* — Agnew *v.* McElroy, 10 Smed. & M. (Miss.) 552, 48 Am. Dec. 772.

*New York.* — Ransom *v.* Wetmore, 39 Barb. (N. Y.) 104; Lockwood *v.* Bull, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539; Roots *v.* Ferguson, 46 Hun (N. Y.) 129; Bach *v.* Tuch, 47 Hun (N. Y.) 536; Sanger *v.* Wood, 3 Johns. Ch. (N. Y.) 416; Rice *v.* King, 7 Johns. (N. Y.) 20; Lloyd *v.* Brewster, 4 Paige (N. Y.) 537, 27 Am. Dec. 88; Rodermund *v.* Clark, 46 N. Y. 354; Kinney *v.* Kiernan, 49 N. Y. 164; Fields *v.* Bland, 81 N. Y. 239; Moller *v.* Tuska, 87 N. Y. 166; Hays *v.* Midas, 104 Hun (N. Y.) 602; Equitable Co-operative Foundry Co. *v.* Hersee, 103 N. Y. 25; Terry *v.* Munger, 121 N. Y. 161, 18 Am. St. Rep. 803, 49 Hun (N. Y.) 560. And see Acer *v.* Hotchkiss, 97 N. Y. 395.

*Pennsylvania.* — Floyd *v.* Browne, 1 Rawle (Pa.) 121, 18 Am. Dec. 602.

*South Carolina.* — Sanders *v.* Egerton, 2 Brev. (S. Car.) 45.

*Vermont.* — Gates *v.* Goreham, 5 Vt. 317, 26 Am. Dec. 303.

*Virginia.* — Sangster *v.* Com., 17 Gratt. (Va.) 124.

*Wisconsin.* — Carroll *v.* Fethers, 102 Wis. 436.

See also the title **ELECTION OF REMEDIES**, 7 ENCYC. OF PL. AND PR. 360.

1. **True.** — Johnson *v.* Des Moines L. Ins. Co., 105 Iowa 276, quoting Webst. Dict.

**True, Correct, Full, Complete.** — The words “true and correct transcript” have been held to be equivalent to “full and complete transcript.” Butler *v.* Owen, 7 Ark. 369.

In Presbyterian Church *v.* Emerson, 66 Ill. 271, it was said: “The statement that the account was correct was equivalent to a statement that it was true and just.”

**True Copy.** — In Central Nat. Bank *v.* Brech-

eisen, 65 Kan. 810, it was said: “The use of the words ‘true copy’ in the statute relative to the recording of chattel mortgages does not require that a literal and verbatim copy of the instrument must be filed, but a copy substantially true, so that the creditors of the mortgagor or subsequent purchasers in good faith may not be misled to their detriment.”

In Com. *v.* Quigley, 170 Mass. 15, it was said: “A copy of a record authenticated by one who has the authority to do so must be taken as a true copy, for it cannot be a copy if it is false.”

“A true copy imports an entire copy.” Edmiston *v.* Schwartz, 13 S. & R. (Pa.) 135.

**True Owner — English Bills of Sale Act.** — In *In re Sarl*, (1892) 2 Q. B. 591, it was held that the expression “the true owner” of personal chattels described in a bill of sale at the time of its execution, within the meaning of the English Bills of Sale Act of 1882, must be taken to mean the person who is the legal owner thereof at the time, irrespective of whether he is also the equitable owner or only trustee for another.

**Same — English Bankruptcy Act.** — In *In re Mills*, (1895) 2 Ch. 564, it was held, that, where the trustees named in a settlement of property of a person who afterwards becomes bankrupt have never executed or had any knowledge of the settlement, or, on being informed of it, decline the trusts, the beneficiaries and not the trustees are the “true owners” for the purpose of giving the necessary “consent and permission” to the property being in the “order or disposition” of the bankrupt as “reputed owner” at the commencement of his bankruptcy, so as to render the property available for his creditors. See also Tuck *v.* Southern Counties Deposit Bank, 42 Ch. D. 471; *Re Tamplin*, 38 W. R. 351.

**True and Punctual Payment.** — Land was conveyed in trust to secure the “true and punctual payment” of certain promissory notes. It was held that true in this connection meant “faithful.” Norris *v.* Beaty, 6 W. Va. 480.

**True Value.** (See also **VALUE**.) — The words “true value,” as used in a revenue law, have been held to mean the actual cost of the goods to the importer at the place from which they were imported, and not the current market value of the goods at such place. U. S. *v.* Tappan, 11 Wheat. (U. S.) 419. See also Tappan *v.* U. S., 2 Mason (U. S.) 404.

The county commissioners of a county were authorized to purchase at their true value all bridges built upon public highways. It was held that the term “true value” as thus used could not be construed to mean the original cost of a bridge when such bridge, at the time of the proposed purchase, was about seven

formable to the actual state of things. In that sense, a statement is untrue which does not express things exactly as they are ; but, in another and broader sense, the word "true" is often used as a synonym of "honest," "sincere," "not fraudulent." <sup>1</sup>

**TRUE BILL.** — See note 2.

**TRUE TITLE.** — See the title FIRE INSURANCE, vol. 13, p. 86.

**TRUNK.** — See note 3.

**TRUSSED.** — See note 4.

**TRUST.** (See also the title TRUSTS AND TRUSTEES, *post.*) — See note 5.

**TRUST COMPANIES.** — See the titles LOAN, TRUST, AND SAFE-DEPOSIT COMPANIES, vol. 19, p. 477; SURETYSHIP, vol. 27, p. 426.

years old and actually worth only about one-sixth of the original cost of construction. *State v. Pierce*, 52 Kan. 521.

**True Value — Confederate Money.** — See *Bierne v. Brown*, 10 W. Va. 767.

1. **True.** — *Moulou v. American L. Ins. Co.*, 111 U. S. 345, quoted in *Globe Mut. L. Ins. Assoc. v. Wagner*, 188 Ill. 133, and in *Weil v. New York L. Ins. Co.*, 47 La. Ann. 1416. In those cases it was held that, as applied to the answers which an applicant for a life-insurance policy must give to the questions propounded by the policy, the latter sense of the term *true* is the correct one.

In *Clapp v. Massachusetts Ben. Assoc.*, 146 Mass. 530, a similar case, the court said: "The word *true* is often used as a synonym of honest or sincere, without evasion or fraud." See also *Fowkes v. Manchester, etc., L. Assur., etc., Assoc.*, 3 B. & S. 928, 113 E. C. L. 928; *Kansas City First Nat. Bank v. Hartford F. Ins. Co.*, 95 U. S. 673. And see the title INSURANCE, vol. 16, p. 919; LIFE INSURANCE, vol. 19, p. 62.

2. **True Bill.** (See also the title INDICTMENTS, INFORMATIONS, AND COMPLAINTS, 10 ENCYC. OF PL. AND PR. 344.) — In *State v. McCarty*, 17 Minn. 76, it was held that the indorsement of an indictment properly filed as a *true bill*, signed by the foreman, was evidence that it was found by a grand jury. See also *State v. Beebe*, 17 Minn. 241.

An indictment has been held bad, although signed by the foreman, where the expression *true bill* was not indorsed upon it. *Rex v. Ford*, *Yelv.* 99; *Rookwood's Trial*, 13 How. St. Tr. 139; *Webster's Case*, 5 Me. 432. But see *Com. v. Smyth*, 11 Cush. (Mass.) 473; *State v. Burgess*, 24 Mo. 381, 69 Am. Dec. 433 (holding that the indorsement of the words *true bill* is not part of the indictment); *State v. Freeman*, 13 N. H. 488; *Reg. v. Townsend*, 28 Nova Scotia 468.

3. **Trunk.** — In *Potter v. State*, 39 Tex. 388, it was held that the words *trunk* and "chest" were not synonymous, and that an indictment for the theft of one "*trunk* or chest" was bad for being in the alternative.

4. **Trussed Roof.** — A building ordinance provided that "the outside walls of buildings having *trussed* roofs, such as churches, public halls, theatres, restaurants, and the like, if more than sixteen and less than twenty-five feet high, shall average at least seventeen inches in thickness." In construing this provision in *Diamond State Iron Co. v. Giles*, 7 Houst.

(Del.) 568, the court said: "*Trussed* roofs are roofs packed or bound closely. They are necessarily very heavy roofs; and although they are sometimes said to be self-supporting, this is said only in respect to their being packed or bound closely and not otherwise; for their weight when supported either by walls or pilasters is uncommonly heavy in comparison to the weight of other kinds of roofs."

5. **Public Trust.** (See also the title PUBLIC OFFICERS, vol. 23, p. 314, and see PUBLIC TRUST OR CHARITY, vol. 23, p. 458.) — The Constitution of *New York* prescribes a certain oath to be taken by every person holding an office or "public *trust*." In *Matter of Wood, Hopk.* (N. Y.) 8, the court, *per* Sanford, C., said: "The words 'public *trust*' \* \* \* appear to include every agency in which the public, reposing special confidence in particular persons, appoint them for the performance of some duty or service." So it was held that the station of a solicitor or counselor was a public *trust*. And in *Seymour v. Ellison*, 2 Cow. (N. Y.) 13, it was held that the section of the constitution providing that "neither the chancellor, nor justices of the Supreme Court, nor any circuit judge shall hold any other office or public *trust*" prohibited a circuit judge from acting as attorney in a case. But see *Matter of Oaths*, 20 Johns. (N. Y.) 492.

**Corporate Trust — Illinois Statute.** — See *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *Harding v. American Glucose Co.*, 182 Ill. 615, wherein it was said: "A trust has usually appeared in the form of an agreement between stockholders in many corporations to place all their stock in the hands of trustees, and to receive trust certificates therefor from the trustees. But the question in the present case is whether a trust is created where a majority of stockholders consolidate their interests by conveying all their property to a corporation organized for the purpose of taking their property. Any combination of competing corporations for the purpose of controlling prices, or limiting production, or suppressing competition, is contrary to public policy and is void." Citing 2 Cook on Corporations (4th ed.), § 503a. See also the title VOTING TRUSTS.

**Kansas Statute.** — See *State v. Smiley*, 65 Kan. 241.

**Texas Statute.** — See *In re Grice*, 79 Fed. Rep. 637; *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118. See also the title MONOPOLIES AND CORPORATE TRUSTS, vol. 20, p. 844.

# TRUST DEEDS AND POWER OF SALE MORTGAGES.

BY THOMAS ATKINS STREET.

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#### CROSS-REFERENCES.

For matters of *PROCEDURE* see in the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE* the titles *CHATTEL MORTGAGES*, vol. 4, p. 507; *FORECLOSURE OF MORTGAGES*, vol. 9, pp. 162-218.

For other matters of *SUBSTANTIVE LAW* related to this subject, see the following titles in this work, and the references there given: *ASSIGNMENTS*, vol. 2, p. 1008; *CHATTEL MORTGAGES*, vol. 5, p. 946; *EQUITY OF REDEMPTION*, vol. 11, p. 205; *FORECLOSURE OF MORTGAGES*, vol. 13, p. 776; *FRAUDULENT SALES AND CONVEYANCES*, vol. 14, p. 210; *MORTGAGES*, vol. 20, p. 888; *RECORDING ACTS*, vol. 24, p. 73.

For the law pertaining to trusts created by deed for other purposes than to secure the payment of a debt or the performance of a contractual duty, see the title *TRUSTS AND TRUSTEES*, *post*.

**I. SCOPE OF TITLE.** — This article is almost exclusively concerned with the exercise of the power of sale contained in mortgages and deeds of trust, but it also deals with such features of the trust deed as are peculiar to this form of security and which are not elsewhere treated in this work.

**II. DEFINITION AND DISTINCTIONS** — **1. Definition.** — A trust deed in the sense here intended is a conveyance, usually by deed, of real or personal property, or both, executed by or on behalf of a debtor to a third person, such property to be held by the grantee for the purpose of securing the payment of creditors or to indemnify sureties.<sup>1</sup>

**Power of Sale as Incident to Trust Deed.** — The trust deed usually lodges in the trustee a power to sell the property upon a stated contingency, such as default in the payment of the debt, interest, or taxes, and to apply the proceeds in satisfaction of the obligation secured. The power of sale is, however, by no means essential to the validity of a trust deed, and if the power be omitted or be defective the instrument may nevertheless be foreclosed by an action.<sup>2</sup> The power of sale mortgage differs from the ordinary mortgage merely in the fact that the instrument expressly confers on the mortgagee the power to sell and convey the mortgaged property upon certain specified conditions for the purpose of satisfying the obligation secured.<sup>3</sup>

**2. Distinction Between Defeasible and Absolute Trust.** — It should be noted that in the form of conveyance now under consideration the title of the trustee is always defeasible.<sup>4</sup> The trust deed, as the term is now used, is therefore to be distinguished from an absolute conveyance in trust for the payment of debts, the execution of which leaves no right or interest whatever in the grantor.<sup>5</sup> The absolute conveyance in trust for the payment of debts is in the nature of an assignment, and the law relating thereto has been elsewhere treated.<sup>6</sup>

**3. Similarity of Trust Deed and Power of Sale Mortgage** — *a. IN GENERAL.* — As defined above the trust deed accomplishes the same purpose as the power of sale mortgage. The trust deed in fact owes its origin to the circumstance that a power of sale vested in the mortgagee was at an early day supposed to be invalid. The trust deed was therefore devised to obviate the technical weakness in the power of sale mortgage. In most jurisdictions the two forms of security are consequently given the same legal effect. The fact that a trust deed is given to secure a debt fixes upon it the character of

1. See Cent. Dict., *s. v.* Deed of Trust.

2. See *infra*, this title, IV. 4. *c. Extent of Power*; also V. 2. *e.* (3) *Defective Power of Sale*.

3. For a definition of the ordinary mortgage, see the title MORTGAGES, vol. 20, p. 897.

4. **Title of Trustee or Mortgagee Defeasible.** — Bartlett *v.* Teah, 1 Fed. Rep. 768; Newman *v.* Samuels, 17 Iowa 528; Turner *v.* Bouchell, 3 Har. & J. (Md.) 99; Wisconsin Cent. R. Co. *v.* Wisconsin River Land Co., 71 Wis. 94.

5. **Absolute Conveyance in Trust.** — A conveyance of lands by a railroad company to trustees, for the sole benefit of certain designated creditors, containing no defeasance clause and no directions as to how the trust shall be executed, vests an absolute title in the trustees as against the grantor, and cannot be regarded as a mortgage. Catlett *v.* Starr, 70 Tex. 485.

**Distinction Stated.** — The distinction between the deed of assignment and a mortgage or deed of trust is that the former is an absolute conveyance to sell and pay at all events by which the grantor finally parts with his property, and it is alienated as well from his creditors as

from himself; while the latter is a mere pledge, and the estate of the grantor is not finally and absolutely divested. Matter of Zwang, 39 Mo. App. 356; State *v.* Benoist, 37 Mo. 500; Crow *v.* Beardsley, 68 Mo. 435.

For a further discussion of the distinction between the deed of trust executed to secure a debt and the absolute deed of conveyance in trust for the payment of a debt, see Turner *v.* Watkins, 31 Ark. 429, *distinguishing* Critten-den *v.* Johnson, 11 Ark. 94, and State *v.* Lawson, 6 Ark. 269; Martin *v.* Alter, 42 Ohio St. 94; also the language of the Master of Rolls in Bell *v.* Carter, 17 Beav. 11.

**In Maryland** absolute conveyances in trust for payment of creditors and conveyances in trust for the separate use of a wife are trust deeds within the meaning of the statutes of that state, and do not require to be sworn to nor to be executed and advertised in the county where the land lies, as is necessary in case of mortgages. Stocket *v.* Holliday, 9 Md. 480; Bank of Commerce *v.* Lanahan, 45 Md. 396.

6. See the titles ASSIGNMENTS, vol. 2, p. 1008; FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 210.



a mortgage.<sup>1</sup> Hence, statutes referring to mortgages generally apply to trust deeds though they are not specially mentioned.<sup>2</sup>

*b. INTEREST REMAINING IN GRANTOR.* — Like the mortgage at common law, the trust deed passes the legal title to the grantee in those jurisdictions where a mortgage passes such interest, and leaves in the grantor the equity of redemption only.<sup>3</sup> Likewise in those states where it is held that the legal title remains in the mortgagor,<sup>4</sup> the same rule is generally applied in favor of the grantor in a trust deed.<sup>5</sup> The fact that what is in legal effect a mortgage is put into the form of a deed of trust does not change its character as a mere security nor cause it in these jurisdictions to convey the legal title.<sup>6</sup>

*c. LEVIABILITY OF GRANTOR'S INTEREST.* — So where the mortgagor's interest may be taken in execution, the interest of a grantor in a deed of trust may generally also be taken.<sup>7</sup>

**1. Trust Deed Treated as a Mortgage** — *England.* — Bell *v.* Carter, 17 Beav. 11, 22 L. J. Ch. 933.

*United States.* — Shillaber *v.* Robinson, 97 U. S. 75; Platt *v.* Union Pac. R. Co., 99 U. S. 57; Bartlett *v.* Teah, 1 McCrary (U. S.) 176, 1 Fed. Rep. 768; Southern Pac. R. Co. *v.* Doyle, 11 Fed. Rep. 253; Wheeler, etc., Mfg. Co. *v.* Howard, 28 Fed. Rep. 741.

*Arkansas.* — Turner *v.* Watkins, 31 Ark. 429.

*Illinois.* — Sargent *v.* Howe, 21 Ill. 148; Pardee *v.* Lindley, 31 Ill. 174, 83 Am. Dec. 219; Wilson *v.* McDowell, 78 Ill. 514; Union Mut. L. Ins. Co. *v.* White, 106 Ill. 67; Fitch *v.* Wetherbee, 110 Ill. 475.

*Indiana.* — Coe *v.* Johnson, 18 Ind. 218; Coe *v.* McBrown, 22 Ind. 252.

*Iowa.* — Newman *v.* Samuels, 17 Iowa 528; Ingle *v.* Culbertson, 43 Iowa 265.

*Kansas.* — Lenox *v.* Reed, 12 Kan. 223.

*Louisiana.* — Tillman *v.* Drake, 4 La. Ann. 16.

*Maine.* — *In re* York, etc., R. Co., 50 Me. 552.

*Massachusetts.* — Eaton *v.* Whiting, 3 Pick. (Mass.) 481.

*Michigan.* — Flint, etc., R. Co. *v.* Auditor Gen., 41 Mich. 635.

*Mississippi.* — Myers *v.* Estell, 48 Miss. 404; Hand *v.* Winn, 52 Miss. 788; Clark *v.* Wilson, 53 Miss. 129.

*Missouri.* — McQuie *v.* Peay, 58 Mo. 56.

*Nebraska.* — Kyger *v.* Ryley, 2 Neb. 20; Hurley *v.* Estes, 6 Neb. 386.

*New York.* — Palmer *v.* Gurnsey, 7 Wend. (N. Y.) 248.

*Ohio.* — Woodruff *v.* Robb, 19 Ohio 212.

*Oregon.* — Thompson *v.* Marshall, 21 Oregon 171.

*Rhode Island.* — Union Co. *v.* Sprague, 14 R. I. 452; Austin *v.* A. & W. Sprague Mfg. Co., 14 R. I. 464.

*Texas.* — Wright *v.* Henderson, 12 Tex. 43; McLane *v.* Paschal, 47 Tex. 365.

**Specific Performance.** — Ashton *v.* Corrigan, L. R. 13 Eq. 76, 41 L. J. Ch. 96; Hermann *v.* Hodges, L. R. 16 Eq. 18, 43 L. J. Ch. 192.

**2. Statutes Regulating the Recording of Mortgages Apply to Trust Deeds.** — Sheffey *v.* Lewisburg Bank, 33 Fed. Rep. 315; Wilkins *v.* Wright, 6 McLean (U. S.) 340; Magee *v.* Carpenter, 4 Ala. 469; Fogarty *v.* Sawyer, 23 Cal. 570; Bank of Commerce *v.* Lanahan, 45 Md.

396; Thibodaux *v.* Anderson, 34 La. Ann. 797; Woodruff *v.* Robb, 19 Ohio 212.

But a statute requiring the judicial foreclosure of mortgages has been held not to apply to trust deeds. Koch *v.* Briggs, 14 Cal. 256, 73 Am. Dec. 651; Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 457.

**3. Trust Deed Passes Legal Title to Grantee.** — Newman *v.* Jackson, 12 Wheat. (U. S.) 570; Stephens *v.* Clay, 17 Colo. 489, 31 Am. St. Rep. 328; Sargent *v.* Howe, 21 Ill. 148; Thornhill *v.* Gilmer, 4 Smed. & M. (Miss.) 153; Brown *v.* Doe, 10 Smed. & M. (Miss.) 268; Anderson *v.* Holloman, 1 Jones L. (46 N. Car.) 169; Taylor *v.* King, 6 Munf. (Va. 358, 8 Am. Dec. 746.

**A Deed of Trust of Personalty Conveys Title.** — Elson *v.* Barrier, 56 Miss. 397.

**Right to Redeem.** — Whatever difference there may be in other respects it is manifest that the mortgage and deed of trust agree in the fact that the debtor has the right in equity to redeem by paying or tendering the amount of the debt at any time before foreclosure of the former or a sale under the latter. Hannah *v.* Carrington, 18 Ark. 85.

**4. See the title MORTGAGES, vol. 20, p. 900 et seq.**

**5. Legal Estate Left in Grantor.** — Newman *v.* Samuels, 17 Iowa 528; Lenox *v.* Reed, 12 Kan. 223; Webb *v.* Hoselton, 4 Neb. 308, 19 Am. Rep. 638; Hurley *v.* Estes, 6 Neb. 386; Kemp *v.* Small, 32 Neb. 318; Cullen *v.* Casey, (Neb. 1901) 95 N. W. Rep. 605; Hoffman *v.* Mackall, 5 Ohio St. 124, 64 Am. Dec. 637; McLane *v.* Paschal, 47 Tex. 365.

**6. Martin *v.* Alter, 42 Ohio St. 94.**

**7. Grantor's Interest Leviable.** — McGregor *v.* Hall, 3 Stew. & P. (Ala.) 397; Pool *v.* Glover, 2 Ired. L. (24 N. Car.) 129; Harrison *v.* Battle, 1 Dev. Eq. (16 N. Car.) 541; Wright *v.* Henderson, 12 Tex. 43. See also Brown *v.* Graves, 4 Hawks (11 N. Car.) 342; Anderson *v.* Holloman, 1 Jones L. (46 N. Car.) 169.

**Grantor's Interest Not a Freehold.** — In *North Carolina*, where the grantor's interest is subject to levy, it has been decided that this interest cannot be considered a freehold interest in the sense of a statute requiring the possession of a freehold as a prerequisite of the right to vote. Pool *v.* Glover, 2 Ired. L. (24 N. Car.) 129. See opinion of Ruffin, C. J., 5 Ired. Eq. (40 N. Car.) Appendix. See also the titles

**Contrary Expressions** are sometimes found,<sup>1</sup> but these statements are made in cases involving absolute deeds of trust in the nature of assignments and are to be reconciled on that ground.<sup>2</sup>

**d. CONSIDERATION — Future Advances.** — The fact that the trust deed, as regards its execution, is governed by principles in no respect different from those applicable to mortgages, is illustrated in other connections. Thus, as in the case of a mortgage, a trust deed given to secure notes supported only by the consideration of love and affection is not enforceable as against a subsequent purchaser.<sup>3</sup>

**A Trust Deed to Secure Future Advances** is good to the extent of the amount specified where the advances are actually made.<sup>4</sup>

**e. STATUTORY PROVISIONS.** — Though the principle that the deed of trust has the same effect as a mortgage is thus generally recognized, a distinction has sometimes been drawn between them for the purpose of avoiding the effect of a statute which might occasion hardship if applied too broadly. Thus, in *California*, a statute providing that a mortgage shall not be treated as a conveyance of title so as to enable the owner to recover possession without foreclosure has been held not to apply to deeds of trust with a power of sale.<sup>5</sup> In the light of this decision the deed of trust has been said in that jurisdiction to convey the legal title although a mortgage does not.<sup>6</sup> A similar conclusion has been reached in *Florida*;<sup>7</sup> and in *Iowa*, for the purpose of sustaining the right to exercise the power of sale, a distinction has even been drawn between ordinary mortgages and mortgages with a power of sale. The latter it was said are virtually trust deeds, though the mortgagee himself is nominated as trustee for the purpose of selling. Hence neither the trust deed nor power of sale mortgage was required to be foreclosed by an action.<sup>8</sup>

EXECUTIONS, vol. 11, pp. 622, 636; MORTGAGES, vol. 20, p. 974.

**1. Interest Remaining in Grantor Not Subject to Levy.** — *Pettit v. Johnson*, 15 Ark. 55; *McIntyre v. Agricultural Bank, Freem.* (Miss.) 105; *Morris v. Way*, 16 Ohio 469.

**2. Nature of Interest Remaining in Grantor Discussed.** — *Turner v. Watkins*, 31 Ark. 429; *Martin v. Alter*, 42 Ohio St. 94. In both these cases the earlier decisions in *Arkansas* and *Ohio* are distinguished and reconciled. See also *National Bank v. Tennessee Coal, etc., R. Co.*, 62 Ohio St. 564.

**3. Debt Secured Must Be Based on Sufficient Consideration.** — *Brooks v. Owen*, 112 Mo. 251.

**To Whom Consideration Should Be Paid.** — See *Mosca Milling, etc., Co. v. Murto*, (Colo. 1903) 72 Pac. Rep. 287. See also the title MORTGAGES, vol. 20, pp. 920, 923, 925.

**4. Deed of Trust for Future Advances.** — *McCarty v. Chalfant*, 14 W. Va. 531. See *Schultze v. Houfes*, 96 Ill. 335.

**Contingent Fee of Attorney a Sufficient Consideration.** — *Pitzer v. Burns*, 7 W. Va. 63.

**A Trust Deed Is Not a Lien** until the money secured or to be advanced is actually received by the borrower. *Schultze v. Houfes*, 96 Ill. 335.

**5. California Doctrine.** — *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Bateman v. Burr*, 57 Cal. 480.

**The Foreclosure** essential to give the mortgagee a right to acquire possession in *California* need not necessarily be a judicial foreclosure. A foreclosure out of court under a power of sale contained in the mortgage is sufficient. *Commerais v. Genella*, 22 Cal. 124.

**6. Deed of Trust Conveys Legal Title Though Mortgage Does Not.** — *Barr v. Schroeder*, 32 Cal. 609; *Fuquay v. Stickney*, 41 Cal. 583; *Grant v. Burr*, 54 Cal. 298.

In *More v. Calkins*, 95 Cal. 435, 29 Am. St. Rep. 128, this court held that a conveyance could be a deed of trust, as distinguished from a mortgage, although the conveyance was made directly to the mortgagee, saying: "Whether the conveyance is to be treated as a mortgage or as a deed of trust must depend upon its essential character, as shown by its terms, and not whether the grantee is a creditor, whose debt is to be paid out of the proceeds to arise from the execution of the trust." The conveyance in that case was, however, an absolute conveyance in trust for the payment of debts. See also *Thompson v. McKay*, 41 Cal. 221, and compare the *Iowa* cases cited in the next note but one.

**7. Florida.** — In this state it has been held that a deed of trust conveying lands in trust to be sold for the payment of debts is not a mortgage in the meaning of a statute prohibiting mortgagees from acquiring possession until foreclosure. Hence, it was said, the trustee had the legal title, a decision also to be supported on the ground that the trust conveyance in question was absolute. *Soutter v. Miller*, 15 Fla. 625.

**8. Mortgage with Power of Sale Operating as a Deed of Trust.** — *Fanning v. Kerr*, 7 Iowa 450; *Collins v. Hopkins*, 7 Iowa 463; *Crocker v. Robinson*, 8 Iowa 404. But under the statutes of *Iowa* now in force all mortgages and deeds of trust of realty must be foreclosed by an action although they contain a power of sale. See *Todd v. Johnson*, 51 Iowa 192.

**III. HISTORY OF PROVISION FOR POWER OF SALE — 1. In England — a. MORTGAGES — (1) *Personalty*.** — The right to foreclose a mortgage of personality by the exercise of a power of sale and without resorting to a bill in equity was sanctioned by Lord Hardwicke in 1742,<sup>1</sup> and the power had been recognized even before that day.<sup>2</sup>

(2) *Realty — Validity of Power Questioned.* — In the case of mortgages of realty the recognition of the validity of the power of sale encountered considerable opposition. At first blush it indeed seems that the positions of creditor and trustee are inherently incompatible. It is therefore not surprising that when the power of sale mortgage first came under judicial notice, the Court of Exchequer should have looked askance upon it. Being generally viewed as a harsh measure and of doubtful validity, the insertion of the power in mortgages did not become frequent among conveyancers until about a hundred years ago; and doubts as to its validity were not infrequently expressed far into the nineteenth century.<sup>3</sup>

**Validity of Power Recognized.** — In 1811 the power was recognized as being a good source of title,<sup>4</sup> and in a few years the practice of inserting the provision had become general.<sup>5</sup>

**b. TRUST DEEDS.** — The trust deed with power of sale was not of such questionable validity, for in that case there is a disinterested middleman to do justice to both parties. Accordingly this form of conveyance was recognized as valid at an earlier day than the power of sale in mortgages.<sup>6</sup>

**Conveyancing Act.** — Having once been recognized in *England*, the power of sale soon came to be an ordinary incident in the execution of a mortgage<sup>7</sup> and was usually inserted as a matter of course; and so fully did the exercise of the power accord with considerations of public policy, that, by parliamentary enactment, the power of sale can now be exercised in *England* by the mortgagee although a provision therefor be omitted from the deed.<sup>8</sup>

**2. In America.** — In America also numerous early expressions are to be found which question the validity of the power of sale or deny it altogether;<sup>9</sup>

1. Lockwood v. Ewer, 2 Atk. 303.

2. Tucker v. Wilson, 1 P. Wms. 261.

3. **Early View of the Power of Sale.** — Croft v. Powel, 2 Comyns 603. The doubt concerning the validity of the power of sale was first raised by this case, but the question was not actually involved.

4. **Power of Sale Mortgage Upheld.** — Corder v. Morgan, 18 Ves. Jr. 344; Selby v. Cooling, 23 Beav. 418.

5. **Practice Became General by 1825.** — So said by Mr. Sugden in a colloquy with Lord Eldon, in which the latter added that the provision for a power of sale was a very strong clause but was perhaps one of the many new improvements in conveyancing. Roberts v. Bozon, (nanc. (Feb. 1825) MS., cited in Coventry's Prec. Mortg. 150; 1 Powell on Mortg. (Am. ed.) 9a note; 2 Jones on Mortg. (4th ed.), § 1765.

In 1813, Judge Kent observed in Jackson v. Henry, 10 Johns. (N. Y.) 196, 6 Am. Dec. 328, that although the power of sale was then fully recognized in *New York*, it had not been in common use in *England*. A few years later the situation was changed, and he tells us in his Commentaries (1826), vol. 4, p. 146, that such "powers are found in *England* to be so convenient that they are gaining ground very fast upon the mode of foreclosure by process in chancery."

6. **Power of Sale in Deed of Trust Upheld.** — Clay v. Sharpe, (1802) in Chancery, cited by

Sir Samuel Romilly in Corder v. Morgan, 18 Ves. Jr. 346, note a.

7. Selby v. Cooling, 23 Beav. 418.

8. **Power of Sale Supplied by Parliament — Effect of Statute.** — Lord Cranworth's Act (1860), 23 & 24 Vict., c. 145, and 25 & 26 Vict., c. 53. This statute was repealed and superseded by the Conveyancing Act of 1881, which gives more extensive and convenient powers than the former act. Under Lord Cranworth's Act mortgagees were given power to convey such estate or interest as the mortgagor could have conveyed.

It resulted that an equitable mortgagee could convey the legal estate. *In re Solomon*, 40 Ch. D. 508; *Hiatt v. Hillman*, 19 W. R. 694.

This provision was omitted from the Conveyancing Act, *In re Hodson*, 35 Ch. D. 669; and an equitable mortgagee can no longer convey the legal estate. See *Blaker v. Herts, etc., Waterworks Co.*, 41 Ch. D. 406; *London, etc., Banking Co. v. Goddard*, (1897) 1 Ch. 642.

9. **Validity of the Power Denied or Doubted.** — *Taylor v. Chowning*, 3 Leigh (Va.) 654; *Chowning v. Cox*, 1 Rand. (Va.) 306; *Ford v. Russell, Freem.* (Miss.) 42. But see *Sims v. Hundly*, 2 How. (Miss.) 896; *Floyd v. Harrison*, 2 Rob. (Va.) 161; *Bell v. Twilight*, 22 N. H. 500.

In a comparatively late case the Supreme Court of *South Carolina* said: "It has always seemed to us somewhat anomalous doctrine that a mortgagor of real estate may include in



but legislative and judicial opinion soon eradicated this notion almost entirely,<sup>1</sup> and it is now settled here as in England that, in the absence of a statutory requirement of judicial foreclosure,<sup>2</sup> the exercise of the power of sale contained in a mortgage or deed of trust will vest a good title in the purchaser and cut off the equity of redemption.<sup>3</sup>

the mortgage a power to the creditor himself to sell the mortgaged premises without any order of foreclosure in a regular proceeding; such power being entirely *ex parte*, and carrying, as claimed, not only the right to ascertain the amount due on the mortgage debt, but to judge of the necessity for a sale, its time, place, terms, etc., and to execute title to the premises so sold. This anomaly is more striking in those states, as in South Carolina, where it is expressly provided by statute that a mortgage of real estate is a mere security, and, even after condition broken, the legal title remains in the mortgagor or his heirs." *Johnson v. Johnson*, 27 S. Car. 309, 13 Am. St. Rep. 636. See also *Webb v. Haeffer*, 53 Md. 187.

**1. Early New York Statute.**—The earliest statutory recognition of power of sale mortgages in the United States is found in the New York Act of March 19, 1774, which is to the effect that the rights of *bona fide* purchasers at sales under such powers shall not be disturbed nor made subject to any right of redemption. This statute provided that the sales should be made at public auction after six months' notice had been given. For an account of the subsequent judicial and legislative development of the law in this state, see *Bergen v. Bennett*, 1 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 281; *Slee v. Manhattan Co.*, 1 Paige (N. Y.) 48; *Mowry v. Sanborn*, 68 N. Y. 153.

**2. Statutory Provisions Requiring Judicial Foreclosure — Colorado.**—All mortgages are required by statute in this state to be foreclosed through the courts. The same rule applies to deeds of trust unless the public trustee authorized to be appointed in each county is named as trustee in the deed. *Brewer v. Harrison*, 27 Colo. 349; *Smissaert v. Prudential Ins. Co.*, 15 Colo. App. 442.

**Idaho.**—Foreclosure by action is the exclusive remedy whether the mortgage or deed of trust conveys realty or personalty. *Brown v. Bryan*, 6 Idaho 1; *Rein v. Callaway*, 7 Idaho 634.

**Indiana.**—In this state there is a requirement that mortgages be judicially foreclosed. This does not apply to deeds of trust. *Eaton, etc., R. Co. v. Hunt*, 20 Ind. 457.

**Iowa.**—*Todd v. Johnson*, 51 Iowa 192. In this state the power of sale could be exercised prior to the enactment of Code, § 3319. See *Fanning v. Kerr*, 7 Iowa 450; *Pope v. Durant*, 26 Iowa 233.

**Kansas.**—Mortgages and deeds of trust conveying realty can be foreclosed by suit only. *Samuel v. Holladay, Woolw.* (U. S.) 400.

**Kentucky.**—*Abbott v. Yeager*, 98 Ky. 424; *Elizabethtown, etc., R. Co. v. Killen*, (Ky. 1899) 50 S. W. Rep. 1108.

**Oregon.**—*Thompson v. Marshall*, 21 Oregon 171. The provision in this state applies to deeds of trust.

**Power Authorizing Sale of Personalty Valid.**—The requirement in *Iowa* that mortgages be judicially foreclosed does not apply to mortgages or deeds of trust of personalty. *Myers v. Snyder*, 96 Iowa 107; *Gibson v. McIntire*, 110 Iowa 417; *Geiser Mfg. Co. v. Krogman*, 111 Iowa 503; *Dowie v. Christen*, 115 Iowa 364; *O. S. Kelley Co. v. Chinn*, (Iowa 1898) 75 N. W. Rep. 315; *Hocking Valley Coal Co. v. Climie*, (Iowa 1902) 92 N. W. Rep. 77.

This is also the law in *Kansas*. *Scott v. Davis*, 4 Kan. App. 488.

**Sale under Power in Code States.**—In a number of the code states there are statutes declaring that the mortgagee shall have no right to obtain possession until there has been a foreclosure. But such a provision does not make judicial foreclosure necessary. A sale under a power is valid. *Cormerais v. Genella*, 22 Cal. 124; *Butte First Nat. Bank v. Bell Silver, etc.*, Min. Co., 8 Mont. 32, *affirmed* *Bell Silver, etc.*, Min. Co. v. *Butte First Nat. Bank*, 156 U. S. 470; *Bryant v. Carson River Lumbering Co.*, 3 Nev. 313, 93 Am. Dec. 403; *Richmond v. Hughes*, 9 R. I. 228.

**3. Power of Sale Upheld — United States.**—*Bell Silver Min., etc., Co. v. Butte First Nat. Bank*, 156 U. S. 470; *Pickett v. Foster*, 36 Fed. Rep. 514.

**Alabama.**—*Lewis v. Wells*, 50 Ala. 198; *Ward v. Ward*, 108 Ala. 278.

**California.**—*Fogarty v. Sawyer*, 17 Cal. 589.

**Georgia.**—*Robenson v. Vason*, 37 Ga. 66; *Ray v. Home, etc., Invest., etc., Co.*, 98 Ga. 122; *Calloway v. People's Bank*, 54 Ga. 441.

**Illinois.**—*Bloom v. Van Rensselaer*, 15 Ill. 503.

**Iowa.**—*Boyd v. Ellis*, 11 Iowa 97; *Crocker v. Robinson*, 8 Iowa 404; *Fanning v. Kerr*, 7 Iowa 450; *Leffler v. Armstrong*, 4 Iowa 482, 68 Am. Dec. 672.

**Louisiana.**—*Tillman v. Drake*, 4 La. Ann. 16; *Frelson v. Tiner*, 6 La. Ann. 18; *Watson v. James*, 15 La. Ann. 386.

**Maryland.**—*Webb v. Haeffer*, 53 Md. 187. See, however, *Mackubin v. Boardman*, 54 Md. 385.

**Michigan.**—*Doyle v. Howard*, 16 Mich. 261; *Pierce v. Grimley*, 77 Mich. 273; *Lee v. Mason*, 10 Mich. 403; *Grover v. Fox*, 36 Mich. 461; *Herbert v. Bulte*, 42 Mich. 489.

**Minnesota.**—*Butterfield v. Farnham*, 19 Minn. 85; *Webb v. Lewis*, 45 Minn. 285.

**Mississippi.**—*Hyde v. Warren*, 46 Miss. 13; *Sims v. Hundly*, 2 How. (Miss.) 896.

**Missouri.**—*Hurt v. Kelly*, 43 Mo. 238; *Carson v. Blakey*, 6 Mo. 273, 35 Am. Dec. 440; *McNees v. Swaney*, 50 Mo. 388; *Destreham v. Scudder*, 11 Mo. 484; *Mann v. Best*, 62 Mo. 491.

**Montana.**—*Butte First Nat. Bank v. Bell Silver, etc.*, Min. Co., 8 Mont. 32.

**Nevada.**—*Bryant v. Carson River Lumbering Co.*, 3 Nev. 313, 93 Am. Dec. 403.

**Nebraska Rule.** — In one American jurisdiction only does a contrary rule prevail, it being held in Nebraska, on common-law grounds, that the foreclosure in all cases where realty is concerned must be by bill in equity.<sup>1</sup>

**IV. NATURE, REQUISITES, AND INCIDENTS OF POWER** — 1. **Authority to Execute Mortgage** — *a*. **INSERTING POWER TO SELL.** — Inasmuch as the clause providing for a sale by the mortgagee under power was for a long time looked upon as a novel and hard provision, it has sometimes been considered that a general authority to execute a mortgage does not by implication include authority to insert a power of sale in the mortgage.<sup>2</sup> But this view has not prevailed, and it is now settled that authority to execute a mortgage authorizes the insertion of a clause containing a power of sale.<sup>3</sup>

*b*. **SPECIFIC PERFORMANCE.** — Equity will also decree specific performance of a contract to execute a mortgage with an immediate power of sale.<sup>4</sup> But whether a court ordering specific performance of a contract to execute a mortgage would allow a provision for a power of sale to be inserted where the contract to be performed does not call for such a provision has not been expressly passed upon. This would no doubt depend upon business usage and the equities involved in the particular case.

2. **Power Coupled with Interest** — *a*. **IN GENERAL.** — The power of sale in

*New Hampshire.* — *Pearson v. Gooch*, 69 N. H. 208; *Very v. Russell*, 65 N. H. 646, *overruling* *Bell v. Twilight*, 22 N. H. 500.

*New Jersey.* — *Clark v. Condit*, 18 N. J. Eq. 358.

*New York.* — *Elliott v. Wood*, 45 N. Y. 71; *Dobson v. Racey*, 8 N. Y. 216.

*Pennsylvania.* — *Bell v. Fisher*, 1 Yeates (Pa.) 581, note; *Random v. Swartz*, 1 Yeates (Pa.) 579; *Bradley v. Chester Valley R. Co.*, 36 Pa. St. 141.

*Rhode Island.* — *Richmond v. Hughes*, 9 R. I. 228.

*South Carolina.* — *Johnson v. Johnson*, 27 S. Car. 309, 13 Am. St. Rep. 636; *Mitchell v. Bogan*, 11 Rich. L. (S. Car.) 686.

*South Dakota.* — *Male v. Longstaff*, 9 S. Dak. 389.

**Ground for Upholding the Validity of the Power.** — In *Longwith v. Butler*, 8 Ill. 32, Koerner, J., sustained the validity of the power of sale on the ground stated by him as follows: "At common law, a mortgage vested the legal estate in the mortgagee, liable to be defeated upon performance of the condition. After default, the legal estate became absolute. There is no question that, by the consent of both the mortgagor and mortgagee, the harshness of this rule might be mitigated. The parties were at liberty to prevent the absolute foreclosure by stipulating that the mortgagee, after default, might sell, so as to evolve the real value of the land and have the debt satisfied, and no more. Such a power was a common-law power, an appointment, and, considering the legal estate all the time in the mortgagee, it may be called a power appendant or annexed to the estate."

In *North Carolina*, power of sale, though admitted to be valid, is not favored, and the conduct of the mortgagee, in executing the power, is watched with jealousy. *Mosby v. Hodge*, 76 N. Car. 387; *Kornegay v. Spicer*, 76 N. Car. 95; *Taylor v. Stearns*, 18 Gratt. (Va.) 244.

1. **Sale under Power Conveys No Title to Realty** — **Nebraska Rule.** — *Kyger v. Ryley*, 2 Neb. 22; *Webb v. Hoselton*, 4 Neb. 308, 19 Am. Rep.

638; *Hurley v. Estes*, 6 Neb. 386; *Comstock v. Michael*, 17 Neb. 298; *Union Mut. L. Ins. Co. v. Lovitt*, 10 Neb. 302; *Cullen v. Casey*, (Neb. 1901) 95 N. W. Rep. 605. This rule has been reluctantly followed by the federal court in that state. *Wheeler v. Sexton*, 34 Fed. Rep. 154.

2. **Power to Mortgage.** — In 1857 Vice-Chancellor Kindersley ruled that where the directors of a company were authorized by charter to execute a mortgage, a power of sale inserted by them in the instrument was nugatory, saying that the power of sale was not a necessary incident to a mortgage. *Clarke v. Royal Panopticon*, 4 Drew. 26, 27 L. J. Ch. 207. Compare *Sanders v. Richards*, 2 Coll. Ch. Cas. 568.

An agreement to give a mortgage on real property is complied with by giving a mortgage in the usual form without a power of sale. *Capron v. Attleborough Bank*, 11 Gray (Mass.) 492.

In *Platt v. McClure*, 3 Woodb. & M. (U. S.) 151, it was said that the power of sale had not become so fully associated with the mortgage as to raise a presumption of the existence of the power where the instrument was not exhibited.

3. **Power to Mortgage Authorizes Insertion of Power of Sale.** — *Bridges v. Longman*, 24 Beav. 27; *Russell v. Plaice*, 18 Beav. 21 (*overruling* *Sanders v. Richards*, 2 Coll. Ch. Cas. 568); *Cook v. Dawson*, 29 Beav. 123; *Leigh v. Lloyd*, 35 Beav. 455; *Vane v. Rigden*, L. R. 5 Ch. 663; *In re Chawner*, L. R. 8 Eq. 569; *Cruikshank v. Duffin*, L. R. 13 Eq. 555; *Wright v. Bundy*, 11 Ind. 398; *Ore v. Rode*, 101 Mo. 387; *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458.

**Deed of Trust to Secure Bank.** — Where a bank is authorized to hold land mortgaged to it by way of security, it may take a deed of trust, with power in the trustee to sell upon default. *Bennett v. Union Bank*, 5 Humph. (Tenn.) 612.

4. **Specific Performance.** — *Hermann v. Hodges*, L. R. 16 Eq. 18, 43 L. J. Ch. 192; *Ashton v. Corrigan*, L. R. 13 Eq. 76, 41 L. J. Ch. 96.

the deed of trust or mortgage is almost universally declared to be coupled with an interest, and therefore irrevocable.<sup>1</sup>

**Nature of Power Coupled with Interest.** — As was said by Judge Kent in one of the earliest American cases on this subject, the possession either of a legal estate or a right in the subject-matter over which the power is to be exercised is sufficient to couple the power with an interest and cause it to be irrevocable.<sup>2</sup>

(1) *Act of Grantor.* — The exercise of the power is consequently not affected by an attempted revocation on the part of the grantor, or by any other act on his part.<sup>3</sup>

(2) *Death or Insanity — Bankruptcy.* — Nor is it terminated by his death<sup>4</sup>

**1. Power Coupled with an Interest and Irrevocable** — *England.* — *Corder v. Morgan*, 18 Ves. Jr. 344.

*United States.* — *Hunt v. Ennis*, 2 Mason (U. S.) 244; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 700; *Taylor v. Benham*, 5 How. (U. S.) 269; *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174; *Peter v. Beverly*, 10 Pet. (U. S.) 564.

*Alabama.* — *McGuire v. Van Pelt*, 55 Ala. 344.

*Arkansas.* — *Hannah v. Carrington*, 18 Ark. 104; *Hudgins v. Morrow*, 47 Ark. 515.

*Georgia.* — *Calloway v. People's Bank*, 54 Ga. 441.

*Illinois.* — *Strother v. Law*, 54 Ill. 413.

*Iowa.* — *Collins v. Hopkins*, 7 Iowa 463.

*Maryland.* — *Berry v. Skinner*, 30 Md. 567; *Dill v. Satterfield*, 34 Md. 52; *Harnickell v. Orndorff*, 35 Md. 341; *Mackubin v. Boarman*, 54 Md. 386.

*Massachusetts.* — *Varnum v. Meserve*, 8 Allen (Mass.) 158; *Connors v. Holland*, 113 Mass. 50.

*Minnesota.* — *Jones v. Tainter*, 15 Minn. 512; *Dunning v. McDonald*, 54 Minn. 1.

*Missouri.* — *Meyer v. Kuechler*, 10 Mo. App. 371; *Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234; *Pickett v. Jones*, 63 Mo. 195; *De Jarnette v. De Giverville*, 56 Mo. 440; *White v. Stephens*, 77 Mo. 452; *McKnight v. Wimer*, 38 Mo. 132, *overruling Miller v. Evans*, 35 Mo. 45.

*New Hampshire.* — *Bell v. Twilight*, 22 N. H. 500.

*New York.* — *Bergen v. Bennett*, 1 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 281; *Taylor v. Morris*, 1 N. Y. 358; *Wilson v. Troup*, 2 Cow. (N. Y.) 236, 14 Am. Dec. 458; *George v. Arthur*, 2 Hun (N. Y.) 406; *Jencks v. Alexander*, 11 Paige (N. Y.) 624; *King v. Duntz*, 11 Barb. (N. Y.) 191; *Cannfield v. Monger*, 12 Johns. (N. Y.) 346; *Bradstreet v. Clarke*, 12 Wend. (N. Y.) 664; *Lawrence v. Farmers' L. & T. Co.*, 13 N. Y. 213; *Franklin v. Osgood*, 14 Johns. (N. Y.) 553; *Jackson v. Davenport*, 18 Johns. (N. Y.) 300; *Cole v. Moffitt*, 20 Barb. (N. Y.) 18; *Gardner v. Ogden*, 22 N. Y. 348, 78 Am. Dec. 192; *Olcott v. Tioga R. Co.*, 27 N. Y. 566, 84 Am. Dec. 298; *Anderson v. Austin*, 34 Barb. (N. Y.) 319.

*South Dakota.* — *Reilly v. Phillips*, 4 S. Dak. 604.

*Tennessee.* — *Hodges v. Gill*, 9 Baxt. (Tenn.) 378.

*Wisconsin.* — *Encking v. Simmons*, 28 Wis. 272.

**Naked Power.** — A mere power of attorney from a debtor to his creditor, authorizing the latter to sell and convey the property, satisfy his claim out of the proceeds, and account for the balance, is only a naked power, and subject to revocation. *Mansfield v. Mansfield*, 6 Conn. 559, 16 Am. Dec. 76.

**Right of Foreclosure by Sale a Vested Interest.** — The right to foreclose under a power of sale, pursuant to the statute in force at the time of its execution, is a vested right which cannot be taken away by subsequent legislation. *O'Brien v. Krenz*, 36 Minn. 136.

**2. Mortgagee's Power Coupled with Interest.** — *Bergen v. Bennett*, 1 Cai. Cas. (N. Y.) 15, 2 Am. Dec. 281. This is said to be the earliest American authority on the subject. *Erskine, J.*, in *Lockett v. Hill*, 1 Woods (U. S.) 560.

**3. Act of Grantor.** — *Mutual Loan, etc., Co. v. Haas*, 100 Ga. 111, 62 Am. St. Rep. 317; *Harvey v. Smith*, 179 Mass. 592; *Hollister v. Stewart*, 111 N. Y. 644; *Bancroft v. Ashhurst*, 2 Grant Cas. (Pa.) 513.

**4. Power of Sale Unaffected by Death of the Grantor or Mortgagor** — *England.* — *Matthie v. Edwards*, 11 Jur. 761, 16 L. J. Ch. 405.

*California.* — *Whitmore v. San Francisco Sav. Union*, 50 Cal. 146; *More v. Calkins*, 95 Cal. 435, 29 Am. St. Rep. 128.

*Missouri.* — *Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234; *White v. Stephens*, 77 Mo. 452.

*Montana.* — *Butte First Nat. Bank v. Bell Silver, etc.*, Min. Co., 8 Mont. 32; *Muth v. Goddard*, 28 Mont. 237.

*New York.* — *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389.

*North Carolina.* — *Parker v. Beasley*, 116 N. Car. 1; *Carter v. Slocomb*, 122 N. Car. 475, 65 Am. St. Rep. 714.

*Rhode Island.* — *Richmond v. Hughes*, 9 R. I. 228.

*South Dakota.* — *Purdin v. Archer*, 4 S. Dak. 54.

*Tennessee.* — *Wilburn v. Spofford*, 4 Sneed (Tenn.) 698; *Hodges v. Gill*, 9 Baxt. (Tenn.) 378.

*Virginia.* — *Sulphur Mines Co. v. Thompson*, 93 Va. 293.

*West Virginia.* — *Spencer v. Miller*, 19 W. Va. 179.

**The Separation of the Power from the Estate to Which It Is Coupled**, as where upon the death of the trustee the power under the terms of the trust goes to his personal representative and the legal estate to his heirs, does not revoke the power. *Sulphur Mines Co. v. Thompson*, 93 Va. 293.



or subsequent insanity;<sup>1</sup> nor by the fact that he goes into insolvency or becomes a bankrupt, or that such proceedings are instituted against him.<sup>2</sup>

(3) *Existence of War.* — Nor is the exercise of the power suspended or otherwise affected by the fact that the grantor at the time of the sale resides in a state against which war is being waged;<sup>3</sup> nor by the fact that he removes thereto, thus becoming an inhabitant of the belligerent state.<sup>4</sup>

b. *POWER OF SALE UNDER COMMON-LAW THEORY.* — It is clear that the power of sale is coupled with an interest in those jurisdictions where the common-law view of the mortgage is or has been accepted; for at common law the legal title passes to the mortgagee,<sup>5</sup> and he is also directly concerned in seeing the power executed. The same consideration applies with perhaps even greater force to the deed of trust.

c. *POWER OF SALE UNDER MODERN THEORY.* — In those jurisdictions where, under modern theory, the mortgage and deed of trust do not strip the mortgagor of the legal title, some doubt has been entertained as to the effect of death upon the right to exercise the power of sale.

The Beneficial Interest in the Mortgagee is, however, generally considered sufficient in these jurisdictions to support the power.<sup>6</sup> The same view is taken of the power of sale in deeds of trust.<sup>7</sup>

1. *Power of Sale Unaffected by Subsequent Insanity of the Grantor* — *Maryland.* — *Berry v. Skinner*, 30 Md. 567.

*Minnesota.* — *Lundberg v. Davidson*, 72 Minn. 49.

*Missouri.* — *Meyer v. Kuechler*, 10 Mo. App. 371; *Vanmeter v. Darrah*, 115 Mo. 153.

*New Hampshire.* — *Davis v. Lane*, 10 N. H. 156.

*South Dakota.* — *Reilly v. Phillips*, 4 S. Dak. 604.

*Wisconsin.* — *Encking v. Simmons*, 28 Wis. 272.

2. *Bankruptcy of Grantor.* — *Dixon v. Ewart*, 3 Meriv. 322; *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476; *McGready v. Harris*, 54 Mo. 137. Compare *Long v. Rogers*, 6 Biss. (U. S.) 416.

*Contra*, under the statutes of *Maryland* relating to insolvent proceedings. *Glenn v. Gill*, 2 Md. 18; *Zeigler v. King*, 9 Md. 335 (*overruling* *Hurt v. Stull*, 4 Md. Ch. 391); *Alexander v. Ghiselin*, 5 Gill (Md.) 179; *Mackubin v. Boorman*, 54 Md. 385.

*Diverse Citizenship.* — But a mortgage from a citizen of *Maryland* to a citizen of *Pennsylvania* is not affected by the insolvent laws of the former state. *Ensor v. Lewis*, 54 Md. 391.

3. *Grantor Resident of Rebellious State.* — *Washington University v. Finch*, 18 Wall. (U. S.) 106; *Ludlow v. Ramsey*, 11 Wall. (U. S.) 581; *Mixer v. Sibley*, 53 Ill. 61; *Willard v. Boggs*, 56 Ill. 163; *Harper v. Ely*, 56 Ill. 179; *Seymour v. Bailey*, 66 Ill. 288; *Foreman v. Carter*, 9 Kan. 679; *Dietrich v. Lang*, 11 Kan. 644; *Dorsey v. Dorsey*, 30 Md. 522, 96 Am. Dec. 633; *De Jarnette v. De Giverville*, 56 Mo. 440; *Black v. Gregg*, 58 Mo. 565; *Dryden v. Stephens*, 19 W. Va. 13.

*Contra.* — *Kanawha Coal Co. v. Kanawha, etc., Coal Co.*, 7 Blatchf. (U. S.) 391; *Green v. Alexander*, 7 D. C. 147; *Johnson v. Robertson*, 34 Md. 165; *Walker v. Beauchler*, 27 Gratt. (Va.) 511. The first three of these decisions were based on the authority of *Dean v. Nelson*, 10 Wall. (U. S.) 158, which was greatly limited

by *Washington University v. Finch*, 18 Wall. (U. S.) 106.

*Expulsion of Mortgagor.* — But where the mortgagor had been driven away by military force judicial proceedings of foreclosure against him were held not to cut off the right of redemption. *Dean v. Nelson*, 10 Wall. (U. S.) 158.

4. *Removal Within Enemy's Lines.* — *Hall v. Connecticut Mut. L. Ins. Co.*, 68 Ill. 357; *Bush v. Sherman*, 80 Ill. 160; *Mitchell v. Nodaway County*, 80 Mo. 257.

5. See the title *MORTGAGES*, vol. 20, p. 900 *et seq.*

6. *Power Supported by Beneficial Interest of Mortgagee.* — *Grandin v. Emmons*, 10 N. Dak. 223, 88 Am. St. Rep. 684; *Jencks v. Alexander*, 11 Paige (N. Y.) 624; *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; *Anderson v. Austin*, 34 Barb. (N. Y.) 319; *King v. Duntz*, 11 Barb. (N. Y.) 191; *George v. Arthur*, 2 Hun (N. Y.) 406; *Cole v. Moffit*, 20 Barb. (N. Y.) 18; *Reilly v. Phillips*, 4 S. Dak. 604.

7. *Trustee's Power Irrevocable in Code States.* — *More v. Calkins*, 95 Cal. 435, 29 Am. St. Rep. 128; *Butte First Nat. Bank v. Bell Silver, etc.*, Min. Co., 8 Mont. 32; *Muth v. Goddard*, 28 Mont. 237.

*Naked Power in Trustee.* — In *Maryland* it is held, contrary to the prevailing doctrine, that a power of sale conferred upon a trustee not interested in the debt is a naked power and is revoked by the death of either party. *Reid v. Gordon*, 35 Md. 174; *Frostburg Mut. Bldg. Assoc. v. Lowdermilk*, 50 Md. 179; *Barrick v. Horner*, 78 Md. 253, 44 Am. St. Rep. 283.

*Power of Sale in Trust Deed Supported by Beneficial Interest of Creditor.* — The *Maryland* decisions just referred to may be taken as indicating that where the trustee has no interest in the debt the power vested in him is naked. Hence, the power must be supported by the beneficial interest of the creditor, a conclusion which is borne out by the general recognition of the right of the creditor to procure a trustee to be appointed in equity to carry out the trust

*d. EFFECT OF STATUTES — POWER TERMINATED BY DEATH.* — In a very few jurisdictions a doctrine contrary to the general rule stated above prevails. Thus, by statute in *Illinois* the death of the grantor in a deed of trust or of a mortgagor abrogates the power to sell;<sup>1</sup> and in *Texas* it has been said that while on general principle the death of a mortgagor does not revoke the power, yet its subsequent exercise is contrary to the statutes governing the settlement of the estates of deceased persons.<sup>2</sup>

*e. GEORGIA AND SOUTH CAROLINA.* — In *Georgia* the power of sale in a mortgage is held to be abrogated by the death of the mortgagor, for the reason that the mortgage is in that state a mere security and does not convey a legal title.<sup>3</sup> In *South Carolina* a similar conclusion is reached on general principles.<sup>4</sup>

**Irrevocable in Life.** — In these states, however, the courts have refrained from holding the power of sale to be revocable otherwise than by death. Hence, a provision in a mortgage to sell upon default is as binding during the life of the parties as any other part of the contract.<sup>5</sup>

**3. Foreclosure under Power Cumulative Remedy — a. IN GENERAL.** — Unless there be statutory provisions making it necessary to foreclose in a particular manner,<sup>6</sup> the creditor may foreclose either by exercising the power of sale given in the instrument or by pursuing statutory provisions, where there are such,<sup>7</sup> or he may foreclose by instituting the proper proceedings in

where the trustee dies or refuses to fulfil the trust. See *infra*, this title, *Who May Exercise Power of Sale*.

**1. Death of Mortgagor or Grantor Abrogates Power to Sell.** — *Skaggs v. Kincaid*, 48 Ill. App. 608.

The statute does not apply to a deed of trust in existence at the time of its passage. *Fisher v. Green*, 142 Ill. 80.

**Power Suspended for One Year.** — In *Colorado* a statute prohibits the foreclosure of a mortgage or deed of trust for one year after the grantor's death, and a foreclosure had in contravention of the statute conveys no title even though the representative should consent. *Reid v. Sullivan*, 20 Colo. 498; *Belmont Min., etc., Co. v. Costigan*, 21 Colo. 471; *Sullivan v. Sheets*, 22 Colo. 153; *Lewis v. Hamilton*, 26 Colo. 263.

**2. Death of Mortgagor Suspends Right to Sell.** — *Robertson v. Paul*, 16 Tex. 472; *McLane v. Paschal*, 47 Tex. 365; *Buchanan v. Monroe*, 22 Tex. 537; *Swearingen v. Williams*, 28 Tex. Civ. App. 559; *Black v. Rockmore*, 50 Tex. 94; *Abney v. Pope*, 52 Tex. 288; *Markham v. Wortham*, (Tex. Civ. App. 1902) 67 S. W. Rep. 341; *Whitmire v. May*, 29 Tex. Civ. App. 241, *affirmed* 96 Tex. 317; *Texas Loan Agency v. Dingee*, (Tex. Civ. App. 1903) 75 S. W. Rep. 866. Compare *Spencer v. Miller*, 19 W. Va. 179.

**Suspension of Right to Exercise the Power of Sale.** — The death of the grantor in a deed of trust operates to suspend the power until administration is had, and not to destroy it altogether. Hence it is held that where the executrix and sole heir appropriates the estate without administration, the power of sale can be exercised by the trustee. *National Bank v. Jackson*, (Tex. Civ. App. 1895) 33 S. W. Rep. 277.

**Expiration of Time for Administration.** — The power may be exercised in *Texas* when the four years appointed for administration are past, no one having qualified in the meantime. *Gillaspie*

*v. Murray*, 27 Tex. Civ. App. 580; *Rogers v. Watson*, 81 Tex. 400; *Silverman v. Landrum*, 19 Tex. Civ. App. 402.

The Death of a Partner does not abrogate or suspend the power to sell property conveyed by a deed of trust executed in the firm name. *Schwab Clothing Co. v. Claunch*, (Tex. Civ. App. 1895) 29 S. W. Rep. 922; *Barnet v. Houston*, 18 Tex. Civ. App. 134.

**3. Power of Sale Revoked by Death of Mortgagor.** — *Lockett v. Hill*, 1 Woods (U. S.) 552; *Lathrop v. Brown*, 65 Ga. 312 (*distinguishing Calloway v. People's Bank*, 54 Ga. 441); *Roland v. Coleman*, 76 Ga. 652; *Wilkins v. McGehee*, 86 Ga. 764; *Johnson v. Johnson*, 27 S. Car. 309, 13 Am. St. Rep. 636.

**Year's Support of Widow.** — The power of sale being revoked by the death of the mortgagor, the property conveyed necessarily goes into administration, and the widow is entitled to have so much of it as is necessary appropriated to her year's support. *Cully v. Bloomingdale*, 68 Ga. 756.

**4. Williams v. Washington**, 40 S. Car. 457.

**5. Power of Sale Irrevocable During Life.** — *Calloway v. People's Bank*, 54 Ga. 441; *Ray v. Hemphill*, 97 Ga. 564; *Mutual Loan, etc., Co. v. Haas*, 100 Ga. 111, 62 Am. St. Rep. 317; *Wilkins v. McGehee*, 86 Ga. 764.

**6. Chattel Mortgages on Household Goods** can be foreclosed in *Ohio* only in a court of record. *Mahoney v. Kinney*, 7 Ohio Dec. 405, 420, 5 Ohio N. P. 197. See also *supra*, this title, II. 3. *e. Statutory Provisions*.

For further statement of the statutory provisions in the several states regarding the method of foreclosure, see the title FORECLOSURE OF MORTGAGES, 9 ENCYC. OF PL. AND PR. 98-118.

**7. Statutory Provisions Regarding Sale.** — The fact that a special power of sale is granted in the instrument does not deprive the creditor of the right to sell under statutory provisions, especially where the special authority to sell

equity, as it is well established that the remedy by sale under the power is cumulative only.<sup>1</sup>

*b. PENDENCY OF FORECLOSURE SUIT.* — The mere fact that a bill has been filed to foreclose the mortgage<sup>2</sup> or to ascertain the amount actually due<sup>3</sup> does not necessarily deprive the mortgagee of the right to foreclose under the power during the pendency of such suit. So of the pendency of a suit by the mortgagor to have the mortgage adjudged satisfied and canceled,<sup>4</sup> or to redeem.<sup>5</sup>

*c. ELECTION OF REMEDY.* — While it is thus true that the pendency of a suit to foreclose does not suspend the power of sale, the institution of such suit or the filing of a cross-bill for foreclosure in a suit to enjoin the sale has sometimes been treated as an election of remedy such as to justify the court which has thus obtained jurisdiction in preventing the creditor or his trustee from selling under the power.<sup>6</sup>

increases the rights and privileges of the creditor instead of restricting them, the result being that the statutory mode of enforcing the power is more favorable to the debtor than that provided for in the contract. *Pettee v. John Deere Plow Co.*, 11 Okla. 467.

**1. Power of Sale a Cumulative Remedy** — *England.* — *Cockell v. Bacon*, 16 Beav. 158; *Wayne v. Hanham*, 9 Hare 62; *In re Wilkinson*, L. R. 13 Eq. 634.

*United States.* — *Alexander v. Central R. Co.*, 3 Dill. (U. S.) 487; *H. B. Claflin Co. v. Furtick*, 119 Fed. Rep. 429.

*Alabama.* — *Marriott v. Givens*, 8 Ala. 694; *Vaughan v. Marable*, 64 Ala. 60; *Bolling v. Vandiver*, 91 Ala. 375; *American Freehold Land Mortg. Co. v. McCall*, 96 Ala. 200.

*California.* — *Fogarty v. Sawyer*, 17 Cal. 589; *Cormerais v. Genella*, 22 Cal. 116; *Brickell v. Batchelder*, 62 Cal. 623.

*Colorado.* — *Denver Brick, etc., Co. v. McAllister*, 6 Colo. 261; *Bennett v. Reef*, 16 Colo. 431.

*District of Columbia.* — *Utermehle v. McGreal*, 1 App. Cas. (D. C.) 359; *Phoenix Mut. L. Ins. Co. v. Grant*, 3 McArthur (D. C.) 42.

*Georgia.* — *Willis v. Jefferson*, 75 Ga. 743.

*Illinois.* — *Hurd v. Case*, 32 Ill. 45, 83 Am. Dec. 249; *Funk v. McReynolds*, 33 Ill. 496; *Warrick v. Hull*, 102 Ill. 280; *Ryan v. Newcomb*, 125 Ill. 91.

*Indiana.* — *Lee v. Fox*, 113 Ind. 98.

*Iowa.* — *Fanning v. Kerr*, 7 Iowa 450; *Crocker v. Robinson*, 8 Iowa 404; *Huston v. Seeley*, 27 Iowa 183; *White v. Savery*, 50 Iowa 515.

*Massachusetts.* — *Plymouth v. Plymouth County*, 16 Gray (Mass.) 341.

*Michigan.* — *Atwater v. Kinman, Harr.* (Mich.) 243.

*Minnesota.* — *Forepaugh v. Pryor*, 30 Minn. 35.

*Mississippi.* — *Wofford v. Board of Police*, 44 Miss. 579; *Thompson v. Houze*, 48 Miss. 444; *Dibrell v. Carlisle*, 48 Miss. 691; *McAllister v. Plant*, 54 Miss. 106; *McDonald v. Vinson*, 56 Miss. 497; *Marx v. Davis*, 56 Miss. 745; *Green v. Gaston*, 56 Miss. 748.

*Montana.* — *Butte First Nat. Bank v. Bell Silver, etc.*, Min. Co., 8 Mont. 32.

*Nebraska.* — *Meeker v. Waldron*, (Neb. 1902) 90 N. W. Rep. 755.

*New York.* — *Charter v. Stevens*, 3 Den. (N

Y.) 35, 45 Am. Dec. 444; *People v. MacLean*, (N. Y. Super. Ct. Gen. T.) 19 N. Y. Supp. 548.

*Ohio.* — *Brisbane v. Stoughton*, 17 Ohio 482. *South Carolina.* — *Charleston v. Caulfield*, 19 S. Car. 201.

*Tennessee.* — *Frierson v. Blanton*, 1 Baxt. (Tenn.) 272; *Bennett v. Union Bank*, 5 Humph. (Tenn.) 612; *Knox v. McCain*, 13 Lea (Tenn.) 197.

*Texas.* — *Morrison v. Bean*, 15 Tex. 267; *Blackwell v. Barnett*, 52 Tex. 326.

*Vermont.* — *Calkins v. Clement*, 54 Vt. 635.

*Wisconsin.* — *Walton v. Cody*, 1 Wis. 420.

**Power of Sale Exclusive Remedy.** — In *California* it has been held that there is a distinction at this point between a mortgage and a deed of trust with power of sale. The exercise of the power is the sole available remedy to foreclose a deed of trust. *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651. *Compare Sampson v. Pattison*, 1 Hare 533.

**2. Pendency of Suit to Foreclose.** — *In re Wilkinson*, L. R. 13 Eq. 634, 41 L. J. Ch. 392; *Mayhall v. Eppinger*, 137 Cal. 5; *Brisbane v. Stoughton*, 17 Ohio 482, *Compare Lacassaque v. Abraham*, 51 La. Ann. 840. See, however, *Sawyer v. Campbell*, 130 Ill. 186.

**Execution.** — But the fact that the property has been taken by the sheriff under an execution avoids the sale. *Fulghum v. Williams Co.*, 114 Ga. 643, 88 Am. St. Rep. 48.

**3. Pendency of Suit for Accounting** — *Jenkins v. International Bank*, 111 Ill. 462; *Stevens v. Shannahan*, 160 Ill. 330; *Porter v. Duke*, 99 Tenn. 24.

**Accounts Not Connected with Mortgage Debt.** — *A fortiori*, the pending of a suit to settle partnership accounts not connected with the mortgage debt will not interfere with the exercise of the power. *Glover v. Hembree*, 82 Ala. 324.

**Junior Incumbrancer's Right to Redeem.** — Where the mortgagee makes a junior incumbrancer a party defendant to a suit to foreclose, and pending the suit exercises his power of sale, the court will allow such junior incumbrancer to redeem from the sale, if it appears that the creditor's course has the effect of misleading the junior incumbrancer and lulling him into inactivity. *Hurd v. Case*, 32 Ill. 45, 83 Am. Dec. 249.

**4. Montgomery v. McEwen**, 9 Minn. 103.

**5. Adams v. Scott**, 7 W. R. 213.

**6. Election of Remedy.** — *Hamilton v. Fowler*,



**4. Formal Requisites in Creation of Power — a. POWER INFERRED.** — No particular formality is required in the creation of the power of sale. Any words are sufficient which evince an intention that the sale shall be made upon default or other contingency;<sup>1</sup> and the power may be inferred from the imposition of duties on the trustee which cannot be performed without selling,<sup>2</sup> as where the conveyance is made in order to pay all the just debts of the grantor.<sup>3</sup>

**b. SEPARATE POWER OF SALE.** — It is not necessary that the power should be contained in the mortgage or trust deed conveying the estate,<sup>4</sup> and where the power is granted by a separate instrument the mortgage need be described with reasonable certainty only.<sup>5</sup>

**c. EXTENT OF POWER.** — The power of sale is not an indispensable element in a mortgage or trust deed, and need not be coextensive with it.<sup>6</sup> The granting clause in a trust deed, and not the power of sale, governs as to the quantity of property that the trustee may sell. Thus, where the deed conveyed an individual two-thirds, and the power authorized the trustee to sell the whole property, it was held that he could convey no more than two-thirds.<sup>7</sup>

**d. ACKNOWLEDGMENT.** — As in the ordinary deed and mortgage, acknowledgment of the deed of trust is not essential to its validity as between the immediate parties.<sup>8</sup>

**A Deed of Trust Defectively Acknowledged** is also valid between the parties and as against all persons having actual notice, where the deed is shown to have been duly executed.<sup>9</sup>

99 Fed. Rep. 18, 40 C. C. A. 47; *Warrick v. Hull*, 102 Ill. 280; *Keith v. Harbison*, (Tenn. Ch. 1899) 52 S. W. Rep. 1109. See also *infra*, this title, XIII. 2. a. (4) (a) *Exclusive Jurisdiction*.

**After Foreclosure in Equity** a trustee will not be permitted to sell although he was not made a party to such suit, as the decree of foreclosure supercedes the trustee's title. *Green v. Gaston*, 56 Miss. 748.

**1. Informal Power of Sale Sufficient.** — *Cannon v. McNab, etc., Bank*, 48 Ala. 99. Compare *Hyman v. Devereux*, 63 N. Car. 624.

**Informal Power of Sale.** — A power of sale to secure the purchase money of land may be lodged in a third person by the terms of the deed conveying such land, and the grantee is bound by such provision. *Moore v. Lackey*, 53 Miss. 85.

**The Power of Sale May Be Exercised by the Donee** as trustee or mortgagee although he is called attorney in fact. *Pemberton v. Simmons*, 100 N. Car. 316.

**Omission of the Contingency** on which the sale is to be made, as where the words "in case of the nonpayment" of the debt are left out, renders the power invalid, and a purchaser thereunder will not get a perfect title. *Lariverre v. Rains*, 112 Mich. 276.

**2. Henderson v. Galloway**, 8 Humph. (Tenn.) 692.

**3. Power of Sale Inferred from Duty to Pay Debts.** — *Vallette v. Bennett*, 69 Ill. 632; *Cherry v. Greene*, 115 Ill. 591; *Porter v. Schofield*, 55 Mo. 56.

**Inferred from Direction to "Pay Over."** — *Going v. Emery*, 16 Pick. (Mass.) 107, 26 Am. Dec. 645; *Purdie v. Whitney*, 20 Pick. (Mass.) 25. See *Mundy v. Vawter*, 3 Gratt. (Va.) 494.

**Parol Agreement for Sale to Be Made.** — Where the deed is absolute on its face but

operates as a mortgage because of a verbal defeasance, the grantee may convey a perfect title to a purchaser, there being evidence to show that the sale was made under an agreement with the original grantor, the power of sale having thereby become absolute. *Jackson v. Lawrence*, 117 U. S. 679.

**Power of Sale Must Be Expressly Given.** — In *Vermont* it has been said that the power of sale is too important to rest upon implication and ought not to be recognized unless granted in explicit terms. *Wing v. Cooper*, 37 Vt. 169.

**4. Separate Power of Sale.** — *Alexander v. Caldwell*, 61 Ala. 543; *Brisbane v. Stoughton*, 17 Ohio 482.

A separate power to sell and convey must be of equal dignity with the conveyance to which it is accessory. *Watson v. Sherman*, 84 Ill. 263.

**5. Description Sufficient Though It Misstates the Page** of the volume where the mortgage is recorded. *Peaslee v. Ridgway*, 82 Minn. 288.

**6. Extent of Power.** — *Butler v. Ladue*, 12 Mich. 173; *Hyman v. Devereux*, 63 N. Car. 624.

**7. Quantity to Be Sold.** — *Donnan v. Intelligencer Printing, etc., Co.*, 70 Mo. 168.

**8. Unacknowledged Deed of Trust.** — *Wilson v. Kimmel*, 109 Mo. 260. And see the title **ACKNOWLEDGMENTS**, vol. 1, p. 483.

**9. Defective Acknowledgment.** — *Bennett v. Shipley*, 82 Mo. 448; *Hannah v. Davis*, 112 Mo. 599.

**Acknowledgment Before Trustee.** — Being one of the parties to the conveyance, the trustee is disqualified from taking the acknowledgment of the grantor. Recording such an instrument does not affect the public with notice of its existence. *Bowden v. Parrish*, 86 Va. 67, 19 Am. St. Rep. 873.

**Unsealed Deed of Trust.** — Though the power be

*e.* DELIVERY. — The deed of trust is, of course, ineffective until delivered.<sup>1</sup> But delivery to the trustee is unnecessary;<sup>2</sup> it is sufficient that the instrument be delivered to the beneficiary.<sup>3</sup>

*f.* ACCEPTANCE. — Nor is it essential to the validity of the power in a trust deed that either the trustee or *cestui que trust* should by any formal writing signify his acceptance of it.<sup>4</sup>

Selling under the Power is a sufficient acceptance on the part of the trustee.<sup>5</sup>

*g.* DESCRIPTION OF DEBT SECURED. — It is not essential to the validity of a deed of trust that it should correctly describe the debt intended to be secured; it is sufficient if the description, though indefinite, is capable of being made certain by parol evidence.<sup>6</sup>

Unexecuted Note. — Where the indebtedness intended to be secured actually exists, the recital that the deed is given to secure a note does not avoid it though the note in fact has not been executed.<sup>7</sup>

Amount of Indebtedness. — A discrepancy between the amount actually due and the amount stated in the trust conveyance will not avoid the instrument in the absence of fraud.<sup>8</sup>

*h.* PARTIES TO TRUST DEED — (1) *Omission of Necessary Name.* — The accidental omission to insert the name of a necessary party, as of the grantor<sup>9</sup> or trustee,<sup>10</sup> renders the deed inoperative at law, but it may create an equitable mortgage.<sup>11</sup> An obvious clerical mistake is of no effect.<sup>12</sup> But interchanging

conferred by an instrument not under seal, a sale fairly conducted under it passes an equitable title to the purchaser which will be upheld and enforced. *Watson v. Sherman*, 84 Ill. 263; *Jones v. Brevington*, 58 Mo. 210. But see *Springfield Five Cents Sav. Bank v. South Cong. Soc.*, 127 Mass. 516.

1. *Delivery Necessary.* — *Hammerslough v. Cheatham*, 84 Mo. 13.

2. *Delivery to Trustee Not Required.* — *Schultz v. Houfes*, 96 Ill. 335.

3. *Delivery to Beneficiary.* — *Walker v. Johnson*, 37 Tex. 127.

An absolute conveyance in trust for the payment of a debt need not be delivered to the beneficiary. *Barr v. Schroeder*, 32 Cal. 609.

4. *Formal Acceptance Unnecessary.* — *Shearer v. Loftin*, 26 Ala. 703; *Crocker v. Lowenthal*, 83 Ill. 579; *Leffler v. Armstrong*, 4 Iowa 482, 68 Am. Dec. 672; *Carpenter v. Bowen*, 42 Miss. 28; *Martin v. Paxson*, 66 Mo. 260; *Flint v. Clinton Co.*, 12 N. H. 430; *Hipp v. Huchett*, 4 Tex. 20; *Charter Oak L. Ins. Co. v. Gisborne*, 5 Utah 319.

5. *Mayhall v. Eppinger*, 137 Cal. 5.

*Failure of Trustee to Give Bond.* — The statutory requirement that the trustee shall give bond before proceeding to execute the trust is intended for the protection of the beneficiary, and if the parties interested make no objection the trustee may proceed to execute the power without giving bond. *Thompson v. Halstead*, 44 W. Va. 390.

6. *Description of Debt Secured.* — *Williams v. Moniteau Nat. Bank*, 72 Mo. 292; *Summers v. Darne*, 31 Gratt. (Va.) 791.

*A Misrecital of the Obligation Secured*, as where a debt by bond is spoken of as being evidenced by a promissory note, will not avoid the deed where the description is sufficient to identify the claim. *Scott v. Bailey*, 23 Mo. 141.

*Uncertainty as to the Amount Due.* — Where a deed recited that it was given to secure a debt, "the amount whereof cannot now be accurately stated, but the principal of which is believed

to be about \$2,600," the deed was held to be good, it being inferred by the court that the amount of the debt might be ascertained within a reasonable time. *Norris v. Lake*, 89 Va. 513.

*Compound Interest.* — A trust deed was given to secure the payment of a bond bearing annual interest, and for several years thereafter interest notes were executed for the annual instalments, bearing the same rate of interest as the bond. It was held that as between the parties, the deed was security for the interest on these interest notes, but not so as against subsequent creditors or purchasers. *Barbour v. Tompkins*, 31 W. Va. 410.

7. *Unexecuted Note.* — *Eacho v. Cosby*, 26 Gratt. (Va.) 112. Compare *Leigh v. Lloyd*, 35 Beav. 455.

8. *Amount of Indebtedness.* — *Muller v. Stone*, 84 Va. 834, 10 Am. St. Rep. 889; *Keagy v. Trout*, 85 Va. 390; *Riggs v. Armstrong*, 23 W. Va. 760. Compare *Shirras v. Caig*, 7 Cranch (U. S.) 34.

*Overstatement of Indebtedness.* — If the value of the property be less than the actual debt, other creditors are not prejudiced by the act of the parties in making the debt appear larger. *Sawyer v. Bradshaw*, 125 Ill. 440.

9. *Grantor's Signature Omitted.* — So, where a trust deed is duly acknowledged by the grantor, but his signature is omitted by mistake, it will be treated in equity as a valid lien, and the grantor may remedy the defect by a new deed. *Martin v. Nixon*, 92 Mo. 26.

10. *McQuie v. Peay*, 58 Mo. 56.

11. *The Omission of the Beneficiary's Name* is not fatal to the deed of trust. As against parties having notice of the trust, the name of the actual beneficiary may be supplied by the trustee and the power enforced for his benefit. *Sleeper v. Iselin*, 62 Iowa 583.

*The Beneficiaries of the Deed of Trust* may be described by class without being individually named. *Elgin First Nat. Bank v. Schween*, 127 Ill. 573, 11 Am. St. Rep. 174.

12. *Clerical Mistake.* — Where a power of sale

the name of the trustee and creditor is fatal.<sup>1</sup>

(2) *Subsequent Insertion*. — The unauthorized insertion of the trustee's name where it has been accidentally omitted does not cure the defect nor authorize him to make a sale under the power.<sup>2</sup>

(3) *Subsequent Nomination of Trustee*. — It is competent for the parties to a trust deed, instead of naming a trustee in the deed itself, to insert a clause authorizing the person interested in the subsequent execution of the trust to appoint a trustee to make the sale.<sup>3</sup>

(4) *Curative Legislation*. — The legislature, by a curative act, may validate previous sales under power in mortgages wherein the donees of the power were not properly designated by name; and the fact that a suit is pending at the time of the enactment, to determine the validity of a sale, does not exclude such case from the operation of the act.<sup>4</sup>

**V. TRUSTEE — QUALIFICATIONS AND DUTIES — 1. Qualifications — a. IN GENERAL.** — The fact that the trustee named in a deed of trust is an alien at the time of his appointment or at the time the power is executed by him does not disable him from exercising the same.<sup>5</sup>

**b. TO BE DISINTERESTED.** — The equitable principles which govern the conduct and fix the responsibility of trustees in general apply with full force to trustees with power to sell for the payment of debts. Such a trustee occupies a position of trust and confidence between the parties, and hence he should be unprejudiced and unbiased in favor of either party. He should not be personally interested in the debt secured, nor closely related to either of the parties.<sup>6</sup>

**Trustee Real Owner of Debt Secured.** — The fact that the person named as trustee is the real owner of the debt secured does not, however, invalidate the power of sale, because the effect of such ownership is merely to render his position that of a mortgagee with power of sale.<sup>7</sup>

**c. REMOVAL OF UNSUITABLE PERSON.** — A person appointed trustee on the *ex parte* application of the creditor has been subsequently removed where he appeared to be a confidential clerk of the creditor, though he had meanwhile entered upon the execution of the trust.<sup>8</sup>

**That a State of Personal Ill-will Exists** between the trustee and beneficiary may also justify a removal, especially where it appears that the trustee's conduct might be affected by it,<sup>9</sup> or where the parties would necessarily be brought into personal relations.<sup>10</sup>

**2. Duties — a. DUTY TO EXERCISE POWER.** — It is the duty of a trustee

mortgage provided that on default the party of the first part (the mortgagor) might make the sale, the court treated the instrument as though it read "party of the second part." *Gaines v. Allen*, 58 Mo. 537. See also *Woodward v. Jewell*, 140 U. S. 247.

1. *McMeel v. O'Connor*, 3 Colo. App. 113.

2. *Unauthorized Alteration of Deed*. — *Hord v. Taubman*, 79 Mo. 101. And see the title *ALTERATION OF INSTRUMENTS*, vol. 2, p. 181.

3. *Subsequent Nomination of Trustee*. — *Lang v. Stansel*, 106 Ala. 389. See also *infra*, this title, *Who May Exercise Power of Sale*.

4. *Curative Legislation*. — *Madigan v. Workingmen's Permanent Bldg., etc., Assoc.*, 73 Md. 317. In this case the power of sale had been made to "the solicitor of the Workingmen's Building and Loan Association," and did not name therein the individual solicitor as was then required by law in *Maryland*. See *Frostburg Mut. Bldg. Assoc. v. Lowdermilk*, 50 Md. 175.

5. *Alien Competent to Be Trustee*. — *Escheator*

*v. Smith*, 4 McCord L. (S. Car.) 452; *Ferguson v. Franklin*, 6 Munf. (Va.) 305.

6. *Trustee to Be Disinterested*. — *Gimbel v. Pignero*, 62 Mo. 240; *Long v. Long*, 79 Mo. 644. See generally the title *TRUSTS AND TRUSTEES*, *post*.

**One Acting as Attorney in Fact for the Vendor of Land** is not incompetent to be trustee in the deed given to secure the purchase price thereof. *Sternberg v. Valentine*, 6 Mo. App. 176.

7. *Trustee Owner of Debt Secured*. — *Foster v. Latham*, 21 Ill. App. 165; *Cassady v. Wallace*, 102 Mo. 575.

**An Employee of the Creditor** may act as trustee where he is nominated in the mortgage or trust as the person to make the sale. *Randolph v. Allen*, 73 Fed. Rep. 23, 41 U. S. App. 117.

8. *Removal of Unsuitable Person*. — *In re Mayfield*, 17 Mo. App. 684.

9. *Ill-will a Cause of Removal*. — *Gartside v. Gartside*, 113 Mo. 348.

10. *McPherson v. Cox*, 96 U. S. 404.



properly clothed with authority to proceed at the proper time to foreclose, and equity may be invoked to compel him to proceed.<sup>1</sup>

**The Trustee Is Not the Agent of the Creditor.** — Hence, the latter is not personally liable for damage resulting to the debtor from the failure of the trustee to exercise reasonable diligence in carrying out his trust.<sup>2</sup>

**Personal Liability of Trustee.** — But, of course, the trustee himself becomes personally liable for a failure to use reasonable diligence in carrying the power into effect.<sup>3</sup>

**b. DUTY TO SECURE FAVORABLE SALE.** — Reasonable effort must be made to render the sale most beneficial to the debtor.<sup>4</sup> To this end he should exercise the degree of care used by prudent men in the protection of their own interests.<sup>5</sup>

**c. REPRESENTS BOTH CREDITOR AND DEBTOR.** — In exercising his power the trustee represents both parties, and should preserve an even balance in all acts affecting the trust.<sup>6</sup>

**d. MORTGAGEE DOES NOT REPRESENT DEBTOR** — (1) *Extent of His Duty.* — The mortgagee in a power of sale mortgage is not infrequently spoken of as a trustee.<sup>7</sup> He does not, however, represent the debtor in any true sense, nor is he technically a trustee, though he does, of course, owe to the debtor the duty of exercising good faith and reasonable care in carrying the power into execution.<sup>8</sup>

(2) *Active Diligence Not Required.* — As a general rule the mortgagee owes no duty of active diligence to the debtor<sup>9</sup> until he has taken possession of the mortgaged property to sell. He must then exercise the diligence of a prudent man.<sup>10</sup>

1. *Hartman v. Evans*, 38 W. Va. 669.

**Notice of Fraud.** — Notice given to the trustee, at the time of his sale, that his trust deed was executed with intent to defraud, does not make it the trustee's duty to abandon the sale, and leave the parties to determine their rights in equity. *Erwin v. Hall*, 18 Ill. App. 315.

**2. Nor Will a Subsequent Ratification by the Creditor** of the acts done by the trustee render the creditor so liable. *Murrell v. Scott*, 51 Tex. 520. But see *Hayes v. Delzell*, 21 Mo. App. 679.

**3. Trustee Personally Liable.** — *Pechel v. Fowler*, 2 Anstr. 549; *Sherwood v. Saxton*, 63 Mo. 78; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513.

**Trustee Liable for Deceit** practiced upon purchaser, as where he fails to reveal the fact that he has released part of the property described in the notice. *Hayes v. Delzell*, 21 Mo. App. 679.

**4. Favorable Sale.** — *Judge v. Booge*, 47 Mo. 544; *Carter v. Abshire*, 48 Mo. 300; *Chesley v. Chesley*, 49 Mo. 540.

**5. Degree of Diligence Required.** — *Ventres v. Cobb*, 105 Ill. 33; *Sherwood v. Saxton*, 63 Mo. 78.

**6. Trustee a Representative of Both Parties.** — *Little Rock, etc., R. Co. v. Huntington*, 120 U. S. 160; *Sherwood v. Saxton*, 63 Mo. 78; *Meacham v. Steele*, 93 Ill. 135; *Cassidy v. Cook*, 99 Ill. 385; *Webber v. Curtis*, 104 Ill. 309; *Williamson v. Stone*, 128 Ill. 120; *Goode v. Comfort*, 39 Mo. 313; *Graham v. King*, 50 Mo. 22, 11 Am. Rep. 401; *Bales v. Perry*, 51 Mo. 449; *Tatum v. Holliday*, 59 Mo. 422; *Stoffel v. Schroeder*, 62 Mo. 147; *Murrell v. Scott*, 51 Tex. 520; *Morriss v. Virginia State Ins. Co.*, 90 Va. 370; *Hartman v. Evans*, 38 W. Va. 669.

**7. Mortgagee Said to Be Trustee.** — *Richmond v. Evans*, 8 Grant Ch. (U. C.) 508.

**8. Duty of Mortgagee to Exercise Good Faith** — *England.* — *Robertson v. Norris*, 4 Jur. N. S. 155; *Jones v. Matthie*, 11 Jur. 504; *Kirkwood v. Thompson*, 2 Hem. & M. 392; *Adams v. Scott*, 7 W. R. 213.

*United States.* — *Markey v. Langley*, 92 U. S. 142.

*Illinois.* — *Longwith v. Butler*, 8 Ill. 32; *Meacham v. Steele*, 93 Ill. 135.

*Maryland.* — *Horsey v. Hough*, 38 Md. 130.

*Massachusetts.* — *Montague v. Dawes*, 14 Allen (Mass.) 369; *Drinan v. Nichols*, 115 Mass. 353; *Thompson v. Heywood*, 129 Mass. 401; *Briggs v. Briggs*, 135 Mass. 306; *Clark v. Simmons*, 150 Mass. 357.

*Missouri.* — *Thornton v. Irwin*, 43 Mo. 153.

*New York.* — *Bedell v. McClellan*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 172; *Ellsworth v. Lockwood*, 9 Hun (N. Y.) 548.

*North Carolina.* — *Howell v. Pool*, 92 N. Car. 450.

*Rhode Island.* — *Hoffman v. Anthony*, 6 R. I. 282, 75 Am. Dec. 701.

**Trustee of Unused Balance.** — The mortgagee, after sale has been made and his own debt satisfied, is a trustee for the mortgagor as regards the balance remaining in his hands. *Warner v. Jacob*, 20 Ch. D. 220; *Martinson v. Clowes*, 21 Ch. D. 857.

**9. Active Diligence Not Required.** — *Davey v. Durrant*, 1 De G. & J. 535.

**10. Duty of Mortgagee After Taking Possession to Sell.** — *Matthie v. Edwards*, 2 Coll. Ch. Cas. 480; *Marriott v. Anchor Reversionary Co.*, 30 L. J. Ch. 571, affirming 2 Giff. 457; *Richmond v. Evans*, 8 Grant Ch. (U. C.) 508; *Latch v. Furlong*, 12 Grant Ch. (U. C.) 303.

**A Mortgagee of a Chattel**, after taking possession, is, under the statutes of *Kansas*, liable as

**Motive Immaterial.** — If he acts in compliance with the terms of the power the sale will be valid,<sup>1</sup> and his motive in exercising the power will not be inquired into.<sup>2</sup>

*e. DUTY OF TRUSTEE OR MORTGAGEE TO RESORT TO EQUITY* —

(1) *Removal of Impediments.* — Circumstances often arise which make it necessary for the trustee or mortgagee to proceed in equity notwithstanding a power of sale is given in the instrument. Thus, it is the duty of the trustee to resort to equity for the removal of impediments to the execution of his trust, as where the property is encumbered and the title in such shape as to deter bidders.<sup>3</sup>

(2) *Accounting.* — So it may sometimes become his duty to file a bill for an accounting in order to ascertain the amount and priorities of the various claims in dispute.<sup>4</sup>

(3) *Defective Power of Sale* — *Inadequate Remedy at Law.* — The mortgagee in a power of sale mortgage, or the creditor secured by a deed of trust, may file a bill to foreclose where the power is defective,<sup>5</sup> or the legal remedy inadequate,<sup>6</sup> or where an invalid sale under the power has been made, thereby complicating the title.<sup>7</sup>

*f. CREDITOR'S RIGHT TO INVOKE AID OF EQUITY.* — Where there are numerous conflicting interests involved,<sup>8</sup> or the trustee has declined to act,<sup>9</sup> the creditor may file a bill to have the deed foreclosed; and, in general, the exercise of the power by the trustee will be controlled by the court at the instance of the creditor.<sup>10</sup>

Where the Right to Sell Is Suspended for a Stated Period, the creditor may proceed in

for a conversion if he fails to sell. *Miller v. McElwain*, 52 Kan. 91.

1. *Kennedy v. De Trafford*, (1897) A. C. 180, 76 L. T. N. S. 427.

2. **Motive Immaterial.** — *Colson v. Williams*, 61 L. T. N. S. 71.

3. **Duty of Trustee to Resort to Equity.** — *Quarles v. Lacy*, 4 Munf. (Va.) 251; *Gay v. Hancock*, 1 Rand. (Va.) 72; *Miller v. Argyle*, 5 Leigh (Va.) 460; *Rossett v. Fisher*, 11 Gratt. (Va.) 493; *Hogan v. Duke*, 20 Gratt. (Va.) 244; *Shultz v. Hansbrough*, 33 Gratt. (Va.) 567; *Hoge v. Junkin*, 79 Va. 220; *Muller v. Stone*, 84 Va. 834, 10 Am. St. Rep. 889; *Hartman v. Evans*, 38 W. Va. 669.

It is the trustee's duty to forbear to sell, and to ask the aid and instructions of a court of equity, in all cases where the amount of the debt is unliquidated or in good faith disputed, when any cloud rests upon the title, when a reasonable price cannot be obtained, or when, for any reason, a sale is likely to be accompanied by a sacrifice of the property, which, at the cost of some delay, may be obviated. *Lane v. Tidball*, *Gilmer* (Va.) 130; *Wilkins v. Gordon*, 11 Leigh (Va.) 572; *Miller v. Trevelian*, 2 Rob. (Va.) 25; *Bryan v. Stump*, 8 Gratt. (Va.) 247; *Morriss v. Virginia State Ins. Co.*, 90 Va. 370.

4. **Duty of Trustee to Ascertain Amount Due.** — *Van Aken v. Gleason*, 34 Mich. 478; *Rossett v. Fisher*, 11 Gratt. (Va.) 493; *Hogan v. Duke*, 20 Gratt. (Va.) 244; *White v. Mechanics Bldg. Fund Assoc.*, 22 Gratt. (Va.) 233; *National Mut. Bldg., etc., Assoc. v. Ashworth*, 91 Va. 706; *Curry v. Hill*, 18 W. Va. 370; *Lallance v. Fisher*, 29 W. Va. 512.

5. **Defective Power.** — *Grant v. Phoenix L. Ins. Co.*, 121 U. S. 105; *Cowles v. Marble*, 37 Mich.

158; *State Bank v. Chappelle*, 40 Mich. 447. *Compare Hudgins v. Manier*, 23 Gratt. (Va.) 494.

**Failure to Observe the Statute**, requiring the power of sale to be recorded, is fatal to its validity. Foreclosure in such cases must be had in equity. *Fry v. Martin*, 33 Ark. 203; *Thorp v. Merrill*, 21 Minn. 336; *Munson v. Ensor*, 94 Mo. 504.

6. **Remedy at Law Inadequate.** — *Stillwell-Bierce, etc., Co. v. Williamston Oil, etc., Co.*, 80 Fed. Rep. 68.

7. **Irregular Sale No Bar to Foreclosure in Equity.** — *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613. *Compare McLean v. Presley*, 56 Ala. 211.

Where the trustee sells under the power, upon default in but one of three notes secured, and the holder of that note purchases all the property at the sale for one-third of its value, with the knowledge that the other notes are outstanding, and the debtor redeems from the sale, equity will again foreclose to protect the other notes. *Shields v. Dyer*, 86 Tenn. 41; *Wicks v. Caruthers*, 13 Lea (Tenn.) 353.

8. **Various Deeds of Trust or Other Incumbrances.** — *Phoenix Mut. L. Ins. Co. v. Grant*, 3 MacArthur (D. C.) 42; *Horton v. Bond*, 28 Gratt. (Va.) 815; *Cole v. M'Rae*, 6 Rand. (Va.) 644.

**Equitable Interference for Protection of Creditors with Conflicting Interests.** — *Duncan v. Grafflin*, 26 N. J. Eq. 228.

9. **Trustee Declining to Act.** — *Alexander v. Central R. Co.*, 3 Dill. (U. S.) 487; *White v. Savery*, 50 Iowa 515.

10. **Trustee under Control of Court.** — *Bradley v. Chester Valley R. Co.*, 36 Pa. St. 141; *Youngman v. Elmira, etc., R. Co.*, 65 Pa. St. 278.

equity as soon as the default occurs,<sup>1</sup> unless the language of the mortgage clearly suspends the right to the equitable remedy also.<sup>2</sup>

**VI. WHO MAY EXERCISE POWER OF SALE — 1. No Right to Delegate Authority — a. IN GENERAL.** — A most important application of the principle that the authority given by the deed must be strictly pursued is found in the rule that the trustee named therein cannot delegate his authority to another, unless the right to do so is expressly granted in the instrument creating the trust.<sup>3</sup>

**The Trust Is of a Personal Nature,** and the debtor has the right to insist that the foreclosure proceedings be conducted by the person named as trustee, and by none other.<sup>4</sup>

**b. DUTIES INVOLVING DISCRETION.** — The rule now being considered is limited to such duties of the mortgagee<sup>5</sup> or trustee<sup>6</sup> as are supposed to involve the exercise of some discretion. Thus, it is not permissible that the mortgagee should turn the mortgage over to another, as, for instance, to a constable, and give him the power of selecting the time and place of sale, and of making the sale without his own supervision and control.<sup>7</sup>

**c. SUPERVISION OF SALE.** — By better authority it is necessary for the trustee to be present and supervise the proceedings. It is not enough for him to appear at the opening and close of the sale where he absents himself during its progress.<sup>8</sup>

**1. Suspension of Power to Sell.** — Chicago, etc., *R. Co. v. Fosdick*, 106 U. S. 47.

**2. Mercantile Trust Co. v. Missouri, etc., R. Co.,** 36 Fed. Rep. 221.

**Virginia Doctrine.** — A different view of a mortgage similar to that involved in the federal cases cited was taken in Virginia, where the court, upon construing the whole instrument, reached the conclusion that a provision authorizing a sale after the expiration of six months, from default in the payment of principal or interest, was intended as a limitation upon the right to foreclose by action as well as by sale. *Potomac Mfg. Co. v. Evans*, 84 Va. 717.

**3. Trustee Cannot Delegate His Authority — Illinois.** — *Taylor v. Hopkins*, 40 Ill. 442; *Flower v. Elwood*, 66 Ill. 438; *Grover v. Hale*, 107 Ill. 638; *Foster v. Strong*, 5 Ill. App. 223.

**Mississippi.** — *Doe v. Robinson*, 24 Miss. 688.

**Missouri.** — *In re Mayfield*, 17 Mo. App. 684; *Whittelsey v. Hughes*, 39 Mo. 13; *Graham v. King*, 50 Mo. 22, 11 Am. Rep. 401; *Howard v. Thornton*, 50 Mo. 291; *Bales v. Perry*, 51 Mo. 449; *Harper v. Mansfield*, 58 Mo. 17; *Landrum v. Union Bank*, 63 Mo. 48; *Brickenkamp v. Rees*, 69 Mo. 426; *Turlock v. Sproule*, 72 Mo. 503; *St. Louis v. Priest*, 88 Mo. 613; *Cassady v. Wallace*, 102 Mo. 575; *Polliham v. Reveley*, (Mo. 1904) 81 S. W. Rep. 182.

**New York.** — *Powell v. Tuttle*, 3 N. Y. 397.

**Texas.** — *Bitter v. Calhoun*, (Tex. 1888) 8 S. W. Rep. 523.

**Utah.** — *Singer Mfg. Co. v. Chalmers*, 2 Utah 542.

**Contract Authorizing Trustee to Delegate Authority.** — *Shahan v. Tethero*, 114 Ala. 404; *Reynolds v. Kroff*, 144 Mo. 433.

**The Burden of Showing Existence of Power to Delegate** is on the purchaser. *Littell v. Jones*, 56 Ark. 139.

**A Power of Appointing a Person to Conduct the Sale**, lodged in the creditor by the terms of the deed, is personal to him and cannot be exercised by the agent of such creditor. *Hartley v. O'Brien*, 70 Miss. 825.

**An Assignment by the Trustee of His Interest in the Debt** secured by the trust deed does not operate as an assignment of the trust. *Charter Oak L. Ins. Co. v. Gisborne*, 5 Utah 319.

**The Use of the Word "Assigns" in the Habendum of a Trust Deed** will not be construed to authorize the trustee to delegate his power. *Whittelsey v. Hughes*, 39 Mo. 13.

**4. Personal Nature of the Trust.** — *Fuller v. O'Neal*, 69 Tex. 349, 5 Am. St. Rep. 59. In this case *Willie, C. J.*, said: "[The trustee] is chosen because of the confidence the grantor has in his integrity and discretion. The trustee, in making the sale, and during the time the property is under the hammer, is expected to protect the interests of the grantor, to see that no fraud is practised detrimental to his interests, and that no improper bid is accepted, and that the property is not knocked off without giving fair opportunity for it to bring its reasonable value. Perhaps the agent selected by the trustee to attend to this important matter is not one to whom the grantor himself would have intrusted it. He has reposed confidence in the party selected by him, and that confidence cannot be transferred without his consent. The trustee can no more absent himself whilst the sale is going on than he can make it at a time or a place or for a character of consideration different from that authorized in the deed."

**5. Discretionary Duties of Mortgagee Incapable of Delegation.** — *Green v. Stevenson*, (Tenn. Ch. 1899) 54 S. W. Rep. 1011; *Bitter v. Calhoun*, (Tex. 1888) 8 S. W. Rep. 523; *Crafts v. Daugherty*, 69 Tex. 477.

**6. Discretionary Duties of Trustee Incapable of Delegation.** — *Hubbard v. Jarrell*, 23 Md. 66.

**7. Green v. Stevenson**, (Tenn. Ch. 1899) 54 S. W. Rep. 1011.

**8. Supervision of Sale.** — *Breckenkamp v. Rees*, 3 Mo. App. 585, 69 Mo. 426; *Morris v. Virginia State Ins. Co.*, 90 Va. 370. See also the preceding note. *Contra, Dunton v. Sharpe*, 70



*d. CLERICAL DUTIES.* — Purely clerical and ministerial duties, on the other hand, may be delegated to an agent or servant by either the trustee or mortgagee. Thus, there is no objection to the employment of an auctioneer to sell, provided he acts under the supervision of the trustee or mortgagee.<sup>1</sup> The same principle applies to such duties as giving or posting notice<sup>2</sup> and making a necessary entry upon the premises.<sup>3</sup>

*e. EFFECT OF IMPROPER DELEGATION.* — The failure on the part of the trustee personally to supervise and conduct the sale affords ground for setting it aside at the instance of the holder of the equity, notwithstanding it may have been fairly conducted,<sup>4</sup> and a mere verbal assent of the grantor and beneficiary to the trustee's being absent from the sale and leaving the conduct of it to a stranger will not amount to a proper authority to delegate the power.<sup>5</sup>

*f. SALE MADE BY ATTORNEY OF MORTGAGEE.* — Decisions in a few jurisdictions countenance a laxer rule as regards the right of the mortgagee to delegate his authority than is indicated above. Thus it has been held that where the mortgagee is vested with the legal title the sale may be made by his attorney, and if the mortgagee subsequently himself executes a deed to the purchaser the conveyance will pass a good title,<sup>6</sup> or at least a title that will be defeasible only at the instance of the person conferring the power, and he must act promptly. In the absence of collusion or fraud his creditors cannot impeach the sale.<sup>7</sup>

Nor, as Against an Innocent Purchaser, can the sale be set aside even by the mortgagor, especially where such purchaser is remote.<sup>8</sup>

**2. Joint Trustees to Act Jointly** — *a. IN GENERAL.* — Where the trust deed lodges the power of sale in more than one person, the trusteeship is an indivisible unit. The parties to the contract in such case can properly insist upon having the benefit of the discretion and good judgment of all the parties named as trustees. Consequently, in the absence of a provision expressly authorizing one to act separately,<sup>9</sup> all must unite in making the sale.<sup>10</sup>

Miss. 850; Palmer v. Young, 96 Ga. 246, 51 Am. St. Rep. 136; Ray v. Home, etc., Invest., etc., Co., 98 Ga. 122.

In *Alabama* the legal title passes notwithstanding the failure of the trustee to supervise the sale. Shahan v. Tethero, 114 Ala. 404.

**By Acquiescence in the Sale** at the time it is made and failure promptly to disaffirm, the grantor waives want of technical authority in the salesman. Welsh v. Coley, 82 Ala. 363; Reynolds v. Kroff, 144 Mo. 433.

**1. Mortgagee Who Is Present May Employ Auctioneer.** — Welsh v. Coley, 82 Ala. 363; Fogarty v. Sawyer, 23 Cal. 570; Kennedy v. Dunn, 58 Cal. 339; Palmer v. Young, 96 Ga. 246, 51 Am. St. Rep. 136; Taylor v. Hopkins, 40 Ill. 442; McPherson v. Sanborn, 88 Ill. 150; Hubbard v. Jarrell, 23 Md. 66; Russell v. Roberts, 121 N. Car. 322. See, however, Singer Mfg. Co. v. Chalmers, 2 Utah 542, which is apparently to the contrary, but it is not clear whether in that instance the mortgagee was entirely absent from the sale or not.

**Auctioneer Not Duly Licensed.** — The fact that the person acting as auctioneer at a foreclosure sale under the power is not duly licensed as required by statute, of which fact the mortgagee is ignorant, does not vitiate the sale. Williston v. Morse, 10 Met. (Mass.) 17; Learned v. Geer, 139 Mass. 31.

**2. Posting Notice a Ministerial Duty.** — Johns v. Sergeant, 45 Miss. 332; Bales v. Perry, 51 Mo. 449.

**3. Entry upon Premises.** — Cranston v. Crane, 97 Mass. 459, 93 Am. Dec. 106.

**4. Failure of Trustee to Supervise Sale.** — Grover v. Hale, 107 Ill. 638; Vail v. Jacobs, 62 Mo. 130; Howard v. Thornton, 50 Mo. 291; St. Louis v. Priest, 14 Mo. App. 575, 88 Mo. 612.

**5. Smith v. Lowther,** 35 W. Va. 300.

**6. Conveyance by Mortgagee After Sale by Attorney.** — Munn v. Burges, 70 Ill. 604; Parker v. Banks, 79 N. Car. 480. Compare Tew v. Henderson, 116 Ala. 545.

**7. Right to Impeach Sale Is Personal to Mortgagor.** — McHany v. Schenk, 88 Ill. 357.

**8. Remote Purchaser for Value.** — Gunnell v. Cockerill, 79 Ill. 79; Hoit v. Russell, 56 N. H. 559.

**9. The Trustees or "Either of Them" — Power to Act Separately.** — Loveland v. Clark, 11 Colo. 265; Taylor v. Dickinson, 15 Iowa 483; Græme v. Cullen, 23 Gratt. (Va.) 266.

**10. Joint Trustees Must Act Jointly.** — Townsend v. Wilson, 3 Madd. 261, 1 B. & Ald. 608; Wilbur v. Almy, 12 How. (U. S.) 180, reversing 2 Woodb. & M. (U. S.) 371; Farmers' L. & T. Co. v. Lake St. El. R. Co. (C. C. A.) 122 Fed. Rep. 914; Black v. Smith, MacArthur & M. (D. C.) 338; Golder v. Bressler, 105 Ill. 419; Powell v. Tuttle, 3 N. Y. 396; Wilson v. Troup, 2 Cow. (N. Y.) 105, 14 Am. Dec. 458. See, however, Smith v. Black, 115 U. S. 308, reversing MacArthur & M. (D. C.) 338. In this case the signature of both trustees appeared on the

*b. PARTNERS.* — The members of a partnership named as mortgagees are regarded as joint trustees, and one partner alone cannot bind the firm or the mortgagor by exercising the power in his own name without the concurrence of his copartners.<sup>1</sup>

*c. ELECTION TO ACT JOINTLY.* — Where trustees, being authorized to act separately, nevertheless jointly give notice, both must join in making the sale.<sup>2</sup>

*Joining in Deed.* — Where one joint trustee has taken no part in the proceedings to sell, his subsequent attempted ratification by joining in the conveyance to the purchaser is not sufficient to cure the defect.<sup>3</sup>

*d. DEATH OF COTRUSTEE.* — Where one of two or more trustees dies, the survivor may execute the power,<sup>4</sup> and it is not necessary for another to be appointed or for the representative of the deceased trustee to join in the conveyance unless the deed itself makes provision to the contrary.<sup>5</sup>

**3. Successors and Substitute Trustees** — *a. IN GENERAL.* — (1) *Contingency Authorizing Appointment of Substitute.* — It often happens that the trustee named in the deed is unable or unwilling to execute the trust. In anticipation of this difficulty a provision is usually inserted authorizing some one upon a stated contingency to appoint another trustee to execute the power. The contingencies usually anticipated are the death, resignation, or removal of the trustee, or his inability, incapacity, or refusal to act as such.<sup>6</sup>

(2) *Equity Jurisdiction.* — If the contract itself gives no such power the Court of Chancery has ample jurisdiction either to appoint another trustee to execute the power,<sup>7</sup> or it will itself assume jurisdiction and carry the trust into effect.<sup>8</sup>

*b. CONTRACT PROVISIONS FOR APPOINTMENT OF SUCCESSOR* — (1) *Person Interested in Debt.* — It is within the capacity of the parties to commit the appointment of a trustee to the nomination of any person interested in the debt.<sup>9</sup>

(2) *Power of Appointment to Be Strictly Pursued.* — It is needless to say

notice; one, however, failed to take part in the sale. He subsequently executed the deed, and it was held that the sale was good.

1. *Warr v. Jones*, 24 W. R. 695.

2. *Election to Act Jointly.* — *White v. Watkins*, 23 Mo. 423.

3. *Joining in Deed.* — *Black v. Smith, MacArthur & M.* (D. C.) 338. See also dissenting opinion of Field, J., in *Smith v. Black*, 115 U. S. 321.

4. *Surviving Trustee to Execute Power.* — *Parsons v. Boyd*, 20 Ala. 112; *Hannah v. Carrington*, 18 Ark. 85; *Golder v. Bressler*, 105 Ill. 410. See *Greenleaf v. Queen*, 1 Pet. (U. S.) 138.

As to the interest which the heirs at law or representatives of a sole trustee who died have in the trust, see *Mauldin v. Armistead*, 14 Ala. 702; *Hind v. Poole*, 1 Kay & J. 383, 1 Jur. N. S. 371. See also the title TRUSTS AND TRUSTEES, *post*.

5. *Cawfield v. Owens*, 129 N. Car. 286.

*Filling Vacancy in Trusteeship.* — Where the trust deed provided that the remaining trustees should fill any vacancy occasioned by the death of one of their number, it was held that a suit instituted by all would not abate on the death of one of the trustees, but the suit was postponed till the vacancy was filled. *Shaw v. Norfolk County R. Co.*, 5 Gray (Mass.) 162. See also generally as to the effect of the death of a trustee, the title TRUSTS AND TRUSTEES, *post*.

6. *Contingencies Justifying Appointment of New Trustee.* — See *Farmers' L. & T. Co. v. Hughes*, 11 Hun (N. Y.) 130.

7. *Appointment by Court of Equity.* — *Smis-aert v. Prudential Ins. Co.*, 15 Colo. App. 442; *Davis v. Lusk*, 191 Ill. 620; *Clark v. Wilson*, 53 Miss. 119; *Converse v. Davis*, 90 Tex. 462; *Davis v. Converse*, (Tex. Civ. App. 1898) 46 S. W. Rep. 910.

8. *Alternative Jurisdiction to Foreclose or to Authorize Trustee to Sell.* — *Craft v. Indiana*, etc., R. Co., 166 Ill. 580. See the title TRUSTS AND TRUSTEES, *post*.

9. *Power to Provide for Future Appointment of Trustee.* — *Lang v. Stansel*, 106 Ala. 389; *West v. Fitz*, 109 Ill. 442. Compare *Ray v. Home*, etc., Invest., etc., Co., 98 Ga. 122.

*Appointment by Holder or Beneficiary.* — *Polle v. Rouse*, 73 Miss. 713; *Perrin v. Trimble*, (Tenn. Ch. 1898) 48 S. W. Rep. 125; *Klein v. Glass*, 53 Tex. 37; *Jacobs v. McClintock*, 53 Tex. 72.

*Appointment by Original Trustee.* — *Reynolds v. Kroff*, 144 Mo. 433.

*Appointment in Writing of "Any Attorney of Record Residing in the State."* — *Cloud v. Kansas L. & T. Co.*, 52 Mo. App. 318.

*Right to Appoint Personal and Incapable of Delegation.* — *Clark v. Wilson*, 53 Miss. 119.

*Who May Appoint.* — Authority to the beneficiaries or their "personal representatives" to appoint a substitute does not extend to an as-

that the power of appointing a successor, in so far as it depends upon the contract, is purely derivative. The provisions of the deed must therefore be strictly followed, and an appointment is of no effect unless the contingency which justifies it has actually happened.<sup>1</sup>

(3) *Refusal of Trustee — Request Necessary.* — If a refusal of the trustee to act is the ground for the appointment of a new one, it must appear that the original nominee was requested to act and refused or failed to do so. There is no refusal until a request has been made, as it is not incumbent on the trustee to take the initiative without being moved to do so by the parties interested.<sup>2</sup> This rule applies with still greater force where the deed of trust itself provides that the trustee shall act upon a request from the party interested.<sup>3</sup>

(4) *Change of Residence by Trustee.* — A provision authorizing the appointment of a substitute upon the removal of the trustee contemplates a change of domicil or a permanent removal.<sup>4</sup>

But a Removal to a Foreign Country with the intention of remaining for an indefinite but extended period has been held to incapacitate the trustee from exercising his duty and to justify the appointment of a successor, even though there is no permanent change of residence.<sup>5</sup>

signee of the debt. *Fuller v. Davis*, 63 Miss. 78.

**1. Power of Appointment to Be Strictly Followed.** — *Stallings v. Thomas*, 55 Ark. 326; *Equitable Trust Co. v. Fisher*, 106 Ill. 189; *Ellis v. Boston, etc., R. Co.*, 107 Mass. 1; *Guion v. Pickett*, 42 Miss. 77; *Ready v. Hamm*, 46 Miss. 422; *Clark v. Wilson*, 53 Miss. 119; *McNeill v. Lee*, 79 Miss. 455; *Bacigalupo v. Lallemon*, 7 Mo. App. 594; *Bemis v. Williams*, (Tex. Civ. App. 1903) 74 S. W. Rep. 332.

An Appointment in Writing is not sufficient where the conveyance requires it to be made by a duly executed and duly recorded deed of appointment. *Bonner v. Lessley*, 61 Miss. 392; *Polle v. Rouse*, 73 Miss. 713.

**Sale by Sheriff.** — A provision that in the case of the trustee's death, or refusal to act, or absence from the state when a sale is desired, the sheriff of the county may proceed to sell, means that the sheriff may act on the happening of any one of the three contingencies. *Hickman v. Dill*, 32 Mo. App. 509; *McKnight v. Wimer*, 38 Mo. 132.

**2. Request to Be Made upon Original Trustee.** — *Stalings v. Thomas*, 55 Ark. 326.

See vol. 12, p. 709, note, *Delinquency — Trustee in a Mortgage*.

**3. Request for Trustee to Proceed.** — *Kelsay v. Farmers, etc., Bank*, 166 Mo. 157; *Boone v. Miller*, 86 Tex. 74; *Bracken v. Bounds*, 96 Tex. 200; *Bracken v. Bounds*, (Tex. Civ. App. 1902) 70 S. W. Rep. 326; *Bemis v. Williams*, (Tex. Civ. App. 1903) 74 S. W. Rep. 332. Compare *McNeill v. Lee*, 79 Miss. 455.

**Refusal After Request.** — Where a request is made, and the trustee without refusing absolutely to sell puts the request aside on the ground that it is inconvenient for him to act at that time, a substitute may be appointed, as the creditor has the right to insist on a sale without delay. *Chase v. Williams*, 74 Mo. 429.

**So Where He Makes a Demand for Greater Compensation than the commissions allowed by law.** *Klein v. Glass*, 53 Tex. 37.

**Death Equivalent to Refusal.** — A deed of trust provided that the trustee, if unable to carry out the power, should appoint another, and in the event that he should refuse so to appoint a substitute the beneficiary himself might do so. It was held that the death of the trustee was sufficient to justify the appointment of a successor by the beneficiary. *Jacobs v. McClintock*, 53 Tex. 72.

**4. Removal Implies Change of Domicil.** — *Barstow v. Stone*, 10 Colo. App. 396.

**Absence from State Means Permanent Absence.** — *Equitable Trust Co. v. Fisher*, 106 Ill. 189.

**Change of County Line.** — Where the trustee's home is in a section of a county subsequently erected into a new political division, a substitute trustee may act where the trust deed authorizes him to act in the absence of the original trustee. *Thompson v. Foerstel*, 10 Mo. App. 290.

**A Removal from the State** is not a refusal to execute the trust, nor does it make the trustee unable to execute the trust, within the meaning of a provision authorizing the appointment of a new trustee where the original one refuses or is unable to perform it. *Bonner v. Lessley*, 61 Miss. 392.

**5. Indefinite Absence of Trustee.** — *Farmers' L. & T. Co. v. Hughes*, 11 Hun (N. Y.) 130.

**Successor by Judicial Appointment.** — Where the power of sale is lodged in a trustee, his successors and assigns, a successor by judicial appointment can execute the power. *Western Maryland R. Land, etc., Co. v. Goodwin*, 77 Md. 271.

**The Appointment of a Trustee by a Special Act of the Legislature** has been upheld where the original trustee was dead, and the ordinary courts were temporarily abolished, there being no provision in the deed for such contingency. *Hindman v. Piper*, 50 Mo. 292.

Where the power of sale is conferred upon a particular person by name, as "J. M. Farris, guardian," the successor of such person in the office of guardian cannot execute the trust, *Gillaspie v. Murray*, 27 Tex. Civ. App. 580.



c. **STATUTORY PROVISIONS FOR SUBSTITUTE TRUSTEE.** — There are also statutory provisions in many jurisdictions giving authority to other courts than that of chancery to appoint a new trustee and pointing out the particular procedure to be followed.<sup>1</sup>

d. **SHERIFF ACTING AS SUBSTITUTE OR SUCCESSOR** — (1) *Private Capacity.* — Not infrequently the deed of trust provides that in case of the death, failure, or inability to act of the trustee, the sale shall be made by the sheriff of the county.<sup>2</sup>

When He Acts under Such Provision He Acts in a Private Capacity, and his sureties are not liable for the proceeds of the sale.<sup>3</sup> Nor does his memorandum of sale have any greater probative force than that of a private person acting as substitute trustee.<sup>4</sup>

(2) *Official Capacity.* — Sometimes the sheriff is, by a general statute, authorized to sell upon such contingency,<sup>5</sup> or the court is authorized to appoint him as substitute.<sup>6</sup>

**Liability of Bondsmen — Authority of Deputy.** — In such case his bondsmen are liable for the proceeds of the sale,<sup>7</sup> and, inasmuch as he is then acting in his official capacity of sheriff, a sale made by him through his deputy is valid.<sup>8</sup> It is the appointment by the court under the statute which thus gives official character to the acts of the sheriff.<sup>9</sup>

c. **FORMALITIES INCIDENT TO SUBSTITUTION OF TRUSTEE.** — In conformity with the general doctrine that the power of sale must be exercised in strict compliance with the requirements of the law and of the contract, it has been held that a statutory provision requiring the deed of appointment to be recorded is not complied with by placing the appointment on record after the sale is made.<sup>10</sup>

1. **Statutory Proceedings for Appointment of Substitute Trustee.** — *In re Mayfield*, 17 Mo. App. 684; *Tatum v. Holliday*, 59 Mo. 422.

**The Statutory Order for Appointment in Virginia** should show on whose motion the order is made. *Pitzer v. Logan*, 85 Va. 374.

**"Person Interested in the Debt."** — A statute authorizing an appointment to be made upon the affidavit of a person interested in the debt means a person interested as creditor. Hence, an appointment made upon affidavit of the debtor is void. *State v. Jackson*, 51 Mo. 196.

2. **Sheriff Acting as Substitute or Successor.** — *Lynch v. Naylor*, 63 Ill. App. 107; *Moore v. Lackey*, 53 Miss. 85; *McKnight v. Wimer*, 38 Mo. 132; *White v. Stephens*, 77 Mo. 452; *Kelsay v. Farmers, etc., Bank*, 166 Mo. 157.

**A Deed of Trust to a Particular Person, "Sheriff of the County of B. and to His Successors in Office,"** vests the trust in the officer and not in the individual. Accordingly a successor in the office may execute the trust. *Beal v. Blair*, 33 Iowa 318.

3. **Sheriff Acting in Private Capacity.** — *State v. Davis*, 88 Mo. 585.

4. **Memorandum of Trustee Acting in Private Capacity.** — *Dunham v. Hartman*, 153 Mo. 625, 77 Am. St. Rep. 747.

5. **Statutory Provisions Authorizing Sheriff to Exercise Power.** — *Blumaur Frank Drug Co. v. Branstetter*, 4 Idaho 557, 95 Am. St. Rep. 151; *Snyder v. Chicago, etc., R. Co.*, 131 Mo. 568; *Woods v. Rozelle*, 75 Miss. 782.

**A Constable Is Not Authorized to Make the Sale** by a statute conferring on "sheriffs or other proper officers" the duty of serving notice of the sale. *Jacobson v. Aberdeen Packing Co.*,

26 Wash. 175; *Pickle v. Smalley*, 21 Wash. 473.

**The Sheriff Cannot Sell** without express authority from the mortgagee where the notice indicates that the mortgagee will conduct the sale. *Watson v. Lynch*, 127 Mich. 365.

**Retroactive Legislation Authorizing Sheriff to Sell.** — It is competent for the legislature to apply to existing mortgages with power of sale, the provisions of a subsequent act requiring sales under such powers to be conducted by the sheriff of the county. The substitution of a public officer as mere salesman does not affect or impair the obligation of the contract. *Webb v. Lewis*, 45 Minn. 285.

6. *White v. Stephens*, 77 Mo. 452.

7. **Sureties Liable for Acts of Sheriff as Trustee.** — *State v. Griffith*, 63 Mo. 545; *State v. Taylor*, 6 Mo. App. 277.

8. **Sale by Deputy of a Sheriff Who Is Made Trustee Virtute Officii.** — *Heinmiller v. Hatheway*, 60 Mich. 301; *Clark v. Mitchell*, 81 Minn. 438; *Tatum v. Holliday*, 59 Mo. 422; *Morrissey v. Dean*, 97 Wis. 302.

But where a public officer acts under appointment made in the deed, he cannot act through a deputy. *Singer Mfg. Co. v. Chalmers*, 2 Utah 542.

9. *State v. Davis*, 88 Mo. 585.

10. **Appointment of Substituted Trustee to Be Recorded Before Sale.** — *White v. Jenkins*, 79 Miss. 57; *Hyde v. Hoffman*, (Miss. 1002) 31 So. Rep. 415.

**Substitution by Election of Officer.** — Where a deed of trust vests the power of sale in the treasurer of a corporation by name, with the express provision that when any other person should become treasurer he should *ipso facto*

But Where the Deed of Trust Only Requires a Duly Acknowledged Appointment it is not essential that the appointment should be recorded in order to give validity to the sale.<sup>1</sup>

*f.* TITLE AND AUTHORITY OF SUBSTITUTE TRUSTEE. — Where the new trustee is appointed in accordance with the provisions of the law or terms of the contract, he succeeds to the same interest as his predecessor,<sup>2</sup> even without a formal conveyance to him;<sup>3</sup> and his acts are in all respects as effective as those done by a trustee named in the deed.<sup>4</sup> Nor will his acts be rendered invalid by a misstatement, in the notice of sale, of the ground on which the substitution is made.<sup>5</sup>

**4. Right of Assignee to Foreclose** — *a.* CONTRACT AUTHORIZING ASSIGNEE TO SELL. — In the ordinary power of sale mortgage a clause is usually inserted authorizing the sale to be made by the mortgagee or his assigns or by any person who becomes lawful holder of the debt secured. Where such provision is made there can, of course, be no doubt that the power may be exercised by an assignee of the debt.<sup>6</sup>

*b.* IMPLIED AUTHORITY FOR ASSIGNEE TO SELL — (1) *General Rule.* — In the absence of such provision, the courts are not agreed as to the effect of an assignment of the debt upon the right to sell. Authority is not lacking to the effect that the power of sale, being coupled with an interest, is necessarily appendant and appurtenant to the estate of the mortgagee, and that, consequently, a transfer of the secured debt necessarily carries with it the right to sell the mortgaged property in case of default.<sup>7</sup>

succeed to the trust, it was held that the election of a new officer must be certified to and recorded. *Shipp v. New South Bldg., etc., Assoc.*, 81 Miss. 17.

1. *Scott v. Wood*, 14 Colo. App. 341.

2. *Title of Substituted Trustee.* — *Lake v. Brown*, 116 Ill. 83.

3. *Formal Conveyance Unnecessary.* — *Craft v. Indiana, etc., R. Co.*, 166 Ill. 580; *Ellis v. Boston, etc., R. Co.*, 107 Mass. 1.

4. *Validity of Acts.* — *Equitable Trust Co. v. Fisher*, 106 Ill. 189; *Lake v. Brown*, 116 Ill. 83; *Irish v. Antioch College*, 126 Ill. 474, 9 Am. St. Rep. 638; *Bradford v. Jenkins*, 41 Miss. 328; *McKnight v. Wimer*, 38 Mo. 132.

5. *Misrecital of Ground for Substitution.* — A recital that the substituted trustee acts in the absence of the original trustee does not avoid his authority where the real ground is the refusal of such trustee to act. *Irish v. Antioch College*, 126 Ill. 474, 9 Am. St. Rep. 638.

6. *Assignee of the Debt Entitled to Sell* — *England.* — *Young v. Roberts*, 15 Beav. 558; *In re Rumney*, (1897) 2 Ch. 351; *Boyd v. Petrie*, L. R. 7 Ch. 385, 41 L. J. Ch. 378.

*Illinois.* — *Sargent v. Howe*, 21 Ill. 148; *Vansant v. Allmon*, 23 Ill. 30; *Olds v. Cummings*, 31 Ill. 188; *Pardee v. Lindley*, 31 Ill. 174, 83 Am. Dec. 219; *Strother v. Law*, 54 Ill. 413; *Bush v. Sherman*, 80 Ill. 160. See also *Hamilton v. Lubukee*, 51 Ill. 415.

*Maryland.* — *Berry v. Skinner*, 30 Md. 567; *Harnickell v. Orndorff*, 35 Md. 341.

*Massachusetts.* — *Varnum v. Meserve*, 8 Allen (Mass.) 158.

*Minnesota.* — *Folsom v. Lockwood*, 6 Minn. 186; *Brown v. Delaney*, 22 Minn. 349.

*Missouri.* — *Beatie v. Butler*, 21 Mo. 313, 64 Am. Dec. 234; *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124; *Pickett v. Jones*, 63 Mo. 195.

*New Hampshire.* — *Bell v. Twilight*, 22 N. H. 500,

*Rhode Island.* — See also *Bradford v. King*, 18 R. I. 743.

*The Making of an Assignment for the Benefit of Creditors* is such a transfer of the assignor's interest as terminates his right to proceed with a sale under a power in a mortgage to him. *Merrick v. Putnam*, 73 Minn. 240.

7. *Assignee Entitled to Exercise the Power Without Express Stipulation.* — 4 Kent Com. 147; *Osborne v. Rowlett*, 13 Ch. D. 774 (*overruling Cooke v. Crawford*, 13 Sim. 91); *Berry v. Skinner*, 30 Md. 573; *Russum v. Wanser*, 53 Md. 92; *Western Maryland R. Land, etc., Co. v. Goodwin*, 77 Md. 271; *Maslin v. Marshall*, 94 Md. 480; *Pickett v. Jones*, 63 Mo. 195; *Bergen v. Bennett*, 1 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 281; *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458.

In *Alabama* this doctrine has been embodied in a provision of the Code (1896), § 1040, to the effect that where a power to sell land is given to the grantee in any mortgage or other conveyance intended to secure the payment of money, the power, being part of the security, may be exercised by any person or the personal representative of any person who, by assignment or otherwise, may become entitled to the money thus secured. *Graham v. Newman*, 21 Ala. 497; *Lewis v. Wells*, 50 Ala. 198; *Sloan v. Frothingham*, 65 Ala. 593; *Sanders v. Cassady*, 86 Ala. 246; *Hartley v. Matthews*, 96 Ala. 224.

Under this provision it is not necessary that the assignment of the debt should be couched in formal words. *McGuire v. Van Pelt*, 55 Ala. 344; *Buell v. Underwood*, 65 Ala. 285; *Wildsmith v. Tracy*, 80 Ala. 263; *Martinez v. Lindsey*, 91 Ala. 334; *Johnson v. Beard*, 93 Ala. 96.

*Right to Purchase Passing to Assignee.* — It has also been held in the same jurisdiction that where the conveyance authorizes the person

(2) *Right to Sell Incident to Transfer of Debt.* — This common-law right of the assignee to sell is incident to the transfer of the debt. The transfer of the mortgage alone does not confer it.<sup>1</sup> It has even been held that the assignment of the mortgage without the debt is a nullity.<sup>2</sup>

*c. EXPRESS AUTHORITY REQUIRED.* — In some jurisdictions it has been held that an assignee cannot exercise the power unless the mortgage expressly so provides.<sup>3</sup>

*Equitable Interest of Assignee.* — Under this view, in the absence of express authority, the assignee of the mortgage and secured debt acquires only an equitable interest in the property mortgaged and cannot exercise the power of sale.<sup>4</sup> The power remains in the original donee.<sup>5</sup>

*d. ASSIGNMENT TO BE RECORDED* — (1) *Statutory Provisions.* — In a number of the states there are statutes requiring that all assignments of the mortgage or secured debt shall be placed on record. A failure to comply with this requirement prevents an assignee from making a valid sale under the power.<sup>6</sup> Under these statutes the assignment must necessarily be in writing,<sup>7</sup> and in such form as to entitle it to be recorded.<sup>8</sup>

(2) *Reassignment.* — It is also necessary under these statutes that a reassignment of the debt to its original owner should be recorded.<sup>9</sup> In other

making the sale to purchase at such sale, the right so to purchase passes to an assignee of the debt the same as the power to sell passes. *Ward v. Ward*, 108 Ala. 278.

**Assignment Need Not Be Absolute Right of Pledgee.** — An assignment or pledge as collateral security for payment of a debt due the assignee will enable him to execute the power on default. *Holmes v. Turner's Falls Co.*, 150 Mass. 535; *Smith v. Commercial Nat. Bank*, 7 S. Dak. 465. See also *Cruse v. Nowell*, 2 Jur. N. S. 536; *Jenkins v. International Bank*, 111 Ill. 462; *Olcott v. Crittenden*, 68 Mich. 230.

**Power Withheld from Assignee.** — A mortgage vesting the power of sale in the mortgagee and upon certain named contingencies in the sheriff evinces an intention not to grant such power in any event to an assignee. *Dolbear v. Norduft*, 84 Mo. 619.

**1. Transfer of Mortgage Confers on Assignee No Authority to Sell.** — *Carpenter v. Longan*, 16 Wall. (U. S.) 271; *Adler v. Sargent*, 109 Cal. 42; *Hamilton v. Lubukee*, 51 Ill. 415; *Sanford v. Kane*, 133 Ill. 199, 23 Am. St. Rep. 602; *Pickett v. Jones*, 63 Mo. 199. Compare *Dameron v. Eskridge*, 104 N. Car. 621.

**The Assignment of One of Several Notes without an assignment of the mortgage leaves the right to sell under the power in the original mortgagee.** *Northern Cattle Co. v. Munro*, 83 Minn. 37, 85 Am. St. Rep. 444.

**2. Assignment of Mortgage a Nullity.** — *Carpenter v. Longan*, 16 Wall. (U. S.) 271; *Thayer v. Campbell*, 9 Mo. 280.

**3. Express Authority Required for Exercise of Power by Assignee.** — *Pardee v. Lindley*, 31 Ill. 174, 83 Am. Dec. 219; *Flower v. Elwood*, 66 Ill. 438; *Strother v. Law*, 54 Ill. 413.

**4. Assignee Acquires Equitable Interest Only.** — *Mason v. Ainsworth*, 58 Ill. 163; *Williams v. Teachey*, 85 N. Car. 402; *Dameron v. Eskridge*, 104 N. Car. 621; *Hussey v. Hill*, 120 N. Car. 312, 58 Am. St. Rep. 789.

**The Sale of One of Several Notes Secured by Mortgage, not accompanied by an assignment of the**

mortgage, leaves the right of foreclosing in the original mortgagee. *Northern Cattle Co. v. Munro*, 83 Minn. 37, 85 Am. St. Rep. 444.

**5. Power to Sell Remaining in Mortgagee.** — *Wilson v. Spring*, 64 Ill. 14; *Hussey v. Hill*, 120 N. Car. 312, 58 Am. St. Rep. 789.

**6. Assignment to Be Recorded.** — *Carli v. Taylor*, 15 Minn. 171; *Dunning v. McDonald*, 54 Minn. 1; *Hathorn v. Butler*, 73 Minn. 15; *Clark v. Mitchell*, 81 Minn. 438; *Morris v. McKnight*, 1 N. Dak. 266.

Where there is nothing in the statute which compels, requires, or permits the registration of the assignment, the transferee is under no obligation to procure or record the transfer, and putting it on record in such case gives no notice of his rights. *Adler v. Sargent*, 109 Cal. 42; *Kenney v. Jefferson County Bank*, 12 Colo. App. 24; *Reeves v. Hayes*, 95 Ind. 521; *Watson v. Dundee Mortg., etc., Invest. Co.*, 12 Oregon 474; *Howard v. Shaw*, 10 Wash. 151. See also the title **RECORDING ACTS**, vol. 24, p. 82.

**7. Hickey v. Richards**, 3 Dak. 345.

**8. Assignment to Be in Form Sufficient to Authorize Recordation.** — *Dohm v. Haskin*, 88 Mich. 144; *Lowry v. Mayo*, 41 Minn. 388.

**The Authority of an Attorney in Fact, duly empowered to make an assignment, need not be recorded with the assignment.** *Morrison v. Mendenhall*, 18 Minn. 232.

**An Assignment Written on the Back of a Mortgage, and referring to it as "the within described mortgage," is sufficient.** *Carli v. Taylor*, 15 Minn. 171.

**Assignment to Be in Firm Name.** — Where two mortgagees, being partners in a firm known as "Beecher and Dean," make separate individual assignments of the mortgage, such assignment is of no effect. *Morris v. McKnight*, 1 N. Dak. 266.

**9. Reassignment to Be Recorded.** — *Backus v. Burke*, 48 Minn. 260; *Burke v. Backus*, 51 Minn. 174.



words, the legal owner of the debt must be the same person as the owner on the face of the record.<sup>1</sup>

(3) *Failure to Record* — **Right to Redeem Vested.** — Where a foreclosure by an assignee is rendered invalid by the circumstance that the assignment of the mortgage is not properly recorded, it has been held that the right of redemption accruing by virtue of such defect is a vested right which cannot be taken away by subsequent legislation validating defective records.<sup>2</sup>

**5. Right of Executors and Administrators to Sell** — *a. REPRESENTATIVE OF MORTGAGEE* — (1) *Power Conferred in Mortgage.* — Where the mortgagee in a power of sale mortgage or the trustee in a deed of trust dies, the question arises whether the power may be exercised by the personal representative of such mortgagee or trustee. In the case of the death of a mortgagee it is, of course, held that his executor or administrator may exercise the power where the mortgage itself expressly confers it upon the mortgagee or his legal representative.<sup>3</sup>

(2) *Power Implied.* — It also seems to be fully established that the power may be exercised in such a case by the executor or administrator, although the representative be not mentioned in the mortgage,<sup>4</sup> but the almost universal custom to insert a clause providing for this contingency makes it necessary to appeal to such principle in rare instances only.

*b. REPRESENTATIVE OF DECEASED TRUSTEE.* — There is authority to the effect that the rule above stated does not apply to a trustee clothed with a power of sale. Thus, it has been held in *Illinois* that the legal representative of a trustee cannot lawfully carry the power into execution even though the trust deed expressly so provides.<sup>5</sup> This decision is placed on the ground that the power of the trustee is naked and not coupled with an interest. In *Maryland* it has been held on similar grounds that where the trustee has no interest in the debt at the time the trust is created, the subsequent assignment of the indebtedness to him will not suffice to authorize his executor to act.<sup>6</sup> The general rule, however, seems to be to the effect that, while authority on the part of the representative of the trustee to foreclose will not be implied, a provision in the contract expressly authorizing him to sell will be given full effect.<sup>7</sup>

*c. SALE BY FOREIGN REPRESENTATIVE* — (1) *General Rule.* — A power of sale given to a mortgagee and his legal representatives authorizes such representatives to carry the power into effect in a foreign jurisdiction without the formality of taking out letters of administration therein.<sup>8</sup> This decision is

1. Legal and Record Owner Must Be the Same Person. — *Clark v. Mitchell*, 81 Minn. 438.

Where There Are Two or More Successive Assignments, and no record is made of one of them, the sale is invalid. *Hathorn v. Butler*, 73 Minn. 15.

Evidence of Assignee's Title. — The assignee of a mortgage who derives title through the executor of a deceased mortgagee need not in the preliminary proceedings file a certificate of the appointment of the executor as evidence of his title. *Erb v. Grimes*, 94 Md. 92.

2. Curative Act Ineffectual as Against Vested Right of Redemption. — *Willis v. Jelineck*, 27 Minn. 18; *O'Brien v. Krenz*, 36 Minn. 136; *Lowry v. Mayo*, 41 Minn. 388.

3. Mortgage Conferring Power on Representative of Mortgagee. — *Saloway v. Strawbridge*, 1 Jur. N. S. 1194, 25 L. J. Ch. 121; *Merrin v. Lewis*, 90 Ill. 505; *Stevens v. Shannahan*, 160 Ill. 330; *Collins v. Hopkins*, 7 Iowa 462; *Fanning v. Kerr*, 7 Iowa 450; *Harnickell v. Orndorff*, 35 Md. 341; *Demorest v. Wynkoop*,

3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467; *Yount v. Morrison*, 109 N. Car. 520.

4. Personal Representative of Mortgagee May Foreclose Without Being Expressly Authorized. — *Emanuel v. Hunt*, 2 Ala. 190; *Lewis v. Wells*, 50 Ala. 198; *Berry v. Skinner*, 30 Md. 567; *Maslin v. Marshall*, 94 Md. 480; *Look v. Kenney*, 128 Mass. 284.

5. Representative of Trustee Without Right to Foreclose. — *Warnecke v. Lemba*, 71 Ill. 91, 22 Am. Rep. 85; *Waughop v. Bartlett*, 165 Ill. 124, affirming 61 Ill. App. 252.

6. Executor of Trustee. — *Barrick v. Horner*, 78 Md. 253, 44 Am. St. Rep. 283. Compare *Taylor v. Carroll*, 89 Md. 32.

7. Representative of Trustee Expressly Authorized to Sell. — *Sulphur Mines Co. v. Thompson*, 93 Va. 293; *Crenshaw v. Seigfried*, 24 Gratt. (Va.) 272.

8. Right of Foreign Representative to Act Without Qualifying in Jurisdiction. — *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389; *Stevens v. Shannahan*, 160 Ill. 330 (*dis-*

based on the ground that while the courts of one state do not recognize a foreign administrator as such, they do nevertheless recognize his right to execute the power as a matter of contract and not of jurisdiction.

(2) *Statutory Provisions.* — In some of the states there are statutes requiring the foreign representative to record a certified copy of his letters. The failure to comply with such provision has, in *Alabama*, been held to nullify the sale altogether.<sup>1</sup>

**6. Right of Corporation to Exercise Power — Maryland Rule.** — A corporation which is authorized to hold a mortgage as security at all should in reason be allowed to exercise the power of sale where such power is conferred. In *Maryland*, however, by judicial construction of the local statutes, the right to foreclose by sale is denied to corporations.<sup>2</sup> The corporation which takes a mortgage with power of sale or a deed of trust in this state must therefore either assign it to a natural person where the deed permits such assignment,<sup>3</sup> or must resort to a bill in equity, in order to foreclose, since the inability of the corporation to execute the power arises from the infirmity of the corporation itself and not from any defect in the power.

The Rule Cannot Be Evaded by Permitting an Attorney of the Corporation to Execute the Power unless the particular attorney be named in the mortgage or deed itself.<sup>4</sup>

**VII. WHEN RIGHT TO SELL ACCRUES — 1. In General.** — The question as to when the power of sale becomes operative so as to be capable of exercise depends upon the terms of the mortgage or deed of trust, and the contingency on which the right attaches must in all cases transpire before the right to sell exists.<sup>5</sup>

**2. Default in Payment of Debt — a. CONDITION PRECEDENT.** — The failure to pay the secured debt at its maturity is, of course, usually made a ground for the exercise of the power, and such default is generally a condition precedent to the right to sell or to institute proceedings intended to culminate in a sale. Sales made before the power has become effective are generally treated as void.<sup>6</sup>

*tinguishing* *Judy v. Kelley*, 11 Ill. 211, 50 Am. Dec. 455; *Lee v. Clary*, 38 Mich. 223; *Holcombe v. Richards*, 38 Minn. 38; *Hayes v. Frey*, 54 Wis. 503.

**1. Failure of Foreign Representative to Record Letters.** — *Sloan v. Frothingham*, 65 Ala. 593. See *Cone v. Nimocks*, 78 Minn. 249, where it is held that a statutory requirement imposed on executors does not apply to the assignee of such executor.

**2. Maryland Rule.** — In this state the trust to sell is said to be personal and not corporate, and it is held that the statutory requirement for the trustee to act under oath cannot be fulfilled in case of corporations. *Queen City Perpetual Bldg. Assoc. v. Price*, 53 Md. 397.

**3. Natural Person May Foreclose as Assignee of Corporation.** — *Chilton v. Brooks*, 71 Md. 445; *Maslin v. Marshall*, 94 Md. 480. *Contra* where the mortgage does not vest the power in the corporation or its "assigns." *Queen City Perpetual Bldg. Assoc. v. Price*, 53 Md. 398.

**4. Foreclosure by Attorney of Corporation.** — *Frostburg Mut. Bldg. Assoc. v. Lowdermilk*, 50 Md. 175.

**5. Demand Before Sale Necessary** where mortgage secures note payable on demand. *Slingo v. Steele-Wedeles Co.*, 82 Ill. App. 139.

**The Incurring of Damages** is a condition precedent to the right of selling under a mortgage executed as indemnity. *Honaker v. Vesey*, 57 Neb. 413.

**A Covenant Against Incumbrances** in a warranty deed must be fulfilled before the vendor of land can sell under a trust deed given to secure the purchase price. *Coffman v. Scofield*, 86 Ill. 300. *Aliter*, where there is no special covenant against incumbrances, but only general covenants of warranty. *Fairman v. Peck*, 87 Ill. 156.

**6. Default a Condition Precedent to Valid Sale.** — *Richards v. Holmes*, 18 How. (U. S.) 143; *Chicago, etc., R. Co. v. Kennedy*, 70 Ill. 350; *Gustav Adolph Bldg. Assoc. v. Kratz*, 55 Md. 394; *Foster v. Boston*, 133 Mass. 143; *Rogers v. Barnes*, 169 Mass. 179; *Pratt v. Tinkcom*, 21 Minn. 142; *Eitelgeorge v. Mutual House Bldg. Assoc.*, 69 Mo. 52; *Long v. Long*, 79 Mo. 644; *Potomac Mfg. Co. v. Evans*, 84 Va. 717. See, however, *Schanewerk v. Hoberecht*, 117 Mo. 22, 38 Am. St. Rep. 631.

**A Mortgage Executed to Secure a Debt Past Due** may be foreclosed upon delivery *eo instante*. *Johnston v. Robuck*, 104 Iowa 523; *Farrell v. Bean*, 10 Md. 217. See also *Phelps v. Fockler*, 61 Iowa 340; *Bearss v. Preston*, 66 Mich. 11.

**Time of Default Determined by Terms of Mortgage.** — Where a mortgage specifies October 1, 1882, as the date upon which payment of the whole debt is to be made, the land cannot be sold until that date, although the debt is really represented by several notes some of which mature prior thereto, and the mortgage recites that it is made to secure such notes. *Keith*

*b. SALE BEFORE MATURITY — (1) Default Waived.* — Still it is obviously within the power of the grantor to waive the right to insist upon default, and the exercise of the power before the maturity of the debt is upheld where the mortgage or deed itself stipulates that the mortgagee or trustee may take possession and sell before default occurs.<sup>1</sup>

(2) *Insecurity Clause — (a) Discretion of Mortgagee.* — An insecurity clause is often inserted in chattel mortgages whereby the creditor is authorized to take possession of the mortgaged property and sell the same should he at any time deem himself to be insecure. Such a provision justifies a sale before default in the payment of the debt,<sup>2</sup> and necessarily clothes the creditor with a discretion. If he acts in good faith, and actually believes that a sufficient ground for selling exists, he may exercise the power with impunity although a jury might, under the particular facts, believe that the reason assigned is insufficient.<sup>3</sup>

(b) *Good Faith Required.* — Good faith, however, is always required, and the clause in question does not confer upon the creditor the right to act arbitrarily or capriciously.<sup>4</sup> It has indeed been held in several jurisdictions that the creditor's feeling of insecurity must be based on reasonable grounds<sup>5</sup> arising after the execution of the mortgage.<sup>6</sup>

*c. PERIOD OF GRACE AFTER DEFAULT.* — If the power is by its terms exercisable only after default has continued for a specified length of time, no valid sale can be made until such period has fully expired;<sup>7</sup> and the proceedings for sale cannot be commenced before the expiration of the period stated.<sup>8</sup>

*d. VOLUNTARY DELAY IN SELLING AFTER DEFAULT.* — It is a general rule that mere failure to exercise the power of sale as soon as the default occurs does not, in the absence of statute, affect the validity of the mortgage or trust deed,<sup>9</sup> especially where the delay is acquiesced in by the mortgagor.<sup>10</sup>

*v. McLaughlin*, 105 Ala. 339. To the same effect see *Earle v. Gorham Mfg. Co.*, 2 N. Y. App. Div. 460.

The Costs of Proceedings to Obtain a Sale of the mortgaged premises is such a charge upon the estate as will entitle the mortgagee to proceed to a sale in the case of nonpayment, although the principal and interest have been paid. *Thompson v. Holman*, 28 Grant Ch. (U. C.) 35; *Paynter v. Carew*, 18 Jur. 417.

1. *Right of Mortgagee to Sell Before Maturity of Debt.* — *Hocking Valley Coal Co. v. Climie*, (Iowa 1902) 92 N. W. Rep. 77; *Schmitt diel v. Moore*, 101 Mich. 590.

2. *Election of Creditor to Foreclose Before Default.* — *Schmitt diel v. Moore*, 101 Mich. 590; *Cole v. Shaw*, 103 Mich. 505.

*Mortgagee Authorized to Take Possession and Sell "Whenever He Chooses to Do So."* — *Landenberger v. Rector*, 59 Ill. App. 550; *Robinson v. Gray*, 90 Iowa 699 (*distinguishing Carroll Bank v. Taylor*, 67 Iowa 572). See *Koster v. Seney*, 100 Iowa 558.

*Sale Before Time of Extension Expires.* — Where the insecurity clause is inserted the mortgagee may sell at once although he has contracted to extend the time of the principal obligation. *Beckman v. Noble*, 115 Mich. 523.

3. *Discretion Reposed in Creditor.* — *Woods v. Gaar*, 93 Mich. 143.

4. *Good Faith Required.* — *Wells v. Chapman*, 59 Iowa 660; *Richardson v. Coffman*, 87 Iowa 121.

5. *Reasonable Basis for Insecurity.* — *Deal v. Osborne*, 42 Minn. 102; *Nash v. Larson*, 80 Minn. 458, 81 Am. St. Rep. 272; *Okarche First Nat. Bank v. Teat*, 4 Okla. 454; *Brook v. Bayless*, 6 Okla. 568.

That the Property Has Been Seized in Distress at the instance of a third person, is a reasonable ground for exercising the option conferred by the insecurity clause. *McCarthy v. Hetzner*, 70 Ill. App. 480.

6. *Campbell v. Doggett*, (Miss. 1898) 23 So. Rep. 371.

7. *Period of Grace After Default.* — *Central Trust Co. v. Worcester Cycle Mfg. Co.*, 93 Fed. Rep. 712, 35 C. C. A. 547; *Poster v. Boston*, 133 Mass. 143; *Powers v. Kueckhoff*, 41 Mo. 425, 97 Am. Dec. 281; *Eitelgeorge v. Mutual House Bldg. Assoc.*, 69 Mo. 52.

*Who May Complain* — A provision deferring the sale under a power for a stated period is personal to the mortgagor, and his general creditors cannot take advantage thereof. *Central Trust Co. v. Worcester Cycle Mfg. Co.*, 93 Fed. Rep. 712, 35 C. C. A. 547, 110 Fed. Rep. 491.

8. *Holden v. Gilbert*, 7 Paige (N. Y.) 208.

*Period of Default Cannot Run Concurrently with Period of Notice.* — *Gibbons v. McDougall*, 26 Grant Ch. (U. C.) 214. But see *Grant v. Canada L. Assur. Co.*, 29 Grant Ch. (U. C.) 256; also *Metters v. Brown*, 9 Jur. N. S. 958.

9. *Failure to Take Possession and Sell at Law Day, i. e., at Maturity of Mortgage.* — *Mitcham v. Schuessler*, 98 Ala. 635; *Pugh v. Harwell*, 108 Ala. 486; *Houck v. Linn*, 48 Neb. 227; *Streeter v. Johnson*, 23 Nev. 194; *Sprights v. Hawley*, 39 N. Y. 441, 100 Am. Dec. 452; *Marshall v. Crawford*, 45 S. Car. 189. See also *Pitts Agricultural Works v. Baker*, 11 S. Dak. 342; *Parlin, etc., Co. v. Hanson*, 21 Tex. Civ. App. 401.

10. *Acquiescence of Mortgagor.* — *Dinniny v. Gavin*, 4 N. Y. App. Div. 298.



But in *Illinois* it has been held that a failure to take possession of the mortgaged chattels within a reasonable time after the debt matures will cause the creditor to lose his lien as against judgment creditors.<sup>1</sup>

*c* PRESUMPTION OF DEFAULT. — After the sale has been consummated it will be presumed that the contingency authorizing the exercise of the power has occurred, and the burden of proof is on a mortgagor who seeks to set aside the sale to aver and prove the contrary.<sup>2</sup>

Where There Is a Dispute as to the Existence of Default, the mortgagor may have an injunction to restrain the advertised sale until the question of default can be judicially determined.<sup>3</sup>

**3 Provisions Accelerating Maturity of Indebtedness** — *a*. ELECTION OF CREDITOR. — It is not uncommon to find in mortgages and deeds of trust provisions declaring that upon the happening of certain contingencies, such as the nonpayment of any one note in a series,<sup>4</sup> or the nonpayment of interest,<sup>5</sup> taxes,<sup>6</sup> or insurance,<sup>7</sup> the creditor may elect to treat the whole debt as due,<sup>8</sup> or that it shall be forthwith due and collectible.<sup>9</sup>

The Election of the Creditor to treat the whole debt as due may be shown by circumstances, and no formal declaration on his part that the debt is due is necessary.<sup>10</sup> Thus the election of the creditor is sufficiently indicated by the fact that he claims the whole debt to be due in his notice of sale.<sup>11</sup> The right to make the election can be exercised by an assignee of the debt and mortgage.<sup>12</sup>

*b*. VALIDITY OF ACCELERATION CLAUSE. — Such a stipulation is valid, and the power of sale becomes operative upon the happening of any of the contingencies provided for.<sup>13</sup> In such case, however, the indebtedness is due only *pro hac vice* for the purpose of justifying the sale and to authorize the pay-

1. *Hewitt v. General Electric Co.*, 61 Ill. App. 168.

2. **Burden of Proof.** — *Pope v. Durant*, 26 Iowa 233.

3. **Sale Enjoined Pending Controversy as to Existence of Default.** — *Bidwell v. Whitney*, 4 Minn. 71; *Dickerson v. Hayes*, 26 Minn. 100; *O'Brien v. Oswald*, 45 Minn. 59.

4. **Nonpayment of One Note in a Series.** — *Gibbons v. Hoag*, 95 Ill. 45; *Wisner v. Chamberlin*, 117 Ill. 568.

5. **Nonpayment of Interest.** — *Richards v. Holmes*, 18 How. (U. S.) 143; *Hooper v. Stump*, (Ariz. 1887) 14 Pac. Rep. 799; *Dalton v. Eaves*, 92 Mo. App. 72.

**Three Interest Instalments Overdue.** — *Jouett v. Gunn*, 13 Tex. Civ. App. 84.

**Rent Applicable to Interest.** — Where there is an understanding that rent due from the mortgagee is to be applied in discharge of interest, a sale is improper where the sole ground therefor is the nonpayment of interest, enough rent being due to discharge the same, where there is also evidence to show an application thereof. *Cockburn v. Edwards*, 18 Ch. D. 449. Compare *Brocklehurst v. Jessop*, 7 Sim. 442.

6. **Nonpayment of Taxes.** — *Pope v. Durant*, 26 Iowa 233.

**Where the Nonpayment of Interest or Taxes Is Made a Ground for Accelerating the Exercise of the Power,** a tender, to stop the sale, must include both interest and taxes where both are in arrears. *Da Silva v. Turner*, 166 Mass. 407.

7. **Breach of Covenant to Keep Up Insurance.** — *Berg v. Olson*, 88 Minn. 392; *Fenley v. Cassidy*, (R. I. 1899) 43 Atl. Rep. 296.

8. **Election to Treat Whole as Due.** — *Lincoln v. Corbett*, 31 Tex. Civ. App. 352.

9. **Debt Becoming Due Ipso Facto upon Default in Payment of Part.** — *McMillan v. Grayston*, 83 Mo. App. 425.

10. **Circumstances Showing Election.** — *Dunton v. Sharpe*, 70 Miss. 850.

**Acceptance of a Payment** the nonpayment of which has already resulted in accelerating the maturity of the whole debt, operates as a waiver of the forfeiture and restores the former status. *McMillan v. Grayston*, 83 Mo. App. 425; *Earle v. Gorham Mfg. Co.*, 2 N. Y. App. Div. 460.

11. **Debt Declared Due in Notice of Sale.** — *Washburn v. Williams*, 10 Colo. App. 153; *Fowler v. Woodward*, 26 Minn. 347.

**An Election Not to Renew a Note** as provided by its terms is indicated by the act of the creditor in advertising and selling shortly after its maturity. *Sacramento Bank v. Copey*, 133 Cal. 663, 85 Am. St. Rep. 242.

12. **Election by Assignee.** — *Heath v. Hall*, 60 Ill. 344.

13. **Provision for Accelerating Maturity of Debt Valid.** — *McLean v. Presley*, 56 Ala. 211; *Magnusson v. Williams*, 111 Ill. 450; *Hoodless v. Reid*, 112 Ill. 105; *Wisner v. Chamberlin*, 117 Ill. 568; *Gorham v. Farson*, 119 Ill. 425; *Pope v. Durant*, 26 Iowa 233; *Philips v. Bailey*, 82 Mo. 639; *Meier v. Meier*, 105 Mo. 411; *Dalton v. Eaves*, 92 Mo. App. 72; *Capehart v. Dettrick*, 91 N. Car. 344; *Kitchin v. Grandy*, 101 N. Car. 86; *Whitehead v. Morrill*, 108 N. Car. 65.

**Attachment of Mortgaged Property** — A clause providing that the mortgagor shall not suffer the property to be taken under attachment and that if it be so taken the mortgagee may seize and sell the property, is valid. *Donahoe v. Gilton*, 167 Mass. 24.

ment of all the notes out of the proceeds of the sale;<sup>1</sup> and it has been held that, notwithstanding such provision, an action cannot be maintained on the undue notes until they mature according to their terms.<sup>2</sup> The contrary doctrine, however, prevails in some jurisdictions.<sup>3</sup>

*c. CONSTRUCTION.* — Decisions are to be found which evince a desire to restrict the meaning of the acceleration clause to very narrow limits. Thus, in *Iowa*, a provision authorizing the mortgagee to take possession when he chooses, and to sell for the payment of the debt, justifies him in taking and holding possession at any time, but does not authorize him to sell until the notes mature.<sup>4</sup> The general disposition of the courts, however, is to let the parties abide by the contract as written, without straining construction in favor of either.<sup>5</sup>

**4. Request of Creditor** — *a. CONDITION PRECEDENT.* — As the trustee has no personal interest in the payment of the debt, it is proper for him to refrain from selling until he is requested so to do by the creditor. A sale made without such request is considered officious and may afford evidence of bad faith. The courts accordingly show a disposition to hold that a request from the creditor is a condition precedent to the right of the trustee to sell when the trust deed provides that he shall sell upon such request.<sup>6</sup>

*b. SALE ON INITIATIVE OF TRUSTEE.* — If, however, the deed does not provide for such request, the trustee may make a valid sale upon his own motion.<sup>7</sup>

**A Request Made After the Trustee Has Already Advertised** has been held not to be sufficient to cure the irregularity.<sup>8</sup>

*c. RATIFICATION.* — A creditor who ratifies a sale made without a request from him, as by purchasing at the sale, cannot have the sale set aside for the irregularity.<sup>9</sup> An acceptance of the proceeds of a sale made without a previ-

**1. Effect of Accelerating Clause.** — *Morgan v. Martien*, 32 Mo. 438; *Mason v. Barnard*, 36 Mo. 384.

**2. No Personal Recovery on Undue Note.** — *Indiana*, etc., R. Co. v. *Sprague*, 103 U. S. 756; *White v. Miller*, 52 Minn. 367; *Mallory v. West Shore Hudson River R. Co.*, 35 N. Y. Super. Ct. 174; *McClelland v. Bishop*, 42 Ohio St. 113.

**3. Debt Due for All Purposes.** — *Wheeler*, etc., Mfg. Co. v. *Howard*, 28 Fed. Rep. 741; *Chambers v. Marks*, 93 Ala. 412; *Parker v. Olliver*, 106 Ala. 549; *Noel v. Gaines*, 68 Mo. 649. See also *Standliff v. Norton*, 11 Kan. 218.

**4. Strict Construction of Acceleration Clause.** — *Koster v. Seney*, 100 Iowa 558, approving *Carroll Bank v. Taylor*, 67 Iowa 572, and distinguishing *Robinson v. Gray*, 90 Iowa 699.

**5. Close Construction Not Favored.** — *Cole v. Shaw*, 103 Mich. 505. See also opinion of *Robinson, J.*, dissenting, in *Koster v. Seney*, 100 Iowa 558.

**6. Request from Beneficiary Essential.** — *Watson v. Waltham*, 2 Ad. & El. 485, 29 E. C. L. 153, 1 Hurl. & W. 24; *Bent-Otero Imp. Co. v. Whitehead*, 25 Colo. 354, 71 Am. St. Rep. 140; *Walker v. Brungard*, 13 Smed. & M. (Miss.) 723; *Magee v. Burch*, 108 Mo. 336; *Bomar v. West*, 87 Tex. 299; *Harrold v. Warren*, (Tex. Civ. App. 1898) 46 S. W. Rep. 657.

**Delivery of Note by Beneficiary to Trustee for Collection** is in effect a request to sell. *Jouett v. Gunn*, 13 Tex. Civ. App. 84.

**Where the Deed Requires a Request by the Grantor** a valid sale cannot be made without

such request. *Walker v. Brungard*, 13 Smed. & M. (Miss.) 723.

**A Request Made by Person Other than the Creditor**, as by a purchaser at a prior invalid sale under the power, is of no effect. *Boone v. Miller*, 86 Tex. 74, reversing *Miller v. Boone*, (Tex. Civ. App. 1893) 22 S. W. Rep. 102.

**7. Wood v. Augustine**, 61 Mo. 46.

**Where the Sale Is Made under Order of Court**, a request from the creditor is not necessary. *Krieger v. Bissell*, 80 Ky. 330.

**A Provision Authorizing the Trustee to Wait** until requested to sell does not operate as a postponement of the law day of the mortgage. *Brock v. Headen*, 13 Ala. 370.

**8. Request Made After Publication.** — *Equitable Trust Co. v. Fisher*, 106 Ill. 189. *Contra*, *Cassady v. Wallace*, 102 Mo. 575.

**Request by Holder of One Note of a Series.** — A trust deed securing a series of notes provided that in case of default "in the payment of said notes or of either of them" a sale should be had at the instance of the payee "or the legal holder of said notes." The notes were negotiated to different parties, and a sale was made by the trustee at the request of the holder of only one of the notes in question, the other notes not being as yet due. Premitting the question as to whether a request from all the holders would be sufficient, the court held that a request by the holder of less than the whole series was nugatory. The sale was accordingly held void. *Bomar v. West*, 87 Tex. 299.

**9. Ratification by Beneficiary.** — *Blake v. McKusick*, 8 Minn. 338.

ous request constitutes a sufficient waiver on the part of the beneficiary.<sup>1</sup> Likewise the mortgagor himself cannot impeach the sale after having relied upon and confirmed it in a former action.<sup>2</sup>

**VIII. DURATION OF RIGHT TO SELL** — 1. **Power Limited in Time.** — Where the power is by its own terms limited to a specified time, it ceases absolutely if not executed within that time.<sup>3</sup>

2. **Indebtedness Barred** — *a.* **GENERAL RULE.** — The fact that the debt secured is barred by the statute of limitations does not, in general, affect the right of selling under the power for the purpose of applying the proceeds of the sale to the debt;<sup>4</sup> since the bar of the statute merely takes away the remedy by action on the debt. The contrary rule has, however, been adopted in *Kentucky* and *Illinois*.<sup>5</sup>

*b.* **STATUTORY PROVISIONS.** — In some jurisdictions statutes have been enacted limiting the duration of the power.<sup>6</sup> A general provision that an action to foreclose mortgages shall be brought within a specified time has no application to foreclosure by sale under the power.<sup>7</sup>

3. **Right to Sell Terminated by Tender** — *a.* **IN GENERAL.** — The owner of the equity of redemption has the right to prevent a sale under the power by making a tender of the amount due and all accrued costs at any time before the sale takes place; and if the tender is refused and the sale proceeded with, equity will interfere by injunction or by setting the sale aside.<sup>8</sup> The tender

1. *Norwood v. Lassiter*, 132 N. Car. 52.

2. **Ratification by Grantor.** — *Blake v. McKusick*, 10 Minn. 251.

3. **Duration of Power Limited by Terms of Deed.** — *Lockett v. Hill*, 1 Woods (U. S.) 552; *Reilly v. Cullen*, 101 Mo. App. 32.

**Apparent Limitation Directory Only.** — Where a power of sale given to trustees contained the clause, "provided always that the same be sold within eighteen months from the date hereof," it was held that this was merely directory, and not a limitation upon the power. *Parsons v. Rhodes*, 22 Hun (N. Y.) 80.

4. **Bar of Statute No Obstacle to Sale under Power** — *United States*. — *Opie v. Castleman*, 32 Fed. Rep. 511; *Harding v. Boyd*, 113 U. S. 765. *California*. — *Grant v. Burr*, 54 Cal. 298.

*Mississippi*. — *Bush v. Cooper*, 26 Miss. 599, 59 Am. Dec. 270.

*Missouri*. — *Cape Girardeau County v. Harbison*, 58 Mo. 90; *Wood v. Augustine*, 61 Mo. 46; *Booker v. Armstrong*, 93 Mo. 49; *Lewis v. Schwenn*, 93 Mo. 26, 3 Am. St. Rep. 511; *Gardner v. Terry*, 99 Mo. 523; *Orr v. Rode*, 101 Mo. 387.

*North Carolina*. — *Capehart v. Dettrick*, 91 N. Car. 344; *Arrington v. Rowland*, 97 N. Car. 131; *Jenkins v. Wilkinson*, 113 N. Car. 532; *Taylor v. Hunt*, 118 N. Car. 172; *Hedrick v. Byerly*, 119 N. Car. 420; *Cone v. Hyatt*, 132 N. Car. 810; *Menzel v. Hinton*, 132 N. Car. 660, 95 Am. St. Rep. 647.

*Pennsylvania*. — *Slagmaker v. Wilson*, 1 P. & W. (Pa.) 216; *Hartman's Estate*, 153 Pa. St. 530, 34 Am. St. Rep. 717.

*Texas*. — *Blackwell v. Barnett*, 52 Tex. 331; *Goldfrank v. Young*, 64 Tex. 432; *Fievel v. Zuber*, 67 Tex. 275; *Mott v. Maris*, (Tex. Civ. App. 1894) 29 S. W. Rep. 825; *Adams v. Kaufman*, 11 Tex. Civ. App. 170.

*Wisconsin*. — *Hayes v. Frey*, 54 Wis. 503.

5. **Power of Sale Gone When Debt Barred.** — *Emory v. Keighan*, 88 Ill. 482; *Schifferstein v. Allison*, 123 Ill. 664; *Jones v. Lander*, 21 Ill.

App. 510; *First Nat. Bank v. Thomas*, (Ky. 1897) 3 S. W. Rep. 12.

6. **Ten Years Limitation.** — *Hill v. Gregory*, 63 Ark. 317; *Union, etc., Bank v. Smith*, 10, Tenn. 476.

**A Statute Limiting the Right to Foreclose by Advertisment to Ten Years After Maturity**, the act to take effect in one year from its passage, gives a reasonable time as to mortgages already matured, and foreclosures not completed by sale within the year come under the operation of the statute. It is sufficient merely to commence foreclosure within the year. *Archambau v. Green*, 21 Minn. 520; *Duncan v. Cobb*, 32 Minn. 460.

**Right to Sell Destroyed by Adverse Possession.** — *Gardner v. Terry*, 99 Mo. 523.

7. **Limitation on Right of Action Only.** — *Golcher v. Brishin*, 20 Minn. 453; *Cone v. Hyatt*, 132 N. Car. 810; *Menzel v. Hinton*, 132 N. Car. 660, 95 Am. St. Rep. 647, *distinguishing* *Hutaff v. Adrian*, 112 N. Car. 259.

8. **Right to Sell Terminated by Tender.** — *Rhodes v. Buckland*, 16 Beav. 212; *Jenkins v. Jones*, 6 Jur. N. S. 391; *Whitworth v. Rhodes*, 20 L. J. Ch. 105; *McCalley v. Otey*, 90 Ala. 302, *affirmed* 99 Ala. 584, 42 Am. St. Rep. 87; *Hayward v. Munger*, 14 Iowa 516; *Whelan v. Reilly*, 61 Mo. 565; *Philips v. Bailey*, 82 Mo. 639; *Olmstead v. Tarsney*, 69 Mo. 396; *Thorn-ton v. National Exch. Bank*, 71 Mo. 221; *Cameron v. Irwin*, 5 Hill (N. Y.) 272; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553, 26 Am. Rep. 627; *Burnett v. Denniston*, 5 Johns. Ch. (N. Y.) 35. See also *Struve v. Childs*, 63 Ala. 473.

**Costs Unascertained.** — A sale made after a tender of the principal and interest alone has been set aside as against the mortgagee and a person buying with notice, the costs not having been ascertained at the time of the tender. *Jenkins v. Jones*, 2 Giff. 99, 6 Jur. N. S. 301.

**The Actual Proffer of the Money** is dispensed with if the debtor, being ready and willing to



may be made to a trustee having the note and deed in his hands for collection.<sup>1</sup>

**The Offer to Be Effective Must Be an Offer of Payment**, and not merely an offer to buy the note and hold by assignment.<sup>2</sup>

**The Effect of a Tender** upon the lien of the mortgage or trust deed is treated elsewhere.<sup>3</sup>

**b. TENDER IN CASE OF ACCELERATION.** — Where there is a series of notes and a provision is inserted in the deed of trust executed to secure them to the effect that upon the failure to pay any one note all shall thereupon become due, a debtor may at any time stop a threatened sale under the power upon making a tender of the amount of the note then due together with the accrued costs. The creditor in such case has no right to insist upon payment of the entire debt.<sup>4</sup>

**Interest and Taxes.** — The same rule is applied where the debt is accelerated by nonpayment of interest or taxes. The mortgagor is required to pay only the amount actually past due.<sup>5</sup>

**4. Right to Sell Terminated by Discharge of Debt** — *a. PAYMENT.* — While the power of sale contained in a mortgage or deed of trust is not affected by a change in the form of indebtedness, as where it is renewed,<sup>6</sup> or reduced to judgment,<sup>7</sup> payment of the debt before sale extinguishes the mortgage,<sup>8</sup> and with it the power of sale.<sup>9</sup>

*b. DISCHARGE BY OTHER MEANS.* — Likewise any act, transaction, or agreement which operates to satisfy the debt, such as a voluntary release under statutes giving effect thereto, or an accord and satisfaction, will also annul the power to sell.<sup>10</sup>

*c. ENTERING RELEASE OF RECORD* — (1) *Duty of Trustee or Mortgagee.* — The debt being extinguished, it is the duty of the mortgagee, trustee, or beneficiary, as the case may be, to acknowledge the satisfaction of record and release the lien.<sup>11</sup> If all the parties in interest so request, the trustee is bound

pay, is prevented from actually producing it by the creditor's declaring that he will not receive it. *Rudolph v. Wagner*, 36 Ala. 702; *McCalley v. Otey*, 99 Ala. 584, 42 Am. St. Rep. 87. See also the title *TENDER*, *ante*, p. 1.

**Offer of Payment Made in Bill Filed Before Sale Sufficient.** — *Way v. Mullett*, 143 Mass. 49; *Clark v. Griffin*, 148 Mass. 540.

1. *Hayward v. Munger*, 14 Iowa 516.

2. **Offer to Purchase Insufficient.** — *Magnusson v. Williams*, 111 Ill. 450; *Chase v. Williams*, 74 Mo. 429.

**A Puise Incumbrancer**, it seems, has the right to insist on a sale and transfer to him of the prior indebtedness. *Rhodes v. Buckland*, 16 Beav. 212.

3. See the title *TENDER*, *ante*, p. 1, and the cross-references found under that title.

**4. Tender of Amount Past Due Stops Sale and Abates Maturity of Undue Remainder.** — *Flower v. Elwood*, 66 Ill. 438; *Whelan v. Reilly*, 61 Mo. 565; *Lapsley v. Howard*, 119 Mo. 480; *Wolz v. Parker*, 134 Mo. 458. *Contra*, *Lincoln v. Corbett*, 31 Tex. Civ. App. 352.

5. *Philips v. Bailey*, 82 Mo. 639.

6. **Renewal of Debt.** — *Christian v. Newberry*, 61 Mo. 446.

7. **Reduction of Debt to Judgment.** — *Bank of Metropolis v. Guttschlick*, 14 Pet. (U. S.) 19; *Hewitt v. Templeton*, 48 Ill. 367; *Ross v. Worthington*, 11 Minn. 438, 88 Am. Dec. 95; *Hanna v. Wilson*, 3 Gratt. (Va.) 232; *Coles v. Withers*, 33 Gratt. (Va.) 186; *Bowie v. Poor School Soc.*, 75 Va. 300; *Stimpson v. Bishop*, 82 Va. 190; *Paxton v. Rich*, 85 Va.

378; *Gibson v. Green*, 89 Va. 524, 37 Am. St. Rep. 888.

8. As to effect of payment on mortgages in general, see the titles *MORTGAGES*, vol. 20, pp. 1055 *et seq.*; *FORECLOSURE OF MORTGAGES*, vol. 13, p. 818.

9. **Power to Sell Extinguished by Payment.** — *Askew v. Sanders*, 84 Ala. 356; *Ryan v. Rice*, 109 Ga. 448; *Redmond v. Packenham*, 66 Ill. 434; *Lycoming F. Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386; *Penny v. Cook*, 19 Iowa 538; *Whelan v. Reilly*, 61 Mo. 565. *Compare Phillips v. W. T. Adams Mach. Co.*, 52 La. Ann. 442.

10. See *James v. Withers*, 126 N. Car. 715.

**Absolute Conveyance of Land** from debtor to the beneficiary in a deed of trust, operating as satisfaction of the trust deed. *Scruggs v. Williams*, 5 Lea (Tenn.) 478. *Compare McKinney v. Matthews*, (Tex. 1888) 6 S. W. Rep. 793.

**A Quitclaim Deed from the Grantor to the Beneficiary** in a trust deed will not be treated as a satisfaction of the debt, in the absence of evidence that such was the intention of the parties. *Colins v. Stocking*, 98 Mo. 290.

**Quitclaim Deed from Grantee to Grantor** operating as a release of the lien, see *Benson v. Markoe*, 41 Minn. 112.

11. **Release of Trust Deed.** — A statute providing for the marginal release of mortgages applies to trust deeds. *McGregor v. Hall*, 3 Stew. & P. (Ala.) 397; *Ingle v. Culbertson*, 43 Iowa 265; *Smith v. Doe*, 26 Miss. 291; *Woodruff v. Robb*, 19 Ohio 212; *Crosby v. Huston*, 1 Tex. 239.

to discharge the trust deed, even though the evidences of debt are not actually canceled.<sup>1</sup>

(2) *Refusal to Enter Release.* — In case of a refusal to enter a release, the party aggrieved may sue for damages, if the injury has resulted, or he may file a bill to remove the cloud.<sup>2</sup>

(3) *Unauthorized Release.* — Though nominally possessed of the legal title the trustee has no authority to release the trust deed where the debt has not in fact been paid, and a release executed under such circumstances will be set aside.<sup>3</sup> But a release made by the person entitled to execute it, being also in proper form, is of course *prima facie* valid,<sup>4</sup> and a subsequent innocent purchaser will get a good title.<sup>5</sup> As between the original parties, or as to subsequent purchasers with notice, an unauthorized release is of no effect, and an action to set it aside is not necessary before proceeding to foreclose.<sup>6</sup>

d. *VALIDITY OF SALE MADE AFTER DISCHARGE.* — The power to sell being wholly taken away by the extinguishment of the debt, it follows that a sale thereafter made is either void<sup>7</sup> or voidable.<sup>8</sup>

*Estoppel of Mortgagor.* — As against an innocent purchaser, the mortgagor may estop himself from the right to complain by seeing the sale made without giving notice of such extinguishment.<sup>9</sup>

5. *Right to Sell as Affected by Promise of Forbearance.* — An arrangement between the creditor and debtor to extend the time of payment until further notice, even though made without valuable consideration, is admissible in evidence as tending to show fraud or bad faith,<sup>10</sup> and may justify a court of equity in setting aside a sale made in violation of the promise.<sup>11</sup> But a voluntary assurance to the holder of the equity that the property will not be sold so long as he pays the interest promptly is not binding.<sup>12</sup>

*Discharge or Release by One of Several Creditors* not binding on the others, *Gottschalk v. Neal*, 6 Mo. App. 596; *Barcroft v. Lessieur*, 48 Mo. 418.

*A Release, or Conveyance, by the Mortgagee, of a Portion of the mortgaged premises, does not impair his right to sell the remainder under the power.* *Durm v. Fish*, 46 Mich. 312; *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458.

1. *Pearce v. Bryant Coal Co.*, 25 Ill. App. 51.

2. *Remedy for Refusal to Acknowledge Satisfaction.* — *Verges v. Giboney*, 47 Mo. 171; *Sherwood v. Wilson*, 2 Sweeney (N. Y.) 684.

*Action to Vacate Release.* — A personal action by the beneficiaries against the trustee, for damages caused by his wrongful release of the deed, will not bar an action to set aside the release. *Chicago, etc., R. Land Co. v. Peck*, 112 Ill. 433.

3. *Release by Trustee Without Payment.* — *Carpenter v. Bowen*, 42 Miss. 28; *Lakeman v. Robards*, 9 Mo. App. 179; *Armstrong v. Robards*, 81 Mo. 445; *De Laureal v. Kemper*, 9 Mo. App. 77.

*Release of Part.* — A trustee has no authority to release specific parts of the trust property, especially where the secured debt remains unsatisfied. *Browne v. Davis*, 109 N. Car. 23.

4. *Battenhausen v. Bullock*, 8 Ill. App. 312.

5. *Warner v. Blakeman*, 36 Barb. (N. Y.) 501.

A proper release having been executed and recorded, an innocent purchaser may safely purchase from the original grantor without searching the records to see whether a conveyance has been made under the power subsequent to the release. *Porter v. McNabney*, 77 Ill. 235.

6. *Purchaser with Notice.* — *Connecticut Gen. L. Ins. Co. v. Eldredge*, 102 U. S. 545; *Stiger*

*v. Bent*, 111 Ill. 328; *Carpenter v. Bowen*, 42 Miss. 28; *Browne v. Davis*, 109 N. Car. 23.

7. *Sale After Payment of Debt Void.* — *Ledyard v. Chapin*, 6 Ind. 320; *Penny v. Cook*, 19 Iowa 538; *Misener v. Gould*, 11 Minn. 166; *Baker v. Haligan*, 75 Mo. 435; *Hume v. Hopkins*, 140 Mo. 65; *Wells v. Estes*, 154 Mo. 291; *Cameron v. Irwin*, 5 Hill (N. Y.) 272. *Compare Long v. Hunter*, 58 S. Car. 152.

*No Obligation Existing.* — A sale under a deed of trust executed to indemnify a surety is invalid unless the debt purporting to be secured is shown to exist. *Mills v. Traylor*, 30 Tex. 7.

8. *Sale After Payment Passes Voidable Title.* — *Huckabee v. Billingsly*, 16 Ala. 414, 50 Am. Dec. 183; *Liddell v. Carson*, 122 Ala. 518. But where the sale is a pretended one no title at all passes. *Stuart v. Mitchum*, 135 Ala. 546.

9. *Estoppel of Debtor.* — *Barbour v. Scottish-American Mortg. Co.*, 102 Ill. 121; *Hancock v. Whybark*, 66 Mo. 672.

In *Minnesota* the sale will be valid in favor of innocent purchasers where a mortgagor or grantor, having satisfied the debt, fails to have its discharge noted of record. *Merchant v. Woods*, 27 Minn. 396; *Bausman v. Faue*, 45 Minn. 412; *Bausman v. Eads*, 46 Minn. 148, 24 Am. St. Rep. 201.

10. *Byrne v. Carson*, 70 Mo. App. 126.

11. *Rounsavell v. Crofoot*, 4 Ill. App. 671.

*The Mortgagor Alone Can Take Advantage of an agreement to forbear to sell for a stated period.* His creditors cannot complain where he himself does not. *Central Trust Co. v. Worcester Cycle Mfg. Co.*, 93 Fed. Rep. 712, 35 C. C. A. 547.

12. *Promise to Holder of Equity.* — *Booth v. Wiley*, 102 Ill. 84. See also *Randall v. Hazelton*, 12 Allen (Mass.) 412.



The Assignee of a Note Already Overdue will not, however, be affected by an agreement of forbearance made by a prior holder, though such agreement be supported by a consideration, unless he has notice of the agreement.<sup>1</sup>

**IX. RIGHT OF POSSESSION PRIOR TO SALE — 1. Realty — a. GRANTOR ENTITLED TO RENT AND INCOME.** — As a general rule the grantor in a deed of trust or the mortgagor is entitled to possession until his title is divested by a sale made in accordance with the conveyance. The grantor is therefore not chargeable with rent prior to the foreclosure sale.<sup>2</sup> This right of possession necessarily draws after it the right to receive and apply the income.<sup>3</sup>

**b. ENTRY BY TRUSTEE OR MORTGAGEE UNNECESSARY.** — Unless the deed so specifies,<sup>4</sup> it is not necessary for the trustee or mortgagee to have possession of the property at the time of the sale, and an entry is not a prerequisite to a valid exercise of the power.<sup>5</sup>

**2. Personalty — a. TRUSTEE AND MORTGAGEE ENTITLED TO POSSESSION.** — Where personal property is involved it is important for the trustee or mortgagee to have possession of the chattels prior to or at the time of the sale. Having legal title after default he is entitled to have the possession also.<sup>6</sup>

1. *Gibson v. McIntire*, 110 Iowa 417.

2. **Grantor or Person Holding under Him Entitled to Possession Prior to Sale.** — *Davis v. Bessehl*, 88 Mo. 439, 15 Mo. App. 575; *In re Life Assoc. of America*, 96 Mo. 632; *Easley v. Tarkington*, 5 Baxt. (Tenn.) 592. *Aliter*, where a decree has been entered directing a sale. *Bidwell v. Paul*, 5 Baxt. (Tenn.) 693.

**A Trust Deed Giving the Trustee Power to Convey the Property to the Creditor upon default in payment of the debt does not entitle the latter to possession without foreclosure and sale.** *Fee v. Swingly*, 6 Mont. 596.

**Trustee Entitled to Possession After Default.** — In jurisdictions where the legal title vests in the trustee after condition broken, the grantor has no right to retain possession. *Johnson v. Houston*, 47 Mo. 227. See also *Siemers v. Schrader*, 88 Mo. 20.

3. **Application of Income.** — *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459; *Gilman v. Illinois, etc., Tel. Co.*, 91 U. S. 603; *American Bridge Co. v. Heidelberg*, 94 U. S. 798; *Forlough v. Bowlin*, 29 Ill. App. 471; *White v. Wear*, 4 Mo. App. 341.

4. *Kiley v. Brewster*, 44 Ill. 186.

**Entry Required by Trust Deed.** — *Foster v. Boston*, 133 Mass. 143.

As to effect of entry under a similar provision, see *Shepard v. Richardson*, 145 Mass. 32.

**Entry on Day of Sale.** — A provision authorizing the mortgagee to enter and sell requires no more than an entry on the day and for the purpose of sale. *Cranston v. Crane*, 97 Mass. 459, 93 Am. Dec. 106.

**A Right to Enter Conferred by the Terms of the Mortgage** is not affected by the death of the mortgagor. *Purdin v. Archer*, 4 S. Dak. 54.

**Construction of Deed.** — A power to a trustee in a mortgage to sell upon request of the mortgagee does not necessarily imply a right to enter upon the premises for that purpose. *Watson v. Waltham*, 2 Ad. & El. 485, 29 E. C. L. 153, 1 Hurl. & W. 24.

**When Entry Must Be Made.** — Where a mortgage provided that in default of payment the mortgagee might enter and take possession of the premises immediately, and might sell and

dispose of the same on giving notice, it was held that an entry or at least a demand was a condition precedent without which no valid sale could be made under the power. *Roarty v. Mitchell*, 7 Gray (Mass.) 243.

5. **Entry Not a Prerequisite to Sale.** — *Jones v. Hagler*, 95 Ala. 529; *Kiley v. Brewster*, 44 Ill. 186; *Vaughn v. Powell*, 65 Miss. 401; *Karcher v. Gans*, 13 S. Dak. 383, 79 Am. St. Rep. 893; *Dimmit County v. Oppenheimer*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1029; *Anderson v. Hanna*, 19 Ont. 58.

**Entry Authorized but Not a Condition of Sale.** — In *Mississippi* it is held that even where a trust deed declares that "it shall be the duty of the party of the third part herein, at the request of the holder of said note, to take into his possession all the property described herein," and to advertise and sell the same, such taking possession is not a condition precedent to the exercise of the power. *Hamilton v. Halpin*, 68 Miss. 90; *Tyler v. Herring*, 67 Miss. 169, 19 Am. St. Rep. 263.

**Request from Beneficiary for Trustee to Enter a Condition Precedent.** — See *Bowman v. Roberts*, 58 Miss. 126.

6. **Right of Possession as Incident to Legal Title.** — Trustee or Mortgagee of Personalty Has Legal Title After Default and is entitled to possession. *People's Sav. Inst. v. Miles*, 76 Fed. Rep. 252, 40 U. S. App. 341; *Myers v. Hale*, 17 Mo. App. 204; *Dean v. Davis*, 12 Mo. 112; *Lacey v. Giboney*, 36 Mo. 320, 88 Am. Dec. 145; *Pace v. Pierce*, 49 Mo. 393; *Parker v. Rodes*, 79 Mo. 91.

**Sale of Personalty Voidable Where Possession Not Taken as Required.** — *Coulson v. Panhandle Nat. Bank*, (C. C. A.) 54 Fed. Rep. 855.

**Sale of Chattels Not in Possession** raises presumption of fraud. — *Allen v. Steiger*, 17 Colo. 552.

**Duty of Mortgagee to Exercise Diligence.** — As against other creditors the mortgagee, in *Colorado*, must take possession with reasonable diligence after default. *Crocker v. Burns*, 13 Colo. App. 54.

**Taking Possession on Monday** shows diligence where the debt matures on the Saturday preceding. *Allen v. Steiger*, 17 Colo. 552.



Accordingly provisions are often inserted in chattel mortgages authorizing the grantee to take possession prior to selling,<sup>1</sup> though it is entirely competent for the deed to authorize a sale by the trustee without taking possession.<sup>2</sup>

**b. SEIZURE WITHOUT PROCESS OF LAW.** — A provision authorizing the mortgagee to take possession on default with or without process of law is not invalid as tending to a breach of the peace, since the law will not presume that either party will violate his agreement, and it is the duty of the mortgagor to surrender peaceable possession. Such a clause therefore authorizes the mortgagee to take the property without the consent of the mortgagor and over his protest.<sup>3</sup> But it will not justify a resort to violent measures.<sup>4</sup> If possession cannot be peaceably obtained the mortgagee must bring an action.<sup>5</sup>

**The Right to Take Possession Is Waived** where the mortgagee consents for the mortgagor to retain possession and to sell privately, accounting to the mortgagee for the proceeds.<sup>6</sup>

**For a Premature and Unauthorized Seizure** the creditor is personally liable in damages.<sup>7</sup>

**X. EXERCISE OF POWER** — 1. **General Principles** — *a. COMPLYING WITH TERMS OF POWER.* — A principle running through the entire subject of trust and mortgage sales is that the sale must be made in strict conformity with the conditions prescribed by law or by the contract.<sup>8</sup> No enlargement of the

**Right to Possession on Attempted Removal.** — *Hargadine-McKittrick Dry Goods Co. v. Jacksboro First Nat. Bank*, 14 Tex. Civ. App. 416.

**Right to Possession upon Violation of Agreement to Apply Proceeds** of sales to the mortgage debt. See *Watson v. Mead*, 98 Mich. 330.

**1. Grantee Authorized to Take Possession.** — *Groos v. Iowa Park First Nat. Bank*, (Tex. Civ. App. 1903) 72 S. W. Rep. 402; *Singer Sewing Mach. Co. v. Rios*, 96 Tex. 174, 97 Am. St. Rep. 901.

**Reasonable Notice Before Seizure.** — See *Massey v. Sladen*, L. R. 4 Exch. 13.

**The Mortgagee of a Transferable License** is not entitled to possession thereof where the necessary consent of local authorities to the transfer has not been obtained. *Feigenspan v. Mulligan*, 64 N. J. Eq. 792.

**Extent of Possessory Right.** — Under a provision authorizing the mortgagee to take possession and sell, he is entitled to possession solely for the purpose of sale. If he takes and holds the property longer than is reasonably necessary for purposes of the sale, he thereby elects to take the property in satisfaction of his claim. In such case he is liable to the mortgagor for so much as the property is worth over and above his debt. *Marseilles Mfg. Co. v. Perry*, 62 Neb. 715.

**Refunding Part Payment.** — Under a statute it is held in *Ohio* that when a mortgagee of goods sold on instalment takes possession, he must refund the payments already made after deducting a reasonable compensation for the use of the property, not to exceed fifty per cent of the amount so paid. *Baker v. Speyer*, 5 Ohio Cir. Dec. 335.

Such provision does not apply to a chattel mortgagee who retakes possession as trustee and not as owner. *Goodman v. Manning*, 9 Ohio Dec. 373.

**2. Ames Iron Works v. Chinn**, 15 Tex. Civ. App. 88.

**A Stipulation Giving Uninterrupted Possession to the grantor until the sale is made** authorizes

a sale without taking possession. But if the grantor at the time of the intended sale claims to hold adversely possession should be taken. *Hall v. Harris*, 11 Tex. 300.

**Action for Possession After Sale.** — Where the trustee sells without having possession, he may sue for possession in order to deliver to the purchaser. *Lacey v. Giboney*, 36 Mo. 320, 88 Am. Dec. 145; *Pace v. Pierce*, 49 Mo. 393.

**3. Mortgagor's Right to Take Possession Without Consent of Mortgagee.** — *Street v. Sinclair*, 71 Ala. 110; *Burns v. Campbell*, 71 Ala. 271; *White Sewing Mach. Co. v. Conner*, 111 Ky. 827; *Walsh v. Taylor*, 39 Md. 592; *Heath v. Randall*, 4 Cush. (Mass.) 195; *North v. Williams*, 120 Pa. St. 109, 6 Am. St. Rep. 695; *Satterwhite v. Kennedy*, 3 Strobb. L. (S. Car.) 457; *Harling v. Creech*, 88 Tex. 300; *Singer Sewing Mach. Co. v. Rios*, 96 Tex. 174, 97 Am. St. Rep. 901 (*criticising Loftus v. Maxey*, 73 Tex. 243); *Nichols v. Webster*, 1 Chand. (Wis.) 203.

**4. Mortgagee Not Authorized to Commit Breach of Peace to Obtain Possession.** — *Kilpatrick v. Haley*, 66 Fed. Rep. 133, 27 U. S. App. 752; *Gillett v. Moody*, (Tex. Civ. App. 1899) 54 S. W. Rep. 35; *Culver v. State*, 42 Tex. Crim. 645.

**5. Action for Possession Maintainable** when only some of the instalments are due, although there be no clause for accelerating the maturity of the whole debt. *Kiger v. Harmon*, 113 N. Car. 406.

**6. Waiver of Right to Possession.** — *Groos v. Iowa Park First Nat. Bank*, (Tex. Civ. App. 1903) 72 S. W. Rep. 402.

**7. Unlawful Seizure.** — *Manker v. Sine*, 35 Neb. 746; *Tootle v. Kent*, 12 Okla. 674.

**A Mortgage Debt Not Yet Due** cannot be set off by the mortgagee against a claim for damages arising out of a premature seizure of the property. *Manker v. Sine*, 35 Neb. 746.

**8. Strict Conformity with Power Required.** — *United States.* — *Wallis v. Thornton*, 2 Brock.

power of the trustee can be implied when his duties are plainly expressed.<sup>1</sup>

*b. UNAUTHORIZED, IRREGULAR, AND INVALID SALES* — (1) *Departure from Terms*. — If the terms of the trust or the statutory provisions are departed from in any material degree, the sale is irregular, and the purchaser's title is thereby rendered defective. The term "defective" is used in order to avoid confusion, for the decisions on their surface are in irreconcilable conflict. According to some the irregular sale is wholly void, according to others it is declared voidable only, while in still other decisions the irregular sale is said to convey a good title. Notwithstanding the confusion which has existed in this field, most of the decisions are capable of being harmonized. To this end it is necessary at this juncture to consider the validity of the irregular sale.

(2) *Wholly Unauthorized Sale* — (a) *Purchaser's Title Void*. — Where the authority to sell is void, as by reason of a fatal defect in a deed<sup>2</sup> or the insufficient acknowledgment of a feme covert,<sup>3</sup> a sale by the trustee or mortgagee conveys no title even to an innocent purchaser.<sup>4</sup>

(b) *Liability for Wrongful Sale*. — One who sells without authority or irregularly is of course personally liable for damages,<sup>5</sup> but the consent of the mortgagor to the sale is a good defense.<sup>6</sup>

(c) *Measure of Damages* — *aa. PERSONALTY*. — Where the absolute title has passed by the unauthorized sale the entire value of the property may be recovered.<sup>7</sup>

*bb. REALTY* — *Damages for Conversion* — *Beclouding Title*. — The extension of the

(U. S.) 422; *Bigler v. Waller*, 14 Wall. (U. S.) 302; *Shillaber v. Robinson*, 97 U. S. 68.

*Arkansas*. — *Stallings v. Thomas*, 55 Ark. 326.

*Illinois*. — *Hall v. Towne*, 45 Ill. 493; *Griffin v. Marine Co.*, 52 Ill. 130; *Strother v. Law*, 54 Ill. 413.

*Iowa*. — *Sears v. Livermore*, 17 Iowa 297, 85 Am. Dec. 564; *Ingle v. Culbertson*, 43 Iowa 265.

*Kentucky*. — *Ormsby v. Tarascom*, 3 Litt. (Ky.) 405.

*Massachusetts*. — *Smith v. Provin*, 4 Allen (Mass.) 516; *Roche v. Farnsworth*, 106 Mass. 513.

*Mississippi*. — *Woods v. Rozelle*, 75 Miss. 782.

*Missouri*. — *Gray v. Shaw*, 14 Mo. 341; *Davis v. Hess*, 103 Mo. 31; *Dunham v. Hartman*, 153 Mo. 625, 77 Am. St. Rep. 741.

*New York*. — *Lawrence v. Farmers' L. & T. Co.*, 13 N. Y. 200.

*Texas*. — *Fuller v. O'Neil*, 69 Tex. 349, 5 Am. St. Rep. 59; *Bemis v. Williams*, (Tex. Civ. App. 1903) 74 S. W. Rep. 332.

**The Power Must Be Followed in All Its Details** though the conditions prescribed seem unimportant or perhaps even frivolous. *Bemis v. Williams*, (Tex. Civ. App. 1903) 74 S. W. Rep. 332.

**1. Construction of Power**. — *Thornton v. Boyden*, 31 Ill. 200.

**The Law Governing a Foreclosure under a Power of Sale** is determined by the statutes in force at the time the contract is made or mortgage given. *In re Solomon*, 40 Ch. D. 508; *Nichols v. Tingstad*, 10 N. Dak. 172.

**2. McMeel v. O'Connor**, 3 Colo. App. 113.

**3. Schmertz v. Hammond**, 47 W. Va. 527.

**4. Effect on Indebtedness**. — A void sale does not operate to extinguish the mortgage debt and constitutes no defense to a personal action thereon where no money has been paid on the

sale. *Powell v. Gagnon*, 52 Minn. 232; *Interstate Bldg., etc., Assoc. v. Barker*, 16 Tex. Civ. App. 676. But see *Lynch v. Naylor*, 63 Ill. App. 107.

**Sale of Part of the Mortgaged Property** under the power does not extinguish the mortgage lien as to the unsatisfied balance. *Hopkins v. McCrillis*, 158 Mass. 97.

As to the effect of selling before maturity, see *supra*, this title, *When Right to Sell Accrues* — *Default in Payment of Debt*.

**5. Liability for Wrongful and Irregular Sale**. — *Ames v. Higdon*, 69 L. T. N. S. 292; *Drayton v. Chandler*, 93 Mich. 383; *Reilly v. Cullen*, 101 Mo. App. 32; *McCormick Harvesting Mach. Co. v. Preitauer*, (Neb. 1902) 91 N. W. Rep. 499; *Dempster Mill Mfg. Co. v. Wright*, (Neb. 1901) 95 N. W. Rep. 806.

**The Right of Action** for damage resulting from a wrongful sale of mortgaged realty is transitory and is not based on any theory of injury to the property itself. *Rogers v. Barnes*, 169 Mass. 179.

**6. Penney v. Mutual Invest. Co.**, 54 Minn. 541.

**Irregular Sale** — *Creditor in Pari Delicto*. — A trust creditor who purchases at a sale void by reason of the failure of the trustee personally to conduct the same cannot recover damages of the trustee, as by becoming a purchaser the creditor contributes to the making of such sale and is *in pari delicto* with the trustee. *Fuller v. Oneal*, 82 Tex. 417.

**7. Person Selling Liable for Full Value**. — See *Kilgour v. Scott*, 101 Fed. Rep. 359; *Waite v. Dennison*, 51 Ill. 319.

**Mortgagee Selling to Himself Liable for Full Value**. — *Lynch v. Naylor*, 63 Ill. App. 107.

**In Case of Seizure Before Default**, the measure of damage is the value of personal property at the time of the conversion. *Woods v. Gaar*, 93 Mich. 143; *Rector-Wilhelmy Co. v. Nissen*, 35 Neb. 716; *Finley v. Cudd*, 42 S. Car. 121,

doctrine of conversion to the law of real property is sanctioned in *Massachusetts* by a divided court. In the same state it is also held that damages may be recovered even though the sale is a nullity, provided the property has reached the hands of an innocent purchaser and the title has thereby become clouded.<sup>1</sup>

(3) *Irregular Sale* — (a) *Rights of Purchaser at Law* — *aa. TITLE PASSES BY DEED.* — The courts are not agreed in regard to the nature of the legal rights which are acquired by one who purchases at an irregular sale. By the weight of authority a sale by a trustee or mortgagee consummated by the execution and delivery of a deed conveys a perfect legal title to the purchaser although the sale is irregular or is even made in violation of the trust. This proposition seems to be at variance with what has been said in regard to the necessity of complying with the terms of the power, and it is not in harmony with the language of many decisions. The doctrine stated will, however, be recognized as sound when it is considered that a trust deed given as security, like the mortgage at common law, is generally taken as vesting the legal title in the trustee.<sup>2</sup> This legal title which is in the trustee may be conveyed by him without compliance with the conditions named in the power of sale.<sup>3</sup>

1. *Rogers v. Barnes*, 169 Mass. 179.

2. This view of the trust deed is adopted even in code states. *Savings, etc., Soc. v. Deering*, 66 Cal. 281.

3. *Legal Title Passes Regardless of Regularity of the Sale* — *Alabama.* — *Brown v. Lipscomb*, 9 Port. (Ala.) 472; *Foster v. Goree*, 5 Ala. 424; *Gary v. Colgin*, 11 Ala. 514; *Huckabee v. Billingsly*, 16 Ala. 414, 50 Am. Dec. 183; *Herbert v. Hanrick*, 16 Ala. 599; *Sherwood v. Alvis*, 83 Ala. 115, 3 Am. St. Rep. 695; *Dudley v. Collier*, 87 Ala. 431, 13 Am. St. Rep. 55; *Craddock v. American Freehold Land Mortg. Co.*, 88 Ala. 282; *Long v. Georgia Pac. R. Co.*, 91 Ala. 522; *Thornhill v. O'Rear*, 108 Ala. 299; *Ehrman v. Alabama Mineral Land Co.*, 109 Ala. 478; *Shahan v. Tethero*, 114 Ala. 404; *Tew v. Henderson*, 116 Ala. 545.

*California.* — See *Savings, etc., Soc. v. Deering*, 66 Cal. 281.

*Colorado.* — *Wells v. Caywood*, 3 Colo. 487; *Stephens v. Clay*, 17 Colo. 489, 31 Am. St. Rep. 328; *Reid v. Sullivan*, 20 Colo. 498; *Cheney v. Crandell*, 28 Colo. 383.

*Illinois.* — *Reece v. Allen*, 10 Ill. 236, 48 Am. Dec. 336; *Graham v. Anderson*, 42 Ill. 514, 92 Am. Dec. 89; *Dyer v. Day*, 61 Ill. 336; *Dawson v. Hayden*, 67 Ill. 52; *Wilson v. South Park Com'rs*, 70 Ill. 50; *Rice v. Brown*, 77 Ill. 549; *Koester v. Burke*, 81 Ill. 436; *Chapin v. Billings*, 91 Ill. 539; *Equitable Trust Co. v. Fisher*, 106 Ill. 189; *Kepley v. Luke*, 106 Ill. 395.

*Missouri.* — *Bowlin v. Furman*, 28 Mo. 427; *Johnson v. Houston*, 47 Mo. 227; *Fowler v. Carr*, 63 Mo. App. 486; *Kennedy v. Siemers*, 120 Mo. 73; *Springfield Engine, etc., Co. v. Donovan*, 120 Mo. 423; *Hume v. Hopkins*, 140 Mo. 65. In some of the Missouri decisions it seems at one time to have been taken for granted that, where the power in a deed of trust is not executed in accordance with essential conditions, the sale and deed are void both at law and in equity. *Stine v. Wilkson*, 10 Mo. 75; *Thornburg v. Jones*, 36 Mo. 514; *Powers v. Kueckhoff*, 41 Mo. 426, 97 Am. Dec. 281; *Eitelgeorge v. Mutual House Bldg. Assoc.*,

69 Mo. 52; *Goff v. Roberts*, 72 Mo. 570; *Long v. Long*, 79 Mo. 644; *Siemers v. Scradler*, 88 Mo. 20; *Ohnsburg v. Turner*, 13 Mo. App. 533, 87 Mo. 127. But these decisions were criticised and distinguished, and the doctrine now prevailing announced, in *Schanewerk v. Hoberrecht*, 117 Mo. 22.

*New York.* — *Minuse v. Cox*, 5 Johns. Ch. (N. Y.) 441, 9 Am. Dec. 313. See also *Wilson v. Troup*, 2 Cow. (N. Y.) 203.

*North Carolina.* — *Lunsford v. Speaks*, 112 N. Car. 608. See also *Gibson v. Barbour*, 100 N. Car. 192.

*Virginia.* — *Harris v. Harris*, 6 Munf. (Va.) 367; *Taylor v. King*, 6 Munf. (Va.) 358, 8 Am. Dec. 746.

*West Virginia.* — *Dryden v. Stephens*, 19 W. Va. 1; *Fulton v. Johnson*, 24 W. Va. 95.

In *Alabama* the legal title passes by the sale though no deed be executed, where the mortgagee lawfully becomes a purchaser at his own sale. *Hambrick v. New England Mortg. Security Co.*, 100 Ala. 551.

But in other cases the deed not only must be executed, but it must also contain sufficient recitals to raise a presumption of regularity. *Robinson v. Cahalan*, 91 Ala. 479.

*Basis of Rule.* — The doctrine that the irregular purchaser gets a good title at law has been said to be founded on the principle that the trustee has an estate coupled with an interest and not a mere naked power. Consequently, where the power for any reason becomes naked, as where, after the death of the trustee nominated in the deed of trust, his personal representative sells under the express authority of the deed, the validity of the deed even at law depends upon compliance with the terms of the power. *Sulphur Mines Co. v. Thompson*, 93 Va. 293. Compare *Deputron v. Young*, 134 U. S. 241.

*Irregular Sale under Chattel Mortgage.* — This principle, of course, applies to a sale under a chattel mortgage, since there is no question but in such case the legal title vests in the mortgagee after default. *McConnell v. People*, 84 Ill. 583; *Campbell v. Wheeler*, 69 Iowa 588,



*bb. CONTRARY DOCTRINE.* — The principle just stated is not everywhere accepted, and there are decisions holding that a deed executed in consummation of a sale not made in accordance with the terms of the trust is a nullity even in a court of law.<sup>1</sup> In some jurisdictions this rule is declared by statute.<sup>2</sup>

*cc. EJECTMENT — WRIT OF ENTRY.* — In accordance with the majority rule a purchaser at an irregular sale, having acquired the legal title by virtue of his deed, cannot be ousted by an action of ejectment or by a writ of entry after he has obtained possession;<sup>3</sup> but an action of ejectment or a writ of entry can be maintained by him against a third person having no title.<sup>4</sup>

(b) **Rights of Purchaser in Equity** — *aa. TITLE DEPENDENT ON REGULARITY OF SALE.* — While the purchaser at a complete irregular sale usually gets a good legal title, the rule in equity is different. In this court the title of the purchaser will not be recognized as valid unless the terms of the power have been strictly followed.<sup>5</sup>

The Sharp Conflict at This Point Between Legal and Equitable Theory has produced much confusion, and the further fact that the question of the validity of most trust sales arises in equity or in courts exercising both legal and equitable jurisdiction has tended to obscure the legal theory altogether. In such courts irregular sales are often declared void in accordance with the equitable doctrine without recognition of the fact that at law the rule would be different.<sup>6</sup> In jurisdictions where the trust deed and power of sale mortgage create a lien only without conveying the legal title, it may be consistently held that the purchaser at a sale made without conforming to the terms of the power gets no title either at law or in equity. So where the trustee or mortgagee is considered as being merely the donee of a naked power all conditions must be complied with before the sale can have any validity.

*bb. PURCHASER TREATED AS EQUITABLE ASSIGNEE* — (*aa*) *In General.* — The rule that the purchaser at an irregular sale gets a good title at law but not in equity, while it settles some difficulties, raises others. It would seem on a *priori* grounds that the right of the purchaser would be on a higher ground in equity than at law, especially where the purchaser, as usually happens, is not a party to the mortgage or deed of trust. But we find the reverse to be true, for the court of equity has its eye on the plight of the debtor and will keep the equity of redemption alive for his benefit so long as this may well be done. In the effort to preserve this right it visits upon the irregular purchaser, as we have seen, the penalty of declaring his title invalid. But the court of equity cannot

1. **Deed Founded on Irregular Sale Passes No Title.** — *Ormsby v. Tarascon*, 3 Litt. (Ky.) 405; *Bottineau v. Aetna L. Ins. Co.*, 31 Minn. 125; *Walker v. Brungard*, 13 Smed. & M. (Miss.) 763; *Wightman v. Doe*, 24 Miss. 681; *Wade v. Thompson*, 52 Miss. 367; *Graham v. Fitts*, 53 Miss. 307; *Enochs v. Miller*, 60 Miss. 19; *Henderson v. Galloway*, 8 Humph. (Tenn.) 692; *Young v. Van Benthuyssen*, 30 Tex. 763; *Kerr v. Galloway*, 94 Tex. 641; *Clark v. Burke*, (Tex. Civ. App. 1897) 39 S. W. Rep. 306.

2. **In Michigan**, and other states, there are statutes expressly declaring that the trustee's deed made in the completion of a defective sale is invalid. *Pierce v. Grimley*, 77 Mich. 273.

3. **Ejectment Not Maintainable Against Purchaser at Irregular Sale.** — *Brobst v. Brock*, 10 Wall. (U. S.) 519; *Wilson v. South Park Com'rs*, 70 Ill. 46; *Jones v. Mack*, 53 Mo. 147; *Russell v. Whitely*, 59 Mo. 106; *Hubbell v. Moulson*, 53 N. Y. 225, 13 Am. Rep. 519; *Wormell v. Nason*, 83 N. Car. 32.

**Writ of Entry Not Maintainable Against Purchaser.** — *Brown v. Smith*, 116 Mass. 108.

4. *Holmes v. Turners Falls Co.*, 142 Mass. 590.

To Support Ejectment or a statutory action in the nature of ejectment, the purchaser's deed must be properly executed. *Robinson v. Cahalan*, 91 Ala. 479.

5. **Purchaser at Irregular Sale Gets No Title in Equity.** — *Stephens v. Clay*, 17 Colo. 489, 31 Am. St. Rep. 328; *Thorp v. McCullum*, 6 Ill. 627; *Graham v. Anderson*, 42 Ill. 514, 92 Am. Dec. 89; *Sears v. Livermore*, 17 Iowa 297, 85 Am. Dec. 564; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 46; *Lumford v. Speaks*, 112 Johns. (N. Y.) 46; *Lunsford v. Speaks*, 112 N. Car. 608; *Taylor v. King*, 6 Munf. (Va.) 358, 8 Am. Dec. 746; *Pownall v. Taylor*, 10 Leigh (Va.) 179, 34 Am. Dec. 725; *Heermans v. Montague*, (Va. 1890) 20 S. E. Rep. 899.

6. **Instances of Broad Statements Declaring Irregular Sales Wholly Void.** — *Bigler v. Waller*, 14 Wall. (U. S.) 297; *Shillaber v. Robinson*, 97 U. S. 68; *Sears v. Livermore*, 17 Iowa 297, 85 Am. Dec. 564; *Ingle v. Culbertson*, 43 Iowa 265.

close its eyes to the fact that a purchaser even at an irregular sale may acquire important rights. Thus it is fully settled that such purchaser, provided he pays the purchase money in whole or in part, is entitled to be subrogated to the rights of the mortgagee or trust creditor to the extent of his outlay. In other words, the debt being paid, or its amount reduced, the purchaser is treated as an equitable assignee of the security.<sup>1</sup>

**Each Subsequent Conveyance by the Purchaser** likewise operates as an assignment of the mortgage or trust deed.<sup>2</sup>

(bb) *Irregular Sale by Sheriff.* — This rule is applied to statutory sales irregularly made by the sheriff or other public officer, as well as to sales made by a trustee or mortgagee.<sup>3</sup>

(cc) *Void Sales.* — While the rule which treats the irregular purchaser as equitable assignee of the mortgagee is just in itself, it in no way hampers the right of the debtor to redeem, for, as we shall elsewhere see,<sup>4</sup> the debtor is required to do equity as a condition precedent to receiving relief. This consideration has led the courts to apply it not only to irregular sales by which the legal title has passed, but also to sales which are held to be void at law, provided the purchase money has been used to extinguish the secured debt.<sup>5</sup>

**cc. IMPROVEMENTS BY PURCHASER.** — A purchaser at an irregular sale who goes into possession and makes improvements in good faith is entitled to compensation when the sale is set aside.<sup>6</sup> He may also remove improvements made

**1. Purchaser at Irregular Sale Treated as Equitable Assignee** — *United States.* — Brobst v. Brock, 10 Wall. (U. S.) 519; McCormick v. Knox, 105 U. S. 122.

*Alabama.* — Taylor v. Agricultural, etc., Assoc., 68 Ala. 229.

*Illinois.* — Harper v. Ely, 70 Ill. 581.

*Indiana.* — Muir v. Berkshire, 52 Ind. 149; Short v. Sears, 93 Ind. 505.

*Iowa.* — Ingle v. Culbertson, 43 Iowa 265.

*Maryland.* — Johnson v. Robertson, 34 Md. 165.

*Massachusetts.* — Burns v. Thayer, 115 Mass. 89; Brown v. Smith, 116 Mass. 108; Dearnaley v. Chase, 136 Mass. 288; Holmes v. Turner's Falls Co., 142 Mass. 590.

*Michigan.* — Gilbert v. Cooley, Walk. (Mich.) 494; Lariverre v. Rains, 112 Mich. 276.

*Minnesota.* — Johnson v. Sandhoff, 30 Minn. 197; Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613; Berg v. Olson, 88 Minn. 392.

*Mississippi.* — Clark v. Wilson, 56 Miss. 753.

*Missouri.* — Jones v. Mack, 53 Mo. 147; Russell v. Whitely, 59 Mo. 196; Wilcoxon v. Osborn, 77 Mo. 621; Polliham v. Reveley, (Mo. 1904) 81 S. W. Rep. 182.

*New York.* — Grosvenor v. Day, Clarke (N. Y.) 109; Robinson v. Ryan, 25 N. Y. 320; Winslow v. Clark, 47 N. Y. 261; Miner v. Beekman, 50 N. Y. 337; Townshend v. Thomson, 139 N. Y. 152; Jackson v. Bowen, 7 Cow. (N. Y.) 13.

*North Carolina.* — Atkins v. Crumpler, 118 N. Car. 532, 120 N. Car. 308; Hussey v. Hill, 120 N. Car. 312, 58 Am. St. Rep. 789.

*South Carolina.* — Williams v. Washington, 40 S. Car. 457.

*Tennessee.* — Green v. Stevenson, (Tenn. Ch. 1899) 54 S. W. Rep. 1011.

*Texas.* — Crafts v. Daugherty, 69 Tex. 477.

**Purchaser at Invalid Sale of Chattels Treated as Assignee.** — Kelsey v. Ming, 118 Mich. 438.

**The Payment of a Part of the Amount Bid** operates in equity as an assignment of the

mortgage debt to the extent of the amount paid, though the sale fails of consummation owing to the nonpayment of the balance. Atkins v. Tutwiler, 98 Ala. 129.

**In Minnesota** an irregular purchaser who actually takes possession with the acquiescence of the mortgagor, and by virtue of the title acquired at the sale, is treated as a mortgagee in possession, and after the right of redemption expires he has the legal title. Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613; Russell v. H. C. Akeley Lumber Co., 45 Minn. 376.

**A Purchaser Who Buys at a Sale Conducted by Himself** will not be treated as equitable assignee, the illegality of the sale being chargeable to his own default. Hayes v. Lienlokken, 48 Wis. 509.

**2. Cooke v. Cooper,** 18 Oregon 142, 17 Am. St. Rep. 709.

**3. Purchaser at Irregular Sheriff's Sale Treated as Assignee.** — Curtis v. Gooding, 99 Ind. 45; Gilbert v. Cooley, Walk. (Mich.) 494; Hoffman v. Harrington, 33 Mich. 392; Wilcoxon v. Osborn, 77 Mo. 621.

**4. See infra, this title, XIII. 3. Setting Sale Aside,** also XIV, *Redemption from Trust and Mortgage Sales.*

**5. Purchaser Treated as Assignee Though Sale Is Void.** — Bonner v. Lessley, 61 Miss. 392; Clark v. Wilson, 56 Miss. 753; Wilcoxon v. Osborn, 77 Mo. 621; Williams v. Washington, 40 S. Car. 457.

**Purchaser Not Acquiring Legal Estate Entitled to Be Subrogated.** — Taylor v. Agricultural, etc., Assoc., 68 Ala. 229.

**6. Improvements by Purchaser.** — Queen City Perpetual Bldg. Assoc. v. Price, 53 Md. 397; Bacon v. Cottrell, 13 Minn. 194; Higginbottom v. Benson, 24 Neb. 461, 8 Am. St. Rep. 211; Benedict v. Gilman, 4 Paige (N. Y.) 58; Putnam v. Ritchie, 6 Paige (N. Y.) 390; Wetmore v. Roberts, (Supm. Ct.) 10 How. Pr. (N. Y.) 51; Mickles v. Dillaye, 17 N. Y. 80; Miner v. Beekman, 50 N. Y. 337; Harper's Appeal, 64

by him where no injury to the realty results.<sup>1</sup>

**2. Proceedings Before Sale** — *a. STATUTORY REQUIREMENTS* — APPRAISAL. — Statutory provisions are often made prescribing that certain acts shall be done before a sale under power is consummated, as that the goods shall be appraised,<sup>2</sup> or that an order of court shall be granted permitting the sale.<sup>3</sup> It has been held that the requirement of an appraisal cannot be waived by the mortgagor either in the mortgage or at the time the sale is made.<sup>4</sup>

*b. NOTICE* — (1) *In General* — (*a*) *Sale Without Notice*. — In the absence of statutory regulation, or of a stipulation in the power, requiring notice of sale to be given, the power may be exercised and a valid sale made without the giving of any notice whatever.<sup>5</sup> But the courts justly regard such a proceeding with suspicion, and will not sustain a sale without notice if there is the least evidence of unfairness.<sup>6</sup>

(*b*) *Notice Required by Contract or Statute*. — Sales without notice are now becoming exceedingly rare, for a clause providing for notice is nearly always inserted in the mortgage or deed of trust itself, and in many jurisdictions statutory provisions are in force which require notice to be given.<sup>7</sup>

(*c*) *Effect of Failure to Give Required Notice*. — Purchasers are bound to take notice of provisions in the deed pertaining to notice as well as of the statutes concerning the same, and when the proper notice is not given the sale is irregular. In some jurisdictions the failure to give notice is said to render the sale wholly nugatory.<sup>8</sup> In others it is held that the legal title passes to the purchaser subject to redemption.<sup>9</sup>

Pa. St. 315; *Green v. Dixon*, 9 Wis. 532; *Carroll v. Robertson*, 15 Grant Ch. (U. C.) 173; *Fawcett v. Burwell*, 27 Grant Ch. (U. C.) 445.

**A Creditor Who Purchases** at an invalid sale conducted by his trustee acquires the rights of a mortgagee in possession after default. *Stallings v. Thomas*, 55 Ark. 326.

**1. Removal of Improvements**. — *Poole v. Johnson*, 62 Iowa 611; *Cooke v. Cooper*, 18 Oregon 142, 17 Am. St. Rep. 709.

**2. Appraisal Necessary**. — *Kelley v. Graham*, 70 Ark. 490; *Webb v. Hunt*, 2 Indian Ter. 612.

**3. Order of Court Required Where Household Goods Are to Be Sold**. — But furniture sold on instalments is not within the statute. *Bernstein v. Zolotkoff*, 70 Ill. App. 369.

**A Piano Is Not Household Goods** within the meaning of this provision. *Thompson v. Elliott*, 86 Ill. App. 440.

**Filing Copy of Notice a Condition Precedent**. — In *New York* the requirement that a copy of the notice of sale be delivered to the county clerk before the sale, and by him properly entered in a book kept for such purpose, is a condition precedent to the validity of the sale. *Mowry v. Sanborn*, 68 N. Y. 153; *Van Vleck v. Enos*, 88 Hun (N. Y.) 348.

**4. Appraisal Cannot Be Waived**. — *Minneapolis Threshing Mach. Co. v. Beck*, 95 Iowa 725.

**Residence of Appraisers**. — The sale is defective where the appraisers and the justice appointing them live in another county than that where the mortgaged property is situated. *Kelley v. Graham*, 70 Ark. 490.

**5. Sale Without Notice**. — *Elliott v. Wood*, 45 N. Y. 71; *Mowry v. Sanborn*, 68 N. Y. 153.

**6. Sale Without Notice Carefully Scrutinized**. — *Davey v. Durrant*, 1 De G. & J. 553; *Re Gilchrist*, 11 Ont. 537; *Richmond v. Evans*, 8

Grant Ch. (U. C.) 508; *Re British Canadian Loan, etc., Co.*, 16 Ont. 15; *Martin v. Paxson*, 66 Mo. 260.

**Where the Giving of Notice Is Dispensed with** the fact that the mortgagor gives notice to some of the parties interested does not make it necessary to give notice to all. *Re British Canadian Loan, etc., Co.*, 16 Ont. 15.

**As to Effect of a Proviso** that the purchaser will not be affected by absence of notice, see *Prichard v. Wilson*, 10 Jur. N. S. 330.

**A Provision Authorizing a Trustee to Sell Without Notice** in a trust conveyance executed for the purpose of paying instead of securing a debt is not affected by a statute requiring publication of notice in sales under power in a mortgage. *Judge v. Pfaff*, 171 Mass. 195.

**7. Statutory Notice as in Judicial Sales**. — *Childs v. Hill*, 20 Tex. Civ. App. 162.

**An Act Requiring Such Notice in Trust Sales** as is "now" given in case of judicial sales does not require a notice complying with subsequent amendments of the law concerning notice in judicial sales. *Bell v. Williams*, 23 Tex. Civ. App. 407; *Marston v. Yaites*, (Tex. Civ. App. 1901) 66 S. W. Rep. 867.

**8. Sale Wholly Nugatory Without Required Notice**. — *Henderson v. Galloway*, 8 Humph. (Tenn.) 692; *Clark v. Burke*, (Tex. Civ. App. 1897) 39 S. W. Rep. 306.

**In Minnesota**, by statute, action to set the sale aside where the proper notice has not been given must be brought within five years. *Russell v. H. C. Akeley Lumber Co.*, 45 Minn. 376. *followed Mogan v. Carter*, 54 Minn. 141.

**9. Legal Title Passes to Purchaser Subject to Redemption**. — *State Bank v. Chapelle*, 40 Mich. 447; *Fowler v. Carr*, 63 Mo. App. 486; *Springfield Engine, etc., Co. v. Donovan*, 120 Mo. 423. See also *supra*, this section, 1. *b.* (3) *Irregular Sale*.



Where the Statutory Notice Is Given to Some Only of the Persons Entitled Thereto, the sale is valid as against the persons actually served with notice, although it may be ineffective as against others not likewise served.<sup>1</sup>

**Liability of Person Selling.** — A subsequent mortgagee entitled to notice may maintain an action for damages against a mortgagee selling without notice.<sup>2</sup>

(2) *By Whom Notice to Be Given* — (a) **Person Foreclosing.** — It is essential to the validity of a notice that it should appear to emanate from a person having authority to execute the power.<sup>3</sup>

(b) **Death of Mortgagee.** — Accordingly a notice signed with the name of a deceased person and purporting to be by his authority is void.<sup>4</sup> Ordinarily the administrator signs the notice in his own name, adding his official designation and without reciting the fact of his appointment as such.<sup>5</sup>

(c) **Notice Given by Assignees.** — Where there has been an assignment of the mortgage the notice of foreclosure should specify the name of the assignee or assignees and be signed by all of them.<sup>6</sup>

(d) **Signature.** — It is usual for the mortgagee or trustee to sign the notice of sale in his own name, but a notice signed merely, "By order of the mortgagor," has been declared sufficient without being accompanied by the name of any one.<sup>7</sup> So a notice signed by one as agent for the mortgagee is good where the mortgage itself was executed to such person as agent.<sup>8</sup>

**The Mere Act of Signing** is not a matter involving the exercise of judgment, and may be done by an agent or attorney of the mortgagee or trustee.<sup>9</sup>

(3) *To Whom Notice Must Be Given* — (a) **Personal Service on Mortgagor** — *av.* **GENERAL RULE.** — Notice to the mortgagor or grantor in a trust deed of intention to foreclose under the power of sale, or of time and place of sale, is not necessary<sup>10</sup> unless either a statute of the state<sup>11</sup> or the mortgage itself requires that personal notice shall be given.<sup>12</sup>

1. *Youker v. Treadwell*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 674.

2. *Hoole v. Smith*, 17 Ch. D. 434.

But an Action for Damages resulting from a sale made without the required notice will not lie where the sale is void. *Thornburg v. Jones*, 36 Mo. 514.

3. **Party to Issue Notice.** — *Roche v. Farnsworth*, 106 Mass. 509; *Niles v. Ransford*, 1 Mich. 338, 51 Am. Dec. 95; *Bausman v. Kelley*, 38 Minn. 197, 8 Am. St. Rep. 661.

**Notice of Sale to Be Conducted by a Public Officer** should be in the name of the party whose sale it is or of his authorized agent. *Powell v. Gagnon*, 52 Minn. 232.

4. **Notice in Name of Deceased Person.** — *White v. Secor*, 58 Iowa 533; *Bausman v. Kelley*, 38 Minn. 197, 8 Am. St. Rep. 661; *Welsh v. Cooley*, 44 Minn. 446; *Clark v. Mitchell*, 81 Minn. 438.

5. *Baldwin v. Allison*, 4 Minn. 25.

6. **Notice to Be Signed by Assignees.** — *Roche v. Farnsworth*, 106 Mass. 509; *Dunning v. McDonald*, 54 Minn. 1; *Hathorn v. Butler*, 73 Minn. 15.

**Where the Mortgagee After Advertising** assigns the mortgage, the assignee must advertise anew in his own name. *Niles v. Ransford*, 1 Mich. 338, 51 Am. Dec. 95.

**Where the Mortgage Is Dead** a notice signed by his personal representative as "E. F. C., assignee of the mortgagee," is valid, the administrator being assignee by act of law. *Thurber v. Carpenter*, 18 R. I. 782.

7. **By Order of Mortgagor's Attorney.** — The court of *Rhode Island* is decidedly more liberal in regard to the requirement as to the contents

of the notice than the courts of other states, and decisions there made are hardly to be considered as being in line with decisions made in other jurisdictions. It is there held that a correct description of the property to be sold and a correct reference to the record of the mortgage are enough. *Colgan v. McNamara*, 16 R. I. 554. In this case the notice was signed, "By order of the mortgagor's attorney," and the notice was held sufficient.

8. **Notice Signed by Agent.** — *Menard v. Crowe*, 20 Minn. 448.

9. *Munson v. Ensor*, 94 Mo. 504.

10. **Personal Notice Unnecessary.** — *Princeton L. & T. Co. v. Munson*, 60 Ill. 371; *Equitable Trust Co. v. Fisher*, 106 Ill. 189; *Hoodless v. Reid*, 112 Ill. 105; *Irish v. Antioch College*, 126 Ill. 474, 9 Am. St. Rep. 638; *Ritchie v. Judd*, 137 Ill. 453; *Harlin v. Nation*, 126 Mo. 97; *Bridgers v. Morris*, 90 N. Car. 32; *Manning v. Elliott*, 92 N. Car. 48; *Carver v. Brady*, 104 N. Car. 219 [*overruling Capehart v. Biggs*, 77 N. Car. 261]; *McIver v. Smith*, 118 N. Car. 73; *Swain v. Mitchell*, 27 Tex. Civ. App. 62; *Fischer v. Simon*, (Tex. Civ. App. 1901) 66 S. W. Rep. 882; *Georgi v. Juergen*, (Tex. Civ. App. 1902) 66 S. W. Rep. 873.

**Heirs of a Deceased Mortgagor** not entitled to personal notice. *Carter v. Slocumb*, 122 N. Car. 475, 65 Am. St. Rep. 714.

11. **Personal Service Required by Statute.** — *Powell v. Gagnon*, 52 Minn. 232; *Kellogg v. Dennis*, (County Ct.) 38 Misc. (N. Y.) 82.

**Where Grantor Resident of County.** — *Walker v. Boggess*, 41 W. Va. 588.

12. **Mortgage Requiring Personal Notice.** — *Major v. Ward*, 5 Hare 598; *Metters v. Brown*,

*bb. PROMISE TO GIVE NOTICE.* — The party exercising the power must, however, give personal notice whenever his previous conduct or statements are such as to warrant the debtor, or party claiming under him, in believing that no sale will be made until such notice has been given. Though an assurance of this kind may not have the support of a valuable consideration, a sale in violation of it would be strong evidence of bad faith.<sup>1</sup>

(b) *Service on Personal Representative.* — A statutory provision requiring notice to be given to the personal representative of a mortgagor refers to the executor or administrator of the deceased mortgagor, and notice given to an agent representing his heirs is not sufficient.<sup>2</sup> It has been held in *New York*, under such a statute, that a sale is not rendered invalid by reason of a failure to serve the notice on the representative when none has been seasonably appointed, as the duty of procuring the appointment of a representative rests on those interested in the estate.<sup>3</sup>

(c) *Notice to Subsequent Incumbrancers.* — Persons to whom the mortgagor conveys his equity of redemption or subsequently mortgages his interest, like the mortgagor himself, are not entitled to personal notice.<sup>4</sup> But under a provision requiring notice to the mortgagor or his assigns, a second mortgagee is entitled to notice although the original mortgagor be still living.<sup>5</sup>

(d) *Notice to Person in Possession.* — In *Minnesota* a copy of the notice of sale is required to be personally served on the person in possession of the mortgaged premises.<sup>6</sup> A failure to comply with the statute in this state, where the premises are actually occupied, renders the sale null and void,<sup>7</sup> at the instance of any person interested therein and not merely at the instance of the occupant.<sup>8</sup> It is therefore not competent for the occupant by a subsequent waiver to validate the sale as against others than himself where the required notice is not given.<sup>9</sup>

(4) *Contents of Notice* — (a) *Form and Sufficiency* — *aa. IN GENERAL.* — The principal object in publishing notice of sale is not so much to notify the grantor

9 Jur. N. S. 958; *Henderson v. Galloway*, 8 Humph. (Tenn.) 692.

*Service on Persons under Disability.* — Under a clause requiring notice to be given to the mortgagor, his heirs or assigns, service upon an infant heir is good. *Tracey v. Lawrence*, 2 Drew 403, 18 Jur. 590; *Bartlett v. Jull*, 28 Grant Ch. (U. C.) 140. Likewise service on the person indicated in the power is valid though he be a lunatic. *Mellersh v. Keen*, 27 Beav. 236; *Robertson v. Lockie*, 15 Sim. 285.

*Waiver of Notice After Transfer by Mortgagor.* — Where a mortgagor has given a mortgage with a power of sale, to be exercised after notice to himself, he cannot by an arrangement with the mortgagee, after conveying his equity of redemption, waive his right to notice, so as to enable the mortgagee to exercise the power without notice. *Forster v. Hoggart*, 15 Q. B. 155, 69 E. C. L. 155. Compare *Casey v. McIntyre*, 45 Minn. 526.

1. *Promise to Notify* — *Clevinger v. Ross*, 109 Ill. 340; *Cassady v. Wallace*, 102 Mo. 575. See also *Tarrt v. Clayton*, 109 Ill. 570; *Randall v. Hazelton*, 12 Allen (Mass.) 412.

*A Failure to Comply with a Voluntary Promise of Personal Service* is no ground for impeaching a sale at the instance of a puisne incumbrancer where publication is the only notice required. *Tisomingo Sav. Inst. v. Duke*, (Miss. 1887) 1 So. Rep. 165.

2. *Notice to Personal Representative.* — *Jones v. Tainter*, 15 Minn. 512; *Atkinson v. Duffy*, 16 Minn. 45.

3. *Service Unnecessary Where There Is No Representative.* — *Anderson v. Austin*, 34 Barb. (N. Y.) 319; *Bond v. Bond*, 51 Hun (N. Y.) 507; *Stanley v. Freckelton*, 65 Hun (N. Y.) 138. See also *King v. Duntz*, 11 Barb. (N. Y.) 191; *Cole v. Moffitt*, 20 Barb. (N. Y.) 18.

*Service on Heir Sufficient* where there is no representative. *Bond v. Bond*, 51 Hun (N. Y.) 507.

4. *Notice to Junior Incumbrancers Not Necessary.* — *Robbins v. Arnold*, 11 Ill. App. 434; *Cleaver v. Green*, 107 Ill. 67; *Bennett v. Healey*, 6 Minn. 240; *Hardwicke v. Hamilton*, 121 Mo. 465.

5. *Subsequent Mortgagees Are Assigns.* — *Hoole v. Smith*, 17 Ch. D. 435.

*Administrator an Assign.* — *Thurber v. Carpenter*, 18 R. I. 782.

6. *Acts of Ownership Without Actual Occupancy* do not entitle one to the statutory notice. *Moulton v. Sidle*, 52 Fed. Rep. 616.

*Notice May Be Served by Mortgagee.* — *Kirkpatrick v. Lewis*, 46 Minn. 164.

As to when mortgagor is in actual possession, see *Cutting v. Patterson*, 82 Minn. 375.

*Service on Wife of Occupant unnecessary* where the husband is served. *Coles v. Yorks*, 28 Minn. 464.

*As to Sales under Power in Chattel Mortgages*, see *Powell v. Gagnon*, 52 Minn. 232.

7. *Brigham v. Connecticut Mut. L. Ins. Co.*, 74 Minn. 33.

8. *Swain v. Lynd*, 74 Minn. 72.

9. *Casey v. McIntyre*, 45 Minn. 526.

or mortgagor as it is to inform the public generally, so that bidders may be present at the sale and a fair price obtained.<sup>1</sup> Accordingly, the notice should contain such facts as are reasonably sufficient to apprise the public of the nature of the property to be sold, and of the time, place, and terms of the sale.<sup>2</sup>

*bb. INACCURACIES IN NOTICE.*—An Untrue or Misleading Statement in the notice as to the condition of the title, or the existence of adverse claims, by which bidding would naturally be discouraged, will warrant setting aside the sale.<sup>3</sup> But a sale will not be set aside where a misleading statement calculated to deter bidders has been corrected by timely and adequate means prior to the sale.<sup>4</sup>

Substantial Compliance with the statutory provisions<sup>5</sup> or with the terms of the mortgage or trust deed itself<sup>6</sup> is all that is necessary where no prejudice is shown.

*cc. STATUTORY FORM.*—The failure strictly to follow a form prescribed by statute does not vitiate the notice.<sup>7</sup> Inaccuracies of detail which cannot mislead will not affect the validity of the notice.<sup>8</sup>

*dd. ONE NOTICE WHERE SEPARATE PARCELS TO BE SOLD.*—Where several trust deeds, each covering a different tract of land, are given to secure separate notes, the parties being the same in all, the trustee may in one advertisement give notice that he will sell under each deed the tract covered by it.<sup>9</sup> So where a mortgage covering several different tracts is intended as a separate mortgage upon each tract for a specified portion of the debt, with the right to foreclose as to each tract upon default in payment of its portion, one notice of sale may be made to include as many tracts as are covered by the sums in default,<sup>10</sup> but it must state separately the amount claimed to be due upon each of such tracts.<sup>11</sup>

(b) *Recital of Default—Right to Sell.*—The notice should contain recitals showing that there has been a default, by virtue of which the power of sale has become operative,<sup>12</sup> though the omission so to state is not fatal to the

1. *De Jarnette v. De Giverville*, 56 Mo. 440.

2. *Contents of Notice.*—*Powers v. Kueckhoff*, 41 Mo. 425, 97 Am. Dec. 281; *Stephenson v. January*, 49 Mo. 465.

*Things to Be Stated.*—The authority by which the property is sold, a description thereof full enough to be understood by the public, its popular name, if any, its proximity to other known property, the name of the occupant at the time, or any other prominent characteristics, may all or either afford means of informing the public and others concerned of the identity of the premises and should be stated. *Reeside v. Peter*, 33 Md. 120; *Yellowly v. Beardsley*, 76 Miss. 616, 71 Am. St. Rep. 536.

"The Essentials of a Notice of Sale under a trust deed are a statement of the time, place, and terms of sale, and such a description of the property to be sold as, if read by persons familiar with the neighborhood, will advise them of what is to be sold, and upon what terms it can be bought, and induce them to attend the sale as prospective bidders, should they feel an inclination to invest in the property to be sold. \* \* \* Under ordinary circumstances, it is indispensable, in a notice of sale, to set forth \* \* \* the time and place of sale, and a correct description of the property." *Tyler v. Herring*, 67 Miss. 169, 19 Am. St. Rep. 288, note by Mr. Freeman.

3. *Notice Misleading in Stating Existence of*

*Prior Incumbrances.*—*Equitable Trust Co. v. Fisher*, 106 Ill. 189; *Long v. Richards*, 170 Mass. 120, 64 Am. St. Rep. 281; *Pearson v. Gooch*, 69 N. H. 208.

*A Notice Is Not Misleading* which fails to state that a prior mortgage on the property to be sold was executed to secure the same debt secured by the trust deed under which sale is to be made. *Weld v. Rees*, 48 Ill. 428.

4. *Hubbel v. Sibley*, 5 Lans. (N. Y.) 51.

5. *McCardia v. Billings*, 10 N. Dak. 373, 88 Am. St. Rep. 729.

6. *Bush v. Sherman*, 80 Ill. 160; *Johns v. Sergeant*, 45 Miss. 332.

7. *Form Prescribed by Statute.*—*Boston Safe Deposit, etc., Co. v. Mixer*, 146 Mass. 100. See also *Newman v. Jackson*, 12 Wheat. (U. S.) 570.

8. *Iowa Invest. Co. v. Shepard*, 8 S. Dak. 332.

9. *One Notice for Separate Parcels.*—*Wheeler v. McBlair*, 5 App. Cas. (D. C.) 375; *Tyler v. Massachusetts Mut. L. Ins. Co.*, 108 Ill. 58; *Richardson v. Hedges*, 150 Ind. 53; *Mason v. Goodnow*, 41 Minn. 9.

10. *One Mortgage Covering Separate Parcels.*—*Mason v. Goodnow*, 41 Minn. 9; *Bitzer v. Campbell*, 47 Minn. 221.

11. *Separate Amounts Due on Separate Parcels.*—*Child v. Morgan*, 51 Minn. 116. See also *Hull v. King*, 38 Minn. 349.

12. *Bush v. Sherman*, 80 Ill. 160.



validity of the sale.<sup>1</sup> The use of technical terms, such as that the mortgage will be foreclosed by a sale of the premises under the power, is not necessary where the purpose to sell under the power is sufficiently manifest,<sup>2</sup> or a sale is announced in accordance with statutory requirements.<sup>3</sup>

It is not necessary to state in the notice that the subscriber has lawful right or authority to exercise the power, the right, if it exists, being independent of any such recital.<sup>4</sup> Where the notice announces a sale, a lawful sale at public outcry will be understood.<sup>5</sup> And a clerical omission of words of sale has been held not fatal where they are easily supplied from the context.<sup>6</sup>

(c) **Names of Parties** — *aa. OMISSION CURED BY REFERENCE.* — The notice of sale should ordinarily contain a statement of the names of the grantor and grantee,<sup>7</sup> but the omission of such statement may perhaps be cured by reference to the book and page where the instrument is recorded.<sup>8</sup>

**A Notice Stating the Name of the Mortgagor Only** has been upheld where the date of the instrument was given and the property sufficiently described.<sup>9</sup>

*bb. ERROR IN DESCRIPTION OF PARTIES.* — When the names of the parties are given, either out of precaution or because required by statute, they should be correctly given.<sup>10</sup> If a wrong name be given as that of the mortgagor,<sup>11</sup> or if it be given in a misleading form, the notice is thereby vitiated. But trifling defects, such as the omission of a middle name,<sup>12</sup> or a slight error in spelling where the form given is *idem sonans* with the real name,<sup>13</sup> or where the names are equivalents of each other in the same or different languages,<sup>14</sup> do not affect the validity of the sale.

*cc. NAME OF ASSIGNEE.* — In the absence of statute it is not necessary that the fact of the assignment of the mortgage should be stated or the name of the assignee given.<sup>15</sup> But where the name of the assignee is required to be stated an omission of the name of any one of several assignees renders the notice invalid.<sup>16</sup>

(d) **Description of Property to Be Sold** — *aa. DEGREE OF CERTAINTY REQUIRED.* — The purpose of describing the property to be sold is to furnish information to the public by means of which the location and character of the property to be

**1. Omission to State Fact of Default.** — *Model Lodging House Assoc. v. Boston*, 114 Mass. 133; *King v. Bronson*, 122 Mass. 122.

**2. Disclosure of Purpose to Sell.** — *Judd v. O'Brien*, 21 N. Y. 186; *Maxwell v. Newton*, 65 Wis. 261.

**Sufficient Notice of Sale.** — The following notice was held sufficiently to indicate a mortgage sale under a power: "Mortgage sale. By virtue and in pursuance of a mortgage made and delivered, by M. to W., bearing date December 8, 1847, the undersigned will sell," etc. *White v. McClellan*, 62 Md. 347.

**3. Leet v. McMaster**, 51 Barb. (N. Y.) 236.

**4. People v. Prescott**, 3 Hun (N. Y.) 419.

**5. Powers v. Kueckhoff**, 41 Mo. 425, 97 Am. Dec. 281.

**6. Nau v. Brunette**, 79 Wis. 664.

**7. Names of Parties Should Be Stated.** — *Reeside v. Peter*, 33 Md. 120.

**8. Reference to Place of Record for Names of Parties.** — *Colgan v. McNamara*, 16 R. I. 554. *Contra*, *Reeside v. Peter*, 33 Md. 120. And see *Yellowly v. Beardsley*, 76 Miss. 613, 71 Am. St. Rep. 536.

**Incorrect Reference.** — But where, in addition to the omission of the names, the notice gives the wrong page of the record, it is insufficient. *Hoffman v. Anthony*, 6 R. I. 282, 75 Am. Dec. 701.

**The Substitution of Mortgages for Mortgagor** is a material and fatal error. *Abbot v. Banfield*, 43 N. H. 152.

**9. Fitzpatrick v. Fitzpatrick**, 6 R. I. 64, 75 Am. Dec. 681.

**10. Misleading Errors in Reciting Names of Parties.** — "Julia" for "Tofila." *Zlotociczski v. Smith*, 117 Mich. 202. "Steidler" for "Seitzler." *Texas Sav. Loan Assoc. v. Seitzler*, 12 Tex. Civ. App. 551.

**11. Lee v. Clary**, 38 Mich. 223. *Compare* *Richardson v. Hedges*, 150 Ind. 53.

**12. Omission of Middle Name.** — *White v. McClellan*, 62 Md. 347.

**Description of Wife.** — Notice of sale under a mortgage executed by husband and wife on her land is not vitiated by the fact that she is described merely as wife. *Yale v. Stevenson*, 58 Mich. 537.

**13. Error in Spelling.** — *Bacon v. Northwestern Mut. L. Ins. Co.*, 131 U. S. 258.

**"Dixon" for "Dickson" Not Fatal.** — *Reading v. Waterman*, 46 Mich. 107.

**14. See Zlotociczski v. Smith**, 117 Mich. 202.

**15. Name of Assignee Not Required.** — *Woonsocket Sav. Inst. v. American Worsted Co.*, 13 R. I. 255.

**16. Weir v. Birdsall**, 27 N. Y. App. Div. 404.

**Where the Name of Only the Last Assignee is required it is not necessary to give the name**

sold can be ascertained with reasonable certainty,<sup>1</sup> and if the description is sufficiently accurate for such purpose, it is good, even though it contains some inaccuracies and is not as full and complete as a careful conveyancer would have drawn it in a deed.<sup>2</sup> Hence, a description will be good enough if it follows that contained in the instrument under which the sale is to be made.<sup>3</sup> But a notice which, instead of giving a description, merely makes a reference to the pages of the record where the trust deed is recorded is not sufficient.<sup>4</sup>

*bb. OVERSTATEMENT OF QUANTITY.* — A description stating that a larger quantity is to be sold than is covered by the mortgage is misleading and insufficient, because persons who might be disposed to purchase the quantity described in the mortgage may not wish to purchase the quantity described in the notice, and therefore might not attend the sale.<sup>5</sup>

*cc. SITUS OF PROPERTY.* — If land is otherwise described with sufficient certainty the notice need not contain the name of the town where it is located,<sup>6</sup> or even that of the state or county,<sup>7</sup> as the land will be presumed to be in the state, and the court will take judicial knowledge of the county of location where the numbers of the section, township, and range are given.<sup>8</sup>

**A Town Lot** is properly described by plat, block, and lot number.<sup>9</sup>

*dd. NATURE AND CONDITION OF PROPERTY.* — Unless required by statute,<sup>10</sup> it is not necessary to state whether the property consists of a town lot or unimproved land.<sup>11</sup>

**A Failure to Specify Improvements on the property**<sup>12</sup> and emblements<sup>13</sup> growing thereon will not ordinarily affect the validity of the sale. But judicial con-

of one to whom the mortgage had been transferred as collateral security for a debt which was fully paid before publication of the notice. *White v. McClellan*, 62 Md. 347.

**1. Scope and Purpose of Description.** — *Loveland v. Clark*, 11 Colo. 265.

**2. Only Reasonable Certainty Required.** — *Newman v. Jackson*, 12 Wheat. (U. S.) 570; *Streeter v. Ilsley*, 151 Mass. 291.

**A Notice Describing Realty Correctly** is not rendered defective, in a subsequent dispute over the title to such realty, by the fact that personalty sold at the same time was incorrectly described. *Butte First Nat. Bank v. Bell Silver, etc.*, Min. Co., 8 Mont. 32, *affirmed* 156 U. S. 470.

**Personal Liability of Mortgagee — English Rule.** — A mortgagee who, in the exercise of his power of sale, personally or by his agent commits a mistake, as by misdescribing the property, whereby a material diminution is caused in the price realized, is liable to the parties interested in the equity of redemption for the loss so occasioned. *Tomlin v. Luce*, 43 Ch. D. 191.

**3. Following Description in Mortgage or Trust Deed.** — *Loveland v. Clark*, 11 Colo. 265; *Wilson v. Page*, 76 Me. 279; *Stickney v. Evans*, 127 Mass. 202; *Miller v. Lanham*, 35 Neb. 886; *Robinson v. Amateur Assoc.*, 14 S. Car. 148.

**Chattel Mortgage of Wheat.** — The fact that a growing crop of wheat subject to a chattel mortgage is described in the notice as so many sacks of wheat and in the mortgage as so many acres is not fatal to the sale where the mortgage, which is referred to, conveys a certain quantity to be raised on the place described. *Harker v. Woolery*, 10 Wash. 484.

**4. Mere Reference to Recorded Deed.** — *Yellowly v. Beardsley*, 76 Miss. 613, 71 Am. St.

Rep. 536. But see *Texas Sav. Loan Assoc. v. Seitzler*, 12 Tex. Civ. App. 551.

**Error in Name of Remote Grantor** in a deed, referred to for description only, is not material, where the land is otherwise fully described. *Richardson v. Hedges*, 150 Ind. 53.

**5. Quantity of Land Overstated.** — *Fenner v. Tucker*, 6 R. I. 551.

**But a Statement that Only So Much Will Be Sold** as is necessary to pay the debt is unobjectionable, nor is such notice rendered defective by a failure to designate the particular parcels to be sold. *Snyder v. Hemmingway*, 47 Mich. 549.

**An Overstatement of One-eighth of the quantity** has been held not to be material. *Schoch v. Birdsall*, 48 Minn. 441.

**Where Part of the Property Described in the Mortgage and Notice** is released prior to the sale, and such fact is not announced by the auctioneer, the sale will be set aside. *People's Sav. Bank v. Wunderlich*, 178 Mass. 453, 86 Am. St. Rep. 493.

**6. Dickerson v. Small**, 64 Md. 395.

**7. Shannon v. Hay**, 106 Ind. 589.

**8. Judicial Knowledge of Location.** — *Brown v. Ogg*, 85 Ind. 234; *Richardson v. Hedges*, 150 Ind. 53.

**9. Noland v. Lee's Summit Bank**, 129 Mo. 57. **Uncertain Description.** — "Lot 8 in block 109 of C. and P. addition" is insufficient. *Texas Sav. Loan Assoc. v. Seitzler*, 12 Tex. Civ. App. 551.

**10. Whether Town Lot or Farm Land to Be Stated.** — *Rathbone v. Clarke* (Supm. Ct. Spec. T.) 9 Abb. Pr. (N. Y.) 66 note.

**11. Austin v. Hatch**, 159 Mass. 198.

**12. Brown v. Wentworth**, 181 Mass. 49.

**Incorrect Statement of Nature of Improvements Not Fatal.** — *Sumrall v. Chaffin*, 48 Mo. 402.

**13. Lepper v. Mooyer**, 82 Md. 649.

firmation of a sale has been refused where large tracts of land comprising several farms were sold under a description by reference to plat merely and without any statement of the character of the property or of the nature of the improvements.<sup>1</sup>

*ee.* ESTATE AND EXTENT OF INTEREST. — Accuracy is required in the statement of the extent of the interest and the nature of the estate to be sold. If the sale is to be made subject to another incumbrance, its amount must be correctly given; and a false statement that the premises are subject to another mortgage will warrant setting the sale aside.<sup>2</sup> The trustee has no right to sell a greater interest than that which the instrument conveys to him. Hence a sale of the entire estate by a junior mortgagee is invalid<sup>3</sup> unless the prior mortgagee assents.<sup>4</sup>

(e) **Description of Mortgage.** — By the weight of authority statutory provisions that the notice state the date of the execution of a mortgage are not required to be literally and strictly followed.<sup>5</sup> Thus, a mistake in stating the date of the execution of a mortgage may be cured by giving the correct date of its recordation and a statement of the book and page of the record where the instrument may be found.<sup>6</sup> Where the date and place of recording are correctly given, the notice is not bad because of an error in stating the number of the record book.<sup>7</sup> In *Minnesota*, on the contrary, it is held that a failure in this respect strictly to follow the requirement of the statute is fatal.<sup>8</sup>

(f) **Statement of Amount Due** — *aa.* GENERAL RULE. — Ordinarily it is not necessary that the notice should state the amount of the indebtedness.<sup>9</sup> The debtor must be supposed to know how much is due, and intending bidders cannot be particularly concerned further than to satisfy themselves that a default has occurred, and that the power of sale has become operative. The state of the account can have no effect upon the purchaser's title, and hence will not influence his bid. It is, however, a common practice to insert such a statement in the notice, and in some jurisdictions there are statutes requiring that this shall be done.<sup>10</sup>

*bb.* OVERSTATEMENT OF INDEBTEDNESS. — Where, in the absence of statute, the notice undertakes to state the amount of the debt, the true amount should, of course, be stated. Otherwise the notice may be misleading and bad for mis-

1. *Carroll v. Hutton*, 88 Md. 676.

2. **Extent of Interest.** — *Callaghan v. O'Brien*, 136 Mass. 378; *Burnet v. Denniston*, 5 Johns. Ch. (N. Y.) 35.

**Ambiguous Statement of Interest.** — If the mortgage is a first lien covering the entire estate, a notice stating merely that "all the equity of redemption" will be sold, is bad, because it suggests prior or continuing incumbrances, and tends to keep bidders from attending. *Fowle v. Merrill*, 10 Allen (Mass.) 350.

3. **A Sale of the Entire Estate by a Junior Mortgagee.** — *Donohue v. Chase*, 130 Mass. 137; *Dearnaley v. Chase*, 136 Mass. 288.

4. **Assent of Prior Mortgagee.** — *Morton v. Hall*, 118 Mass. 511; *Cook v. Basley*, 123 Mass. 396.

5. *McCardia v. Billings*, 10 N. Dak. 373, 88 Am. St. Rep. 729.

6. **Failure to State Correct Date Cured by Reference.** — *Bacon v. Northwestern Mut. L. Ins. Co.*, 131 U. S. 258; *Reading v. Waterman*, 46 Mich. 107; *Brown v. Burney*, 128 Mich. 205; *Baker v. Cunningham*, 162 Mo. 134; *McCardia v. Billings*, 10 N. Dak. 373, 88 Am. St. Rep. 729. Compare *Morgan v. Joy*, 121 Mo. 677.

**Omission to State Page Where an Assignment Is**

**Registered** is not fatal where its date is stated. *McCammon v. Detroit, etc., R. Co.*, 103 Mich. 104.

**Where There Are Two Mortgages** with same date between the same parties, recorded in the same book but on different pages, a misrecital of one for the other is misleading, and a sale has been set aside against one having knowledge of the error. *Freeman v. Moffitt*, 119 Mo. 280.

7. **Notice Not Vitiating by Mistake in Number of Record Book.** — *Judd v. O'Brien*, 21 N. Y. 186; *Harrington v. Keteltas*, 92 N. Y. 44.

8. **A Notice Which Fails to Give the Correct Date of Record** is invalid though it gives the place, book, and page of record by reference to which the exact date could be found. *Martin v. Baldwin*, 30 Minn. 537; *Clifford v. Tomlinson*, 62 Minn. 195; *Peaslee v. Ridgway*, 82 Minn. 288.

9. **Statement of Amount of Debt Unnecessary.** — *Wiswall v. Ross*, 4 Port. (Ala.) 321; *Stratton v. Reisdorph*, 35 Neb. 314; *Gooch v. Addison*, 13 Tex. Civ. App. 76. See also *Miller v. Evans*, 35 Mo. 45.

10. **Amount Due Required to Be Stated.** — *Maxwell v. Newton*, 65 Wis. 261.



description.<sup>1</sup> But if the claim is made honestly and in good faith, the notice is not vitiated by the mere fact that the creditor claims more than turns out to be actually due.<sup>2</sup>

**Excessive Claim as Ground for Injunction.** — A statement by the mortgagee in his notice of sale of a larger amount than the mortgagor claims is actually due may warrant an injunction to restrain the sale until the amount due can be ascertained,<sup>3</sup> but if there is no substantial question as to the amount of the beneficiary's debt, a sale under the power will not be enjoined for the taking of an account.<sup>4</sup>

*cc.* **STATUTE REQUIRING AMOUNT OF DEBT TO BE STATED** — **Interpretation.** — Substantially the same rule is applied where the statute requires the notice to state the amount of the indebtedness. All that is necessary is that the creditor should exhibit good faith. A claim made excessive merely by a misconstruction of the contract or by an erroneous computation does not render the sale invalid.<sup>5</sup>

(g) **Statement of Time and Place of Sale** — *aa.* **TIME.** — It is manifestly indispensable to the sufficiency of the notice that it should state the time and place of sale.

**An Error in the Statement of the Year** may be so palpable as not to mislead,<sup>6</sup> or it may be cured by consideration of the context,<sup>7</sup> or by reference to the date of the paper in which it is printed.<sup>8</sup> But where the error in the statement of

1. Child v. Morgan, 51 Minn. 116.

**Fatal Errors in Stating Amount of Debt.** — A statement that five thousand dollars is due when the true amount is only five hundred dollars is fatal. Grace v. Noel Mill Co., (Tenn. Ch. 1901) 63 S. W. Rep. 246.

So where the notice claimed one thousand six hundred dollars, the true amount being less than a thousand. Spencer v. Annan, 4 Minn. 542.

A claim of as much again as is due vitiates the notice. Carey v. Fulmer, 74 Miss. 729.

**Acceleration of Maturity.** — Where the mortgagee is authorized to declare the principal debt due upon default in payment of interest or an instalment of principal, a recital of such default, and that the option has been exercised to declare the whole debt due and payable, sufficiently shows the amount claimed to be due. Hoyt v. Pawtucket Sav. Inst., 110 Ill. 390.

2. **Excessive Claim Not Fatal.** — Savings, etc., Soc. v. Burnett, 106 Cal. 514; Kerfoot v. Billings, 160 Ill. 563; Millard v. Truax, 50 Mich. 343; Mowry v. Sanborn, 62 Barb. (N. Y.) 223; Lewis v. Duane, 69 Hun (N. Y.) 28. Compare Damon v. Deeves, 62 Mich. 465.

**If the Overstatement Is Gross or Fraudulent** or is due to illegal charges the sale may be set aside. Fairman v. Peck, 87 Ill. 156; Carey v. Fulmer, 74 Miss. 729. See also Kerfoot v. Billings, 160 Ill. 563; Lewis v. Duane, 69 Hun (N. Y.) 28.

**Interest Part of Mortgage Debt.** — A statement that ten dollars is due upon the mortgage debt is good although the amount be accrued interest and not a part of the principal. Traflet v. Cornell, 62 Minn. 442.

**Notice of Sale by Puisne Mortgagee** is not rendered defective by an error in overstating the amount due under the prior incumbrances. Way v. Dyer, 176 Mass. 448.

3. **Equity Jurisdiction.** — Stringham v. Brown, 7 Iowa 33; Sloan v. Coolbaugh, 10 Iowa 31; Bidwell v. Whitney, 4 Minn. 76; Armstrong v.

Sanford, 7 Minn. 49; Cole v. Savage, Clarke (N. Y.) 361; Van Bergen v. Demarest, 4 Johns. Ch. (N. Y.) 37; Capehart v. Biggs, 77 N. Car. 261; Purnell v. Vaughan, 77 N. Car. 268.

4. Curry v. Hill, 18 W. Va. 370. See also Hinson v. Brooks, 67 Ala. 491.

5. **Notice Not Affected by Overstatement of Indebtedness** unless gross or fraudulent. Hamilton v. Lubukee, 51 Ill. 415, 99 Am. Dec. 562; Reedy v. Millizen, 155 Ill. 636; Bowman v. Ash, 36 Ill. App. 115; Ramsey v. Merriam, 6 Minn. 168; Miller v. Evans, 35 Mo. 45; Klock v. Cronkhite, 1 Hill (N. Y.) 107; Jencks v. Alexander, 11 Paige (N. Y.) 619.

**Amount Due at Date of Notice.** — Where the notice is required to specify the amount claimed to be due "at the date of the notice," it is not indispensable that a date be affixed to the published notice. The time of its first publication will be regarded as its date. Ramsey v. Merriam, 6 Minn. 168.

In Butterfield v. Farnham, 19 Minn. 85, it was held that, in the absence of evidence of injury or fraudulent intent, a claim of thirty-four thousand two hundred and fifty-one dollars and twenty-eight cents, being an excess of seven thousand three hundred and thirty-five dollars and sixty-eight cents over the amount actually due, did not vitiate the sale. See also Bowers v. Hechtman, 45 Minn. 238.

**Statement of Amount Paid for Taxes.** — Under a statute requiring the notice to state the amount of taxes paid by the mortgagee, it is not necessary to give the year of levy, the date of payment, nor to state that the party holds the tax receipts. Jones v. Cooper, 8 Minn. 334. See also Kirkpatrick v. Lewis, 46 Minn. 164.

6. **A Notice of a Sale** to take place in 1761 when 1861 is meant does not vitiate the sale. Jensen v. Weinlander, 25 Wis. 477.

7. Mowry v. Sanborn, 68 N. Y. 153.

8. **Where No Year Is Stated** the current year is meant and the date may be supplied from the paper. Parnly v. Walker, 102 Ill. 617.

the year of sale may prove misleading, the notice is insufficient.<sup>1</sup>

**The Month, and More Especially the Day, of Sale** must be indicated with precision.<sup>2</sup>

**Hour of Sale.** — It is not necessary that the notice should state the exact hour at which the sale is to be made,<sup>3</sup> and where no hour is specified it will be intended that the sale is to be made within the usual business hours<sup>4</sup> or at the hour conventionally determined by custom in the particular community.<sup>5</sup>

**Changing Date of Sale.** — While the date of sale may, in a proper case, be changed, pending the publication of the notice,<sup>6</sup> yet if the owner or other parties interested are misled by reason of the change, and lose the opportunity of attending the sale by not learning of the substituted date, the sale will be set aside.<sup>7</sup>

**bb. PLACE.** — The place where the sale is to be made should be designated in the notice with sufficient certainty to enable the public to find the locality without seeking other information.<sup>8</sup> If the designated place has no existence, as where the notice states that the sale will take place in front of the court house in a certain village which contains no court house, a sale made thereunder is invalid.<sup>9</sup>

If the Conveyance Itself Contains Directions as to the place of sale, the notice must be in conformity with such directions.<sup>10</sup>

**Evidence.** — Where the notice itself cannot be produced, parol evidence is admissible to show that the place of sale was properly designated.<sup>11</sup>

(5) **Mode of Giving Notice** — (a) **In General.** — Provisions either of the general law or of the mortgage or deed of trust itself directing that notice shall be given in a particular manner are mandatory and must be strictly followed.<sup>12</sup> Where no particular mode is prescribed, the means chosen must be reasonably adapted to the purpose of giving publicity to the sale.<sup>13</sup>

(b) **Posting** — *aa. ELECTION TO POST OR PUBLISH.* — As a matter of convenience, personal service upon the mortgagor is usually dispensed with, and public notice is given either by posting,<sup>14</sup> or by publication in a newspaper.<sup>15</sup>

*bb. WHAT CONSTITUTES POSTING NOTICE.* — The purpose of giving public notice is to attract bidders in order that the sale may be made under the most favorable conditions. Consequently notice is not posted within the meaning of

1. **Misleading Error in Stating Year of Sale.** — *Fenner v. Tucker*, 6 R. I. 551.

2. *Menard v. Crowe*, 20 Minn. 448.

Where a sale is advertised for "the 28th day of December next," the word "next" may be referred to the 28th where the notice is published on the 7th of December and the context shows that there is no intention to postpone the sale to the next year. *Gray v. Shaw*, 14 Mo. 341.

3. **Omission to State Hour of Sale.** — *Hamilton v. Lubukee*, 51 Ill. 415, 99 Am. Dec. 562; *Menard v. Crowe*, 20 Minn. 448; *Thorwarth v. Armstrong*, 20 Minn. 464; *Meier v. Meier*, 105 Mo. 411.

4. **Notice of Sale Between Ten A. M. and Four P. M. Sufficient.** — *Northrop v. Cooper*, 23 Kan. 432.

5. **Where the Custom Is to Sell at One P. M.** a sale made at eleven A. M. is irregular and may be set aside. *Holdsworth v. Shannon*, 113 Mo. 508, 35 Am. St. Rep. 719.

6. *Banning v. Armstrong*, 7 Minn. 46.

7. *Dana v. Farrington*, 4 Minn. 433.

8. **A Notice Is Sufficiently Certain as to the Place of Sale** which states that it will take place "at the court house in the village of Mason, Ingham County." *McCammon v. Detroit, etc., R. Co.*, 103 Mich. 104.

**Under a Statute Requiring the Place of Sale to**

**Be Stated**, it is sufficient to designate it as in front of the office of the register of deeds of the county, without giving the location of his office. *Merrill v. Nelson*, 18 Minn. 366.

9. *Bottineau v. Ætha L. Ins. Co.*, 31 Minn. 125.

10. **Place of Sale Indicated in Mortgage.** — *Colcord v. Bettinson*, 131 Mass. 233. *Compare Williams v. Dreyfus*, 79 Miss. 245.

11. *Wilkerson v. Allen*, 67 Mo. 502.

12. *Sears v. Livermore*, 17 Iowa 297, 85 Am. Dec. 564.

13. **Publication in a Newspaper** having large circulation in the county, and the placing of plats on the court-house door and in the hands of real estate agents and others, is ample to justify confirmation. *Carroll v. Hutton*, 91 Md. 379.

14. **The Act of Posting Notices** may be done by an agent of the trustee. *Tyler v. Herring*, 67 Miss. 169, 19 Am. St. Rep. 263.

15. **Election to Post or Publish.** — A mortgage provided that a sale under the power could be made by advertising the same for a specified period in a newspaper published in a certain town, "by posting up written or printed notices in four public places" in the county. The court held that the word "by" was intended for "or," and that the notice might be given in either mode. *Watson v. Sherman*, 84 Ill. 263.

the law when it is taken down by or at the instance of the person required to post it, soon after being properly affixed to the spot designated.<sup>1</sup>

*cc. REMOVAL BY STRANGER.* — The person making the sale, however, is not held responsible for keeping the notice posted, and its subsequent removal by a stranger will not affect the validity of the sale.<sup>2</sup> When the notice has once been properly posted it will be presumed, until the contrary is shown, that it remained posted up to the day of the sale.<sup>3</sup>

*dd. PLACE OF POSTING NOTICE* — (*aa*) *Public Places.* — It is usual to require that the notice shall be posted in one or more public places in the county where the sale is to take place.<sup>4</sup>

Where a Particular Place Is Designated, the notice must be posted there.<sup>5</sup> The fact that the owner of the premises will not permit the trustee to post the notice in such place is no excuse for a failure to comply.<sup>6</sup> And it has been held, in a case where the spot designated was nonexistent, that sale under the power could not be effected at all.<sup>7</sup>

*(bb) Different Places.* — The requirement that the notice shall be posted in three public places means three different places, and such provision is violated where one notice is posted at the court-house door and the other two respectively at or near two corners of the public square.<sup>8</sup> But it has been held that, one notice being posted at the court house, another may be posted on the post-office door though only a hundred and fifty yards away.<sup>9</sup>

*(c) Publication of Notice in Newspaper* — *aa. IN GENERAL* — (*aa*) *Strict Conformity Required.* — Publication by advertising in a paper is not essential unless a statute or the mortgage so requires,<sup>10</sup> but where the requirement is made purchasers must take notice of its effect. Strict compliance with the statutory provisions or with the terms of the deed concerning the publication of notice is required,<sup>11</sup>

1. Culbertson v. Young, 50 Mich. 190.

2. Removal by Stranger. — Graham v. Fitts, 53 Miss. 307; Sandusky v. Faris, 49 W. Va. 150. In the latter case it was said: "It is not the duty of the trustee to stand over the notice and prevent its being torn down after it is posted, and the fact that persons looked for and did not find it after it was posted cannot be regarded as proof that it had not been posted."

In a case where there were suspicious circumstances which savored of premeditated wrong, it was held that the notice must continue to be posted until the sale though there was no proof that the trustee connived at its removal. Denning v. Smith, 3 Johns. Ch. (N. Y.) 332.

3. Hornby v. Cramer, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 490.

4. Three Places in County, One Being at Court-house Door. — National Loan, etc., Co. v. Dorenblaser, 30 Tex. Civ. App. 148; Fischer v. Simon, 95 Tex. 234; Marston v. Yaites, (Tex. Civ. App. 1901) 66 S. W. Rep. 867.

*Public Place.* — The side of a public square in a town or city is a public place. Carter v. Abshire, 48 Mo. 300. So a court house, and not exclusively the front part of it, is a public place. Campbell v. Wheeler, 69 Iowa 588.

*Notice Inaccessible on Sunday.* — A notice posted on the inside of the post-office door, where it is visible to the public except on Sundays, is sufficient, as the law does not contemplate that the public concerns itself with temporal things on the Sabbath. Graham v. Fitts, 53 Miss. 307.

*A Local Custom* among auctioneers of posting notices upon the doors or in the windows of houses to be sold, stating the time and place of

sale, does not have the force of law or contract, and a sale made without observing such custom is valid. Chilton v. Brooks, 69 Md. 584.

5. At the Court-house Door. — A notice may be posted in the court-house corridor on a board furnished by the county authorities for such purposes, where the notice is required to be posted "at the court-house door." Howard v. Fulton, 79 Tex. 231.

*"At or Near" Place Designated.* — Where the posting is required to be at a public place, notice is insufficient where the proof shows only that the notice was posted "at or near" a public place. Powell v. Hardy, 89 Minn. 229.

6. Sears v. Livermore, 17 Iowa 297, 85 Am. Dec. 564.

7. Designated Place Nonexistent. — In Dutton v. Cotton, 10 Iowa 408, a statute required that one of the notices of sale should be posted at the place of holding the last term of the district court. At the time of posting the notices under a mortgage, no term of court had ever been held in the county, but the notices were posted in three public places in the county, one of which was the office of the clerk of the district court. It was held that the sale was invalid, and that a judicial foreclosure was the mortgagee's proper remedy.

8. National Loan, etc., Co. v. Dorenblaser, 30 Tex. Civ. App. 148.

9. Graham v. Fitts, 53 Miss. 307.

10. Fogarty v. Sawyer, 23 Cal. 570.

11. Strict Compliance with Provision Requiring Publication in Paper. — Bacon v. Kennedy, 56 Mich. 329; Thornburg v. Jones, 36 Mo. 514; Van Slyke v. Sheldon, 9 Barb. (N. Y.) 278; King v. Duntz, 11 Barb. (N. Y.) 191; Bunce



and a sale made upon notice given in an improper way<sup>1</sup> or for an insufficient period of time is defective.<sup>2</sup>

(bb) *Lex Rei Sitæ*. — Laws concerning the exercise of the power of sale have no extraterritorial force. The *lex rei sitæ* controls. The courts of one state accordingly refuse to enjoin a sale of property located in another state, in accordance with the law of such state, although the publication is insufficient under the statutes of the state where the publication has been made and where the suit for the injunction has been filed.<sup>3</sup>

(cc) *Conflict Between Statute and Terms of Mortgage*. — Where the statute prescribes the contents of a notice of sale, and the manner of its publication, these requirements cannot be varied by the terms of the mortgage or trust deed.<sup>4</sup> In some states the statutes regulating the matter of publication expressly apply only where the deed itself makes no provision on the subject.<sup>5</sup>

(dd) *Law Governing Publication of Notice*. — The law in force when a sale is made controls in the matter of publication if such be the legislative intent.<sup>6</sup> But ordinarily a statute fixing the length of time during which publication shall be made does not apply to a conveyance already executed, the presumption being that the statute was not intended to be retroactive.<sup>7</sup> In such case, the provisions of the trust will govern.<sup>8</sup>

bb. SELECTING MEDIUM OF PUBLICATION — (aa) *Discretion of Person Selling*. — The paper in which publication is to be made may be determined by the mortgage itself or, in general terms, by the statute of the state. Where the medium of publication is not so determined, the selection of a paper rests in the discretion of the person authorized to sell.<sup>9</sup> This discretion will not ordinarily be questioned.<sup>10</sup> But the trustee must use good faith in choosing the channel of

*v. Reed*, 16 Barb. (N. Y.) 347; *Mowry v. Sanborn*, 72 N. Y. 534.

**Mere Clerical Errors in the Publication**, such as could not mislead any one, will not justify setting aside the sale. *Mitchel v. Nowaday County*, 80 Mo. 257; *Draper v. Bryson*, 17 Mo. 71, 57 Am. Dec. 257; *Tanner v. Stine*, 18 Mo. 583, 59 Am. Dec. 320; *Curd v. Lackland*, 49 Mo. 451; *Houck v. Cross*, 67 Mo. 151.

**Existence of War**. — The fact that communication between the mortgagee's residence and the place where publication of notice of sale is required by the deed to be made, is cut off by the existence of war, will not justify a sale made without such publication. If the power cannot be complied with, it is for the time suspended. *Bigler v. Waller*, 14 Wall. (U. S.) 297.

1. *Powell v. Hardy*, 89 Minn. 229.

2. **Sale Defective for Insufficient Period of Publication**. — *Shillaber v. Robinson*, 97 U. S. 68; *International Bldg., etc., Assoc. v. Hardy*, 86 Tex. 610, 40 Am. St. Rep. 870; *Childs v. Hill*, 20 Tex. Civ. App. 162. But see *Schanewerk v. Hoberecht*, 117 Mo. 22, 38 Am. St. Rep. 631, *overruling* in effect *Siemers v. Schrader*, 88 Mo. 20.

**If the Grantor Expressly Consents** that the trustee may sell upon a shorter notice than that required by the deed, he becomes estopped to attack the sale on the ground of insufficient notice. *Maulsby v. Barker*, 3 Mackey (D. C.) 165. *Aliter*, where the period is fixed by statute. *Cornell v. Newkirk*, 144 Ill. 241.

3. **Lex Rei Sitæ**. — *Carpenter v. Black Hawk Gold Min. Co.*, 65 N. Y. 43. See also *Central Gold Min. Co. v. Platt*, 3 Daly (N. Y.) 263; *Elliott v. Wood*, 45 N. Y. 71.

4. **Statute Controls Provisions of Mortgage**. — *Cornell v. Newkirk*, 144 Ill. 246; *Butterfield v. Farnham*, 19 Minn. 85; *Elliott v. Wood*, 45 N. Y. 71.

5. **Statute Applying When Power Silent**. — Publication in only one paper as required in the deed is sufficient although the local statutes require publication in two papers, such requirement having application only when the deed is silent on the subject. *Knapp v. Anderson*, 89 Md. 189.

**Publication under Terms of Deed Impossible**. — Under a statute prescribing publication of notice in case none is provided for by the terms of the power, the statute may be followed where the method of publication agreed upon in the power cannot possibly be carried out, as for want of a daily paper in the county. *Warehime v. Carroll County Bldg. Assoc.*, 44 Md. 512.

6. **Law in Force at Time of Sale**. — *Atkinson v. Duffy*, 16 Minn. 45; *James v. Stull*, 9 Barb. (N. Y.) 482.

7. *International Bldg., etc., Assoc. v. Hardy*, 86 Tex. 610, 40 Am. St. Rep. 870.

8. *Childs v. Hill*, 20 Tex. Civ. App. 162.

9. **Discretion of Mortgagee or Trustee**. — *Singleton v. Scott*, 11 Iowa 589.

**Official Publication**. — Publication need not necessarily be made in the paper designated as official by the court in accordance with the *Missouri* statutes. *Dart v. Bagley*, 110 Mo. 42.

10. **Discretion of Trustee in Choosing Paper** will not be questioned except in a clear case of abuse. *Hurt v. Cooper*, 63 Tex. 362; *El Paso v. Ft. Dearborn Nat. Bank*, (Tex. Civ. App. 1903) 71 S. W. Rep. 799; *Maxwell v. Newton*, 65 Wis. 261.

publication, and there must be no appearance of an intention on his part to prevent instead of to give notice.<sup>1</sup> Thus, a sale has been set aside where it appeared that the notice was inserted in a weekly of small local circulation in order to escape the eyes of unscrupulous attorneys who it was feared might stir up litigation.<sup>2</sup>

(bb) *General Designation.*—In the greater number of cases the deed of trust or the statute requires that publication shall be made in a paper or newspaper published at a designated place or in a specified county, without naming a particular periodical. Such requirement is not subject to the defect of being too general and must be followed.<sup>3</sup>

If a Particular Paper Is Designated it must, of course, be used, and where such paper is discontinued before the time for the sale, the trustee, though not deprived of the naked legal title, can no longer execute the power. In such case he must resort to judicial foreclosure.<sup>4</sup>

A Change in the Name of a Paper or Its Removal to another county pending the publication of the notice and after that particular medium has been chosen does not affect the validity of the notice.<sup>5</sup> Nor is the fact material that the paper is consolidated with another, where there is no break in the successive publications.<sup>6</sup>

(cc) *Place of Publication.*—In the exercise of a sound discretion the trustee may insert his notice in a paper published in a state other than that where the property is located.<sup>7</sup> It is, however, generally provided that the paper shall be published in the county of location or place of sale if there be such paper.<sup>8</sup> In *Maine* it has been held that a statute directing the notice to be given in a newspaper printed in the county is not satisfied by proof that the paper used was published in such county.<sup>9</sup> But according to what is apparently the better view, "print" and "publish" are synonymous terms.<sup>10</sup>

(dd) *Circulation.*—If the medium of publication is a paper or newspaper

1. Publication "Made to Prevent and Not to Give Notice."—*Flint v. Lewis*, 61 Ill. 299; *Welber v. Curtiss*, 104 Ill. 309. Compare *Thompson v. Heywood*, 129 Mass. 401.

2. *Stewart v. Hamilton Bldg., etc., Assoc.*, (Tenn. Ch. 1898) 47 S. W. Rep. 1106.

3. General Designation Sufficient.—*Singleton v. Scott*, 11 Iowa 589; *Brown v. Wentworth*, 181 Mass. 49; *Martin v. Paxson*, 66 Mo. 260.

4. *Tucker v. Silver*, 9 Iowa 261.

5. Change in Name.—*Perkins v. Keller*, 43 Mich. 53.

6. Consolidation with Another Paper.—*Wilkinson v. Eilers*, 114 Mo. 245.

7. *Ingle v. Jones*, 43 Iowa 286.

8. Nearest Place of Sale.—A statutory requirement of publication in a paper published nearest the place of sale is complied with by publishing in any paper issued in the city or town nearest the place of sale. Such requirement does not contemplate exact measurement by streets or in an air line as between several papers published in such town. *Felker v. Grant*, 10 S. Dak. 141.

Where Land Lying in Several Counties is to be sold under one mortgage, publication need be made in only one of such counties. *Paulle v. Wallis*, 58 Minn. 192.

Where Notice Is Required to Be Published in Two Counties, publication in one county only is insufficient. *Thornburg v. Jones*, 36 Mo. 514.

"Hydra-headed" Paper—Place of Publication.—Where several newspapers, all having the same contents but different headings and date lines according to the different towns of their

destination, were printed and issued at Fall River, it was held that the particular edition circulated as "The Dighton Rock" in a town named Dighton was not published at Dighton in the sense of the statute so as to make it necessary to advertise therein a sale of premises located in such town. *Rose v. Fall River Five Cents Sav. Bank*, 165 Mass. 273.

Yet publication in such a paper is sufficient where the city whence all editions are issued lies in the same county as the town of the location of the premises. *Brown v. Wentworth*, 181 Mass. 49.

9. Paper to Be "Printed" in County.—*Bragdon v. Hatch*, 77 Me. 433; *Hollis v. Hollis*, 84 Me. 96.

10. "Print" and "Publish" Synonymous.—See *Sharp v. Daugney*, 33 Cal. 505; *Bunce v. Reed*, 16 Barb. (N. Y.) 347; *Menard v. Crowe*, 20 Minn. 448.

Place Designated in Mortgage—Error in Recording.—The publication is sufficient if made in a paper published at the place designated in the mortgage, notwithstanding an error in the record as to such designation. The mortgagee cannot be affected by the fault of the recording officer. *Colgan v. McNamara*, 16 R. I. 554.

Error in Certified Copy of Deed.—Where the newspaper used is published in the county designated in the deed of trust, the validity of the sale is not affected by the fact that a certified copy of the deed of trust makes it appear that the notice was to be published in a different county. *Jones v. Moore*, 42 Mo. 413.

within the meaning of the statute or of the mortgage or deed of trust,<sup>1</sup> it is not material that it should be the one of widest circulation<sup>2</sup> which might have been chosen. Neither is it necessary that it should have a circulation in any particular city or portion of the county.<sup>3</sup>

(*ce*) *Language of Notice.* — The subjects of the language of the notice and of the paper in which it is published are elsewhere treated.<sup>4</sup>

*cc. PUBLICATION IN WEEKLY OR DAILY PAPER* — (*aa*) *In General.* — Where daily publication is not expressly required,<sup>5</sup> publication in a weekly,<sup>6</sup> or in a daily at regular intervals,<sup>7</sup> is entirely adequate whether the required period of publication be stated in weeks or days.

(*bb*) *Different Editions.* — Likewise it is not essential to the validity of the publication that the notice should be published in all editions of the paper issued on the days of its publication, where the edition in which it appears is really a separate edition.<sup>8</sup>

**When Publication Has Begun** in either a daily or a weekly, the notice cannot be transferred to the other without beginning anew and publishing the full time even though both papers are under the same management and contain matter in common.<sup>9</sup>

(*cc*) *Place of Insertion.* — It seems not to be material at what place in the columns of a paper the notice appears.<sup>10</sup>

*dd. PERIOD TO BE COVERED BY PUBLICATION* — (*aa*) *Reasonable Time.* — Where the period during which publication is to be made is not specified, a reasonable discretion is to be used which should, if practicable, conform with the prevailing usage of prudent men or with the rules of court concerning sales of like property in that jurisdiction.<sup>11</sup>

(*bb*) *Continuity of Publication* — *aaa. General Rule.* — The publication should, as a rule, be continuous,<sup>12</sup> that is, it should appear in every issue or at regular intervals, if the paper is a daily. But a single insertion may be sufficient if the power does not contemplate a continuous publication.<sup>13</sup>

*bbb. Sunday Issue.* — It is not necessary to insert the notice in the Sunday issue of a daily, Sunday being *dies non*,<sup>14</sup> and the failure to do so does not

1. As to What Constitutes a Paper or Newspaper, see the titles NEWSPAPERS, vol. 21, p. 533; PUBLICATION, vol. 23, p. 307.

2. No Proof of Circulation Required. — *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 556.

3. Locality of Circulation. — *Stevenson v. Hano*, 148 Mass. 616; *Smith v. Foxworthy*, 39 Neb. 214; *Maxwell v. Newton*, 65 Wis. 261.

4. See the title PUBLICATION, vol. 23, p. 308.

5. Publication in Two Dailies required in Baltimore by local statute. See *Chilton v. Brooks*, 71 Md. 445.

6. Weekly Publication Sufficient. — *Hamilton v. Fowler*, 99 Fed. Rep. 18, 40 C. C. A. 47; *Leffler v. Armstrong*, 4 Iowa 482, 68 Am. Dec. 672; *Campbell v. Tagge*, 30 Iowa 305; *Johnson v. Dorsey*, 7 Gill (Md.) 286; *German Bank v. Stumpf*, 73 Mo. 311; *Gray v. Worst*, 129 Mo. 122. *Contra* *Washington v. Bassett*, 15 R. I. 563, 2 Am. St. Rep. 929.

7. *White v. Malcolm*, 15 Md. 529.

8. Different Editions. — *Brown v. Wentworth*, 181 Mass. 49; *Everson v. Johnson*, 22 Hun (N. Y.) 115.

Notice Appearing in All Copies of the paper, except some gratuitously sent to nonresident advertisers, sufficient. *Johnson v. Wood*, 125 Ala. 330.

9. *Stine v. Wilkson*, 10 Mo. 75.

10. *Nations v. Pulse*, 175 Mo. 86.

11. Twelve Days a Reasonable Time. — It has been held that six every-other-day insertions in a daily newspaper ending on the day preceding a sale of real property are sufficient, there being other evidence of efforts at publicity. *Wilson v. Wall*, 99 Va. 353, *criticising* *Morris v. Virginia State Ins. Co.*, 90 Va. 370, where it was decided that an advertisement of realty for less than thirty days was not sufficient.

12. Publication to Be Continuous. — *Cushman v. Stone*, 69 Ill. 516; *Stine v. Wilkson*, 10 Mo. 75; *Kellogg v. Carrico*, 47 Mo. 157; *Washington v. Bassett*, 15 R. I. 563, 2 Am. St. Rep. 929. *Compare* *German Bank v. Stumpf*, 73 Mo. 311.

A Notice Appearing in a Daily published only on week days need not be inserted in a Sunday paper made up of matter printed in the daily as issued during the preceding week days. *El Paso v. Ft. Dearborn Nat. Bank*, (Tex. Civ. App. 1903) 71 S. W. Rep. 799.

13. Continuous Publication Not Contemplated by Power. — *Weld v. Rees*, 48 Ill. 428; *Jenkins v. Pierce*, 98 Ill. 646.

"After Publishing a Notice Ten Days Before the Sale," contemplates one publication. "Notice for ten days" would require a continuous publication. *Weld v. Rees*, 48 Ill. 428.

14. Notice Not Appearing on Sunday. — *Cushman v. Stone*, 69 Ill. 516; *Kellogg v. Carrico*, 47 Mo. 157; *Howard v. Fulton*, 79 Tex. 231.



destroy the continuity of the publication.<sup>1</sup>

(cc) *Beginning Publication*. — The publication should not begin until default has occurred; hence a publication begun on the same day the debt becomes due is premature and void.<sup>2</sup> Likewise where, by the terms of the power, the sale is not to be made until after default has continued for a certain time, publication cannot begin until the period of grace has elapsed.<sup>3</sup>

(dd) *Period to Elapse Before Sale* — *aaa. Terminus a Quo*. — Provisions in a statute or in a mortgage requiring notice to be given for a specified time are construed so as to require the date of the first and not of the last publication to be used as the terminal from which the time is to be computed.<sup>4</sup> Thus a requirement of thirty days' notice does not make it necessary for such interval to elapse after the last appearance of the notice.<sup>5</sup>

*bbb. One Terminal Day Excluded*. — In computing the duration of the period during which publication shall continue, one of the terminal days is excluded and the other included.<sup>6</sup> The full number of days<sup>7</sup> or weeks<sup>8</sup> specified must always elapse before the sale.<sup>9</sup>

*ccc. Sunday to Be Counted*. — Though, as we have just seen, notice need not be published on Sunday,<sup>10</sup> such day is properly counted in computing the period to be covered by the publication.<sup>11</sup>

*ee. INTERVAL BETWEEN LAST PUBLICATION AND DAY OF SALE*. — It is not necessary for the sale to take place on the day following the expiration of the required period of publication,<sup>12</sup> unless the mortgage so provides,<sup>13</sup> and a reasonable

1. *El Paso v. Ft. Dearborn Nat. Bank*, (Tex. Civ. App. 1903) 71 S. W. Rep. 799.

2. *Pratt v. Tinkcom*, 71 Minn. 142.

3. *Macon, etc., R. Co. v. Georgia R. Co.*, 63 Ga. 103.

4. *Taylor v. Reid*, 103 Ill. 349. And see the title TIME (COMPUTATION OF), *ante*, p. 209.

It Will Be Presumed that the First Publication in a daily paper was made on the day the notice bears date. *Kopmeier v. O'Neil*, 47 Wis. 593.

5. *Bell Silver, etc., Min. Co. v. Butte First Nat. Bank*, 156 U. S. 470, *affirming Butte First Nat. Bank v. Bell Silver, etc.*, Min. Co., 8 Mont. 32.

6. *One Terminal Day to Be Excluded*. — *Magnusson v. Williams*, 111 Ill. 450; *Worley v. Naylor*, 6 Minn. 192; *Howard v. Hatch*, 29 Barb. (N. Y.) 297; *Bowles v. Brauer*, 89 Va. 466. And see the title TIME (COMPUTATION OF), *ante*, p. 209.

7. *Specified Number of Days Before Sale*. — *Enochs v. Miller*, 60 Miss. 19; *Howard v. Fulton*, 79 Tex. 231; *Mallory v. Kessler*, 18 Utah 11, 72 Am. St. Rep. 765.

Where Ten Days' Notice Is Required, a sale on the eighteenth when the first publication is made on the eighth is invalid. *Lerch v. Snyder*, 2 Tex. Civ. App. 421.

*Publication for Nineteen Successive Days* ending on the morning of the sale does not comply with a requirement that publication be made at least twenty days prior to the day of sale, such publication to be made at least three times during such sale. *Siemers v. Schrader*, 14 Mo. App. 346; *Childs v. Hill*, 20 Tex. Civ. App. 162.

*Laxer Rule Sanctioned*. — In *Missouri* it has been held that a requirement of thirty days' notice is satisfied where the publication in a weekly of a sale to take place on June 18 is made in the four issues between May 19 and June 16, inclusive. *Gray v. Worst*, 129 Mo. 122.

Likewise a published notice beginning September 22 for a trustee's sale on October 23 was held good where thirty days publication was required, although two or three of the insertions were omitted at the end of the period. *German Bank v. Stumpf*, 73 Mo. 311.

8. *Specified Number of Weeks Before Sale*. — *Gantz v. Toles*, 40 Mich. 725; *Bacon v. Kennedy*, 56 Mich. 329; *Bunce v. Reed*, 16 Barb. (N. Y.) 347; *Finlayson v. Peterson*, 5 N. Dak. 587, 57 Am. St. Rep. 584.

9. *Weekly Publication*. — Where notice is required to be published "six times, once in each week for six successive weeks," the giving of notice is complete when it has been published in six successive issues of a weekly, and it is not necessary to postpone the sale until six full weeks, or forty-two days, has elapsed from the first publication. In such case the sale can take place on the thirty-seventh day. *Grandin v. Emmons*, 10 N. Dak. 223, 88 Am. St. Rep. 684. To the same effect, see *Dexter v. Shepard*, 117 Mass. 480; *Frothingham v. March*, 1 Mass. 247; *Worley v. Naylor*, 6 Minn. 192; *George v. Arthur*, 2 Hun (N. Y.) 406; *Howard v. Hatch*, 29 Barb. (N. Y.) 297; *McDonald v. Nordyke Marmon Co.*, 9 N. Dak. 290; *Marling v. Robrecht*, 13 W. Va. 440; *Miller v. Neff*, 33 W. Va. 197; *Sandusky v. Faris*, 49 W. Va. 150.

10. See *supra*, this subdivision, *bbb. Sunday Issue*.

11. *Sunday Counted in Computing Period to Elapse*. — *Cushman v. Stone*, 69 Ill. 516; *Bowles v. Brauer*, 89 Va. 466.

12. *When Sale Must Be Made*. — *Beal v. Blair*, 33 Iowa 318; *Howard v. Hatch*, 29 Barb. (N. Y.) 297.

As to Effect of a Failure to Publish Notice on the Day of Sale, under the particular facts, see *Patterson v. Miller*, 52 Md. 388.

13. *Sale to Follow Publication*. — Where the mortgage provides for publication for four weeks next before the day of sale, an inter-

interval may be allowed to elapse.<sup>1</sup> A sale is not unreasonably dilatory where it occurs eight<sup>2</sup> or ten<sup>3</sup> days after the termination of six weeks' publication.

**Language Expressly Requiring an Interval of a Stated Length** does not prohibit the adoption of a longer but, of course, reasonable interval.<sup>4</sup>

*ff* **SECOND PUBLICATION WHEN FIRST DEFECTIVE.** — Where the original publication is insufficient, it cannot be cured by postponing the sale and publishing notice of that fact.<sup>5</sup> The proper course is to abandon the defective notice altogether and advertise anew for the required period.<sup>6</sup>

*gg* **AFFIDAVIT OF PUBLICATION REQUIRED** — (*aa*) *Effect of Failure to Comply.* — In a few jurisdictions an affidavit of publication or a copy of the notice<sup>7</sup> is required to be filed with the proper functionary after the sale has been made. Such provisions are intended to secure the preservation of evidence for the benefit of purchasers, and are not generally treated as creating a condition subsequent. Consequently the validity of the sale is not impeached by a failure of the mortgagee to file such affidavit.<sup>8</sup>

**Parol Evidence.** — The fact of publication can also be shown apart from the affidavit, and the presumption raised by it can be rebutted.<sup>9</sup>

(*bb*) *By Whom to Be Made.* — The publisher is a printer within the meaning of a statute requiring the affidavit to be made by the printer.<sup>10</sup>

*hh* **PRESUMPTION AS TO GIVING NOTICE.** — Where a trustee has executed the power and transmitted title to the purchaser at his sale by a proper deed, and subsequently the grantor or some person claiming under him brings suit to vacate the deed or recover the property on the ground that the sale was not advertised, it will be presumed in favor of the purchaser at the trustee's sale that the publication was properly made, and the burden of showing an irregularity therein is upon the plaintiff although he is thereby compelled to prove a negative. This is clearly the law where the deed itself recites that notice was properly given;<sup>11</sup> but the presumption doubtless arises apart from such recital.<sup>12</sup> The presumption has been said to exist where a sale has been made but no deed executed;<sup>13</sup> but this is doubtful.

**3. Proceedings Incident to Sale** — *a*. **DUTY OF TRUSTEE.** — It is the duty of the trustee to act to the best interest of both parties, and he should con-

mission of nine days is too long. *McMahon v. American Bldg., etc., Assoc.*, 75 Miss. 965.

**1. Reasonable Interval.** — *Taylor v. Reid*, 103 Ill. 349.

**2.** *Atkinson v. Duffy*, 16 Minn. 45.

**3.** *Goenen v. Schroeder*, 18 Minn. 66.

**4.** *Tooke v. Newman*, 75 Ill. 215.

**5. Notice of Postponement.** — *Pratt v. Tinkcom*, 21 Minn. 142. But see *Jackson v. Clark*, 7 Johns. (N. Y.) 217.

**6. Second Publication When First Defective.** — *Macon, etc., R. Co. v. Georgia R. Co.*, 63 Ga. 103; *Ritchie v. Judd*, 137 Ill. 453.

**7. Copy of Notice.** — *Goenen v. Schroeder*, 18 Minn. 66.

**8.** *Field v. Gooding*, 106 Mass. 310.

**A Sheriff Who Sells as Official Trustee** is not required to have before him at the time an affidavit showing that the proper notice has been given. *McCammon v. Detroit, etc., R. Co.*, 103 Mich. 104.

**Recording Copy of Notice and Name of Paper.** — In *Maine* it is necessary that a copy of the printed notice and the name and date of the newspaper in which the notice is last published be recorded within thirty days after the last publication. The fulfilment of this require-

ment is treated as a condition subsequent, and hence is essential to the validity of the sale. *Blake v. Dennett*, 49 Me. 102; *Freeman v. Atwood*, 50 Me. 473; *Bragdon v. Hatch*, 77 Me. 433; *Hollis v. Hollis*, 84 Me. 96; *Stafford v. Morse*, 97 Me. 222.

**9.** *Mowry v. Sanborn*, 72 N. Y. 534, reversing 11 Hun (N. Y.) 545.

**10. Printer and Publisher Synonymous.** — *Sharp v. Daugney*, 33 Cal. 506; *Menard v. Crowe*, 20 Minn. 448; *Bunce v. Reed*, 16 Barb. (N. Y.) 347. *Contra*, *Bragdon v. Hatch*, 77 Me. 433; *Hollis v. Hollis*, 84 Me. 96.

**Affidavit of Auctioneer** made before a county clerk or his deputy is void. *Van Vleck v. Enos*, 88 Hun (N. Y.) 348.

**11.** *Simson v. Eckstein*, 22 Cal. 581.

**12. Presumption as to Giving Notice** — **Burden of Proof.** — *Tartt v. Clayton*, 109 Ill. 579; *Sawyer v. Bradshaw*, 125 Ill. 440; *Cawfield v. Owens*, 129 N. Car. 286; *Dryden v. Stephens*, 19 W. Va. 1; *Burke v. Adair*, 23 W. Va. 139. See also *Hougham v. Sandys*, 2 Sim. 95; *Western Union Tel. Co. v. Hearne*, (Tex. Civ. App. 1897) 40 S. W. Rep. 50. *Contra*, *Gibson v. Jones*, 5 Leigh (Va.) 369.

**13.** *McKarsie v. Citizens' Bldg., etc., Assoc.*, (Tenn. Ch. 1899) 53 S. W. Rep. 1007.

duct the sale openly, fairly, and in compliance with the terms of the power,<sup>1</sup> or in accordance with the statute,<sup>2</sup> using all reasonable efforts to make the property bring its full value.<sup>3</sup> He owes this duty to the grantor even after the latter has sold the encumbered property to one who has assumed the debt, thus making the original grantor a surety instead of principal debtor.<sup>4</sup> If the sale be honestly conducted by the trustee, the animus of the creditor or his agent in forcing the sale is not material.<sup>5</sup>

*b. PUBLIC OR PRIVATE SALE* — (1) *Private Sale*. — In the exercise of his discretion a mortgagee or trustee who is clothed with a power to sell may sell privately, unless a public sale is expressly required by the power itself or by statute.<sup>6</sup>

(2) *Contract to Sell*. — Likewise a trustee, having power to make a private sale, may bind himself and the trust property by any contract to sell in the future, which he has power to execute;<sup>7</sup> and it seems not to be fatal to the validity of such agreement that it is made before the expiration of the full time stipulated for notice and hence could not be fully performed until later.<sup>8</sup>

(3) *Sale at Public Auction*. — A sale at public auction is, however, coming to be an almost universal requirement, and where such provision is made the trustee cannot make a private sale even though the interest of the grantor should require it.<sup>9</sup> Where a public sale is required a mortgagee who makes a private sale has been held guilty of a conversion.<sup>10</sup> A requirement that the sale be made at auction may be waived by the debtor.<sup>11</sup>

*c. PLACE OF SALE* — (1) *Discretion of Person Selling*. — A provision in a deed of trust designating the place of sale will usually be controlling.<sup>12</sup> Where the instrument is silent the person authorized to sell may exercise his discretion as to the place of sale. Where land is to be sold, it is well to sell on the premises,<sup>13</sup> or at a proper place in the county.<sup>14</sup>

1. *Atkins v. Crumpler*, 118 N. Car. 532.

2. *Waiver of Statutory Requirements*. — A clause authorizing a chattel mortgagee to sell "without any liability for real or supposed damages" relieves him, in *Iowa*, from the duty of conforming to the requirements of the statute regulating sales under power in chattel mortgages. *Geiser Mfg. Co. v. Krogman*, 111 Iowa 503.

3. *Duty of Trustee*. — *Chesley v. Chesley*, 49 Mo. 540; *Tatum v. Holliday*, 59 Mo. 422; *Axman v. Smith*, 156 Mo. 286; *Dunn v. McCoy*, 150 Mo. 548.

*Bad Faith and Unfairness in Selling* a ground for setting sale aside. *Schier v. Dankwardt*, 88 Iowa 750; *Orr v. McKee*, 134 Mo. 78.

*The Sale Should Be to the Highest Bidder*, and this will be presumed after the sale is made though the notice fails to state that the sale will be so made. *McCammon v. Detroit*, etc., R. Co., 103 Mich. 104.

4. *Dwyer v. Rohan*, 99 Mo. App. 120.

5. *Mutual F. Ins. Co. v. Barker*, 17 App. Cas. (D. C.) 205.

6. *Private Sale Valid*. — *Saloway v. Strawbridge*, 1 Jur. N. S. 1194, 25 L. J. Ch. 121; *Davey v. Durrant*, 1 De G. & J. 535, 26 L. J. Ch. 830; *Brouard v. Dumaresque*, 3 Moo. P. C. 457; *Marston v. Brittenham*, 76 Ill. 611; *Martin v. Paxson*, 66 Mo. 260; *Lawrence v. Farmers L. & T. Co.*, 13 N. Y. 200; *Elliott v. Wood*, 45 N. Y. 71; *Mowry v. Sanborn*, 68 N. Y. 153. See also *Myers v. Snyder*, 96 Iowa 107; *McClurg v. McSpadden*, 101 Tenn. 433.

*Replenishing Stock* while the goods covered by a mortgage are being gradually sold under the power does not vitiate the mortgage.

*Tollerton, etc., Co. v. Anderson*, 108 Iowa 217.

*Selling at Retail*. — One having authority to sell at private sale may sell at retail. *Johnston v. Robuck*, 104 Iowa 523; *Tollerton, etc., Co. v. Anderson*, 108 Iowa 217. See *H. E. Spencer Co. v. Papach*, 103 Iowa 513.

7. *Trustee Bound by Contract to Sell*. — *Shannon v. Bradstreet*, 1 Sch. & Lef. 52; *Low v. Swift*, 2 Ball & B. 529; *Judge v. Pfaff*, 171 Mass. 195; *Clarke v. Moore*, 1 J. & La T. 723; *Belding v. Archer*, 131 N. Car. 287.

8. *Agreement to Sell Before Expiration of Notice*. — *Major v. Ward*, 5 Hare 598; *Ford v. Heely*, 3 Jur. N. S. 1116.

9. *Public Sale Required*. — *Greenleaf v. Queen*, 1 Pet. (U. S.) 138; *Griffin v. Marine Co.*, 52 Ill. 130; *Daniel v. Adams*, Ambl. 495. See also *H. E. Spencer Co. v. Papach*, 103 Iowa 513.

10. *Conversion*. — *Colby v. W. W. Kimball Co.*, 99 Iowa 321; *Tobener v. Hassinbusch*, 56 Mo. App. 591. See also *Heermans v. Montague* (Va. 1890) 20 S. E. Rep. 899.

11. *Cockrill v. Whitworth*, (Tenn. Ch. 1899) 52 S. W. Rep. 524.

12. *Designation of Place of Sale*. — *Fry v. Old Dominion Bldg., etc., Assoc.*, 48 W. Va. 61; *Beitel v. Dobbin*, (Tex. Civ. App. 1898) 44 S. W. Rep. 299.

13. *Sale on Premises Proper*. — *Jenkins v. Daniel*, 125 N. Car. 161, 74 Am. St. Rep. 632; *Morriss v. Virginia State Ins. Co.*, 90 Va. 370.

14. *Hess v. Dean*, 66 Tex. 663.

*As to Power of Equity to Control the Selection of Place of Sale*, see *Morriss v. Virginia State Ins. Co.*, 90 Va. 370.



(2) *Sale in Other County or State.* — It is not absolutely necessary that the sale should take place in the county where the property is located,<sup>1</sup> and it has been held that a sale in pursuance of the power is not invalid though made in another state.<sup>2</sup>

(3) *Statutory Provisions.* — In many states there are specific enactments<sup>3</sup> in regard to the place of sale, which in some cases are operative only when the power is silent;<sup>4</sup> in other cases the statutes override the contrary provisions of the mortgage or deed of trust itself.<sup>5</sup>

(4) *Sale at Court House* — (a) **Removal or Destruction.** — It is not uncommon for the power of sale itself or a general statute to require that the sale shall take place at or near the county court house. Where such requirement is made, doubt as to where the sale should be made sometimes arises by reason of the rebuilding, removal, or destruction of the court house and the consequent abandonment of it by the official authorities. It is generally held that the designation of the court house refers to its character as an official and public building. Hence the place used as a court house at the time of foreclosure is the proper place for the sale, rather than the place used as a court house at the time the mortgage is executed.<sup>6</sup> Thus where the court house is wholly or partially destroyed and is consequently vacated, another building used as such, though only temporarily, is the court house within the meaning of the requirement.<sup>7</sup>

**Liberal View.** — Though the general rule is as just stated, the courts are strongly inclined in a case of doubt to support the sale where it is fairly conducted and no injury is shown.<sup>8</sup> Thus, sales on the old situs of the court house,<sup>9</sup> and sales in front of a new structure built for a court house but not

**1. Sale in Another County.** — *Greenwood v. Fontaine*, (Tex. Civ. App. 1896) 34 S. W. Rep. 826. *Aliter*, where the trustee deed specifies that the sale shall be made in the county. *Chandler v. Peters*, (Tex. Civ. App. 1898) 44 S. W. Rep. 867. Compare *Scott v. Davis*, 4 Kan. App. 488.

**A Sale of Mortgaged Chattels** in another county than that where the goods were located when the mortgage was given is invalid where a statutory requirement that on removal to another county a copy of the mortgage shall be filed for registration in the new county is not complied with. *McCormick Harvesting Mach. Co. v. Preitauer*, (Neb. 1902) 91 N. W. Rep. 499; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123.

**2. Sale in Another State.** — *Ingle v. Jones*, 43 Iowa 286; *Ingle v. Culbertson*, 43 Iowa 265.

**3. Sales Required to Be Made in County.** — *Webb v. Haefler*, 53 Md. 187; *Kerr v. Galloway*, 94 Tex. 641.

A statutory provision requiring sales to be made in the county does not affect sales under powers contained in mortgages executed prior to the enactment. *McConneaughey v. Bogardus*, 106 Ill. 321; *Chandler v. Peters*, (Tex. Civ. App. 1898) 44 S. W. Rep. 867.

In *South Dakota* the board of county commissioners are required to designate each year three public places in the county where sales under the power may be conducted. *Felker v. Grant*, 10 S. Dak. 141.

**4. Statute Controlling When Power Silent.** — *Goodman v. Durant Bldg., etc., Assoc.*, 71 Miss. 310.

**5. In a Case of Conflict** between the place designated by statute, and that designated by the mortgage, the land is to be sold at the spot

designated by statute. Such conflict does not render the power wholly inoperative. The law is to be read into the contract and controls it. *Kerr v. Galloway*, 94 Tex. 641, reversing *Galloway v. Kerr*, (Tex. Civ. App. 1901) 63 S. W. Rep. 180.

**6. Place Used as Court House at Time of Sale.** — *Moore v. Isbel*, 40 Iowa 383; *Stewart v. Brown*, 112 Mo. 171; *Snyder v. Chicago, etc., R. Co.*, 131 Mo. 568. Compare *Kane v. McCown*, 55 Mo. 181.

**Where a Court House Has Been Officially Designated** by the commissioners a sale made elsewhere is void. *Boone v. Miller*, 86 Tex. 74.

**Removal of Court House.** — Where the sale is required to be made "at the court house," and before the day of sale the court house is removed to a different part of the city, the sale must be made at the new location. *Napton v. Hurt*, 70 Mo. 497.

**7. Removal to New Location.** — *Hambright v. Brockman*, 59 Mo. 53.

**After the Destruction of the Cook County Court House** by the Chicago fire it was held that a sale was good which was made in front of the building used as a court house in another part of the city. *Alden v. Goldie*, 82 Ill. 581.

**8. Sales Upheld.** — *Moore v. Isbell*, 40 Iowa 383; *Johnson v. Cocks*, 37 Minn. 530; *Maloney v. Webb*, 112 Mo. 575.

**Sale at Particular Door.** — Though a trust deed provides for a sale at the east door of the court house, yet a sale at the south door is not void, in the absence of evidence that the irregularity resulted in any injury to the debtor. *Hickey v. Behrens*, 75 Tex. 488. Compare *Martin v. Barth*, 4 Colo. App. 346.

**9. Sale at Location of Old Structure.** — *Long v.*

yet occupied,<sup>1</sup> have been declared good.

(b) **More than One Court House.** — If there is more than one court house in a county the property should be sold at the county seat unless the other court house is clearly indicated.<sup>2</sup> Where the doubt as to which court house should be used as the place of sale cannot be settled, the creditor should resort to foreclosure in equity.<sup>3</sup>

d. **TIME OF SALE** — (1) *Day Fixed by Notice.* — It is necessary that the sale should take place on the day indicated in the notice, where notice has been given.<sup>4</sup>

(2) *Hour of Sale Stated in Notice.* — If the sale is advertised for a certain hour, it should begin promptly at that hour,<sup>5</sup> but if intending purchasers are not shown to have left on account of the delay, a valid sale may be made at any time during the following hour. Thus, the hour of twelve will be deemed to last until one o'clock if the attendance continues.<sup>6</sup>

(3) *Discretion as to Time.* — Aside from this requirement, the mortgagee or trustee, unless controlled by statute,<sup>7</sup> may use his discretion as to the time of sale.<sup>8</sup>

(4) *Holiday.* — It is no ground for impeaching a sale that it was made during Christmas week<sup>9</sup> or on any legal holiday other than Sunday.<sup>10</sup>

e. **ADJOURNMENT** — (1) *Implied Authority to Adjourn.* — Many contingencies arise which render it proper or even necessary for the sale to be postponed or adjourned from the time stated in the notice. Thus, a sufficient number of bidders may not be present,<sup>11</sup> or other circumstances may concur in making an adjournment advisable. The person conducting the sale always has by implication authority to take this step.<sup>12</sup>

(2) *Duty and Discretion of Person Selling.* — It is the duty of the person selling to adjourn when the interest of the parties will be promoted thereby,<sup>13</sup>

Rogers, 6 Biss. (U. S.) 416; Waller v. Arnold, 71 Ill. 350.

1. Davis v. Hess, 103 Mo. 31.

2. Gray v. Worst, 129 Mo. 122.

3. Stewart v. Brown, 112 Mo. 171.

**Formation of New County.** — A sale is void where the power declares that the sale shall be made at the county seat of Presidio county, and the sale is made at the county seat of Brewster county, although the latter county is formed from the former subsequently to the execution of the deed of trust. Durrell v. Farwell, (Tex. Civ. App. 1894) 27 S. W. Rep. 795.

4. Beal v. Blair, 33 Iowa 318.

5. **Sale Before Hour Stated Invalid.** — Richards v. Finnegan, 45 Minn. 208.

6. **Hour Fixed in Notice.** — Lathrop v. Tracy, 24 Colo. 382, 65 Am. St. Rep. 229; McGovern v. Union Mut. L. Ins. Co., 109 Ill. 151; Lester v. Citizens' Sav. Bank, 17 R. I. 88.

7. **Sale to Be at Least Five Days after seizure.** Stevens v. Breen, 75 Wis. 595; Vreeland v. Waddell, 93 Wis. 107.

8. Hawkins v. Alston, 4 Ired. Eq. (39 N. Car.) 137.

**Different Tracts may be sold at different times.** Pryor v. Baker, 133 Mass. 459.

**Within Lawful Hours.** — Where the power authorizes a sale "within lawful hours" the discretion of the trustee in choosing the day is not restricted to such days as are lawful for execution sales. Thompson v. Cobb, 95 Tex. 140, 93 Am. St. Rep. 820.

9. **Sale During Christmas Week.** — Anderson v. White, 2 App. Cas. (D. C.) 408; Mutual F. Ins. Co. v. Barker, 17 App. Cas. (D. C.) 205.

10. **Sale on Washington's Birthday Valid.** — Stewart v. Brown, 112 Mo. 171.

**Sale on Day of State Election Valid.** — Bank of Commerce v. Lanahan, 45 Md. 396.

11. **Absence of Bidders.** — Marcus v. Collamore, 168 Mass. 56; French v. Westgate, 71 N. H. 510.

12. **Right to Adjourn** — *England.* — Davey v. Durrant, 1 De G. & J. 535.

*United States.* — Fairfax v. Hopkins, 2 Cranch (C. C.) 134; Richards v. Holmes, 18 How. (U. S.) 143.

*Illinois.* — Thornton v. Boyden, 31 Ill. 200.

*Maine.* — Russell v. Richards, 11 Me. 371, 26 Am. Dec. 532.

*Massachusetts.* — Hosmer v. Sargent, 8 Allen (Mass.) 97, 85 Am. Dec. 683; Warren v. Leland, 9 Mass. 265; Dexter v. Shepard, 117 Mass. 480; Thompson v. Heywood, 129 Mass. 401; Briggs v. Briggs, 135 Mass. 306.

*Missouri.* — Meyer v. Jefferson Ins. Co., 5 Mo. App. 245; Vail v. Jacobs, 62 Mo. 130.

*New York.* — Miler v. Hull, 4 Den. (N. Y.) 104; Tinkom v. Purdy, 5 Johns. (N. Y.) 345; Westgate v. Handlin, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 372.

*North Carolina.* — Johnston v. Eason, 3 Ired. Eq. (38 N. Car.) 330.

**Authority Implied.** — The insertion into the deed of trust of express authority to adjourn is superfluous, as the power exists unless it is expressly denied. Griffin v. Marine Co., 52 Ill. 130.

**Postponement Before Day of Sale Arrives** is as valid as an adjournment made at the time and place indicated for the sale. Dana v. Farrington, 4 Minn. 433; Banning v. Armstrong, 7 Minn. 40; Bennett v. Brundage, 8 Minn. 432.

13. **Duty to Adjourn.** — Fairfax v. Hopkins, 2 Cranch (C. C.) 134; Judge v. Booge, 47 Mo.

but the exercise of his discretion in favor of the adjournment or against it will ordinarily be binding.<sup>1</sup>

(3) *Notice of Adjourned Sale* — (a) *In General*. — When the sale is postponed or adjourned, proper notice thereof must be given. Statutory provisions or terms of the power applicable to the giving of such notice must, of course, be complied with. If there be no such provisions, reasonable notice is sufficient.<sup>2</sup>

Where Notice of an Adjournment Is Published, the date fixed for the sale must correspond with that announced when the adjournment is made.<sup>3</sup>

(b) *Duration*. — The notice of the adjourned sale need not extend over the full period prescribed for the original notice.<sup>4</sup>

(4) *Continuance of Sale from Day to Day*. — If the sale is properly commenced on the day advertised, and is not completed at the close of that day, it may be continued to the next day without a new publication,<sup>5</sup> but an incomplete sale cannot be resumed on the following day if the bidders are allowed to disperse without notice of such intention.<sup>6</sup>

f. ORDER OF SELLING. — The trustees may exercise a discretion in regard to the order in which the mortgaged property is sold,<sup>7</sup> but exempt property covered by the mortgage should be sold last, as the other property might perchance bring enough to satisfy the debt.<sup>8</sup>

g. SALE EN MASSE OR IN PARCELS — (1) *Duty and Discretion* — (a) *In General*. — In determining whether the property conveyed shall be sold as a whole or in separate parcels, the trustee or mortgagee must exercise a sound discretion, pursuing that mode which will bring the best results.<sup>9</sup> It is some-

544; *Graham v. King*, 50 Mo. 22, 11 Am. Rep. 401; *Howard v. Thornton*, 50 Mo. 291.

1. *Refusal to Adjourn Sustained*. — *Mutual F. Ins. Co. v. Barker*, 17 App. Cas. (D. C.) 205; *Dunn v. McCoy*, 150 Mo. 548. See also *Bailey v. Brown*, 14 Colo. App. 392.

*Mortgagee Not Bound to Adjourn*. — If the mortgagee conducts the sale openly and fairly, he is under no obligation to postpone it for the purpose of obtaining a better price. *Davey v. Durrant*, 1 De G. & J. 535; *Franklin v. Greene*, 2 Allen (Mass.) 519.

*Indefinite Postponement*. — A postponement for three years of a sale under a trust deed does not raise any presumption of fraud, when no possession of the land, or other benefit from it, is reserved to the grantor. *Starke v. Etheridge*, 71 N. Car. 240.

2. *Notice of Adjournment*. — *Richards v. Holmes*, 18 How. (U. S.) 143; *Marcus v. Colamore*, 168 Mass. 56; *Dexter v. Shepard*, 117 Mass. 480; *Way v. Dyer*, 176 Mass. 448. See also *Stevenson v. Dana*, 166 Mass. 170.

3. *Miller v. Hull*, 4 Den. (N. Y.) 104.

The publication of notice of a postponement destroys the efficacy of the original notice, and a sale subsequently made on the day first fixed is invalid. *Jackson v. Clark*, 7 Johns. (N. Y.) 217.

4. *Duration of Notice Where Sale Is Adjourned*. — *Dana v. Farrington*, 4 Minn. 433; *Westgate v. Handlin*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 372; *Jackson v. Clark*, 7 Johns. (N. Y.) 217; *Sayles v. Smith*, 12 Wend. (N. Y.) 57. *Contra*, see *Thornton v. Boyden*, 31 Ill. 200; *Griffin v. Marine Co.*, 52 Ill. 130.

*The Mortgagor Is Estopped* from questioning the validity of an adjourned sale on the ground of the insufficiency of the notice where the adjournment is made and notice given with the sanction of himself or of his agent. *Way v. Dyer*, 176 Mass. 448.

5. *Lallance v. Fisher*, 29 W. Va. 512.

6. *Notice of Intention to Resume Sale*. — *Judge v. Booge*, 47 Mo. 545; *Davis v. Hess*, 103 Mo. 31.

7. *Order of Sale*. — *Brown v. Wentworth*, 181 Mass. 49; *Hinton v. Pritchard*, 120 N. Car. 1, 58 Am. St. Rep. 768.

*The Emancipation of Slaves conveyed in trust* does not affect the right to sell realty conveyed in the same instrument, though a provision was inserted therein declaring that the slaves should be sold first. *Thurmond v. Woods*, 27 Gratt. (Va.) 727.

*Order of Marshaling*. — Where several trust deeds or mortgages are placed on different tracts in such way as to give rise to the equity of marshaling, the senior trustee should follow the order of such equity in selling. *Sternberg v. Valentine*, 6 Mo. App. 176.

*Inverse Order of Alienation*. — A person equitably entitled to have parcels covered by a power of sale mortgage sold in the inverse order of alienation, should file his bill before the sale for that purpose; and if he does not, the sale will not be disturbed as against a *bona fide* purchaser. *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 556.

8. *Baughn v. Allen*, (Tex. Civ. App. 1903) 73 S. W. Rep. 1063.

*The Sale of Exempt Property* covered by the trust deed will not, in the absence of statute, be enjoined merely because the debtor has other property subject to execution. See *Stevens v. Myers*, 11 Iowa 183.

*Severance of Mineral Interest*. — In *England* a mortgagee of a freehold may sell the mineral interest separate from the land. *In re Beaumont*, L. R. 12 Eq. 86. See also *In re Wilkinson*, L. R. 13 Eq. 634.

9. *Duty and Discretion of Trustee*. — *Cassidy v. Cook*, 99 Ill. 385; *Carroll v. Hutton*, 88 Md. 676; *National Loan, etc., Co. v. Dorenblaser*,



times advantageous to sell as a whole though the property has been, or is capable of being, divided into separate parcels,<sup>1</sup> as where two separate tracts are used as a single farm.<sup>2</sup> Sometimes it is better to divide and sell separately property which has been used as a whole and conveyed in one trust deed, or to divide the property in a way different from that in which it has been used.<sup>3</sup>

(b) **Asking for Separate Bids.** — A sale in parcels, where the property is easily and naturally divisible, being likely to bring better results than a sale *en masse*, it is advisable for the trustee to call for bids for the separate parcels before offering the property as a whole.<sup>4</sup> Where this procedure is adopted, the trustee or auctioneer should announce, before asking for the bids, that the sale is contingent.<sup>5</sup> The bid or bids which bring the larger amount can then be accepted.

(c) **Request of Owner.** — The judgment of the owner is entitled to consideration in determining how the sale should be made, and a request from him that the property be sold in parcels should be obeyed if practicable.<sup>6</sup>

(2) *Distinct Parcels to Be Separately Sold.* — Where the property conveyed consists of separate tracts or parcels, it should usually be sold separately.<sup>7</sup> This mode of sale gives a chance to those who may not desire to bid for all, and at the same time does not exclude any who may wish to buy the whole.

(3) *Subdivision of Individual Tracts* — (a) **In General.** — The same circumstance also frequently makes it desirable to subdivide individual tracts.<sup>8</sup> This the trustee should do when the property is easily susceptible of division and such course will result in a more advantageous sale,<sup>9</sup> but he is not bound to do so.<sup>10</sup>

30 Tex. Civ. App. 148; *Scott v. Ballard*, 117 N. Car. 195; *Michie v. Jeffries*, 21 Gratt. (Va.) 334.

1. *Coudert v. De Logerot*, (Supm. Ct. Gen. T.) 30 N. Y. Supp. 114.

2. **Separate Parcels Used Together.** — *Larzelere v. Starkweather*, 38 Mich. 96; *Yale v. Stevenson*, 58 Mich. 537; *Merrill v. Nelson*, 18 Minn. 366; *Kellogg v. Carrico*, 47 Mo. 157; *Maxwell v. Newton*, 65 Wis. 261. And it is immaterial that the component tracts are separately described in the mortgage. *Worley v. Naylor*, 6 Minn. 192.

**One Sale of Separate Undivided Interests.** — Where two deeds of trust are given to the same creditor to secure the same debt, each covering an undivided half of the same tract, the whole should be sold together under both deeds, and not one undivided half at one time and the other half at another. *Coffman v. Scoville*, 86 Ill. 300.

3. *Carroll v. Hutton*, 88 Md. 676. See also *Gray v. Shaw*, 14 Mo. 341.

4. **Asking for Separate Bids Before Selling en Masse** — *United States*. — *Olcott v. Bynum*, 17 Wall. (U. S.) 44.

*Illinois*. — *Cassidy v. Cook*, 99 Ill. 385.

*Massachusetts*. — *Holmes v. Turner's Falls Co.*, 150 Mass. 535.

*Michigan*. — *Durm v. Fish*, 46 Mich. 312; *Morse v. Byam*, 55 Mich. 594.

*Minnesota*. — *Johnson v. Williams*, 4 Minn. 260; *Lalor v. McCarthy*, 24 Minn. 417.

*Missouri*. — *Hardwicke v. Hamilton*, 121 Mo. 465; *Sumrall v. Chaffin*, 48 Mo. 402; *Carter v. Abshire*, 48 Mo. 300; *Chesley v. Chesley*, 49 Mo. 540.

*New York*. — *Ellsworth v. Lockwood*, 42 N. Y. 89; *Wells v. Wells*, 47 Barb. (N. Y.) 416.

*West Virginia*. — *Curry v. Hill*, 18 W. Va.

5. *Lazarus v. Caesar*, 157 Mo. 199.

6. *Morriss v. Virginia State Ins. Co.*, 90 Va. 370.

**Request by Former Bidder.** — A request that the land be sold in parcels from one who failed to comply as bidder at a former sale may be disregarded. *Pullis v. Pullis Bros. Iron Co.*, 157 Mo. 565.

7. *Hull v. King*, 38 Minn. 349.

**Separate Tracts May Be Sold at Different Times.** — Where separate tracts lying in different towns are conveyed, the trustee can advertise and sell separately and at different times. *Pryor v. Baker*, 133 Mass. 459.

8. **Subdivision of Individual Tracts.** — *Gray v. Shaw*, 14 Mo. 341; *Bales v. Perry*, 51 Mo. 449. See also *Smith v. Deeson*, (Miss. 1893) 14 So. Rep. 40; *Sumrall v. Chaffin*, 48 Mo. 402.

**Sale of Part of Tract upheld under the particular facts**, though not enough was realized to pay the debt. *Belding v. Archer*, 131 N. Car. 287.

**As to Selling Chattels in parcel rather than in bulk**, see *Edmonston v. Jones*, 96 Mo. App. 83.

**Chattels Cannot Be Commingled and sold in bulk with other things not covered by the mortgage.** *Orcutt v. Williams*, 63 Ill. App. 407.

9. **Duty to Subdivide.** — *Hubbard v. Jarrell*, 23 Md. 66; *Carter v. Abshire*, 48 Mo. 300; *Chesley v. Chesley*, 49 Mo. 540; *Tatum v. Holliday*, 59 Mo. 422.

**Disadvantageous Division of the property as ground for setting sale aside**, see *Axman v. Smith*, 156 Mo. 286.

10. *Markwell v. Markwell*, 157 Mo. 326.

**Railway to Be Sold as an Entirety.** — See *Dunham v. Cincinnati, etc., R. Co.*, 1 Wall. (U. S.) 254; *Wilmer v. Atlanta, etc., R. Co.*, 2 Woods (U. S.) 447.

**Request of Junior Mortgagee.** — A sale *en masse* will be set aside where the mortgagee has been

(b) **Subsequent Division by Grantor.** — Nor, where the grantor himself, after the execution of the deed, divides the property into small lots, is the trustee bound to follow such subdivision.<sup>1</sup> So the trustee in his discretion may sell as a whole though part of the property has been subsequently sold to third persons.<sup>2</sup>

(4) **Sale en Masse** — (a) **When Upheld.** — Though a sale in separate parcels is often to be preferred, a sale of the property as a whole will not ordinarily be disturbed, especially where the property is sold by the trustee just as it was conveyed to him.<sup>3</sup>

(b) **When Set Aside.** — If, however, it appears that such mode of selling was adopted through unfairness, or that a sale in parcels would have been decidedly more advantageous, the sale *en masse* will be set aside as improper and indiscreet.<sup>4</sup> An improper sale *en masse* rather than in parcels is voidable only even in states where graver irregularities render sales wholly void.<sup>5</sup>

(5) **Statutory Provisions — Validity of Sale.** — There are in a number of states statutes declaring that mortgaged property shall be sold in distinct parcels if the premises are easily susceptible of division. These statutes are generally held to be directory only, and sales in contravention thereof are voidable only upon proof of fraud or probable injury.<sup>6</sup> Likewise the sale is only voidable where a statute requiring that a quarter section of land be sold as a whole instead of in forties is not complied with.<sup>7</sup>

duly requested to offer it in separate parcels by a junior mortgagee, who agreed to bid the entire amount of the first mortgage for a certain designated part of the tract, which is easily capable of division, even though the whole is described in the mortgage as one tract. *Ellsworth v. Lockwood*, 42 N. Y. 89.

1. **Subsequent Subdivision by Grantor.** — *Meacham v. Steele*, 93 Ill. 135; *Shannon v. Hay*, 106 Ind. 589; *Durn v. Fish*, 46 Mich. 312; *Kline v. Vogel*, 11 Mo. App. 211; *Lamerson v. Marvin*, 8 Barb. (N. Y.) 9; *Ellsworth v. Lockwood*, 9 Hun (N. Y.) 548; *Anderson v. Austin*, 34 Barb. (N. Y.) 319. Compare *Patterson v. Miller*, 52 Md. 388.

2. **Sale of Part to Third Person.** — *Johnson v. Williams*, 4 Minn. 260; *Paquin v. Braley*, 10 Minn. 379; *Abbott v. Peck*, 35 Minn. 499; *Willard v. Finnegan*, 42 Minn. 476; *Ryder v. Hulett*, 44 Minn. 354; *Clark v. Kraker*, 51 Minn. 444.

**Partial Release.** — In *Michigan* where the mortgage covered a single tract, but subsequently the mortgagee released a portion of it, the remainder being in separate parcels, it was held that a sale of the remainder without recognizing the change of its condition was void under a statute requiring separate tracts to be sold separately. *Durm v. Fish*, 46 Mich. 312. See also *Lee v. Mason*, 10 Mich. 403; *Udell v. Kahn*, 31 Mich. 195.

3. **Sale en Masse Upheld** — *Colorado*. — *Love-land v. Clark*, 11 Colo. 265.

*Illinois*. — *Hall v. Gould*, 79 Ill. 16; *Cleaver v. Green*, 107 Ill. 67.

*Iowa*. — *Ingle v. Jones*, 43 Iowa 286.

*Minnesota*. — *Clark v. Kraker*, 51 Minn. 444; *Phelps v. Western Realty Co.*, 89 Minn. 319.

*Missouri*. — *Kline v. Vogel*, 11 Mo. App. 211; *Harlin v. Nation*, 126 Mo. 97; *Bales v. Perry*, 51 Mo. 449; *German Bank v. Stumpf*, 73 Mo. 311; *Keiser v. Gammon*, 95 Mo. 217; *Snyder v. Chicago, etc., R. Co.*, 131 Mo. 568; *Markwell v. Markwell*, 157 Mo. 326.

*Virginia*. — *Michie v. Jeffries*, 21 Gratt. (Va.) 334; *Old Dominion Invest. Co. v. Moomaw*, (Va. 1896) 25 S. E. Rep. 540.

**Where a Homestead Is Included** in the mortgaged premises the property may be divided into appropriate divisions and separately sold. *Markwell v. Markwell*, 157 Mo. 326. But a sale of all will not be set aside unless it appears that more might have been obtained by pursuing the other course. *Phelps v. Western Realty Co.*, 89 Minn. 319.

**Contract Requiring Sale en Masse.** — *Dunn v. McCoy*, 150 Mo. 548.

4. **Sale en Masse Set Aside.** — *Ross v. Mead*, 10 Ill. 171; *Gillespie v. Smith*, 29 Ill. 473, 81 Am. Dec. 328; *Fairman v. Peck*, 87 Ill. 156; *Kerfoot v. Billings*, 160 Ill. 563; *Shine v. Hill*, 23 Iowa 264; *Ingle v. Jones*, 43 Iowa 286; *Goode v. Comfort*, 39 Mo. 313; *Benkendorf v. Vincenz*, 52 Mo. 441; *Chesley v. Chesley*, 54 Mo. 347; *Terry v. Fitzgerald*, 32 Gratt. (Va.) 843.

**Other Property Included.** — It has been held that a sale in one parcel, of the premises mortgaged, and also of another tract not covered by the mortgage, does not affect the validity of the sale as to the former. *Bottineau v. Etna L. Ins. Co.*, 31 Minn. 125; *Lowry v. Tilly*, 31 Minn. 500.

5. **Sale en Masse Voidable.** — *Willard v. Finnegan*, 42 Minn. 476; *Clark v. Kraker*, 51 Minn. 444; *Phelps v. Western Realty Co.*, 89 Minn. 319. But see *Hull v. King*, 38 Minn. 349.

6. **Sales Made Contrary to Statute Voidable** — *Swenson v. Halberg*, 1 McCrary (U. S.) 96; *Willard v. Finnegan*, 42 Minn. 476; *Ryder v. Hulett*, 44 Minn. 353.

**Statute Directory.** — Though the statute says that the sale "must" be so made, it is held to be directory and not mandatory. *Wallace v. Feely*, (C. Pl. Spec. T.) 61 How. Pr. (N. Y.) 225.

7. *Middlesex Banking Co. v. Lester*, 7 S. Dak. 333.

(6) *Who May Complain — Estoppel.* — The mortgagee himself cannot be heard to object that his own sale was not made in parcels as required by the statute.<sup>1</sup> Any other person who is present and consents to a sale in a particular way, or who fails to object to the plan adopted, cannot subsequently have the sale set aside on the ground that it should have been conducted in a different manner.<sup>2</sup>

*Laches* on the part of the person complaining will also justify the court in refusing relief.<sup>3</sup>

*h. AMOUNT OF PROPERTY TO BE SOLD* — (1) *Enough to Pay Debt.* — As a general rule the trustee in the exercise of his discretion should sell only so much of the mortgaged property as is necessary to satisfy the debt,<sup>4</sup> but no hard and fast rule is to be laid down on this point. Cases arise where it would be impracticable to sell a part or where the interest of the debtor would be best subserved by selling the whole.

(2) *Advertising More than Enough.* — The fact that a trustee or mortgagee who is clothed with authority to sell so much as is necessary to pay the debt advertises a sale of the entire property, furnishes no ground for restraining the sale.<sup>5</sup> The court will not surmise that the directions of the mortgage will be violated.<sup>6</sup>

(3) *Debt Satisfied by Sale of Part.* — Upon a sale in parcels, the power becomes exhausted as soon as a sufficient amount has been sold to satisfy the debt and costs. Sales thereafter made are invalid.<sup>7</sup> But the trustee may still proceed with the sale where he is charged with the duty of satisfying other liens out of the proceeds.<sup>8</sup> A mortgagee who, after having sold enough to satisfy his debt, proceeds to sell the remainder of the property in violation of the terms of the mortgage is liable for a conversion.<sup>9</sup>

(4) *Sale to Satisfy Excessive Claim* — (a) *In General.* — A sale is not rendered invalid by the fact that it is made to satisfy an excessive claim.<sup>10</sup>

1. *Clark v. Stilson*, 36 Mich. 482.

2. *Estoppel.* — *Carroll v. Hutton*, 91 Md. 379; *Mutual F. Ins. Co. v. Barker*, 17 App. Cas. (D. C.) 205; *Middlesex Banking Co. v. Lester*, 7 S. Dak. 333. See also *Hogan v. Hudson*, 110 Mich. 54.

*How Sale to Be Attacked.* — The objection that the trustee should have sold in parcels must be made directly by proceedings to set aside the sale, and not by a collateral attack upon the purchaser's title. *Haeussler v. Missouri Glass Co.*, 52 Mo. 452.

*Person Without Right of Redemption Cannot Complain.* — A statutory requirement that separate tracts be separately sold was said in a *Michigan* case to have been made in the interest of persons entitled to redeem, and to protect the right of separate redemption. Hence it was considered that a grantor who had for a valuable consideration waived the right of redemption could not be heard to complain when two tracts of land were sold together, — a conclusion which might better have been rested on the fact that no prejudice was shown. *Clark v. Stilson*, 36 Mich. 482.

3. *Laches.* — *Kline v. Vogel*, 11 Mo. App. 211. See also *infra*, XIII. 3. f. (4) *Laches*.

4. *Amount to Be Sold.* — *Montgomery v. Miller*, 131 Mo. 595; *Curry v. Hill*, 18 W. Va. 370; *Miller v. Mann*, 88 Va. 212.

*Directions for Trustee to Sell so Much as Will Satisfy the Debt* have been held by implication to exclude the right to sell in smaller quantities and at different times. *Quarles v. Lacy*, 4 Munf. (Va.) 251.

5. *Equitable Jurisdiction.* — *Hyman v. Devereux*, 63 N. Car. 624; *Worley v. Naylor*, 6 Minn. 192. But see *Johnson v. Williams*, 4 Minn. 260.

*Debt Paid by First Sale.* — A sale will be set aside on timely application where two deeds of trust securing the same debt are successively foreclosed, the first sale having produced enough to pay the debt. *Kelsay v. Farmers, etc.*, Bank, 166 Mo. 157.

*An Attempted Sale of a Greater Estate in the Land* than is authorized by the power will not be enjoined, because such sale would be void, and adequate relief could be had at law. *Armstrong v. Sanford*, 7 Minn. 49.

6. *Presumption that Trustee Will Obey Law.* — *Cleaver v. Green*, 107 Ill. 67; *Moore v. Barksdale*, (Va. 1896) 25 S. E. Rep. 529; *Cleaver v. Matthews*, 83 Va. 801; *Muller v. Stone*, 84 Va. 834, 10 Am. St. Rep. 889; *Grover v. Fox*, 36 Mich. 461; *Abbott v. Peck*, 35 Minn. 499.

*Consent of Mortgagee to Sale of All* is sufficient to make the sale binding as against his creditors. *Hogan v. Hudson*, 110 Mich. 54.

7. *Satisfaction of Debt.* — *Pryor v. Baker*, 133 Mass. 460; *Grover v. Fox*, 36 Mich. 461; *Baker v. Halligan*, 75 Mo. 435; *Charter v. Stevens*, 3 Den. (N. Y.) 33, 45 Am. Dec. 444; *Kirby v. Howie*, 9 S. Dak. 471; *Curry v. Hill*, 18 W. Va. 370. Compare *Miller v. Mann*, 88 Va. 212.

8. *Other Liens to Be Paid Off.* — *Hall v. Gould*, 79 Ill. 16.

9. *Kohn v. Dravis*, (C. C. A.) 94 Fed. Rep. 288.

10. *Sale to Satisfy Excessive Claim Valid.* — *Savings, etc.*, Soc. v. *Burnett*, 106 Cal. 514;



(b) **Usury.** — The fact that the mortgage debt is infected with usury does not destroy the right to sell for the amount lawfully owing.<sup>1</sup> But there are sundry local statutes rendering usurious contracts wholly void. Where such is the law the power of sale is also nugatory.<sup>2</sup>

(c) **Set-off.** — Though, as elsewhere stated, the fact that the debt is disputed may justify equitable interposition,<sup>3</sup> a sale will not be enjoined to allow the debtor the benefit of an independent claim such as would ordinarily be available in set-off or recoupment,<sup>4</sup> unless the creditor be insolvent.<sup>5</sup>

i. **TERMS** — (1) *Cash Sale Authorized* — (a) **When Cash to Be Required.** — Where the power does not expressly authorize the trustee to give credit it is technically proper for him to sell for cash only.<sup>6</sup>

**A Fortiori** cash should be required when the trust deed itself expressly so provides.<sup>7</sup>

(b) **What Constitutes Cash Payment.** — It is not necessary that a requirement of cash should be literally and strictly complied with.<sup>8</sup> The entry of a credit on the mortgage debt for the amount of the bid is equivalent to receiving cash where the creditor buys.<sup>9</sup> A reloan by the beneficiary to the purchaser may also be made without receiving the money,<sup>10</sup> and a check may be taken as cash in conformity with business usage.<sup>11</sup>

(c) **Discretion** — *aa.* **CASH OR CREDIT.** — Where the deed authorizes a sale either for cash or on credit, the terms are wholly within the discretion of the trustee.

*Northwestern Mortg. Co. v. Bradley*, 9 S. Dak. 495.

**Recovery of Excess.** — Where the debtor allows the mortgagee to proceed and sell for an amount greater than is lawfully due, he may subsequently recover of the mortgagee the difference between what is actually due and the amount for which the property sells, though the creditor himself is the purchaser. *Fagan v. People's Sav., etc., Assoc.*, 55 Minn. 437.

1. **Effect of Usury.** — *Moseley v. Rambo*, 106 Ga. 597; *Powell v. Hopkins*, 38 Md. 1; *Northwestern Mortg. Co. v. Bradley*, 9 S. Dak. 495.

**Injunction Against Sale to Satisfy Usurious Claim.** — *Alston v. Morris*, 113 Ala. 506; *Bidwell v. Whitney*, 4 Minn. 76; *Banker v. Brent*, 4 Minn. 521.

A mortgagee who seeks to enjoin a sale on the ground of usury must offer to pay the full amount legally due. *Eslava v. Crampton*, 61 Ala. 507; *Whitley v. Barker*, 79 Ga. 790.

2. **Power Invalid for Usury.** — *Pottle v. Lowe*, 99 Ga. 576. 59 Am. St. Rep. 246; *Duncan v. Hough*, (Tex. Civ. App. 1894) 27 S. W. Rep. 945. See also the title **USURY**.

3. See *supra*, V. 2. c. *Duty of Trustee or Mortgagee to Resort to Equity—Accounting*.

4. **Set-off and Counterclaim Not Available in Bar of Right to Sell.** — *Gregg v. Hight*, 6 Mo. App. 579; *Frieze v. Chapin*, 2 R. I. 420; *National Rubber Co. v. Rhode Island Hospital Trust Co.*, (R. I. 1895) 33 Atl. Rep. 254; *Robertson v. Hogshead*, 3 Leigh (Va.) 667; *Koger v. Kane*, 5 Leigh (Va.) 606.

**By Statute in North Dakota** a sale under the power may be enjoined where the debtor has a legal counterclaim. *McCann v. Mortgage, etc., Co.*, 3 N. Dak. 172.

5. *McDaniel v. Cowart*, 109 Ga. 419.

6. **Sale for Cash.** — *Olcott v. Bynum*, 17 Wall. (U. S.) 44; *Cassell v. Ross*, 33 Ill. 244. 85 Am. Dec. 270; *Smith v. Deeson*, (Miss. 1893) 14 So. Rep. 40.

But, under a power not specifying the terms of sale, a sale for cash, though declared valid, has been criticised as savoring of hardship. See *Powell v. Hopkins*, 38 Md. 1.

**Reasonable Cash Deposit** may be properly required. *Pope v. Burrage*, 115 Mass. 282. See also *Farrar v. Lacy*, 25 Ch. D. 636.

7. *Scott v. Sierra Lumber Co.*, 67 Cal. 71.

**Where the Sale Is Required to Be for Cash** by the terms of the trust the failure of the auctioneer to announce such fact at the sale does not operate to waive it. *Coler v. Barth*, 24 Colo. 31.

8. **Substantial Compliance Sufficient.** — *Balinger v. Bourland*, 87 Ill. 513, 29 Am. Dec. 69; *Snyder v. Chicago, etc., R. Co.*, 131 Mo. 568.

**A Delay of a Few Days** in closing the transaction by executing the deed and paying over the money will not be regarded as extending credit. *Strother v. Law*, 54 Ill. 413.

9. **Entering Credit for Amount of Bill.** — *Jacobs v. Turpin*, 83 Ill. 424; *Tartt v. Clayton*, 109 Ill. 579; *Ivey v. New South Bldg., etc., Assoc.*, 103 Ga. 585.

**Beneficiaries Who Purchase** need not pay cash or execute notes, as their purchase simply extinguishes the debt. *Stanford v. Andrews*, 12 Heisk. (Tenn.) 664.

10. **Reloan by Beneficiary to Purchaser.** — *Balinger v. Bourland*, 87 Ill. 513, 29 Am. Rep. 69; *Reynolds v. Kroff*, 144 Mo. 433; *Marlin v. Sawyer*, (Tenn. Ch. 1899) 57 S. W. Rep. 416.

11. **Check Received as Cash.** — *Farrer v. Lacy*, 31 Ch. D. 42, 25 Ch. D. 636; *Carey v. Brown*, 62 Cal. 373; *McConneaughey v. Bogardus*, 106 Ill. 321.

**Note of Purchaser** received as equivalent of cash. *Mead v. McLaughlin*, 42 Mo. 198.

**Personal Assumption of Payment by Auctioneer** equivalent to sale for cash. See *Muhlig v. Fiske*, 131 Mass. 110.

**Note Due from Party Entitled to Proceeds** should not be accepted as cash. *Pursley v. Forth*, 82 Ill. 327.

He can sell for cash only,<sup>1</sup> or on time, or for part cash and part on time.<sup>2</sup>

*bb. RETAINING LIEN FOR PART OF PURCHASE MONEY.* — The strict requirement of cash is calculated to operate with hardship on the debtor. Accordingly the courts are extremely reluctant to set aside a sale where the trustee in the exercise of a sound discretion has given credit for part of the purchase money even though the power provides for a cash sale.<sup>3</sup> If fairly made, and security in the form of a lien reserved or new mortgage is taken for the deferred payment, the sale will be upheld.<sup>4</sup>

(d) *Sale on Time Upheld — Basis of Rule.* — The provision authorizing a sale for cash is usually inserted for the benefit of the creditor and to enable him to have his money speedily.<sup>5</sup> Consequently, if the creditor enters into a private agreement with the purchaser for credit,<sup>6</sup> or gives time for the payment of the part due to himself, the mortgagor or grantor in the deed of trust cannot complain.<sup>7</sup> It is solely a matter between the mortgagee and the purchaser. Another reason why the giving of credit does not vitiate the sale, where the power authorizes a sale for cash, is found in the fact that the sale extinguishes the mortgage debt to the extent of the bid and leaves the mortgagor without any ground of complaint.<sup>8</sup>

(2) *Statutes Requiring Sale on Time.* — The giving of credit for a part at least of the purchase money is so manifestly to the interest of the debtor that statutes have been passed requiring the sales to be made on time.<sup>9</sup>

*j. RESALE — (1) First Sale Invalid — (a) General Rule.* — Where a sale is rendered ineffectual by reason of a failure to proceed according to the terms of the deed, the vitality of the power is in no wise affected, and the trustee may sell again as if the first sale had not occurred.<sup>10</sup>

(b) *Contrary Doctrine.* — In a few jurisdictions it is held that an irregular sale

1. *Hitz v. Jenks*, 16 App. Cas. (D. C.) 530.

2. *Markey v. Langley*, 92 U. S. 142.

*Interest on Deferred Payment* from date of sale. *Stanford v. Andrews*, 12 Heisk. (Tenn.) 664.

3. *Discretion of Trustee.* — *Olcott v. Bynum*, 17 Wall. (U. S.) 63; *Hubbard v. Jarrell*, 23 Md. 75.

4. *New Mortgage Taken as Security for Deferred Payment.* — *Bailey v. Aetna Ins. Co.*, 10 Allen (Mass.) 286.

*But a Second Mortgage* on the same property is not to be taken. *Coler v. Barth*, 24 Colo. 31.

*Sale Wholly on Credit.* — Where a sale for cash is provided for in the deed of trust, a purchaser who buys wholly on credit has defeasible title. The defect, however, could not operate as against a remote *bona fide* purchaser. *Cassell v. Ross*, 33 Ill. 246, 85 Am. Dec. 270; *Strother v. Law*, 54 Ill. 413; *Johnson v. Watson*, 87 Ill. 535.

*Exercise of Discretion.* — It is improper for a mortgagee to reject a large deposit in cash with offer of security to be given upon ratification of the sale, the result being that the mortgagee himself purchases at a lower price. *Horsely v. Hough*, 38 Md. 130.

*Upon Judicial Foreclosure* the court may in its discretion order a sale on credit though the trust deed authorizes a sale for cash. *Mitchell v. McKinny*, 6 Heisk. (Tenn.) 83. See also *Wood v. Krebs*, 33 Gratt. (Va.) 685.

5. *Provision Inserted for Benefit of Creditor.* — *Tompkins v. Drennen*, (C. C. A.) 56 Fed. Rep. 694; *Durden v. Whetstone*, 92 Ala. 480; *Jones v. Hagler*, 95 Ala. 529; *Mewburn v. Bass*, 82 Ala. 622; *Cooper v. Hornsby*, 71 Ala. 62; *Mahone v. Williams*, 39 Ala. 202; *Waterman v. Spaulding*, 51 Ill. 425; *Burr v. Borden*, 61 Ill.

389; *Sawyer v. Campbell*, 130 Ill. 18; *Hubbard v. Jarrell*, 23 Md. 66.

6. *Chase v. Cleburne First Nat. Bank*, 1 Tex. Civ. App. 595.

7. *Credit Given by Beneficiary.* — Where the bid is for an amount greater than the debt, and the surplus coming to the mortgagor is paid in cash, the creditor may give credit for the amount coming to him. *Bailey v. Aetna Ins. Co.*, 10 Allen (Mass.) 286; *Marlin v. Sawyer*, (Tenn. Ch. 1899) 57 S. W. Rep. 416.

*Cash to Extent of Debt.* — Under a mortgage providing that the terms of sale should be the amount of the debt in cash, and the balance on time, the mortgagee is not bound to realize at least the amount of the debt. He may sell for less, and sue for the deficiency. *Shepherd v. May*, 115 U. S. 505; *May v. Shepherd*, 1 Mackey (D. C.) 430.

8. *Sale Extinguishes Debt.* — *Parker v. Banks*, 79 N. Car. 480. *Compare* *Tompkins v. Drennen*, 56 Fed. Rep. 694, 13 U. S. App. 308.

9. *Walker v. Boggess*, 41 W. Va. 588.

*The Commission of Waste* by the mortgagor in possession does not deprive him of the right to insist that credit shall be given at the sale. *Patch v. Morrisett*, (Va. 1895) 22 S. E. Rep. 173.

10. *Resale Where First Sale Invalid.* — *United States.* — *Bigler v. Waller*, 14 Wall. (U. S.) 297; *Shillaber v. Robinson*, 97 U. S. 68.

*Michigan.* — *Morse v. Byam*, 55 Mich. 594.

*Minnesota.* — *Martin v. Baldwin*, 30 Minn. 537; *Bottineau v. Aetna L. Ins. Co.*, 31 Minn. 125.

*Mississippi.* — *Leake v. Caffey*, (Miss. 1896) 19 So. Rep. 716; *Enochs v. Miller*, 60 Miss. 19.

*Missouri.* — *Ohnsborg v. Turner*, 87 Mo. 127,

exhausts the power. Consequently the trustee or mortgagee cannot sell again where the first sale is defective. Resort must then be had to equity.<sup>1</sup> The reason assigned for this ruling is that the irregular sale passes the trustee's legal title and leaves nothing in him to pass by his second sale.<sup>2</sup>

(2) *Default of First Bidder* — (a) *In General*. — A second sale should also be made when the original successful bidder fails to comply with the terms of his bid.<sup>3</sup>

(b) *Mode of Sale*. — In a proper case, such resale may be forthwith made at the time and place of the first sale,<sup>4</sup> or by a simple adjournment to another day, or upon readvertisement, where such course is rendered necessary by the dispersal of bidders.<sup>5</sup>

A *Resale on the Spot* has been held valid where the trustee merely struck off the property to the next highest bidder.<sup>6</sup>

(c) *Liability of Original Bidder* — *aa. MEASURE OF DAMAGES*. — A purchaser at a sale, who fails to comply, is liable for such loss as may be occasioned thereby. If the property brings less at the second sale than at the first, the purchaser who is in default must pay the difference.<sup>7</sup> So, if the property brings more at the second sale than at the first, he is perhaps entitled to the excess of proceeds just as he is responsible for a deficiency. This is certainly so where judicial proceedings for a resale treat the first contract as binding on him.<sup>8</sup>

*bb. SUING FOR PURCHASE MONEY* — *Specific Performance*. — A trustee or mortgagee, instead of reselling upon noncompliance, may if he chooses tender a sufficient deed and sue for the purchase price,<sup>9</sup> or he may enforce specific performance.<sup>10</sup>

13 Mo. App. 533; *Lanier v. McIntosh*, 117 Mo. 508.

*New York*. — *Stackpole v. Robbins*, 47 Barb. (N. Y.) 212.

*Illustrations* — *First Sale Defective Because Made in Wrong Place*. — *Texas Loan Agency v. Gray*, 12 Tex. Civ. App. 430.

*First Sale Defective for Want of Appraisal*. — *Webb v. Hunt*, 2 Indian Ter. 612.

*First Sale Invalid for Misdescription in Notice*. — *Lanier v. McIntosh*, 117 Mo. 508.

*First Sale Invalid for Failure of Notice to State Place of Sale*. — *Bottineau v. Aetna L. Ins. Co.*, 31 Minn. 125.

*Resale Where First Sale Judicially Set Aside*. — *Reeside v. Peter*, 35 Md. 221; *Lane v. Holmes*, 55 Minn. 379, 43 Am. St. Rep. 508.

*First Sale Regular* — *Power Exhausted*. — Where the first sale is complete and in every respect regular, it exhausts the trustee's power and he has no authority to reopen the sale a few minutes later and sell to a higher bidder. *Paquin v. Braley*, 10 Minn. 379. *Compare Gair v. Tuttle*, 49 Fed. Rep. 198.

1. *Irregular Sale Exhausts Power of Trustee*. — *Stephens v. Clay*, 17 Colo. 489, 31 Am. St. Rep. 328; *Graham v. Anderson*, 42 Ill. 514, 92 Am. Dec. 89; *Dawson v. Hayden*, 67 Ill. 52; *Koester v. Burke*, 81 Ill. 436.

2. *Second Sale Void Though Provided for in Deed*. — Where ninety days' notice is required, the trustee conveys the legal title in *Colorado* although only eighty-nine days' notice is actually given. In such a case a second sale was held to be void though made upon readvertisement as prescribed by the terms of the deed. *Stephens v. Clay*, 17 Colo. 489, 31 Am. St. Rep. 328.

3. *Resale upon Noncompliance*. — *Gardner v. Armstrong*, 31 Mo. 535; *Dover v. Kennerly*, 38 Mo. 469, 44 Mo. 145.

4. *Resale Made Before Dispersal of Bidders*. —

*Fall River Sav. Bank v. Sullivan*, 131 Mass. 537; *Davis v. Hess*, 103 Mo. 31.

5. *Readvertisement Necessary Where Bidders Leave Before Resale*. — *Barnard v. Duncan*, 38 Mo. 170, 90 Am. Dec. 416; *Dover v. Kennerly*, 38 Mo. 469; *Judge v. Booge*, 47 Mo. 544.

*Resale upon Republication of Notice*. — *McClung v. Missouri Trust Co.*, 137 Mo. 106 (by order of court); *Aukam v. Zantzing*, 94 Md. 421.

*Power Limited in Point of Time*. — A trustee whose power is limited in point of duration cannot, where the purchaser fails to comply, sell again on readvertisement. *Simmons v. Baynard*, 30 Fed. Rep. 532.

6. *Dover v. Kennerly*, 38 Mo. 469.

*Confirmation to Next Highest Bidder* at end of three days valid as against a debtor who as purchaser had failed to comply. *Maloney v. Webb*, 112 Mo. 575.

7. *Measure of Damages*. — *Gardner v. Armstrong*, 31 Mo. 536.

But where the second sale is itself irregular, the amount bid is no proper criterion of the damage. *Barnard v. Duncan*, 38 Mo. 170, 90 Am. Dec. 416.

*Right of Possession*. — A defaulting purchaser when sued for possession by a purchaser at the second sale cannot take advantage of an irregularity in the sale under which such second purchaser claims. *Undeland v. Stanfield*, 53 Neb. 120.

8. *Aukam v. Zantzing*, 94 Md. 421.

9. *Misrepresentations by the Mortgagee or Trustee* as to the state of title constitute a good defense in favor of a bidder who has been misled into buying at a higher price than he would otherwise have bid. *Schaeffer v. Bond*, 70 Md. 480.

*Action to Enforce Payment of Purchase Money*. — *Gross v. Jancsok*, 16 Daly (N. Y.) 346; *Schneider v. Greenbaum*, (Ky. 1898) 46 S. W. Rep. 2.

10. *Dover v. Kennerly*, 38 Mo. 469.



(d) **Liability of Trustee.** — A trustee who releases a responsible purchaser and resells for a lower price is personally liable to the party aggrieved, and such person is not compelled to repudiate the second sale,<sup>1</sup> but he may do so if he chooses and hold the purchaser at the first sale.<sup>2</sup>

*k. INADEQUACY OF PRICE* — (1) *In General.* — The mere fact that property sold under power brings less than its true value is not sufficient to render the sale defective. Though the price may be inadequate in fact, it will not be so considered in law,<sup>3</sup> unless the disparity is so great as to shock the conscience<sup>4</sup> and give rise to a presumption of fraud.<sup>5</sup> In determining this question each case necessarily depends upon its own peculiar facts.

(2) *Coupled with Fraud or Irregularity.* — Though the fact that the property brings less than its value does not in itself invalidate the sale, such circumstance is nevertheless cogent or even conclusive in determining whether a sale should be set aside on some other ground which perhaps would not alone suffice to justify such action.<sup>6</sup> Inadequacy coupled with unfair-

**Election to Resell.** — After the trustee has proceeded to make a second sale, he cannot maintain a suit for specific performance against the successful bidder at the first sale. *Fleming v. Holt*, 12 W. Va. 143.

1. *Sherwood v. Saxton*, 63 Mo. 78.

**A Bid Made under Misapprehension** of the terms of sale may be retracted by the bidder with the consent of the trustee. *Waterman v. Spaulding*, 51 Ill. 425.

2. *Gair v. Tuttle*, 49 Fed. Rep. 198.

**3. Inadequacy of Price** — *England.* — *Kennedy v. De Trafford*, (1896) 1 Ch. 762; *Warner v. Jacob*, 20 Ch. D. 220.

*United States.* — *Smith v. Black*, 115 U. S. 308; *Cross v. Allen*, 141 U. S. 528.

*Arkansas.* — *Hudgins v. Morrow*, 47 Ark. 515.

*California.* — *Kennedy v. Dunn*, 58 Cal. 339.

*Colorado.* — *Loveland v. Clark*, 11 Colo. 265; *Washburn v. Williams*, 10 Colo. App. 153; *Lathrop v. Tracy*, 24 Colo. 382, 65 Am. St. Rep. 229.

*District of Columbia.* — *Hitz v. National L. Ins. Co.*, 3 MacArthur (D. C.) 170; *Mutual F. Ins. Co. v. Barker*, 17 App. Cas. (D. C.) 205.

*Illinois.* — *Bowman v. Ash*, 36 Ill. App. 115; *Weld v. Rees*, 48 Ill. 428; *Parmy v. Walker*, 102 Ill. 617; *Burns v. Middleton*, 104 Ill. 411; *Cleaver v. Green*, 107 Ill. 67; *Laclede Bank v. Keeler*, 109 Ill. 385; *Hoodless v. Reid*, 112 Ill. 105.

*Maryland.* — *Horsey v. Hough*, 38 Md. 130; *Chilton v. Brooks*, 71 Md. 445; *Condon v. Maynard*, 71 Md. 601; *Carroll v. Hutton*, 91 Md. 379.

*Massachusetts.* — *King v. Bronson*, 122 Mass. 122; *Wing v. Hayford*, 124 Mass. 249.

*Missouri.* — *Million v. McRee*, 9 Mo. App. 344; *Kline v. Vogel*, 11 Mo. App. 211; *Landrum v. Union Bank*, 63 Mo. 48; *Keiser v. Gammon*, 95 Mo. 217; *Markwell v. Markwell*, 157 Mo. 326; *Hardwicke v. Hamilton*, 121 Mo. 465; *Keith v. Browning*, 139 Mo. 190; *Reynolds v. Kroff*, 144 Mo. 433.

*North Carolina.* — *McNair v. Pope*, 100 N. Car. 404.

*New York.* — *Coudert v. De Logerot*, (Supm. Ct. Gen. T.) 30 N. Y. Supp. 114; *Parsons v. Rhodes*, 22 Hun (N. Y.) 80.

*South Carolina.* — *Robinson v. Amateur*

*Assoc.*, 14 S. Car. 148; *Ex p. Alexander*, 35 S. Car. 409.

*Texas.* — *Seip v. Grinnan*, (Tex. Civ. App. 1896) 36 S. W. Rep. 349.

*West Virginia.* — *Bradford v. McConihay*, 15 W. Va. 732; *Lallance v. Fisher*, 29 W. Va. 512.

*Wisconsin.* — *Maxwell v. Newton*, 65 Wis. 261.

**Illustrations.** — A sale of land for half its value will be allowed to stand. *Austin v. Hatch*, 159 Mass. 198; *Maloney v. Webb*, 112 Mo. 575; *Monroe v. Fuchter*, 121 N. Car. 101; *Bradford v. McConihay*, 15 W. Va. 732; *Lallance v. Fisher*, 29 W. Va. 512. So a sale for one-fifth, *Stevenson v. Dana*, 166 Mass. 163; *Harlin v. Nation*, 126 Mo. 97; or even a tenth, in case of personalty, *Kingman v. Hill*, 71 Mo. App. 666, has been upheld.

**Judicial Sale.** — Where the sale is judicial, *State v. Campbell*, 5 S. Dak. 636, or requires judicial confirmation to make it valid, as in *Maryland*, a more liberal rule is adopted by which the sale may be set aside or nonconfirmed at the discretion of the court. See *Carroll v. Hutton*, 88 Md. 676.

**Duty of Mortgagee to Obtain Fair Price** — **English Rule as to Liability.** — A mortgagee in possession who fails to use due diligence in selling, whereby the property is sold at an undervaluation, is chargeable with the difference between the price obtained and the real value of the property. *National Bank v. United Hand-in-Hand, etc., Co.*, 4 App. Cas. 391; *Wolff v. Vanderzee*, 20 L. T. N. S. 353; *Jones v. Linton*, 44 L. T. N. S. 601.

4. *Martin v. Barth*, 4 Colo. App. 346.

**5. Inadequacy Raising Presumption of Fraud.** — *Bailor v. Daly*, 18 D. C. 175; *Kerfoot v. Billings*, 160 Ill. 563; *Hope v. Valley City Salt Co.*, 25 W. Va. 789.

**6. Inadequacy Coupled with Other Circumstances.** — *Babcock v. Wells*, 25 R. I. 23.

**Insanity of Owner** at time of the sale is not a circumstance which will strengthen inadequacy as a ground for setting the sale aside. *Meyer v. Kuechler*, 10 Mo. App. 371.

**The Existence of Financial Stringency** at time of sale no ground for setting it aside for inadequacy. *Lathrop v. Tracy*, 24 Colo. 382, 65 Am. St. Rep. 229; *Newman v. Meek, Freem.* (Miss.) 441.

ness<sup>1</sup> or fraud,<sup>2</sup> or indeed with any irregularity in the proceedings or with a failure of the trustee to do his full duty, will justify setting the sale aside where this can be done without prejudice to innocent purchasers.<sup>3</sup> Thus if the successful bidder induces others present not to bid or to withdraw their bids,<sup>4</sup> or if a secret agreement to suppress competition is made between the mortgagee or trustee and others,<sup>5</sup> or if no attempt is made by a trustee to get a higher bid,<sup>6</sup> or if the property is sold separately when it should be sold *en masse*,<sup>7</sup> the sale will be set aside, the price being inadequate. Equity, as has been said, readily seizes upon any incident of surprise, undue advantage, or other inequitable circumstance as a ground of relief where the property has sold for a price so low as to result in hardship.<sup>8</sup>

(3) *Purchase by Creditor*. — Even though the mortgagee or *cestui que trust* becomes the purchaser, mere inadequacy of price will not vitiate the sale, if it appears to have been in all respects fairly and honestly conducted.<sup>9</sup> But a mortgagee is held to a higher degree of care and diligence in obtaining bidders than would be required of a trustee, in cases where he purchases the property at his own sale.<sup>10</sup>

(4) *Only One Bid*. — The fact that only one bid is made is not necessarily fatal to a sale.<sup>11</sup> But where only one bidder is present and the property goes for an inadequate price the sale has been set aside.<sup>12</sup>

Where the Right of Redemption is not cut off by the sale, the courts are more reluctant to set it aside for inadequacy than where the sale bars the right altogether. *Sigerson v. Sigerson*, 71 Iowa 476; *Babcock v. Canfield*, 36 Kan. 437; *Cameron v. Adams*, 31 Mich. 426; *Johnson v. Cocks*, 37 Minn. 530; *Maxwell v. Newton*, 65 Wis. 261.

1. *Unfairness, Bad Faith, or Want of Reasonable Discretion*. — *Hitz v. Jenks*, 16 App. Cas. (D. C.) 530; *Hoyt v. Pawtucket Sav. Inst.*, 110 Ill. 390; *Magnusson v. Williams*, 111 Ill. 450; *Horsey v. Hough*, 38 Md. 130; *Learned v. Geer*, 139 Mass. 31; *Holdsworth v. Shannon*, 113 Mo. 508, 35 Am. St. Rep. 719; *Orr v. McKee*, 134 Mo. 78; *Latch v. Furlong*, 12 Grant Ch. (U. C.) 303.

2. *Fraud*. — *Ventres v. Cobb*, 105 Ill. 33; *Newman v. Ogden*, 82 Wis. 53.

3. *Inadequacy Coupled with Irregularity or Other Circumstances* tending to show bad faith, undue advantage, or mistake:

*England*. — *Ferrand v. Clay*, 1 Jur. 165.

*United States*. — *Graffam v. Burgess*, 117 U. S. 180.

*Arkansas*. — *Fry v. Street*, 44 Ark. 502; *Hudgins v. Morrow*, 47 Ark. 515.

*Illinois*. — *Mapps v. Sharpe*, 32 Ill. 13; *Webber v. Curtiss*, 104 Ill. 309; *Equitable Trust Co. v. Fisher*, 106 Ill. 189; *Cleaver v. Green*, 107 Ill. 67; *Pestel v. Primm*, 109 Ill. 353; *Hoodless v. Reid*, 112 Ill. 105.

*Maryland*. — *Loeber v. Eckes*, 55 Md. 1.

*Massachusetts*. — *Howard v. Ames*, 3 Met. (Mass.) 308; *King v. Bronson*, 122 Mass. 122; *Thompson v. Heywood*, 129 Mass. 401; *Briggs v. Briggs*, 135 Mass. 306.

*Michigan*. — *Culbertson v. Young*, 50 Mich. 190; *Norton v. Tharp*, 53 Mich. 146.

*Mississippi*. — *Martin v. Swofford*, 59 Miss. 328; *Helm v. Yerger*, 61 Miss. 44.

*Missouri*. — *Meyer v. Jefferson Ins. Co.*, 5 Mo. App. 245; *Million v. McRee*, 9 Mo. App. 344; *Kline v. Vogel*, 11 Mo. App. 211; *Vail v. Jacobs*, 62 Mo. 130; *Mann v. Best*, 62 Mo. 491; *Stoffel v. Schroeder*, 62 Mo. 147.

*Nevada*. — *Runkle v. Gaylord*, 1 Nev. 123.

*New York*. — *Banta v. Maxwell*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 479; *Murdock v. Empie*, (Supm. Ct.) 19 How. Pr. (N. Y.) 79; *Jackson v. Crafts*, 18 Johns. (N. Y.) 110; *Jencks v. Alexander*, 11 Paige (N. Y.) 619; *Soule v. Ludlow*, 6 Thomp. & C. (N. Y.) 24; *Leet v. McMaster*, 51 Barb. (N. Y.) 236.

*Rhode Island*. — *Galvin v. Newton*, 19 R. I. 176.

*South Dakota*. — *Stacy v. Smith*, 9 S. Dak. 137.

*Texas*. — *Klein v. Glass*, 53 Tex. 37.

*West Virginia*. — *Hope v. Valley City Salt Co.*, 25 W. Va. 789.

*Wisconsin*. — *Encking v. Simmons*, 28 Wis. 272; *Maxwell v. Newton*, 65 Wis. 261; *Newman v. Ogden*, 82 Wis. 53.

*Innocent Purchaser*. — If the property has been conveyed since the sale, to a *bona fide* purchaser without notice, even the grossest inadequacy of price will not induce the court to set the sale aside. *Dryden v. Stephens*, 19 W. Va. 1.

4. *Suppression of Bidding*. — *Dover v. Kennerly*, 44 Mo. 145; *Fenner v. Tucker*, 6 R. I. 551.

5. *Secret Agreement with Mortgagee*. — *Mapps v. Sharpe*, 32 Ill. 13; *Williamson v. Stone*, 27 Ill. App. 214, 128 Ill. 129; *Bradley v. Tyson*, 33 Mich. 337.

6. *Runkle v. Gaylord*, 1 Nev. 123.

7. *Lalor v. McCarthy*, 24 Minn. 417.

8. *Meath v. Porter*, 9 Heisk. (Tenn.) 224.

9. *Purchase by Creditor*. — *Glide v. Dwyer*, 83 Cal. 477; *Hitz v. National L. Ins. Co.*, 3 MacArthur (D. C.) 170; *Landrum v. Union Bank*, 63 Mo. 48; *Robinson v. Amateur Assoc.*, 14 S. Car. 148.

10. *Diligence Required*. — *Horsey v. Hough*, 38 Md. 130; *Loeber v. Eckes*, 55 Md. 1.

11. *Mutual F. Ins. Co. v. Barker*, 17 App. Cas. (D. C.) 205.

12. *Only One Bidder Present*. — *Williamson v. Stone*, 128 Ill. 129; *Chilton v. Brooks*, 69 Md. 584; *Castner v. Darby*, 128 Mich. 241.

(5) *Who May Complain.* — The objection that the price was inadequate can be made only by parties having an interest in the land or in the fund.<sup>1</sup> And an application to set aside a sale will not be considered in any case, unless it is shown that a larger price can be realized upon a resale.<sup>2</sup>

7. WHO MAY PURCHASE — (1) *Mortgagor* — (a) *In General.* — The mortgagor or grantor may always buy at a sale of his own property by the mortgagee or trustee.<sup>3</sup> So his administrator, acting in his private capacity, may purchase.<sup>4</sup> The wife of the mortgagor may also purchase in her own right, holding the property as her separate estate.<sup>5</sup>

A Director of a Corporation Mortgagor is not prevented by his office from purchasing at a sale under the mortgage, if he acts in good faith.<sup>6</sup>

(b) *Comortgagor.* — Likewise one of several mortgagors, being a part owner of the property conveyed, may buy the whole in his own behalf and without being accountable to the other mortgagors for any profit that may arise from the transaction.<sup>7</sup>

(c) *Title of Mortgagor* — *aa. AS AGAINST MORTGAGEE.* — A mortgagor who purchases at the sale of his own property gets a title good as against the mortgagee, and the latter has no right to sell it again if the property did not bring enough to pay the whole debt. One sale under the power exhausts it.<sup>8</sup>

*bb. AS AGAINST JUNIOR INCUMBRANCER.* — But the mortgagor's title after such purchase is not good as against his own junior incumbrancers. On the contrary the purchase inures to their benefit.<sup>9</sup> This is true though the purchase is made indirectly through a third person.<sup>10</sup> The rule is different where the mortgagor purchases in a different capacity.<sup>11</sup>

(2) *Junior Mortgagee.* — Being a stranger to the prior incumbrance, a junior mortgagee is under no disability to purchase at the first sale, and he is often compelled to do so to protect himself.<sup>12</sup> In such case he acquires an

1. *Who May Complain.* — *Franklin v. Greene*, 2 Allen (Mass.) 519; *Lazarus v. Cæsar*, 157 Mo. 199.

A Daughter of the Grantor has no standing in a court to complain of inadequacy in the price, although the creditor who purchased had before the sale made a voluntary agreement to convey the property after foreclosure to such daughter and subsequently refused to do so. *Taylor v. Von Schraeder*, 107 Mo. 206.

2. *More Advantageous Sale Possible.* — *Parmly v. Walker*, 102 Ill. 617; *Farmers' Bank v. Quick*, 71 Mich. 534, 15 Am. St. Rep. 280; *Keiser v. Gammon*, 95 Mo. 217.

3. *Coleman v. McKee*, 24 R. I. 596.

4. *Markwell v. Markwell*, 157 Mo. 326.

*Sale to Estate of Dead Person Void.* — *Kenaston v. Lorig*, 81 Minn. 454.

5. *Purchase by Mortgagor's Wife.* — *Stetson v. O'Sullivan*, 8 Allen (Mass.) 321; *Field v. Gooding*, 106 Mass. 310; *Gantz v. Toles*, 40 Mich. 725.

6. *Director of Corporation.* — *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Holt v. Bennett*, 146 Mass. 437; *Saltmarsh v. Spaulding*, 147 Mass. 224.

Even if good faith were not shown, the sale could be avoided only by repayment of the purchase price. *Saltmarsh v. Spaulding*, 147 Mass. 224.

7. *Kennedy v. De Trafford*, (1897) A. C. 180, *affirming* (1896) 1 Ch. 762.

But in *Burr v. Mueller*, 65 Ill. 258, it was said that a purchase by one tenant in common at the foreclosure of an incumbrance which both are equally obligated to pay, gives the other a right in equity to contribute his *pro*

*rata* of the sum expended and share in the purchase.

8. *Regular Sale Exhausts Power.* — *Dick v. Moon*, 26 Minn. 309; *Hanson v. Dunton*, 35 Minn. 189; *Loomis v. Clambey*, 69 Minn. 469, 65 Am. St. Rep. 576; *Fowler v. Johnson*, 26 Minn. 338. But see *Standish v. Vosberg*, 27 Minn. 175.

9. *Purchase by Mortgagor Inures to Benefit of Junior Incumbrancers.* — *Otter v. Vaux*, 6 De G. M. & G. 638; *Toulmin v. Steere*, 3 Meriv. 210.

One Who Purchases Property Covered by Several Mortgages and assumes the payment of them, cannot obtain a title free from the lien of the junior mortgages by purchasing at a foreclosure under the first mortgage, *Stiger v. Mahone*, 24 N. J. Eq. 426; *Hilton v. Bissell*, 1 Sandf. Ch. (N. Y.) 407; especially where there is any element of fraud or collusion, *Thompson v. Heywood*, 129 Mass. 401.

10. *Tompkins v. Halstead*, 21 Wis. 118.

11. *A Married Woman Who Executes a Mortgage on Her Property as Security for the debts of another acquires a good title as against the second mortgagee where the purchaser at the sale under the first mortgage executes a deed to her for her separate use.* *Plum v. Studebaker Bros. Mfg. Co.*, 89 Mo. 162.

12. *Purchase by Junior Mortgagee.* — *Shaw v. Bunny*, 11 Jur. N. S. 99, 33 Beav. 494, 34 L. J. Ch. 257; *Kirkwood v. Thompson*, 2 De G. J. & S. 613, 34 L. J. Ch. 305; *Brown v. Woodhouse*, 14 Grant Ch. (U. C.) 682; *Munsen v. Hauss*, 22 Grant Ch. (U. C.) 279; *Ten Eyck v. Craig*, 62 N. Y. 406. See also *Parkinson v. Hanbury*, 2 De G. J. & S. 450.



irredeemable title by virtue of the purchase and may hold under it regardless of his own mortgage.<sup>1</sup> But the junior mortgagee cannot buy in his own behalf where he holds the second mortgage in trust for others. Whatever he acquires inures to their benefit, subject to his right to be reimbursed.<sup>2</sup>

(3) *Trust Creditor*. — The creditor secured by a deed of trust, unlike the mortgagee and trustee, is under no disability, since he does not occupy a fiduciary relation to the property, and he may always purchase if he acts in good faith.<sup>3</sup> The trust creditor may purchase though the trustee who sells is in his general employment as a clerk,<sup>4</sup> and a corporation creditor is not disabled to buy merely because the trustee is one of its own officers.<sup>5</sup> Sometimes the deed of trust expressly sanctions the right of the creditor to bid,<sup>6</sup> but this is not necessary. The creditor can buy at the sale of his trustee, just as mortgagees may purchase at judicial foreclosures. To render a purchase by the secured creditor valid, it must be free from any appearance of collusion with the trustee.<sup>7</sup>

(4) *Disability of Mortgagee* — (a) *General Doctrine*. — A mortgagee who forecloses under a power of sale cannot by the weight of authority, either directly or indirectly, purchase at his own sale.<sup>8</sup> Two reasons are assigned for this.

1. *Irredeemable Title*. — *Shaw v. Bunny*, 2 De G. J. & S. 468; *Watkins v. McKellar*, 7 Grant Ch. (U. C.) 584.

2. *Purchase by Junior Mortgagee as Trustee*. — *Van Epps v. Van Epps*, 9 Paige (N. Y.) 237; *Taylor v. Heggie*, 83 N. Car. 244. Compare *Kirkwood v. Thompson*, 2 De G. J. & S. 613, affirming 2 Hem. & M. 392.

3. *Right of Creditor to Buy*. — *Richards v. Holmes*, 18 How. (U. S.) 143; *Smith v. Black*, 115 U. S. 308; *Easton v. German-American Bank*, 127 U. S. 532; *Loveland v. Clark*, 11 Colo. 265; *Mutual F. Ins. Co. v. Barker*, 17 App. Cas. (D. C.) 205. Compare *Shields v. Dyer*, 86 Tenn. 41.

In *Missouri* by statute the debtor is entitled to redeem within one year where the creditor or his assignee buys at the sale or where another buys for him. *Keith v. Browning*, 139 Mo. 190.

4. *Monroe v. Fuchtlar*, 121 N. Car. 101.

5. *Corporation Creditor*. — *Copsey v. Sacramento Bank*, 133 Cal. 659, 85 Am. St. Rep. 238; *Hamill v. Copeland*, 26 Colo. 178.

6. *Lathrop v. Tracy*, 24 Colo. 382, 65 Am. St. Rep. 229.

7. *Collusion with Trustee*. — *Bloom v. Van Rensselaer*, 15 Ill. 503; *Fishburne v. Smith*, 34 S. Car. 330.

8. *Disability of Mortgagee to Purchase* — *England*. — *Henderson v. Astwood*, (1894) A. C. 150; *Downes v. Grazebrook*, 3 Meriv. 200; *Matter of Bloye*, 1 Macn. & G. 488.

*United States*. — *Michoud v. Girod*, 4 How. (U. S.) 503; *Lockett v. Hill*, 1 Woods (U. S.) 552.

*Alabama*. — *Garland v. Watson*, 74 Ala. 324; *Ezzell v. Watson*, 83 Ala. 120; *Thomas v. Jones*, 84 Ala. 302; *McCall v. Mash*, 89 Ala. 487, 18 Am. St. Rep. 145.

*Illinois*. — *Mapps v. Sharpe*, 32 Ill. 13; *Griffin v. Marine Co.*, 52 Ill. 130; *Roberts v. Fleming*, 53 Ill. 196; *Burr v. Borden*, 61 Ill. 380; *Gibbons v. Hoag*, 95 Ill. 45; *Nichols v. Otto*, 132 Ill. 91.

*Indiana*. — *Emmons v. Hawn*, 75 Ind. 356.

*Maine*. — *Patten v. Pearson*, 57 Me. 428.

*Maryland*. — *Korns v. Shaffer*, 27 Md. 83.

*Minnesota*. — *Kern v. Chalfant*, 7 Minn. 487; *Allen v. Chatfield*, 8 Minn. 435.

*Mississippi*. — *Hyde v. Warren*, 46 Miss. 13; *Byrd v. Clarke*, 52 Miss. 623.

*Missouri*. — *Rutherford v. Williams*, 42 Mo. 18; *Thornton v. Irwin*, 43 Mo. 153; *McNees v. Swaney*, 50 Mo. 388; *Moore v. Ryan*, 31 Mo. App. 474.

*New Jersey*. — *Snyder v. Greaves*, (N. J. 1891) 21 Atl. Rep. 291.

*New York*. — *Bergen v. Bennett*, 1 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 281; *Dobson v. Racey*, 8 N. Y. 216.

*North Carolina*. — *Whitehead v. Helen*, 76 N. Car. 99; *Joyner v. Farmer*, 78 N. Car. 196; *Froneberger v. Lewis*, 79 N. Car. 426; *Howell v. Pool*, 92 N. Car. 450; *Sumner v. Sessoms*, 94 N. Car. 371; *Gibson v. Barbour*, 100 N. Car. 192; *Simpson v. Simpson*, 107 N. Car. 552; *Shew v. Call*, 119 N. Car. 450, 56 Am. St. Rep. 678.

*Rhode Island*. — *Parmenter v. Walker*, 9 R. I. 225.

*Vermont*. — *Hyndman v. Hyndman*, 19 Vt. 9, 46 Am. Dec. 171.

*Wisconsin*. — *Encking v. Simmons*, 28 Wis. 272.

*Contra*. — *Howards v. Davis*, 6 Tex. 174; *Scott v. Mann*, 33 Tex. 725; *Marsh v. Hubbard*, 50 Tex. 203; *Connolly v. Hammond*, 51 Tex. 635.

*Good Faith Irrelevant*. — The circumstance that the mortgagee pays a fair price and that the transaction is in all respects honest is irrelevant, as the rule prohibiting the mortgagee from buying is intended to prevent possible as well as actual wrong. *Blockley v. Fowler*, 21 Cal. 326, 82 Am. Dec. 747; *Houston v. National Mut. Bldg., etc., Assoc.*, 80 Miss. 31, 92 Am. St. Rep. 565; *Moore v. Thompson*, 40 Mo. App. 195; *Very v. Russell*, 65 N. H. 646; *Jones v. Pullen*, 115 N. Car. 465.

*A Pledgee of a Mortgagee* cannot purchase at his own sale. *Callan v. Wilson*, 127 U. S. 540.

*General Disability of Person Selling* — The inhibition against the mortgagee's purchasing at his own sale extends to all officers authorized or required by law to conduct mortgage sales. *Mapps v. Sharpe*, 32 Ill. 13.

In the first place, a sale by a person to himself is no sale at all, and the mortgagee is not permitted to take the mortgaged property at a price fixed by himself, even though such price be its full value.<sup>1</sup> In the second place, the mortgagee is treated by many courts as a trustee, and to permit him to purchase would violate the rule which prevents the trustee from turning the trusteeship to his private advantage.<sup>2</sup>

(b) **Qualifications** — *aa. SALE BY SHERIFF.* — The general doctrine is subject to various qualifications. Thus, where the mortgage sale is conducted under authority of law by a person other than the mortgagee, as, for instance, by the sheriff, the mortgagee may safely purchase.<sup>3</sup>

*bb. CHATTEL MORTGAGES.* — Neither does the general rule apply to sales under chattel mortgages, for the reason that the mortgagee, after default, holds the legal title and does not stand in the position of a trustee.<sup>4</sup>

*cc. CLAUSE AUTHORIZING MORTGAGEE TO PURCHASE.* — The rule which wholly disables the mortgagee from buying may easily operate to the disadvantage of all persons concerned, and as the danger of fraud is really not great where the sale is conducted in public, a clause permitting the mortgagee to purchase is nearly always inserted in the mortgage. These provisions are universally held to be valid.<sup>5</sup> It has, however, been said that the authority for the mortgagee to purchase must be clear and unequivocal,<sup>6</sup> and that a purchase by the mortgagee under a clause permitting it is a transaction which the law watches with jealousy.<sup>7</sup> The mortgagee in such case is held to strict good faith and diligence in protecting the debtor.<sup>8</sup>

**Subsequent Purchase by Mortgagee.** — When the mortgagee has made a sale in good faith to a third person, he may thereafter deal with the property the same as any other person. *Munn v. Burges*, 70 Ill. 604.

In *Alabama*, when the mortgagee becomes purchaser, the sale passes the legal title and nothing is left in the mortgagor except his right to disaffirm the sale by resort to equity in a reasonable time, and relief will not be granted unless an offer is made to pay the mortgage debt. *American Freehold Land Mortg. Co. v. Pollard*, 120 Ala. 1.

In *Alexander v. Hill*, 88 Ala. 487, 16 Am. St. Rep. 55, it was said that the sale cuts off the equity of redemption as long as it is allowed to stand, but leaves the mortgagor the right to disaffirm it. See, to the same effect, *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 163; *Knox v. Armistead*, 87 Ala. 513, 13 Am. St. Rep. 65.

1. **Reason for Disability.** — *Farrar v. Farrar*, 40 Ch. D. 409; *Byrd v. Clarke*, 52 Miss. 623.

2. See *Fox v. Mackreth*, 2 Bro. C. C. 400, 2 Cox Ch. 320, and note to this case 1 White & T. Lead. Cas. 141.

3. **Mortgagee May Purchase at Sheriff's Sale.** — See *Ramsey v. Merriam*, 6 Minn. 168; *Allen v. Chatfield*, 8 Minn. 435. Compare *Bloom v. Van Rensselaer*, 15 Ill. 503.

**Sale by Marshal Who Is Also Cotrustee.** — But under a mortgage providing for a sale by either the mortgagee or marshal, it was held that they were cotrustees, and that the mortgagee could not, by refusing to conduct the sale in person, remove his disability to purchase at a sale by the marshal. *Gaines v. Allen*, 58 Mo. 537.

4. **Rule Not Applicable to Chattel Mortgages.** — *Richards v. Holmes*, 18 How. (U. S.) 143; *Emmons v. Hawn*, 75 Ind. 356; *Lee v. Fox*, 113 Ind. 98; *Syfers v. Bradley*, 115 Ind. 345; *Bean v. Barney*, 10 Iowa 498; *Richardson v. Coff-*

*man*, 87 Iowa 121; *Parker v. Roberts*, 116 Mo. 657; *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 84 Am. Dec. 298; *Edmiston v. Brucker*, 40 Hun (N. Y.) 256; *French v. Powers*, 120 N. Y. 128; *Maxwell v. Newton*, 65 Wis. 261.

In *Illinois* the prohibitory rule is applied also to chattel mortgages. *Waite v. Dennison*, 51 Ill. 319.

5. **Clause Permitting Mortgagee to Purchase Valid.** — *Waters v. Groom*, 11 Cl. & F. 684; *Knox v. Armistead*, 87 Ala. 511, 13 Am. St. Rep. 65; *Ellenhogen v. Griffey*, 55 Ark. 266; *Matthews v. Daniels*, (Ark. 1893) 21 S. W. Rep. 469; *Kennedy v. Dunn*, 58 Cal. 339; *Mutual Loan, etc., Co. v. Haas*, 100 Ga. 111, 62 Am. St. Rep. 317; *Griffin v. Marine Co.*, 52 Ill. 130; *Montague v. Dawes*, 12 Allen (Mass.) 397, 14 Allen (Mass.) 369; *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476; *Jewell Pure Water Co. v. Kansas City Towel, etc., Co.*, 74 Mo. App. 150; *Elliott v. Wood*, 45 N. Y. 71; *Robinson v. Amateur Assoc.*, 14 S. Car. 148.

**Purchase by Assignee of Mortgagee.** — Where it is permissible for the mortgagee to buy, his assignee having the power to foreclose may also purchase at his own sale. *Ward v. Ward*, 108 Ala. 278; *Woodruff v. Adair*, 131 Ala. 530. Compare *Clarkson v. Mullin*, 62 Mo. App. 622, 1 Mo. App. Rep. 575.

6. *Griffin v. Marine Co.*, 52 Ill. 130.

**Authority for the Mortgagee to Purchase** must be conferred in express terms. A clause providing that the validity of the sale shall not be affected by irregularities in giving notice or in making the sale, does not confer the right. *British, etc., Mortg. Co. v. Norton*, 125 Ala. 522.

7. *Dexter v. Shepard*, 117 Mass. 480.

8. **"Strictest Good Faith" Required.** — *Montague v. Dawes*, 14 Allen (Mass.) 369.

**Burden on Purchaser to Show Good Faith.** — *McLeod v. Bullard*, 86 N. Car. 210; *Jones v. Pullen*, 115 N. Car. 465.

*dd.* STATUTORY PERMISSION FOR MORTGAGEE TO PURCHASE. — Further modification of the general doctrine has resulted in many jurisdictions from the enactment of statutes expressly permitting the mortgagee to purchase at his own sale.<sup>1</sup> Such a statute, of course, means that the purchase must be made in good faith, whether it so states or not.<sup>2</sup>

*ee.* COMPLETING THE SALE — DEED. — Where the mortgagee lawfully becomes the purchaser at his own sale, he may either execute a deed to a third person and have the latter convey back to him,<sup>3</sup> or he may execute the deed directly to himself as purchaser, which would operate as an appointment, by the donee of the power, to his own use.<sup>4</sup> A mortgagee selling to himself is bound to complete the purchase just as if he were a stranger to the mortgage. He cannot, by ignoring the sale and failing to execute a deed to himself as purchaser, maintain an action on the debt where the amount of his bid was sufficient to extinguish it.<sup>5</sup>

(c) Indirect Purchase by Mortgagee — *aa.* IN GENERAL. — Under the general rule which disables the mortgagee from buying at his own sale, a sale to a firm of which he is a member is invalid,<sup>6</sup> and, of course, a colorable sale to a nominal bidder who is really acting for the mortgagee is likewise vicious.<sup>7</sup>

*bb.* MORTGAGEE'S AGENT — SOLICITOR. — The disability existing under the general rule stated above attaches to any one who acts as the mortgagee's agent either in conducting the sale or merely in the particular act of buying.<sup>8</sup> The rule applies with special force to a solicitor or attorney who conducts the sale for

1. Statutory Permission for Mortgagee to Purchase. — *Elliott v. Wood*, 53 Barb. (N. Y.) 285, affirmed 45 N. Y. 71; *Slee v. Manhattan Co.*, 1 Paige (N. Y.) 48; *Bergen v. Bennett*, 1 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 281; *Hubbell v. Sibley*, 5 Lans. (N. Y.) 51; *Lewis v. Duane*, 69 Hun (N. Y.) 28; *McLaughlin v. Hanley*, 12 R. I. 61; *Woonsocket Sav. Inst. v. American Worsted Co.*, 13 R. I. 255; *Thompson v. Browne*, 10 S. Dak. 344. See *Galvin v. Newton*, 19 R. I. 176.

Executors of the Assignee of a mortgagee may purchase under a statute authorizing the mortgagee or his legal representative to buy. *Chilton v. Brooks*, 71 Md. 445; *Condon v. Maynard*, 71 Md. 601.

2. See *Maxwell v. Newton*, 65 Wis. 261.

3. Deed Made Through Third Person. — *Gamble v. Caldwell*, 98 Ala. 577; *Dexter v. Shepard*, 117 Mass. 480; *Hood v. Adams*, 124 Mass. 481, 26 Am. Rep. 687.

4. Conveyance to Mortgagee by Himself. — *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476; *Hood v. Adams*, 124 Mass. 481, 26 Am. Rep. 687; *Jones v. Pullen*, 115 N. Car. 465; *Woonsocket Sav. Inst. v. American Worsted Co.*, 13 R. I. 255; *Marsh v. Hubbard*, 50 Tex. 203. See also *Dexter v. Shepard*, 117 Mass. 480; *Jackson v. Colden*, 4 Cow. (N. Y.) 266.

5. *Hood v. Adams*, 124 Mass. 481, 26 Am. Rep. 687.

6. Sale to Mortgagee's Firm. — *Lockett v. Hill*, 1 Woods (U. S.) 552; *Mapps v. Sharpe*, 32 Ill. 13.

Purchase by Corporation. — Where the mortgagee is stockholder in a corporation the latter may buy at the foreclosure sale. *Farrar v. Farrar*, 40 Ch. D. 395. Compare *Sacramento Bank v. Copesey*, 133 Cal. 663, 85 Am. St. Rep. 242.

7. Sale Ostensibly Made to Third Person. — *Lockett v. Hill*, 1 Woods (U. S.) 552; *Gibbons*

*v. Hoag*, 95 Ill. 45; *Nichols v. Otto*, 132 Ill. 91; *Bryne v. Carson*, 70 Mo. App. 126; *Very v. Russell*, 65 N. H. 646; *Elliott v. Pool*, 3 Jones Eq. (56 N. Car.) 17; *Simpson v. Simpson*, 107 N. Car. 552; *Austin v. Stewart*, 126 N. Car. 525; *Parmenter v. Walker*, 9 R. I. 225.

Purchase Through Agent. — In those states where the mortgagee gets a good title by purchasing at his own sale, he may, of course, purchase through another. *Williamson v. Mayer*, 117 Ala. 253; *Dexter v. Shepard*, 117 Mass. 480.

A Presumption of Collusion is not raised where the purchaser conveys the property to the mortgagee nearly two years after the sale. *Burr v. Borden*, 61 Ill. 389. Compare *Ross v. Demoss*, 45 Ill. 447.

Assignment of Bid to Mortgagee. — Where a *bona fide* purchaser is unable to pay it is not improper for the mortgagee to take the property off his hands at the price bid by him. *Munn v. Burges*, 70 Ill. 604.

8. Disability of Mortgagee's Agent. — *Orme v. Wright*, 3 Jur. 19; *Thompson v. Holman*, 28 Grant Ch. (U. C.) 35; *Adams v. Sayre*, 76 Ala. 509; *Hoit v. Russell*, 56 N. H. 559; *Gibson v. Barbour*, 100 N. Car. 192; *Baxter v. Knoxville*, First Nat. Bank, 85 Tenn. 44.

Officer of Mortgagee Building Society Incompetent. — *Martinson v. Clowes*, 21 Ch. D. 857.

One Who Acts Merely for the Borrower in procuring a loan may buy at the sale. *Seip v. Grinnan*, (Tex. Civ. App. 1896) 36 S. W. Rep. 349.

But not so of one who as representative of the mortgagee is the medium through which the money is advanced and security taken. *Orme v. Wright*, 3 Jur. 19.

The Burden of Proving Partnership or Agency is on the mortgagor who would impeach the sale. *McMillan v. Baxley*, 112 N. Car. 578.



the mortgagee. He can neither purchase in his own right nor in behalf of the mortgagee.<sup>1</sup>

(d) **Effect of Purchase by Mortgagee** — *aa*. TITLE VOIDABLE ONLY. — A sale at which the mortgagee purchases is voidable only and not absolutely void. The mortgagor or person owning the equity of redemption is the only one who can impeach it.<sup>2</sup> The mortgagee himself cannot take advantage of the defect.<sup>3</sup>

If the Mortgagor Elects to Impeach the Sale on the ground that the mortgagee became purchaser, it may be set aside and a new sale ordered.<sup>4</sup> If, however, he elects to affirm, as by bringing a personal action against the mortgagee, his recovery will be limited to the amount the property actually sold for, deducting the costs of the sale and the amount of the mortgage debt.<sup>5</sup>

*bb*. INNOCENT SUBVENDEE. — Where the sale is made to the mortgagee through the medium of a third person, and the property is subsequently conveyed to a *bona fide* purchaser without notice, the mortgagor will not as against him be allowed to redeem after the statutory period.<sup>6</sup>

(5) **Disability of Trustee to Purchase** — (a) **In General.** — The trustee is not allowed to become the purchaser at his own sale under the power, either on his own behalf or as agent for a third person. He cannot act in the double capacity of buyer and seller.<sup>7</sup> This rule is much more rigorously applied than

1. **Disability of Solicitor or Attorney.** — *Ex p.* Bennett, 10 Ves. Jr. 381. But see *Nutt v. Easton*, (1899) 1 Ch. 873; 68 L. J. Ch. 367.

The solicitor cannot become such purchaser either personally or through his clerk. *Ellis v. Delabough*, 15 Grant Ch. (U. C.) 583. Nor can the clerk purchase for his own benefit. *Hobday v. Peters*, 28 Beav. 349.

2. **Voidable at Instance of Owner of Equity** — *Alabama.* — *Downs v. Hopkins*, 65 Ala. 508; *Harris v. Miller*, 71 Ala. 26; *Cooper v. Hornsby*, 71 Ala. 62; *Comer v. Sheehan*, 74 Ala. 453; *McHan v. Ordway*, 76 Ala. 347; *Ezell v. Watson*, 83 Ala. 120; *Thomas v. Jones*, 84 Ala. 302; *Knox v. Armistead*, 87 Ala. 511, 13 Am. St. Rep. 65; *Craddock v. American Freehold Land Mortg. Co.*, 88 Ala. 281; *Martinez v. Lindsey*, 91 Ala. 334; *Durden v. Whetstone*, 92 Ala. 480; *Hambrick v. New England Mortg. Security Co.*, 100 Ala. 551; *Lovelace v. Hutchinson*, 106 Ala. 417; *Ward v. Ward*, 108 Ala. 278; *Diefenbach v. Vaughan*, 116 Ala. 150; *Williamson v. Mayer*, 117 Ala. 253.

*California.* — *Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342; *Copsey v. Sacramento Bank*, 133 Cal. 659, 85 Am. St. Rep. 238.

*Colorado.* — *Blockley v. Fowler*, 21 Cal. 326, 82 Am. Dec. 747.

*Georgia.* — *Palmer v. Young*, 96 Ga. 246, 51 Am. St. Rep. 136; *Mutual Loan, etc., Co. v. Haas*, 100 Ga. 111, 62 Am. St. Rep. 317; *Standback v. Thornton*, 106 Ga. 81. See also *Macy v. Southern Bldg., etc., Assoc.*, 102 Ga. 812.

*Illinois.* — *Moore v. Titman*, 44 Ill. 367; *Ross v. Demoss*, 45 Ill. 447; *Hall v. Towne*, 45 Ill. 493; *Waite v. Dennison*, 51 Ill. 319; *Roberts v. Fleming*, 53 Ill. 196; *Harper v. Ely*, 56 Ill. 179; *Nichols v. Otto*, 132 Ill. 91.

*Indiana.* — *Emmons v. Hawn*, 75 Ind. 356.

*Minnesota.* — *Kern v. Chalfant*, 7 Minn. 487.

*Mississippi.* — *Byrd v. Clarke*, 52 Miss. 623.

*Missouri.* — *Thornton v. Irwin*, 43 Mo. 153; *Allen v. Ranson*, 44 Mo. 263, 100 Am. Dec. 282; *Reddick v. Gressman*, 49 Mo. 389; *McNees v. Swaney*, 50 Mo. 388.

*New York.* — *Dobson v. Racey*, 8 N. Y. 216.

*North Carolina.* — *Brothers v. Brothers*, 7 Ired. Eq. (42 N. Car.) 150; *Joyner v. Farmer*, 78 N. Car. 196; *Froneberger v. Lewis*, 79 N. Car. 426; *Sumner v. Sessoms*, 94 N. Car. 371; *Gibson v. Barbour*, 100 N. Car. 192.

*Canada.* — *Spain v. Watt*, 16 Grant Ch. (U. C.) 260.

In *Alabama* the mortgagor can always redeem within two years from a mortgagee who purchases at his own sale. *Alexander v. Hill*, 88 Ala. 487, 16 Am. St. Rep. 55; *Woodruff v. Adair*, 131 Ala. 530. See also other *Alabama* cases cited in this note.

3. *Whitehead v. Whitehurst*, 108 N. Car. 458.

A Mortgagor Who Has Sold the Equity of Redemption has no standing to impeach the sale. *McCall v. Mash*, 89 Ala. 487, 18 Am. St. Rep. 145; *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 163.

4. **Mortgagor's Right of Election.** — *Garland v. Watson*, 74 Ala. 323; *Nichols v. Otto*, 132 Ill. 91.

**New Sale Ordered.** — *Gibson v. Barbour*, 100 N. Car. 192. See also *Martin v. McNeely*, 101 N. Car. 634.

5. **Election to Affirm.** — *Syme v. Badger*, 92 N. Car. 706; *Horton v. Lee*, 99 N. Car. 227; *Austin v. Stewart*, 126 N. Car. 526.

6. **Right of Innocent Subvendee.** — *Robinson v. Cullom*, 41 Ala. 693; *Rutherford v. Williams*, 42 Mo. 18; *Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342; *Blockley v. Fowler*, 21 Cal. 326, 82 Am. Dec. 747; *Gibbons v. Hoag*, 95 Ill. 45; *Montague v. Dawes*, 12 Allen (Mass.) 397; *Burns v. Thayer*, 115 Mass. 89; *Dexter v. Shepard*, 117 Mass. 480; *Thurston v. Prentiss*, 1 Mich. 193; *Niles v. Ransford*, 1 Mich. 338, 51 Am. Dec. 95; *Very v. Russell*, 65 N. H. 646. See *Henderson v. Astwood*, (1894) A. C. 150.

7. **Disability of Trustee to Purchase** — *Stephen v. Beall*, 22 Wall. (U. S.) 329; *White v. Trotter*, 14 Smed. & M. (Miss.) 30, 53 Am. Dec. 112; *Lawrence v. Hand*, 23 Miss. 103; *Lass v. Sternberg*, 50 Mo. 124.

As to whether the trustee might purchase with

that prohibiting the mortgagee to buy.<sup>1</sup> It is seldom impaired by special clauses in the contract, and never by statutory provision.<sup>2</sup>

After the Sale Has Been Closed, the trustee may purchase the property from the successful bidder, provided there is no collusion or understanding between them to that effect at the time of sale.<sup>3</sup>

(b) *Bid Communicated Before Sale.* — Though the trustee may not buy for another it is permissible for him before the sale to receive a bid from a prospective purchaser, such bid to be used at the sale.<sup>4</sup>

He Has No Implied Authority to bid on behalf of the creditor.<sup>5</sup>

(c) *Who May Complain.* — A sale to a trustee can be avoided at the instance of the *cestui que trust*,<sup>6</sup> or of the debtor,<sup>7</sup> or, as has been held, at the instance of the general creditors of the debtor who are not secured by the deed of trust.<sup>8</sup> The sale is not so far void that the trustee himself can repudiate it, as the rule does not exist for his benefit.<sup>9</sup>

*m. IRREGULARITIES INCIDENT TO SALE* — (1) *Non-fatal Irregularity.* — Irregularities in the conduct of the sale which do not violate a statute or the terms of the power, and which do not impeach the fairness of the sale nor injure any one, will not render the sale invalid. Thus, a suspension of the sale during an hour in order to give opportunity for an application for injunction is harmless.<sup>10</sup> Other illustrations of non-fatal irregularities are given in the cases cited below.<sup>11</sup>

Ratification of nocuous irregularity renders it harmless.<sup>12</sup>

(2) *Fatal Irregularity* — (a) *Constructive Notice.* — Though there is a presumption in favor of the validity and regularity of a completed sale,<sup>13</sup> the

the consent of his *cestui que trust*, see language of Lord Eldon in *Downes v. Grazebrook*, 3 Meriv. 200.

*Grantor's Consent Necessary.* — *Dwyer v. Rohan*, 99 Mo. App. 120.

*A Bank May Purchase* at a sale by a trustee who is one of its directors and stockholders. *Copsey v. Sacramento Bank*, 133 Cal. 659, 85 Am. St. Rep. 238.

1. *A Trustee Who Vacates the Trust* by removing to another state is still disabled to buy although the sale is made by a substitute trustee appointed under the terms of the trust deed. *Brewer v. Harrison*, 27 Colo. 349.

*Sale to Trustee Is Not an Alienation* within the meaning of a policy of insurance. *Commercial Union Assur. Co. v. Scammon*, 126 Ill. 360, 9 Am. St. Rep. 607.

2. *Contract Authorizing Purchase by Trustee.* — A trustee or his attorney may purchase for the benefit of the creditors where he himself is one of several secured creditors who are empowered to buy. *Kennedy v. Dunn*, 58 Cal. 339; *Bohn v. Davis*, 75 Tex. 24.

3. *Stephen v. Beall*, 22 Wall. (U. S.) 329.

4. *Communication of Bid Prior to Sale.* — *See-sel v. Ewan*, 35 Ark. 127; *Dunton v. Sharpe*, 70 Miss. 850; *Springfield Engine, etc., Co. v. Donovan*, 147 Mo. 622.

5. *Ratification* would be implied from the acceptance of a deed, but the mere fact that the trustee executes the deed to the creditor and records it will not be binding. *Ellsworth v. Harmon*, 101 Ill. 274.

*Purchase by Junior Trustee.* — If the trustee in a second trust deed becomes the purchaser at a sale under the first trust deed, his beneficiaries are entitled to the benefit of his bargain, but they must first reimburse him in full. *Crutchfield v. Haynes*, 14 Ala. 49; *Gunter v.*

*Janes*, 9 Cal. 643; *Lass v. Sternberg*, 50 Mo. 124.

6. *Voidable at Instance of Cestui Que Trust.* — *Cunningham v. Macon, etc.*, R. Co., 156 U. S. 400; *Benson v. Benson*, 97 Mo. App. 460.

7. *The Debtor Is Estopped* from attacking the sale where he procures a third person to buy from the trustee and sees the property improved without objecting. *Jenkins v. Pierce*, 98 Ill. 646.

8. *Elliott v. Pool*, 3 Jones Eq. (56 N. Car.) 17.

9. *Benson v. Benson*, 97 Mo. App. 460. *Compare Borders v. Murphy*, 125 Ill. 577.

10. *Erwin v. Hall*, 18 Ill. App. 315.

11. *Non-fatal Irregularity.* — *Ehrman v. Alabama Mineral Land Co.*, 109 Ala. 478; *Marvel v. McKinzy*, 105 Ill. App. 164; *Western Maryland R. Land, etc., Co. v. Goodwin*, 77 Md. 271; *Brown v. Wentworth*, 181 Mass. 49; *Simonton v. Connecticut Mut. L. Ins. Co.*, (Minn. 1903) 95 N. W. Rep. 451; *Tackaberry v. Gilmore*, 57 Neb. 450; *Babcock v. Wells*, 25 R. I. 23.

*Failure of Trustee to Indorse Amount of Bid.* — *Riggs v. Owen*, 120 Mo. 176.

*Failure to Insert Certificate of qualification* as trustee in notice of sale. *Sandusky v. Faris*, 49 W. Va. 150.

*Failure to File Mortgage Notes* in confirmation proceedings. *Heider v. Bladen*, 83 Md. 242.

*The Absence of the Debtor* on account of sickness is no ground for setting the sale aside. *Bowles v. Brauer*, 89 Va. 466.

12. *Saxe v. Rice*, 64 Minn. 190.

13. *Good Faith Presumed.* — *Geiser Mfg. Co. v. Krogman*, 111 Iowa 503. See, however, *McMillan v. Baxley*, 112 N. Car. 578.

*Presumption of Regularity.* — *Eastern Trust, etc., Co. v. American Ice Co.*, 14 App. Cas. (D.

purchaser is affected with the consequences, and therefore with the knowledge of all material irregularities incident to the exercise of the power.<sup>1</sup> This rule is necessarily involved in the equitable doctrine already considered whereby irregular sales are declared invalid.

(b) **Caveat Emptor.** — It has also been supposed to result from the application of the maxim *caveat emptor*. Certainly the doctrine embodied in this maxim does apply in trust sales, but hardly more than in other fields. It has been held that one who purchases under a notice announcing a sale of eighty acres, bidding a stated price per acre, cannot recover the excess purchase money though there be in fact only twenty-three acres.<sup>2</sup> It has also been held that the purchaser cannot in equity subject other property than that sold on the ground of mistake in the mortgage.<sup>3</sup> The purchaser, of course, always takes subject to prior liens, whether the property be real or personal.<sup>4</sup> Nor is he entitled to any relief merely because existing superior liens are larger than was supposed. The case is not altered by the fact that the trustee failed in his duty to ascertain the amount of the liens and to give notice thereof.<sup>5</sup>

(3) **Noninquiry Clause** — (a) **Extent of Protection.** — The effect of the rule which visits upon the purchaser the full consequence of every irregularity in the exercise of the power, whether he has knowledge of it or not, is sometimes avoided by inserting in the mortgage or trust deed a clause declaring that the purchaser shall not be bound to inquire into the regularity of the proceedings incident to the sale. Under such a provision the purchaser is protected from all irregularities of which he is ignorant, but he is not protected where he has actual knowledge of the defect in question.<sup>6</sup>

(b) **Protection Against Antecedent Conditions.** — Nor does the ordinary noninquiry clause cure a defect antecedent to the right of sale, as, for instance, where the contingency authorizing the mortgagee to sell has not arisen.<sup>7</sup> It is, however, entirely competent for the parties to insert a clause sufficiently far-reaching to protect the purchaser against the nonperformance of antecedent conditions and from the effect of irregularities known to him; but the language used must be explicit in order to justify such a construction.<sup>8</sup>

(c) **Remedy in Case of Irregularity.** — Where the noninquiry clause is inserted, a mortgagor who is injured by the making of an irregular sale has no other recourse than by an action for damages. Equity will not enjoin the sale where the irregularity complained of is covered by such a provision.<sup>9</sup>

C.) 304. Compare *Butler v. Cockrill*, (C. C. A.) 73 Fed. Rep. 945.

**Sale upon Default of Interest.** — Where the sale is made upon nonpayment of interest under an acceleration clause and before the maturity of the debt, the fact of default in the payment of interest must be shown by the purchaser. This fact together with a regular deed is *prima facie* proof of title. *Western Union Tel. Co. v. Hearne*, (Tex. Civ. App. 1897) 40 S. W. Rep. 50.

In *New York* the purchaser is required to show conformity with certain statutory provisions. See *Weir v. Birdsall*, 27 N. Y. App. Div. 404; *Van Vleck v. Enos*, 88 Hun (N. Y.) 348.

1. **Constructive Notice of Irregularities.** — *Stephens v. Clay*, 17 Colo. 489, 31 Am. St. Rep. 328; *Hamilton v. Lubukee*, 51 Ill. 415, 99 Am. Dec. 562; *Sears v. Livermore*, 17 Iowa 297, 85 Am. Dec. 564; *Pierce v. Grimley*, 77 Mich. 273.

2. **Mistake in Quantity.** — *Coons v. North*, 27 Mo. 73. But in such case the sale may be set aside.

3. **Mistake as to Property Conveyed.** — *Haley v.*

*Bagley*, 37 Mo. 363; *Schwickerath v. Cooksey*, 53 Mo. 75.

4. **Prior Lien on Chattel.** — *Finkel v. Lepkin*, 62 N. J. L. 580; *Ames Iron Works v. Chinn*, 15 Tex. Civ. App. 88.

5. *Fleming v. Holt*, 12 W. Va. 143.

6. **Noninquiry Clause Protects Innocent Purchaser Only.** — *Selwyn v. Garfit*, 38 Ch. D. 273; *Parkinson v. Hanbury*, 1 Drew. & Sm. 143, L. R. 2 H. L. 1; *Jenkins v. Jones*, 6 Jur. N. S. 391; *Thomas v. Davies*, 9 W. R. 831; *Jenkins v. Jones*, 2 Giff. 99.

7. *Ford v. Heely*, 3 Jur. N. S. 1116.

But the purchaser is protected against the discharge of the debt prior to the sale. *Dicker v. Angerstein*, 3 Ch. D. 600, 45 L. J. Ch. 754.

8. *Prichard v. Wilson*, 10 Jur. N. S. 330.

A **Clause Protecting the Purchaser Against All Irregularities** does not protect against the effect of the fact that the mortgagee himself becomes purchaser. *British, etc., Mortg. Co. v. Norton*, 125 Ala. 522.

9. **Action for Damages.** — *Dicker v. Angerstein*, 3 Ch. D. 602; *Prichard v. Wilson*, 10 Jur. N. S. 330.



(4) *Innocent Purchaser* — (a) *Limit to Doctrine of Constructive Notice*. — The doctrine of constructive notice of defects in the power and of irregularities in its exercise being fully recognized, it might seem that there is no room in the law of trust sales for any doctrine of innocent purchase. This is indeed true wherever the principle of constructive notice properly applies, but that doctrine is limited strictly to the existence of the power and the manner of its exercise.<sup>1</sup>

(b) *Limit to Doctrine of Innocent Purchaser*. — Beyond this there is a field where knowledge or lack of knowledge is quite material. The general principle is that the innocent purchaser is protected against collateral defects as distinguished from defects in the power and irregularities in its exercise.<sup>2</sup> Thus, fraud in the procurement of the mortgage,<sup>3</sup> usury in the secured debt,<sup>4</sup> and absence or failure of consideration<sup>5</sup> justify setting the sale aside as against one with notice, but not as against an innocent purchaser. Other circumstances which have been held to invalidate the sale as against persons with actual notice, but not as against *bona fide* purchasers, are: refusal of a proper tender;<sup>6</sup> payment of the mortgage debt, where the mortgage remains unsatisfied of record;<sup>7</sup> and the breach of a collateral agreement between the mortgagor and mortgagee for the extension of time,<sup>8</sup> or for the giving of personal notice prior to the sale.<sup>9</sup> In short, unfair conduct, fraud, or bad faith on the part of the mortgagee or trustee in connection with the performance of his trust will not vitiate the title,<sup>10</sup> provided the terms of the power are followed<sup>11</sup> and the purchaser has no knowledge of the unfair conduct in question.<sup>12</sup>

(c) *Remote Purchasers*. — Remote *bona fide* purchasers are afforded still greater protection than immediate purchasers, for though a sale may be open to attack against the latter on the ground of irregularity, an innocent subvendee may get a good title.<sup>13</sup> But the deed of the trustee to the original purchaser must be regular and such as not to affect the subvendee with notice of any defect.<sup>14</sup>

1. Gunnell v. Cockerill, 84 Ill. 319.

2. Hosmer v. Campbell, 98 Ill. 572.

3. *Fraud of Mortgagor in Procuring Property*. — See Mashburn v. Dannenberg Co., 117 Ga. 567.

4. *Usury*. — Welsh v. Coley, 82 Ala. 363; Penny v. Cook, 19 Iowa 538; Jordan v. Humphrey, 31 Minn. 495; Scott v. Austin, 36 Minn. 460; Jackson v. Henry, 10 Johns. (N. Y.) 185, 6 Am. Dec. 328; Jackson v. Dominick, 14 Johns. (N. Y.) 435; Elliott v. Wood, 53 Barb. (N. Y.) 285; Hyland v. Stafford, 10 Barb. (N. Y.) 558.

5. Mathews v. Lecompte, 24 Mo. 545.

6. *Refusal of Tender*. — Montague v. Dawes, 12 Allen (Mass.) 397; Hoit v. Russell, 56 N. H. 559. Compare Philips v. Bailey, 82 Mo. 639.

7. *Payment Without Release of Record*. — Palmer v. Bates, 22 Minn. 532; Merchant v. Woods, 27 Minn. 396; Warner v. Blakeman, 36 Barb. (N. Y.) 501.

But in some jurisdictions it is held that payment of the debt wholly destroys the power even as against innocent purchasers. Redmond v. Packenham, 66 Ill. 434. See also Ledyard v. Chapin, 6 Ind. 320.

8. Beatie v. Butler, 21 Mo. 313, 64 Am. Dec. 234.

9. Randall v. Hazelton, 12 Allen (Mass.) 412.

10. *Want of Good Faith in Trustee*. — Burns v. Thayer, 115 Mass. 89; Dexter v. Shepard, 117 Mass. 480; Wade v. Thompson, 52 Miss. 367.

*Trustee Becoming Owner of Secured Debt*. — The fact that the trustee becomes owner of one

of the secured notes prior to a sale by him does not affect the title of a purchaser ignorant of such fact. Carey v. Brown, 62 Cal. 373.

11. *Terms of Power to Be Followed*. — Stevenson v. Hano, 148 Mass. 616; Da Silva v. Turner, 166 Mass. 407.

12. *Purchaser Having Knowledge of Unfair Conduct of Trustee Not Protected*. — Mann v. Best, 62 Mo. 491; Jackson v. Crafts, 18 Johns. (N. Y.) 110.

*A Mortgagee Buying at His Own Sale cannot claim to be a bona fide purchaser*. Jackson v. Dominick, 14 Johns. (N. Y.) 435; Wade v. Harper, 3 Yerg. (Tenn.) 383.

*Notice to One of Two Joint Purchasers* is notice to both. Kelsay v. Farmers, etc., Bank, 166 Mo. 157.

13. *Innocent Subvendees*. — Hamilton v. Lubukee, 51 Ill. 415, 99 Am. Dec. 562; Fairman v. Peck, 87 Ill. 156; Shine v. Hill, 23 Iowa 264; Burns v. Thayer, 115 Mass. 89; Thompson v. Heywood, 129 Mass. 401; Hoit v. Russell, 56 N. H. 559.

*An Innocent Subvendee gets a good title from one who collusively buys in behalf of the mortgagee*. Gibbons v. Hoag, 95 Ill. 45; Burns v. Thayer, 115 Mass. 89; Dexter v. Shepard, 117 Mass. 480.

*Burden of Proving Innocent Purchase is on the subvendee*. Gunnell v. Cockerill, 84 Ill. 319; Grover v. Hale, 107 Ill. 638.

14. *Regularity of Deed*. — Chicago, etc., R. Co. v. Kennedy, 70 Ill. 350; Gunnell v. Cockerill, 84 Ill. 319; Gibbons v. Hoag, 95 Ill. 45; Wilson v. South Park Com'rs, 70 Ill. 46.

*n. EXECUTION OF DEED — (i) Purchaser's Right to Conveyance —*

(a) **In General.** — Save in those states where some other means of putting title in the purchaser has been provided,<sup>1</sup> one whose bid is accepted is entitled to a sufficient deed.<sup>2</sup>

(b) **Time Right Accrues.** — This right is fixed at the time of the sale.<sup>3</sup> The purchaser, however, does not get the legal title until the deed is actually delivered.<sup>4</sup>

(c) **Compliance with Terms.** — The purchaser, however, cannot insist upon a conveyance until he himself complies with the terms of the sale. Thus, if the sale is required to be for cash, he must tender the amount of his bid either immediately after the bid is accepted or at least during the legal hours of sale on that day.<sup>5</sup> Where the purchaser is indulged for a reasonable time, his failure to pay when the trustee tenders a deed forfeits his right as purchaser altogether, and a subsequent tender by him of the amount bid is of no effect.<sup>6</sup>

(d) **Source of Purchaser's Title.** — It is a recognized principle that a deed executed in pursuance of the power is the conveyance not only of the trustee, mortgagee, or assignee executing it, but of the mortgagor as well.<sup>7</sup>

**Relation.** — The title of the purchaser acquired under the deed consequently relates back to the date of the mortgage and is not subject to incumbrances created subsequently thereto.<sup>8</sup>

(2) **Time for Delivery of Deed.** — No provision being made by law in regard to the time of delivering a deed, the purchaser is entitled to have the deed delivered within a reasonable time.<sup>9</sup>

(3) **By Whom to Be Executed** — (a) **Implied Authority.** — A grant of power to sell includes authority to convey by a proper deed, the one being a necessary incident of the other.<sup>10</sup>

(b) **Express Authority.** — The power to make the deed is, however, usually given in express terms, and it may be conferred on any competent person.<sup>11</sup>

(c) **In Whose Name** — *aa. CONVEYANCE IN NAME OF GRANTOR.* — In determining whether the person executing the deed should execute the instrument in his

1. See *infra*, this section, *Certificate of Sale; Affidavit of Proceedings*.

2. **Right to Deed.** — *Huston v. Seeley*, 27 Iowa 183.

3. **In a Proceeding to Test the Purchaser's Right** to have a deed executed the question of the disposition of the proceeds of the sale cannot be raised. *Mendelsohn v. Blaise*, 52 La. Ann. 857.

4. **Time Right Attaches.** — *Missouri Valley Land Co. v. Barwick*, 50 Kan. 57; *Cronkhite v. Buchanan*, 59 Kan. 541, 68 Am. St. Rep. 379.

5. *Tripp v. Ide*, 3 R. I. 51. Compare *Brunson v. Morgan*, 84 Ala. 598.

**Effect of Sale on Mortgage Debt.** — The sale, however, even before the deed is executed, operates to satisfy the mortgage or trust obligation. *Evans v. Rhode Island Hospital Trust Co.*, 67 Minn. 160; *Brown v. Tucker*, (Tenn. Ch. 1896) 39 S. W. Rep. 346.

6. **Complying with Terms of Sale.** — *Allen v. Martin*, 5 Jur. 239; *Dwelle v. Blackshear Bank*, 115 Ga. 679; *Lewis v. Woods*, 4 How. (Miss.) 86, 34 Am. Dec. 110; *McKarsie v. Citizens' Bldg., etc., Assoc.*, (Tenn. Ch. 1899) 53 S. W. Rep. 1007.

7. *Heuer v. Rutkowski*, 18 Mo. 216.

8. **Source of Title.** — *Doe v. Jones*, 10 B. & C. 459, 21 E. C. L. 113; *Matkin v. Marx*, 96 Ala. 501; *Donohue v. Chase*, 130 Mass. 137; *Woonsocket Sav. Inst. v. American Worsted Co.*, 13 R. I. 255; *Bull's Petition*, 15 R. I. 534.

9. **Not Subject to Subsequent Incumbrances.** — *Aiken v. Bridgeford*, 84 Ala. 295; *Donohue v. Chase*, 130 Mass. 137; *Mullanphy v. Simpson*, 4 Mo. 319; *Sappington v. Oeschli*, 49 Mo. 244; *Sims v. Field*, 66 Mo. 111; *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389; *Bancroft v. Ashhurst*, 2 Grant Cas. (Pa.) 513. But see, as to effect of subsequent conveyance in *South Carolina*, *Warren v. Raymond*, 12 S. Car. 9; *Team v. Baum*, 47 S. Car. 410, 58 Am. St. Rep. 893, *criticising Dendy v. Waite*, 36 S. Car. 569.

**Title of Purchaser — Quitclaim.** — The purchaser, prior to the termination of the period prescribed for redemption, has such an interest as will pass by quitclaim. *Tuttle v. Boshart*, 88 Minn. 284.

10. *Strother v. Law*, 54 Ill. 413.

**An Unexplained Delay of Ten Years** raises no presumption against the admissibility of a deed otherwise regular and sufficient. *Jones v. Hagler*, 95 Ala. 529.

11. **Implied Authority to Execute Deed.** — *Lang v. Stansel*, 106 Ala. 389; *Fogarty v. Sawyer*, 17 Cal. 589; *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; *McNeill v. Lee*, 79 Miss. 455; *Williams v. Otey*, 8 Humph. (Tenn.) 563, 47 Am. Dec. 632; *Hunter v. Wooldert*, 55 Tex. 433.

**Deed to Be Executed by Assignee** when he makes the sale. *Heath v. Hall*, 60 Ill. 344.

11. **Auctioneer Authorized to Execute Deed.** — *Gamble v. Caldwell*, 98 Ala. 577.

own name or in the name of the mortgagor or grantor, the terms of the instrument are to be considered.<sup>1</sup>

**The General Rule**, in those states where the mortgage or deed of trust is merely a security and does not vest the legal title, is that the conveyance under the power should be executed in the name of the grantor or mortgagor, the person executing the power being treated in the law as an attorney in fact.<sup>2</sup>

**The Circumstance that the Donee of the Power Executes the Conveyance in His Own Name** prevents the legal title from passing, but vests an interest in the purchaser which a court of equity will recognize and establish.<sup>3</sup>

*bb. CONVEYANCE BY ADMINISTRATOR.* — An administrator who takes a mortgage to secure a debt owing to the estate should execute the power in his own name, as he has no authority to bind the estate in such capacity.<sup>4</sup>

*cc. CONVEYANCE BY SHERIFF.* — Where a deputy sheriff conducts a sale under the authority of a statute, the deed should be executed by the person holding the office of sheriff at the time the deed is executed, rather than by the person holding the office at the time of the sale, if a change in the office has meanwhile taken place.<sup>5</sup>

(4) *To Whom Executed* — (a) **Successful Bidder or His Nominee.** — The successful bidder is usually the person to whom the deed should be made. But it may be made to any one designated by him or to the assignee of his bid.<sup>6</sup>

(b) **Death of Purchaser.** — There must, of course, be a competent grantee. A certificate of sale executed merely to the estate of a deceased person has been held void for this reason.<sup>7</sup> In *Alabama*, where the purchaser dies before the sale is completed, the deed may be executed in the name of his personal representative in trust for the widow and heirs or next of kin.<sup>8</sup>

(5) *Contents of Deed* — (a) **In General.** — As a trustee's deed conveys to the purchaser the interest of the grantor as of the date of the execution of the trust deed, a purchaser's deed which purports to convey all the grantor's right and title is sufficient though subsequent to the execution of the deed the grantor has conveyed away the equity of redemption, and it is not necessary that the deed should also purport to convey the interest of the grantor's assigns.<sup>9</sup>

(b) **Covenants of Trustee.** — The trustee is under no obligation to insert any other covenant in his deed to the purchaser than the ordinary covenant against acts done or incumbrances suffered by himself. His deed is effectual without either warranty or personal covenants. The power to convey gives

1. *Moseley v. Rambo*, 106 Ga. 597.

**Deed Signed by Donee of Power.** — Authority to "make, execute, and deliver to the purchaser, all necessary conveyances for the purpose of vesting in him the premises sold, in fee simple," will support a deed signed by the donee of the power in his own name. *Cranston v. Crane*, 97 Mass. 459, 93 Am. Dec. 106.

2. **Conveyance to Be Made in Name of Original Grantor.** — *Moseley v. Rambo*, 106 Ga. 597; *Speer v. Haddock*, 31 Ill. 439; *Dendy v. Waite*, 36 S. Car. 569. Compare *Sanders v. Cassady*, 86 Ala. 246.

**Deed in Name of Donee of the Power.** — In states where the common-law view of mortgages is maintained, the property may, it seems, be conveyed by the mortgagee under his own name and seal. *Sanders v. Cassady*, 86 Ala. 246; *Cranston v. Crane*, 97 Mass. 459, 93 Am. Dec. 106.

3. **Equitable Title.** — *Moseley v. Rambo*, 106 Ga. 597; *Mulvey v. Gibbons*, 87 Ill. 368; *Gibbons v. Hoag*, 95 Ill. 45.

**Husband Need Not Join** in deed executed by married woman in pursuance of a power of

sale. *Heath v. Withington*, 6 Cush. (Mass.) 497; *Cranston v. Crane*, 97 Mass. 459, 93 Am. Dec. 106.

4. *Wilkerson v. Allen*, 67 Mo. 502.

5. **Conveyance by Sheriff.** — *Wilson v. Russell*, 4 Dak. 376; *Morrissey v. Dean*, 97 Wis. 302.

6. **Deed to Highest Bidder Complying with Terms.** — *Coler v. Barth*, 24 Colo. 31; *Maloney v. Webb*, 112 Mo. 575; *Cockrill v. Whitworth*, (Tenn. Cir. 1899) 52 S. W. Rep. 524.

**Party Designated by Successful Bidder.** — *Jones Mortg.* (4th ed.) 1896; *Jones v. Hagler*, 95 Ala. 529; *Southey v. McIntire*, 7 App. Cas. (D. C.) 447; *Johnson v. Watson*, 87 Ill. 535; *Massey v. Young*, 73 Mo. 260; *Bensieck v. Cook*, 110 Mo. 173, 33 Am. St. Rep. 422.

7. *Kenaston v. Lorig*, 81 Minn. 454.

But, in *Kansas*, upon the death of the purchaser subsequent to the sale, the court may order the deed to be made in the decedent's name. *Cronkhite v. Buchanan*, 59 Kan. 541, 68 Am. St. Rep. 379.

8. *Lewis v. Wells*, 50 Ala. 198.

9. *Tyler v. Massachusetts Mut. L. Ins. Co.*, 108 Ill. 58.



the trustee no implied authority to insert covenants binding on the grantor.<sup>1</sup> If, however, the trust deed empowers the trustee to sell and convey with full covenants of warranty, such covenants in the trustee's deed to the purchaser at his sale are as binding on the grantor in the trust deed as if he had personally made them.<sup>2</sup>

(c) **Recitals of Deed** — *aa. IN GENERAL.* — By reason of its evidentiary value and for the sake of avoiding ambiguity, the deed should contain recitals showing that the sale was made under and by virtue of the power and that the proper steps were taken in executing such power.<sup>3</sup> These recitals are not absolutely necessary, however, as parol evidence is admissible to show that the sale was properly made under the power.<sup>4</sup>

**The Legal Presumption of Regularity** and of compliance with official duty dispenses with the necessity of reciting the particular steps taken.<sup>5</sup>

**Omission to recite the date of sale,**<sup>6</sup> or the fact that the sale was properly advertised,<sup>7</sup> or that it was made at the place designated in the power,<sup>8</sup> may be supplied by parol when the issue is properly raised.

**Nor Do Erroneous Recitals** prevent the legal title from passing.<sup>9</sup>

*bb. RECITALS AS EVIDENCE.* — A clause is occasionally inserted in deeds of trust to the effect that the recitals in the trustee's deed shall be *prima facie*, full, or conclusive evidence of the truth of the statements therein made. A *bona fide* purchaser at the sale is protected by such a provision, and the recitals of the conveyance constitute *prima facie*, full, or conclusive proof, as the case may be, of the performance of the requisite conditions.<sup>10</sup>

**In the Absence of Such a Provision** the recitals are taken in courts of law as *prima facie* evidence that the statements therein made are true.<sup>11</sup>

**That the Acknowledgment Was Made by a Sheriff** who sold the property five days after the deed was filed for registration does not affect its validity. *McCammon v. Detroit*, etc., R. Co., 103 Mich. 104.

1. **Warranty to Be Expressly Authorized.** — *Barnard v. Duncan*, 38 Mo. 170, 90 Am. Dec. 416; *Johnson City First Nat. Bank v. Pearson*, 119 N. Car. 494.

2. *Thurmond v. Brownson*, 69 Tex. 597.

**Burden of Proof.** — A purchaser who would reject a deed for lack of proper warranties must aver and prove that the deed authorizes their insertion. *Johnson City First Nat. Bank v. Pearson*, 119 N. Car. 494; *Thurmond v. Brownson*, 69 Tex. 597.

3. *Porter v. Schofield*, 55 Mo. 303.

4. **Parol Evidence Coupling Deed with Power.** — *Lanigan v. Sweany*, 53 Ark. 185; *Taylor v. Eatman*, 92 N. Car. 601; *Smith v. Henning*, 10 W. Va. 596.

**Deed Operating as Assignment of Mortgagee's Interest.** — A deed not referring expressly to the fact that it was executed in pursuance of the power has, in *Missouri*, been held to operate merely as an assignment of the mortgagee's interest in the property, including the power of sale, thus leaving the property subject to redemption. *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124.

5. **Presumption of Regularity.** — *McCammon v. Detroit*, etc., R. Co., 103 Mich. 104; *Graham v. Fitts*, 53 Miss. 307; *Tyler v. Herring*, 67 Miss. 169, 19 Am. St. Rep. 263.

**Deed Prima Facie Evidence of Title.** — *Lunsford v. Speaks*, 112 N. Car. 608; *McCreary v. Reliance Lumber Co.*, 16 Tex. Civ. App. 45.

**In Michigan the Sheriff's Official Deed** in cases of foreclosure by him is not presumptive proof that the necessary conditions have been com-

plied with. *Barman v. Carhartt*, 10 Mich. 338; *Hebert v. Bulte*, 42 Mich. 489.

6. *Jones v. Hagler*, 95 Ala. 529.

7. *Allen v. De Groodt*, 105 Mo. 442.

8. *Missouri Fire Clay Works v. Ellison*, 30 Mo. App. 67.

9. **Error in Recitals.** — *O'Neil v. Vanderburg*, 25 Iowa 104; *Hume v. Hopkins*, 140 Mo. 65. See also *Schanewerk v. Hoberrecht*, 117 Mo. 26, 38 Am. St. Rep. 631.

**Purchaser Bound by Erroneous Recital** concerning the rate of interest on the mortgage debt. *Dodge v. Kennedy*, 93 Mich. 547.

**Irregular and Contradictory Recitals** are construed as in other deeds and do not render the conveyance ineffective where its sense can be made out. *Miller v. Shaw*, 103 Ill. 277.

10. **Recitals Made Prima Facie Evidence.** — *Bent-Otero Imp. Co. v. Whitehead*, 25 Colo. 354, 71 Am. St. Rep. 140; *Mosca Milling, etc., Co. v. Murto*, (Colo. App. 1903) 72 Pac. Rep. 287; *White v. Stephens*, 77 Mo. 452; *Wells v. Estes*, 154 Mo. 291.

The recital in such case is as effective in equity as in a court of law. *Allen v. Courtney*, 24 Tex. Civ. App. 86.

**Request of Holder** that sale be made is sufficiently shown by a recital in the deed that such request was made, but the presumption is overturned by a positive denial by the holder. *Mosca Milling, etc., Co. v. Murto*, (Colo. App. 1903) 72 Pac. Rep. 287; *Bent-Otero Imp. Co. v. Whitehead*, 25 Colo. 354, 71 Am. St. Rep. 140; *Swain v. Mitchell*, 27 Tex. Civ. App. 62.

**Recitals Made Full Evidence.** — *Jesson v. Texas Land, etc., Co.*, 3 Tex. Civ. App. 25; *McCreary v. Reliance Lumber Co.*, 16 Tex. Civ. App. 45.

**Recitals Made Conclusive.** — *Carey v. Brown*, 62 Cal. 373.

11. **Recitals Prima Facie Evidence.** — *Martin v.*

**Statutes.** — In some jurisdictions the recitals are given this effect by statute.<sup>1</sup>

(6) *Second Deed to Cure Defects in First.* — The trustee or mortgagee may execute a second deed to the purchaser, to correct errors or omissions in the first.<sup>2</sup> But where the original conveyance is regular and effective and has been delivered, the power of the trustee is exhausted, and the deed cannot then be altered by the trustee, as, for instance, by substituting another grantee.<sup>3</sup>

(7) *Recording Trustee's Deed.* — The trustee's deed relates back to the date of the execution of the trust deed, and the record of the latter is sufficient to put all persons on inquiry as to whether a sale has been made in exercise of the power. Hence, as against attaching creditors, the trustee's deed need not be recorded.<sup>4</sup>

**o. CERTIFICATE OF SALE** — (1) *In General.* — In some states the certificate which is required by statute to be made out by the person conducting the sale operates to transfer the legal title and consequently takes the place of a deed. Thus, in *Minnesota*, all sales under power must be made by the sheriff of the county, and his certificate of sale operates as a deed after the expiration of the year prescribed for redemption.<sup>5</sup> In other jurisdictions a complete deed is issued to the purchaser at the expiration of the period of redemption.<sup>6</sup>

(2) *Person to Execute Certificate.* — A sheriff making the sale should execute the certificate in his official capacity, but the mere failure to recite in the certificate that the sale was made by him as sheriff is not fatal where the instrument is signed by him as such.<sup>7</sup> Where the deputy sheriff makes the sale, the certificate should be executed in the name of the sheriff by the deputy,<sup>8</sup> or by the sheriff himself.<sup>9</sup> But the fact that the deputy incorrectly executes the certificate in his own name has been held not to be fatal to the

*Merritt*, 3 Ont. L. Rep. 284; *Carico v. Kling*, 11 Colo. App. 349; *Ensley v. Page*, 13 Colo. App. 452; *Breit v. Yeaton*, 101 Ill. 242; *Beal v. Blair*, 33 Iowa 318; *Ingle v. Jones*, 43 Iowa 286; *Tyler v. Herring*, 67 Miss. 169, 19 Am. St. Rep. 263; *McNeill v. Lee*, 79 Miss. 455. *Contra*, *Henderson v. Galloway*, 8 Humph. (Tenn.) 692.

**Right of Creditor to Purchase** is sufficiently shown by a recital that the power authorized a sale to him. *Savings, etc., Soc. v. Deering*, 66 Cal. 281.

**The Recitals of the Deed Are to Be Given Great Weight** after the expiration of a long period in cases of conflict in testimony. *Naugher v. Sparks*, 110 Ala. 572.

**The Failure to Recite Performance of One Particular Essential** raises no presumption against the performance of such duty although the performance of the other essential acts is particularly recited. *Tartt v. Clayton*, 109 Ill. 579.

**Sale by Representative of Deceased Trustee.** — The recitals are not *prima facie* evidence where the sale is made and deed executed by the administrator of the original trustee, though the trust deed itself authorizes the personal representative of the trustee to sell in case of the trustee's death. But where the purchaser's title under the deed is coupled with possession, a presumption is indulged that the sale was regular. *Sulphur Mines Co. v. Thompson*, 93 Va. 294.

1. *Hume v. Hopkins*, 140 Mo. 65.

2. **Curative Deed.** — *O'Day v. Vansant*, 3 Mackey (D. C.) 196; *Parnly v. Walker*, 102 Ill. 617. Compare *Balfour-Guthrie Invest. Co. v. Woodworth*, 124 Cal. 169.

3. *Kenney v. Jefferson County Bank*, 12 Colo. App. 24.

4. *Farrar v. Payne*, 73 Ill. 82.

5. **Effect of Certificate.** — *Cable v. Minneapolis Stock-Yards, etc., Co.*, 47 Minn. 417; *Lindgren v. Lindgren*, 73 Minn. 90.

**Requisites.** — The certificate must, however, be acknowledged and recorded and is required to state when the time for redemption will expire where the property is subject to redemption. *Lindgren v. Lindgren*, 73 Minn. 90; *Cable v. Minneapolis Stock-Yards, etc., Co.*, 47 Minn. 417.

But a statement that the premises "are subject to redemption within the time and according to statute," is a sufficient compliance with the statute, the certificate itself being dated. *Wells v. Atkinson*, 24 Minn. 161.

6. **The Certificate Is Not Invalidated** by a misrecital of the period at expiration of which the deed will be executed. *Hayes v. Frey*, 54 Wis. 503.

In *New York* and *Wisconsin* the statutory affidavits operate to vest title where the mortgagee becomes purchaser at his own sale. In such case no deed is necessary. *Mowry v. Sanborn*, 68 N. Y. 153; *Arnot v. McClure*, 4 Den. (N. Y.) 44; *Jackson v. Colden*, 4 Cow. (N. Y.) 266; *Nau v. Brunette*, 79 Wis. 664. See also *infra*, this section, *Affidavit of Proceedings*.

7. *Merrill v. Nelson*, 18 Minn. 366.

8. **Certificate of Deputy Sheriff.** — *McCardia v. Billings*, 10 N. Dak. 373, 88 Am. St. Rep. 729. In *Minnesota* a deputy conducting the sale executes the certificate in his own name. *Burke v. Lacock*, 41 Minn. 250.

9. *Morrissey v. Dean*, 97 Wis. 302.

validity of the sale.<sup>1</sup>

(3) *Formality*. — Though the certificate constitutes a muniment of title, the failure to seal it,<sup>2</sup> or to file a duplicate copy in the office of the register,<sup>3</sup> does not affect its validity.<sup>4</sup>

A *Misdescription* of the property sold is fatal to the validity of the certificate;<sup>5</sup> but a failure to give the correct date of the mortgage or the amount of the mortgage debt is not.<sup>6</sup>

*p. AFFIDAVIT OF PROCEEDINGS* — (1) *Statutes Directory Only*. — In a number of states it is provided by statute that the proceedings in the exercise of a power of sale may be proved by affidavits of the facts, made by the proper persons, and recorded with the register of deeds. Such statutes are directory only. Consequently a failure to file the required affidavits does not invalidate the sale,<sup>7</sup> and the necessary facts may be shown by other evidence.<sup>8</sup> A different rule would enable the mortgagee by his own negligence after the sale to defeat the title of an innocent purchaser. The affidavits, though made *prima facie* proof by statute, are subject to rebuttal.<sup>9</sup>

A *Failure to Record the Affidavit* is not fatal unless the statute expressly so provides.<sup>10</sup>

(2) *Requisites*. — The affidavit must be based on affiant's knowledge and not merely on his information and belief.<sup>11</sup> It should also be made within a reasonable time after the facts certified to have occurred. An affidavit framed after the lapse of several years is without probative force.<sup>12</sup>

*q. ITEMIZED STATEMENT AFTER SALE*. — In *Illinois*, one who sells under a chattel mortgage is required within ten days to supply the mortgagor with an itemized statement of the expenses and of the articles sold, together with the names of the purchasers. A failure to comply with this statute does not defeat the title of the purchaser, but subjects the delinquent party to a penalty.<sup>13</sup> In *South Dakota* the statute requiring such a report of the proceedings to be filed with the register of deeds is mandatory, and a failure to comply

1. *Hodgdon v. Davis*, 6 Dak. 21.

2. *Hayes v. Frey*, 54 Wis. 303.

3. *Failure to File with Register*. — *Sanborn v. Petter*, 35 Minn. 449; *Johnson v. Day*, 2 N. Dak. 295.

*Recordation Within Ten Months Sufficient*. — *Ryder v. Hulett*, 44 Minn. 353.

4. *Smith v. Buse*, 35 Minn. 234.

5. *Certificate to Contain Description of Mortgage*. — *Golcher v. Brisbin*, 20 Minn. 453.

6. *Cable v. Minneapolis Stock-Yards, etc., Co.*, 47 Minn. 417.

*Certificate as Evidence*. — It is competent for the legislature to pass an act declaring that certificates of sale, whether already executed or thereafter issued, shall be *prima facie* evidence that the requirements of law have been complied with, since such a statute merely changes a rule of evidence. *Burke v. Lacock*, 41 Minn. 250.

7. *Failure to File Affidavit*. — *Field v. Gooding*, 106 Mass. 310; *Burns v. Thayer*, 115 Mass. 89; *Learned v. Foster*, 117 Mass. 365; *Barnes v. Kerlinger*, 7 Minn. 82; *Johnson v. Cocks*, 37 Minn. 530; *Jackson v. Young*, 5 Cow. (N. Y.) 269, 15 Am. Dec. 473; *Johnson v. Day*, 2 N. Dak. 295.

*Aliter*, where the mortgage itself provides therefor. *Smith v. Provin*, 4 Allen (Mass.) 516.

8. *Affidavit Not Exclusive of Other Proof*. — *Field v. Gooding*, 106 Mass. 310; *Menard v. Crowe*, 20 Minn. 448; *Golcher v. Brisbin*, 20 Minn. 453; *Wilkerson v. Allen*, 67 Mo. 502;

*Howard v. Hatch*, 29 Barb. (N. Y.) 297; *Frink v. Thompson*, 4 Lans. (N. Y.) 489; *Tuthill v. Tracy*, 31 N. Y. 157; *Mowry v. Sanborn*, 68 N. Y. 153.

9. *Affidavit May Be Rebutted*. — *Arnot v. McClure*, 4 Den. (N. Y.) 44; *Sherman v. Willett*, 42 N. Y. 146; *Maxwell v. Newton*, 65 Wis. 261.

10. *Failure to Record Affidavit*. — *Howard v. Hatch*, 29 Barb. (N. Y.) 297; *Tuthill v. Tracy*, 31 N. Y. 157; *Johnson v. Day*, 2 N. Dak. 295.

In *New York* it is required as a condition precedent to the passage of title that the affidavit be filed and recorded where the person authorized to execute the power becomes purchaser at his own sale. *Cowdrey v. Turner*, 85 Hun (N. Y.) 451.

11. *Mowry v. Sanborn*, 65 N. Y. 581.

In *Massachusetts* the affidavit need not state that the mortgagee has rendered an account to the mortgagor or show how the purchase money has been applied. *Childs v. Dolan*, 5 Allen (Mass.) 319.

*An Erroneous Statement* of a particular ground for the sale does not vitiate the certificate where another sufficient ground exists and is also stated. *Da Silva v. Turner*, 166 Mass. 407.

12. *Mundy v. Monroe*, 1 Mich. 68. See also *supra*, this section, 2. b. (5) (c) *gg. Affidavit of Publication Required*.

13. *Itemized Statement of Chattels Sold*. — *Robley v. Culwell*, 69 Ill. App. 272; *Geo. J. Stadler Brewing Co. v. Weadley*, 99 Ill. App. 161.

*The Penalty Cannot Be Recovered* for a failure



invalidates the sale.<sup>1</sup>

**XI. RIGHTS OF PURCHASER** — 1. **Possession** — *a.* **IN GENERAL.** — A deed having been delivered and the statutory period for redemption having expired where such statutory right exists, the purchaser is entitled to possession and may bring ejectment;<sup>2</sup> or he may have a purely possessory remedy, such as unlawful detainer, where the deed of trust under which the sale was made expressly provides therefor.<sup>3</sup>

*b.* **USE AND OCCUPATION — RENT.** — Where a statute provides that the mortgagor may redeem within a specified time, meanwhile retaining possession, the purchaser cannot require him to account for the use and occupation during such period even though the mortgage itself expressly conveys the rents and profits also. After foreclosure the mortgage ceases to be security for the debt. The rights of the purchaser are then to be determined by the statute, and to require an accounting for use and occupation would deprive the mortgagor of possession contrary to its tenor.<sup>4</sup> Where, however, the right to possession is unquestioned the purchaser may collect rents from the tenant of the mortgagor accruing after the sale,<sup>5</sup> or may recover of the mortgagor for use and occupation,<sup>6</sup> particularly where the mortgage conveys both tenements and hereditaments.<sup>7</sup>

**A Mortgagor Holding Possession Pending the Time for Redemption** must, in *California*, by statute, account for use and occupation, and is liable in an action of assumpsit.<sup>8</sup>

**2. Emblements.** — The purchaser is likewise entitled to the growing crops, as against both the debtor and persons claiming under him subsequent to the recording of the trust deed;<sup>9</sup> but a purchaser who at the time concurs in an agreement that the emblements shall not pass under the sale cannot subsequently assert any right thereto.<sup>10</sup>

**The Right of a Tenant to Growing Crops** is no better than that of his landlord where the mortgage antedates the lease;<sup>11</sup> and the fact that the crops are sown prior

to supply the statement where the mortgagor is himself present at the sale and has the means of knowing all the facts of which the statement would put him in possession. *Marvel v. McKinzey*, 105 Ill. App. 164.

1. *Edmonds v. Riley*, 15 S. Dak. 470.

2. *Pownal v. Taylor*, 10 Leigh (Va.) 179, 34 Am. Dec. 725.

**Notice to Quit Unnecessary.** — *Waters v. Butler*, 4 Cranch (C. C.) 371.

**Trustee's Sale Not Subject to Rule Against Champerty.** — The purchaser's right to recover cannot be defeated by proof that when the sale was made the property was in the adverse possession of one claiming under the grantor in the deed of trust. *Wiswall v. Ross*, 4 Port. (Ala.) 328. But see *Pownal v. Taylor*, 10 Leigh (Va.) 179, 34 Am. Dec. 725.

**3. Unlawful Detainer** sanctioned by clause in deed of trust. *Griffith v. Brackman*, 97 Tenn. 387 (*distinguishing* *Ballow v. Motheral*, 5 Baxt. (Tenn.) 602); *Building, etc., Assoc. v. Patton*, 105 Tenn. 407. See also *Kuhn v. Feiser*, 3 Head (Tenn.) 82.

**Ac to Remedy by Summary Process** in *Massachusetts*, see *North Brookfield Sav. Bank v. Flanders*, 161 Mass. 335; *Lewis v. Jackson*, 165 Mass. 481.

**Agreement to Extend Time for Redemption** does not deprive a purchaser of right to acquire possession by summary means. *Audretsch v. Hurst*, 126 Mich. 301.

4. *Pioneer Sav., etc., Co. v. Farnham*, 50 Minn. 315.

5. *Clement v. Shipley*, 2 N. Dak. 430.

**6. Duty of Mortgagor to Account for Mesne Profits.** — An act declaring that the mortgagor remaining in possession shall not account for use and occupation, and that a purchaser in possession shall upon redemption account for profits, changes the rule at common law, and so far as applicable to existing mortgages is unconstitutional on the ground of impairing the obligation of the contract. *Greenfield v. Dorris*, 1 Sneed (Tenn.) 548.

**7. Rent Reserved a Hereditament.** — *Dunton v. Sharpe*, (Miss. 1886) 11 So. Rep. 168.

**8. Statute Requiring Mortgagor to Account Pending Time for Redemption.** — *Walker v. McCusker*, 71 Cal. 594. See also *Clement v. Shipley*, 2 N. Dak. 430.

**9. Purchaser Entitled to Emblements.** — *Anderson v. Strauss*, 98 Ill. 485; *Sugden v. Beasley*, 9 Ill. App. 71; *Harmon v. Fisher*, 9 Ill. App. 22; *Jones v. Thomas*, 8 Blackf. (Ind.) 428; *Downard v. Groff*, 40 Iowa 597; *Scriven v. Moote*, 36 Mich. 64; *Steele v. Farber*, 37 Mo. 80; *Hayden v. Burkemper*, 101 Mo. 644, 20 Am. St. Rep. 643; *Salmon v. Fewell*, 17 Mo. App. 118; *Vogt v. Cunningham*, 50 Mo. App. 136; *Fischer v. Johnson*, 51 Mo. App. 157; *Fowler v. Carr*, 63 Mo. App. 486; *Aldrich v. Reynolds*, 1 Barb. Ch. (N. Y.) 613; *Shepard v. Philbrick*, 2 Den. (N. Y.) 174; *Crews v. Pendleton*, 1 Leigh (Va.) 297, 19 Am. Dec. 750.

**10. Agreement as to Emblements.** — *Kerr v. Hill*, 27 W. Va. 576; *Hubbs v. Swabacker*, 51 W. Va. 438.

**11. Tenant of Mortgagor Has No Right to Growing Crop as Against Purchaser.** — *Howell v.*

to default is immaterial.<sup>1</sup> In *Missouri* the common-law rule has been so changed by statute as to protect the tenant.<sup>2</sup>

**3. Improvements.** — The purchaser is not bound to pay the debtor or his privies for permanent improvements made subsequent to the creation or recording of the mortgage.<sup>3</sup> Such improvements are calculated to enhance the selling price of the premises, and as the debtor is entitled to the excess of proceeds he is thus indirectly compensated for his outlay.<sup>4</sup>

**4. Easement — Trade Machinery.** — A sale of land under the power contained in a mortgage or deed of trust conveys to the purchaser not only the legal title to the premises in question, but also by implication such rights, easements, and advantages as are appurtenant thereto.<sup>5</sup> In *England* it is held that a mortgagee who rightfully sells only a part of the mortgaged premises thereby vests in the purchaser an easement of light.<sup>6</sup>

**Trade Machinery Passing with Freehold.** — Under a mortgage of lands and buildings which constitute a manufacturing plant, the title to trade machinery attached to the freehold will pass to the purchaser at the sale by the mortgagee.<sup>7</sup>

**5. Title by Estoppel.** — A title acquired by a mortgagor subsequent to the execution of the mortgage enures to the benefit of the mortgagee or creditors secured by the trust and will pass to a purchaser at the foreclosure sale to the same extent as if the original conveyance were absolute.<sup>8</sup>

**XII. APPLICATION OF PROCEEDS — 1. Purchaser Not Bound to See Proceeds Applied.** — A clause is not infrequently inserted in deeds of trust expressly declaring that the purchaser shall not be bound to see to the application of the proceeds.<sup>9</sup> But, aside from this provision, the purchaser on common-law principles is not responsible for a misapplication or misappropriation to which he is not a party.<sup>10</sup> Having no personal interest in the fund and not being responsible for its disposition, the purchaser cannot maintain an action to recover it where a misappropriation has actually been made.<sup>11</sup>

**2. Expenses — a. COSTS OF FORECLOSURE — (1) In General.** — The first item properly chargeable against the proceeds is the legitimate costs of making the sale. These expenses are to be paid out of the fund whether the trust deed so provides or not.<sup>12</sup>

(2) *Particular Items* — (a) **Unnecessary Outlay.** — The trustee or mortgagee

Schenck, 24 N. J. L. 89; Lane v. King, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105.

1. Fischer v. Johnson, 51 Mo. App. 157.

2. **Statute Protecting Tenants of Mortgagor or of Mortgagor's Grantee.** — Wells v. Bente, 86 Mo. App. 264.

Statutes protecting tenants from being adversely affected by "mortgage" sales apply also to sales under deeds of trust. Walton v. Fudge, 63 Mo. App. 52; Wells v. Bente, 86 Mo. App. 264.

3. **Improvements.** — Childs v. Dolan, 5 Allen (Mass.) 319; Neal v. Hamilton, (Tex. 1887) 7 S. W. Rep. 672.

4. Neal v. Hamilton, (Tex. 1887) 7 S. W. Rep. 672. See also the title IMPROVEMENTS, vol. 16, pp. 119-121.

5. **An Easement Consisting of a Right to Support** by adjacent land acquired after the execution of the mortgage passes to the purchaser. Swedish-American Nat. Bank v. Connecticut Mut. L. Ins. Co., 83 Minn. 377.

6. **Easement of Light.** — Born v. Turner, (1900) 2 Ch. 211, 69 L. J. Ch. 593.

7. *In re Yates*, 38 Ch. D. 112.

8. **Estoppel by Mortgage or Deed of Trust.** — Hyde Park Thomson-Houston Light Co. v. Brown, 172 Ill. 329; Swedish-American Nat. Bank v. Connecticut Mut. L. Ins. Co., 83 Minn.

379; Cockrill v. Bane, 94 Mo. 444; Boyd v. Haseltine, 110 Mo. 203.

9. **Purchaser Excused from Seeing to Application of Proceeds.** — Coler v. Barth, 24 Colo. 31; Mosca Milling, etc., Co. v. Murto, (Colo. App. 1903) 72 Pac. Rep. 287.

10. **Purchaser Not Responsible for Wrongful Application of Proceeds.** — Mosca Milling, etc., Co. v. Murto, (Colo. App. 1903) 72 Pac. Rep. 287; Wood v. Augustine, 61 Mo. 46; Conover v. Stothoff, 38 N. J. Eq. 55; Woodwine v. Woodrum, 19 W. Va. 67.

**Though the Mortgagee Himself Becomes the Purchaser**, his failure to pay over the surplus to the proper persons does not prevent the title from vesting in him. Damon v. Deeves, 62 Mich. 465; Sinclair v. Learned, 51 Mich. 339. *Contra*, Hunter v. Wooldert, 55 Tex. 433.

11. Day v. New Lots, 107 N. Y. 148.

12. **Costs of Selling Chargeable to Proceeds of Sale.** — Thomas v. Jones, 84 Ala. 302; Marsh v. Morton, 75 Ill. 621; Dowie v. Christen, 115 Iowa 364; Keairnes v. Durst, 110 Iowa 114; Morton v. Hall, 118 Mass. 511; Philips v. Bailey, 82 Mo. 639; Collins v. Standish, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 493; Allen v. Robbins, 7 R. I. 33; Lime Rock Bank v. Phetteplace, 8 R. I. 56.

**Where the Mortgagee Himself Buys for less**

cannot include in the costs of sale an item representing an unnecessary<sup>1</sup> or unreasonable outlay.<sup>2</sup>

Where One Mortgage Includes Distinct and Severable Liens on Separate Pieces of Property, the creditor may foreclose the liens separately or may sell all the parcels at once. In the latter event he is entitled only to the costs and disbursements incident to one foreclosure.<sup>3</sup>

Insurance Premiums paid by the mortgagee, to be properly chargeable as an incidental expense, should be stipulated for in the mortgage.<sup>4</sup>

(b) **Employment of Third Person.** — A trustee who employs another to do an act which properly devolves on himself must pay therefor of his own means. Thus, it has been held that he may not employ a lawyer to write the notice of sale, nor make any additional charge therefor as attorney when the notice is written by himself or by his law partner.<sup>5</sup>

**Auctioneer.** — The conduct of the sale being one of the prime duties of the trustee, if an auctioneer is employed he must be paid by the trustee out of his own commissions.<sup>6</sup>

The Charges of Necessary Agents may, in particular cases, be allowed.<sup>7</sup>

(c) **Costs of Postponement — Second Sale.** — The costs of a postponement made at the instance of the mortgagee cannot be charged to the mortgagor.<sup>8</sup> So, where a valid but irregular sale has taken place and the mortgagee out of abundant caution chooses to sell again, he must bear the expense himself.<sup>9</sup>

(d) **Proof of Expenses — Affidavit.** — The legitimate costs incident to the exercise of the trust may be shown by the production of receipts properly verified.<sup>10</sup> In *Minnesota* there is a statute requiring the person foreclosing to file an affidavit of costs within ten days after foreclosure.<sup>11</sup> The term "foreclosure" as used in this statute refers to the completion of the sale and passage of the title to the purchaser, which occurs upon the timely execution and recording of the certificate of sale.<sup>12</sup>

A Failure to Comply with This Provision forfeits the right to expenses<sup>13</sup> and subjects the delinquent person to a penalty,<sup>14</sup> but does not affect the validity of the sale.<sup>15</sup>

than the amount of the debt, he must pay in enough to cover the costs and expenses. *In re Ellerhorst*, 2 Sawy. (U. S.) 219.

**Treble Damages** for excessive, unauthorized, and extortionate charges, see *Hobe v. Swift*, 58 Minn. 84.

1. **Outlay Must Be Necessary.** — *Shirley v. Shattuck*, 28 Miss. 27; *Condict v. Flower*, 47 Mo. App. 514.

**Brokerage Fees** paid for affecting an unauthorized sale not allowable. *Reilly v. Cullen*, 101 Mo. App. 32.

**Official Appraisement** not necessary when the property is sold privately. *Myers v. Snyder*, 96 Iowa 107.

2. **Abstract of Title** costing two hundred and sixty dollars not a legitimate charge, see *Cheltenham Imp. Co. v. Whitehead*, 128 Ill. 279.

3. *Farnsworth Loan, etc., Co. v. Commonwealth Title Ins., etc., Co.*, 87 Minn. 179.

4. **Insurance Premiums Covered by Mortgage.** — *Pele v. Meaux*, 17 La. Ann. 60; *Grunewald v. Commercial Soap, etc., Manufactory Co.*, 49 La. Ann. 489; *Germania Sav. Bank v. Lemley*, 50 La. Ann. 1289.

As to the right of trustee to keep up insurance, see the title TRUSTS AND TRUSTEES, *post*.

5. *Condict v. Flower*, 47 Mo. App. 514.

6. *Duffy v. Smith*, 132 N. Car. 38. Compare *Smith v. Olcott*, 19 App. Cas. (D. C.) 61.

7. **Collector of Accounts Conveyed by Chattel**

**Mortgage.** — *Tollerton, etc., Co. v. Anderson*, 108 Iowa 217.

8. *Hobe v. Swift*, 58 Minn. 84.

9. *Clark v. Stilson*, 36 Mich. 482.

10. *Germania Sav. Bank v. Lemley*, 50 La. Ann. 1289.

11. **The Affidavit Is Admissible** as evidence only of such items of costs as are lawful. *Wyatt v. Quinby*, 65 Minn. 537.

12. **Limit of Time for Filing Affidavit of Costs.** — The certificate of sale is required to be filed within twenty days after the sale; the affidavit of costs within ten days after the certificate is filed. The latter provision is mandatory, and though the time for filing the certificate is directory only, it is held that the time for filing the affidavit of costs cannot at the furthest be postponed longer than thirty days by reason of delay in filing the certificate. *Larocque v. Chapel*, 63 Minn. 517.

13. **Forfeiture of Expenses.** — *Itasca Invest. Co. v. Dean*, 84 Minn. 388; *Johnson v. Northwestern Loan, etc., Assoc.*, 60 Minn. 393; *Brown v. Scandia Bldg., etc., Assoc.*, 61 Minn. 527.

14. **Penalties Recoverable Within One Year.** — *Brown v. Baker*, 65 Minn. 133.

As to the Period of Limitation in action to recover surplus and expenses, see *Eliason v. Sidle*, 61 Minn. 285; *Brown v. Baker*, 65 Minn. 133.

15. **Validity of Sale Not Affected.** — *Johnson v.*



*b. ATTORNEY'S FEE* — (1) *Stipulation for Fee Strictly Construed.* — One of the most obtrusive items in the expenses of foreclosure is the attorney's fee. It is a somewhat elastic charge, and is often used to disguise excessive commissions and usurious interest. The courts are accordingly inclined to scrutinize it more closely than other charges. Stipulations for the payment of an attorney's fee are therefore construed strictly in favor of the debtor,<sup>1</sup> and the creditor will not be allowed an attorney's fee at all, either in a suit to foreclose<sup>2</sup> or in connection with a sale under power,<sup>3</sup> if the trust deed or mortgage fails to provide therefor.<sup>4</sup> The debtor is to be given the benefit of all doubts.<sup>5</sup>

*Illustrations.* — In accordance with this doctrine a provision for an attorney's fee in case of sale under the power does not warrant the allowance of such fee where foreclosure is had by action,<sup>6</sup> and if the stipulation is for an attorney's fee on foreclosure by the trustee, such fee will not be allowed in a suit to foreclose brought by another person as, for instance, the beneficiary.<sup>7</sup>

*Propriety of Charge for Legal Services.* — Before the fee will be allowed it must appear that legal service was needed,<sup>8</sup> and the burden is on the attorney or person seeking reimbursement to show such fact.<sup>9</sup> Where the mortgage pro-

Cocks, 37 Minn. 532; Farnsworth Loan, etc., Co. v. Commonwealth Title Ins., etc., Co., 84 Minn. 62.

1. *Provisions for Attorney's Fees Strictly Construed.* — Thomas v. Jones, 84 Ala. 302; Cheltenham Imp. Co. v. Whitehead, 26 Ill. App. 609, 128 Ill. 279; Payette v. Free Home Bldg., etc., Assoc., 27 Ill. App. 307.

*Conflict Between Note and Mortgage.* — Where a mortgage provides for payment of "all attorney's or solicitor's fees," out of the proceeds of sale, and the mortgage notes also provide for the payment of ten per cent additional for collection after default, the mortgagee is not entitled to retain ten per cent. out of the proceeds, but only a reasonable attorney's fee. The provision in the notes does not govern in the case of collection by sale under the power. Tompkins v. Drennen, 95 Ala. 463.

*Provisions for Attorneys' Fees Void.* — In Michigan it is settled that provisions for attorneys' and solicitors' fees are contrary to public policy and void except so far as they are sanctioned by statute. This rule applies not only to foreclosures by sale under power, but to foreclosures in judicial proceedings as well. Bendey v. Townsend, 109 U. S. 665; Sage v. Riggs, 12 Mich. 313; Hardwick v. Bassett, 29 Mich. 17; Bullock v. Taylor, 39 Mich. 137, 33 Am. Rep. 356; Van Marter v. McMillan, 39 Mich. 304; Myer v. Hart, 40 Mich. 517, 29 Am. Rep. 553; Canfield v. Conkling, 41 Mich. 371; Parks v. Allen, 42 Mich. 482; Vosburgh v. Lay, 45 Mich. 455; Louder v. Burch, 47 Mich. 111; Millard v. Traux, 47 Mich. 251, 50 Mich. 343; Botsford v. Botsford, 49 Mich. 31; Kennedy v. Brown, 50 Mich. 336; Damon v. Deeves, 62 Mich. 465; Wright v. Traver, 73 Mich. 495; Kittermaster v. Brossard, 105 Mich. 219, 55 Am. St. Rep. 437.

But the fact that an attorney's fee is improperly charged does not necessarily affect the validity of the sale. Sinclair v. Learned, 51 Mich. 339; Emmons v. Van Zee, 78 Mich. 171.

2. Jefferson v. Edrington, 53 Ark. 545. See also Adams v. Kehlor Milling Co., 38 Fed. Rep. 281.

*Authority to Charge Fee Incurred "in Fore-*

*closing a Mortgage"* includes both judicial foreclosure and a sale under power. Speakman v. Oaks, 97 Ala. 503.

3. Thomas v. Jones, 84 Ala. 302.

4. *Attorney's Fee Not an Expense.* — The term "expenses of sale" occurring in a mortgage does not include an attorney's fee. Fowler v. Equitable Trust Co., 141 U. S. 408; Thomas v. Jones, 84 Ala. 302.

A reasonable attorney's fee in connection with drawing the deed has been sanctioned. Varnum v. Meserve, 8 Allen (Mass.) 158.

5. *Where the Mortgage Is Ambiguous* as to whether the ten per cent attorney's fee is to be calculated on the amount of the debt or on the proceeds of the sale, the smaller sum is to be taken as the basis of computation. Keokuk Falls Imp. Co. v. Kingsland, etc., Mfg. Co., 5 Okla. 32.

6. *Fee Denied in Judicial Foreclosures.* — Bynum v. Frederick, 81 Ala. 489; Danforth v. Charles, 1 Dak. 273; Sage v. Riggs, 12 Mich. 313; Myer v. Hart, 40 Mich. 517, 29 Am. Rep. 553; Van Marter v. McMillan, 39 Mich. 304; Interstate Bldg., etc., Assoc. v. McCartha, 43 S. Car. 72; Walker v. Killiam, 62 S. Car. 482.

In Alabama the attorney's fee will not be allowed in a suit to compel the mortgagor to elect to affirm, or disaffirm, where the mortgagee elects to affirm; and this though the mortgage provides for the payment of a fee upon foreclosure under the power. American Freehold Land Mortg. Co. v. Pollard, 120 Ala. 1.

As to allowance of attorney's fee in judicial foreclosure, see generally the title FORECLOSURE OF MORTGAGES, vol. 13, pp. 823-825.

7. Payette v. Free Home Bldg., etc., Assoc., 27 Ill. App. 307.

8. *No Allowance for Unnecessary Services.* — Boyd v. Jones, 96 Ala. 305, 38 Am. St. Rep. 100; Ruley v. Hyland, 77 Md. 487; Moore v. Calvert, 8 Okla. 358.

*No Attorney's Fee for Ineffectual Service,* as where he gives a defective notice and the sale has to be abandoned. Collar v. Harrison, 30 Mich. 66.

9. Duffy v. Smith, 132 N. Car. 38.

vides for a fee but does not fix its amount it must appear to be reasonable.<sup>1</sup>

(2) *When Right to Fee Accrues.* — Where the trust deed or mortgage authorizes the employment of an attorney, his right to be paid for proper service actually rendered accrues when he is employed, and the mortgagor cannot thereafter stop the sale without compensating him and paying the legitimate expenses.<sup>2</sup>

(3) *Mode of Payment.* — A mortgagee who, in foreclosing, has properly paid for legal services may retain therefor.<sup>3</sup> The fee is usually taxable as costs when resort is had to a court for foreclosure or confirmation.<sup>4</sup>

(4) *Recovery of Unlawful Fees.* — An attorney's fee improperly exacted in a statutory foreclosure may be recovered.<sup>5</sup>

*c. COMPENSATION OF PERSON SELLING* — (1) *In General* — (a) *Mortgagee.* — A mortgagee exercising the power of sale acts for himself as well as for the mortgagor, and in the absence of a stipulation therefor in the mortgage is entitled to no compensation for his attention and personal service.<sup>6</sup>

(b) *Trustee.* — The trustee is on a different footing. He is a disinterested party acting for others at their request. He is therefore entitled to reasonable compensation out of the proceeds of the sale for such service as is actually performed;<sup>7</sup> and this whether the trust deed provides for compensation or not.<sup>8</sup> The mere appointment of a trustee not followed by the performance of service imposes no duty on either the creditor or debtor to compensate him.<sup>9</sup>

(2) *Postponement.* — In case of postponement the person selling will not be entitled to his commission proper, as the right thereto attaches only when the sale is consummated.<sup>10</sup> But he will be given a reasonable allowance for his time and other expenses.<sup>11</sup> An agreement with the mortgagor that the commission shall be allowed in case of postponement may create a personal liability on his part to answer therefor, but it will not be charged against the fund.<sup>12</sup>

(3) *Payment of Debt Before Sale.* — The right to the contract commission is destroyed by the payment of the trust debt after advertisement and before

1. *Evidence as to Value of Services.* — An offer by the mortgagee to prove that he paid a stated amount for the services of an attorney is not sufficient to admit the evidence unless accompanied by an offer to show that the service was reasonably worth the amount stated. *Aultman, etc., Co. v. Shelton*, 90 Iowa 288.

The Question of the Propriety of the suit is to be determined by the court on the facts of each case. The fee has been denied where the debtor before foreclosure proceedings were begun tendered nearly as much as was due, and the ensuing litigation was chiefly over a claim which the creditor failed to establish. *Lilienthal v. McCormick*, 117 Fed. Rep. 89, 54 C. C. A. 475.

2. *Mjones v. Yellow Medicine County Bank*, 45 Minn. 335.

3. *Right to Retain.* — *Morse v. Home Sav., etc., Assoc.*, 60 Minn. 316.

4. *Attorney's Fee Taxed as Costs* in cases of foreclosure by attorneys of record only. *Keokuk Falls Imp. Co. v. Kingsland, etc., Mfg. Co.*, 5 Okla. 32.

*Affidavit of Attorney's Fee.* — In *Iowa* the fee cannot be taxed as a part of the costs where the mortgagee fails to file an affidavit. *Gamon v. Bull*, 86 Iowa 754.

5. *Vosburgh v. Lay*, 45 Mich. 455.

*Recovery of Attorney's Fee* included in bid by mistake, see *Truesdale v. Siddle*, 65 Minn. 315.

In *Michigan* where provisions for attorney's fees are contrary to public policy redemption

has been allowed where an excessive fee was included in the sum for which the property was bid in. *Millard v. Truax*, 50 Mich. 345.

6. *Mortgagee Not Entitled to Commissions.* — *Johnson v. Glenn*, 80 Md. 369; *Rappanier v. Bannon*, (Md. 1887) 8 Atl. Rep. 555; *Arnold v. Garner*, 2 Phil. 231; *Allen v. Robbins*, 7 R. I. 33.

7. *Harris v. Springfield First Nat. Bank*, (Tex. Civ. App. 1898) 45 S. W. Rep. 311.

A Trustee Is Not Precluded from Claiming His Commission by failing to include such item in a statement of the amount due given to the debtor prior to the sale. *Duffy v. Smith*, 132 N. Car. 38.

Right of Trustee to Compensation doubtfully sanctioned. *Boyd v. Hawkins*, 2 Dev. Eq. (17 N. Car.) 329.

8. *The Commission Usually Allowed in New York* where the trustee receives and pays out a sum in excess of ten thousand dollars is one per cent. *Dow v. Memphis, etc., R. Co.*, 23 Blatchf. (U. S.) 84.

9. *Catlin v. Glover*, 4 Tex. 151.

10. *Whitaker v. Old Dominion Guano Co.*, 123 N. Car. 368.

11. *Allowance in Case of Postponement.* — *Whitaker v. Old Dominion Guano Co.*, 123 N. Car. 368; *Boyd v. Hawkins*, 2 Dev. Eq. (17 N. Car.) 336; *Fry v. Graham*, 122 N. Car. 773; *Allen v. Robbins*, 7 R. I. 33; *Neptune Ins. Co. v. Dorsey*, 3 Md. Ch. 334.

12. *Neptune Ins. Co. v. Dorsey*, 3 Md. Ch. 334.

the sale,<sup>1</sup> save where the trust deed itself makes the stipulated commission a part of the secured debt and thus fixes it as a lien upon the trust property.<sup>2</sup>

(4) *Abortive Sale*. — In case of an ineffectual sale, rendered so by act of the party foreclosing, compensation will not be allowed.<sup>3</sup> It is otherwise where the miscarriage is due to the act of a third person, as where a second sale is made necessary by the noncompliance of the successful bidder.<sup>4</sup>

(5) *How Paid*. — Compensation May Be Retained out of the proceeds by the person entitled,<sup>5</sup> or the court having jurisdiction of the fund will order the proper amount to be paid.<sup>6</sup>

**Lien of Claim.** — Unless expressly made so, the trustee's claim for compensation does not constitute a lien upon the property,<sup>7</sup> and the purchaser cannot be compelled to satisfy it as a condition precedent to receiving his deed.<sup>8</sup>

**3. Satisfaction of Prior Lien** — *a. IN GENERAL.* — Inasmuch as the purchaser at a mortgagee's or trustee's sale takes the title subject to all prior liens,<sup>9</sup> no part of the proceeds should be applied to their extinguishment in the absence of an express provision therefor in the deed of trust or other agreement binding on the mortgagor.<sup>10</sup>

**Illustrations.** — Prior judgments,<sup>11</sup> tax titles,<sup>12</sup> mortgages,<sup>13</sup> and tax liens<sup>14</sup> existing at the time of the sale are within the rule, but a landlord's lien on chattels has been held not to be so.<sup>15</sup>

*b. REIMBURSEMENT FOR LIENS SATISFIED BEFORE SALE.* — Where taxes are paid before the sale, a thing which may always be done in the interest of the creditor, the amount paid may be reimbursed out of the proceeds. In such case, however, the property is sold free from the incumbrance and presumably brings so much more.<sup>16</sup> So an outstanding tax title,<sup>17</sup> or judgment,<sup>18</sup> constituting an incumbrance, may be bought in before the date, and the amount expended will be charged to the proceeds. The general doctrine is that where the property is sold subject to an incumbrance the purchaser must satisfy it.<sup>19</sup> On the other hand, if the entire interest is for any reason sold, incumbrances having precedence of the debt for which the sale is made must be satisfied out of the proceeds, and the purchaser will be exonerated.<sup>20</sup>

1. *Pass v. Brooks*, 118 N. Car. 397.

2. *Cannon v. McCape*, 114 N. Car. 580.

3. *Collar v. Harrison*, 30 Mich. 66.

4. *Farrer v. Lacy*, 25 Ch. D. 636.

5. *Harris v. Springfield First Nat. Bank*, (Tex. Civ. App. 1898) 45 S. W. Rep. 311.

6. *Boyd v. Hawkins*, 2 Dev. Eq. (17 N. Car.) 336.

7. *Mercantile Trust, etc., Co. v. Atlantic, etc., R. Co.*, 99 N. Car. 139.

8. *Atherton v. Hull*, 12 W. Va. 171.

9. **Purchaser Takes Subject to Liens.** — *Finkel v. Lepkin*, 62 N. J. L. 580; *Fox v. Cronan*, 47 N. J. L. 493, 54 Am. Rep. 190.

10. **Discharge of Prior Liens.** — *Tanner v. Tausig*, 11 Mo. App. 534; *Schmidt v. Smith*, 57 Mo. 135.

**Agreement to Make Clear Title** to purchaser will justify the satisfaction of an existing incumbrance. *Scott v. Shy*, 53 Mo. 478.

11. *Nelson v. Turner*, 97 Va. 54.

**Trust Deed Providing** for payment of "all liens" authorizes the satisfaction of a judgment rendered after the execution of the deed but before the sale. *Hall v. Gould*, 79 Ill. 16.

12. *Skilton v. Roberts*, 129 Mass. 306.

**Land may be redeemed** from a tax title out of the proceeds of the sale where the trustee is authorized to pay all money advanced for taxes. *Gornley v. Bunyan*, 138 U. S. 623,

13. *Helweg v. Heitcamp*, 20 Mo. 569.

14. *Scott v. Shy*, 53 Mo. 478.

**Taxes Constituting a Simple Debt** against the owner and which are not an incumbrance on the property cannot of course be satisfied out of the proceeds. *Schmidt v. Smith*, 57 Mo. 135.

15. **Landlord's Lien to Be Satisfied Out of Proceeds of Sale.** — *Dowie v. Christen*, 115 Iowa 364.

The landlord's right to have his rent is superior to that of a garnishing subsequent creditor. *Doane v. Garretson*, 24 Iowa 351.

16. **Reimbursement of Taxes Paid by Creditor.** — *Nickerson v. Atchison, etc., R. Co.*, 3 McCrary (U. S.) 455, 17 Fed. Rep. 408; *Mix v. Hotchkiss*, 14 Conn. 32; *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Davis v. Bean*, 114 Mass. 360; *Walton v. Bagley*, 47 Mich. 385; *Scott v. Shy*, 53 Mo. 478; *Schmidt v. Smith*, 57 Mo. 135; *Brown v. Simons*, 44 N. H. 475; *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385; *Bell v. New York*, 10 Paige (N. Y.) 49.

17. *Skilton v. Roberts*, 129 Mass. 306.

18. *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370.

19. **Purchaser Must Satisfy Prior Incumbrance.** — *Appleton v. Bancroft*, 10 Met. (Mass.) 231; *Skilton v. Roberts*, 129 Mass. 306.

20. **Purchaser Exonerated.** — *White v. Whitney*, 3 Met. (Mass.) 81; *Abby v. Fuller*, 8 Met.



Taxes paid by the mortgagee after the sale will not be reimbursed.<sup>1</sup>

**4. Payment of Secured Debt** — *a.* IN GENERAL. — The expenses of the sale having been paid and prior liens discharged where their payment is justified, it next behooves the mortgagee or trustee to satisfy the secured debt and interest.<sup>2</sup> The reduction of the debt to judgment,<sup>3</sup> or the attachment of other property than that covered by the mortgage,<sup>4</sup> does not impair the creditor's right to have the debt paid according to the terms of the trust.

*b.* SALE BEFORE ENTIRE DEBT MATURES. — If the mortgage debt is evidenced by a series of notes and the sale is made before all are due, the mortgagee has the right, after satisfying the notes actually due, to pay the others,<sup>5</sup> or at least to retain enough of the balance to satisfy the remaining notes when they do mature.<sup>6</sup> Nor is it necessary in such case that the mortgage or deed of trust should contain a clause accelerating the maturity of the whole debt, as the right so to retain and apply the proceeds results from the fact that an authorized sale made upon the nonpayment of part of the debt conveys the entire title and exhausts the power.<sup>7</sup>

*c.* SALE BY ONE OF SEVERAL MORTGAGEES. — On similar principles it has been held that a sale by one of several mortgagees contemporaneously secured in different sums by the same mortgage exhausts the power. The foreclosing mortgagee in such case must account to the other mortgagees for their proportion of the proceeds.<sup>8</sup>

**5. Disposition of Surplus** — *a.* BALANCE TO MORTGAGOR — (1) *In General.* — The expenses and secured debt having been satisfied, any surplus remaining on hand is to be paid to the mortgagor or person claiming under him.<sup>9</sup>

(Mass.) 36; O'Connell *v.* Kelly, 114 Mass. 97; Alden *v.* Wilkins, 117 Mass. 216; Cook *v.* Basley, 123 Mass. 396.

**Whole Estate Sold** at second mortgage sale by consent of the first and second mortgagees and of the purchaser. Morton *v.* Hall, 118 Mass. 511.

**1. Taxes Paid After Sale.** — Spencer *v.* Levering, 8 Minn. 461; Gorham *v.* National L. Ins. Co., 62 Minn. 327; Wyatt *v.* Quinby, 65 Minn. 537.

**Under the Minnesota Statute**, the mortgagee who had purchased at the foreclosure sale, and who subsequently redeemed the land from a tax sale, was not permitted to add such taxes to the amount required to be paid upon redemption by a second mortgagee. Nopson *v.* Horton, 20 Minn. 268.

**2. Interest.** — See West *v.* Diprose, (1900) 1 Ch. 337; Thompson *v.* Hudson, L. R. 10 Eq. 497.

**3.** Dodge *v.* Stanhope, 55 Md. 113.

**Where the Debt Is Reduced to Judgment** the mortgage stands as security therefor. Darst *v.* Bates, 95 Ill. 493.

**4.** Hutchings *v.* Reinhalter, 23 R. I. 518.

**5. Application of Proceeds to Whole Debt.** — McLean *v.* Presley, 56 Ala. 211; Fowler *v.* Johnson, 26 Minn. 338; Bridges *v.* Ballard, 62 Miss. 237; Fryar *v.* Fryar, 62 Miss. 205. See Holden *v.* Gilbert, 7 Paige (N. Y.) 208.

**6. Proceeds Retained to Pay Notes Not Due.** — Olcott *v.* Bynum, 17 Wall. (U. S.) 44; Huffard *v.* Gotthberg, 54 Mo. 271.

**Retention of Principal Authorized by Mortgage** in a case where the sale was made upon default of interest. Davis *v.* Dodson, (Ariz. 1804) 35 Pac. Rep. 1058. See also Hooper *v.* Stump, (Ariz. 1887) 14 Pac. Rep. 700.

**7. One Authorized Sale Exhausts Power.** —

Brown *v.* Brown, 47 Mich. 378; Fowler *v.* Johnson, 26 Minn. 338; Miles *v.* Skinner, 42 Mich. 181; Buford *v.* Smith, 7 Mo. 489.

**In Minnesota** it has been held that if the mortgagor redeems from a sale to satisfy one installment the mortgagee may again sell under the power to enforce payment of the other installments. This decision is placed on the ground that redemption in that state annuls the sale. Standish *v.* Vosberg, 27 Minn. 175.

**Application of Proceeds to Notes Not Due.** — A mortgage did not contain a clause accelerating the maturity of all the notes upon the nonpayment of one of them, but authorized the mortgagee upon nonpayment of any note to sell the whole property for the satisfaction of the principal and interest of all. Some of the notes being past due, the creditor attached other property and subsequently sold under the power. It was held that he might apply the proceeds of the sale to the notes not due, in order to allow the property attached to be applied to the notes which were past due. Hutchings *v.* Reinhalter, 23 R. I. 518.

**8.** Seattle First Nat. Bank *v.* Woolery, 6 Wash. 215.

**A Sheriff Foreclosing Without Notice** that some of the secured notes have been assigned may safely pay all the proceeds to the original mortgagee. Northern Cattle Co. *v.* Munro, 83 Minn. 37. 85 Am. St. Rep. 444.

**9. Balance to Mortgagor.** — Gair *v.* Tuttle, 49 Fed. Rep. 198; Ballinger *v.* Bourland, 87 Ill. 513. 29 Am. Rep. 69; Citizens' Bank *v.* Whinery, 110 Iowa 390; Perkins *v.* Stewart, 75 Minn. 21; Rogers *v.* Gosnell, 51 Mo. 466; Fitzgerald *v.* Barker, 70 Mo. 687; Vick *v.* Smith, 83 N. Car. 80; Mosby *v.* Johnson, 86 Va. 420; Flanders *v.* Thomas, 12 Wis. 410.

**A Resulting Trust Arises in favor of the**

An Application to the Court for the Payment Over of a surplus fund operates as a ratification of the sale as against the person making the application.<sup>1</sup>

(2) *Death of Mortgagor.* — The authorities are not agreed on the question whether, in case of the death of the mortgagor, the right to the surplus vests in his personal representative or in his heirs at law. In *England* and some of the *United States* the surplus belongs to the heirs or devisees where the sale takes place after the mortgagor's death.<sup>2</sup> In *Massachusetts* the personal representative is entitled to the surplus.<sup>3</sup> A provision requiring that the surplus be paid to the mortgagor or to his heirs or assigns is now frequently inserted in the deed.<sup>4</sup>

*b. RETENTION FOR PAYMENT OF UNSECURED DEBT.* — The mortgagee or trustee holding a surplus cannot retain it to satisfy a simple contract debt due to himself as against a junior lienor.<sup>5</sup> The simple contract debt must yield to a secured claim.<sup>6</sup>

*c. PERSON CLAIMING UNDER MORTGAGOR* — (1) *Assignee or Purchaser.* — Where the mortgagor conveys away his right to the surplus, as by assignment or sale of the equity of redemption, the surplus should, of course, be paid to such assignee or purchaser.<sup>7</sup>

(2) *Junior Incumbrancers* — (a) *Junior Mortgagee* — *aa. IN GENERAL.* — A junior mortgagee, as against the mortgagor and prior mortgagees, is entitled in equity to the balance remaining in the hands of the trustee or mortgagee;<sup>8</sup>

grantor or those claiming under him, as to the surplus after satisfying the secured debt. *Hargadine v. Henderson*, 97 Mo. 375.

*Assignee in Bankruptcy Entitled to Balance* whether the trust deed mentions assigns or not. *Calloway v. People's Bank*, 54 Ga. 441.

*The Wife Alone Is Entitled to Surplus* where a mortgage on her separate real estate, to secure her husband's debt, is executed by both, though it recites that the surplus shall be paid to "the parties of the first part." *Kinner v. Walsh*, 44 Mo. 65.

But a wife who joins in mortgage merely to release her dower right has no interest in the surplus. *Kauffman v. Peacock*, 115 Ill. 214.

1. *Chase v. Williams*, 74 Mo. 429.

2. *Surplus Goes to Heirs.* — *Rushbrook v. Lawrence*, L. R. 5 Ch. 3, 39 L. J. Ch. 93; *Wright v. Rose*, 2 Sim. & St. 323; *Polley v. Seymour*, 2 Y. & C. Exch. 708; *Bourne v. Bourne*, 2 Hare 35; *Shaw v. Hoadley*, 8 Blackf. (Ind.) 165; *Sweezy v. Thayer*, 1 Duer (N. Y.) 286; *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497, 19 Am. Rep. 293; *Chaffee v. Franklin*, 11 R. I. 578; *Allen v. Allen*, 12 R. I. 301.

3. *Varnum v. Meserve*, 8 Allen (Mass.) 158.

4. *Surplus to Mortgagor, His Heirs, or Assigns.* — *Wright v. Rose*, 2 Sim. & St. 323; *Bourne v. Bourne*, 2 Hare 35; *In re Smith*, 7 Jur. N. S. 903; *Chatterton v. Watney*, 16 Ch. D. 378.

5. *Major v. Hill*, 13 Mo. 247.

6. See *Vick v. Smith*, 83 N. Car. 80.

*When a Mortgagee Dies Insolvent* and the mortgagee, after realizing his security, has a surplus in his hands, he cannot retain that surplus in payment of a simple contract debt due him from the mortgagor, and so give himself a preference over the other creditors, but must hand it over to the mortgagor's legal personal representative as part of his estate. *Talbot v. Frere*, 9 Ch. D. 568.

*Right of Mortgagee to Retain.* — As against a person claiming under the mortgagor, the fore-

closing mortgagee can retain to satisfy a judgment procured before such person acquired the interest of the mortgagor. *Eddy v. Smith*, 13 Wend. (N. Y.) 489.

7. *Balance to Assignee or Purchaser from Mortgagor.* — *Shillaber v. Robinson*, 97 U. S. 68; *Ballingier v. Bourland*, 87 Ill. 514, 29 Am. Rep. 69; *Buttrick v. Wentworth*, 6 Allen (Mass.) 79; *Cook v. Basley*, 123 Mass. 396; *Brown v. Crookston Agricultural Assoc.*, 34 Minn. 545; *Foster v. Potter*, 37 Mo. 525; *Reid v. Mullins*, 43 Mo. 306.

*Purchaser by Warranty Deed* from the mortgagor entitled to surplus. *Johnson v. Wilson*, 77 Mo. 639.

*Conveyance in Fraud of Creditors.* — The trustee or mortgagee cannot refuse to pay over the surplus to a purchaser of the equity of redemption, on the ground that his purchase was without consideration and in fraud of creditors. *Reid v. Mullins*, 43 Mo. 306, 48 Mo. 344.

*The Purchaser of the Premises at an Execution Sale*, who at the time of a sale under a trust deed is not entitled to a conveyance, the time for redemption from the sheriff's sale not having expired, is entitled to share in the surplus held by the trustee only to the extent of his bid at the sheriff's sale, and the grantor is entitled to the balance. *Hart v. Wingate*, 83 Ill. 282.

8. *Junior Mortgagee Entitled to Surplus* — *England.* — *West London Commercial Bank v. Reliance Permanent Bldg. Soc.*, 27 Ch. D. 187; *In re Keeler*, 1 New Reports 44.

*Canada.* — *Re Kingsland*, 15 Can. L. J. N. S. 85; *Nicol v. Ewin*, 7 Ont. Pr. 331.

*Illinois.* — *Ballingier v. Bourland*, 87 Ill. 513, 29 Am. Rep. 69.

*Massachusetts.* — *Buttrick v. Wentworth*, 6 Allen (Mass.) 79; *Andrews v. Fiske*, 101 Mass. 422; *Cook v. Basley*, 123 Mass. 396.

*Minnesota.* — *Ayer v. Stewart*, 14 Minn. 97; *Fowler v. Johnson*, 26 Minn. 338; *Brown v. Crookston Agricultural Assoc.*, 34 Minn. 545.

and the fund should be retained by the trustee until the rights of such claimants are determined.<sup>1</sup>

*bb. NOTICE.* — The mortgagee or trustee is under no duty to examine the records to ascertain whether junior mortgages have been executed, and the putting of such to record does not operate as constructive notice.<sup>2</sup> He should be given actual notice.<sup>3</sup>

(b) *Judgment Creditors.* — A judgment creditor may by a proper proceeding subject the surplus to his judgment,<sup>4</sup> but he cannot maintain a direct action at law against the trustee to recover it.<sup>5</sup> The judgment may be a lien on the equity of redemption, but not upon the surplus.<sup>6</sup>

(c) *Order of Discharge.* — Where there is more than one subsequent incumbrance they should be discharged in their respective order.<sup>7</sup>

*The Consent of a Subsequent Incumbrancer* that his share of the surplus may be paid to a purchaser of the equity of redemption will not justify such payment as against the mortgagor, because he is entitled to have the mortgage debts discharged before his grantee, under a deed subject to the mortgages, receives anything.<sup>8</sup>

*Several Debts Secured by the Same Trust Deed* and held by the same persons, but with different sureties, stand on equal footing as liens, and should be paid out of the proceeds ratably, in the absence of some intervening equities.<sup>9</sup>

(3) *Right to Dower in Surplus.* — Where a mortgage is effectual against the inchoate dower right of the mortgagor's wife, she has no dower claim to the surplus proceeds of a sale made during the life of the mortgagor, either as against him or his assignee in bankruptcy.<sup>10</sup> But if the sale is made after

*Missouri.* — *Helweg v. Heitcamp*, 20 Mo. 569.

*New York.* — *Astor v. Miller*, 2 Paige (N. Y.) 68; *Bartlett v. Gale*, 4 Paige (N. Y.) 503; *Averill v. Loucks*, 6 Barb. (N. Y.) 470.

*Pennsylvania.* — *Douglass's Appeal*, 48 Pa. St. 223; *Fry's Appeal*, 76 Pa. St. 82.

*Rhode Island.* — *De Wolf v. Murphy*, 11 R. I. 630.

*South Dakota.* — *Smith v. Donahoe*, 13 S. Dak. 334.

*Junior Mortgagee Entitled as an "Assign."* — *Ayer v. Stewart*, 14 Minn. 97; *Nopson v. Horton*, 20 Minn. 268; *Brown v. Crookston Agricultural Assoc.*, 34 Minn. 545; *Fuller v. Langum*, 37 Minn. 74; *Nichols v. Tingstad*, 10 N. Dak. 172. See also *Cuilerier v. Brunelle*, 37 Minn. 71.

*As to the Reason for Denying the Prior Mortgagee's Right to Surplus*, see *supra*, this section, *Satisfaction of Prior Liens*.

*Duty to Interplead.* — But a mortgagee who would defend an action by the mortgagor to recover the surplus on the ground that a second mortgage exists, must bring such junior incumbrancer into the suit so that his rights may be adjudicated. *Itasca Invest. Co. v. Dean*, 84 Minn. 388.

*Liability of Mortgagee to Junior Mortgagee for Damages.* — In *England*, a mortgagee with power of sale is liable to junior mortgagees for damages caused by a misstatement, in his notice of the sale, as to the condition of the premises, in consequence of which the purchaser insisted upon, and obtained, a deduction from his bid, before he would complete it. *Tomlin v. Luce*, 43 Ch. D. 101.

1. *Duty of Trustee or Mortgagee to Retain until Rights of Subsequent Incumbrancers Are Determined.* — *Yarborough v. Wise*, 5 Ala. 292; *Hayes v. Woods*, 72 Ala. 92; *O'Reilly v. Hen-*

*dricks*, 2 Smed. & M. (Miss.) 388; *Mead v. McLaughlin*, 42 Mo. 198; *Bleecker v. Graham*, 2 Edw. (N. Y.) 647.

2. *Norman v. Hallsey*, 132 N. Car. 6.

3. *M'Lean v. Lafayette Bank*, 4 McLean (U. S.) 430.

4. In *Massachusetts* he should file a bill within the statutory period of thirty days after the rendition of his judgment, and while the surplus remains in the hands of the mortgagee. *Wiggin v. Heywood*, 118 Mass. 514; *Judge v. Herbert*, 124 Mass. 330.

5. *Norman v. Hallsey*, 132 N. Car. 6.

6. *Perkins v. Stewart*, 75 Minn. 21.

*The Levy of an Attachment* upon mortgaged lands does not give the plaintiff any vested interest in the equity of redemption, nor entitle him to share in the surplus proceeds of a mortgage sale consummated before he has reduced his claim to judgment. *Gardner v. Barnes*, 106 Mass. 505.

7. *Order of Discharge.* — *Markey v. Langley*, 92 U. S. 142; *Fielder v. Varner*, 45 Ala. 429; *Beard v. Fitzgerald*, 105 Mass. 134. See also *Gayle v. Wilson*, 30 Gratt. (Va.) 166.

*Directions or Representations on the Part of the Mortgagor* indicating a disposition of the fund different from that which the law points out cannot be given effect. The purchaser should not rely on his statement that a particular incumbrance is to be satisfied out of the proceeds. *Gair v. Tuttle*, 49 Fed. Rep. 198; *Shear v. Robinson*, 18 Fla. 379; *Ledyard v. Phillips*, 32 Mich. 13; *Schmidt v. Smith*, 57 Mo. 135.

8. *Andrews v. Fiske*, 101 Mass. 422.

9. *Kitchin v. Grandy*, 101 N. Car. 86.

*Mortgage First Filed for Record* entitled to priority in surplus. *Barnett v. McConnell*, 101 Ga. 32.

10. *Inchoate Right of Dower Lost.* — *Kauffman*



the death of the mortgagor, the widow's dower right having thereby become vested, she is entitled to her share of the surplus.<sup>1</sup>

*d. LIABILITY OF MORTGAGEE* — (1) *Funds Actually Collected*. — A mortgagee is liable only for such surplus as is actually paid to him,<sup>2</sup> unless he gives credit or takes something besides money as an equivalent thereof.<sup>3</sup>

**A Mortgagee Who Bids More than His Debt** must account for the excess.<sup>4</sup>

(2) *Interest*. — While the mortgagee is chargeable with interest during the time he wrongfully withholds the surplus from the party entitled thereto,<sup>5</sup> he is not so chargeable where the money has remained unproductive in his hands, awaiting the determination of adverse claims made upon him by different persons.<sup>6</sup>

**In Minnesota a Statutory Penalty** is given for failure of the mortgagee properly to account for the surplus. The question of the assignability of such penalty is not determined.<sup>7</sup>

(3) *Liable in Court of Law*. — A mortgagee who exercises the power is usually spoken of as a trustee for the mortgagor as to the unconsumed balance,<sup>8</sup> but neither he nor the trustee is such in a purely equitable sense.<sup>9</sup> They are custodians of the fund, and, being bound to apply it properly, are liable at law for money had and received where they fail to do so.<sup>10</sup>

**6. Deficiency — Liability of Mortgagor**. — As the mortgagor or grantor is entitled to surplus after the satisfaction of the secured debt, so likewise in case of a deficiency he may be held liable for so much as is necessary to satisfy the debt.<sup>11</sup> This rule is applied though the deficiency is due to the negligence of the trustee.<sup>12</sup> But in this case the debtor having paid the deficiency may

*v. Peacock*, 115 Ill. 214; *Newhall v. Lynn Five Cents Sav. Bank*, 101 Mass. 428, 3 Am. Rep. 387; *Frost v. Peacock*, 4 Edw. (N. Y.) 678; *Titus v. Neilson*, 5 Johns. Ch. (N. Y.) 452; *Bell v. New York*, 10 Paige (N. Y.) 49. See, however, *De Wolf v. Murphy*, 11 R. I. 630.

**A Sale under the Power in a Purchase-money Mortgage** bars the dower right of the mortgagor's wife, though she does not join in the mortgage. *Brackett v. Baum*, 50 N. Y. 8. As to the rule in *Canada*, see 42 Vict., c. 220; *Martindale v. Clarkson*, 6 Ont. App. 6.

1. *Chaffee v. Franklin*, 11 R. I. 578.

2. **Liable Only for Surplus Collected**. — *Russell v. Dufon*, 4 Lans. (N. Y.) 399. Compare *West London Commercial Bank v. Reliance Permanent Bldg. Soc.*, 27 Ch. D. 187.

3. *Bailey v. Aetna Ins. Co.*, 10 Allen (Mass.) 286.

**Amount of Surplus — Evidence**. — In an action by the mortgagor against the mortgagee to recover an alleged surplus, parol evidence is admissible to show that the consideration named in the mortgagee's deed to the purchaser included the amount of a prior mortgage, and that the actual purchase price was smaller by that amount. *O'Connell v. Kelly*, 114 Mass. 97; *Story v. Hamilton*, 20 Hun (N. Y.) 133. Compare *Alden v. Wilkins*, 117 Mass. 216.

4. **Mortgagee Liable for Excess of Bid over Mortgage Debt**. — *Seiler v. Wilber*, 29 Minn. 307; *Price v. Blankenship*, 144 Mo. 203.

5. **Interest**. — *Eley v. Read*, 76 L. T. N. S. 39; *Perkins v. Stewart*, 75 Minn. 21; *Hunter v. Wooldert*, 55 Tex. 433.

6. *Mathison v. Clark*, 25 L. J. Ch. 29.

**As to Computation of Interest**, see *Thompson v. Hudson*, L. R. 10 Eq. 497, 40 L. J. Ch. 28.

**Party Entitled to Surplus Unknown**. — If the mortgagee cannot ascertain the persons entitled it is his duty to set apart the surplus so as to

be fruitful for their benefit, and he is liable for the interest in case of failure to do so. *Charles v. Jones*, 35 Ch. D. 544.

7. *Lynott v. Dickerman*, 65 Minn. 471.

8. **Mortgagee a Trustee as to Surplus**. — *Gouthwaite v. Rippon*, 8 L. J. Ch. 139; *Vick v. Smith*, 83 N. Car. 80; *Cotten v. Willoughby*, 83 N. Car. 75, 35 Am. Rep. 564.

9. **Trust Cognizable at Law**. — *Ballinger v. Bourland*, 87 Ill. 514, 29 Am. Rep. 69; *Reynolds v. Hennessy*, 15 R. I. 215.

10. **Remedy at Law for Money Had and Received**. — *Webster v. Singley*, 53 Ala. 208, 25 Am. Rep. 609; *Hayes v. Woods*, 72 Ala. 92; *Laughlin v. Heer*, 89 Ill. 119; *Cook v. Basley*, 123 Mass. 396; *Johnson v. Cobleigh*, 152 Mass. 17; *Matthews v. Duryee*, 45 Barb. (N. Y.) 69; *Bevier v. Schoonmaker*, (Supm. Ct. Gen. T.) 29 How. Pr. (N. Y.) 411; *Cope v. Wheeler*, 41 N. Y. 393; *Stoeper v. Stoeper*, 9 S. & R. (Pa.) 434.

**Limitations**. — The legal nature of the duties of the mortgagee and trustee is further shown by the fact that they may plead the statute of limitations. *Banner v. Berridge*, 18 Ch. D. 254.

11. **Deficiency**. — *Otter v. Vaux*, 2 Kay & J. 650, affirmed 6 De G. M. & G. 638; *Rein v. Callaway*, 7 Idaho 634; *Mallory v. Kessler*, 18 Utah 11, 72 Am. St. Rep. 765. Compare *Dinniny v. Gavin*, 159 N. Y. 556, affirming 4 N. Y. App. Div. 298. See generally the title MORTGAGES, vol. 21, p. 985.

**Exhaustion of Security** necessary before debtor can be held for deficiency in states where there are statutes declaring that there shall be only one action to enforce any debt or right secured by mortgage. *Herbert Craft Co. v. Bryan*, (Cal. 1902) 68 Pac. Rep. 1020; *Rein v. Callaway*, 7 Idaho 634.

12. *Hull v. Pace*, 1 Mo. App. Rep. 318.

have his recourse against the party in default.

**XIII. EQUITY JURISDICTION — 1. In General.** — Equity has general jurisdiction to control the exercise of the power and to grant relief where a sale has been irregularly effected. Particular instances of such intervention are found throughout this article. The general principles governing the court of equity in the exercise of this jurisdiction will be briefly considered.

**2. Restraining Sale — a. GENERAL PRINCIPLES — (1) Allegations Required.** — It is well settled that the jurisdiction to restrain a sale under the power is exercised with caution and only upon precise allegations of distinct facts showing that the consummation of the sale would prove inequitable and work irreparable injury.<sup>1</sup> The equity of the complainant must be free from reasonable doubt.<sup>2</sup>

**(2) Terms and Conditions of Relief — (a) Offer to Do Equity.** — Where a perpetual injunction against the exercise of the power is sought, the maxim that he who seeks equity must do equity applies. The complainant in such case is required as a condition precedent to relief to pay or offer to pay the amount justly due under the mortgage.<sup>3</sup>

**Usurious Mortgage.** — This rule is applied where the injunction is sought on the ground of usury,<sup>4</sup> even though a statute renders the usurious contract void.<sup>5</sup> Where the mortgagor is on the defensive, relief from usury may, of course, be obtained by mere reduction and without any offer to pay the lawful debt.<sup>6</sup> If in a suit to enjoin a sale on the ground of usury the creditor waives or remits the usurious part of the contract the injunction may be refused.<sup>7</sup>

**(b) Time for Application.** — The mortgagor should not be dilatory in making the application to restrain the sale. If without a sufficient reason he refrains from giving notice of his equities at the sale the court will not interfere to prevent its consummation, especially where the purchaser has paid a large part of his bid and the parties cannot be placed *in statu quo*.<sup>8</sup>

**(3) Preliminary Injunction.** — It is no answer to an application for a preliminary injunction against a threatened sale, that the filing of a notice of

**1. Full and Precise Allegations Required.** — *Vaughan v. Marable*, 64 Ala. 60; *Security Loan Assoc. v. Lake*, 69 Ala. 456; *McCalley v. Otey*, 90 Ala. 302; *Montgomery v. McEwen*, 9 Minn. 103; *Foster v. Reynolds*, 38 Mo. 553; *Bedell v. McClellan*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 172; *Whittaker v. Hill*, 96 N. Car. 2.

**2. Security Loan Assoc. v. Lake**, 69 Ala. 456. **Existence of Power to Sell.** — The bill must allege that the mortgage in question contains a power to sell. *Grant County v. Colonial, etc., Mortg. Co.*, 3 S. Dak. 390.

**3. Payment of Amount Justly Due.** — *Paynter v. Carew*, 18 Jur. 417; *Hickson v. Darlow*, 23 Ch. D. 690; *Hill v. Kirkwood*, 28 W. R. 358; *Eslava v. Crampton*, 61 Ala. 507; *Sloan v. Coolbaugh*, 10 Iowa 31; *Casady v. Bosler*, 11 Iowa 242; *Walker v. Cockey*, 38 Md. 75; *Meysenburg v. Schlieper*, 46 Mo. 209; *Vechte v. Brownell*, 8 Paige (N. Y.) 212.

**Payment into Court Not Required** where the mortgagee at the time of taking the mortgage was solicitor of the mortgagor. *Macleod v. Jones*, 24 Ch. D. 280.

**Assignment of Mortgage in Pledge — Amount to Be Paid.** — A grantee of a mortgagor cannot restrain an assignee of the mortgagee from selling, on the ground of fraud practised by the mortgagee upon the mortgagor in obtaining the mortgage, unless the plaintiff is willing to pay the entire mortgage debt, although the

mortgage was assigned to the defendant as security for a smaller sum. *Foster v. Wightman*, 123 Mass. 100. Nor even though he took it with notice of the fraud. *Fairfield v. McArthur*, 15 Gray (Mass.) 526.

**4. Injunction Against Usurious Mortgage.** — *Branch Bank v. Strother*, 15 Ala. 51; *Nelson v. Dunn*, 15 Ala. 501; *Rogers v. Torbut*, 58 Ala. 523; *Eslava v. Crampton*, 61 Ala. 507; *Tooke v. Newman*, 75 Ill. 215; *Casady v. Bosler*, 11 Iowa 242; *Powell v. Hopkins*, 38 Md. 1; *Warfield v. Ross*, 38 Md. 85; *Gantt v. Grindall*, 49 Md. 310; *Kornegay v. Spicer*, 76 N. Car. 95; *Manning v. Elliott*, 92 N. Car. 48; *Haggerson v. Phillips*, 37 Wis. 364.

**5. Fanning v. Dunham**, 5 Johns. Ch. (N. Y.) 122, 9 Am. Dec. 283.

**6. Haggerson v. Phillips**, 37 Wis. 364. *Compare Fanning v. Dunham*, 5 Johns. Ch. (N. Y.) 122, 9 Am. Dec. 283.

**7. Manning v. Elliott**, 92 N. Car. 48.

**8. Pender v. Pittman**, 84 N. Car. 372.

**Immediate Application.** — Under a statute requiring an application to enjoin a sale under mortgage to be made immediately after receiving notice of the sale, a delay of a month after such notice is not fatal to the application, in the absence of a showing of prejudice to the mortgagee by the delay. *O'Brien v. Oswald*, 45 Minn. 59.

**Absence of a Naval Officer** on a foreign cruise and ignorance of the sale is a sufficient excuse

*lis pendens* would charge purchasers with notice of the applicant's rights.<sup>1</sup> A preliminary injunction, especially where the security will remain unimpaired, will be continued in force until a hearing upon the merits, unless the facts upon which the injunction was granted are clearly disproved.<sup>2</sup>

(4) *Extent of Relief*—(a) **Exclusive Jurisdiction.**—The court having assumed jurisdiction and the trustee and creditors being formal parties to the suit, a sale cannot then be made under the power contained in the deed of trust.<sup>3</sup>

(b) **Full Relief.**—In the exercise of its power to grant full relief the court may order a sale of the trust property under its own supervision.<sup>4</sup> It may, on the other hand, after determining the amount due and clearing away other obstacles to a sale, dissolve the injunction and allow the sale to proceed under the power.<sup>5</sup> If deemed proper the sale may be conducted by the commissioner of the court rather than by the trustee or mortgagee named in the conveyance.<sup>6</sup>

**A Sale Made under the Power in Violation of an Injunction would be void.**<sup>7</sup>

(c) **Terms of Mortgage Control.**—In a case where the mortgage authorizes a sale immediately upon default, the court may properly allow a reasonable period of grace.<sup>8</sup> Likewise, if the period of notice prescribed in the trust deed is short, the court on taking jurisdiction may in its discretion prescribe a longer and more reasonable period, especially where the language of the deed is not restrictive.<sup>9</sup> But, as a general rule, the terms of sale prescribed in the mortgage or deed of trust cannot be disregarded or altered by the court without the consent of all the parties interested.<sup>10</sup>

**b. COLLUSION, FRAUD, AND OPPRESSION.**—Equity will enjoin the sale when it clearly appears that the power is being exercised in an oppressive or fraudulent manner. Thus, where the mortgagee colluded with third persons, who were attempting to subject the lands to an alleged outstanding lien, to prevent a successful defense by the owner, and it appeared that a cloud would thereby be cast on the title so that money could not be raised to pay off the incumbrance, the exercise of the power was temporarily enjoined.<sup>11</sup>

**Any Act Savoring of Bad Faith** on the part of the trustee or beneficiary is sufficient to justify the court in restraining the exercise of the power; as where a

for failing to apply before the sale. *Johnson v. Williams*, 4 Minn. 260.

**1. Application for Preliminary Injunction.**—*Conkey v. Dike*, 17 Minn. 457. But see *Mills v. Mills*, (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 437; *Grant County v. Colonial*, etc., *Mortg. Co.*, 3 S. Dak. 390.

**Counter-affidavits** not admissible on *ex parte* application. *Commercial Nat. Bank v. Smith*, 1 S. Dak. 28.

**2. Continuance of Preliminary Injunction.**—*Harrison v. Bray*, 92 N. Car. 488; *Turner v. Cathrell*, 94 N. Car. 239; *Whittaker v. Hill*, 96 N. Car. 2.

**3. Exclusive Jurisdiction of the Court of Equity.**—*Maddux v. Triplett*, 89 Va. 318; *Bock v. Bock*, 24 W. Va. 586; *Hartman v. Evans*, 38 W. Va. 669; *Parsons v. Snider*, 42 W. Va. 517; *Martin v. Kester*, 49 W. Va. 647. See also *supra*, IV. 3. *b. Pendency of Foreclosure Suit.*

**Territorial Jurisdiction.**—The right to decree a trustee's sale of railroad property is not affected by the fact that a portion of the road lies outside the territorial limits of the judicial district. A sale under such decree passes title to the entire line. *Wilmer v. Atlanta*, etc., *Air Line R. Co.*, 2 Woods (U. S.) 447.

**4. Extent of Relief.**—*Kraft v. De Forest*, 53 Cal. 656; *Alexander v. Howe*, 85 Va. 198.

**5. Sale under Power after Dissolution of Injunction.**—*James River Lodge No. 32 v. Campbell*, 6 S. Dak. 157; *Fry v. Old Dominion Bldg.*, etc., *Assoc.*, 48 W. Va. 61.

**6. Sale by Commissioner.**—*More v. Calkins*, 85 Cal. 177; *Crenshaw v. Seigfried*, 24 Gratt. (Va.) 272.

**Special Commissioner** appointed to conduct sale. *Martin v. Kester*, 49 W. Va. 647.

*Lash v. McCormick*, 14 Minn. 482.

**8. Sixty Days Grace Allowed.**—*Manning v. Elliott*, 92 N. Car. 48.

**9. Length of Notice.**—Where the notice required by the deed is "ten days at least," the court should require thirty days' notice to be given. *Morris v. Virginia State Ins. Co.*, 90 Va. 370.

**10. Court Bound by Terms of Deed.**—*Hoff v. Crafton*, 79 N. Car. 592; *Crenshaw v. Seigfried*, 24 Gratt. (Va.) 272.

**In Case of Wrongful Injunction**, the mortgagee is entitled to recover, in addition to the usual costs, interest on the debt during the time the injunction was in force, and, in case of a deficiency after the sale, the value of emblements removed by the owner. *Foster v. Goodrich*, 127 Mass. 176; *Goodrich v. Foster*, 131 Mass. 217; *Aldrich v. Reynolds*, 1 Barb. Ch. (N. Y.) 613.

**11. Oppressive or Collusive Sale.**—*Robertson v. Norris*, 4 Jur. N. S. 155; *Struve v. Childs*, 63



sale is threatened in violation of a binding agreement to extend the time,<sup>1</sup> or where the beneficiary fails to fulfil an agreement to procure the discharge of judgment liens on the property.

*c. ACCOUNTING.* — Where the amount due is uncertain and the accounts are complicated, or the property is subject to disputed or conflicting liens, the mortgagee may be enjoined from selling until the amount due can be ascertained and the validity of the various incumbrances settled.<sup>2</sup> This equity is very freely exercised in *Virginia*.<sup>3</sup> Where the indebtedness has been put into the form of an account stated it may be opened and the sale enjoined if any element of fraud or unfairness is present.<sup>4</sup>

*d. DISPUTE AS TO EXISTENCE OF DEBT.* — A trustee's sale will be enjoined where the secured notes were given without consideration,<sup>5</sup> or where the consideration for the secured debt has failed.<sup>6</sup> Nor is a mortgagor estopped from enjoining the sale when there is no consideration for the mortgage, by the fact that he executed the instrument in order to hinder and defraud his creditors.<sup>7</sup> Likewise a sale will be enjoined where the mortgage debt has been paid.<sup>8</sup>

**Proof of Doubtful or Defective Title** is a sufficient ground to justify an injunction where the trust deed was executed to secure the purchase price of land.<sup>9</sup>

*e. IRREGULAR SALE THREATENED.* — The right to an injunction against a proposed sale infected with irregularity only is not so clear. The irregularity may be so trivial as not to justify equitable interposition;<sup>10</sup> or it may be so gross as to make the sale altogether void, in which case equity might perhaps interfere if the contemplated sale would not create a cloud.<sup>11</sup> On principle the sale will be restrained where the irregularity is such as would render the purchaser's title defective.

**If Proper Notice Has Not Been Given**, an injunction will be granted against the sale.<sup>12</sup> But the relief has been refused in a case where the mortgage, though requiring notice, declared that the title of the purchaser should not be affected by the failure to give notice, and that the mortgagor's remedy should be an action for damages.<sup>13</sup>

**Injunction Refused — Miscellaneous.** — Neither the insolvency of the trustee<sup>14</sup> nor

Ala. 473; *McCalley v. Otey*, 99 Ala. 585, 42 Am. St. Rep. 87; *Foster v. Hughes*, (Supm. Ct. Spec. T.) 51 How. Pr. (N. Y.) 20.

1. *Grinnan v. Platt*, 31 Barb. (N. Y.) 328.

*Aliter*, where the agreement is conditioned on the prompt payment of interest by the debtor, with which condition he fails to comply. *Bramlett v. Reily*, (Miss. 1888) 3 So. Rep. 658.

2. **Injunction Pending an Accounting.** — *Security Loan Assoc. v. Lake*, 69 Ala. 456; *More v. Calkins*, 85 Cal. 177; *Kornegay v. Spicer*, 76 N. Car. 95.

**Injunction Pending Ascertainment of Liens and Conflicting Equities.** — *Draper v. Davis*, 104 U. S. 347; *Rappanier v. Bannon*, (Md. 1887) 8 Atl. Rep. 555; *Dohm v. Haskin*, 88 Mich. 144; *Drayton v. Chandler*, 93 Mich. 383.

**Disputed Prior Liens.** — The fact that the trust estate is encumbered by other trust deeds and judgment liens is no reason for interfering with the trustee's sale, unless the amount or priority of such liens is in dispute. *Lallance v. Fisher*, 29 W. Va. 512.

3. *Muller v. Stone*, 84 Va. 834, 10 Am. St. Rep. 889; *Shultz v. Hansbrough*, 33 Gratt. (Va.) 567. See also *supra*, V. 2. *c. Duty of Trustee or Mortgagee to Resort to Equity*.

4. *Pritchard v. Sanderson*, 84 N. Car. 299.

5. **Absence of Consideration.** — *Wearse v.*

*Peirce*, 24 Pick. (Mass.) 141; *Hannan v. Hannan*, 123 Mass. 441, 25 Am. Rep. 121; *Ryan v. Gilliam*, 75 Mo. 132; *Bush v. Lathrop*, 22 N. Y. 535; *Briggs v. Langford*, 107 N. Y. 680.

6. See *Higbie v. Rogers*, 63 N. J. Eq. 368, *reversing* (N. J. 1901) 48 Atl. Rep. 554.

7. **Injunction Against Foreclosure of Mortgage Executed to Defraud Creditors.** — *Wearse v. Peirce*, 24 Pick. (Mass.) 141; *Sackner v. Sackner*, 39 Mich. 39; *Devlin v. Quigg*, 44 Minn. 534, 20 Am. St. Rep. 592.

8. *Green v. Engelmänn*, 39 Mich. 460.

9. *Miller v. Argyle*, 5 Leigh (Va.) 460.

10. **Trivial Irregularity.** — Where the amount involved was thirty-five thousand dollars, and an abatement of only ten thousand dollars was claimed, the court applied the maxim *de minimis non curat lex*. *Sidney Land, etc., Co. v. Milner, etc., Lumber Co.*, (Ala. 1903) 35 So. Rep. 48. And see the title *DE MINIMUS NON CURAT LEX*, vol. 8, p. 828.

11. **Right of Redemption Secured by Statute.** — An injunction has been denied where the mortgagee proposed to sell free from the right of redemption, such right being secured by statute. *Armstrong v. Sanford*, 77 Minn. 49.

12. Anonymous, 6 Madd. 11.

13. *Prichard v. Wilson*, 10 Jur. N. S. 330.

14. *Tooke v. Newman*, 75 Ill. 215.

of the mortgagor,<sup>1</sup> nor the existence of financial stringency due to unusual depression,<sup>2</sup> supplies any reason for restraining the sale. So, the loss of the original mortgage does not affect the right to sell, and affords no ground for an injunction.<sup>3</sup> The grantor in a deed of trust is estopped to impeach his own title in order to prevent a sale under the trust.<sup>4</sup>

Where the Complainant Has an Adequate Remedy at Law, equity will not interfere.<sup>5</sup>

**3. Setting Sale Aside** — *a. IN GENERAL.* — The grounds on which the court of equity will exercise its jurisdiction to set aside a completed sale differ little, if at all, from the grounds which justify equitable interposition to restrain a sale not yet made. There is, to be sure, an *English* dictum sometimes repeated in text books and decisions to the effect that equity will set aside a completed sale upon slighter grounds than are required to justify interference before the sale is made;<sup>6</sup> but it seems to be of little or no authority.<sup>7</sup>

*b. FRAUD AND IRREGULARITY.* — Fraudulent, unfair, or oppressive conduct on the part of the mortgagee or trustee, or the failure of either to comply with the essential requirements of the power, raises a presumption of injury and affords sufficient ground for impeaching the sale.<sup>8</sup> A sale will be set aside where the mortgage debt had been paid prior to the sale,<sup>9</sup> or upon proof that the mortgage was without consideration.<sup>10</sup> So a sale made before the mortgage debt is due,<sup>11</sup> or a sale made without the required notice,<sup>12</sup> will not be allowed to stand.

*c. INSUFFICIENT GROUNDS* — MISCELLANEOUS. — The sale will not be set aside for irregularities and defects in the proceedings which do not affect the

**1. Where the Mortgagor Becomes Bankrupt,** a mortgagee who is not compelled to go in under the act may proceed to sell under the power. *Gordon v. Ross*, 11 Grant Ch. (U. C.) 124.

**2. Financial Stringency.** — *Muller v. Bayly*, 21 Gratt. (Va.) 521; *Muller v. Stone*, 84 Va. 834, 10 Am. St. Rep. 889; *Caperton v. Landcraft*, 3 W. Va. 540.

**3. Bibb v. Crews**, 113 Ala. 617.

**4. Martin v. Kester**, 46 W. Va. 438.

**5. Prichard v. Wilson**, 10 Jur. N. S. 330.

**The First Mortgagee of a Chattel** having the right to take possession at law cannot enjoin a sale by a second mortgagee. *McCormick Harvesting Mach. Co. v. De La Mater*, 114 Iowa 382.

**6. Interference Before and After Sale.** — *Kershaw v. Kalow*, 1 Jur. N. S. 974; *Struve v. Childs*, 63 Ala. 473. See *Jones on Mortg.* (4th ed.), vol. 2, § 1805.

**7. Injurious Effect of Delay.** — That complainant's case is not strengthened by delaying until after the sale, see *Johnson v. Williams*, 4 Minn. 260; *Pender v. Pittman*, 84 N. Car. 372.

**8. Fraud and Irregularity in Exercise of Power** — *England.* — *Matthie v. Edwards*, 2 Coll. Ch. Cas. 465; *Jones v. Matthie*, 11 Jur. 504; *Orme v. Wright*, 3 Jur. 19.

*United States.* — *Bigler v. Waller*, 14 Wall. (U. S.) 297.

*Arkansas.* — *Littell v. Grady*, 38 Ark. 584.

*Illinois.* — *Longwith v. Butler*, 8 Ill. 32; *Weld v. Rees*, 48 Ill. 428; *Waller v. Arnold*, 71 Ill. 350; *Webber v. Curtiss*, 104 Ill. 309; *Ventres v. Cobb*, 105 Ill. 33; *Equitable Trust Co. v. Fisher*, 106 Ill. 189.

*Maryland.* — *Gould v. Chappell*, 42 Md. 466; *Wicks v. Westcott*, 59 Md. 270.

*Massachusetts.* — *Montague v. Dawes*, 14 Allen (Mass.) 369; *Drinan v. Nichols*, 115

Mass. 353; *Thompson v. Heywood*, 129 Mass. 401; *Hood v. Adams*, 124 Mass. 481, 26 Am. Rep. 687; *Briggs v. Briggs*, 135 Mass. 306.

*Michigan.* — *Grover v. Fox*, 36 Mich. 461.

*Missouri.* — *Clarkson v. Creely*, 35 Mo. 95; *Benkendorf v. Vincenz*, 52 Mo. 441. *Compare Nations v. Pulse*, 175 Mo. 86.

*New York.* — *Ellsworth v. Lockwood*, 42 N. Y. 89; *Lect v. McMaster*, 51 Barb. (N. Y.) 236; *Jencks v. Alexander*, 11 Paige (N. Y.) 619; *Hubbell v. Sibley*, 5 Lans. (N. Y.) 51; *Soule v. Ludlow*, 3 Hun (N. Y.) 503, 6 Thomp. & C. (N. Y.) 24.

**Sale Set Aside for Misrepresentation Concerning Incumbrances.** — *Wicks v. Westcott*, 59 Md. 270.

**Breach of Faith by Creditor.** — A trust creditor dissuaded the debtor from making a very favorable sale, upon promising to buy the land in and allow the debtor additional time to redeem. He subsequently purchased, but refused to carry out the agreement. The sale was annulled. *Long v. McGregor*, 65 Miss. 70.

**Unfair Sale of Part.** — Where the sale is unfairly conducted as regards some of the property the entire sale should be set aside, rights of innocent parties not being involved, notwithstanding the fact that no unfairness is shown as to another tract sold at the same time. *Lalor v. McCarthy*, 24 Minn. 417.

**Conditions Rendering Sale Improper.** — A trustee's sale of property during the civil war and while it was in the military occupation of the United States, so that the public could not enter for the purpose of examining it, has been set aside. *Green v. Alexander*, 7 D. C. 147.

**9. Liddell v. Carson**, 122 Ala. 518.

**10. Walker v. Carleton**, 97 Ill. 582.

**11. Sullivan v. McLaughlin**, 99 Ala. 60.

**12. Swain v. Lynd**, 74 Minn. 72.



validity of the title and which could not cause the property to bring less at the sale.<sup>1</sup> That the debtor was absent from illness and presently died,<sup>2</sup> or the fact that the sale was made at an inauspicious time, as just after a disastrous overflow,<sup>3</sup> does not justify a court of equity in interfering.<sup>4</sup> Other illustrations of insufficient grounds for setting the sale aside are found in the cases cited below.<sup>5</sup>

*d. CONDITIONS OF RELIEF* — (1) *Payment of Amount Owning*. — An offer to do equity by paying the full amount due is required where the object of the bill is to redeem or to set aside the sale and free the complainant's title altogether from the incumbrance.<sup>6</sup>

(2) *Where Offer of Payment Unnecessary*. — Where, however, the object of the proceeding is merely to set aside a particular voidable sale, leaving the incumbrance intact, it is not necessary to make an offer of payment.<sup>7</sup> In such case the court may content itself merely with setting the defective sale aside,<sup>8</sup> leaving the right to make another sale under the power intact,<sup>9</sup> or it may retain jurisdiction for the purpose of reselling, if such course is justified by the state of the pleadings.<sup>10</sup>

*Refunding Surplus Received*. — A mortgagor, or one claiming under him, who seeks to avoid a sale must, of course, always refund any surplus actually received by him.<sup>11</sup> But there is no further duty to repay to a purchaser the amount which he may have given for his defective title,<sup>12</sup> especially where he has participated in a fraudulent sale.<sup>13</sup>

*e. PROOF REQUIRED*. — One who seeks to impeach a sale under the power must specifically set forth the defects and irregularities complained of,<sup>14</sup> and his allegations must be supported by clear and satisfactory proof.<sup>15</sup> Collusion

1. *Non-injurious Irregularity*. — Woerther v. Backhoff, 12 Mo. App. 586; Corrothers v. Harris, 23 W. Va. 177.

2. Bowles v. Brauer, 89 Va. 466.

3. Dunton v. Sharpe, 70 Miss. 850.

4. *In Alabama* a sale by the trustee cannot be set aside as invalid on the ground that the trust deed itself was unlawful, as where the beneficiary, a foreign corporation, had not complied with the statutes of the state. Sherwood v. Alvis, 83 Ala. 115, 3 Am. St. Rep. 695; Cradrock v. American Freehold Land Mortg. Co., 88 Ala. 281.

5. *Illustrations of Insufficient Grounds for Setting Sale Aside*. — *Accident and Surprise* occasioned by failure to obtain money to pay the debt. Dunn v. McCoy, 150 Mo. 548.

*Pendency of Appeal* in a suit brought prior to the sale to secure an injunction. Hitz v. Jenks, 16 App. Cas. (D. C.) 530.

*Claiming Too Large an Attorney's Fee* in the notice of sale. Swenson v. Halberg, 1 Fed. Rep. 444.

*Accidental or Negligent Failure of Mortgagor to Attend Sale*. — Hendrickson v. Hinckley, 17 How. (U. S.) 443; Weld v. Rees, 48 Ill. 428; King v. Bronson, 122 Mass. 122.

*Terms Hard or Rate of Interest High*. — Learned v. Geer, 139 Mass. 31; Robinson v. Amateur Literary, etc., Assoc., 14 S. Car. 148.

*Failure of Trustee to Take the Oath*. — Ferris v. Eichbaum, 4 Baxt. (Tenn.) 70.

6. Sloan v. Coolbaugh, 10 Iowa 31. See Kline v. Vogel, 11 Mo. App. 211.

*Effect of Failure to Do Equity*. — Upon failure by the debtor to comply with the condition of payment imposed by the court in setting aside the sale, the decree becomes wholly inoperative. Cupples v. Galligan, 6 Mo. App. 62.

7. *Offer of Payment Unnecessary*. — Brewer v. Harrison, 27 Colo. 349; Meyer v. Jefferson Ins. Co., 5 Mo. App. 245; Harper v. Mansfield, 58 Mo. 17; Denning v. Smith, 3 Johns. Ch. (N. Y.) 332; Briggs v. Hall, 16 R. I. 577. *Contra*, Schwarz v. Sears, Walk. (Mich.) 170; Goldsmith v. Osborne, 1 Edw. (N. Y.) 560. See the criticism of these cases in Meyer v. Jefferson Ins. Co., 5 Mo. App. 245.

8. *Sale Set Aside*. — Grapengether v. Fejervary, 9 Iowa 163, 74 Am. Dec. 336; Boyd v. Ellis, 11 Iowa 98; Bradford v. Limpus, 13 Iowa 424.

9. *Second Sale under Power*. — The power of sale is not exhausted by an illegal or irregular sale, and when such sale is vacated the mortgage is restored and the power may be exercised anew. Stackpole v. Robbins, 48 N. Y. 665, affirming 47 Barb. (N. Y.) 212.

10. *Bill to Redeem — Resale Refused* — Where the complainant's claim to relief is based solely upon a right of redemption, and his bill is framed in that light, a decree authorizing the sale to be set aside on the payment of the debt is proper, and there is no error in refusing a resale of the property to raise the money. Decker v. Patton, 120 Ill. 464; Massachusetts Mut. L. Ins. Co. v. Boggs, 121 Ill. 119.

11. Brewer v. Nash, 17 R. I. 793.

12. Lerch v. Snyder, 2 Tex. Civ. App. 421.

13. Littell v. Grady, 38 Ark. 584. In this case it was said that the purchaser might be subrogated to the original lien of the mortgagee to the extent of the money paid by him.

14. Sawyer v. Bradshaw, 125 Ill. 440.

*The Purchaser and His Successors in Title* are necessary parties. Fairman v. Peck, 87 Ill. 156; Candee v. Burke, 1 Hun (N. Y.) 546.

15. *Clear and Satisfactory Proof Required*. — Bush v. Sherman, 80 Ill. 160; Tarrt v. Clayton,



between a trustee and a *cestui que trust* will not be presumed from the mere fact of the relationship.<sup>1</sup>

*f. WHO MAY COMPLAIN* — (1) *In General*. — Either the mortgagor or the purchaser of his equitable interest<sup>2</sup> may file a bill to set aside an illegal sale.<sup>3</sup> The right to complain of an act which constitutes a mere irregularity and which does not altogether avoid the sale is, however, confined to the party injured.<sup>4</sup> Thus it has been held that a failure of the trustee to give the required notice,<sup>5</sup> or the failure of the mortgagee to have the mortgaged chattels on hand at the time and place of sale,<sup>6</sup> are defects of which a stranger cannot take advantage.

(2) *Estoppel*. — A person otherwise entitled to invoke the aid of the court of equity in procuring an irregular sale to be set aside may be estopped by his own acts from claiming such relief. Thus a grantor in a deed of trust who is present at the sale, encourages bidders, and subsequently sees the purchaser make improvements, cannot thereafter take advantage of a mere irregularity in the appointment of the trustee who acted at the sale.<sup>7</sup> So an owner of the equity of redemption who, with knowledge of an alleged irregularity, induces a subsequent purchaser to buy by representing the title to be good, is precluded from raising the question of the validity of the sale.<sup>8</sup>

(3) *Ratification*. — The grantor, mortgagor, or person claiming under either also loses the right to question the regularity of a sale by subsequent ratification. The retention of the surplus proceeds of the sale after notice of the irregularity operates as a ratification,<sup>9</sup> and this although the money is retained under erroneous advice from counsel.<sup>10</sup>

(4) *Laches*. — Laches also operates with the same effect as a positive act of ratification. Delay gives opportunity for other rights to intervene and raises a presumption of waiver and acquiescence.<sup>11</sup> One who would vacate a sale for irregularity in the execution of the power must accordingly act within a reasonable time.<sup>12</sup>

**Illustrations.** — What delay constitutes laches depends on the facts of each case. A very short period of delay is enough where the situation has

109 Ill. 579; *Graham v. Fitts*, 53 Miss. 307; *McNew v. Booth*, 42 Mo. 192; *Forrester v. Scoville*, 51 Mo. 268; *Kennedy v. Kennedy*, 57 Mo. 76; *Forrester v. Moore*, 77 Mo. 651; *Jackson v. Wood*, 88 Mo. 77; *Keiser v. Gammon*, 95 Mo. 217; *Burke v. Adair*, 23 W. Va. 139; *Fulton v. Johnson*, 24 W. Va. 95; *Lallance v. Fisher*, 29 W. Va. 512; *Hayes v. Frey*, 54 Wis. 503.

1. See *Dempster v. West*, 69 Ill. 613.

2. **Right of Purchaser of Mortgagor's Equitable Interest to File Bill.** — *Brewer v. Harrison*, 27 Colo. 349; *Cheney v. Crandall*, 28 Colo. 383.

3. **The Creditor Secured by a Trust Deed cannot impeach a completed sale on account of the fraud or misconduct of a receiver appointed by the court in conducting the sale, where the trustee has acted in good faith.** The trustee having allowed the sale to be confirmed, he is concluded, and the creditor is concluded with him. *Fletcher v. Ann Arbor R. Co.*, (C. C. A.) 116 Fed. Rep. 479; *Kerrison v. Stewart*, 93 U. S. 155; *Richter v. Jerome*, 123 U. S. 233.

4. *Wade v. Thompson*, 52 Miss. 367.

5. *Wightman v. Doe*, 24 Miss. 681.

6. *Wormell v. Nason*, 83 N. Car. 32.

7. **Estoppel of Grantor.** — *Lunsford v. Speaks*, 112 N. Car. 608; *Reynolds v. Kroff*, 144 Mo. 433; *Wilson v. Wall*, 99 Va. 353. *Compare Baker v. Cunningham*, 162 Mo. 134, 85 Am. St. Rep. 490.

8. **Estoppel by Misrepresentation.** — *Giddens v. Byers*, 12 Tex. 75; *Hess v. Dean*, 66 Tex. 663.

9. **Ratification by Acceptance and Retention of Proceeds.** — *Moore v. Hill*, 85 N. Car. 218; *Austin v. Stewart*, 126 N. Car. 527; *Brewer v. Nash*, 17 R. I. 793.

**Acquiescence of Creditor.** — The fact that the creditor assists in a sale and himself bids does not operate as an acquiescence or ratification where the mortgaged chattels bring less than the amount of his debt. *In re Robert*, 18 Quebec Super. Ct. 101.

**An Infant Who Accepts a Surplus on Reaching Majority ratifies the sale provided he then has knowledge of the irregularity.** *Smith v. Gray*, 116 N. Car. 311.

10. *Norwood v. Lassiter*, 132 N. Car. 52.

1. *McHany v. Schenk*, 88 Ill. 357.

12. **Right to Vacate Sale Lost by Laches.** — *Fraker v. Houck*, 36 Fed. Rep. 403; *Welsh v. Coley*, 82 Ala. 363; *Brunson v. Morgan*, 84 Ala. 508; *Hamilton v. Lubukee*, 51 Ill. 415, 99 Am. Dec. 562; *Dempster v. West*, 69 Ill. 613; *Bush v. Sherman*, 80 Ill. 160; *Maher v. Farwell*, 97 Ill. 56; *Hoyt v. Pawtucket Sav. Inst.*, 110 Ill. 390; *Irish v. Antioch College*, 126 Ill. 474, 9 Am. St. Rep. 638; *Helm v. Yerger*, 61 Miss. 44; *Moore v. Ryan*, 31 Mo. App. 474; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467; *Joyner v. Farmer*, 78 N. Car. 196; *Fowler v. Lewis*, 36 W. Va. 112.

materially changed.<sup>1</sup> An attack in February on a sale made in the preceding December is timely.<sup>2</sup> But four months,<sup>3</sup> six months,<sup>4</sup> two years,<sup>5</sup> four years,<sup>6</sup> and other periods of greater duration<sup>7</sup> have, under varying conditions, been held to constitute laches.

In Alabama, the period of two years has been conventionally adopted as the proper time within which a suit to set aside the sale for irregularities should ordinarily be brought.<sup>8</sup> The lapse of such a period raises a presumption of ratification, but this presumption can be rebutted by showing satisfactory reasons for not bringing the action sooner.<sup>9</sup>

If a Sale Is Wholly Void the complainant will not be denied relief within the period prescribed by the general statute of limitations.<sup>10</sup>

Notice of an Irregularity Will Be Presumed from the fact that the mortgagor has knowledge of the sale, as he is thereby put on inquiry,<sup>11</sup> and is bound to use diligence in discovering any defects in the proceedings.<sup>12</sup>

**XIV. REDEMPTION FROM TRUST AND MORTGAGE SALES—1. In General.**—The law of redemption enters into the subject of foreclosure by sales in three aspects, and we are to consider (1) the equity of redemption, (2) the statutory right of redemption, and (3) redemption upon disaffirmance of irregular sales.

**2. Equity of Redemption.**—Prior to foreclosure and indeed until the sale is actually consummated the mortgagor or grantor may always exercise the equitable right to redeem by paying the debt, interest, and costs.<sup>13</sup> A clause in the instrument expressly waiving the equity is without effect.<sup>14</sup> The consummation of the sale, however, changes the situation, and the equity of redemption is thereby lost; for the power of sale, unless it is expressly limited, embraces the entire estate of the mortgagor or grantor, and a valid sale thereunder is equivalent to a strict foreclosure by bill in equity.<sup>15</sup> This rule is, of

Infant Parties cannot give binding assent to irregularities in the sale and are not affected by laches in failing to set the same aside. *Tatum v. Holliday*, 59 Mo. 422.

1. As to the effect of a subsequent sale to innocent purchaser, see *supra*, X. 3. m. (4) *Innocent Purchaser*.

2. *Kelsay v. Farmers, etc., Bank*, 166 Mo. 157.

3. *Northwestern Mortg. Trust Co. v. Bradley*, 9 S. Dak. 495.

4. *Wilson v. Wall*, 99 Va. 353.

5. *Baker v. Cunningham*, 162 Mo. 134, 85 Am. St. Rep. 490.

6. *Cornell v. Newkirk*, 144 Ill. 241, *affirming* 44 Ill. App. 487.

7. **Unreasonable Delay.**—*Bergen v. Bennett*, 1 Cal. Cas. (N. Y.) 1, 2 Am. Dec. 281; *Learned v. Foster*, 117 Mass. 365; *Askew v. Sanders*, 84 Ala. 356; *Bausman v. Eads*, 46 Minn. 148, 24 Am. St. Rep. 201.

In Minnesota there is a statute limiting the right to set aside a sale for irregularity in the notice or publication to five years. *Russell v. H. C. Akeley Lumber Co.*, 45 Minn. 376; *Mogan v. Carter*, 54 Minn. 141; *Bitzer v. Campbell*, 47 Minn. 221. This statute does not apply to void sales. *Bausman v. Kelley*, 38 Minn. 197, 8 Am. St. Rep. 661.

8. **Two Years Limit.**—*Cooper v. Hornsby*, 71 Ala. 64; *Comer v. Sheehan*, 74 Ala. 452.

This conventional rule follows the analogy of the statute allowing two years for redemption from valid foreclosures. *Ezzell v. Watson*, 83 Ala. 120; *Comer v. Sheehan*, 74 Ala. 452.

9. *Alexander v. Hill*, 88 Ala. 487, 16 Am. St. Rep. 55.

Infants may disaffirm within two years after

reaching majority provided the general statute of twenty years has not run. *Alexander v. Hill*, 88 Ala. 487, 16 Am. St. Rep. 55, *explaining* *Mewburn v. Bass*, 82 Ala. 622.

10. *Sloan v. Frothingham*, 65 Ala. 593; *Hull v. King*, 38 Minn. 349. See also *Bausman v. Kelley*, 38 Minn. 197, 8 Am. St. Rep. 661.

11. **Notice of Irregularity Presumed.**—*Marcotte v. Hartman*, 46 Minn. 202; *Depew v. Dewey*, (Supm. Ct. Gen. T.) 46 How. Pr. (N. Y.) 441.

12. **Duty to Exercise Diligence in Discovering Irregularities.**—*Bush v. Sherman*, 80 Ill. 160; *Cornell v. Newkirk*, 144 Ill. 241.

13. **Redemption Before Sale.**—*Linnell v. Lyford*, 72 Me. 280; *Clark v. Henry*, 2 Cow. (N. Y.) 324. See the title EQUITY OF REDEMPTION, vol. 11, p. 205.

14. **Waiver of Equity Ineffective.**—*Fields v. Helms*, 82 Ala. 449; *Armstrong v. Sanford*, 7 Minn. 49.

15. **Equity of Redemption Foreclosed by Sale under Power.**—*United States.*—*Parker v. Dacres*, 130 U. S. 43.

Alabama.—*Cooper v. Hornsby*, 71 Ala. 62; *Harris v. Miller*, 71 Ala. 26; *Bailey v. Timberlake*, 74 Ala. 221; *Comer v. Sheehan*, 74 Ala. 452; *Gassenheimer v. Molton*, 80 Ala. 521; *Mewburn v. Bass*, 82 Ala. 622; *Aiken v. Bridgeford*, 84 Ala. 295; *Woodruff v. Adair*, 131 Ala. 530; *American Freehold Land Mortg. Co. v. Pollard*, 120 Ala. 1.

Arkansas.—*Robards v. Brown*, 40 Ark. 423; *Hudgins v. Morrow*, 47 Ark. 515.

California.—*Odd Fellows' Sav., etc., Bank v. Harrigan*, 53 Cal. 229.

Colorado.—*Nippel v. Hammond*, 4 Colo. 211.

Iowa.—*Lowe v. Grinnan*, 19 Iowa 193.

course, given effect as against subsequent incumbrancers as well as against the grantor and his assigns. Resort can be had by them only to the surplus proceeds if there be any.<sup>1</sup>

**3. Statutory Right of Redemption.** — In several states statutes have been passed expressly creating a new right of redemption for a limited period after the foreclosure sale has been made.<sup>2</sup> The sale then, while it destroys the equity, at the same time marks the inception of the statutory right to redeem where such right exists.<sup>3</sup>

**Nature of the Statutory Right.** — These statutes vary materially as to the time, conditions, and manner in which the right is to be exercised, and the courts are not in harmony as to the nature of the right itself. Thus, in *Alabama*, it is merely a personal privilege which can be exercised only by the persons specified in the statute. The privilege is incapable of transfer and cannot be waived.<sup>4</sup> In *Tennessee* the right may be transferred and is capable of being waived by a provision in the deed of trust.<sup>5</sup> Obviously the practitioner must be guided by the statutes of his own state.

**4. Disaffirmance of Irregular Sale.** — If the sale is attended by serious irregularities, and *a fortiori* if the sale is altogether void, the debtor or his privies

*Massachusetts.* — *Kinsley v. Ames*, 2 Met. (Mass.) 29.

*Mississippi.* — *Dibrell v. Carlisle*, 48 Miss. 691; *Hyde v. Warren*, 46 Miss. 13.

*Missouri.* — *Plum v. Studebaker Bros. Mfg. Co.*, 89 Mo. 162; *Ferguson v. Soden*, 111 Mo. 208, 33 Am. St. Rep. 512.

*North Carolina.* — *Paschal v. Harris*, 74 N. Car. 335.

*North Dakota.* — *Grandin v. Emmons*, 10 N. Dak. 223, 88 Am. St. Rep. 684.

*Ohio.* — *Turner v. Johnson*, 10 Ohio 204; *Brisbane v. Stoughton*, 17 Ohio 482.

*Rhode Island.* — *Bull's Petition*, 15 R. I. 534.

*Virginia.* — *Miller v. Mann*, 88 Va. 212.

In *Illinois* the equity of redemption seems not to be cut off unless the mortgage or trust deed expressly provides that the sale shall be free from the equity of redemption. *Bloom v. Van Rensselaer*, 15 Ill. 503; *Weld v. Rees*, 48 Ill. 428.

**Express Waiver of Right to Redeem.** — In other jurisdictions, there are decisions apparently conflicting with the doctrine above laid down. Thus it has been held in *Tennessee* that the waiver of the right to redeem must be express, but the right referred to is the statutory right of redemption and not the equity of redemption. See *Knox v. McCain*, 13 Lea (Tenn.) 197; *Ordway v. White*, 3 Lea (Tenn.) 537. Compare *Nippel v. Hammond*, 4 Colo. 211.

**1. Equity of Redemption Lost to Subsequent Incumbrancers.** — *Lowe v. Guinnan*, 19 Iowa 193; *Plum v. Studebaker Bros. Mfg. Co.*, 89 Mo. 162.

**2. Statutory Right of Redemption Recognized.** — *United States.* — *Singer Mfg. Co. v. McCollock*, 24 Fed. Rep. 667.

*Alabama.* — *Childress v. Monette*, 54 Ala. 317; *Fields v. Helms*, 82 Ala. 449; *Powers v. Andrews*, 84 Ala. 289; *Lehman v. Moore*, 93 Ala. 186.

*Arkansas.* — *Robards v. Brown*, 40 Ark. 423; *Wood v. Holland*, 57 Ark. 198.

*California.* — *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655.

*Michigan.* — *Dodge v. Brewer*, 31 Mich. 227; *Cameron v. Adams*, 31 Mich. 426.

*Minnesota.* — *Nopson v. Horton*, 20 Minn.

268; *Atwater v. Manchester Sav. Bank*, 45 Minn. 341; *Hoover v. Johnson*, 47 Minn. 434; *Cable v. Minneapolis Stock-Yards, etc., Co.*, 47 Minn. 417; *Bovey De Laitre Lumber Co. v. Tucker*, 48 Minn. 223; *Todd v. Johnson*, 50 Minn. 310; *Lowry v. Akers*, 50 Minn. 508.

*Missouri.* — *Udike v. Merchants Elevator Co.*, 96 Mo. 160; *Dawson v. Egger*, 97 Mo. 36.

**Redemption Controlled by Law** in force at time of the inception of the contract. *Bronson v. Kinzie*, 1 How. (U. S.) 311; *Howard v. Bugbee*, 24 How. (U. S.) 461; *Smith v. Green*, 41 Fed. Rep. 455; *Robards v. Brown*, 40 Ark. 423; *Hudgins v. Morrow*, 47 Ark. 515.

**3.** *Mayer v. Farmers' Bank*, 44 Iowa 212.

**4. Nature of Statutory Right to Redeem in Alabama.** — *Childress v. Monette*, 54 Ala. 317; *Otis v. McMillan*, 70 Ala. 46; *Parmer v. Parmer*, 74 Ala. 285; *Powers v. Andrews*, 84 Ala. 289; *Commercial Real Estate, etc., Assoc. v. Parker*, 84 Ala. 298; *Walden v. Speigner*, 87 Ala. 379; *McCall v. Mash*, 89 Ala. 487, 18 Am. St. Rep. 145; *Lehman v. Moore*, 93 Ala. 186; *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272.

**5. Nature of Right in Tennessee.** — *Ewing v. Cook*, 85 Tenn. 332, 4 Am. St. Rep. 765; *Pearcy v. Tate*, 91 Tenn. 478; *Bledsoe v. McCorry*, 9 Baxt. (Tenn.) 323; *McClean v. Harris*, 14 Lea (Tenn.) 514; *Weakley v. Cockrill*, 6 Lea (Tenn.) 270. To the same effect, see *Armstrong v. Sanford*, 7 Minn. 49.

In *Kentucky* also the right is transferable. *Hibbitt v. Spurrier*, 3 B. Mon. (Ky.) 469.

In *Missouri* the statutory right of redemption exists only when the creditor, his assignee, or some person for him becomes the purchaser. *Keith v. Browning*, 139 Mo. 190.

In *Illinois* the statutory right to redeem exists only in judicial foreclosures, but in such foreclosures the right to redeem is recognized even though the deed of trust contains a power of sale waiving the right of redemption. By proceeding judicially the creditor waives the right of absolute foreclosure. *Bloom v. Van Rensselaer*, 15 Ill. 503; *Jones v. Ramsey*, 3 Ill. App. 303; *Warner v. De Witt County Nat. Bank*, 4 Ill. App. 305; *Fitch v. Wetherbee*, 110 Ill. 475.



may disaffirm the sale upon paying the amount due.<sup>1</sup> This right has already been considered in treating the subject of equitable intervention,<sup>2</sup> and only one observation need be added. This is in regard to the nature of the right to disaffirm.

**Nature of Right to Disaffirm.**—By the majority of the courts the irregular sale is said not to cut off the equity of redemption at all. Under this view the right of disaffirmance is merely a continuation of that equity, and the exercise of the right is a true instance of redemption.<sup>3</sup> In *Alabama*, the court has adopted the view that the equity of redemption is, in the absence of fraud, foreclosed by an irregular sale provided there is substantial conformity with the power.<sup>4</sup> The right of disaffirmance in equity is, however, still recognized. Thus a mortgagee who without permission purchases at his own sale gets a title free from the right of redemption proper, but the mortgagor may nevertheless disaffirm.<sup>5</sup> Under this view, disaffirmance in this particular instance is distinguished from both equitable and statutory redemption.<sup>6</sup> The result, however, is practically the same, whether the right to disaffirm is considered as an independent equity or as an instance of redemption, since the mortgagor under either view may pay the debt and have his property back. Perhaps the sole difference is that an equity of redemption is assignable while the bare right to disaffirm is declared to be incapable of transfer.<sup>7</sup>

**TRUSTEE.** (See also the title *TRUSTS AND TRUSTEES, post.*)—See note 8.  
**TRUSTEE COMPANY.**—See note 9.

**1. Disaffirmance of Void Sale.**—*Williamson v. Stone*, 27 Ill. App. 214.

**Disaffirmance of Irregular Sale.**—*Stinson v. Pepper*, 47 Fed. Rep. 676; *Chowning v. Cox*, 1 Rand. (Va.) 306, 10 Am. Dec. 530.

**Disaffirmance of Sale Made After Payment of Debt.**—*Askew v. Sanders*, 84 Ala. 356; *Redmond v. Pakenham*, 66 Ill. 434; *Cameron v. Irwin*, 5 Hill (N. Y.) 272.

**Disaffirmance Where Mortgagee Buys at His Own Sale.**—*Moore v. Titman*, 44 Ill. 367; *Thornton v. Irwin*, 43 Mo. 153; *Allen v. Ranson*, 44 Mo. 263, 100 Am. Dec. 282; *Reddick v. Gressman*, 49 Mo. 389.

**Usury.**—The fact that the debt secured was infected with usury does not entitle the debtor to redeem from a sale under the power; he should tender the amount legally due, before foreclosure. *Ryan v. Sanford*, 25 Ill. App. 571, affirmed 133 Ill. 291; *Ferguson v. Soden*, 111 Mo. 208, 33 Am. St. Rep. 512.

**Disaffirmance on Equitable Grounds.**—The violation of an agreement *in pais*, whereby the debtor is misled by the creditor or trustee and his interests are adversely affected, will justify equitable interposition to restore his title where he offers to pay the debt. *Stinson v. Pepper*, 47 Fed. Rep. 676; *Williamson v. Stone*, 128 Ill. 129; *Union Mut. L. Ins. Co. v. Slee*, 123 Ill. 57. Compare *Dodge v. Brewer*, 31 Mich. 227.

**2.** See *supra*, XIII. 3. *Setting Sale Aside.*

**3. Equity of Redemption Not Destroyed by Irregular Sale.**—*Allen v. Ranson*, 44 Mo. 263, 100 Am. Dec. 282; *Whitehead v. Hellen*, 76 N. Car. 99.

**4.** *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272.

**5. Disaffirmance in Equity.**—*Alexander v. Hill*, 88 Ala. 487, 16 Am. St. Rep. 55; *McCall v. Mash*, 89 Ala. 487, 18 Am. St. Rep. 145; *Diefenbach v. Vaughan*, 116 Ala. 150; *American Freehold Land Mortg. Co. v. Pollard*, 120 Ala. 1.

**Equitable Right of Mortgagee to Compel Election.**

—A mortgagee who has purchased without authority may file a bill in equity to compel the mortgagor to elect to ratify or to disaffirm. *Craddock v. American Freehold Land Mortg. Co.*, 88 Ala. 281; *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 163..

**As to Terms** see *Garland v. Watson*, 74 Ala. 323.

**6. Right of Disaffirmance in Equity Distinguished from Right to Redeem.**—*Askew v. Sanders*, 84 Ala. 356; *Craddock v. American Freehold Land Mortg. Co.*, 88 Ala. 281; *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 163; *American Freehold Land Mortg. Co. v. Turner*, 95 Ala. 272.

**7.** *McCall v. Mash*, 89 Ala. 487, 18 Am. St. Rep. 145.

**9. Trustee—Garnishment.** (See also the title *GARNISHMENT*, vol. 14, p. 731.)—In *Cross v. Brown*, 19 R. I. 249, it was said: "In short, the word *trustee*, as used in the various provisions of the statutes relating to *trustee* process, manifestly denotes the debtor or agent of the principal defendant, *i. e.*, the person against whom an action *ex contractu* at law only might be maintained in favor of the principal defendant, and is not used in its technical sense. It was evidently never intended that the *trustee* process provided for in our statutes should be an equitable proceeding, but strictly a proceeding at law. See *Raymond v. Narragansett Tinware Co.*, 14 R. I. 310. As pertinently stated by the plaintiff's counsel himself, in his brief, 'Trustee process is statutory, and the rights legal rights.'"

**9. Trustee Company.**—In *Perpetual Executors, etc., Assoc. v. Swan*, (1898) A. C. 764, it was said: "The appellants are a *trustee company*—that is to say, a company incorporated by statute and authorized by its special act to undertake the duties of executors, administrators, and trustees for pecuniary reward.

**TRUSTEE PROCESS.** — See the title GARNISHMENT, vol. 14, p. 731. And see TRUSTEE, *ante*, p. .

**TRUSTEE'S SALES.** — See the title TRUSTS AND TRUSTEES, *post*.

**TRUSTOR.** — The term “trustor” is sometimes used to designate the creator, donor, or vendor of a trust.<sup>1</sup>

The powers and obligations of *trustee companies* depend in each case on the special act, and on certain provisions of the Trustee Act, 1890.” See also the title LOAN, TRUST, AND SAFE-DEPOSIT COMPANIES, vol. 19, p. 477.

1. **Trustor.** — Encyc. Dict. And see Hallinan v. Hearst, 133 Cal. 645; Patterson v. Lanning, 62 Neb. 634.

In Stephens v. Clay, 17 Colo. 491, it was said: “Trust deeds given as security and mortgages containing a power of sale vest the legal title in the trustee. The equity of redemption or equitable title remains in the mortgagor or *trustor*, i. e., the owner.”

# TRUSTS AND TRUSTEES.

BY THE EDITORIAL STAFF.

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#### CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *TRUSTS AND TRUSTEES*,  
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For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ASSIGNMENTS FOR THE BENEFIT OF CREDITORS*, vol. 3, p. 1; *CHARITIES AND TRUSTS FOR CHARITABLE USES*, vol. 5, p. 893; *DEEDS*, vol. 9, p. 87; *EQUITY*, vol. 11, p. 145; *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 720; *FRAUD AND DECEIT*, vol. 14, p. 12; *FRAUDULENT SALES AND CONVEYANCES*, vol. 14, p. 210; *IMPLIED TRUSTS*, vol. 15, p. 1119; *INVESTMENTS*, vol. 17, p. 423; *MARRIAGE SETTLEMENTS*, vol. 19, p. 1224; *PERPETUITIES AND TRUSTS FOR ACCUMULATION*, vol. 22, p. 701; *POWERS*, vol. 22, p. 1088; *PRECATORY TRUSTS*, vol. 22, p. 1162; *PURCHASERS FOR VALUE AND WITHOUT NOTICE*, vol. 23, p. 520; *RELIGIOUS SOCIETIES*, vol. 24, p. 323; *REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS*, vol. 24, p. 374; *RESCISSION, CANCELLATION, AND REFORMATION*, vol. 24, p. 604; *SEPARATE PROPERTY OF MARRIED WOMEN*, vol. 25, p. 331; *SPECIFIC PERFORMANCE*, vol. 26, p. 7; *SPENDTHRIFTS AND SPENDTHRIFT TRUSTS*, vol. 26, p. 137; *VENDOR'S LIEN*; *WILLS*.

**I. DEFINITION AND SCOPE OF TITLE — 1. Definition.** — A trust may be defined as an obligation arising out of a confidence reposed in one who has the legal title to property conveyed to him, that he will faithfully apply and deal with such property according to the confidence reposed.<sup>1</sup> A trustee,

**1. Trust Defined.** — 1 Perry on Trusts, § 2; Flint on Trusts, § 1; 2 Bouv. Law Dict., tit. Trusts; Willis on Trusts 2.

*United States.* — Seymour v. Freer, 8 Wall. (U. S.) 202.

*Connecticut.* — Beers v. Lyon, 21 Conn. 604.

*Georgia.* — McCreary v. Gewinner, 103 Ga.

534.  
*Mississippi.* — Sinking Fund Com'rs v. Walker, 6 How. (Miss.) 143, 38 Am. Dec. 433.

*Nebraska.* — Carter v. Gibson, 29 Neb. 324, 26 Am. St. Rep. 381.

*New York.* — Person v. Warren, 14 Barb. (N. Y.) 488; Moore v. Spellman, 5 Den. (N. Y.) 225; Gifford v. Rising, 51 Hun (N. Y.) 3; Munroe v. Crouse, 59 Hun (N. Y.) 248; Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 118; Coster v. Lordillard, 14 Wend. (N. Y.) 333.

*Tennessee.* — Muldoon v. Trewitt, (Tenn. Ch. 1896) 38 S. W. Rep. 112.

*Pennsylvania.* — Coates's Appeal, 2 Pa. St. 129.

*Virginia.* — Com. v. Martin, 5 Munf. (Va.) 143.

A trust is a relation between two persons, by virtue of which one of them (the trustee) holds property for the benefit of the other (the *cestui que trust*). Corby v. Corby, 85 Mo. 371.

A trust exists where the legal interest is in one person, and the equitable interest in another. Wallace v. Wainwright, 87 Pa. St. 263; Chaffees v. Risk, 24 Pa. St. 432.

A trust implies two estates or interests, — one equitable and one legal; one person as trustee holding the legal title, while another is *cestui que trust*. Hospes v. Northwestern Mfg. etc., Co., 48 Minn. 174, 31 Am. St. Rep. 637.

**Story's Definition.** — "A trust in the most enlarged sense in which that term is used in English jurisprudence may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof." 2 Story Eq., § 964; Burnet v. Bookstaver, 10 Hun (N. Y.) 481.

therefore, is one who holds property in trust.<sup>1</sup>

**2. Scope of Title.**—Trusts, in the broadest sense of the above definition, embrace not only technical trusts but also obligations arising from numerous fiduciary relationships, such as those occupied by executors, administrators, guardians, bailees, factors, agents, assignees, etc. Trusts of the latter nature are treated in other parts of this work under their appropriate titles, and accordingly this title will be confined to a discussion of technical trusts alone. Moreover, all trusts are separated by an important line of division into two great classes, known as express trusts and implied trusts. Express trusts are those which are created by the direct and positive acts of the parties, manifested by some instrument in writing, whether by deed, will, or otherwise.<sup>2</sup> Implied trusts are those which are deducible from the transaction as a matter of clear intention, but not found in the words of the parties, or which are superinduced upon the transaction by operation of law as matter of equity, independent of the particular intention of the parties.<sup>3</sup> Implied trusts, which

**Lord Coke's Definition of a use** has been considered an exact definition of a trust, viz.: "A confidence reposed in some other, not issuing out of the land but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which *cestui que use* has no remedy but by subpoena in chancery." 1 Lewin on Trusts 13; 1 Perry on Trusts, § 13; Farmers' L. & T. Co. v. Carroll, 5 Barb. (N. Y.) 613.

**Trusts Cognizable Only in Equity.**—Trusts, in a strict and technical sense, are known only to equity and fall within the peculiar and exclusive jurisdiction of a court of equity. Harris v. Calvert, 2 Kan. App. 749; Wren v. Gayden, 1 How. (Miss.) 365; Yeo v. Mercereau, 18 N. J. L. 390.

**Power in Trust.**—A power in trust is to be understood in contradistinction to an estate in trust. The former is a mere authority or right to limit a use, while the latter is an estate or interest in the subject. Selden v. Vermilyea, 1 Barb. (N. Y.) 58; Farmers' L. & T. Co. v. Carroll, 5 Barb. (N. Y.) 652; Sterrick v. Dickinson, 9 Barb. (N. Y.) 516; Fellows v. Heermans, 4 Lans. (N. Y.) 256.

**A General Power Is in Trust** when any person or class of persons, other than the grantee of such power, is designated as entitled to the proceeds or any portion of the proceeds, or other benefits to result from the alienation. Cutting v. Cutting, 20 Hun (N. Y.) 360; Syracuse Sav. Bank v. Porter, 36 Hun (N. Y.) 168; Kinnier v. Rogers, 42 N. Y. 531; Delaney v. McCormack, 88 N. Y. 174; Dana v. Murray, 122 N. Y. 604; Sweeney v. Warren, 127 N. Y. 426, 24 Am. St. Rep. 468.

**1. Trustee Defined.**—Taylor v. Davis, 110 U. S. 330; Rowe v. Rand, 111 Ind. 206; Schee v. La Grange, 78 Iowa 101; State v. Irons, 35 N. J. L. 464; State v. Grover, 37 N. J. L. 174; Ogden City St. R. Co. v. Wright, 31 Oregon 150.

"A trustee, in the widest meaning of the term, may be defined to be a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another." Hill on Trustees 41; Emmert v. De Long, 12 Kan. 67; Truesdale v. Philadelphia Trust, etc., Co., 63 Minn. 49; Burnet v. Bookstaver, 10 Hun (N. Y.) 481.

**Trustees de Son Tort** are those who of their own

authority enter into the possession, or assume the management, of property which belongs beneficially to others. 1 Perry on Trusts, § 245; Houston v. Farris, 93 Ala. 587; Penn v. Fogler, 182 Ill. 76; In re Mitchell, 74 Vt. 186.

**Distinction Between Trustee and Legatee Charged with Trust Duties.**—Perry v. Drury, 56 Iowa 60.

**2. Express Trust Defined.**—2 Story Eq. Jur., § 980; 1 Perry on Trusts, § 24; Law of Trusts (Tif. & Bul.) 11; Flint on Trusts, § 5; Russell v. Peyton, 4 Ill. App. 473; Yokem v. Hicks, 93 Ill. App. 667; Harris v. Calvert, 2 Kan. App. 749; Lefferty v. Turley, 3 Sneed (Tenn.) 171; Guntert v. Guntert, (Tenn. Ch. 1896) 37 S. W. Rep. 894; Thompson v. Whitaker Iron Co., 41 W. Va. 578; Tennant v. Tennant, 43 W. Va. 555.

**An Express Use** is where the use or interest is openly expressed or declared between the parties in the creation of the estate whereunto the use is annexed. Van Dyke v. Johns, 1 Del. Ch. 106.

**Trustee of Express Trust.**—By the statutes of several of the states, the trustee of an express trust is defined as "a person with whom or in whose name a contract is made for the benefit of another." Heavenridge v. Mondy, 34 Ind. 28; Northwestern Conference v. Myers, 36 Ind. 375; Davis v. Barton, 130 Ind. 399; Lomme v. Sweeney, 1 Mont. 584; Brown v. Cherry, 56 Barb. (N. Y.) 635; Hanlon v. Metropolitan L. Ins. Co., (C. Pl. Gen. Tr.) 9 Misc. (N. Y.) 70; Considerant v. Brisbane, 22 N. Y. 389; Hallahan v. Herbert, 57 N. Y. 409; Waterman v. Chicago, etc., R. Co., 61 Wis. 464, 50 Am. Rep. 145; Platt v. Iron Exch. Bank, 83 Wis. 358. See also the title TRUSTS AND TRUSTEES, 22 ENCYC. OF PL. AND PR. 167 *et seq.*

**Express Trust Becoming Also Resulting Trust.**—Where an express trust, relating entirely to personal property, is made to affect real estate by the act of the trustee, it becomes also a resulting trust, but its character as an express trust is not thereby changed. Roach v. Caraffa, 85 Cal. 436.

**3. Express and Implied Trusts Distinguished.**—2 Story's Eq. Jur., § 980; 1 Pomeroy Eq. Jur., § 152; Walden v. Skinner, 101 U. S. 577; Creswell v. Jones, 68 Ala. 420; McCarthy v. McCarthy, 74 Ala. 546; Caldwell v. Matthewson, 57 Kan. 258; Wilson v. Welles, 79 Minn. 53;

include resulting and constructive trusts, have been treated elsewhere,<sup>1</sup> as have also those so-called implied trusts known as precatory trusts.<sup>2</sup> Under this title, therefore, it is proposed to deal only with express as distinguished from implied trusts.

**II. ORIGIN AND DEVELOPMENT — *Fidei Commissa*.** — Trusts existed in the Roman law under the name of *fidei commissa*. They were introduced by testators for the purpose of avoiding the municipal law which disabled certain persons from being heirs or legatees. The inheritance or legacy was given to a person competent to take, in trust, for the real object of the testator's bounty. Being sanctioned and favored by several of the Roman emperors, these trusts rapidly increased in number, and a special equity jurisdiction was finally created to enforce their performance.<sup>3</sup>

**Uses.** — It is generally believed that the English notion of uses was borrowed from the *fidei commissa* of the Romans,<sup>4</sup> though it is also claimed to have been of native origin.<sup>5</sup> But in either event, the system was inaugurated in England near the close of the reign of Edward III. by the ecclesiastics, who attempted to evade the statutes of mortmain by obtaining grants of lands to the use of, instead of directly to, their religious houses.<sup>6</sup> Thus, an ancient use was "a mere confidence in a friend, to whom the estate was conveyed by the owner without consideration, to dispose of it upon trusts designated at the time, or to be afterwards appointed by the real owner. The trustee was, to all intents and purposes, the real owner of the estate at law, and the *cestui que use* had only a confidence or trust, for which he had no remedy at the common law."<sup>7</sup> But the clerical chancellors deemed such uses or trusts to be binding in conscience and assumed the jurisdiction of compelling their execution in the court of chancery.<sup>8</sup> This evasion of the common law was met and suppressed by the statute of 15 Richard II., c. 5, embracing uses within the purview of the statutes of mortmain. Then uses were applied to save lands from the effects of attainders, and gradually to a variety of purposes in the business of civil life, until they grew up into a refined and regular system.<sup>9</sup>

**Statute of Uses.** — The abuses which crept into the system of uses, however, finally led to the enactment of the statute of 27 Hen. VIII., c. 10, commonly called the statute of uses, and providing as follows: "When any person shall be seized of lands, etc., to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seized or possessed of the land, etc., of and in the like estates as they have in the use, trust, or confidence; and that the estate of the person so seized to uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition, as they had before in the use."<sup>10</sup> The intent of this statute was to sweep away the system of uses and to substitute

Baldwin v. Campfield, 8 N. J. Eq. 891; Brown v. Cherry, 56 Barb. (N. Y.) 635; Johnson v. Fleet, 14 Wend. (N. Y.) 176; Currence v. Ward, 43 W. Va. 367.

1. See the title IMPLIED TRUSTS, vol. 15, p. 1119.

2. See the title PRECATORY TRUSTS, vol. 22, p. 1162.

3. 4 Kent Com. 289; 2 Bl. Com. 327; 2 Pom. Eq. Jur., §§ 976-7; 2 Story Eq. Jur., § 966.

4. 4 Kent Com. 290; 2 Bl. Com. 328; Carney v. Kain, 40 W. Va. 809; Farmers' L. & T. Co. v. Carroll, 5 Barb. (N. Y.) 613; 1 Cruise Dig. 393; 2 Story Eq. Jur., §§ 965-6; 2 Pom. Eq. Jur. § 976; Tiedeman Real Prop., § 438; 2 Washb. Real Prop. 384-386; 1 Spence Eq. Jur. 439-442.

5. Early English Equity, by Judge O. W. Holmes, 1 Law Quar. Rev. 162; The Origin of Uses, by Prof. F. W. Maitland, 8 Harv. L. Rev. 127; 2 Pollock & M. Hist. Eng. Law (2d ed.) 228 *et seq.* See also the title REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, vol. 24, p. 426.

6. Henderson v. Adams, 15 Utah 30; Farmers' L. & T. Co. v. Carroll, 5 Barb. (N. Y.) 613; 2 Bl. Com. 328; 4 Kent Com. 290.

7. 4 Kent Com. 289; Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762; Henderson v. Adams, 15 Utah 30.

8. 2 Bl. Com. 328.

9. 4 Kent Com. 290.

10. 2 Bl. Com. 332.



a simple method of transferring title to lands. The statute "executes the use," *i. e.*, it conveys the possession to the use and transfers the use into possession, thereby making the *cestui que use* the complete owner of the lands and tenements as well at law as in equity.<sup>1</sup> Three things are essential to the effectual operation of the statute, *viz.*, a person seized to a use, a *cestui que use*, and a use *in esse*, and when these three things concur, the use is said to be executed.<sup>2</sup>

**Kinds of Uses.** — The equitable doctrine of uses was, by the statute, transferred to courts of law, but the judges of those courts soon departed from the rigor and simplicity of the rules of the common law, and allowed a more minute and complex construction upon conveyances to uses than upon others.<sup>3</sup> And from their adjudications in particular cases there came to be known and recognized various kinds of uses, such as springing,<sup>4</sup> shifting or secondary,<sup>5</sup> future or contingent,<sup>6</sup> resulting,<sup>7</sup> and revocable uses.<sup>8</sup>

**Trusts.** — By these equitable decisions in the courts of law the power of chancery over real property was greatly curtailed, as was the intention of the statute of uses. But that power was speedily not only restored but actually increased through the inability of the law judges to depart from a technical construction of the statute in other particulars. It was held, first, that "no use could be limited on a use;"<sup>9</sup> again, that the statute did not extend to terms of years or other chattel interests, of which the termor was not *seized*, in the language of the statute, but only *possessed*;<sup>10</sup> and lastly, that where lands were given to one and his heirs, in trust to receive and pay over the profits to another, this use was not executed by the statute, as the land must necessarily remain in the trustee to enable him to perform the trust.<sup>11</sup> Thus, there were declared to be some uses to which the statute did not transfer the possession, but which still continued separate and distinct from the legal estate, and these were taken notice of and supported by the Court of Chancery,

1. 2 Bl. Com. 333; *Robinson v. Grey*, 9 East 1; *Doe v. Collier*, 11 East 377; *Right v. Smith*, 12 East 455; *Williams v. Waters*, 14 M. & W. 166; *Broughton v. Langley*, 2 Salk. 679; *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762; *Henderson v. Adams*, 15 Utah 30. See also *Newhall v. Wheeler*, 7 Mass. 189; *Richardson v. Stodder*, 100 Mass. 528; *Carr v. Richardson*, 157 Mass. 576.

2. *Hutchins v. Heywood*, 50 N. H. 491; *Moore v. Shultz*, 13 Pa. St. 98, 53 Am. Dec. 446; *Williman v. Holmes*, 4 Rich. Eq. (S. Car.) 475.

3. 4 Kent Com. 294; 2 Bl. Com. 334.

4. A **Springing Use** is one limited to arise on a future event, where no preceding estate is limited, and which does not take effect in derogation of any preceding interest. Until the event happens, the use results to the grantor, who has a determinable fee. 4 Kent Com. 298; *Bouv. Inst.*, vol. 1. No. 1893; *Martindale Law of Conv.*, p. 105; *Gilbert Uses* 153, note. See also the title **REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS**, vol. 24, p. 428.

5. A **Shifting or Secondary Use** is one taking effect in derogation of some other estate, and is either limited by the deed creating it, or authorized to be created by some person named in the deed. 1 *Bouv. Inst.* No. 1894; *Gilbert Uses* 152, note; 4 Kent Com. 206; 2 *Minor Inst.* 816. See also *Spencer v. Marlborough*, 3 Bro. P. C. (Tomb. ed.) 232. And see the title **REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS**, vol. 24, p. 428.

6. A **Future or Contingent Use** is one limited to

take effect as a remainder. 4 Kent Com. 298; 2 *Minor Inst.* (3d ed.) \*817; *Gilbert Uses* 164, note. See also the title **REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS**, vol. 24, p. 428.

7. A **Resulting Use** is a use, limited by deed, which expires, or cannot vest, and returns to him who raised it, after such expiration, or during such impossibility. 2 Bl. Com. 335; 4 Kent Com. 299.

8. A **Revocable Use** is one which may be revoked at any future time, the grantor having reserved to himself such a power at the time of the creation of the estate. 2 Bl. Com. 335; 2 *Minor Inst.* (3d ed.) \*817; *Gilbert Uses* 158, note 5, 313.

9. 2 Bl. Com. 35; 4 Kent Com. 301; *Tyrrel's Case*, 2 Dyer 155a; *Hopkins v. Hopkins*, 1 Atk. 591; *Whetstone v. Sts. Bury*, 2 P. Wms. 146; *Doe v. Passingham*, 6 B. & C. 305, 13 E. C. L. 180; *Croxall v. Shererd*, 5 Wall. (U. S.) 268; *Hutchins v. Heywood*, 50 N. H. 491; *Johnson v. Fleet*, 14 Wend. (N. Y.) 180. See also *Calvert v. Eden*, 2 Har. & M. (Md.) 279.

10. 2 Bl. Com. 336; 4 Kent Com. 302; *Doe v. Routledge*, 2 Cowp. 709; *Anonymous*, *Dyer* 369a.

11. 2 Bl. Com. 336; *Jones v. Say and Seal*, 1 Eq. Cas. Abr. 383, par. 4; *Doe v. Homfray*, 6 Ad. & El. 206, 33 E. C. L. 55; *Garth v. Baldwin*, 2 Ves. 646; *Barker v. Greenwood*, 4 M. & W. 429; *Doe v. Edlin*, 4 Ad. & El. 582, 31 E. C. L. 143; *Shapland v. Smith*, 1 Bro. C. C. 75; *Stanley v. Lennard*, 1 Eden 87; *Exeter v. Odiorne*, 1 N. H. 236; *Upham v. Varney*, 15 N. H. 462; *Ash-*

as trusts in equity, which in conscience ought to be performed.<sup>1</sup> From this source has the modern system of trusts arisen, and a trust, therefore, may be said to be a use not executed by the statute of uses; or, as has been well remarked, trusts since the statute are what uses were before its passage.<sup>2</sup>

**Uses in the United States.** — In many of the United States, the statute of uses is so far recognized as the law of the state, either by judicial decision, as part of the common law, or by express enactment of the main features of the statute, that where the trust is merely dry or passive, the legal title will immediately vest in the *cestui que trust*, whereas if any active duty is imposed upon the trustee, the statute will not transfer the legal title to the *cestui*.<sup>3</sup> In other states, either the statute has never been in force,<sup>4</sup> or all uses and

hurst *v.* Given, 5 W. & S. (Pa.) 328; Sprague *v.* Sprague, 13 R. I. 701.

1. 2 Bl. Com. 336; 1 Cruise Dig. 411; Burgess *v.* Wheate, 1 W. Bl. 123; Ware *v.* Richardson, 3 Md. 547, 56 Am. Dec. 762; Farmers' L. & T. Co. *v.* Carroll, 5 Barb. (N. Y.) 613. See also Hopkins *v.* Hopkins, 1 Atk. 591.

2. 2 Bl. Com. 327; 1 Cruise Dig. 411; Altham *v.* Anglesey, Gilb. Eq. 17; Ware *v.* Richardson, 3 Md. 505, 56 Am. Dec. 762; Farmers' L. & T. Co. *v.* Carroll, 5 Barb. (N. Y.) 613; Fisher *v.* Fields, 10 Johns. (N. Y.) 505; Moore *v.* Spellman, 5 Den. (N. Y.) 225; Williams *v.* First Presb. Soc., 1 Ohio St. 499; Henderson *v.* Adams, 15 Utah 30; Nease *v.* Capehart, 8 W. Va. 107. See also Gamble *v.* Rees, 6 U. C. Q. B. 396; Hutchins *v.* Heywood, 50 N. H. 491.

3. *Alabama.* — Simmons *v.* Augustin, 3 Port. (Ala.) 69; Carter *v.* Balfour, 19 Ala. 829; Horton *v.* Sledge, 29 Ala. 478.

*Connecticut.* — Bacon *v.* Taylor, Kirby (Conn.) 368; Barrett *v.* French, 1 Conn. 354, 6 Am. Dec. 241; Bryan *v.* Bradley, 16 Conn. 474.

*Georgia.* — Bowman *v.* Lang, 26 Ga. 142; Adams *v.* Guerard, 29 Ga. 651, 76 Am. Dec. 624; Knorr *v.* Raymond, 73 Ga. 749.

*Illinois.* — Witham *v.* Brooner, 63 Ill. 344; Bennett *v.* Bennett, 66 Ill. App. 28; Kellogg *v.* Hale, 108 Ill. 164; Harris *v.* Ferguy, 207 Ill. 534.

*Indiana.* — Linville *v.* Golding, 11 Ind. 374; Nelson *v.* Davis, 35 Ind. 474; Adams *v.* La Rose, 75 Ind. 471; Gaylord *v.* Dodge, 31 Ind. 41.

*Iowa.* — Pierson *v.* Armstrong, 1 Iowa 282, 63 Kan. Dec. 440.

*Kansas.* — Bayer *v.* Cockrill, 3 Kan. 292.

*Maine.* — Shapleigh *v.* Pilsbury, 1 Me. 271; Emery *v.* Chase, 5 Me. 232; Marden *v.* Chase, 32 Me. 329; Blake *v.* Collins, 69 Me. 156.

*Maryland.* — Calvert *v.* Eden, 2 Har. & M. (Md.) 279; Reid *v.* Gordon, 35 Md. 183; Brown *v.* Renshaw, 57 Md. 67; Matthews *v.* Ward, 10 Gill & J. (Md.) 449; Leonard *v.* Diamond, 31 Md. 541; Ware *v.* Richardson, 3 Md. 505, 56 Am. Dec. 762; Waters *v.* Tazewell, 6 Md. 301; Cheney *v.* Watkins, 1 Har. & J. (Md.) 527, 2 Am. Dec. 530; West *v.* Biscoe, 6 Har. & J. (Md.) 465.

*Massachusetts.* — Cox *v.* Edwards, 14 Mass. 492; Chenery *v.* Stevens, 97 Mass. 85; Richardson *v.* Stodder, 100 Mass. 528; Marshall *v.* Fisk, 6 Mass. 24, 4 Am. Dec. 76; Wallis *v.* Wallis, 4 Mass. 135, 3 Am. Dec. 210; Johnson *v.* Johnson, 7 Allen (Mass.) 106, 83 Am. Dec. 676; Parker *v.* Nichols, 7 Pick. (Mass.) 111; Thatcher *v.* Omans, 3 Pick. (Mass.) 522; New-

hall *v.* Wheeler, 7 Mass. 189. See also Chapin *v.* First Universalist Soc., 8 Gray (Mass.) 580.

*Missouri.* — Guest *v.* Farley, 19 Mo. 147; Webb *v.* Hayden, 166 Mo. 48.

*New Hampshire.* — Exeter *v.* Odiorne, 1 N. H. 232; Chamberlain *v.* Crane, 1 N. H. 64; French *v.* French, 3 N. H. 234; Pritchard *v.* Brown, 4 N. H. 397, 17 Am. Dec. 431; Dennett *v.* Dennett, 40 N. H. 498; Hayes *v.* Tabor, 41 N. H. 526; Rollins *v.* Riley, 44 N. H. 11; Wilcox *v.* Wheeler, 47 N. H. 490; Hutchins *v.* Heywood, 50 N. H. 491.

*New Jersey.* — Den *v.* Crawford, 8 N. J. L. 90; Price *v.* Sisson, 13 N. J. Eq. 168.

*North Carolina.* — In this state there exists a statute similar to the present *Virginia* statute. Springs *v.* Hanks, 5 Ired. L. (27 N. Car.) 30.

*Pennsylvania.* — Report of Judges, 3 Binn. (Pa.) 618; Okison *v.* Patterson, 1 W. & S. (Pa.) 395; Wilt *v.* Franklin, 1 Binn. (Pa.) 502, 2 Am. Dec. 474; Ashhurst *v.* Given, 5 W. & S. (Pa.) 323; Kay *v.* Scates, 37 Pa. St. 31, 78 Am. Dec. 399; Barnett's Appeal, 46 Pa. St. 392, 86 Am. Dec. 502.

*Rhode Island.* — Nightingale *v.* Hidden, 7 R. I. 115; Sprague *v.* Sprague, 13 R. I. 701.

*South Carolina.* — Jenney *v.* Laurens, 1 Spears L. (S. Car.) 356; McNish *v.* Guerard, 4 Strobh. Eq. (S. Car.) 74; Williman *v.* Holmes, 4 Rich. Eq. (S. Car.) 475; Howard *v.* Henderson, 18 S. Car. 184; Ramsay *v.* Marsh, 2 McCord L. (S. Car.) 252, 13 Am. Dec. 717; Henderson *v.* Griffin, 5 Pet. (U. S.) 151; Posey *v.* Cook, 1 Hill L. (S. Car.) 413.

*Utah.* — Henderson *v.* Adams, 15 Utah 30.

*Virginia.* — The provisions of the Revised Code of 1849, p. 502, only execute the possession to the use in cases of deeds of bargain and sale, of lease and release, and of covenants to stand seized; so if a use is raised by any other form of conveyance, as by devise, it remains, as before the statute of uses, a mere equitable interest not cognizable at law. Bass *v.* Scott, 2 Leigh (Va.) 359; Rowlett *v.* Daniel, 4 Munf. (Va.) 473; Jones *v.* Tatum, 19 Gratt. (Va.) 733. See also Roy *v.* Garnett, 2 Wash. (Va.) 9.

4. *Nebraska.* — Farmers, etc., Ins. Co. *v.* Jensen, 58 Neb. 522.

*Ohio.* — Helfenstine *v.* Garrard, 7 Ohio (pt. i.) 275; Williams *v.* First Presb. Soc., 1 Ohio St. 495. Compare Thompson *v.* Gibson, 2 Ohio 339.

*Tennessee.* — In Jourofmon *v.* Massengill, 86 Tenn. 91, it was said: "It has never been determined whether this statute was in force in this state, and this for the reason, probably,

trusts have been abolished except such as are expressly authorized by statute.<sup>1</sup>

**Substitutions and Fidei Commissa in Louisiana.** — Under the civil law as prevailing in Louisiana a substitution is a gift or bequest of property to one or more persons who are to be succeeded in the enjoyment thereof by other persons designated by the donor or testator. A *fidei commissum* is a gift or bequest of property to one person to be held for and delivered to another. In the substitution, the successive donees or legatees each have an interest in the property or an advantage to be derived from it. The *fidei commissum* is a mandate or trust with no interest conferred on the donee or legatee, who is charged only to deliver. "Every substitution is a *fidei commissum*, but every *fidei commissum* is not a substitution."<sup>2</sup> By the civil code of Louisiana, substitutions and *fidei commissa* are and remain prohibited. "Every disposition by which the donee, the heir, or legatee is charged to preserve for or to return a thing to a third person is null, even with regard to the donee, the instituted heir, or the legatee."<sup>3</sup> The code contains but two modifications of this prohibition. It provides that what was termed in the civil law the vulgar substitution, by which a third person is called to take the gift or legacy in case the donee or legatee does not take it, should not be considered a substitution, and should be valid;<sup>4</sup> and that a disposition *inter vivos* or *causa mortis*, by which the usufruct is given to one and the naked property to another, should be received in the same light.<sup>5</sup> The code also declares that illegal impossible conditions, and those contrary to morals, shall be reputed not written.<sup>6</sup> The effect of these statutory provisions is that modern express trusts, which are *fidei commissa*, by whatever mode created, or proposed to be executed, are forbidden in Louisiana. If the intention of the donor or testator is seen to be that the ownership of the property shall not vest immediately upon the making of the donation, or upon his death, a trust is created and the disposition is invalid.<sup>7</sup> But the donor or testator may divide the ownership by giving to one the usufruct and to another the immediate naked ownership of the property, in which case the statutory prohibition does not apply.<sup>8</sup>

that, without regard to the statute, this court has adopted the principle that a trustee takes exactly that quantity of interest which the purposes of the trust require." See also *Ellis v. Fisher, 3 Sneed (Tenn.) 231*, 65 Am. Dec. 52; *Hooberry v. Harding, 10 Lea (Tenn.) 392*; *Temple v. Ferguson, (Tenn. 1903) 72 S. W. Rep. 455*; *Hart v. Bayliss, 97 Tenn. 72*; *Harding v. St. Louis L. Ins. Co., 2 Tenn. Cn. 465*.

*Vermont.* — *Gorham v. Daniels, 23 Vt. 602*; *Sherman v. Dodge, 28 Vt. 26*. Compare Society, etc. *v. Hartland, 2 Paine (U. S.) 536*.

1. *Michigan.* — *Loring v. Palmer, 118 U. S. 343*. Compare *Trask v. Green, 9 Mich. 358*; *Ready v. Kearsley, 14 Mich. 216*.

*New York.* — Real Property Law, § 70 *et seq.*; *Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290*. But the statute was formerly in force in this state. *Jackson v. Cadwell, 1 Cow. (N. Y.) 622*; *Jackson v. Myers, 3 Johns. (N. Y.) 388, 3 Am. Dec. 504*; *Jackson v. Fish, 10 Johns. (N. Y.) 456*; *Dyett v. Central Trust Co., 140 N. Y. 54*; *Jackson v. Cary, 16 Johns. (N. Y.) 302*; *Reformed Protestant Dutch Church v. Veeder, 4 Wend. (N. Y.) 494*; *Vanderheyden v. Crandall, 2 Den. (N. Y.) 9*; *Welch v. Allen, 21 Wend. (N. Y.) 147*; *Vander Volgen v. Yates, 3 Barb. Ch. (N. Y.) 242*.

*Wisconsin.* — *Riehl v. Bingenheimer, 28 Wis. 84*; *Goodrich v. Milwaukee, 24 Wis. 422*.

2. *Ducloslange v. Ross, 3 La. Ann. 432*; *McCan's Succession, 48 La. Ann. 145*.

3. Rev. Civ. Code La. (1900), art. 1520.

4. Rev. Civ. Code La. (1900), art. 1521.

5. Rev. Civ. Code La. (1900), art. 1522.

6. Rev. Civ. Code La. (1900), art. 1519.

7. **Express Trusts Prohibited.** — *Ducloslange v. Ross, 3 La. Ann. 432*; *Henderson v. Rost, 5 La. Ann. 460*; *Franklin's Succession, 7 La. Ann. 395*; *Gates v. Renfro, 7 La. Ann. 569*; *State v. McDonogh, 8 La. Ann. 171*; *Partee v. Hill, 12 La. Ann. 767*; *Clague v. Clague, 13 La. 1*; *Perin v. McMicken, 15 La. Ann. 154*; *Cochrane's Succession, 29 La. Ann. 232*; *Foucher's Succession, 30 La. Ann. 1020*; *Steven's Succession, 36 La. Ann. 755*; *Stephen's Succession, 45 La. Ann. 962*; *McCan's Succession, 48 La. Ann. 145*; *Beauregard's Succession, 49 La. Ann. 1176*; *Kernan's Succession, 52 La. Ann. 51*; *Ward's Succession, 110 La. 75*. Compare *Macias's Succession, 31 La. Ann. 127*; *Strauss's Succession, 38 La. Ann. 55*.

**Foreign Trusts** are not recognized by the laws of Louisiana. *Perin v. McMicken, 15 La. Ann. 154*.

**Marriage Settlements** of other states are not valid when creating a *fidei commissum*. *Sherrod v. Callegan, 9 La. Ann. 510*.

8. **Division of Ownership Permitted.** — *Ducloslange's Succession, 4 Rob. (La.) 409*; *Roy v. Latiolas, 5 La. Ann. 553*; *Barker's Succession, 10 La. Ann. 28*; *Law's Succession, 31 La. Ann. 456*; *Shaffer's Succession, 50 La. Ann. 617*; *Ward's Succession, 110 La. 75*.



Moreover the code does not abolish naked trusts, to be executed immediately,<sup>1</sup> or the trusts of executors in respect to their duties as such,<sup>2</sup> nor does it reach or affect trusts arising by operation of law and known as implied trusts.<sup>3</sup>

**III. CLASSIFICATION OF TRUSTS — 1. Simple and Special.** — Trusts may be first classified as simple, or dry, or naked, or passive, and special or active. A simple trust is where the property is vested in one person in trust for another, and the nature of the trust, not being qualified by the settlor, is left to the construction of the law. A special trust is where the machinery of a trustee is introduced for the execution of some purpose particularly pointed out, and the trustee is not, as in a simple trust, a mere passive depository of the estate, but is called upon to exert himself in the execution of the settlor's intention.<sup>4</sup> As we have heretofore seen, simple trusts are, in most jurisdictions, either expressly prohibited by statute or immediately executed by the statute of uses.<sup>5</sup>

**Discretionary and Ministerial.** — Active trusts are again classified as discretionary, and ministerial or directory. A discretionary trust is one which cannot be duly administered without the application of a certain degree of prudence and judgment. A ministerial trust is one which calls for the exercise of no discretion on the part of the trustee.<sup>6</sup> There is also a mixed trust and power, as where the settlor outlines the trust, but leaves the details to be settled and carried into effect according to the judgment of the trustee. The exercise of such a power is said to be imperative, while the mode of its execution is discretionary.<sup>7</sup> This latter kind of trust is to be distinguished from the ordinary trust with power annexed, in which case the trust is complete in itself, and the power is a simple addition to be exercised or not within the discretion of the trustee.<sup>8</sup>

**2. Legal and Illegal.** — Legal trusts are such as are created for some honest and lawful purpose. Illegal trusts are those created for the attainment of some end contravening the policy of the law.<sup>9</sup>

**1. Naked Trusts Not Abolished.** — Milne v. Milne, 17 La. 57; Cochrane's Succession, 29 La. Ann. 232; McCan's Succession, 48 La. Ann. 161.

**2. Trusts of Executors Not Affected.** — McCan's Succession, 48 La. Ann. 161.

**3. Implied Trusts Not Affected.** — Gaines v. Chew, 2 How. (U. S.) 619.

**4. Simple and Special.** — Flint on Trusts, § 3; 1 Lewin on Trusts 18; 1 Perry on Trusts, § 18.

*England.* — Cole v. Wade, 16 Ves. Jr. 27.

*United States.* — Bowen v. Chase, 94 U. S. 819.

*Alabama.* — Simmons v. Richardson, 107 Ala. 697.

*Illinois.* — Kirkland v. Cox, 94 Ill. 400; Kellogg v. Hale, 108 Ala. 164; Hart v. Seymour, 147 Ill. 598; Silverman v. Kristufek, 162 Ill. 222; Harris v. Ferguy, 207 Ill. 534.

*Indiana.* — Wall St. M. E. Church v. Johnson, 140 Ind. 445. See Adams v. La Rose, 75 Ind. 471.

*Minnesota.* — Thompson v. Conant, 52 Minn. 208.

*Missouri.* — Webb v. Hayden, 166 Mo. 39.

*New Jersey.* — Cooper v. Cooper, 36 N. J. Eq. 121; Story v. Palmer, 46 N. J. Eq. 1.

*New York.* — Dyett v. Central Trust Co., 140 N. Y. 54; Steere v. Steere, 5 Johns. Ch. (N. Y.) 1, 9 Am. Dec. 256.

*Pennsylvania.* — Kay v. Scates, 37 Pa. St. 31, 78 Am. Dec. 399; Dodson v. Ball, 60 Pa. St. 492, 100 Am. Dec. 588; Earp's Appeal, 75 Pa. St. 119; Phillips's Appeal, 80 Pa. St. 472;

Philadelphia Trust, etc., Co.'s Appeal, 93 Pa. St. 209; Fisher v. Wister, 154 Pa. St. 65; Forney's Estate, 161 Pa. St. 209; Butler v. Butler, 9 Phila. (Pa.) 269, 30 Leg. Int. (Pa.) 45; Keene's Estate, 9 Phila. (Pa.) 339, 30 Leg. Int. (Pa.) 404; McCreary v. Bomberger, 11 Pa. Co. Ct. 68.

*Tennessee.* — Turley v. Massengill, 7 Lea (Tenn.) 353; Hart v. Bayliss, 97 Tenn. 72; Temple v. Ferguson, (Tenn. 1903) 72 S. W. Rep. 455; Muldoon v. Treshitt, (Tenn. Ch. 1896) 38 S. W. Rep. 109.

*Vermont.* — Atkins v. Atkins, 70 Vt. 565.

*Wisconsin.* — Goodrich v. Milwaukee, 24 Wis. 422.

**A Bare or Naked Trustee** is one who has no active duties to perform, it being immaterial whether or not he has any beneficial interest in the trust property. *In re Cunningham*, (1891) 2 Ch. 567.

**5. See supra**, this title, II. *Origin and Development*.

**6. Discretionary and Ministerial.** — Flint on Trusts, § 3; 1 Lewin on Trusts 18; 1 Perry on Trusts, § 19; Atty.-Gen. v. Gleg, 1 Atk. 356; Hibbard v. Lamb, Ambl. 309; Atty.-Gen. v. Scott, 1 Ves. 417; Gower v. Mainwaring, 2 Ves. 89; Deaderick v. Cantrell, 10 Yerg. (Tenn.) 263, 31 Am. Dec. 576.

**7. Mixed Trust and Power.** — 1 Perry on Trusts, § 20; 1 Lewin on Trusts 19; Flint on Trusts, § 3.

**8. Trust with Power Annexed.** — 1 Perry on Trusts, § 20; 1 Lewin on Trusts 19.

**9. Legal and Illegal.** — 1 Lewin on Trusts 19;

3. **Public and Private.** — A public, or charitable, trust is one constituted for the benefit of the public at large or of some considerable portion of it answering a particular description. A private trust concerns only individuals or families and is limited in duration.<sup>1</sup>

4. **Executed and Executory.** — The distinction between executed and executory trusts rests upon the manner in which the trust is declared. Where the limitations of the trust are fully and perfectly declared, it is regarded as an executed trust; where the limitations are imperfectly declared, and the intent of the creator is expressed in general terms, leaving the manner in which his intent is to be carried into effect substantially in the discretion of trustees, the trust is an executory trust.<sup>2</sup>

5. **Voluntary and for Value.** — A voluntary trust is one created in consideration of a mere moral obligation or natural love and affection. A trust for value is one created upon such valuable consideration moving to the settlor as would support a simple contract at law.<sup>3</sup>

**IV. CREATION OF TRUSTS** — 1. **Scope of Section.** — It is designed in this section to treat so far as possible only of the creation of direct or express trusts in accordance with the intention of the parties, and of the manner in which such an intention must be manifested or proved. The circumstances under which the law irrespective of the intention of the parties will impress property with a trust has already been discussed elsewhere.<sup>4</sup>

2. **Requisites of Creation** — *a.* **IN GENERAL.** — For the creation of a valid

1 *Perry on Trusts*, § 21; *Flint on Trusts*, § 4; *Myers v. Little*, 60 Miss. 203; *Servis v. Nelson*, 14 N. J. Eq. 94; *Bettinger v. Bridenbecker*, 63 Barb. (N. Y.) 395; *Sloan v. Birdsall*, 58 Hun (N. Y.) 317. See also the titles *PERPETUITIES AND TRUSTS FOR ACCUMULATION*, vol. 22, p. 701; *CHARITIES AND TRUSTS FOR CHARITABLE USES*, vol. 5, p. 893; *SPENDTHRIFTS AND SPENDTHRIFT TRUSTS*, vol. 26, p. 137.

1. **Public and Private.** — 1 *Lewin on Trusts* 20; 1 *Perry on Trusts*, § 22; *Flint on Trusts*, § 4. See also the title *CHARITIES AND TRUSTS FOR CHARITABLE USES*, vol. 5, p. 293.

2. **Executed and Executory.** — *Flint on Trusts*, § 4; 1 *Lewin on Trusts* 111; 1 *Perry on Trusts*, § 359; *Hill on Trustees* 328; 4 *Kent Com.* 304, 305.

*England.* — *Tatham v. Vernon*, 29 Beav. 604; *Stamford v. Hobart*, 1 Bro. P. C. 288; *Boswell v. Dillon*, Drew. 291; *Rochfort v. Fitzmaurice*, 2 Dr. & War. 1; *Wright v. Pearson*, 1 Eden 119; *Austen v. Taylor*, 1 Eden 366; *Jervoise v. Northumberland*, 1 Jac. & W. 539; *Leonard v. Sussex*, 2 Vern. 526; *Bagshaw v. Spencer*, 1 Ves. 152; *Ellison v. Ellison*, 6 Ves. Jr. 656.

*Canada.* — *Adamson v. Adamson*, 17 Ont. 413; *Cornwall v. Halifax Banking Co.*, 35 N. Bruns. 413.

*United States.* — *Ireland v. Gëraghty*, 15 Fed. Rep. 35.

*Georgia.* — *Wiley v. Smith*, 3 Ga. 551; *Schley v. Lyon*, 6 Ga. 530; *Taylor v. Brown*, 112 Ga. 758.

*Illinois.* — *Nicoll v. Ogden*, 29 Ill. 323, 81 Am. Dec. 311; *Lynn v. Lynn*, 135 Ill. 18; *McCartney v. Ridgway*, 160 Ill. 129; *Yokem v. Hicks*, 93 Ill. App. 667.

*Indiana.* — *Gaylord v. Lafayette*, 115 Ind. 423.

*Kentucky.* — *Berry v. Williamson*, 11 B. Mon. (Ky.) 245.

*New Jersey.* — *Cushing v. Blake*, 30 N. J. Eq. 689; *Mullany v. Mullany*, 4 N. J. Eq. 16,

31 Am. Dec. 238; *Price v. Sisson*, 13 N. J. Eq. 168, affirmed 17 N. J. Eq. 476.

*North Carolina.* — *Saunders v. Edwards*, 2 Jones Eq. (55 N. Car.) 134.

*Ohio.* — *Gilpin v. Williams*, 17 Ohio St. 408.

*Pennsylvania.* — *Dennison v. Gochring*, 7 Pa. St. 175, 47 Am. Dec. 506.

*Rhode Island.* — *Tillinghast v. Coggeshall*, 7 R. I. 383.

*Virginia.* — *Hayes v. Goode*, 7 Leigh (Va.) 478.

*West Virginia.* — *Carney v. Kain*, 40 W. Va. 803.

"All Trusts Are in a Sense Executory, because a trust cannot be executed except by conveyance, and therefore there is always something to be done. But that is not the sense which a court puts upon the term 'executory trust.' A court of equity considers an executory trust as distinguished from a trust executing itself." *Egerton v. Brownlow*, 4 H. L. Cas. 1; *Cushing v. Blake*, 29 N. J. Eq. 399; *Smith's Estate*, 144 Pa. St. 434. See also *Cruise Dig.* 489; *Pomeroy Eq. Jur.*, § 1001.

"The Words 'Executed' and 'Executory' refer rather to the manner and perfection of the creation of the trusts, than to the action of the trustee in administering the property." *Cushing v. Blake*, 29 N. J. Eq. 399.

In *Georgia*, the code declares that a trust is executory when something remains to be done by the trustee, "either to secure the property, to ascertain the objects of the trust, or to distribute according to a specified mode, or some other act, to do which requires him to retain the legal estate." *Thomas v. Crawford*, 57 Ga. 211; *Riggins v. Adair*, 105 Ga. 727.

3. **Voluntary and for Value.** — *Underhill on Trusts*, 11, 13; *Flint on Trusts*, § 4; *Eastwood v. Kenyon*, 11 Ad. & El. 438, 39 E. C. L. 137; *Jefferys v. Jefferys*, Cr. & Ph. 138; *Moore v. Crofton*, 3 J. & La T. 438; *Bowen v. Chase*, 94 U. S. 822; *Lynn v. Lynn*, 135 Ill. 18.

4. See the title *IMPLIED TRUSTS*, vol. 15, p. 1119,

trust, three circumstances must concur: first, a definite subject-matter within the disposal of the settlor; second, a lawful definite object to which the subject-matter is to be devoted; third, clear and unequivocal words or acts, devoting the subject-matter to the object of the trust.<sup>1</sup>

The Word "Trustor" is sometimes used to designate the creator or settlor of a trust.<sup>2</sup>

**b. ACTS OR WORDS NECESSARY.** — The creation of a trust requires no prescribed form of words, and any expression which evinces the settlor's present intention to place his beneficial interest in specified property absolutely beyond his control, for the benefit of some person or object, is enough,<sup>3</sup> and even precatory words, if as a whole the intention appears that they are intended as imperative, will create a valid trust.<sup>4</sup>

**c. SUBJECT-MATTER.** — As a general rule all property, whether real or personal and whether legal or equitable, may be the subject of a trust, provided the policy of the law or some statutory enactment does not prevent the holding of the legal title by one for the benefit of another.<sup>5</sup>

**d. OBJECT OR PURPOSE** — (1) *Must Be Lawful.* — The object of the trust must be legal, for no valid trust can be founded on an interest derived from an illegal contract or established in contravention of the general policy of the law.<sup>6</sup>

(2) *Effect of Partial Illegality.* — Where several trusts, partly legal and partly illegal, are created, and they are independent of each other, so that each is complete in itself and the legal can be separated from the illegal, the illegal trust will be cut off and the legal permitted to stand.<sup>7</sup> But where the

**1. General Requisites of Creation.** — *Malim v. Keighley*, 2 Ves. Jr. 333; *Cruwys v. Colman*, 9 Ves. Jr. 323; *Knight v. Boughton*, 11 Cl. & F. 513; *In re Brooke*, (1898) 1 Ch. 651; *Lines v. Darden*, 5 Fla. 51; *Sinking Fund Com'rs v. Walker*, 6 How. (Miss.) 185; *In re Soulard*, 141 Mo. 642; *Smith's Estate*, 144 Pa. St. 428, 27 Am. St. Rep. 641. See also *Eldridge v. See Yup Co.*, 17 Cal. 44; *Carter v. Gibson*, 29 Neb. 324, 26 Am. St. Rep. 381.

**2. Trustor.** — See for example *Civ. Code Cal.*, § 2221; *Pittman v. Pittman*, 107 N. Car. 159.

**Trustor** is the corresponding term in the law of Scotland. *Cent. Dict.*

**3. Necessary Acts or Words.** — *Colton v. Colton*, 127 U. S. 300; *McCarthy v. McCarthy*, 74 Ala. 546; *McCrary v. Clements*, 95 Ga. 778; *Wadd v. Hazelton*, 137 N. Y. 215, 33 Am. St. Rep. 707; *McCreary v. Gewinner*, 103 Ga. 528; *Norman v. Burnett*, 25 Miss. 183; *Helfenstein's Estate*, 77 Pa. St. 328, 18 Am. Rep. 449; *Smith's Estate*, 144 Pa. St. 428, 27 Am. St. Rep. 641. See also *infra*, this section, 4. *b.* (4) (*d.*); 4. *e.*; 6. *b.*

**As to the Definiteness Required in the words of creation**, see *infra*, this section, 8. *d.*

**4.** See the title **PRECATORY TRUSTS**, vol. 22, p. 1162.

**5.** *Lewin on Trusts* (8th ed.) 47. See *infra*, this title, *The Trust Estate*.

**6. Must Be Lawful.** — *Lewin on Trusts* (8th Eng. ed.) 84, 94; *Hill on Trustees* (4th Am. ed.) 45; *Bettinger v. Bridenbecker*, 63 Barb. (N. Y.) 395; *O'Brien v. Barkley*, (Supm. Ct. Gen. T.) 28 N. Y. Supp. 1049; *Quaker Soc. of Contentnea v. Dickenson*, 1 Dev. L. (12 N. Car.) 189.

**Presumption Is Against Invalidity of Trust** — *People v. Open Board of Stock Broker's Bldg.*

*Co.*, 49 Hun (N. Y.) 349, *affirmed* 112 N. Y. 670. See also *Milbank v. Jones*, 127 N. Y. 370, 24 Am. St. Rep. 454.

**Illegality Generally.** — See also the titles **CONDITIONS**, vol. 6, p. 499; **ILLEGAL CONTRACTS**, vol. 15, p. 927, and cross-references there given.

**Charities and Charitable Trusts.** — See the title **CHARITIES AND TRUSTS FOR CHARITABLE USES**, vol. 5, p. 893; **MORTMAIN**, vol. 20, p. 1075; **SUPERSTITIOUS USE**, vol. 27, p. 417.

**Trusts to Delay and Defraud Creditors.** — See the title **FRAUDULENT SALES AND CONVEYANCES**, vol. 14, p. 210, especially p. 278.

**Perpetuities and Trusts for Accumulation.** — See the title **PERPETUITIES AND TRUSTS FOR ACCUMULATION**, vol. 22, p. 701.

**Restraints on Alienation.** — See the title **RESTRAINTS ON ALIENATION**, vol. 24, p. 863.

**Agreements for Separation.** — See the title **SEPARATION (HUSBAND AND WIFE)**, vol. 25, p. 451. See also *Cowley v. Twombly*, 173 Mass. 393.

**Spendthrift Trusts.** — See the title **SPENDTHRIFTS AND SPENDTHRIFT TRUSTS**, vol. 26, p. 137.

**7. Separable Trusts.** — *Matter of Willey*, 128 Cal. 1; *Matter of Pichoir*, 139 Cal. 682; *Allen v. McGee*, 158 Ind. 465, *affirming* (Ind. 1901) 60 N. E. Rep. 460; *Darling v. Rogers*, 22 Wend. (N. Y.) 483; *Kane v. Gott*, 24 Wend. (N. Y.) 611, 35 Am. Dec. 641; *Lorillard v. Coster*, 5 Paige (N. Y.) 172; *Harrison v. Harrison*, 36 N. Y. 543; *Van Schuyver v. Mulford*, 59 N. Y. 426; *Kennedy v. Hoy*, 105 N. Y. 134; *Culross v. Gibbons*, 130 N. Y. 447; *Dupre v. Thompson*, 4 Barb. (N. Y.) 279, 8 Barb. (N. Y.) 537; *Leavitt v. Wolcott*, (Supm. Ct. Gen. T.) 65 How. Pr. (N. Y.) 51; *Delbert's Appeal*, 83 Pa. St. 462; *In re Denis's Estate*, 201 Pa. St. 616; *Goodeve v. Manners*, 5 Grant Ch.



legal and illegal trusts form part of one general scheme and are dependent upon one another, the legal trust must fail along with the illegal.<sup>1</sup>

(3) *Statutory Limitation on Purposes.* — A mere dry use of land was executed by the statute of uses, which annexed the seizin to the estate of the *cestui que use*,<sup>2</sup> and this principle has generally in the *United States*, by express legislation or judicial construction, served to render void mere dry passive or nominal trusts in land.<sup>3</sup> The purpose which underlies this legislation has been pushed further in some states, and under the provisions of the Revised Statutes of *New York*,<sup>4</sup> enacted in 1828, and adopted to a greater or less extent in a number of states,<sup>5</sup> not only are passive trusts of realty to be construed as direct conveyances to the beneficiary, but express active trusts in real property are valid as trusts for certain enumerated purposes only.<sup>6</sup> But if the performance of any act lawful under a power is authorized, the trust is effective as a power in trust.<sup>7</sup>

**Trusts of Real Property Not Permitted by These Statutes are void,<sup>8</sup> and the test**

(U. C.) 114. See also the titles *ILLEGAL CONTRACTS*, vol. 15, p. 990; *PERPETUITIES AND TRUSTS FOR ACCUMULATION*, vol. 22, p. 723 *et seq.*, especially p. 726.

A prior trust for life will not be invalidated by the illegality of trusts in remainder. *Nellis v. Rickard*, 133 Cal. 617, 85 Am. St. Rep. 227. See also *Matter of Hendy*, 118 Cal. 656.

A trust created by the two owners of certain property may be valid and enforceable as to one, while invalid as to the other. *Pitney v. Bolton*, 45 N. J. Eq. 639.

**Principal and Alternative Objects.** — Where there are two trust objects, one of which is principal and the other alternative, and the latter only is void, the principal trust may stand and the other fall. *Schettler v. Smith*, 41 N. Y. 328; *Tiers v. Tiers*, 98 N. Y. 568; *Cross v. U. S. Trust Co.*, 131 N. Y. 330, 27 Am. St. Rep. 597; *Hascall v. King*, 162 N. Y. 134, 76 Am. St. Rep. 302.

**1. Trusts Part of One Scheme.** — *Matter of Fair*, 132 Cal. 552, 136 Cal. 79; *Carpenter v. Cook*, 132 Cal. 621, 84 Am. St. Rep. 118; *Amory v. Lord*, 9 N. Y. 403; *Knox v. Jones*, 47 N. Y. 389; *Van Schuyver v. Mulford*, 59 N. Y. 426; *Tilden v. Green*, 130 N. Y. 50, 27 Am. St. Rep. 487; *Roberts v. Cary*, 84 Hun (N. Y.) 328; *Kelly v. Nichols*, 17 R. I. 306. See also the title *ILLEGAL CONTRACTS*, vol. 15, p. 988.

Thus, where trusts for life are created, followed by trusts of the residue and remainder of the property already limited, if the primary trusts are for any reason illegal, the ulterior trusts fail likewise. *Carpenter v. Cook*, 132 Cal. 621, 84 Am. St. Rep. 118; *Cowen v. Rinaldo*, 82 Hun (N. Y.) 479. See also the title *PERPETUITIES AND TRUSTS FOR ACCUMULATION*, vol. 22, p. 724. But this would perhaps not be an absolute rule applicable in all cases. See the title *REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS*, vol. 24, p. 453.

2. See *supra*, this title, II. *Origin and Development*, and the title *REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS*, vol. 24, p. 427.

3. *Allen v. Craft*, 109 Ind. 476, 58 Am. Rep. 425; *Kay v. Scates*, 37 Pa. St. 31, 78 Am. Dec. 399.

4. Rev. Stat. N. Y. 1828, part ii, c. 1, tit.

2, art. 2, § 55 *et seq.*; Real Prop. Law N. Y. 1896, § 76 *et seq.* And see Gray Rest. on Alienation (2d ed.), p. 283.

5. See, for instance, Civ. Code Cal., § 857; Compiled Laws Mich. 1897, § 8839 *et seq.*; Gen. Stat. Minn. 1894, § 4274 *et seq.*; Annot. Stat. S. Dak. 1901, § 3710 *et seq.* And see generally 1 Stim. Am. Stat. L., § 1703, and the local statutes.

**Express Trust Clearly Defined Valid.** — The *Michigan* statute contains a clause declaring that an express trust in lands may be created "for the beneficial interest of any person or persons when such trust is fully expressed and clearly defined upon the face of the instrument creating it." *Loring v. Palmer*, 118 U. S. 321; *Culbertson v. H. Witbeck Co.*, 127 U. S. 326; *Obermiller v. Wylie*, 36 Fed. Rep. 641. And the same is true in *Wisconsin*. *Holmes v. Walter*, 118 Wis. 409. See also the *Minnesota* statute, *Shanahan v. Kelly*, 88 Minn. 211.

**6. The Object of These Statutes was to limit the creation of express trusts to those cases where the purposes of the trust seemed to require that the legal estate should pass to the trustee, and to give legal effect to a purpose, where such a necessity did not exist, by permitting its execution as a power in trust, if contemplating the performance of some act.** *Townshend v. Frommer*, 125 N. Y. 458. See also *Matter of Fair*, 132 Cal. 523, 84 Am. St. Rep. 70.

**7. As to Powers in Trust**, see *infra*, this section.

**8. Trusts for Purposes Not Enumerated Void.** — *Wittfield v. Forster*, 124 Cal. 418; *Toms v. Williams*, 41 Mich. 573; *Randall v. Constans*, 33 Minn. 333; *Moore v. Moore*, 47 Barb. (N. Y.) 259; *Hawley v. James*, 16 Wend. (N. Y.) 61; *Adams v. Perry*, 43 N. Y. 496; *Holmes v. Mead*, 52 N. Y. 332; *Syracuse Sav. Bank v. Holden*, 105 N. Y. 415; *Murphey v. Cook*, 11 S. Dak. 47.

**Trust to Receive and Pay Over Profits of Lands.** — A trust to receive the rents and profits of land and pay them over to the beneficiary is valid. *Leggett v. Perkins*, 2 N. Y. 297.

**A Trust to Convey Real Property to named beneficiaries is invalid.** *Matter of Fair*, 132 Cal. 523, 84 Am. St. Rep. 70; *Matter of Sanford*, 136 Cal. 97; *Matter of Pichoir*, 139 Cal.

whether a valid trust is created is whether the instrument confers upon the trustee an authority in respect to the land and the power is conferred to accomplish one of the purposes enumerated.<sup>1</sup>

Trusts for Charities are not included in the enumeration of these statutes, and they have been held to be abolished.<sup>2</sup>

**Personal Property.** — The provisions of the *New York Revised Statutes* and similar legislation do not affect personal property, and trusts of personal property may be created for any lawful purpose without regard to these statutes.<sup>3</sup>

**3. Who May Create** — *a.* IN GENERAL. — The capacity to create a trust in property is co-extensive with the capacity to make a valid disposition of the property,<sup>4</sup> except so far as the capacity may be specially conferred by a power upon a person otherwise incapacitated to dispose of the property.<sup>5</sup>

*b.* KING OR STATE. — In *England* the sovereign may grant his private property to one person in trust for another by letters patent<sup>6</sup> or by his will.<sup>7</sup> And in the *United States*, the state, by legislative enactment, may either directly, or through agents properly appointed, convey property in trust and appoint trustees.<sup>8</sup>

*c.* INFANTS. — A declaration of trust by an infant is, like his deeds or general contracts, voidable but not void, and may be confirmed by his acts after coming of age.<sup>9</sup>

*d.* MARRIED WOMEN. — A married woman's power to create trusts of her property, real or personal, legal or equitable, is coextensive with her power to convey or dispose thereof and is subject to the same regulations.<sup>10</sup>

682; *McCurdy v. Otto*, 140 Cal. 48; *Gilman v. Reddington*, 24 N. Y. 15; *Townshend v. Frommer*, 125 N. Y. 446; *Hotchkiss v. Elting*, 36 Barb. (N. Y.) 44.

**A Trust to Sell, Mortgage, or Lease Land** reposed in executors for purposes other than the benefit of legatees or satisfying charges is invalid. *Weeks v. Cornwell*, 104 N. Y. 338. See also *Cowen v. Rinaldo*, 82 Hun (N. Y.) 479.

1. *Vernon v. Vernon*, 53 N. Y. 351; *Morse v. Morse*, 85 N. Y. 53.

2. See the title CHARITIES, ETC., vol. 5, p. 910, for the *New York* cases, and *passim*, pp. 906-912, for doctrine in other jurisdictions.

3. **Personal Property.** — *Gott v. Cook*, 7 Paige (N. Y.) 521, *affirmed* 24 Wend. (N. Y.) 641, 35 Am. Dec. 641; *Holmes v. Mead*, 52 N. Y. 332; *Power v. Cassidy*, 79 N. Y. 602, 35 Am. Rep. 550; *Gilman v. McArdle*, 99 N. Y. 451, 52 Am. Rep. 41; *Matter of Carpenter*, 131 N. Y. 86; *Hirsh v. Auer*, 146 N. Y. 19; *Brown v. Harris*, 25 Barb. (N. Y.) 134; *Heyer v. Burger*, *Hoffm.* (N. Y.) 1. See also *Civ. Code Cal.*, § 3220; *Civ. Code Mont.*, § 2955. But see *Maitland v. Baldwin*, 70 Hun (N. Y.) 267.

**Aliter in Minnesota** under the legislation of 1875, which applies equally to personal property. *Shanahan v. Kelly*, 88 Minn. 202. Before the Act of 1875 the scheme of this legislation did not embrace personality. *Baker v. Terrell*, 8 Minn. 195.

**Equitable Conversion.** — A direction to executors for the immediate conversion of real property into personality takes the case out of the statute and renders it a trust of personal property so far as the statute is concerned. *Kane v. Gott*, 24 Wend. (N. Y.) 659, 35 Am. Dec. 641; *Wells v. Wells*, 88 N. Y. 332. But compare *Moore v. Campbell*, 102 Ala. 445, holding that a direction for conversion will not validate a parol trust attached to a devise.

4. *Hill on Trustees* (4th Am. ed.) 45; *Lewin on Trusts* (8th Eng. ed.) 21; *Reiff v. Horst*, 52 Md. 267. See generally the titles CONTRACTS, vol. 7, p. 88; DEEDS, vol. 9, p. 87.

Aliens. — See the title ALIENS, vol. 2, p. 83.

**Lunatics and Persons Non Compos Mentis.** — See the title INSANITY, vol. 16, p. 558; INTOXICATION, vol. 17, p. 398.

**Freedom of Will — Fraud and Undue Influence.** — See the titles FRAUD AND DECEIT, vol. 14, p. 12; UNDUE INFLUENCE. See also the titles RESCISSION, CANCELLATION, AND REFORMATION, vol. 24, p. 604.

5. See the title POWERS, vol. 22, p. 1099 *et seq.*

6. *Bacon on Uses* 66; *Lewin on Trusts* (8th ed.) 21.

**Canada.** — *Atty. Gen. v. Grasett*, 6 Grant Ch. (U. C.) 485, *affirmed* 8 Grant Ch. (U. C.) 130.

**All Prizes Taken in War** vest in the sovereign and are commonly by the royal warrant granted to trustees for distribution among the captors. But such trust is not enforceable in equity and may be revoked at the pleasure of the sovereign. *Alexander v. Wellington*, 2 Russ. & M. 35. The persons appointed are more properly agents than trustees. *Kinloch v. Secretary of State*, 15 Ch. D. 1, 7 App. Cas. 619.

7. *Lewin on Trusts* (8th ed.) 22, *citing* 39 and 40 Geo. III., c. 88, § 10.

8. *Sinking Fund Com'rs v. Walker*, 6 How. (Miss.) 143, 38 Am. Dec. 433.

9. **Infants.** — *Ownes v. Ownes*, 23 N. J. Eq. 60. See also the titles DEEDS, vol. 9, p. 114; INFANTS, vol. 16, p. 282.

10. See also the titles ACKNOWLEDGMENTS, vol. 1, p. 483; HUSBAND AND WIFE, vol. 15, p. 785; SEPARATE PROPERTY OF MARRIED WOMEN, vol. 25, p. 331, especially p. 380 *et seq.*

**As to Whether a Declaration of Trust** under the statute of frauds as distinguished from the creation of a trust by a married woman must

*e. BANKRUPTS.* — The pendency of a proceeding in bankruptcy deprives the bankrupt of the power to dispose of his property,<sup>1</sup> and upon his adjudication as a bankrupt, the title to property held by him in his own right passes to his assignee or trustee;<sup>2</sup> but the surplus remaining after the termination of the proceedings reverts to the bankrupt,<sup>3</sup> and in the United States he takes a beneficial interest in property acquired after the commencement of proceedings.<sup>4</sup> But property held by the bankrupt in trust is not affected by the bankruptcy proceedings,<sup>5</sup> and after bankruptcy he may make a valid declaration of trust of property the apparent title to which had been conveyed to him, but which he really held in trust for another.<sup>6</sup>

*f. CORPORATIONS.* — The power to alienate its property resides in a corporation as it does in a natural person who is the owner of property, except as restrained by its organic law.<sup>7</sup> It is well established that a private corporation may create a trust for a legitimate corporate purpose.<sup>8</sup>

**Municipal Corporations** may dispose of their property not subject to a public trust<sup>9</sup> and may undoubtedly create a trust.<sup>10</sup>

**4. Parol Trusts and Requirement of Writing** — *a. WHEN WRITING IS ESSENTIAL* — (1) *General and Historical.* — At common law a use or trust was not required to be declared in any particular way; the declaration might be by deed, by will, by writing not under seal, or by mere word of mouth; for in old technical language uses and trusts were "averrable" and did not need writing.<sup>11</sup> Secret and parol declarations of trusts offered a ready induce-

conform to statutory requirements, see *infra*, this section.

1. See the title **INSOLVENCY AND BANKRUPTCY**, vol. 16, p. 698.

2. See the title **INSOLVENCY AND BANKRUPTCY**, vol. 16, p. 721.

3. See the title **INSOLVENCY AND BANKRUPTCY**, vol. 16, p. 699.

4. See the title **INSOLVENCY AND BANKRUPTCY**, vol. 16, p. 738.

5. See the title **INSOLVENCY AND BANKRUPTCY**, vol. 16, p. 728.

6. *Gardner v. Rowe*, 5 Russ. 258, 2 Sim. & St. 346.

7. See the title **CORPORATIONS (PRIVATE)**, vol. 7, p. 734 *et seq.*

8. **As to Pay Debts.** — See the titles **ASSIGNMENTS**, vol. 3, p. 23; **BANKS AND BANKING**, vol. 3, p. 848; **CORPORATIONS (PRIVATE)**, vol. 7, p. 741 *et seq.*; **DISSOLUTION OF CORPORATIONS**, vol. 9, p. 565.

9. See the title **MUNICIPAL CORPORATIONS**, vol. 20, p. 1185.

10. *Colchester v. Lowton*, 1 Ves. & B. 246.

In *England*, by statute, all property of municipal corporations is trust property. *Davis v. Leicester*, (1894) 2 Ch. 228.

11. **Trusts Averrable at Common Law.** — *Gilbert on Uses* 270, 271; 1 *Sanders on Uses* (4th ed.), 210; 1 *Spence Eq. Jur.* 496.

*England.* — *Fordyce v. Willis*, 3 Bro. C. C. 587.

*Alabama.* — *Patton v. Beecher*, 62 Ala. 585.

*Maryland.* — *Gordon v. McCulloh*, 66 Md. 249.

*Mississippi.* — *Anding v. Davis*, 38 Miss. 593, 77 Am. Dec. 658.

*North Carolina.* — *Shelton v. Shelton*, 5 Jones Eq. (58 N. Car.) 292; *Pittman v. Pittman*, 107 N. Car. 159.

*Ohio.* — *Fleming v. Donahoe*, 5 Ohio 255.

*Texas.* — *James v. Fulcro*, 5 Tex. 512, 55 Am. Dec. 743.

*West Virginia.* — *Currence v. Ward*, 43 W. Va. 370. But see *Troll v. Carter*, 15 W. Va. 580.

**Parol Trusts at Common Law.** — In regard to lands, "as a feoffment which passed the estate might be made at common law by parol, so, by the same reason, might the uses of the estate be declared by parol; but where a deed was requisite for the passing of the estate itself, it seems, it was requisite for the declaration of uses, as upon a grant of the rent or the like." *Gilb. on Uses* 270. The doctrine of uses and trusts grew up in chancery, and, where there was no feoffment to uses, in order to prevent a resulting use, proof of a consideration was required. *Bacon's Law Tracts* 317; 4 *Reeves Hist. Eng. Law* (Finlason's ed.) 233; *Pittman v. Pittman*, 107 N. Car. 163. Before the statute of enrolments, stat. 27 Hen. VIII. c. 16, required bargains and sales of lands to be by deed enrolled, a use might be raised by parol by bargain and sale for a valuable consideration, and after the statute this might still be done in cities exempted out of the statute. *Chibborne's Case*, 2 *Dyer* 229a. The necessity for a deed in case of a covenant to stand seized, seems to have arisen from judicial construction. "At first parol declarations seem to have been admitted as constituting a covenant to stand seized, but in the reign of [Elizabeth, in *Callard v. Callard*, Moo. K. B. 687, 2 *Rolle Abr.* 788, reversing *Popham* 47. *Cro. Eliz.* 344], it was decided that there must be a deed as indicative of a settled resolution." 1 *Spence Eq. Jur.* 478 note. Mr. *Spence's* interpretation of the law as to covenants to stand seized seems more in harmony with the analogies with respect to deeds of bargain and sale than that of Chief Baron *Gilbert*, who, by the doctrine that a deed was always necessary when the possession was not passed (*Gilbert on Uses*, pp. 270, 271), leaves the exception in the case of places not within the statute of enrolments as an



ment to fraud and perjury, and to restrain this evil the English statute of frauds, in 1676, enacted that all trusts of lands should be proved and manifested by writing.<sup>1</sup> The statute applied only to trusts of lands, and trusts of personalty were left as at the common law.<sup>2</sup>

(2) *Parol Trusts of Personal Property.* — Since trusts of personal property are not within the statute of frauds, it may be laid down, as a general rule, that a valid trust of personal property may be created verbally and proved by parol evidence, evincing with sufficient clearness the intention of the settlor to create the trust.<sup>3</sup> In some states, though trusts in personal property may

anomaly. *Callard v. Callard*, *ubi supra*, (*sub nom.* *Talarde v. Talarde*, 2 Anderson 64), shows the wide disagreement of the judges at the time. *Page v. Moulton*, 3 Dyer 296b, was distinguished by Coke, Atty.-Gen., because the words there were future merely. See Cro. Eliz. 344. Perhaps the final disposition of *Callard v. Callard*, *ubi supra*, was merely to the effect that a covenant without deed was insufficient under Stat. 27 Elizabeth. See Popham 50.

To sum up, it seems that by the ancient common law, a writing was never essential in order to raise a use except with regard to incorporeal hereditaments, such as rents, which always lay in grant (see the title DEEDS, vol. 9, p. 99), unless founded in prescription (see the title PRESCRIPTION, vol. 22, p. 1180). By statute and judicial decision in the seventeenth century, a deed became necessary with respect to bargain and sale, founded on valuable consideration, and covenant to stand seized, founded on good consideration. An admirable examination of the old law is to be found in *Hall v. Livingston*, 3 Del. Ch. 348.

1. 1 Sanders on Uses (4th ed.), p. 315; 1 Spence Eq. Jur., p. 497.

2. *Statutes Inapplicable to Personalty.* — 1 Sanders on Uses (4th ed.), p. 315; *Nab v. Nab*, 10 Mod. 404; *Fordyce v. Willis*, 3 Bro. C. C. 587. And see the next note *infra*.

3. *Writing Not Necessary to Trusts of Personalty* — *England.* — *Nab v. Nab*, 10 Mod. 404; *Fordyce v. Willis*, 3 Bro. C. C. 588; *Benbow v. Townsend*, 1 Myl. & K. 506; *Bayley v. Boulcott*, 4 Russ. 345; *M'Fadden v. Jenkyns*, 1 Hare 461, 1 Phil. 153; *Dipple v. Corlis*, 11 Hare 183.

*United States.* — *Allen v. Withrow*, 110 U. S. 119.

*Alabama.* — *Patton v. Beecher*, 62 Ala. 591; *Sayre v. Weil*, 94 Ala. 466.

*California.* — *Roach v. Caraffa*, 85 Cal. 436; *Lockwood v. Canfield*, 20 Cal. 126; *Hellman v. McWilliams*, 70 Cal. 449.

*Connecticut.* — *Vail's Appeal*, 37 Conn. 198.

*Georgia.* — *Kirkpatrick v. Davidson*, 2 Ga. 297; *Robson v. Harwell*, 6 Ga. 589; *Gordon v. Green*, 10 Ga. 534. Under the present statute providing that "all express trusts" must be created or declared in writing (Code Ga. 1896, § 3153, and see § 3080), it seems that trusts of personal property must be in writing. *Smith v. Peacock*, 114 Ga. 691, 88 Am. St. Rep. 53.

*Hawaii.* — *Kamihana v. Glade*, 5 Hawaii 497.

*Indiana.* — *Hon v. Hon*, 70 Ind. 135; *Hunt v. Elliott*, 80 Ind. 245, 41 Am. Rep. 794; *Mohn v. Mohn*, 112 Ind. 285; *Thomas v. Merry*, 113 Ind. 83; *Haxton v. McClaren*, 132 Ind. 235; *Ransdel v. Moore*, 153 Ind. 393; *Stanley v.*

*Pence*, 160 Ind. 636, 645; *Woods v. Matlock*, 19 Ind. App. 364.

*Iowa.* — *Patterson v. Mills*, 69 Iowa 758.

*Kansas.* — *Belleville v. Mitchell*, 6 Kan. App. 920, 51 Pac. Rep. 63.

*Kentucky.* — *Barkley v. Lane*, 6 Bush (Ky.) 587; *Letcher v. Letcher*, 4 J. J. Marsh. (Ky.) 592; *Berry v. Norris*, 1 Duv. (Ky.) 303; *Estill v. Miller*, 3 Bibb (Ky.) 177; *Roche v. George*, 93 Ky. 611; *Sherley v. Sherley*, 97 Ky. 512; *Crews v. Crews*, (Ky. 1902) 67 S. W. Rep. 276.

*Maine.* — *Cobb v. Knight*, 74 Me. 253; *Bath Sav. Inst. v. Hathorn*, 88 Me. 122, 51 Am. St. Rep. 382.

*Maryland.* — *Smith v. Darby*, 39 Md. 277; *Taylor v. Henry*, 48 Md. 560, 30 Am. Rep. 486; *Gordon v. Small*, 53 Md. 550; *Milholland v. Whalen*, 89 Md. 212; *Snader v. Slingluff*, 95 Md. 365.

*Massachusetts.* — *Chace v. Chapin*, 130 Mass. 128; *Chase v. Perley*, 148 Mass. 289; *Peck v. Scofield*, (Mass. 1904) 71 N. E. Rep. 109.

*Michigan.* — *Bostwick v. Mahaffy*, 48 Mich. 342; *Calder v. Moran*, 49 Mich. 14; *Hamilton v. Hall*, 111 Mich. 291; *Eipper v. Benner*, 113 Mich. 75.

*Mississippi.* — *Anding v. Davis*, 38 Miss. 593, 77 Am. Dec. 658.

*Nebraska.* — *Wolf v. Haslach*, (Neb. 1902) 91 N. W. Rep. 283.

*New Jersey.* — *Kimball v. Morton*, 5 N. J. Eq. 26, 43 Am. Dec. 621; *Hooper v. Holmes*, 11 N. J. Eq. 122; *Sayre v. Fredericks*, 16 N. J. Eq. 205; *Eaton v. Cook*, 25 N. J. Eq. 55; *Danser v. Warwick*, 33 N. J. Eq. 133; *Pitney v. Bolton*, 45 N. J. Eq. 639.

*New York.* — *Day v. Roth*, 18 N. Y. 448; *Barry v. Lambert*, 98 N. Y. 300, 50 Am. Rep. 677; *Gilman v. McArdle*, 99 N. Y. 451, 52 Am. Rep. 41; *Matter of Carpenter*, 131 N. Y. 86; *Bork v. Martin*, 132 N. Y. 285, 28 Am. St. Rep. 570; *Neresheimer v. Smyth*, 167 N. Y. 202, affirming 35 N. Y. App. Div. 632; *Hoffman House v. Foote*, 172 N. Y. 355; *Hirsh v. Auer*, 146 N. Y. 13, affirming 79 Hun (N. Y.) 493; *Bloodgood v. Massachusetts Ben. L. Assoc.*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 460.

*North Carolina.* — *Riggs v. Swann*, 6 Jones Eq. (59 N. Car.) 118.

*Ohio.* — *Fleming v. Donahoe*, 5 Ohio 256; *Vance v. Park*, 8 Ohio Cir. Dec. 425, modifying 7 Ohio Dec. 564.

*Oregon.* — *Cooper v. Thomason*, 30 Oregon 161; *Martin v. Martin*, 43 Oregon 119.

*Pennsylvania.* — *Maffitt v. Rynd*, 69 Pa. St. 380.

*South Carolina.* — *Higginbottom v. Peyton*, 3 Rich. Eq. (S. Car.) 398; *Gadsden v. Whaley*,

be created and proved by parol, a "conveyance of any existing trust" in "goods or choses in action" is required to be in writing.<sup>1</sup>

When the Trust Agreement Is Reduced to Writing it becomes, like other written contracts, incapable of being varied by parol evidence.<sup>2</sup> But where the written evidence merely shows the transfer to a certain person as trustee, evidence of the oral and written declarations of the donor are admissible to identify the beneficiary and to establish the terms of the trust.<sup>3</sup>

**Trusts in the Proceeds of Realty.** — When a deed of lands is made upon a parol trust, and the grantee sells the land and converts it into money, a subsequent parol declaration by the grantee that he holds the funds in trust may be proved and will be enforced,<sup>4</sup> and a parol agreement to hold the proceeds of land in trust has been held to be valid and enforceable,<sup>5</sup> at least after the land has been sold<sup>6</sup> in pursuance of the agreement.<sup>7</sup>

**A Direction in a Will for the Conversion** of real into personal property will not validate a parol trust attached to the property,<sup>8</sup> but it has been held to render the property personal so far as to take it out of the statute existing in several states limiting the purposes for which trusts in lands may be created.<sup>9</sup>

**b. STATUTE OF FRAUDS** — (1) *Provisions Applicable* — (a) *Sections Regulating Conveyances and Contracts of Sale.* — The application to trusts of those clauses of the statute of frauds which require conveyances of lands or interests therein, or contracts for the sale thereof, to be in writing, has frequently arisen in states where the sections dealing specifically with trusts were not or are not in force.<sup>10</sup>

14 S. Car. 210; *Harris v. Bratton*, 34 S. Car. 259.

*Tennessee.* — *Saunders v. Harris*, 1 Head (Tenn.) 185.

*Utah.* — *Skeen v. Marriott*, 22 Utah 73.

*Vermont.* — *Porter v. Rutland Bank*, 19 Vt. 410; *Williams v. Haskins*, 66 Vt. 378.

*Wisconsin.* — See *Backhaus v. Backhaus*, 70 Wis. 518.

**Case Contra.** — *Mt. Calvary Church v. Albers*, 174 Mo. 331, declaring writing essential, is a clear inadvertence, unsupported by the authorities cited, which deal, so far as this question is concerned, with land.

1. **Transfers of Existing Trusts to Be in Writing.** — *Talbott v. Barber*, 11 Ind. App. 1, 54 Am. St. Rep. 491; *Phipard v. Phipard*, 55 Hun (N. Y.) 433; *Wood v. Mulock*, 48 N. Y. Super. Ct. 79.

2. **Trust of Personalty Reduced to Writing.** — *Boykin v. Pace*, 64 Ala. 73; *Hogan v. Sullivan*, 114 Iowa 456.

**Parol Evidence of Intent** in the use of the word "heirs" in a written trust of personal property is admissible. *Eaton v. Cook*, 25 N. J. Eq. 55.

3. *Kendrick v. Ray*, 173 Mass. 305, 73 Am. St. Rep. 289. See also *Green v. Griswold*, 57 N. Y. Super. Ct. 24, affirming 2 N. Y. Supp. 624, and itself affirmed 127 N. Y. 682.

4. **Trusts in Proceeds of Real Property.** — *Mohn v. Mohn*, 112 Ind. 285; *Thomas v. Merry*, 113 Ind. 83; *Calder v. Moran*, 49 Mich. 14; *Collar v. Collar*, 86 Mich. 513, 75 Mich. 414; *Hess's Appeal*, 112 Pa. St. 168.

5. *State v. Roudebush*, 114 Ind. 349; *Talbott v. Barber*, 11 Ind. App. 1, 54 Am. St. Rep. 491; *Simonds's Estate*, 31 Pittsb. Leg. J. N. S. Pa. 291.

**Active Duties in Addition to Sale.** — An agreement between two persons that one shall hold

the title to land, collect the rents and profits, pay taxes, sell and account, has been held to create a trust in realty, which can only be taken out of the statute by performance or subsequent acknowledgment, the provisions for payment of the proceeds not being separable. *Randall v. Constans*, 33 Minn. 329; *Wolford v. Farnham*, 44 Minn. 159. See also *Maxwell v. Barringer*, 110 N. Car. 76, 28 Am. St. Rep. 668.

6. *Graves v. Graves*, 45 N. H. 323; *Tracy v. Tracy*, 3 Bradf. (N. Y.) 57; *Robbins v. Robbins*, 89 N. Y. 251. See also *infra*, this section, b. 5. (b) *Executed Express Trusts.*

7. *Randall v. Constans*, 33 Minn. 335.

8. **Conversion.** — *Moore v. Campbell*, 102 Ala. 445.

9. *Kane v. Gott*, 24 Wend. (N. Y.) 659, 35 Am. Dec. 641; *Wells v. Wells*, 88 N. Y. 331; *Cochrane v. Schell*, 140 N. Y. 516; *Russell v. Hilton*, 80 N. Y. App. Div. 178, which reversed 37 Misc. (N. Y.) 642, was affirmed 175 N. Y. 525.

10. **In Pennsylvania**, when the first three sections of the English statute, declaring that no interest in land "whether in law or equity" should pass by parol, were in force (consolidated into the first section of the Pennsylvania Act), and the seventh section was omitted, the argument that the creation of a trust by parol was prevented by the first section of the Pennsylvania statute was answered by *Gibson, C. J.*, who declared that the Pennsylvania Act, by its language, covered the transfer of trust estates, but that the creation of such estates was not included in it; for to hold that the creation of trusts by parol was prohibited would be entirely to neglect the effect of the omission of the seventh section of the English statute, which could not be imputed to accident, and the design of which must have been to prevent its provisions from

Sometimes it has been said broadly that the clause as to sales is to be confined strictly to the contracts specified and does not include the creation or proof of trusts in land by parol.<sup>1</sup> Other authorities hold that this clause does not affect parol declarations of trust by the grantor or settlor contemporaneous with the grant, nor, perhaps, subsequent declarations by the grantee in the nature of acknowledgments which tend to prove the original beneficial purpose of the grantor in making, and of the grantee in accepting, the grant.<sup>2</sup> But where the grantor intended only an absolute transfer of title, and the trust is claimed to arise out of the grantee's or vendee's intention that a third person is to have an interest in the property, the grantee's declaration to that effect can be no more than a mere contract to make a conveyance thereafter, and is prohibited by the clause of the statute of frauds in question, unless the property of the indicated beneficiary has actually been used in making the purchase in accordance with a previous agreement between himself and the vendee.<sup>3</sup>

**Fraud**, however, which "in equity is an exception to every rule," may take the case out of this clause as well as out of the seventh section of the statute,<sup>4</sup> and the constant tendency of the courts to search for and base their decisions on the presence of fraud, following the analogy of the exceptions created on this basis by the courts where the seventh section is in force,<sup>5</sup> or to treat the

becoming the law of the land. "How," said he, "can we make them the law of the land on the face of such a demonstration of legislative intention?" *Murphy v. Hubert*, 7 Pa. St. 420.

That in the adoption of an English statute the construction put upon it by the English courts is likewise adopted, is well settled. See the title *STATUTES*, vol. 26, p. 700.

1. **Sales of Lands.** — *Patton v. Beecher*, 62 Ala. 586; *James v. Fulcrod*, 5 Tex. 512, 55 Am. Dec. 743. See also *Soggins v. Heard*, 31 Miss. 426.

In *Mathews v. Massey*, 4 Baxt. (Tenn.) 460, it was suggested that the clause as to sales might apply to a parol trust, but the facts of the case took it out of the statute by part performance.

**A Parol Contract by Two or More Persons for the Joint Acquisition of Land** is not a contract for the sale of land and hence is not required by the *Texas* statute of frauds to be in writing. *Gardner v. Rundell*, 70 Tex. 453, holding also that a trust may arise by reason of a prior agreement between the parties, though none of the purchase money is paid at the time of the acquisition of title in the name of the other party. See also *Reed v. Howard*, 71 Tex. 204. And compare *Parker v. Coop*, 60 Tex. 118; *Williams v. San Saba County*, 59 Tex. 442; *Toole v. Dibrell*, (Tex. Civ. App. 1895) 29 S. W. Rep. 387, which cases deal with constructive trusts.

2. **Declarations by Grantor Contemporaneous with Grant.** — *Freeman v. Freeman*, 2 Pars. Eq. Cas. (Pa.) 81. See also *Garner v. Garner*, 4 Ky. L. Rep. 823.

But in *Chiles v. Woodson*, 2 Bibb (Ky.) 71, the clause as to sales was extended to prevent a trust in favor of the grantor which flowed from the grantor's conveyance to the grantee, upon an express promise to reconvey.

And see *Sherley v. Sherley*, 97 Ky. 512, where, under the provision requiring contracts for the sale of land to be in writing, together with the provision that "no estate of inheritance or freehold, or for a lease of more than one year, in lands, shall be conveyed unless by deed or will," it was said, "the courts in this

state have never sanctioned or enforced these voluntary parol declarations of trusts made by the owner of the legal title to any one, whether a child or a stranger."

3. **Trusts Declared by Vendee in Favor of Another** — *Kentucky*. — *Com. v. Chesapeake, etc.*, R. Co., 94 Ky. 20; *Parker v. Bodley*, 4 Bibb (Ky.) 102; *Fowke v. Slaughter*, 3 A. K. Marsh. (Ky.) 56, 13 Am. Dec. 133.

*Pennsylvania*. — *Kisler v. Kisler*, 2 Watts (Pa.) 323, 27 Am. Dec. 308; *Robertson v. Robertson*, 9 Watts (Pa.) 32; *Haines v. O'Conner*, 10 Watts (Pa.) 313, 36 Am. Dec. 180; *Fox v. Heffner*, 1 W. & S. (Pa.) 372; *Jackman v. Ringland*, 4 W. & S. (Pa.) 149; *Sample v. Coulson*, 9 W. & S. (Pa.) 62; *Freeman v. Freeman*, 2 Pars. Eq. Cas. (Pa.) 81; *Blyholder v. Gilson*, 18 Pa. St. 134.

*West Virginia*. — *Nash v. Jones*, 41 W. Va. 769; *Currence v. Ward*, 43 W. Va. 370; *Woods v. Ward*, 48 W. Va. 653.

See also in this connection the title *PARTNERSHIP*, vol. 22, pp. 66, 93.

**Agreement Subsequent to Passage of Title.** — In *North Carolina* it seems that no parol agreement made by the vendee or grantee after the acquisition of title to real property, can, under the statute of frauds, give rise to a trust. *Hamilton v. Buchanan*, 112 N. Car. 463. See also *infra*, this section, 4. e.

**Theory of Exceptions to Statute.** — These cases of exception to the statute proceed on the basis that "a purchase with trust money, in whole or in part, gives the owner of the money a correspondent ownership of the land." *Kisler v. Kisler*, 2 Watts (Pa.) 323, 27 Am. Dec. 308. But other circumstances of performance may take such cases out of the statute as mere contracts of purchase without resort to the theory of trusts. See *Blyholder v. Gilson*, 18 Pa. St. 134; *Boynton v. Winslow*, 37 Pa. St. 315; and the title *SPECIFIC PERFORMANCE*, vol. 26, p. 50.

4. **Fraud.** — *Mathews v. Leaman*, 24 Ohio St. 623; *Troll v. Carter*, 15 W. Va. 567.

5. See, for example, *Troll v. Carter*, 15 W. Va. 567, where it seems to have been considered that proof of fraud more than a breach of an



cases as constructive or implied trusts,<sup>1</sup> renders the adjudications on this subject very confused.

A Subsequent Reduction to Writing would seem, on well-settled principles, not to be sufficient where the case is held to be within the clause as to sales of interests in land, since this clause requires the instrument creating the estate to be in writing, in distinction from the seventh section which only requires that the trust be manifested in writing,<sup>2</sup> but decisions are found which seem to hold a subsequent writing sufficient even under the clause regulating sales of land.<sup>3</sup>

**Voluntary Conveyance.** — The rule has been announced that where the conveyance is voluntary parol "evidence that at the time of the conveyance the vendee agreed to hold the title in trust for the vendor" is within the statute and the rule against parol evidence and inadmissible,<sup>4</sup> but evidence that the vendee agreed to hold in trust for a third person may be admitted though in parol.<sup>5</sup>

(b) **Sections Dealing Expressly with Trusts** — *aa. ENGLISH STATUTE.* — At common law, as has been stated, trusts as well of lands as of personal property might be created by parol. But by the seventh section of the statute of frauds, A. D. 1676,<sup>6</sup> it was provided that "all declarations or creations of trusts<sup>7</sup> or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust or by his last will in writing." By the eighth section trusts which may "arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law," are excepted from statute; and by the ninth section "all grants or assignments of any trust or confidence shall likewise be in writing," signed, etc., or by will. Under these sections a trust need only be manifested or proved by writing, and need not, like an agreement, within the fourth section of the statute, be created by writing; so that a subsequent writing, if sufficient in its contents, is enough.<sup>8</sup>

*bb. STATUS OF LEGISLATION IN VARIOUS JURISDICTIONS* — (*aa. Statute of Frauds Not a Part of Common Law.* — This statute, as it did not expressly extend to the colonies, did not affect those settled prior to its passage, and from the supplement of

oral agreement was necessary. following and applying decisions where the seventh section was in force.

It has been well said that in every case wherein courts are called upon to enforce a parol trust a measure of fraud must exist, whether enough to move a court in a jurisdiction where the seventh section is in force or not. *Patton v. Beecher*, 62 Ala. 593; *Brock v. Brock*, 90 Ala. 92; *Perry v. McHenry*, 13 Ill. 236.

1. In *Murphy v. Hubert*, 7 Pa. St. 420, *Gibson, C. J.*, said: "As was intimated in *Pugh v. Good*, 3 W. & S. (Pa.) 56, 37 Am. Dec. 534, much misconception has arisen by looking into the English statute, and the decisions upon it, and not exclusively to our own. Perhaps no decision [before this] has declared in words that an express parol declaration of trust is valid in Pennsylvania; but all the decisions in support of implied trusts have gone on a principle which extends equally to them."

Among the cases where the English decisions seem to have been erroneously followed is *Bedilian v. Seaton*, 3 Wall. Jr. (C. C.) 279.

Thus Such Trusts as Wou'd Be Valid as Constructive Trusts where the statute is in force, have been frequently recognized and enforced in jurisdictions where the seventh and eighth sections of the statute of frauds are not in force. See the title IMPLIED TRUSTS, vol. 15, p. 1184 *et seq.*

2. *Randall v. Morgan*, 12 Ves. Jr. 74.

3. *Pendleton v. Patrick*, (Ky. 1900) 57 S. W. Rep. 464; *Aynsworth v. Haldeman*, 2 Duv. (Ky.) 570; *Broadrup v. Woodman*, 27 Ohio St. 553; *Mathews v. Massey*, 4 Baxt. (Tenn.) 450; *McCandless v. Warner*, 26 W. Va. 754.

4. This proposition seems to be a confounding of the rule that a recital of consideration rebuts a resulting trust (see the title IMPLIED TRUSTS, vol. 15, p. 1125), and the remarks in *Porter v. Mayfield*, 21 Pa. St. 263, which have been overruled as dicta by *Lingenfelter v. Ritchey*, 58 Pa. St. 488, 98 Am. Dec. 308. But see *Martin v. Baird*, 175 Pa. St. 551. The rule is stated with regard to an agreement between the parties, and an express trust requires no consideration. *McCandless v. Warner*, 26 W. Va. 782.

5. *Troll v. Carter*, 15 W. Va. 567; *Zane v. Fink*, 18 W. Va. 755; *Cain v. Cox*, 23 W. Va. 504. See also *Titchenell v. Jackson*, 26 W. Va. 468.

6. In effect "from and after the four and twentieth day of June which shall be in the year of our Lord one thousand six hundred seventy and seven." 29 Car. II., c. 3, § 1.

7. **Creation and Declaration of Trust Distinguished.** — See CREATION, vol. 8, p. 228; DECLARATION OF TRUST, vol. 9, p. 4.

8. *Forster v. Hale*, 3 Ves. Jr. 696; *Randall v. Morgan*, 12 Ves. Jr. 67; *Smith v. Matthews*, 3 De G. F. & J. 139; *Rochevoucauld v. Boustead*, (1897) 1 Ch. 196.

The Ninth Section, while general in its lan-

1752<sup>1</sup> it was evidently conceived of as in force in such colonies only as had adopted or recognized it.<sup>2</sup> It appears not to have been considered as common law in any state as an English statute "applicable to our situation and not inconsistent with our institutions."<sup>3</sup>

(bb) *Extent and Form of Re-enactment* — **Substantial Verbal Re-enactment.** — In *Canada*<sup>4</sup> and in many of the *United States*, however, the English statute has been re-enacted in substantially the same language, and the construction is the same, namely, that any writing proving the trust is sufficient, although it might be created by parol.<sup>5</sup>

"Created or Declared" in Writing. — In other states trusts are required to be "created or declared" in writing, and the construction is the same.<sup>6</sup>

guage, is confined to trusts in land, being a part of the scheme of legislation developed in the prior two sections. Lewin on Trusts (8th Eng. ed.) 693. Especially must this be so where, as in many of the United States, all this matter on trusts forms one section. But compare the anomalous and evidently inadvertent decision in *Mt. Calvary Church v. Albers*, 174 Mo. 340.

1. 25 Geo. II., c. 6, § 10.

2. See *Hall v. Livingston*, 3 Del. Ch. 366.

3. *Patton v. Beecher*, 62 Ala. 586. See also the title COMMON LAW, vol. 6, p. 277.

4. **Statute Re-enacted in Substantially Same Phraseology** — *Canada*. — *Hutchinson v. Hutchinson*, 6 Grant Ch. (U. C.) 119; *Brown v. Capron*, 24 Grant Ch. (U. C.) 91; *Harper v. Patterson*, 14 U. C. C. P. 538. Of course this does not apply to *Quebec* where, under the civil law in force, trusts are not in general recognized. See *Sweeny v. Montreal Bank*, 12 Can. Sup. Ct. 671, per Strong, J.

5. *Arkansas*. — *McDonald v. Hooker*, 57 Ark. 632.

*District of Columbia*. — *McCartney v. Fletcher*, 11 App. Cas. (D. C.) 1.

*Florida*. — Rev. Stat. Fla., 1892, § 1951.

*Illinois*. — *Hovey v. Holcomb*, 11 Ill. 660; *Perry v. McHenry*, 13 Ill. 227; *Sheldon v. Harding*, 44 Ill. 68; *Smith v. Hollenback*, 51 Ill. 223; *Kingsbury v. Burnside*, 58 Ill. 328, 11 Am. Rep. 67; *Phillips v. South Park Com'rs*, 119 Ill. 640; *Monson v. Hutchin*, 194 Ill. 431.

*Maryland*. — *Maccubbin v. Cromwell*, 7 Gill & J. (Md.) 157; *Albert v. Winn*, 5 Md. 66; *Gordon v. McCulloh*, 66 Md. 245. See also *Nickerson v. Nickerson*, 127 U. S. 674.

*Missouri*. — *Lane v. Ewing*, 31 Mo. 75, 77 Am. Dec. 632; *Cornelius v. Smith*, 55 Mo. 528; *Rogers v. Ramey*, 137 Mo. 607; *Hillman v. Allen*, 145 Mo. 638; *Mt. Calvary Church v. Albers*, 174 Mo. 340.

*New Jersey*. — *Smith v. Howell*, 11 N. J. Eq. 349; *Brown v. Combs*, 29 N. J. L. 76; *McVay v. McVay*, 43 N. J. Eq. 47; *Newkirk v. Place*, 47 N. J. Eq. 477; *Aller v. Crouter*, 64 N. J. Eq. 381.

*Pennsylvania*. — The seventh section of the English statute was virtually re-enacted in 1856, Act April 22, 1856, § 4. *Barnet v. Dougherty*, 32 Pa. St. 371; *Lingenfelter v. Ritchey*, 58 Pa. St. 485, 98 Am. Dec. 308; *Meason v. Kaine*, 63 Pa. St. 339; *Watson v. Watson*, 108 Pa. St. 234; *Grove v. Kase*, 2 Dauphin Co. Rep. (Pa.) 125. Prior to this date, that section was not in force and trusts of land were valid by parol. *Freeman v. Freeman*, 2 Pars. Eq. Cas. (Pa.) 81; *Jones v. McKee*, 3 Pa. St. 496, 45

Am. Dec. 661, 6 Pa. St. 425; *Murphy v. Hubert*, 7 Pa. St. 420; *Lingenfelter v. Ritchey*, 58 Pa. St. 485, 98 Am. Dec. 308, *distinguishing* *Porter v. Mayfield*, 21 Pa. St. 263.

*Rhode Island*. — In *Rhode Island* the seventh section of the statute of frauds, "though never expressly re-enacted," is "recognized as a part of the law of the state," the statute of frauds having been declared to be in force therein by the Act of 1749. *Taft v. Dimond*, 16 R. I. 586. Gen. Laws R. I., 1896, p. 657 (c. 202, § 2), provides that every conveyance of land by way of "use or trust, for any term longer than one year, and all declarations of trusts concerning the same, shall be void unless made in writing," etc. See also Gen. Laws R. I., 1896, p. 805 (c. 233, § 6, subsec. 3); *Rogers v. Rogers*, 20 R. I. 400.

*South Carolina*. — *Rutledge v. Smith*, 1 McCord Eq. (S. Car.) 130; *Brown v. Brown*, 1 Strobb. Eq. (S. Car.) 363; *Reid v. Reid*, 12 Rich. Eq. (S. Car.) 213; *Price v. Brown*, 4 S. Car. 144; *Rogers v. Rogers*, 52 S. Car. 393; *Pruitt v. Pruitt*, 57 S. Car. 162.

6. "Created or Declared" in Writing — *California*. — *Brison v. Brison*, 75 Cal. 526, 7 Am. St. Rep. 189; *Barr v. O'Donnell*, 76 Cal. 469, 9 Am. St. Rep. 242; *Hasshagen v. Hasshagen*, 80 Cal. 514; *Smith v. Mason*, 122 Cal. 426.

*Georgia*. — *Robson v. Harwell*, 6 Ga. 589 (decided before the Code); *Alexander v. Alexander*, 46 Ga. 291; *Printup v. Barrett*, 46 Ga. 411; *Roughton v. Rawlings*, 88 Ga. 819; *Smith v. Williams*, 89 Ga. 13.

*Maine*. — *Bragg v. Paulk*, 42 Me. 512; *McClellan v. McClellan*, 65 Me. 500; *Wentworth v. Shibles*, 89 Me. 167. From 1827 (Stat. Me. 1827, c. 358) until the revision of 1841, a transcript of the English statute was in force and the English construction was adopted. *Second Unitarian Soc. v. Woodbury*, 14 Me. 281; *Evans v. Chism*, 18 Me. 223. By Rev. Stat. Me. 1841, c. 91, § 31, the words were changed to "created and manifested," and it seems that a subsequent declaration was insufficient. *Richardson v. Woodbury*, 43 Me. 206. See also *Brown v. Lunt*, 37 Me. 434. And compare *Bates v. Hurd*, 65 Me. 180. By Rev. Stat. Me. 1857, c. 73, § 11, the present wording was adopted, with a return to the old construction. *McClellan v. McClellan*, 65 Me. 500 (stated under CREATE, vol. 8, p. 228).

*Massachusetts*. — *Barrell v. Joy*, 16 Mass. 221; *Stratton v. Edwards*, 174 Mass. 374. See also *Jenkins v. Eldredge*, 3 Story (U. S.) 294. And see *Safford v. Rantoul*, 12 Pick. (Mass.) 233, an anomalous case, wherein by reason of

**Creation in Writing Required.** — In a few states the trust must be "created" in writing, and about the construction of acts so worded there appears to be some difference of opinion.<sup>1</sup>

**"By Deed or Instrument in Writing."** — In several states trusts are required to be "created or declared by deed or conveyance in writing" or "by deed or instrument in writing,"<sup>2</sup> and the change in phraseology in these statutes has been held not to effect any change in construction from that adopted under the English statute of frauds.<sup>3</sup>

**By Writings Executed as Deeds.** — Under other statutes, the instrument creating the trust must be executed "in the same manner as deeds of conveyance,"<sup>4</sup>

the statute of 1817, c. 87, granting equity jurisdiction in cases of trust "arising under deeds," etc., the court treated a trust of personalty, a ship, created by deed as subject to the statute of frauds.

*New Hampshire.* — *Graves v. Graves*, 29 N. H. 129; *Moore v. Moore*, 38 N. H. 382; *Hall v. Congdon*, 55 N. H. 104; *Packard v. Putnam*, 57 N. H. 43; *Moulton v. Adams*, 67 N. H. 102. By Act of February 10, 1791, the English act had been re-enacted. *Hale v. Everett*, 53 N. H. 244.

*South Dakota.* — *Murphey v. Cook*, 11 S. Dak. 47.

*Vermont.* — *Bickford v. Bickford*, 68 Vt. 527; *Sullivan v. Haskin*, 70 Vt. 487. See also *Pinney v. Fellows*, 15 Vt. 525, as to history of legislation.

**1. Created in Writing** — *Alabama.* — No trust concerning land, except, etc., "can be created unless by instrument in writing signed by the party creating or declaring the same." Civ. Code Ala. 1896, § 1041. *Patton v. Beecher*, 62 Ala. 579 (*distinguishing Kennedy v. Kennedy*, 2 Ala. 571, and *Bishop v. Bishop*, 13 Ala. 475, as decided before the adoption of the statute); *White v. Farley*, 81 Ala. 563; *Moore v. Campbell*, 102 Ala. 448; *Brackin v. Newman*, 121 Ala. 311; *Oden v. Lockwood*, 136 Ala. 514. In *Sanders v. Steele*, 124 Ala. 415, the statute is said to be "a substantial re-enactment of the seventh and eighth sections of the English statute of frauds." See also *Wiggs v. Winn*, 127 Ala. 621, where subsequent declarations are approved *obiter*.

*Indiana.* — Though the statute requires the trust to be "created" in writing, a subsequent declaration is sufficient. *Mescall v. Tully*, 91 Ind. 96; *Gaylord v. Lafayette*, 115 Ind. 428; *Ransdel v. Moore*, 153 Ind. 393.

*Kansas.* — *Lyons v. Berlau*, 67 Kan. 426. But compare *Dassler's Gen. Stat. Kan. 1901*, § 1210, requiring "declarations or creations of trusts" to be executed "in the same manner as deeds of conveyance."

That a Subsequent Declaration is sufficient has been decided in *Indiana*. See cases *supra*, this note. In *Patton v. Beecher*, 62 Ala. 579, the question is raised but left open as unnecessary to the decision. But see later cases cited above. In *Richardson v. Woodbury*, 43 Me. 212, under a like statute, since repealed, the court in an *obiter* appears to regard a subsequent declaration as insufficient.

**2. By Deed or Conveyance or Instrument in Writing** — *Colorado.* — *Learned v. Tritch*, 6 Colo. 440; *Johnson v. Calnan*, 19 Colo. 168, 41 Am. St. Rep. 224.

*Idaho.* — *McGinness v. Stanfield*, 6 Idaho 372.

*Michigan.* — *Rood v. Winslow*, 2 Dougl. (Mich.) 70; *Patton v. Chamberlain*, 44 Mich. 5; *Douglass v. Douglass*, 72 Mich. 86; *Renz v. Stoll*, 94 Mich. 377, 34 Am. St. Rep. 358; *McCarn v. Wilcox*, 106 Mich. 64; *Eipper v. Benner*, 113 Mich. 75. As to former law, see *Ready v. Kearsley*, 14 Mich. 215.

*Minnesota.* — *Randall v. Constans*, 33 Minn. 334.

*Montana.* — *Chowen v. Phelps*, 26 Mont. 524.

*Nebraska.* — *Carter v. Gibson*, 29 Neb. 324, 26 Am. St. Rep. 381; *Dailey v. Kinsler*, 31 Neb. 340; *Elder v. Webber*, (Neb. 1902) 92 N. W. Rep. 126; *Pollard v. McKenney*, (Neb. 1903) 96 N. W. Rep. 679.

*Nevada.* — *Sime v. Howard*, 4 Nev. 473.

*New York.* — The English statute of frauds was substantially re-enacted by Act February 21, 1787, § 12. *Movan v. Hays*, 1 Johns. Ch. (N. Y.) 339; *Steere v. Steere*, 5 Johns. Ch. (N. Y.) 1, 9 Am. Dec. 256. By the Revised Statutes of 1828 (2 Rev. Stat. N. Y. 135, § 6), trusts were required to be "created \* \* \* or declared \* \* \* by a deed or conveyance," which it seems might be subsequent to the creation of the trust. *Wright v. Douglass*, 7 N. Y. 564, *reversing* 10 Barb. (N. Y.) 97. But in 1860, to avoid all doubt, a statute was passed providing that the enactment just quoted should not be construed so as "to prevent any declaration of trust from being proved by any writing subscribed by the party declaring the same," so that there is now no question that the New York statute law is the same in effect as the English statute of frauds. *Cook v. Barr*, 44 N. Y. 156; *McArthur v. Gordon*, 51 Hun (N. Y.) 511, *modified* 126 N. Y. 597; *Hutchins v. Van Vechten*, 66 Hun (N. Y.) 69.

*Oregon.* — *Dodson v. Dodson*, 26 Oregon 358; *Cooper v. Thomson*, 30 Oregon 170; *Parrish v. Parrish*, 33 Oregon 486. See also *Nickerson v. Nickerson*, 127 U. S. 673.

*Utah.* — Rev. Stat. Utah 1898, §§ 1974, 2461. See also *Skeen v. Marriott*, 22 Utah 73.

*Wisconsin.* — *White v. Fitzgerald*, 19 Wis. 480; *Pavey v. American Ins. Co.*, 56 Wis. 221; *Begole v. Hazzard*, 81 Wis. 274; *Krouskop v. Krouskop*, 95 Wis. 296; *Strong v. Gordon*, 96 Wis. 476; *Fillingham v. Nichols*, 108 Wis. 52.

3. *Carter v. Gibson*, 29 Neb. 324, 26 Am. St. Rep. 381. See also *Bohm v. Bohm*, 9 Colo. 106, and *infra*, this section, (4) (e) *Various Forms of Declaration or Manifestation*.

**4. By Instruments Executed "in the Same Manner as Deeds of Conveyance"** — *Iowa.* — *Butler*



and in *Mississippi* by writing "acknowledged and proved as other writings."<sup>1</sup> The changes made by these statutes will be discussed below.<sup>2</sup>

(cc) *States Not Expressly Re-enacting the Seventh Section.* — In a large number of states the seventh section of the statute of frauds is not in force in any form, and in the majority of these a parol declaration of a trust in lands is valid.<sup>3</sup> But in a few states of this class parol trusts in lands are excluded.<sup>4</sup> Acknowledg-

*v. Nelson*, 72 Iowa 732; *Andrew v. Concannon*, 76 Iowa 251; *Maroney v. Maroney*, 97 Iowa 711; *Byers v. McEniry*, 117 Iowa 499; *Andrew v. Andrew*, 114 Iowa 524. See also *Allen v. Withrow*, 110 U. S. 129, applying the Iowa statute.

*Kansas.* — Gen. Stat. Kan. 1897, c. 117, § 6. But compare *Dassler's Gen. Stat.* 1901, § 7875, requiring that trusts shall be "created in writing."

1. *Mississippi.* — Code Miss. 1892, § 4230 (Code 1857, p. 359, § 5); *Anding v. Davis*, 38 Miss. 593, 77 Am. Dec. 658; *Klein v. McNamara*, 54 Miss. 100; *Cameron v. Lewis*, 56 Miss. 81; *Barkwell v. Swan*, 69 Miss. 907 (record required); *Horne v. Higgins*, 76 Miss. 813. Prior to 1857 parol trusts of lands were valid. *Anding v. Davis*, 38 Miss. 593, 77 Am. Dec. 658; *Soggins v. Heard*, 31 Miss. 426.

2. See *infra*, this section, *Various Forms of Declaration or Manifestation*.

3. *Delaware.* — Hall v. Livingston, 3 Del. Ch. 348; *Pierson v. Pierson*, 5 Del. Ch. 11.

*Hawaii.* — The seventh section is not in force. *Kamihana v. Glade*, 5 Hawaii 497. Compare *Montgomery v. Montgomery*, 2 Hawaii 568. Whether parol trust valid is not determined. *Manu v. Campbell*, 6 Hawaii 382.

*North Carolina.* — *Foy v. Foy*, 2 Hayw. (3 N. Car.) 131; *Gay v. Hunt*, 1 Murph. (5 N. Car.) 111; *Streator v. Jones*, 3 Hawks (10 N. Car.) 423; *Riggs v. Swann*, 6 Jones Eq. (59 N. Car.) 118; *Hughes v. Pritchard*, 122 N. Car. 59; *Taylor v. McMillan*, 123 N. Car. 390; *Owens v. Williams*, 130 N. Car. 165. See, however, *Ferguson v. Haas*, 64 N. Car. 772. In this state the law before the statute of frauds is in force. See *supra*, this section, 4. a. (1) note. When the deed, like ancient feoffment, fine, or recovery, operates by transmutation of the legal estate, a contemporaneous parol declaration of trust is valid. When the deed operates without transmutation of possession, as bargain and sale or covenant to stand seized, the trust must be declared by writing, even though founded on valuable consideration. *Shelton v. Shelton*, 5 Jones Eq. (58 N. Car.) 292; *Riggs v. Swann*, 6 Jones Eq. (59 N. Car.) 118; *Frey v. Ramsour*, 66 N. Car. 466; *Wood v. Cherry*, 73 N. Car. 110; *Pittman v. Pittman*, 107 N. Car. 159; *Dover v. Rhea*, 108 N. Car. 92; *Blount v. Washington*, 108 N. Car. 230; *Blackburn v. Blackburn*, 109 N. Car. 488; *Cobb v. Edwards*, 117 N. Car. 244; *Salisbury First Nat. Bank v. Fries*, 121 N. Car. 241, 61 Am. St. Rep. 663; *Sykes v. Boone*, 132 N. Car. 109, 95 Am. St. Rep. 619. A declaration of trust not made in connection with a conveyance of the legal title must be in writing, *Dover v. Rhea*, 108 N. Car. 88; and apparently supported by consideration or sealed, *Pittman v. Pittman*, 107 N. Car. 159.

*Ohio.* — *Fleming v. Donahoe*, 5 Ohio 255; *Mathews v. Leaman*, 24 Ohio St. 623; *Harvey v. Gardner*, 41 Ohio St. 642; *Paddock v. Adams*, 56 Ohio St. 248; *Russell v. Bruer*, 64 Ohio St. 1.

*Tennessee.* — *McLanahan v. McLanahan*, 6 Humph. (Tenn.) 99; *Haywood v. Ensley*, 8 Humph. (Tenn.) 460; *Thompson v. Thompson*, (Tenn. Ch. 1899) 54 S. W. Rep. 145; *Woodfin v. Marks*, 104 Tenn. 512.

*Texas.* — *James v. Fulcrod*, 5 Tex. 512, 55 Am. Dec. 743; *Mead v. Randolph*, 8 Tex. 191; *Miller v. Thatcher*, 9 Tex. 482, 60 Am. Dec. 172; *McClenny v. Floyd*, 10 Tex. 159; *Cuney v. Dupree*, 21 Tex. 219; *Millican v. Millican*, 24 Tex. 426; *Leakey v. Gunter*, 25 Tex. 400; *Grooms v. Rust*, 27 Tex. 231; *Fretelliere v. Hindes*, 57 Tex. 392; *Neyland v. Bendy*, 69 Tex. 711; *Gardner v. Rundell*, 70 Tex. 453; *Brotherton v. Weathersby*, 73 Tex. 472; *Cook v. Cook*, 77 Tex. 85; *Holland v. Farthing*, 2 Tex. Civ. App. 155; *Barriet v. Houston*, 18 Tex. Civ. App. 134, 51 Am. Rep. 295; *Williams v. Emberson*, 22 Tex. Civ. App. 522; *Houser v. Jordan*, 26 Tex. Civ. App. 398; *Cordova v. Lee*, (Tex. 1890) 14 S. W. Rep. 208; *Smith v. Eckford*, (Tex. 1891) 18 S. W. Rep. 210; *Brown v. Jackson*, (Tex. Civ. App. 1897) 40 S. W. Rep. 162; *Branch v. De Blanc*, (Tex. Civ. App. 1901) 62 S. W. Rep. 134. See also *Orviss v. Dunn*, 34 Fed. Rep. 683; *Osterman v. Baldwin*, 6 Wall. (U. S.) 123, applying Texas law.

*Virginia.* — Express trusts may be established by parol. *U. S. Bank v. Barrington*, 7 Leigh (Va.) 566; *Walraven v. Lock*, 2 Patt. & H. (Va.) 547; *Hancock v. Talley*, (Spec. Ct. of App. 1881) 5 Va. L. Jour. 583, 7 Va. L. Reg. 24. *Dicta* that though the seventh and eighth sections are omitted in the Virginia statute the omission probably does not affect the law as found in *Sprinkle v. Hayworth*, 26 Gratt. (Va.) 392. See also *Borst v. Nalle*, 28 Gratt. (Va.) 436; *Sims v. Sims*, 94 Va. 580, 64 Am. St. Rep. 772. The question is regarded as an open one in *Jesser v. Armentrout*, 100 Va. 673. Resulting and implied trusts may at any rate be established by parol. *Francis v. Cline*, 96 Va. 219; *Phelps v. Seely*, 22 Gratt. (Va.) 573.

*West Virginia.* — *Currence v. Ward*, 43 W. Va. 367; *Hamilton v. McKinney*, 52 W. Va. 321. The question was still an open one as late as *Titchenell v. Jackson*, 26 W. Va. 468. Resulting and implied trusts may be proved by parol. *Potts v. Fitch*, 47 W. Va. 63.

4. *Connecticut.* — *Dean v. Dean*, 6 Conn. 285; *Vail's Appeal*, 37 Conn. 198; *Todd v. Munson*, 53 Conn. 579; *Brown v. Brown*, 66 Conn. 499; *Verzier v. Convard*, 75 Conn. 1. These cases proceed on the theory that to admit parol evidence to annex a trust to a deed would be to vary or contradict the deed by

ments or declarations of trusts in writing are of course valid.<sup>1</sup>

(2) *Parol Trusts of Lands Merely Voidable* — (a) *In General*. — A parol trust of lands is not void except at the election of the trustee; he may execute it or not as he chooses, and the courts will not interfere to compel him to execute it or to restrain him from so doing. If he elects to perform his moral duty and does execute the trust, the courts will protect him in so doing, and will protect the beneficiaries so far as possible in the enjoyment of the fruits of the executed trust.<sup>2</sup>

(b) *Waiver of Statute*. — The statute may be waived,<sup>3</sup> and a failure to plead it has been held to waive its protection.<sup>4</sup> But where the statute is pleaded an acknowledgment of the parol trust in the answer counts for nothing.<sup>5</sup>

(3) *What Property Is Within Statute*. — The statute includes real and not personal property.<sup>6</sup>

**Chattels Real** are within the seventh section of the statute of frauds, so that a parol trust thereof is invalid.<sup>7</sup>

**Copyhold Lands** are within the statute.<sup>8</sup>

**Mortgages**. — A valid trust of a mortgage debt may be created by parol, though a trust thus created cannot embrace the land held in pledge.<sup>9</sup>

(4) *Declaration or Manifestation Required under Statute* — (a) *Who May Declare Trust*. — The statute requires the writing to be signed by the person entitled to declare the trust. The person entitled to create or to declare a

parol evidence. Compare the cases as to proving an absolute deed to be a mortgage collected in the title MORTGAGES, vol. 20, p. 949 *et seq.*

*Kentucky*. — In this state though no enactment equivalent to the seventh section of the statute of frauds is in force, the act requiring sales of lands to be in writing, supplemented by the provision that "no estate of inheritance or freehold or for a lease of more than one year, in lands, shall be conveyed unless by deed or will" seems to have been considered by the courts as sufficient to prevent parol trusts of land. *Chiles v. Woodson*, 2 Bibb (Ky.) 71; *Parker v. Bodley*, 4 Bibb (Ky.) 103; *Sherley v. Sherley*, 97 Ky. 522. See also, holding parol trusts invalid, *Speers v. Sewell*, 4 Bush (Ky.) 239; *Harper v. Harper*, 5 Bush (Ky.) 177; *Rucker v. Abell*, 8 B. Mon. (Ky.) 566, 48 Am. Dec. 406; *Usher v. Flood*, 83 Ky. 552; *Com. v. Chesapeake, etc.*, R. Co., 94 Ky. 20. Compare *Woolfolk v. Earle*, (Ky. 1897) 40 S. W. Rep. 247. But the ordinary constructive trusts are valid though lying in parol. See the title IMPLIED TRUSTS, vol. 15, p. 1184 *et seq.* The cases in this state cannot, perhaps, be reconciled, but in *Sherley v. Sherley*, 97 Ky. 522, many of the cases are cited, and an attempt made to reconcile them. See also *supra*, this section, 4. b. (1) (a).

1. *Wallace v. Pruitt*, 1 Tex. Civ. App. 231; *Franklin v. Piper*, 5 Tex. Civ. App. 253; *McCandless v. Warner*, 26 W. Va. 754.

2. *Voluntary Execution of Parol Trust Valid*. — *McCormick Harvesting Mach. Co. v. Griffin*, 116 Iowa 401; *Brown v. Lunt*, 37 Me. 434; *Sieman v. Austin*, 33 Barb. (N. Y.) 9; *Richmond v. Bloch*, 36 Oregon 590; *Karr v. Washburn*, 56 Wis. 303; *Begole v. Hazzard*, 81 Wis. 274. See also *Wood v. Perkins*, 57 Fed. Rep. 258; *Randall v. Constans*, 33 Minn. 334; *Bork v. Martin*, 132 N. Y. 280, 28 Am. St. Rep. 570.

A Trustee Who Is Also a Debtor may recognize the equitable though unenforceable claims of his cestui que trust, and convey the property to

the beneficiary without being guilty of any fraud as against his creditors. *Appleton First Nat. Bank v. Bertschy*, 52 Wis. 451. See also the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 258.

3. *Waiver of Statute*. — *Myers v. Myers*, 167 Ill. 52.

4. *Flagg v. Mann*, 2 Sumn. (U. S.) 486; *Carpenter v. Davis*, 72 Ill. 14; *Brown v. Lunt*, 37 Me. 434; *Albert v. Winn*, 5 Md. 66; *Roddy v. Roddy*, 3 Neb. 96. Compare *Wilde v. Wilde*, 20 Grant Ch. (U. C.) 521.

The Requirement that the Evidence Must Be Clear and Convincing is not affected by failure to plead the statute. *Slocum v. Marshall*, 2 Wash. (U. S.) 399; *Bailey v. Irwin*, 72 Ala. 505.

The Statute of Frauds Not Being Pleaded in the answer the complainant may show a trust by parol though it differs from the trust stated in the answer. *Shaw v. Shaw*, 17 Grant Ch. (U. C.) 282.

5. 2 Story's Eq. Jur. 757; *Davis v. Stambaugh*, 163 Ill. 557; *Myers v. Myers*, 167 Ill. 65; *Thomas v. Churchill*, 48 Neb. 266; *Whiting v. Gould*, 2 Wis. 552. See also the title FRAUDS, STATUTE OF, 9 ENCYC. OF PL AND PR. 712.

6. See *supra*, this section, 4. b. See also generally the titles PERSONAL PROPERTY, vol. 22, p. 746; PROPERTY, vol. 23, p. 259; REAL ESTATE, vol. 23, p. 893; REAL PROPERTY, vol. 23, p. 933, and titles treating of the nature of particular interests in this work.

7. 1 Lewin on Trusts (8th ed.) 53; *Skett v. Whitmore*, Freem. Ch. 280 (term of years).

8. *Copyholds*. — 1 Lewin on Trusts (8th Eng. ed.) 53, citing *Withers v. Withers*, Amb. 151; *Langfield v. Hodges*, Loft 230, 1 Watk. on Cop. 227; *Acherley v. Acherley*, 7 Bro. P. C. (Toml. ed.) 273.

9. *Mortgages*. — *Bellasis v. Compton*, 2 Vern. 294; *Benbow v. Townsend*, 1 Myl. & K. 506; *Patterson v. Mills*, 69 Iowa 755; *Sayre v. Fredericks*, 16 N. J. Eq. 206; *Danser v. Warwick*,

trust is one and the same, namely, the beneficial owner of the property,<sup>1</sup> who may be the grantor at the date of the deed of trust,<sup>2</sup> or, in the case of a subsequent declaration, the grantee in a deed absolute on its face, or the beneficiary of a resulting trust thereunder.<sup>3</sup> It follows that a declaration of trust by the grantor in a deed absolute subsequent to the time when he has parted with title is of no weight<sup>4</sup> unless he is the *cestui que trust* of a resulting trust.<sup>5</sup>

(b) **Time of Declaration.** — The declaration or creation of a trust within the statute may be by declaration of trust in the instrument conveying the property, by an agreement in contemplation of the trust and antedating the acquisition of the property to which the trust is to attach, or it may consist of the acknowledgment of a right in another person, subsequent to the acquisition.<sup>6</sup>

**When an Antecedent Writing** constitutes the evidence of the trust, it appears that it must be in the nature of a covenant or agreement to act as trustee, which is perfected by the acceptance of the title to the subject-matter of the trust.<sup>7</sup> A suit for specific performance may be maintained upon such an agreement<sup>8</sup> supported by a valuable consideration.<sup>9</sup>

**A Subsequent Declaration** of trust operates as an admission, and its effect, therefore, is independent of the intention with which it is made.<sup>10</sup> Such a subsequent declaration relates back to the time of the creation of the trust of which it is the evidence, for the purpose of giving effect to all acts of disposition made by the *cestui que trust* between the declaration of the trust and its actual creation, and of defeating the rights which parties claiming under the trustee might have otherwise acquired.<sup>11</sup> But it cannot have effect by relation to defeat the rights of *bona fide* purchasers and creditors, acquired before the date of the admission.<sup>12</sup>

33 N. J. Eq. 133; *Barry v. Lambert*, 98 N. Y. 300, 50 Am. Rep. 677. See also the title MORTGAGES, vol. 20, p. 1028 *et seq.*

1. *Tierney v. Wood*, 19 Beav. 330.

**Mere Conduit of Title Not Creator.** — Where, in order to create a trust, A conveys property to B, who conveys to the trustee, who acknowledges the trust, the several conveyances constitute one transaction, and B cannot be considered as the creator of the trust. *Culross v. Gibbons*, 130 N. Y. 447.

**Statutory Provisions.** — By statute in *California* and other western states which have adopted the proposed New York Civil Code, a trust in real property is invalid unless evidenced, "1. By a written instrument subscribed by the trustee or by his agent thereto authorized by writing; 2. By the instrument under which the trustee claims the estate affected." *Doran v. Doran*, 99 Cal. 311; *Murphey v. Cook*, 11 S. Dak. 47.

2. *Gordon v. McCulloh*, 66 Md. 245.

3. *Tierney v. Wood*, 19 Beav. 330; *Myers v. Myers*, 167 Ill. 52; *Ransdel v. Moore*, 153 Ind. 401; *Barrell v. Joy*, 16 Mass. 221.

**The Subsequent Declaration of the Grantee in an Absolute Deed** derives its force not from his character as trustee, but is an admission against interest by the apparent owner of the property. See *infra*, this section, 4. b. (4) (b).

**The Answer of the Grantee Admitting the Trust** is binding on the other parties. *Myers v. Myers*, 167 Ill. 66.

4. *Phillips v. South Park Com'rs*, 119 Ill. 626.

5. *Tierney v. Wood*, 19 Beav. 330.

6. **Time of Declaration.** — *Dale v. Hamilton*, 2 Phil. 275; *Wiggs v. Winn*, 127 Ala. 621; *Rans-*

*del v. Moore*, 153 Ind. 401; *Bragg v. Paulk*, 42 Me. 512; *Jackson v. Moore*, 6 Cow. (N. Y.) 726. See also *infra*, this section, 4. b. (4) (e).

7. **Antecedent Agreement.** — 1 Ames Cas. Trusts (2d ed.) 178; *Morton v. Tewart*, 2 Y. & C. Ch. 67; *Luco v. De Toro*, 91 Cal. 417; *Compo v. Jackson Iron Co.*, 49 Mich. 39; *Jackson v. Moore*, 6 Cow. (N. Y.) 726.

8. See the title SPECIFIC PERFORMANCE, vol. 26, p. 124.

9. **Agreement to Reconvey as Consideration.** — It has been held that the agreement of the grantee to reconvey to a third person may be shown as the consideration of the original conveyance even though the agreement to reconvey was not reduced to writing. *Shaw v. Shaw*, 17 Grant Ch. (U. C.) 282. See also the title IMPLIED TRUSTS, vol. 15, pp. 1187, 1193, under the rubric *Minority Rule*.

10. **Subsequent Declaration.** — 1 Ames Cas. on Trusts (2d ed.) 178; *Bates v. Hurd*, 65 Me. 180; *McClellan v. McClellan*, 65 Me. 500; *Mac-cubbin v. Cromwell*, 7 Gill & J. (Md.) 164; *Hutchinson v. Tindall*, 3 N. J. Eq. 357.

11. **Subsequent Declaration Relates Back.** — *Hill on Trustees* (4th Am. ed.) 56; *Ambrose v. Ambrose*, 1 P. Wms. 322; *Wilson v. Dent*, 3 Sim. 385; *Mathews v. Massey*, 4 Baxt. (Tenn.) 459. See also the title RELATION, vol. 24, p. 274.

12. *Albert v. Winn*, 5 Md. 66; *Price v. Brown*, 4 S. Car. 144; *White v. Fitzgerald*, 19 Wis. 489. See generally the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 210.

**As to Who Is a Bona Fide Purchaser.** see the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 472.

**A Post-nuptial Marriage Settlement in writ-**



(c) **Signing or Subscription** — The writing, to satisfy the English statute of frauds, must be "signed by the party who is by law enabled to declare such trust." This requirement is repeated in many jurisdictions in the United States,<sup>1</sup> while in other states the writing must be subscribed.<sup>2</sup> Where the writing consists of several documents sufficiently connected to be received as evidence of the transaction, only one need be signed.<sup>3</sup>

(d) **What Writing Must Show — Must Disclose Terms of Trust.** — The statute requires that the written evidence, although it need not be expressed in formal or technical language,<sup>4</sup> must be sufficient to establish the whole trust; not only that there is a trust, but what it is.<sup>5</sup> It should identify the property or interests to which the trust relates or should afford means by which that identity may be made certain, and it should disclose the terms of the trust.<sup>6</sup> Other authorities, however, hold that if the writing makes clear the existence of the trust, its terms may be shown by parol.<sup>7</sup>

ing made in pursuance of an antenuptial oral agreement is, according to the better doctrine, regarded as voluntary, and is void against creditors. See the title **MARRIAGE SETTLEMENTS**, vol. 19, pp. 1246, 1247, 1248.

1. **Signing.** — *Samuels v. Greenspan*, 9 Kan. App. 140; *Gordon v. McCulloh*, 66 Md. 245. See also the title **SIGN — SIGNATURE**, vol. 25, p. 1064, and the various statutes.

Signing does not require subscription, and it is sufficient that the name appear in any part of the instrument, provided it is affixed for the purpose of authenticating it. *Smith v. Howell*, 11 N. J. Eq. 349; *McVay v. McVay*, 43 N. J. Eq. 47.

**Signing in Trustee's Presence and by His Direction Sufficient.** — *Packard v. Putnam*, 57 N. H. 43.

**Initials Sufficient Signature.** — *Smith v. Howell*, 11 N. J. Eq. 349.

2. See the various statutes. Subscription was a requirement of the *New York Revised Statutes*, and is found generally in states which have adopted their phraseology. The amendment in New York in 1860 made no change in this particular. *Cook v. Barr*, 44 N. Y. 156. See also **SUBSCRIBER**, vol. 27, p. 273; **SUBSCRIPTION**, vol. 27, p. 275.

3. **Several Writings.** — *Wiggs v. Winn*, 127 Ala. 621; *Kingsbury v. Burnside*, 58 Ill. 310, 11 Am. Rep. 67; *Gaylord v. Lafayette*, 115 Ind. 423; *McClellan v. McClellan*, 65 Me. 500.

4. **Declaration Need Not Be Formal or Technical.** — *Wiggs v. Winn*, 127 Ala. 621; *Luco v. De Toro*, 91 Cal. 417; *Tenney v. Simpson*, 37 Kan. 579; *Hinckley v. Hinckley*, 79 Me. 320; *Brown v. Combs*, 29 N. J. L. 36; *Pratt v. Ayer*, 3 Chand. (Wis. 265). See also this section, 8. a.

5. **Writing Must Disclose Terms of Trust — England.** — *Forster v. Hale*, 3 Ves. Jr. 707; *Leman v. Whitley*, 4 Russ. 423; *Smith v. Matthews*, 3 De G. F. & J. 139; *Rochefoucauld v. Boustead*, (1897) 1 Ch. 206.

*United States.* — *Fagan v. Thompson*, 38 Fed. Rep. 467.

*California.* — See *Hasshagen v. Hasshagen*, 80 Cal. 514; *Lynch v. Rooney*, 112 Cal. 279.

*Colorado.* — See *Waterbury v. Fisher*, 5 Colo. App. 362.

*Georgia.* — *Russell v. Switzer*, 63 Ga. 723.

*Illinois.* — *Kellogg v. Peddicord*, 181 Ill. 22.

*Indiana.* — See *Ransdel v. Moore*, 153 Ind.

403.

*Kansas.* — See *Tenney v. Simpson*, 37 Kan. 579.

*Maine.* — *McClellan v. McClellan*, 65 Me. 500. See also *Lane v. Lane*, 80 Me. 570; *Hinckley v. Hinckley*, 79 Me. 320.

*Massachusetts.* — *Homer v. Homer*, 107 Mass. 82.

*Michigan.* — *Renz v. Stoll*, 94 Mich. 380, 34 Am. St. Rep. 358; *Wright v. King*, Harr. (Mich.) 12. See also *Loring v. Palmer*, 118 U. S. 321, construing the Michigan statute.

*Minnesota.* — *Tatge v. Tatge*, 34 Minn. 272.

*Montana.* — See *Chowen v. Phelps*, 26 Mont. 524.

*New Jersey.* — *Newkirk v. Place*, 47 N. J. Eq. 477.

*New York.* — *Steere v. Steere*, 5 Johns Ch. (N. Y.) 1, 9 Am. Dec. 256; *Cook v. Barr*, 44 N. Y. 156; *Dillaye v. Greenough*, 45 N. Y. 438; *Hutchins v. Van Vechten*, 140 N. Y. 115; *Morgan v. Turner*, (Supm. Ct. Tr. T.) 35 Misc. (N. Y.) 399, affirmed 81 N. Y. App. Div. 645.

*Pennsylvania.* — *Dyer's Appeal*, 107 Pa. St. 446; *Martin v. Baird*, 175 Pa. St. 540; *Braun v. First German, etc., Church*, 198 Pa. St. 152; *Watson v. Watson*, 198 Pa. St. 241; *Ash v. Ash*, 4 Pa. Dist. 725.

*Rhode Island.* — *Taft v. Dimond*, 16 R. I. 584.

*Wisconsin.* — See *Heermans v. Schmaltz*, 10 Biss. (U. S.) 323, construing Wisconsin statute.

**A Will Devising Lands in Accordance with the Terms of an Oral Trust**, but without stating that the lands are held in trust is not a declaration of the trust within the statute and may be revoked. *Champlin v. Champlin*, 136 Ill. 309, 29 Am. St. Rep. 323.

**The Consideration may be proved by parol.** *Ransdel v. Moore*, 153 Ind. 404; *Arms v. Ashley*, 4 Pick. (Mass.) 74.

6. *Blodgett v. Hildreth*, 103 Mass. 486.

**Identifying Subject-matter by Parol.** — See *infra*, this section, 4. d.

7. *Kingsbury v. Burnside*, 58 Ill. 328, 11 Am. Rep. 67; *Reid v. Reid*, 12 Rich. Eq. (S. Car.) 213.

The early English cases on which these decisions were founded, either directly or through text books, *Hutchins v. Lee*, 1 Atk. 447; *Irnham v. Child*, 1 Bro. C. C. 92; *Cripps v. Jee*, 4 Bro. C. C. 472, seem to have proceeded only on the ground of preventing fraud or correcting mistake.

**Deed to Trustee Simply.** — Thus where a deed is to one as "trustee" simply, without defining the purpose of the trust or mentioning the beneficiary, it has been held that parol evidence was admissible to show these matters.<sup>1</sup>

**Loose and Inadvertent Declarations** are not sufficient to raise a trust.<sup>2</sup>

(e) **Various Forms of Declaration or Manifestation — Form of Writing Immaterial.** — In some states, as has been seen, the writing must be by deed or conveyance; but subject to this requirement in these jurisdictions,<sup>3</sup> it may be in any form which sufficiently states the trust,<sup>4</sup> and it is not necessary that it should have been framed for the purpose of acknowledging it,<sup>5</sup> nor that it should be contemporaneous with the creation of the trust.<sup>6</sup>

**Illustrations.** — It may consist of several writings, provided these may be connected together without resort to oral testimony.<sup>7</sup> The statute is satisfied by admissions in the pleadings in the case,<sup>8</sup> by recitals in a subsequent deed,<sup>9</sup> or in a bond,<sup>10</sup> or by letter or writing acknowledging the trust,<sup>11</sup> or by

Where an answer to a bill to engraft a trust on an absolute deed admits the trust, stating that the defendant is unable to remember its terms, these may be shown by parol. *Myers v. Myers*, 167 Ill. 52.

**Conversations Admitted as Part of the Res Gestæ** to show the purpose of the trust. *Drew v. Corliss*, 65 Vt. 650. See also *Leakey v. Gunter*, 25 Tex. 400.

1. *Union Pac. R. Co. v. Durant*, 95 U. S. 576; *Johnson v. Calnan*, 19 Colo. 168, 41 Am. St. Rep. 224.

2. *Cowan v. Wheeler*, 25 Me. 267, 43 Am. Dec. 283; *Campbell v. Campbell*, 70 Wis. 311.

**Mere Indefinite Memoranda** unsigned are insufficient. *Ratliff v. Ellis*, 2 Iowa 59, 63 Am. Dec. 471.

3. **"Deed or Conveyance" Required** — "To meet such requirement the paper offered must come within the definition of a deed or a conveyance," but it may be subsequent to the creation of the trust. *Sime v. Howard*, 4 Nev. 481.

**Attestation and Acknowledgment.** — The "deed or conveyance" requisite under these statutes need not be witnessed or acknowledged. *Carter v. Gibson*, 29 Neb. 324, 26 Am. St. Rep. 381; *White v. Fitzgerald*, 19 Wis. 486.

**A Seal** has been held not to be implied in the term "conveyance." *Corse v. Leggett*, 25 Barb. (N. Y.) 389; *White v. Fitzgerald*, 19 Wis. 486. See also CONVEY—CONVEYANCE, vol. 7, p. 486.

**Where a Writing "Executed in the Same Manner as Deeds of Conveyance"** is required, a simple receipt is not enough. *Cornelison v. Roberts*, 107 Iowa 220.

**Acknowledgment and Record Required.** — See *Barkwell v. Swan*, 69 Miss. 907.

4. *Buck v. Swazey*, 35 Me. 49, 56 Am. Dec. 681; *Hall v. Farmers, etc., Bank*, 145 Mo. 418; *Hutchinson v. Tindall*, 3 N. J. Eq. 357; *Hutchins v. Van Vechten*, 140 N. Y. 115.

5. *Kingsbury v. Burnside*, 58 Ill. 310, 11 Am. Rep. 67; *Kellogg v. Peddicord*, 181 Ill. 30.

6. *Forster v. Hale*, 3 Ves. Jr. 696; *Roche-foucauld v. Boustead*, (1897) 1 Ch. 206; *Barrell v. Joy*, 16 Mass. 221; *Throckmorton v. O'Reilly*, (N. J. 1903) 55 Atl. Rep. 56; *McVay v. McVay*, 43 N. J. Eq. 47; *Augustus v. Graves*, 9 Barb. (N. Y.) 595; *Throop v. Hatch*, (Supm. Ct. Spec. T.) 3 Abb. Pr. (N. Y.) 23; *Bechtel*

*v. Ammon*, 199 Pa. St. 87; *Price v. Brown*, 4 S. Car. 144. See also *supra*, this section, 4. b. (1) (b) *bb.* (bb).

7. **Several Writings.** — *Forster v. Hale*, 3 Ves. Jr. 696; *Loring v. Palmer*, 118 U. S. 321; *Wiggs v. Winn*, 127 Ala. 621; *McCreary v. Gewinner*, 103 Ga. 528; *Myers v. Myers*, 167 Ill. 63; *Ransdel v. Moore*, 153 Ind. 393; *Tenney v. Simpson*, 37 Kan. 579; *Gates v. Paul*, 117 Wis. 170; *Hannig v. Mueller*, 82 Wis. 235. See also the title INTERPRETATION AND CONSTRUCTION, vol. 17, p. 9.

8. **Admissions in Pleadings.** — *Hampton v. Spencer*, 2 Vern. 288; *Garnsey v. Gothard*, 90 Cal. 603; *Alexander v. Alexander*, 46 Ga. 291; *McLaurie v. Partlow*, 53 Ill. 345; *White v. Ross*, 160 Ill. 69; *Maccubbin v. Cromwell*, 7 Gill & J. (Md.) 164; *Patton v. Chamberlain*, 44 Mich. 5; *Cornelius v. Smith*, 55 Mo. 533; *McVay v. McVay*, 43 N. J. Eq. 47; *Broadrup v. Woodman*, 27 Ohio St. 553; *Preston v. Preston*, 202 Pa. St. 515; *Reid v. Reid*, 12 Rich. Eq. (S. Car.) 215; *Pratt v. Ayer*, 3 Chand. (Wis.) 265. See also *Hutchinson v. Tindall*, 3 N. J. Eq. 357.

**A Demurrer**, which necessarily admits the facts stated, is sufficient. *Second Unitarian Soc. v. Woodbury*, 14 Me. 281.

**When the Statute Is Pleaded** an admission in the answer counts for nothing. See *supra*, this section.

9. **Recitals in a Subsequent Deed.** — *Deg v. Deg*, 2 P. Wms. 414; *Wright v. Douglass*, 7 N. Y. 564, reversing 10 Barb. (N. Y.) 97.

**Indenture of Lease.** — *Aller v. Crouter*, 64 N. J. Eq. 381.

10. **Recital in Bond.** — *Bragg v. Paulk*, 42 Me. 502; *Gomez v. Tradesmen's Bank*, 4 Sandf. (N. Y.) 102.

11. **Letter or Writing Acknowledging Trust — England.** — *Crooke v. Brookeing*, 2 Vern. 106. **Illinois.** — *Moore v. Pickett*, 62 Ill. 158; *Union Mut. L. Ins. Co. v. Campbell*, 95 Ill. 267, 35 Am. Rep. 166.

**Indiana.** — *Kintner v. Jones*, 122 Ind. 148.

**Maine.** — *Blake v. Collins*, 69 Me. 156.

**Maryland.** — *Gordon v. McCulloh*, 66 Md. 245.

**Massachusetts.** — *Dorr v. Clapp*, 160 Mass. 538; *Stratton v. Edwards*, 174 Mass. 374; *Arms v. Ashley*, 4 Pick. (Mass.) 71; *Scituate v. Hanover*, 16 Pick. (Mass.) 222; *Montague v. Hayes*, 10 Gray (Mass.) 609.

receipt.<sup>1</sup> The writing need not be *inter partes*,<sup>2</sup> but may consist of pleadings in a case with a third party.<sup>3</sup>

**A Compulsory Deposition**, taken in a cause against the protest of the deponent, has been held not to establish a trust or to satisfy the statute.<sup>4</sup>

**A Married Woman's Acknowledgment or Deed** has been held, unless executed in conformity with statutory requirements, absolutely void as a declaration of trust.<sup>5</sup>

**Will Improperly Executed.** — A writing purporting to be a will, but not executed as required by the statute of wills, cannot operate as a declaration of trust under the statute.<sup>6</sup>

(5) *Cases to Which Statute Does Not Apply* — (a) **Implied and Constructive Trusts** — *aa. GENERAL STATEMENT.* — Under the seventh and eighth sections of the statute of frauds, in order to admit parol evidence, the case must fall within the express exception of the statute as arising "by implication or construction of law,"<sup>7</sup> or it must come within the class of judicial exceptions created in equity to prevent the employment of the statute in effecting schemes founded on fraud or imposition, or the trust must be shown to have been omitted from the writing by mistake.<sup>8</sup>

*New Hampshire.* — Packard v. Putnam, 57 N. H. 43.

*New Jersey.* — Newkirk v. Place, 47 N. J. Eq. 477.

*New York.* — Corse v. Leggett, 25 Barb. (N. Y.) 389; Malin v. Malin, 1 Wend. (N. Y.) 625.

*Pennsylvania.* — Ash v. Ash, 4 Pa. Dist. 725.

*South Carolina.* — Rutledge v. Smith, 1 McCord Eq. (S. Car.) 119; Reid v. Reid, 12 Rich. Eq. (S. Car.) 215.

*Vermont.* — Pinney v. Fellows, 15 Vt. 525.

*Wisconsin.* — Pratt v. Ayer, 3 Chand. (Wis.) 265.

See also Beadle v. Beadle, 2 McCrary (U. S.) 586, 40 Fed. Rep. 315.

**A Voluntary Deposition** stating the objects and nature of the trust and signed satisfies the statutes. Baker v. Baker, (Cal. 1892) 31 Pac. Rep. 355; Kellogg v. Peddicord, 181 Ill. 30.

**A Bond Securing the Conveyance** of land by the trustee to the *cestui que trust* has been held sufficient. Orleans v. Chatham, 2 Pick. (Mass.) 29.

1. **Receipt.** — Bates v. Hurd, 65 Me. 180; Robert's Appeal, 92 Pa. St. 407.

2. **Need Not Be Addressed to Cestui Que Trust.** — Morton v. Tewart, 2 Y. & C. Ch. 67; Bates v. Hurd, 65 Me. 180; Barrell v. Joy, 16 Mass. 221; Montague v. Hayes, 10 Gray (Mass.) 609.

Writings showing that the person claimed to be a trustee dealt with the property not in his own right but as agent, together with a deed to him as trustee, are sufficient. Brown v. Combs, 29 N. J. L. 36.

**An Undelivered Writing** not addressed to any one, found among decedent's valuable papers, purporting to be for the guidance of his executor, wherein the trust was acknowledged, has been held to satisfy the statute. Urann v. Coates, 109 Mass. 581, 117 Mass. 41.

3. **Admissions in the Pleadings in Case with Third Party.** — Cook v. Barr, 44 N. Y. 156. See also Baker v. Baker, (Cal. 1892) 31 Pac. Rep. 355.

This appears to result from the solemn

nature of the admission, and a private letter addressed to a stranger seems not to be sufficient. Steere v. Steere, 5 Johns. Ch. (N. Y.) 13, 9 Am. Dec. 256.

4. Davis v. Stambaugh, 163 Ill. 557.

**Evidence Given by the Trustee and Reduced to Writing** on the settlement of the grantor's estate long after the trust was created, admitting the parol trust, has been held insufficient. Hasshagen v. Hasshagen, 80 Cal. 514.

5. **Married Woman's Deed Improperly Executed.** — Tatge v. Tatge, 34 Minn. 272; Graham v. Long, 65 Pa. St. 383. See also Carter v. Gibson, 29 Neb. 324, 26 Am. St. Rep. 381. In the *Pennsylvania* case cited, Judge Sharswood proceeded on the "settled maxim of the law that no *feme covert* could be barred of her frank-tenement or inheritance by her confession merely without an examination in due course of law." This principle would surely apply to the creation of a trust of her own property, but *quære* whether applicable to her declaration as to property of which the beneficial ownership was never in her. In the *Minnesota* case the decision was not necessary, because the deed, if admitted, contained no mention of a trust.

6. **Improperly Executed Will.** — Leslie v. Leslie, 53 N. J. Eq. 275. See also *In re Boyes*, 26 Ch. D. 531.

In the *New Jersey* case cited, it is stated (following 1 Perry on Trusts, § 91) that if the so-called will was properly signed and contained on its face a declaration that the title had been in fact all the time held in trust by the testator, it might be construed as a declaration of trust.

7. Hutchinson v. Hutchinson, 6 Grant Ch. (U. C.) 117. IMPLIED TRUSTS, vol. 15, p. 1119.

8. **Fraud Takes Case Out of Statute** — *California.* — Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189; Doran v. Doran, 99 Cal. 311; Wittenbrock v. Cass, 110 Cal. 5.

*Colorado.* — Learned v. Tritch, 6 Colo. 432. *District of Columbia.* — McCartney v. Fletcher, 11 App. Cas. (D. C.) 9.



*bb. EXPRESS AND IMPLIED TRUSTS DISTINGUISHED.* — Where a trust arises independently of the intention of the parties, from the application of the principles of equity to a transaction, it is within the express exception of the statute, and these trusts have been fully considered in another title;<sup>1</sup> but where the trust arises from an agreement between the parties or from the declaration of the beneficial owner of the property, made with the intention of establishing a trust, it is within the statute and must be proved by writing,<sup>2</sup> in the absence, as stated above, of fraud or imposition.

*cc. WHAT SUFFICIENT EVIDENCE OF FRAUD.* — Although there have been protests against permitting the requirements of the statute of frauds to be cut away by allowing parol proof of trusts in any event,<sup>3</sup> it has long been established in courts of equity that the statute of frauds shall not be employed as an instrument in the accomplishment of fraud, and to prevent such an abuse of the statute, equity will impose a trust on the conscience of one who acquires an absolute title by deed or devise.<sup>4</sup>

*Georgia.* — *Robson v. Harwell*, 6 Ga. 589; *Printup v. Barrett*, 46 Ga. 411; *Roughton v. Rawlings*, 88 Ga. 819.

*New Jersey.* — *Hutchinson v. Tindall*, 3 N. J. Eq. 357.

*Wisconsin.* — *Fillingham v. Nichols*, 108 Wis. 52.

1. *Lehman v. Lewis*, 62 Ala. 129; *Cameron v. Lewis*, 56 Miss. 76. See also the title IMPLIED TRUSTS, vol. 15, p. 1119.

**A Resulting Trust Must Arise at the Time the Conveyance Is Made**, if at all, and must be certain. *Knox v. McFarren*, 4 Colo. 586; *Maroney v. Maroney*, 97 Iowa 711; *Lovett v. Taylor*, 54 N. J. Eq. 317; *Fleming v. Donahoe*, 5 Ohio 255; *Barger v. Barger*, 30 Oregon 276. But an express trust founded on agreement need not arise at the time of the transaction. *Oberlender v. Butcher*, (Neb. 1903) 93 N. W. Rep. 764.

**2. When Agreement Creates Trust It Is Express** — *England.* — *Kronheim v. Johnson*, 7 Ch. D. 60.

*Alabama.* — *Lehman v. Lewis*, 62 Ala. 129; *Patton v. Beecher*, 62 Ala. 587.

*Illinois.* — *Adams v. Adams*, 79 Ill. 518; *Stevenson v. Crapnell*, 114 Ill. 19; *Horne v. Ingraham*, 125 Ill. 198; *McDearmon v. Burnham*, 158 Ill. 55; *Ellis v. Hill*, 162 Ill. 557; *Kyle v. Wills*, 166 Ill. 501; *Monson v. Hutchin*, 194 Ill. 431; *Potter v. Clapp*, 203 Ill. 592, 96 Am. St. Rep. 322; *Morton v. Nelson*, (Ill. 1892) 31 N. E. Rep. 168; *Moore v. Horsley*, 156 Ill. 36; *Godschalk v. Fulmer*, (Ill. 1896) 45 N. E. Rep. 809, 176 Ill. 64.

*Indiana.* — *Irwin v. Ivers*, 7 Ind. 308, 63 Am. Dec. 420; *Pearson v. Pearson*, 125 Ind. 341; *Stonehill v. Swartz*, 129 Ind. 310; *Columbus, etc., R. Co. v. Braden*, 110 Ind. 558.

*Iowa.* — *Ratliff v. Ellis*, 2 Iowa 59, 63 Am. Dec. 471; *Hain v. Robinson*, 72 Iowa 735; *Acker v. Priest*, 92 Iowa 618; *Dunn v. Zwilling*, 94 Iowa 233; *Hemstreet v. Wheeler*, 100 Iowa 290; *Keller v. Strong*, 104 Iowa 585; *Gregory v. Bowlsby*, 115 Iowa 327; *McClenahan v. Stevenson*, 118 Iowa 106.

*Kansas.* — *Moore v. Wade*, 8 Kan. 387; *Knaggs v. Mastin*, 9 Kan. 547; *Franklin v. Colley*, 10 Kan. 260; *Brake v. Ballou*, 19 Kan. 397; *Ingham v. Burnell*, 31 Kan. 333; *Gee v. Thrailkill*, 45 Kan. 173.

*Maine.* — *Coe v. Bradley*, 49 Me. 388.

*Maryland.* — *Hertle v. McDonald*, 2 Md. Ch. 130.

*Massachusetts.* — *Moran v. Somes*, 154 Mass. 200; *Titcomb v. Morrill*, 10 Allen (Mass.) 15; *Bartlett v. Bartlett*, 14 Gray (Mass.) 277.

*Michigan.* — *Shafter v. Huntington*, 53 Mich. 315; *Chapman v. Chapman*, 114 Mich. 144.

*Mississippi.* — *Gibson v. Foote*, 40 Miss. 788; *Miazza v. Yeger*, 53 Miss. 135; *Mercer v. Stark*, Smed. & M. Ch. (Miss.) 488.

*Missouri.* — *Hillman v. Allen*, 145 Mo. 638.

*Nebraska.* — *Thomas v. Churchill*, 48 Neb. 266; *Veeder v. McKinley-Lanning L. & T. Co.*, 61 Neb. 892; *Elder v. Webber*, (Neb. 1902) 92 N. W. Rep. 126; *Oberlender v. Butcher*, (Neb. 1903) 93 N. W. Rep. 764.

*New Hampshire.* — *Farrington v. Barr*, 36 N. H. 86; *Hale v. Everett*, 53 N. H. 244; *Hall v. Congdon*, 55 N. H. 104; *Taylor v. Sayles*, 57 N. H. 465.

*New Jersey.* — *Baldwin v. Campfield*, 8 N. J. Eq. 891; *Lovett v. Taylor*, 54 N. J. Eq. 311; *Coffey v. Sullivan*, 63 N. J. Eq. 296.

*New York.* — *McCahill v. McCahill*, 71 Hun (N. Y.) 221; *Hutchinson v. Hutchinson*, 84 Hun (N. Y.) 482.

*Oregon.* — *Richmond v. Bloch*, 36 Oregon 593.

*Pennsylvania.* — *Watson v. Watson*, 198 Pa. St. 234.

*South Carolina.* — *Kinsey v. Bennett*, 37 S. Car. 319.

*Wisconsin.* — *Whiting v. Gould*, 2 Wis. 552.

In *Emerson v. Galloupe*, 158 Mass. 146, it is said: "We cannot construe that exception [the exception in the statute as to resulting and constructive trusts] as extending to a trust which arises from the plain words of a contract, merely because the words promise it by implication, instead of setting it forth at needless length." See also the title IMPLIED TRUSTS, vol. 15, p. 1119.

3. *Bedilian v. Seaton*, 3 Wall. Jr. (C. C.) 287; *Rasdall v. Rasdall*, 9 Wis. 388; *McManus v. McManus*, 24 Grant Ch. (U. C.) 118.

4. **The Statute Not to Be a Cover for Fraud.** — *McCormick v. Grogan*, L. R. 4 H. L. 82; *Jenkins v. Eldredge*, 3 Story (U. S.) 290; *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640; *Goldsmith v. Goldsmith*, 145 N. Y. 313; *McClellan v. Grant*, 83 N. Y. App. Div. 599; *Bork v. Martin*, 132 N. Y. 280, 28 Am. St. Rep. 570.

**Something More than Breach of Contract.** — The fraud against which equity will relieve must be something more than that which is inherent in the breach of every mere parol promise,<sup>1</sup> though the breach may, of course, be considered as one of the elements of a case of fraud.<sup>2</sup> For where one party has relied on the mere honor or promise of another, for equity to interpose would be virtually to annul the statute.<sup>3</sup> Just what additional elements of fraud are necessary to constitute the promisor a trustee is a question upon which the cases are not agreed.

**Fraud in Original Transaction.** — It is said in many well-considered cases that the fraud against which equity will relieve is fraud existing in the original transaction, not subsequent fraud by breach of a mere parol agreement; there must be actual fraud on the part of the grantee by which the title was obtained in an absolute form.<sup>4</sup>

**Elements of Equitable Estoppel — Part Performance.** — At least in addition to the original parol trust, there must have been, in reliance upon and induced by it, some change of situation in the nature of an estoppel *in pais* or part performance which equity will not permit the grantee or devisee to take advantage of while repudiating its obligations under cover of the statute.<sup>5</sup> In some

**An Agreement to Reduce the Trust to Writing** made contemporaneously with the creation of the trust lulling the other party into security has been held to take a case out of the statute. *Jenkins v. Eldredge*, 3 Story (U. S.) 292; *Jerome v. Bohm*, 21 Colo. 322. See also *Newell v. Montgomery*, 129 Ill. 58, and the title IMPLIED TRUSTS, vol. 15, p. 1196.

**1. Something More than Breach of Oral Agreement Necessary — England.** — *James v. Smith*, (1891) 1 Ch. 384, 63 L. T. N. S. 524.

*Alabama.* — *White v. Farley*, 81 Ala. 563; *Oden v. Lockwood*, 136 Ala. 514.

*California.* — *Brison v. Brison*, 75 Cal. 527, 7 Am. St. Rep. 189; *Barr v. O'Donnell*, 76 Cal. 469, 9 Am. St. Rep. 242.

*Colorado.* — *Von Troha v. Bamberger*, 15 Colo. 1.

*Illinois.* — *Perry v. McHenry*, 13 Ill. 236; *Rogers v. Simmons*, 55 Ill. 82; *Walter v. Klock*, 55 Ill. 365; *Davis v. Stambaugh*, 163 Ill. 557; *Mayfield v. Forsyth*, 164 Ill. 32; *Benson v. Dempster*, 183 Ill. 297; *Champlin v. Champlin*, 136 Ill. 309, 29 Am. St. Rep. 323; *Johnston v. Johnston*, 138 Ill. 385.

*Indiana* — *Peterson v. Boswell*, 137 Ind. 211; *Wright v. Moody*, 116 Ind. 175.

*Iowa.* — *Burden v. Sheridan*, 36 Iowa 125, 14 Am. Rep. 505; *McClain v. McClain*, 57 Iowa 170; *Dunn v. Zwilling*, 94 Iowa 233; *Byers v. McEniry*, 117 Iowa 499; *Willis v. Robertson*, (Iowa 1903) 96 N. W. Rep. 900.

*Maine.* — *Cowan v. Wheeler*, 25 Me. 267, 43 Am. Dec. 283.

*Massachusetts.* — *Fitzgerald v. Fitzgerald*, 168 Mass. 488; *Boyd v. Stone*, 11 Mass. 348.

*Minnesota.* — *Tatge v. Tatge*, 34 Minn. 272; *Connelly v. Sheridan*, 41 Minn. 18; *Luse v. Reed*, 63 Minn. 5.

*Mississippi.* — *Miazza v. Yerger*, 53 Miss. 135.

*Missouri.* — *Rogers v. Ramey*, 137 Mo. 607.

*Nebraska.* — *Pollard v. McKenney*, (Neb. 1903) 96 N. W. Rep. 679.

*New Hampshire.* — *Moore v. Moore*, 38 N. H. 382.

*New York.* — *Allen v. Arkenburgh*, 2 N. Y. App. Div. 455, affirmed 158 N. Y. 697.

*Pennsylvania.* — *Hollinshead's Appeal*, 103 Pa. St. 158; *McCloskey v. McCloskey*, 205 Pa. St. 491.

*Wisconsin.* — *Rasdale v. Rasdale*, 9 Wis. 379. See also the title FRAUD AND DECEIT, vol. 14, p. 47 *et seq.*

But compare the title IMPLIED TRUSTS, vol. 15, pp. 1187, 1193, under rubric *Minority Rule*, and in accord therewith, see *Shaw v. Shaw*, 17 Grant Ch. (U. C.) 282; *Williams v. Jenkins*, 18 Grant Ch. (U. C.) 536; *Ross v. Scott*, 21 Grant Ch. (U. C.) 391, 22 Grant Ch. (U. C.) 29.

**2. Gregory v. Bowsby**, 115 Iowa 327.

**3. Reliance on Mere Honor or Promise Insufficient.** — *Montacute v. Maxwell*, 1 P. Wms. 618; *Nickerson v. Nickerson*, 127 U. S. 668; *Patton v. Beecher*, 62 Ala. 579; *Brock v. Brock*, 90 Ala. 86; *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418.

**4. Fraud in Original Transaction — Alabama.** — *Patton v. Beecher*, 62 Ala. 579 (*overruling* *Barrell v. Hanrick*, 42 Ala. 60); *Manning v. Phippen*, 86 Ala. 357, 95 Ala. 537; *Brock v. Brock*, 90 Ala. 86; *Houston v. Farris*, 93 Ala. 588; *Tolleson v. Blackstock*, 95 Ala. 510; *Moore v. Campbell*, 102 Ala. 448.

*California.* — *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189.

*Colorado.* — *Bohm v. Bohm*, 9 Colo. 100.

*Iowa.* — *Gregory v. Bowsby*, 115 Iowa 327.

*Oregon.* — *Parrish v. Parrish*, 33 Oregon 486.

*Pennsylvania.* — *Barnet v. Dougherty*, 32 Pa. St. 371.

*Rhode Island.* — *Aborn v. Padelford*, 17 R. I. 143.

*Wisconsin.* — *Rasdale v. Rasdale*, 9 Wis. 379. Therefore an oral declaration in the nature of an admission subsequent to the time of the acquisition of the property under the trust agreement is insufficient. *Walker v. Hill*, 21 N. J. Eq. 191, 22 N. J. Eq. 513; *Barnes v. Taylor*, 27 N. J. Eq. 259. See also *infra*, this section, 4. e.

**5. Something Done in Reliance on Promise — United States.** — *Fagan v. Thompson*, 38 Fed. Rep. 467; *Reorganized Church, etc., v. Church of Christ*, 60 Fed. Rep. 937.

states cases of part performance are expressly excepted out of the statute.<sup>1</sup>

*dd. CLASSIFICATION OF IMPLIED TRUSTS.* — The various circumstances under which implied and constructive trusts have been held to arise enforceable without regard to the statute of frauds have been considered at length in another title.<sup>2</sup>

*ee. EXPRESS EXCLUDES IMPLIED TRUST.* — The existence of an express trust necessarily excludes the idea of an implied trust in relation to the same thing.<sup>3</sup> But where the nature of the transaction between two parties has given rise to an implied trust, it seems that this will not be changed into an express trust by its recognition in writing by the trustee, even in an instrument transferring the legal title to the property.<sup>4</sup>

(b) **Executed Express Trusts.** — Where a trust though created by parol has been fully executed or carried into effect, it becomes irrevocable and is not within the statute of frauds,<sup>5</sup> and parol evidence is admissible to show that it has been executed.<sup>6</sup>

*c. STATUTE OF WILLS — (1) In General.* — When an instrument creating a trust is of a testamentary character, it must, in order to be operative, be executed with all the formalities required by statute in the case of wills.<sup>7</sup>

*California.* — *Simons v. Bedell*, 122 Cal. 341, 68 Am. St. Rep. 35.

*Connecticut.* — *Church v. Sterling*, 16 Conn. 388; *Verzier v. Convard*, 75 Conn. 6.

*Colorado.* — *Stewart v. Stevens*, 10 Colo. 440.

*Iowa.* — *Burden v. Sheridan*, 36 Iowa 125, 14 Am. Rep. 505.

*Maine.* — *Wentworth v. Shibles*, 89 Me. 167.

*Massachusetts.* — *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418.

*New York.* — *Ryan v. Dox*, 34 N. Y. 319, 90 Am. Dec. 696; *Wheeler v. Reynolds*, 66 N. Y. 227; *Allen v. Arkenburgh*, 2 N. Y. App. Div. 455, *affirmed* 158 N. Y. 697.

*North Carolina.* — *East v. Dolihite*, 72 N. Car. 567.

*Compare Pillsbury-Washburn Flour-Mills Co. v. Kistler*, 53 Minn. 123. See also *Robertson v. Smith*, 21 Grant Ch. (U. C.) 308; *McManus v. McManus*, 24 Grant Ch. (U. C.) 123.

The plaintiff must first show acts on his part explicable only on the theory that they were in part performance of some agreement, the nonperformance of which would be to his injury, and the foundation being thus laid parol evidence will be admitted to ascertain what that agreement was in order that its terms may be enforced and the wrong prevented. *Verzier v. Convard*, 75 Conn. 1.

1. *Dailey v. Kinsler*, 31 Neb. 340; *Oberlander v. Butcher*, (Neb. 1903) 93 N. W. Rep. 764; *Kincaid v. Kincaid*, 85 Hun (N. Y.) 141; *Grinnely v. Shelmidine*, 83 N. Y. App. Div. 559.

2. See the title IMPLIED TRUSTS, vol. 15, p. 1129 *et seq.*

3. **Express Trust Excludes Implied Trust.** — *Dunn v. Zwilling*, 94 Iowa 233; *Byers v. McEniry*, 117 Iowa 499; *Mercer v. Stark*, Smed. & M. Ch. (Miss.) 488; *Green v. Cates*, 73 Mo. 115; *Whiting v. Gould*, 2 Wis. 552. See also *Wilde v. Wilde*, 20 Grant Ch. (U. C.) 521; *Leggett v. Dubois*, 5 Paige (N. Y.) 117, 28 Am. Dec. 413.

Where an express trust is alleged, proof of an implied trust from facts not alleged is inadmissible. *Hall v. Congdon*, 55 N. H. 104.

Cases occur, however, where under allegations of an express trust, there being no evidence to support such allegations, the court has

examined the facts for evidence of an implied trust. See, for instance, *Elder v. Webber*, (Neb. 1902) 92 N. W. Rep. 126.

4. *Darrow v. Calkins*, 154 N. Y. 503, 61 Am. St. Rep. 637, 6 N. Y. App. Div. 28.

**Implied Trust Continues Notwithstanding Admission.** — When an implied trust has once arisen, it cannot be converted into an express trust by the subsequent admission of the trustee in his answer in chancery. *Warren v. Tynan*, 54 N. J. Eq. 402.

5. **Executed Trusts — California.** — *Polk v. Boggs*, 122 Cal. 114.

*Georgia.* — *Beazley v. Kendrick*, 78 Ga. 121.

*Indiana.* — *Brown v. White*, (Ind. 1903) 67 N. E. Rep. 273; *Sunnyside Coal, etc., Co. v. Reitz*, 14 Ind. App. 478.

*Iowa.* — *McCormick Harvesting Mach. Co. v. Griffin*, 116 Iowa 401.

*Michigan.* — *Barber v. Milner*, 43 Mich. 248.

*Nebraska.* — *Oberlander v. Butcher*, (Neb. 1903) 93 N. W. Rep. 764.

*New Jersey.* — *Eaton v. Eaton*, 35 N. J. L. 290; *Silvers v. Potter*, 48 N. J. Eq. 539.

*New York.* — *Robbins v. Robbins*, 89 N. Y. 251; *Bork v. Martin*, 132 N. Y. 280, 28 Am. St. Rep. 570; *Allen v. Arkenburgh*, 158 N. Y. 697. See also *Mason v. Libbey*, 19 Hun (N. Y.) 119.

*Wisconsin.* — *Main v. Bosworth*, 77 Wis. 660.

**A Parol Agreement for a Trust Fully Performed** on the part of the plaintiff is not within the statute. *Jeremiah v. Pitcher*, 26 N. Y. App. Div. 402, *affirmed* 163 N. Y. 574; *reversed* by the Appellate Division, *Jeremiah v. Pitcher*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 513.

**If an Agreement for the Sale and Conversion of Land into Money** and for division of the proceeds has been executed by the trustee so that nothing remains but to divide the money received, it is not within the statute of frauds. *White v. Cleaver*, 75 Mich. 17; *Collar v. Collar*, 75 Mich. 414, 86 Mich. 507.

6. *Moore v. Cottingham*, 90 Ind. 239; *Bitely v. Bitely*, 85 Mich. 227; *Collar v. Collar*, 86 Mich. 507, 75 Mich. 414.

7. **Statute of Wills** — *Woodland v. Newhall*, 31 Fed. Rep. 434; *Moore v. Campbell*, 102 Ala. 445; *Comer v. Comer*, 120 Ill. 420, *affirming* 24



(2) *Subsequent Declarations of Trust.* — If a devise or bequest is made on trusts not disclosed by the will but to be thereafter declared, the subsequent declaration is invalid unless executed as a will; for to hold otherwise would be, in effect, to receive as part of a will or as a codicil, instruments not executed as required by statute.<sup>1</sup> In such a case, as the fiduciary nature of the gift appears, the intended trustee takes not beneficially but in trust for those who would be entitled.<sup>2</sup>

(3) *Fraud Taking Case out of Statute* — (a) **Fraud Inducing Direct Devise or Bequest.** — Where no trust appears on the face of a devise or bequest which the testator has been induced to make or, having made, has been induced not to revoke, in consideration of an agreement by the devisee or legatee, which may be either by express words or by silent assent on his part, to apply the property or some of it to certain trusts, equity, in order to prevent the conversion of the statute into an instrument of fraud, will enforce the trust against the legatee or devisee.<sup>3</sup>

(b) **Gifts on Secret Unlawful Trusts.** — If, however, the devise or bequest is made in consideration of a promise to execute trusts which are invalid and unlawful, equity will not allow the devisee or legatee to profit by his fraud, but will raise a resulting trust in favor of the testator's heir or next of kin.<sup>4</sup> But where there is no bargain between the testator and the devisee or legatee, the gift to the latter will be good, although from the impulse of his own mind he intends to carry out what he believes to have been the testator's wish.<sup>5</sup>

(c) **Fraud Preventing Making of Will.** — When the making of a will is prevented

Ill. App. 526; *Orth v. Orth*, 145 Ind. 190; *Fellows v. Fellows*, 69 N. H. 343.

**Paper Made Part of Will by Reference.** — A deed creating a trust may by proper reference be made part of a will, and it is not necessary to exhibit it to the witnesses of the will or to present it for probate. *Matter of Willey*, 128 Cal. 1; *Van Cott v. Prentice*, 35 Hun (N. Y.) 317, affirmed 104 N. Y. 45.

But it must be in existence at the time of the making of the will and must be clearly identified. *Singleton v. Tomlinson*, 3 App. Cas. 404.

**Contemporary Memorandum** by testator admissible to explain intention in creating trust. *Cumming v. Reid Memorial Church*, 64 Ga. 105. *Aliter* as to subsequent memoranda, *Briggs v. Penny*, 3 De G. & Sm. 525.

**A Bare Recital** in a Will that property has been devised to A in trust is not a devise of such property in trust satisfying the statute. *Hunt v. Evans*, 134 Ill. 496; *Stodder v. Hoffman*, 158 Ill. 486.

1. **Subsequent Declarations of Trust.** — *Briggs v. Penny*, 3 De G. & Sm. 525; *Johnson v. Ball*, 5 De G. & Sm. 85. See also *In re Boyes*, 26 Ch. D. 531.

2. *In re Fleetwood*, 15 Ch. D. 594. And see the cases cited in the last note, and *infra*, this subsection, 4. c. (3) (d).

3. **Fraud Inducing Will — England.** — *Drakeford v. Wilks*, 3 Atk. 539; *McCormick v. Grogan*, L. R. 4 H. L. 82; *Byrn v. Godfrey*, 4 Ves. Jr. 10; *Paine v. Hall*, 18 Ves. Jr. 475.

*United States.* — *Shields v. McAuley*, 37 Fed. Rep. 302.

*Alabama.* — *Bishop v. Bishop*, 13 Ala. 475; *Barrell v. Hanrick*, 42 Ala. 60; *Moore v. Campbell*, 102 Ala. 445, 113 Ala. 587.

*California.* — *De Laurencel v. De Boom*, 48 Cal. 581; *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189.

*Maine.* — *Gilpatrick v. Glidden*, 81 Me. 137, 10 Am. St. Rep. 245.

*Massachusetts.* — *Oliffe v. Wells*, 130 Mass. 221.

*Michigan.* — *Hooker v. Axford*, 33 Mich. 453.

*Mississippi.* — *Ragsdale v. Ragsdale*, 68 Miss. 92, 24 Am. St. Rep. 256.

*New Jersey.* — *Carver v. Todd*, 48 N. J. Eq. 102, 27 Am. St. Rep. 466.

*New York.* — *Matter of O'Hara*, 95 N. Y. 403, 47 Am. Rep. 53; *Edson v. Bartow*, 10 N. Y. App. Div. 104.

*North Carolina.* — *Cook v. Redman*, 2 Ired. Eq. (37 N. Car.) 623.

*Pennsylvania.* — *McKee v. Jones*, 6 Pa. St. 425.

*Tennessee.* — *McLellan v. McLean*, 2 Head (Tenn.) 685.

See also the title IMPLIED TRUSTS, vol. 15, p. 1191 *et seq.* And compare *Bedilian v. Seaton*, 3 Wall. Jr. (C. C.) 279.

**Devise to Two One of Whom Is Informed of Trust.** — Where a devise intended to be in trust is to two as tenants in common, and the trust is subsequently communicated to one only, he takes the property charged with a trust, while the devisee not informed thereof takes it discharged. *Tee v. Ferris*, 2 Kay & J. 357; *Rowbotham v. Dunnnett*, 8 Ch. D. 430.

**A Mere Declaration of Intention** by a devisee or legatee under a will, made to the testator, as to a future use intended to be made of the property, does not create a trust. *Bennett v. Littlefield*, 177 Mass. 294.

4. **Secret Unlawful Trusts.** — *Adlington v. Cann*, 3 Atk. 141; *Muckleston v. Brown*, 6 Ves. Jr. 52; *Stickland v. Aldridge*, 9 Ves. Jr. 516; *Springett v. Jennings*, L. R. 10 Eq. 488.

5. *Wallgrave v. Tebbis*, 2 Kay & J. 313 (devisee intending to carry out an intention which would have been void as a trust).

by the promise of an heir or distributee to hold the property in trust for a particular person, the case is taken out of the statute by the fraud, and such heir or distributee will be held a constructive trustee.<sup>1</sup>

(d) **Gifts in Trust Without More.** — If the will discloses that a gift is intended to be on trust, but the terms and purpose of the trust are not declared, the trust may be enforced in accordance with the testator's real intent if that intent was communicated to the devisee or legatee at the time of making the will;<sup>2</sup> and it has been held that if during his life the testator has subsequently communicated his true intentions to the devisee or legatee and the gift has been accepted by him on specific trusts, the trusts are valid and may be proved by oral evidence such as the donee's admissions.<sup>3</sup> But if the trusts are not made known to and accepted by the donee during the testator's life, the beneficial interest in the property reverts to the residuary legatee or next of kin.<sup>4</sup>

(4) **Whether Will or Executed Trust.** — Questions may arise as to whether the instrument claimed as creating the trust can be considered as evidencing a complete trust, or whether by reason of the fact that certain provisions are postponed to take effect at the death of the settlor, the instrument is in its nature testamentary.

**Reserving Power of Revocation.** — If the trust created is complete and effective from the date of the instrument, the character of the writing as an executed declaration of trust is not affected by the fact that a general power of revocation is reserved during the creator's lifetime.<sup>5</sup>

**Provisions to Take Effect from Death Only.** — The mere fact that certain provisions in a deed of trust are not to take effect until the grantor's death does not affect its character as creating an executed trust, and render it testamentary where a present estate is transferred by it to the trustee.<sup>6</sup> But where no

**1. Will Prevented.** — *Stickland v. Aldridge*, 9 Ves. Jr. 516; *Simons v. Bedell*, 122 Cal. 341, 68 Am. St. Rep. 35; *Ransdel v. Moore*, 153 Ind. 393. See also IMPLIED TRUSTS, vol. 15, p. 1192, and compare *Whitton v. Russel*, 1 Atk. 448.

**2. Trusts Communicated to Trustee at Making of Will.** — *Crook v. Brooking*, 2 Vern. 50, 106; *Pring v. Pring*, 2 Vern. 99; *Smith v. Attersoll*, 1 Russ. 266; *Podmore v. Gunning*, 7 Sim. 644; *Irvine v. Sullivan*, L. R. 8 Eq. 673; *Riordan v. Banon*, Ir. R. 10 Eq. 649; *In re Fleetwood*, 15 Ch. D. 594; *In Goods of Marchant*, (1893) P. 254.

**Sealed Declaration Accepted by Donee.** — If the trusts are declared in a writing deposited in a sealed envelope which is given to the donee, who promises to execute such trusts though their terms are unknown to him, it seems that equity may enforce the trust against him and also against those entitled to claim as beneficiaries in the absence of a declaration. *In re Boyes*, 26 Ch. D. 531. And see *Van Cott v. Prentice*, 104 N. Y. 45, affirming 35 Hun (N. Y.) 317.

**3. Trusts Communicated Subsequent to Will.** — *Moss v. Cooper*, 1 Johns. & H. 352. This decision (if it is sound) must proceed on the principle of not permitting the statute to be turned into an instrument of fraud. See *Riordan v. Banon*, Ir. R. 10 Eq. 649; *In re Fleetwood*, 15 Ch. D. 607. But it has been pointed out that the fraud which would be avoided is not that of the donee, for the estate would go to the innocent next of kin or residuary legatee. 1 *Lewin on Trusts* (8th Eng. ed.) 65.

**4. In re Boyes**, 26 Ch. D. 531.

**5. Power of Revocation During Life Reserved.** — *Thompson v. Browne*, 3 Myl. & K. 32; *Bar-*

*low v. Loomis*, 19 Fed. Rep. 677; *Nichols v. Emery*, 109 Cal. 323, 50 Am. St. Rep. 43; *Matter of Willey*, 128 Cal. 1; *Kelly v. Parker*, 181 Ill. 49; *Hiserodt v. Hamlett*, 74 Miss. 37; *Van Cott v. Prentice*, 104 N. Y. 45, affirming 35 Hun (N. Y.) 317; *Thompson v. McDonald*, 2 Dev. & B. Eq. (22 N. Car.) 463; *Lines v. Lines*, 142 Pa. St. 149, 24 Am. St. Rep. 487.

**A Parol Declaration of trust where a present interest is transferred may be valid in spite of the statute of wills, although a right of revocation is reserved.** *Dougherty v. Shillingsburg*, 175 Pa. St. 59.

**6. When Present Estate Is Transferred.** — *Massey v. Huntington*, 118 Ill. 80; *Ewing v. Jones*, 130 Ind. 247; *Craven v. Winter*, 38 Iowa 471; *Forney v. Remey*, 77 Iowa 549; *Pennsylvania R. Co. v. Stevenson*, 63 N. J. Eq. 634; *Thompson v. McDonald*, 2 Dev. & B. Eq. (22 N. Car.) 463; *Egerton v. Carr*, 94 N. Car. 648, 55 Am. Rep. 630; *Dickerson's Appeal*, 115 Pa. St. 198, 2 Am. St. Rep. 547; *Brace v. Van Eps*, 12 S. Dak. 191; *Millican v. Millican*, 24 Tex. 426. See generally the title DEEDS, vol. 9, p. 91 *et seq.*

When the property is transferred during the creator's life by a deed to the grantee in trust, the right to revoke during the grantor's life being reserved, and the ultimate disposition of the property to be determined by a sealed paper of even date with the deed and delivered with it, the trust is executed, and the instrument is not executory and is not testamentary in character. *Van Cott v. Prentice*, 104 N. Y. 45, affirming 35 Hun (N. Y.) 317.

**A Deed of Trust May Be Delivered in Escrow to take effect at the grantor's death.** *Simons*

present interest passes and the estate of the beneficiary is not to begin until the death of the testator, the intention is testamentary, and no completed trust is created.<sup>1</sup>

**d. RULE AGAINST PAROL EVIDENCE GENERALLY.** — The Rule Against Varying a Deed or Other Writing by Parol has been frequently held to offer no obstacle to annexing an oral trust to a written instrument absolute on its face.<sup>2</sup> Full effect is given to the writing in passing the absolute title at law, and the trust is but a separable part of the contract or a collateral agreement *dehors* the instrument not reduced or intended to be reduced to writing, which a court of equity enforces as binding on the conscience of the party.<sup>3</sup> The fact that the statute of frauds itself allows a trust to be raised by evidence *dehors* the deed, only requiring that the evidence be in writing, shows that such extrinsic evidence does not contradict the deed, and where the statute does not prevent the trust may be by parol.<sup>4</sup>

**Annexing Condition and Annexing Trust Distinguished.** — The attempt has been made to distinguish the cases wherein parol evidence is admitted in order to annex to an absolute deed a condition converting it into a security for money, because the condition affects the legal estate, which the trust does not.<sup>5</sup> But the cases allowing parol evidence to show a deed to be a mortgage are frequently cited as altogether analogous and conclusive in principle when the evidence is intended to establish a trust.<sup>6</sup>

**Consideration.** — The admissibility of parol evidence as affecting the consideration of written instruments has been considered elsewhere.<sup>7</sup> The want of consideration may be proved in connection with and as a part of constructive fraud.<sup>8</sup>

**Identifying Subject-matter and Showing Position of Parties.** — Parol evidence, not inconsistent with the contract as reduced to writing,<sup>9</sup> is admissible to identify the subject-matter of the trust<sup>10</sup> and to show the position and surroundings of the parties at the time of the writing.<sup>11</sup>

*v. Bedell*, 122 Cal. 341, 68 Am. St. Rep. 35. See also *Kelly v. Parker*, 181 Ill. 49.

**1. Where No Present Interest Passes.** — *Norway Sav. Bank v. Merriam*, 88 Me. 153; *Clay v. Layton*, (Mich. 1903) 96 N. W. Rep. 458; *Towle v. Wood*, 60 N. H. 434, 49 Am. Rep. 326; *Kelsey v. Cooley*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 745, 58 Hun (N. Y.) 601; *Sterling v. Wilkinson*, 83 Va. 791; *Kreh v. Moses*, 22 Ont. 307. But compare *Hoboken Sav. Bank v. Schwoom*, 62 N. J. Eq. 503.

**2.** *Brison v. Brison*, 75 Cal. 533, 7 Am. St. Rep. 189; *Williams v. Emberson*, 22 Tex. Civ. App. 522. And see *supra*, this section, 4. *b.* (1) (*b.*) *bb.* (*cc.*).

**3. Trust a Collateral Incident to Written Transfer.** — *Patton v. Beecher*, 62 Ala. 585; *Hall v. Livingston*, 3 Del. Ch. 373; *Anding v. Davis*, 38 Miss. 594, 77 Am. Dec. 658; *Shelton v. Shelton*, 5 Jones Eq. (58 N. Car.) 292; *Fleming v. Donahoe*, 5 Ohio 255; *Harvey v. Gardner*, 41 Ohio St. 646; *Paddick v. Adams*, 56 Ohio St. 248; *Martin v. Martin*, 43 Oregon 119; *Clark v. Haney*, 62 Tex. 511, 50 Am. Dec. 536. But see *Dean v. Dean*, 6 Conn. 284; *Sprinkle v. Hayworth*, 26 Gratt. (Va.) 392; *Troll v. Carter*, 15 W. Va. 567.

**4.** *Hall v. Livingston*, 3 Del. Ch. 375.

**5. Condition and Trust.** — *Shelton v. Shelton*, 5 Jones Eq. (58 N. Car.) 292; *Shields v. Whitaker*, 82 N. Car. 520.

**6.** *Hall v. Livingston*, 3 Del. Ch. 348; *Mead v. Randolph*, 8 Tex. 196. See also *Rasdale v. Rasdale*, 9 Wis. 379.

**7.** See the titles *CONSIDERATION*, vol. 6, pp. 758 *et seq.*, 797 *et seq.*; *RECITALS*, vol. 24, p. 64.

**8.** *Brison v. Brison*, 75 Cal. 532, 7 Am. St. Rep. 189; *Shotwell v. Shotwell*, 24 N. J. Eq. 385.

**9. Must Be Consistent with Writing.** — *Knight v. Bunn*, 7 Ired. Eq. (42 N. Car.) 77.

A subsequent declaration of trust cannot, of course, vary or add to the original declaration contained in an instrument in writing. *Burling v. Newlands*, 112 Cal. 476.

**10. Identifying Subject-matter.** — *Watkins v. Greer*, 52 Ark. 65; *Moore v. Pickett*, 62 Ill. 158; *Packard v. Putnam*, 57 N. H. 43; *McArthur v. Gordon*, 51 Hun (N. Y.) 511; *Ash v. Ash*, 4 Pa. Dist. 725; *Barker v. Wheelip*, 5 Humph. (Tenn.) 329, 42 Am. Dec. 432; *Renshaw v. Tullahoma First Nat. Bank*, (Tenn. Ch. 1900) 63 S. W. Rep. 194. See also the title *PAROL EVIDENCE*, vol. 21, p. 1119 *et seq.*

**11. To Show Situation of Parties.** — *Bellamy v. Sheriff*, 6 Fla. 62; *Ransdel v. Moore*, 153 Ind. 401; *Haxton v. McClaren*, 132 Ind. 235; *McVay v. McVay*, 43 N. J. Eq. 47; *Newkirk v. Place*, 47 N. J. Eq. 477; *McArthur v. Gordon*, 51 Hun (N. Y.) 511. See also the title *PAROL EVIDENCE*, vol. 21, p. 1108.

When an instrument is claimed to be an acknowledgment and proof of an express trust the circumstances under which it was made may be used to elucidate its construction. *Morton v. Tewart*, 2 Y. & C. Ch. 67; *Aller v. Crouter*, 64 N. J. Eq. 381.



**Writings Ambiguous: Rebutting and Establishing Trust.** — When the inference of a trust from the written evidence is clear and positive, it cannot be rebutted by parol proof; but when the writings are loose and ambiguous, parol evidence is admissible to remove the obscurity and to rebut the trust,<sup>1</sup> or to establish the trust.<sup>2</sup>

**e. AMOUNT AND ADMISSIBILITY OF PAROL EVIDENCE TO ESTABLISH TRUST.** — In order to establish a parol trust as to either real or personal property, the evidence must be clear and explicit, and must manifest the owner's purpose to transfer the right and point out with certainty both the subject of the trust and the person who is to take the beneficial interest;<sup>3</sup> the essential facts must be proved clearly and satisfactorily by a preponderance of testimony.<sup>4</sup> Sometimes the rule is stated to be that the mere oral declaration of the trust must find support in the surrounding circumstances and the subsequent conduct of the parties.<sup>5</sup>

**Fastening Trust on Absolute Instrument.** — Especially must the evidence be clear, convincing, and conclusive, where it is relied on to fasten a parol trust on a written instrument,<sup>6</sup> and in one state at least oral declarations and admissions

**1. Rebutting Trust.** — *Steere v. Steere*, 5 Johns. Ch. (N. Y.) 1, 9 Am. Dec. 256.

**Parol Evidence Is Admissible to Rebut** where it is admissible to establish a trust. *Newhall v. Le Breton*, 119 U. S. 259; *Smith v. Howell*, 11 N. J. Eq. 349.

**2. Parol Evidence to Establish Trust Where Language Doubtful.** — *Featherston v. Richardson*, 68 Ga. 505. See also *Gaylord v. Lafayette*, 115 Ind. 430.

In *Redington v. Redington*, 3 Ridg. P. C. 182, it seems to have been held that parol evidence was admissible, when the writings were ambiguous, to rebut, but not to raise, a trust. See the statement of the case by Kent, Ch., in *Steere v. Steere*, 5 Johns. Ch. (N. Y.) 19, 9 Am. Dec. 256.

**3. Evidence Must Be Clear and Explicit — Canada.** — *McManus v. McManus*, 24 Grant Ch. (U. C.) 124.

**United States.** — *Allen v. Withrow*, 110 U. S. 119.

**Alabama.** — *Bailey v. Irwin*, 72 Ala. 505.

**Georgia.** — *Morrison v. Ball*, 54 Ga. 212.

**Hawaii.** — *Kamihana v. Glade*, 5 Hawaii 497; *Manu v. Campbell*, 6 Hawaii 382.

**Iowa.** — *Trout v. Trout*, 44 Iowa 471.

**Mississippi.** — *Mercer v. Stark, Smed. & M. Ch. (Miss.)* 479.

**Missouri.** — *Rogers v. Rogers*, 87 Mo. 257.

**Nebraska.** — *Roddy v. Roddy*, 3 Neb. 96; *Kobarg v. Greeder*, 51 Neb. 365; *Columbia Nat. Bank v. Baldwin*, 64 Neb. 732.

**New York.** — *Lennon v. Bradley, etc., Co.*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 452, affirmed 46 N. Y. App. Div. 621.

**Oregon.** — *Clark v. Pratt*, 15 Oregon 304.

**South Carolina.** — *Harris v. Bratton*, 34 S. Car. 259.

**Tennessee.** — *Haywood v. Ensley*, 8 Humph. (Tenn.) 466; *Renshaw v. Tullahoma First Nat. Bank*, (Tenn. Ch. 1900) 63 S. W. Rep. 194.

**Texas.** — *Mead v. Randolph*, 8 Tex. 199; *Cuney v. Dupree*, 21 Tex. 219.

**Utah.** — *Skeen v. Marriott*, 22 Utah 73.

**The Quantum of Parol Evidence to Establish a Resulting Trust** is measured by the same standard. See *Stone v. Manning*, 103 Tenn.

232, and the title IMPLIED TRUSTS, vol. 15, p. 1174 *et seq.*

**When a Trust Depends on a Deed Not Produced**, the evidence must be of the clearest and most satisfactory kind, both to prove its existence and account for its nonproduction. *Brown v. Capron*, 24 Grant Ch. (U. C.) 91. See also *Curry v. Curry*, 26 Grant Ch. (U. C.) 1.

**The Testimony of the Person Claiming under the Trust** is insufficient to establish it. *Renshaw v. Tullahoma First Nat. Bank*, (Tenn. Ch. 1900) 63 S. W. Rep. 194; *Ingenhuett v. Hunt*, 15 Tex. Civ. App. 248.

**4. Falsken v. Harkendorf**, 11 Neb. 82; *Robinson v. Jones*, 31 Neb. 20; *Stubblefield v. Stubblefield*, (Tex. Civ. App. 1898) 45 S. W. Rep. 965.

**Vague Indefinite Oral Statements** are not sufficient. *Levi v. Evans*, (C. C. A.) 57 Fed. p. 677. See also *Crouse v. Frothingham*, 97 N. Y. 105.

**5. Crissman v. Crissman**, 23 Mich. 217; *Hamilton v. Hall*, 111 Mich. 295. See also *Allen v. Withrow*, 110 U. S. 119.

**6. Fastening Trust on Absolute Instrument — Alabama.** — *McVey v. Parker*, 64 Ala. 493.

**California.** — *Sherman v. Sandell*, 106 Cal. 375; *Sheehan v. Sullivan*, 126 Cal. 189.

**Colorado.** — *Mullen v. McKim*, 22 Colo. 468. **District of Columbia.** — *McCartney v. Fletcher*, 11 App. Cas. (D. C.) 9.

**New Jersey.** — *Sayre v. Fredericks*, 16 N. J. Eq. 205.

**North Carolina.** — *Harding v. Long*, 103 N. Car. 1, 14 Am. St. Rep. 775; *Cobb v. Edwards*, 117 N. Car. 244.

**Ohio.** — *Stall v. Cincinnati*, 16 Ohio St. 169; *Mathews v. Leaman*, 24 Ohio St. 624; *Mannix v. Purcell*, 46 Ohio St. 102, 15 Am. St. Rep. 562; *Russell v. Bruer*, 64 Ohio St. 1; *Vance v. Park*, 8 Ohio Cir. Dec. 425, modifying 7 Ohio Dec. 564; *Goodrich v. French*, 8 Ohio Dec. 351.

**Tennessee.** — See *Guntert v. Guntert*, (Tenn. Ch. 1896) 37 S. W. Rep. 890.

**Texas.** — *Grooms v. Rust*, 27 Tex. 231.

**Virginia.** — *Jesser v. Armentrout*, 100 Va. 674.

are inadmissible unless facts *dehors* the instrument are shown which to a fair mind are incompatible with the writing and explicable only upon the ground that a trust was intended.<sup>1</sup>

**Subsequent Declarations of Grantor.** — The declarations of the grantor in a deed made subsequent to its execution, and when he has no interest in the property conveyed, are clearly without probative force whether the trust is provable by parol or is within the statute of frauds.<sup>2</sup>

**Subsequent Declarations of Grantee.** — Where the trust is one whose creation or manifestation by parol is forbidden, the case can be taken out of the statute only on the ground of fraud, which requires a preceding or contemporaneous contract, and a subsequent declaration by the grantee is without effect.<sup>3</sup>

**Where Parol Trusts Are Not Prohibited by Statute,** the same rule has been applied in some states, namely that only prior or contemporaneous declarations or agreements for a trust are admissible;<sup>4</sup> but upon principle, since no element of fraud is involved, the rule seems to be to submit the question to the untrammelled conscience of the court, admitting testimony according to the ordinary rules of evidence, and requiring, in order to overcome the presumption arising from the absolute form of a conveyance, such proof as leaves no doubt of the existence and exact terms of the trust.<sup>5</sup>

**5. Consideration and Voluntary Trusts** — *a.* **PERFECTED TRUSTS ENFORCED THOUGH VOLUNTARY.** — Where there is no fraud,<sup>6</sup> and a trust has been actually created and the relation of trustee and *cestui que trust* established, it is irrevocable and will be enforced in equity without regard to the question whether it is a voluntary trust or is founded on consideration; but a trust will not be created or the relation of trustee and *cestui que trust* established, unless the imperfect trust or the agreement to create a trust is supported by a valu-

*West Virginia.* — Nease v. Capehart, 8 W. Va. 132; Troll v. Carter, 15 W. Va. 582.

**Great Caution** should be exercised in the receipt of parol evidence to establish a trust against an absolute deed. Mason v. Libbey, 19 Hun (N. Y.) 119.

**Even though a Long Time Has Elapsed** since the deed, *e. g.*, thirty years, the rule applies. Miller v. Stokely, 5 Ohio St. 195; Troll v. Carter, 15 W. Va. 567.

**The Testimony of One Witness** has been said to be insufficient. Orviss v. Dunn, 34 Fed. Rep. 685. But not unless the witness is the claimant under the trust. Irgenhuett v. Hunt, 15 Tex. Civ. App. 248.

**Loose Oral Statements** cannot avail to establish a trust as against an absolute deed. Bradshaw v. Remick, 90 Iowa 409; Acker v. Priest, 92 Iowa 621; Bennett v. Fulmer, 49 Pa. St. 155.

**Instances — Evidence Insufficient.** — Duffy v. Masterson, 44 N. Y. 557.

**1. North Carolina.** — Blackwell v. Overby, 6 Ired. Eq. (41 N. Car.) 44; Clement v. Clement, 1 Jones Eq. (54 N. Car.) 184; Shields v. Whitaker, 82 N. Car. 516; Leggett v. Leggett, 88 N. Car. 108; Williams v. Hodges, 95 N. Car. 32; Smiley v. Pearce, 98 N. Car. 189; Harding v. Long, 103 N. Car. 1, 14 Am. St. Rep. 775; Blount v. Washington, 108 N. Car. 230; Cobb v. Edwards, 117 N. Car. 244.

**2. Subsequent Declarations of Grantor.** — McGinnis v. Jacobs, 147 Ill. 24; Grooms v. Rust, 27 Tex. 231; Smith v. McElyea, 68 Tex. 70.

**3. Prior or Contemporaneous Declarations Required.** — Allen v. Withrow, 110 U. S. 119; Sherman v. Sandell, 106 Cal. 375; Harvey v. Gardner, 41 Ohio St. 647; Russell v. Bruer, 64 Ohio St. 1; Walker v. Hill, 21 N. J. Eq. 191,

22 N. J. Eq. 513. See also *supra*, this section, 4. b. (5) (a) bb.

**4. North Carolina.** — Shields v. Whitaker, 82 N. Car. 522; Link v. Link, 90 N. Car. 235; Smiley v. Pearce, 98 N. Car. 185; Pittman v. Pittman, 107 N. Car. 167; Blount v. Washington, 108 N. Car. 232; Hamilton v. Buchanan, 112 N. Car. 463. See also Owens v. Williams, 130 N. Car. 165.

*Tennessee.* — Thompson v. Thompson, (Tenn. Ch. 1899) 54 S. W. Rep. 145 (*distinguishing* Parker v. Bragg, 11 Humph. (Tenn.) 212; Lowry v. McGee, 3 Head (Tenn.) 269; Perkins v. Cheairs, 2 Baxt. (Tenn.) 194).

*West Virginia.* — Currence v. Ward, 43 W. Va. 370.

**Contemporaneous Declarations Excluded.** — In *North Carolina* it has been announced in a late case that though a valid declaration of trust may accompany the act of buying, "it must be made in advance of the transmission of any interest by the sale." Kelly v. McNeill, 118 N. Car. 349.

**5. Hall v. Livingston,** 3 Del. Ch. 383; Grooms v. Rust, 27 Tex. 231; Neyland v. Bendy, 69 Tex. 711.

If the agreement is of a character such that it would have been valid under the statute if expressed in writing, it will, without question, be valid, where the statute is not in force, though not embodied in writing. James v. Fulcrood, 5 Tex. 518, 55 Am. Dec. 743.

**6. As to the Presence or Absence of Consideration as Bearing on the Fraudulent Character of the trust** see Bancroft v. Curtis, 108 Mass. 49. See generally the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, pp. 242, 247, and *passim*.

able consideration.<sup>1</sup> Where a trust is created with the intention of conferring a gratuitous benefit on the *cestui que trust*, a consideration is no more essential than in the case of a direct gift, even though the settlor declares himself a trustee without disposing of the legal title.<sup>2</sup> When a trust is created by the transfer of property to a trustee for the benefit of the *cestui que trust*, the confidence reposed on the part of the settlor and the actual undertaking of the performance of the trust by the trustee are sufficient without other valuable consideration to support the trust.<sup>3</sup> In such a case, therefore, the question of the absence of consideration can arise only upon the claim of a volunteer *cestui que trust*, and there has never been a doubt that where a contract is of a character to establish between the parties thereto the relations of trustor and settlor and trustee, the intended beneficiary, though a volunteer, may affirm

**1. When Trust Is Complete, Equity Aids Volunteer Beneficiary.**—*England.*—*Lechmere v. Carlisle*, 3 P. Wms. 211; *Ellison v. Ellison*, 6 Ves. Jr. 656, 1 White & T. Lead. Cas. (6th ed.) 291; *Ex p. Pye*, 18 Ves. Jr. 140; *Kekewich v. Manning*, 1 De G. M. & G. 176; *Fletcher v. Fletcher*, 4 Hare 67; *Price v. Price*, 14 Beav. 598; *Bridge v. Bridge*, 16 Beav. 315; *Beech v. Keep*, 18 Beav. 285; *Jones v. Lock*, L. R. 1 Ch. 25; *Paul v. Paul*, 20 Ch. D. 742.

*Canada.*—*Cornwall v. Halifax Banking Co.*, 35 N. Bruns. 398; *Smith v. Stuart*, 12 Grant Ch. (U. C.) 246.

*Alabama.*—*Sayre v. Weil*, 94 Ala. 466.

*California.*—*Matter of Webb*, 49 Cal. 541.

*Illinois.*—*Switzer v. Skiles*, 8 Ill. 529, 44 Am. Dec. 723; *Badgley v. Votrain*, 68 Ill. 25, 18 Am. Rep. 541; *Padfield v. Padfield*, 72 Ill. 322, 68 Ill. 210; *Lynn v. Lynn*, 135 Ill. 18.

*Indiana.*—*Gaylord v. Lafayette*, 115 Ind. 423; *Wright v. Moody*, 116 Ind. 175; *Pearson v. Pearson*, 125 Ind. 341; *Ransdel v. Moore*, 153 Ind. 393.

*Maine.*—*Norway Sav. Bank v. Merriam*, 88 Me. 146.

*Maryland.*—*Gordon v. Small*, 53 Md. 557.

*Massachusetts.*—*Stone v. Hackett*, 12 Gray (Mass.) 227; *Welch v. Henshaw*, 170 Mass. 409, 64 Am. St. Rep. 309.

*Missouri.*—*Lane v. Ewing*, 31 Mo. 75, 77 Am. Dec. 632; *In re Soulard*, 141 Mo. 660.

*New Jersey.*—*Owens v. Owens*, 23 N. J. Ep. 60; *Landon v. Hutton*, 50 N. J. Eq. 500.

*New York.*—*Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329; *Westlake v. Wheat*, 43 Hun (N. Y.) 77.

*Pennsylvania.*—*Cressman's Appeal*, 42 Pa. St. 147, 82 Am. Dec. 498; *Carhart's Appeal*, 78 Pa. St. 100; *Dougherty v. Shillingsburg*, 175 Pa. St. 56; *Steeley v. Steeley*, 24 Pa. Co. Ct. 612.

*Rhode Island.*—*Stone v. King*, 7 R. I. 358, 84 Am. Dec. 557.

*South Carolina.*—*Reilly v. Whipple*, 2 S. Car. 277.

*Vermont.*—*Williams v. Haskins*, 66 Vt. 378; *Cathart v. Nelson*, 70 Vt. 317.

*West Virginia.*—*Hardman v. Orr*, 5 W. Va. 71.

**Some Confusion Has Occasionally Arisen by applying principles or dicta stated with reference to executory trusts to cases of executed trusts.** See *Woodland v. Newhall*, 31 Fed. Rep. 434; *Yarborough v. West*, 10 Ga. 471; *Aborn v. Padelford*, 17 R. I. 143.

But it is established by overwhelming au-

thority that where "the relation of trustee and *cestui que trust* is clearly established," a court of equity "will act upon it although there was no consideration at all." *Price v. Price*, 14 Beav. 604 (criticising dictum of Lord Thurlow in *Colman v. Sarel*, 3 Bro. C. C. 12, 1 Ves. Jr. 50); *Kekewich v. Manning*, 1 De G. M. & G. 190.

**2. Gratuitous Settlement in Trust.**—The principle is well stated by *Jessel, M. R.*, in *Richards v. Delbridge*, L. R. 18 Eq. 11: "A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person." See also *Jones v. Lock*, L. R. 1 Ch. 25 (wherein, at p. 28, *Lord Cranworth, L. C.*, repudiated the dicta attributed to him in *Scales v. Maude*, 6 De G. M. & G. 43); *Lawrence v. Lawrence*, 181 Ill. 248; *Leeper v. Taylor*, 111 Mo. 312; *Janes v. Falk*, 50 N. J. Eq. 468, 35 Am. St. Rep. 783, reversing 49 N. J. Eq. 484; *Carter v. Carter*, 63 N. J. Eq. 726, (N. J. 1903) 55 Atl. Rep. 1132. And see *infra*, this section, 7. d.

The statement that "a person in the legal possession of money or property acknowledging a trust becomes from that time a trustee, if the acknowledgment is founded on a valuable or meritorious consideration" (*Day v. Roth*, 18 N. Y. 453; *Hamer v. Sidway*, 124 N. Y. 550, 21 Am. St. Rep. 693), while entirely true, is misleading if the last clause is taken as stating a condition essential to the validity of the transaction.

**3. Trustee's Undertaking a Sufficient Consideration.**—*Switzer v. Skiles*, 8 Ill. 529, 44 Am. Dec. 723; *Ransdel v. Moore*, 153 Ind. 404; *Rutgers v. Lucet*, 2 Johns. Cas. (N. Y.) 92. See also *Carter v. Gibson*, 29 Neb. 324, 26 Am. St. Rep. 381.

**The Same Principle Is Applied with Regard to Gratuitous Bailments.**—See the titles *BAILMENTS*, vol. 3, p. 735 note; *CONSIDERATION*, vol. 6, p. 736.



and enforce the trust.<sup>1</sup>

With Respect to Lands in some jurisdictions a good or valuable consideration is necessary to raise a trust upon a conveyance operating under the statute of uses, but where the deed operates by analogy to ancient feoffment, and the trust is declared at the time the legal title passes, no consideration is essential.<sup>2</sup>

*b.* ENFORCEMENT OF INCOMPLETE TRUSTS — (1) *General Doctrine.* — An executory agreement to raise a trust is concerned with the creation or transfer of equitable rights separated from the legal title; and, apart from statute, no remedy for the breach of such an agreement can lie in court of law, but its enforcement must be sought in a court of equity.<sup>3</sup> No principle is more conclusively established than that the mere declaration of an intention or purpose to create a trust, or a mere executory agreement to do so not supported by a consideration, is ineffectual and equity will not aid in its enforcement.<sup>4</sup> But where such an agreement is supported by consideration so as to have all the elements of a contract, it may, subject to the usual limitations be enforced in equity under the equitable jurisdiction to enforce the specific performance of contracts.<sup>5</sup>

**Future Marriage a Valuable Consideration.** — An antenuptial agreement to settle property in favor of wife and children is valid, being supported by the valuable consideration of subsequent marriage.<sup>6</sup>

**1. When a Contract for the Benefit of a Third Person Creates a Perfect Trust** the *cestui que trust*, though not a party thereto, may sue upon it.

*England.* — *Pigott v. Thompson*, 3 B. & P. 149; *Gregory v. Williams*, 3 Meriv. 582 (*explained in In re Express Engineering Co.*, 16 Ch. D. 129); *In re Flavell*, 25 Ch. D. 89.

*Canada.* — *Shaw v. Shaw*, 17 Grant Ch. (U. C.) 282.

*United States.* — *McKee v. Lamon*, 159 U. S. 322; *McKee v. Latrobe*, 159 U. S. 327.

*Georgia.* — *Bell v. McGrady*, 32 Ga. 257; *Spears v. Scott*, 111 Ga. 745.

*Indiana.* — *Waterman v. Morgan*, 114 Ind. 237.

*Kentucky.* — *Williamson v. Yager*, 91 Ky. 282, 34 Am. St. Rep. 184.

See further 2 Story's Eq. Juris., § 1041, and the titles CONTRACTS, vol. 7, p. 110; IMPLIED OR QUASI CONTRACTS, vol. 15, p. 1096 *et seq.*

**2.** *Wood v. Cherry*, 73 N. Car. 110; *Pittman v. Pittman*, 107 N. Car. 159; *Blount v. Washington*, 108 N. Car. 230; *Blackburn v. Blackburn*, 109 N. Car. 488; *Sykes v. Boone*, 132 N. Car. 199, 95 Am. St. Rep. 610. See also *supra*, this section, 4. *b.* (1) (*b*) *bb.* (*cc.*).

**3.** *Fry on Specific Performance* (3d Am. ed.), § 22.

**4. Incomplete Trusts Without Consideration** — *England.* — *Bayley v. Boulcott*, 4 Russ. 345; *Lister v. Hodgson*, L. R. 4 Eq. 30; *Dipples v. Corles*, 11 Hare 183.

*District of Columbia.* — *Gwynn v. Gwynn*, 11 App. Cas. (D. C.) 564.

*Illinois.* — *Hamilton v. Downer*, 152 Ill. 651, *affirming* 46 Ill. App. 542.

*Iowa.* — *Stokes v. Sprague*, 110 Iowa 89.

*Kentucky.* — *Barkley v. Lane*, 6 Bush (Ky.) 589; *Williamson v. Yager*, 91 Ky. 282, 34 Am. St. Rep. 184; *Roche v. George*, 93 Ky. 609; *Krankel v. Krankel*, 104 Ky. 745.

*Maryland.* — *Lloyd v. Brooks*, 34 Md. 27.

*Massachusetts.* — *Bennett v. Littlefield*, 177 Mass. 294.

*Michigan.* — *Hamilton v. Hall*, 111 Mich. 296.

*Nebraska.* — *Roddy v. Roddy*, 3 Neb. 96.

*New Hampshire.* — *Bartlett v. Remington*, 59 N. H. 364.

*New Jersey.* — *Owens v. Owens*, 23 N. J. Eq. 60.

*Pennsylvania.* — *In re Painter*, 42 Pa. St. 156 note; *Helfenstein's Estate*, 77 Pa. St. 328, 18 Am. Rep. 449; *Wolff's Appeal*, 123 Pa. St. 438; *Smith's Estate*, 144 Pa. St. 428, 27 Am. St. Rep. 641; *Sterling v. Lintott*, 24 Pa. Co. Ct. 369.

*Rhode Island.* — *Jenckes v. Cook*, 9 R. I. 520; *Sprague v. Thurber*, 17 R. I. 458; *Rogers v. Rogers*, 20 R. I. 400; *Whiting v. Dyer*, 21 R. I. 278.

See also *supra*, this section, 5. *a.*

**5.** *Carhart's Appeal*, 78 Pa. St. 100. See also the title SPECIFIC PERFORMANCE, vol. 26, p. 7, especially pp. 49 (statute of frauds and part performance), 87 (contracts enforced where remedy at law inadequate), 124 (enforcement of trusts).

**Parting with Property on the Faith of a Promise** that it is to be used for the benefit of the person who parts with the title constitutes a valuable consideration, enabling the person to enforce the trust. *Aborn v. Padel-ford*, 17 R. I. 143.

**6. Marriage as Consideration** — *England.* — *Price v. Jenkins*, 4 Ch. D. 483, 5 Ch. D. 619; *Gale v. Gale*, 6 Ch. D. 148.

*Indiana.* — *Ransdel v. Moore*, 153 Ind. 404.

*Maine.* — *Whitehouse v. Whitehouse*, 90 Me. 468, 60 Am. St. Rep. 278.

*Maryland.* — *Albert v. Winn*, 5 Md. 66.

*New Jersey.* — *Gevers v. Wright*, 18 N. J. Eq. 330.

See also the title MARRIAGE SETTLEMENTS, vol. 19, p. 1230 *et seq.*

**A Postnuptial Settlement Made Pursuant to an Antenuptial Agreement** is valid as against creditors. *Albert v. Winn*, 5 Md. 66. See also

The Rule that One Cannot Sue on a Contract for His Benefit made between third persons, where it is recognized at law, has been held to apply equally in equity, in the absence of a declaration creating a complete trust;<sup>1</sup> but where it is not in force, then perhaps in the case of an imperfect trust the proposed beneficiary, though a volunteer, may be entitled to enforce its performance, provided it is supported by consideration as between the parties to the executory trust agreement, and he is within the rule that the contract is directly and not incidentally for his benefit.<sup>2</sup>

(2) *Meritorious Consideration*. — Voluntary Trusts for Wife or Children. — An executed trust, resting upon "a meritorious consideration," in the sense explained below, is, of course, irrevocable and enforceable in equity.<sup>3</sup> In some cases the attempt has been made to establish an exception in the case of improperly executed voluntary trusts in favor of wife and children on the ground that the moral obligation to provide for them constituted a "meritorious consideration," which equity would recognize and therefore enforce the trust though executory.<sup>4</sup> This view has been authoritatively discarded in *England* and in some of the *United States*, and it is settled that such cases stand exactly on the footing of other voluntary executory trusts and constitute a mere nullity even in equity.<sup>5</sup> But in some of the *United States* the view that such a meritorious consideration will take the case out of the general rule is recognized by some of the courts, and equity will enforce an imperfect trust in favor of wife or children,<sup>6</sup> but as against the successors or representatives of the settlor or donor only, where the settlor's intention to create a trust continued unchanged at his death, and not against him personally.<sup>7</sup>

(3) *Sealed Instruments*. — Since equity may go behind a seal and determine whether an agreement is founded on a valuable consideration, the fact that an imperfect executory trust is evidenced by a sealed instrument will not entitle it to be enforced in equity if it is in fact voluntary.<sup>8</sup> Some cases in the *United States*, however, appear to hold that the presence of a seal will render the trust enforceable in equity, but it will be found that these cases usually turn on the presence of meritorious consideration or some such element.<sup>9</sup>

(4) *Incomplete Trusts and Gifts*. — A court of equity will not impute an intention to create a trust where a trust was not in contemplation.<sup>10</sup> So if a transaction was intended to be effected by a gift, and the gift is incomplete

the title MARRIAGE SETTLEMENTS, vol. 19, pp. 1236, 1247.

1. *In re* Empress Engineering Company, 16 Ch. D. 125; *In re* Rotherham Alum, etc., Co., 25 Ch. D. 103. See also *Woodland v. Newhall*, 31 Fed. Rep. 434 (where, however, the declaration would seem to have been complete); *Rhode Island Hospital Trust Co. v. Manchester*, 16 R. I. 308; *Burris v. Rhind*, 29 Can. Sup. Ct. 498. As to the rule of law generally, see the title CONTRACTS, vol. 7, p. 104 *et seq.*

2. *Waterman v. Morgan*, 114 Ind. 237. See also *Ransdel v. Moore*, 153 Ind. 405.

But compare *McDonald v. American National Bank*, 25 Mont. 456, limiting this principle (Civ. Code Mont., § 2103) to cases where the third party sustains "such a relation to the contracting parties that a consideration may be deemed to have passed from him to the promisee which raises the implication of a promise from the promisor directly to himself; there must be a consideration passing from the third person by virtue of which he may assert the existence of a promise in his favor."

3. *Meritorious Consideration*. — *Nichols v. Emery*, 109 Cal. 323, 50 Am. St. Rep. 43; Gay-

lord *v. Lafayette*, 115 Ind. 423; *Ewing v. Jones*, 130 Ind. 247.

4. *Ellis v. Nimmo*, Ll. & G. t. Sugd. 333. See also *Moore v. Crofton*, 3 J. & La T. 442.

5. *Holloway v. Headington*, 8 Sim. 324; *Dillon v. Coppin*, 4 Myl. & C. 647; *Jefferys v. Jefferys*, Cr. & Ph. 138; *Cornwall v. Halifax Banking Co.*, 35 N. Bruns. 430; *Cox v. Hill*, 6 Md. 285; *Whitaker v. Whitaker*, 52 N. Y. 368, 11 Am. Rep. 711.

6. *Conover v. Brown*, 49 N. J. Eq. 156; *Landon v. Hutton*, 50 N. J. Eq. 500.

7. *Cox v. Hill*, 6 Md. 287; *Gevers v. Wright*, 18 N. J. Eq. 330.

8. *Seal*. — *Jefferys v. Jefferys*, Cr. & Ph. 141; *Pringle v. Pringle*, 59 Pa. St. 281; *Stone v. King*, 7 R. I. 358, 84 Am. Dec. 557. See also *Bond v. Bunting*, 78 Pa. St. 212.

9. *Bright v. Bright*, 8 B. Mon. (Ky.) 194; *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329; *Hayes v. Kershaw*, 1 Sandf. Ch. (N. Y.) 258; *Dennison v. Goehring*, 7 Pa. St. 175, 47 Am. Dec. 505; *Caldwell v. Williams*, Bailey Eq. (S. Car.) 175; *Reed v. Vannorsdale*, 2 Leigh (Va.) 569. See *Pringle v. Pringle*, 59 Pa. St. 281.

10. *Richards v. Delbridge*, L. R. 18 Eq. 11.

for want of delivery, and therefore is not enforceable as such in equity,<sup>1</sup> it nevertheless cannot be enforced as a declaration of trust; for to do so would be to substitute in place of the actual intention to transfer the property directly to the donee the intention to make or become a trustee, and, besides, would open the way for every imperfect gift to be converted into a perfect trust.<sup>2</sup> A few cases are found, however, where transactions which in fact were merely incomplete present gifts have been sustained and enforced as trusts.<sup>3</sup>

**6. When Trust Is Complete — a. QUESTION OF FACT.** — The existence of a complete trust is in every case to be determined as a question of fact, having in view the surrounding facts and circumstances of the transaction, the intention of the parties, and the substance rather than the form of the instrument.<sup>4</sup>

**b. DECLARATION — (1) Must Be Unequivocal.** — Apart from the requirements of statute, no particular form is essential in the creation of a trust, but

1. See the title GIFTS, vol. 14, p. 1006.

2. **Imperfect Gift Not Trust — England.** — *Antrobus v. Smith*, 12 Ves. Jr. 39; *Milroy v. Lord*, 4 De G. F. & G. 264; *Jones v. Lock*, L. R. 1 Ch. 25; *Richards v. Delbridge*, L. R. 18 Eq. 11; *Moore v. Moore*, L. R. 18 Eq. 483; *Mallott v. Wilson*, (1903) 2 Ch. 494.

*Canada.* — *Kreh v. Moses*, 22 Ont. 307; *Cornwall v. Halifax Banking Co.*, 35 N. Bruns. 398.

*Maine.* — *Hallowell Sav. Inst. v. Titcomb*, 96 Me. 62.

*Missouri.* — *In re Soulard*, 141 Mo. 642.

*Ohio.* — *Flanders v. Blandy*, 45 Ohio St. 108.

*Pennsylvania.* — *Smith's Estate*, 144 Pa. St. 428, 27 Am. St. Rep. 641.

*New York.* — *Beaver v. Beaver*, 137 N. Y. 59, reversing 62 Hun (N. Y.) 194; *Wadd v. Hazelton*, 137 N. Y. 215, 33 Am. St. Rep. 707; *Priester v. Hohloch*, 70 N. Y. App. Div. 256; *Govin v. De Miranda*, 76 Hun (N. Y.) 414, 79 Hun (N. Y.) 286; *Beeman v. Beeman*, 88 Hun (N. Y.) 14.

3. *Richardson v. Richardson*, L. R. 3 Eq. 686; *Morgan v. Malleson*, L. R. 10 Eq. 475. These cases are *disapproved* in *Richards v. Delbridge*, L. R. 18 Eq. 11; *Young v. Young*, 80 N. Y. 422, 36 Am. Rep. 634.

4. **Existence of Complete Trust Question of Fact — England.** — *Jones v. Lock*, L. R. 1 Ch. 25.

*Illinois.* — *Padfield v. Padfield*, 72 Ill. 322; *Lynn v. Lynn*, 135 Ill. 19.

*Indiana.* — *Gaylord v. Lafayette*, 115 Ind. 423.

*Kentucky.* — *Krankel v. Krankel*, 104 Ky. 745.

*Maryland.* — *Lloyd v. Brooks*, 34 Md. 27; *American Casualty Ins. Co.'s Case*, 82 Md. 560; *Snader v. Slingluff*, 95 Md. 364.

*Michigan.* — *O'Neil v. Greenwood*, 106 Mich. 572.

*New Hampshire.* — *Fellows v. Fellows*, 69 N. H. 343.

*New York.* — *Starbuck v. Farmers' L. & T. Co.*, 28 N. Y. App. Div. 272.

*Pennsylvania.* — *Steeley v. Steeley*, 24 Pa. Co. Ct. 612.

*Rhode Island.* — *Blackmar v. McLoughlin*, 21 R. I. 487.

*South Carolina.* — *Richardson v. Ingelsby*, 13 Rich. Eq. (S. Car.) 59.

See also *Farrell v. Farrell*, 91 Mo. App. 665.

Where an Irrevocable Trust Was Not Intended, but the settlor expressed her purpose to control the property and she afterwards revoked

the settlement, the intended *cestuis que trustent* were held to be without remedy. *Townsend v. Rackham*, 143 N. Y. 516, affirming 68 Hun (N. Y.) 231.

**The Practical Interpretation of the Parties Themselves** in such cases is entitled to great weight. *Gaylord v. Lafayette*, 115 Ind. 423.

**Facts Held to Establish Trust — United States.** — *Orviss v. Dunn*, 34 Fed. Rep. 683; *Moore v. Moore*, (C. C. A.) 121 Fed. Rep. 737. See also *Love v. Wheeler*, 87 Fed. Rep. 523.

*Colorado.* — *Kilham v. Western Bank, etc., Co.*, 30 Colo. 365.

*Georgia.* — *McCreary v. Gewinner*, 103 Ga. 528.

*Illinois.* — *Kelly v. Kinsella*, 162 Ill. 516.

*Kentucky.* — *Gatliff v. King*, (Ky. 1895) 32 S. W. Rep. 279.

*Maryland.* — *Kreps v. Kreps*, 91 Md. 692.

*Missouri.* — *Bobb v. Bobb*, 89 Mo. 411.

*New York.* — *Matter of Falls*, 66 N. Y. App. Div. 616, affirming (Surrogate Ct.) 31 Misc. (N. Y.) 658; *Rand v. Whipple*, 71 N. Y. App. Div. 62; *McClellan v. Grant*, 83 N. Y. App. Div. 599.

*Pennsylvania.* — *Raybold v. Raybold*, 20 Pa. St. 308.

**Facts Insufficient to Establish Trust — United States.** — *Finley v. Isett*, 154 U. S. 561; *Sowles v. Witters*, 35 Fed. Rep. 463.

*Maryland.* — *Williams v. Snebly*, 92 Md. 9.

*Michigan.* — *Price v. Dawson*, 111 Mich. 279.

*Nebraska.* — *Williams v. Lowe*, 4 Neb. 382.

*New Jersey.* — *Warmouth v. Durand*, 57 N. J. Eq. 160.

*New York.* — *Bliss v. Fosdick*, 86 Hun (N. Y.) 162, affirmed 151 N. Y. 625; *New York University v. Loomis Laboratory*, 68 N. Y. App. Div. 635, affirming 35 Misc. (N. Y.) 82; *Hayes v. Klock*, 87 N. Y. App. Div. 624; *Pierson v. Drexel*, (Supm. Ct. Spec. T.) 11 Abb. N. Cas. (N. Y.) 150.

*Pennsylvania.* — *Gilmor's Estate*, 158 Pa. St. 186; *Cone v. St. John*, 180 Pa. St. 25; *Schmidt v. Baizley*, 184 Pa. St. 527; *Harris v. Brown*, 9 Pa. Dist. 521.

*Wisconsin.* — *Campbell v. Campbell*, 70 Wis. 311.

**A Receipt by the Trustee of a Fund** which sufficiently states the particulars of the trust agreement is evidence of the trust, and if accepted by the settlor is binding upon him without his signature. *Boykin v. Pace*, 64 Ala. 68.



the acts or words relied on must be unequivocal, admitting of but one interpretation, and manifesting a completed transaction *in presenti*.<sup>1</sup> The general rule is that the author of a trust must do all, so far as lies in his power, that the nature of the property admits of, to carry out his intention.<sup>2</sup>

(2) *Conditional Declaration*.—The declaration may be conditional or contingent at first, but if the conditions are finally eliminated and the provisions of the trust are settled so that the declaration becomes unequivocal, it is sufficient.<sup>3</sup> Such is the case where a trust is declared dependent on the performance of certain acts by the *cestui que trust*, who thereupon performs the acts required.<sup>4</sup>

(3) *Enjoyment Postponed till Future Event*.—The character of the trust as complete is not affected by the fact that the right of enjoyment is reserved to the settlor until a future period, as until his death,<sup>5</sup> provided the intention to place the subject of the trust beyond his control is clearly manifested.<sup>6</sup> But it is otherwise where title is not intended to pass until the settlor's death.<sup>7</sup>

**1. Unequivocal Declaration Necessary**—*England*.—Warriner v. Rogers, L. R. 16 Eq. 340; Heartley v. Nicholson, L. R. 19 Eq. 233.

*Canada*.—Kreh v. Moses, 22 Ont. 307.

*California*.—Luco v. De Toro, 91 Cal. 417.

*Georgia*.—Maxwell v. Hoppie, 70 Ga. 158.

*Maine*.—Norway Sav. Bank v. Merriam, 88 Me. 146.

*Maryland*.—Taylor v. Henry, 48 Md. 550, 30 Am. Rep. 480; Reiff v. Horst, 52 Md. 255; American Casualty Ins. Co.'s Case, 82 Md. 560.

*Massachusetts*.—Chace v. Chapin, 130 Mass. 128.

*Michigan*.—Hamilton v. Hall, 111 Mich. 296.

*Missouri*.—Mize v. Bates County Nat. Bank, 60 Mo. App. 358, 1 Mo. App. Rep. 99.

*Montana*.—McDonald v. American Nat. Bank, 25 Mont. 494.

*New York*.—Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; Young v. Young, 80 N. Y. 422, 36 Am. Rep. 634; Barry v. Lambert, 98 N. Y. 300, 50 Am. Rep. 677; Beaver v. Beaver, 117 N. Y. 421, 15 Am. St. Rep. 531, reversing 53 Hun (N. Y.) 258; Wadd v. Hazelton, 137 N. Y. 215, 33 Am. St. Rep. 707; Sullivan v. Sullivan, 161 N. Y. 554, affirming 39 N. Y. App. Div. 99; Matter of Crise, 2 Connolly (N. Y.) 59; Butler v. Duprat, 51 N. Y. Super. Ct. 77.

*Pennsylvania*.—Smith's Estate, 144 Pa. St. 428, 27 Am. St. Rep. 641, affirming 8 Pa. Co. Ct. 539; Girard Trust Co. v. Mellor, 156 Pa. St. 579.

*Rhode Island*.—Ray v. Simmons, 11 R. I. 268, 23 Am. Rep. 447.

*South Carolina*.—Harris v. Bratton, 34 S. Car. 259.

*Tennessee*.—Citizens' Bank, etc., Co. v. Bradt, (Tenn. Ch. 1898) 50 S. W. Rep. 778. See also Gardenhire v. Hinds, 1 Head (Tenn.) 402.

*Utah*.—Skeen v. Marriott, 22 Utah 73.

2. Milroy v. Lord, 4 De G. F. & J. 264; Otis v. Beckwith, 49 Ill. 121; Williamson v. Yager, 91 Ky. 282, 34 Am. St. Rep. 184; Roche v. Geroge, 93 Ky. 609. See also *infra*, this section, 6. c.

**3. Conditional or Contingent Declaration**—Hallowell Sav. Inst. v. Titcomb, 96 Me. 62; Maxwell v. Whieldon, 10 Cush. (Mass.) 221; Hirsh v. Auer, 146 N. Y. 13.

**Whether Declaration Conditional Question of**

**Fact**.—McComb v. Frink, 149 U. S. 629, affirming Snyder v. McComb, 39 Fed. Rep. 292 (declaration of trust in stock held unconditional).

Where a trust agreement recognizes and exactly defines existing relations, executory stipulations on the part of the *cestui que trust* may not prevent the agreement being an executed declaration of trust, independent of performance of the stipulation by the *cestui*. Gilderleeve v. Stratton, 59 N. J. Eq. 1.

4. Jones v. Lloyd, 117 Ill. 597; Cornelius v. Smith, 55 Mo. 528; Hamer v. Sidway, 124 N. Y. 538, 21 Am. St. Rep. 693, reversing 57 Hun (N. Y.) 229 (stated under the title CONSIDERATION, vol. 6, p. 745, note 1); Pendergast v. Greenfield, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 829.

**5. Enjoyment Postponed until Settlor's Death**—*United States*.—Barlow v. Loomis, 19 Fed. Rep. 677.

*California*.—Nichols v. Emery, 109 Cal. 323, 50 Am. St. Rep. 43; Matter of Willey, 128 Cal. 1.

*Illinois*.—Williams v. Evans, 154 Ill. 98.

*Indiana*.—Pond v. Sweetser, 85 Ind. 144.

*Iowa*.—Craven v. Winter, 38 Iowa 471.

*Kentucky*.—Barkley v. Lane, 6 Bush (Ky.) 587.

*Massachusetts*.—Davis v. Ney, 125 Mass. 590, 28 Am. Rep. 272.

*New Jersey*.—Green v. Tulane, 52 N. J. Eq. 169.

*New York*.—Von Hesse v. MacKaye, 62 Hun (N. Y.) 458; Durland v. Durland, 83 Hun (N. Y.) 174, affirmed 153 N. Y. 67; Grafing v. Heilmann, 1 N. Y. App. Div. 260, affirmed 153 N. Y. 673.

See also Meldrim v. Trinity Church, 100 Ga. 479; Paine v. Forsaith, 84 Me. 66; *In re* Souldard, 141 Mo. 642; Smith v. Speer, 34 N. J. Eq. 336.

**The Settlor May Reserve a Life Interest in the Income of the property settled**. Moore v. Darton, 4 De G. & Sm. 517; Hallowell Sav. Inst. v. Titcomb, 96 Me. 62.

But the reservation of a life interest or control may be powerful evidence against the creation of a trust. *In re* Shield, 53 L. T. N. S. 5.

6. See *supra*, this section, 4. c. (4).

7. Norway Sav. Bank v. Merriam, 88 Me. 153; Alger v. North End Sav. Bank, 146 Mass.

**Possession Retained During Life.** — Where possession is retained by the settlor during his life, and no trustee is named, but the validity of the trust turns on the construction of a gift or assignment found among the owner's papers, the distinction between an assignment and the creation of a complete trust becomes delicate.<sup>1</sup> A complete trust can be read into such a transaction only by interpreting the paper as a declaration of the settlor's intention to constitute himself trustee for the beneficiaries, and the very nature of the transaction renders the implication of such an intent awkward and unnatural,<sup>2</sup> or an intent to create the personal representatives trustees must be found. The cases lack distinctness on these propositions, which might receive more attention.<sup>3</sup>

**c. NOTIFICATION OF AND ACCEPTANCE BY BENEFICIARY.** — The fact that the trust was brought to the notice of the beneficiary is of controlling importance in establishing the creation of the trust,<sup>4</sup> and in some cases the absence of notification seems to have been held an evidentiary circumstance conclusive against its existence.<sup>5</sup> But in no case, so far as observed, has notification been held an essential in theory to the creation,<sup>6</sup> and in many cases it is held not to be requisite that the *cestui que trust* should be notified of the declaration or establishment of the trustee.<sup>7</sup>

The Acceptance by the Beneficiary of a trust in his favor is presumed, until he

422, 4 Am. St. Rep. 331; Providence Sav. Inst. v. Carpenter, 18 R. I. 287; Peoples Sav. Bank v. Webb, 21 R. I. 218.

**Deed to Grantee Who Gives Back Mortgage for Support.** — Where A conveys land absolutely to B, and B gives back a mortgage conditioned for the payment of a sum annually to A as trustee for the support of C, a trust irrevocable without C's consent is created. McPherson v. Rollins, 107 N. Y. 316, 1 Am. St. Rep. 826.

But where the mortgage given back is conditioned for the annual payment of a sum to A for his own use, with a provision that after A's death certain payments are to be made to C, no irrevocable trust in favor of C is created, the provision as to him being testamentary and ambulatory. Townsend v. Rackham, 143 N. Y. 516, reversing 68 Hun (N. Y.) 231; Beeman v. Beeman, 88 Hun (N. Y.) 14.

**1. Assignments and Trusts Distinguished.** — In Beech v. Keep, 18 Beav. 285, it was said: "There is a very thin distinction between an assignment for the benefit of a volunteer and a declaration of trust in his favor, but it is one which is found to have been taken in all the cases." The distinction is that a mere assignment without actual transfer is an imperfect gift, while a declaration of trust, as by the owner declaring himself a trustee for another, is a complete transaction enforceable in equity. Bridge v. Bridge, 16 Beav. 315. See also *supra*, this section, 5. b. (4).

**2.** The transaction has been construed in this light; see, for instance, Barkley v. Lane, 6 Bush (Ky.) 587.

**3.** The cases frequently state a variety of general propositions regulating the creation of valid trusts and hold that the transaction either does or does not satisfy them. See the majority and minority opinions in Phipard v. Phipard, 55 Hun (N. Y.) 433.

**4.** Bath Sav. Inst. v. Hathorn, 88 Me. 122, 51 Am. St. Rep. 382; Kendrick v. Ray, 173 Mass. 305, 73 Am. St. Rep. 289; Blasdel v. Locke, 52 N. H. 228; Smith v. Ossine Valley Ten Cents Sav. Bank, 64 N. H. 228, 10 Am. St. Rep. 400; Cunningham v. Davenport, 147 N. Y.

43, 49 Am. St. Rep. 641, reversing 74 Hun (N. Y.) 53; Ray v. Simmons, 11 R. I. 266, 23 Am. Rep. 447; Peoples Sav. Bank v. Webb, 21 R. I. 218.

**5. Absence of Notification.** — Clark v. Clark, 108 Mass. 522; Welch v. Henshaw, 170 Mass. 409, 64 Am. St. Rep. 309; Marcy v. Amazeen, 61 N. H. 131, 60 Am. Rep. 320. See also Stone v. Bishop, 4 Cliff. (U. S.) 593.

**Absence of Notification with Other Circumstances** has been held to negative the inference of a trust. Noyes v. Savings Inst., 164 Mass. 583, 40 Am. St. Rep. 484.

**6.** In Gerrish v. New Bedford Sav. Inst., 128 Mass. 163, 35 Am. Rep. 365, it is said: "Notice to the donee is, indeed, not necessary when other acts or declarations of the donor are sufficient and complete in themselves; but where the transaction is capable of two interpretations, and the settlement is merely voluntary, it is plain that notice given by the donor to the donee of the existence of the trust would, in most cases, be decisive on the question of intention."

**7. Notification Not Necessary — England.** — Richardson v. Richardson, L. R. 3 Eq. 686.

**Maine.** — Bath Sav. Inst. v. Hathorn, 88 Me. 122, 51 Am. St. Rep. 382.

**Maryland.** — Smith v. Darby, 39 Md. 278.

**Missouri.** — Mize v. Bates County Nat. Bank, 60 Mo. App. 358, 1 Mo. App. Rep. 99.

**New Jersey.** — James v. Falk, 50 N. J. Eq. 468, 35 Am. St. Rep. 783, reversing 49 N. J. Eq. 484; Collins v. Steuart, 58 N. J. Eq. 392, affirmed 60 N. J. Eq. 488.

**New York.** — Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; Willis v. Smyth, 91 N. Y. 297; Martin v. Martin, 46 N. Y. App. Div. 445; Matter of Biggars, (Surrogate Ct.) 39 Misc. (N. Y.) 426.

**Pennsylvania.** — Merigan v. McGonigle, 205 Pa. St. 321.

**Rhode Island.** — Ray v. Simmons, 11 R. I. 266, 23 Am. Rep. 447.

**Vermont.** — Connecticut River Sav. Bank v. Albee, 61 Vt. 571, 33 Am. St. Rep. 944; Williams v. Haskins, 66 Vt. 378.

rejects it.<sup>1</sup> In the *United States* assignments for the benefit of creditors are held to come within this rule, and the assent of the creditors will be implied unless the assignment is onerous, but in *England* such assignments constitute an exception to the general rule.<sup>2</sup>

*d. DELIVERY TO AND ACCEPTANCE BY TRUSTEE.* — In general, delivery to and acceptance by the trustee, or even knowledge of the trust on his part, are not essential to the validity of a trust as against the settlor,<sup>3</sup> and the fact that the trustee declines to execute the trust does not defeat it or affect the rights of beneficiaries.<sup>4</sup> But where the intention to create the trust is by way of transfer of the legal title to a trustee for the *cestui que trust*, and there is no evidence that the intention was to be carried out in any other manner, and delivery to the trustee is necessary to the transfer of the legal title, proof of such delivery is essential.<sup>5</sup>

**Evidence and Effect of Trustee's Acceptance.** — The acceptance of a trust created by a written instrument conveying title to the grantee is presumed from his acceptance of the instrument and taking possession of the property thereunder, and such acceptance completes and perfects the trust.<sup>6</sup>

*e. TRANSFER OF TITLE TO PROPERTY* — (1) *Naming Third Person Trustee.* — Where the Subject-matter Is Capable of Legal Transfer, and the settlor purposes to transfer the legal title to a trustee, the rule has been laid down that an actual transfer of the legal title to the property is essential.<sup>7</sup> Thus in the case of a deed of land of which the settlor is the legal owner delivery is necessary.<sup>8</sup>

See also *Booth v. Oakland Sav. Bank*, 122 Cal. 19.

1. **Acceptance Presumed.** — *In re Soulard*, 141 Mo. 642; *Stone v. King*, 7 R. I. 358, 84 Am. Dec. 557; *Grievies v. Keane*, 23 R. I. 136.

The trustee's acts in accepting and holding the property for the *cestui que trust* are deemed to be in the interest of the latter, and his acceptance is presumed. *Hogan v. Sullivan*, 114 Iowa 461.

**Where the Beneficiaries Are Not Sui Juris**, as in the case of minors, the law puts in an acceptance for them. *Brunson v. Henry*, 140 Ind. 455.

2. See the titles **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, vol. 3, p. 62; **FRAUDULENT SALES AND CONVEYANCES**, vol. 14, p. 390.

3. **Delivery to Trustee — England.** — *Tierney v. Wood*, 19 Beav. 330; *Fletcher v. Fletcher*, 4 Hare 74.

*United States.* — *Adams v. Adams*, 21 Wall. (U. S.) 185.

*New Hampshire.* — *Minot v. Tilton*, 64 N. H. 371.

*Rhode Island.* — *Stone v. King*, 7 R. I. 358, 84 Am. Dec. 557.

*South Carolina.* — *Cloud v. Calhoun*, 10 Rich. Eq. (S. Car.) 358.

4. *Adams v. Adams*, 21 Wall. (U. S.) 185; *Minot v. Tilton*, 64 N. H. 371; *King v. Donnelly*, 5 Paige (N. Y.) 46.

5. *Loring v. Hildreth*, 170 Mass. 328, 64 Am. St. Rep. 301; *Wadd v. Hazelton*, 137 N. Y. 215, 33 Am. St. Rep. 707.

6. **Proof and Effect of Acceptance.** — *Hearst v. Pujol*, 44 Cal. 230; *McCreary v. Gewinner*, 103 Ga. 537; *Lyle v. Burke*, 40 Mich. 499; *Harvey v. Gardner*, 41 Ohio St. 642. See also *infra*, this section, 7. c. (2) (a).

In *California* and other states having the civil code this principle is statutory. *Hellman v. McWilliams*, 70 Cal. 449; *Booth v.*

*Oakland Sav. Bank*, 122 Cal. 19; *Keogh v. Noble*, 136 Cal. 153. See also *Civ. Code Cal.*, § 2222; *Civ. Code Mont.*, § 2957.

**Where the Trustee Has Accepted a Trust**, he is bound by the terms thereof and by the settlor's actions or nonaction with respect to reserved powers. *Moses v. Hatch*, 163 N. Y. 554, *affirming* 21 N. Y. App. Div. 468.

7. *Landon v. Hutton*, 50 N. J. Eq. 500; *Sprague v. Thurber*, 17 R. I. 454. See also *Mallott v. Wilson*, (1903) 2 Ch. 494.

**Thus a Married Woman's Transfer of Property in Trust** is absolutely void unless executed as required by statute. *Tatge v. Tatge*, 34 Minn. 272; *Graham v. Long*, 65 Pa. St. 383.

8. **Deed of Lands.** — *Adams v. Adams*, 21 Wall. (U. S.) 185; *Loring v. Hildreth*, 170 Mass. 328, 64 Am. St. Rep. 301; *Stone v. King*, 7 R. I. 358, 84 Am. Dec. 557; *Smith v. Stuart*, 12 Grant Ch. (U. C.) 246.

**What Constitutes Delivery.** — There is some conflict in the authorities as to what constitutes a legal delivery of a trust deed. One class of cases holds that delivery to the trustee and acceptance by him is necessary to give the deed validity. *Smith v. Stuart*, 12 Grant Ch. (U. C.) 246. See also *supra*, this section, 6. d.

At least, in the absence of evidence that the grantor intended to create a trust otherwise than by a legal transfer of title in manner and form as provided. *Loring v. Hildreth*, 170 Mass. 331, 64 Am. St. Rep. 301.

Other cases hold that where the deed is executed with the formalities required by law and recorded, although never communicated to the trustee, it is legally delivered. *Adams v. Adams*, 21 Wall. (U. S.) 185; *Craven v. Winter*, 38 Iowa 471; *Frank v. Heiner*, 117 N. Car. 79. See also *Cloud v. Calhoun*, 10 Rich. Eq. (S. Car.) 362.

But this is a presumption merely, *Kelly v. Parker*, 181 Ill. 49; *Chilvers v. Race*, 196 Ill.



And so in the case of personal property everything necessary to vest the legal title in the trustee must be done.<sup>1</sup>

But Where the Subject Is Incapable of Legal Transfer, whether it is a legal or a mere equitable right or interest, the better rule seems to be that the trust is complete when no further act which the settlor can do to complete the transfer remains to be done, and his intention to relinquish his interest to another *in presenti* is clear and distinct.<sup>2</sup> Thus a trust of the equitable interest of a person in property, of which the legal title is in trustees, has been held to be

71; and may be rebutted, *Townsend v. Rackham*, 143 N. Y. 516, *affirming* 68 Hun (N. Y.) 231.

Upon the general subject of what constitutes delivery, see the titles DEEDS, vol. 9, p. 150 *et seq.*; RECORDING ACTS, vol. 24, p. 100.

A Formal Delivery, by an acknowledgment that the instrument was "signed, sealed, and delivered," has been held sufficient. *Linton v. Brown*, 20 Fed. Rep. 455; *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329; *Blight v. Schenck*, 10 Pa. St. 285, 51 Am. Dec. 478.

Delivery Is Conclusively Presumed from the trustee's acceptance indorsed on the deed. *New South Bldg., etc., Assoc. v. Gann*, 101 Ga. 681.

Retention of Possession of Land under Reservation in Deed. — Where a deed creating a trust with a reservation of a life interest to the grantor is duly delivered, retention of possession of the land by the grantor does not affect the transaction. *Williams v. Evans*, 154 Ill. 98.

Delivery of Deeds of Assignment for Benefit of Creditors. — See the title ASSIGNMENTS FOR BENEFIT OF CREDITORS, vol. 3, p. 68.

Trust Deed May Be Delivered in Escrow. — *Ober v. Pendleton*, 30 Ark. 61.

Oral Conditions Repugnant to the Terms of a Deed of Trust cannot be attached to the delivery thereof. *Wallace v. Berdell*, 97 N. Y. 13.

1. Personal Property. — See *Bentley v. Mackay*, 15 Beav. 12; *Stone v. Hackett*, 12 Gray (Mass.) 227; *Green v. Tulane*, 52 N. J. Eq. 169; *Youmans v. Buckner*, 3 Hill L. (S. Car.) 218, *Riley L. (S. Car.)* 204.

As to what is essential to transfer title to personal property, see generally the titles ASSIGNMENTS, vol. 2, p. 1007; GIFTS, vol. 14, p. 1006.

Corporate Stock. — As to what is a sufficient delivery to perfect a trust of shares of stock in a corporation, see *Milroy v. Lord*, 4 De G. F. & J. 264; *Coffey v. Coffey*, 179 Ill. 283, *affirming* 74 Ill. App. 241; *Stone v. Hackett*, 12 Gray (Mass.) 227; *Green v. Tulane*, 52 N. J. Eq. 169; *Jackson v. Twenty-third St. R. Co.*, 88 N. Y. 521; *Dickerson's Appeal*, 115 Pa. St. 198, 2 Am. St. Rep. 547. See also the titles GIFTS, vol. 14, p. 1023; STOCKS AND STOCKHOLDERS, vol. 26, p. 861 *et seq.* and *passim*.

Insurance Policy. — As to what is a sufficient assignment of an insurance policy to pass the title and perfect a trust therein, see

England. — *Fortescue v. Barnett*, 3 Myl. & K. 36; *In re King*, 14 Ch. D. 179.

Illinois. — *Otis v. Beckwith*, 49 Ill. 121.

Massachusetts. — *Pingrey v. National L. Ins.*

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Co., 144 Mass. 374; *Kendrick v. Ray*, 173 Mass. 305, 73 Am. St. Rep. 289.

New Jersey. — *Janes v. Falk*, 50 N. J. Eq. 468, 35 Am. St. Rep. 783, *reversing* 49 N. J. Eq. 484.

New York. — *Phipard v. Phipard*, 55 Hun (N. Y.) 433.

Pennsylvania. — *Elliott's Appeal*, 50 Pa. St. 75, 88 Am. Dec. 525.

See also the titles ASSIGNMENTS, vol. 2, p. 1044; BENEFICIARIES (IN INSURANCE), vol. 3, p. 923; LIFE INSURANCE, vol. 19, p. 93.

Delivery of Bonds with Apt Declaration establishes trust. *Snader v. Slingluff*, 95 Md. 356.

Delivery of Notes and Bonds to One of Two Beneficiaries for the use of the other with a declaration of trust is sufficient to perfect the trust. *In re Soulard*, 141 Mo. 642.

Delivery of Deed in Trust, Forming Family Settlement. — *Tarbox v. Grant*, 56 N. J. Eq. 199. See also the title FAMILY SETTLEMENTS, vol. 12, p. 877, and note 5.

Constructive Delivery of Check. — Drawing a check payable to the *cestui que trust*, placing it in the settlor's safe, and directing an uncle to have the settlor's brother deliver the check to the uncle and that he was to give it to the *cestui*, creates a trust and is perfected by the constructive delivery. *Whitehouse v. Whitehouse*, 90 Me. 468, 60 Am. St. Rep. 278.

Indorsement of Notes payable to order is not essential. *Lyle v. Burke*, 40 Mich. 499.

Where a Note Is the Subject-matter of the Trust a direction to A by a person about to die, to instruct B to collect the note which would be found among his papers at a distant place, and to apply the proceeds to certain purposes, has been held a sufficient creation of a trust, there being no other act which the settlor could have done. *Roche v. George*, 93 Ky. 609.

2. Rights Not Capable of Legal Transfer. — *Kekewich v. Manning*, 1 De G. M. & G. 187; *Fortescue v. Barnett*, 3 Myl. & K. 36; *Bentley v. Mackey*, 15 Beav. 12; *Pearson v. Amicable Assur. Office*, 27 Beav. 229; *Roche v. George*, 93 Ky. 609. Compare *Edwards v. Jones*, 1 Myl. & C. 226; *Ward v. Audland*, 8 Sim. 571.

A Direction to a Debtor to Hold the Debt in Trust for a third person creates a perfect trust when accepted by the debtor. *Eaton v. Cook*, 25 N. J. Eq. 55. See also *Strong v. Weir*, 47 S. Car. 307.

A Trust in Moneys to Become Due from a Valid Sale of the Wife's Realty which belonged to the husband *jure mariti* under the existing law, may be declared by the husband in the wife's favor, and being accepted by the wife and the trustee, is valid and enforceable according to the condition of the declaration. *Clements v. Horn*, 44 N. J. Eq. 595. See also the title HUSBAND AND WIFE, vol. 15, p. 827.

created by assignment to other trustees for volunteers,<sup>1</sup> or by assignment to a new *cestui que trust* without new trustees.<sup>2</sup> But the transaction must indicate that the settlor's intention has been completely carried out, and so long as an act or formality which he contemplated performing in the creation of the trust remains undone, the trust is executory and incomplete, although the declaration might have been effected without such act or formality if he had intended the transaction to be complete without it.<sup>3</sup>

**Choses in Action** of all kinds were incapable of legal transfer at common law, but their assignment was recognized in equity.<sup>4</sup> Consequently all property of this description fell under the rule given above,<sup>5</sup> though at the present day choses in action are generally assignable at law<sup>6</sup> so that the question now is usually a legal one.<sup>7</sup>

**When Assignment Is In Writing.** — Delivery of the choses in action themselves has been said to become a secondary inquiry where the trust is created by a written assignment. In such a case the question is generally whether the assignment itself was delivered or so dealt with as to show an intention to create a trust actually perfected.<sup>8</sup> But it must always be remembered that the creation of a trust depends on all the facts in the case, and absence of delivery has been held fatal to the creation.<sup>9</sup>

**Where the Subject Is Partly Capable and Partly Incapable of Legal Transfer,** the part capable of legal transfer must be transferred.<sup>10</sup>

(2) **Settlor Assuming Character of Trustee.** — The settlor may, without parting with the possession of the subject-matter of the trust, himself assume the character of trustee, with respect to property already owned by him, or upon the acquisition of property in pursuance of a previous agreement. It is not necessary that this be done in express terms, but in the absence of statutory requirements any words or acts are sufficient which clearly denote his intention to relinquish his beneficial interest in the property *in præsentia* and to hold it for the benefit of another, and this without regard to whether the property is equitable or legal or whether it is capable or incapable of transfer at law.<sup>11</sup>

1. *Sloane v. Cadogan*, 3 Sudg. Ven. and Pur. appendix 66, 1 Ames Sel. Cas. Trusts (2d ed.) 135; *Donaldson v. Donaldson*, Kay 711.

**Assignment of Equitable Interest in Deceased Wife's Estate to Trustees for Children.** — *Tarbox v. Grant*, 56 N. J. Eq. 199.

2. *Rycroft v. Christy*, 3 Beav. 238. See also *M'Fadden v. Jenkyns*, 1 Hare 458, 1 Phil. 153.

3. **Intention to Execute Deed.** — So where personal property is delivered to a trustee with full directions as to the trust, but the intention is that these trusts are to be embodied in a deed, although a trust of personality by parol is valid, yet if the deed is never executed or never delivered, the trust is not complete. *Bayley v. Boulcott*, 4 Russ. 345; *Lisher v. Hodgson*, L. R. 4 Eq. 30; *Lloyd v. Brooks*, 34 Md. 27.

**Aliter**, where a general trust has been perfected by the transfer and acceptance of bank notes, although a deed of trust was intended to be subsequently prepared, which was to be in the nature of a particular appointment of the general trust fund. *Sherwood v. Andrews*, 2 Allen (Mass.) 79.

4. *Ellis v. Secor*, 31 Mich. 185, 18 Am. Rep. 178. See also the title ASSIGNMENTS, vol. 2, p. 1014 et seq.

5. *Grover v. Grover*, 24 Pick. (Mass.) 261, 35 Am. Dec. 319.

**Assignment of Chose in Action a Trust.** — See the title ASSIGNMENTS, vol. 2, p. 1095. But compare *supra*, this section, 6. b. 3. note.

6. See the title ASSIGNMENTS, vol. 2, p. 1016, and titles dealing with particular instruments throughout this work.

7. Some cases dealing with particular instruments, such as insurance policies and corporate stock, are grouped in the notes to the preceding paragraph of the text.

8. **Assignment in Writing.** — *Ellis v. Secor*, 31 Mich. 186, 18 Am. Rep. 178; *O'Neal v. Greenwood*, 106 Mich. 572; *Tarbox v. Grant*, 56 N. J. Eq. 199.

9. *Yokem v. Hicks*, 93 Ill. App. 667; *Clay v. Layton*, (Mich. 1903) 96 N. W. Rep. 458.

10. *Woodford v. Charnley*, 28 Beav. 96.

11. **Settlor Becoming Trustee** — *England*. — *Kronheim v. Johnson*, 7 Ch. D. 66; *Warriner v. Rogers*, L. R. 16 Eq. 340; *Ex p. Pye*, 18 Ves. Jr. 149.

*United States*. — *Linton v. Brown*, 20 Fed. Rep. 455.

*Alabama*. — *Sayre v. Weil*, 94 Ala. 466; *Walker v. Crews*, 73 Ala. 418.

*California*. — *Matter of Webb*, 49 Cal. 541; *Lynch v. Rooney*, 112 Cal. 279.

*Connecticut*. — *Minor v. Rogers*, 40 Conn. 512, 16 Am. Rep. 69.

*Georgia*. — *McCreary v. Gewinner*, 103 Ga. 535.

*Illinois*. — *Tyler v. Tyler*, 25 Ill. App. 333; *Yokem v. Hicks*, 93 Ill. App. 667.

*Kentucky*. — *Barkley v. Lane*, 6 Bush (Ky.) 589; *Tanner v. Skinner*, 11 Bush (Ky.) 120;

**Words or Acts Sufficient.**—While the principle just stated is universally admitted, in its application some conflict arises.<sup>1</sup> In some states it is held that the mere act of a person in declaring himself trustee of certain property for another is sufficient, if uncontradicted by other evidence, to justify a court in declaring the trust established;<sup>2</sup> while other authorities demand in addition some further evidence to show that the act was regarded and intended by the settlor to be a completed transaction.<sup>3</sup> Such evidence may consist in the fact of notifying the beneficiary,<sup>4</sup> or delivering to him shares of stock which the settlor has caused to be issued to himself as trustee.<sup>5</sup>

**As Against Creditors and Purchasers** in some states a mere declaration of trust of personal property without a transfer of possession is ineffectual, unless in writing and recorded.<sup>6</sup>

**f. REVOCATION**—(1) *Complete Trust Irrevocable.*—If a trust has been once perfectly created with an intelligent comprehension of the nature of the act, it is irrevocable, even though it be voluntary, and the subsequent acts of the settlor or the trustee cannot affect it.<sup>7</sup>

*Barton v. Barton*, 80 Ky. 215; *Williamson v. Yager*, 91 Ky. 282, 34 Am. St. Rep. 184; *Krankel v. Krankel*, 104 Ky. 745.

*Maine.*—*Norway Sav. Bank v. Merriam*, 88 Me. 151.

*Maryland.*—*Smith v. Darby*, 39 Md. 268; *Carson v. Phelps*, 40 Md. 99; *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486; *Reiff v. Horst*, 52 Md. 268.

*New Jersey.*—*Eaton v. Cook*, 25 N. J. Eq. 55; *Janes v. Falk*, 50 N. J. Eq. 468, 35 Am. St. Rep. 783, reversing 49 N. J. Eq. 484.

*New York.*—*Day v. Roth*, 18 N. Y. 448; *Locke v. Farmers' L. & T. Co.*, 140 N. Y. 135, reversing 66 Hun (N. Y.) 428; *Westlake v. Wheat*, 43 Hun (N. Y.) 77.

*Pennsylvania.*—*Dickerson's Appeal*, 115 Pa. St. 198, 2 Am. St. Rep. 547; *Smith's Estate*, 144 Pa. St. 428, 27 Am. St. Rep. 641, affirming 8 Pa. Co. Ct. 539.

*Rhode Island.*—*Blackmar v. McLoughlin*, 21 R. I. 487.

*South Carolina.*—*Gadsden v. Whaley*, 14 S. Car. 210.

*Vermont.*—*Cathcart v. Nelson*, 70 Vt. 317.

See also *infra*, this section, 7. *d. Deposits in Savings Banks.*

**A Deed of Lands to the grantor in trust for persons named, duly attested and acknowledged, may be retained by the grantor in his capacity as trustee, and is sufficiently delivered to create a valid trust in the beneficiaries.** *Carson v. Phelps*, 40 Md. 73.

**Declaration that Owner Holds Land in Trust Valid.**—*Pierce v. Brooks*, 52 Ga. 425.

**A Written Promise to Hold in Trust for Another a Certain Office to be obtained for the promisor by that other has been held to be a sufficient declaration of a present trust.** *Bellamy v. Burrow*, Cas. t. Talb. 97.

**1. Words or Acts Sufficient.**—*Milholland v. Whalen*, 89 Md. 215.

**2.** *Milholland v. Whalen*, 89 Md. 212; *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Locke v. Farmers' L. & T. Co.*, 140 N. Y. 135. See also *infra*, this section, *Deposits in Savings Banks.*

**But the Evidence Must Show the Intent Unequivocally and an imperfect gift is not enforceable as a trust.** *Wadd v. Hazelton*, 137 N. Y. 215, 33 Am. St. Rep. 707; *Sullivan v.*

*Sullivan*, 161 N. Y. 554, affirming 39 N. Y. App. Div. 99; *Matter of Small*, 27 N. Y. App. Div. 438, affirmed 158 N. Y. 128; *Hickok v. Bunting*, 67 N. Y. App. Div. 560; *Govin v. De Miranda*, 76 Hun (N. Y.) 414. See also *supra*, this section, 5. *b. (4)* and 6. *b. (1)*.

In *Kreh v. Moses*, 22 Ont. 307, it is said: "The cases go to show that the trust intended must be irrevocable" before the courts will enforce it if created by a voluntary act of the settlor declaring himself trustee.

But this is surely not the doctrine in the majority of the *United States*. See *infra*, this section, 6. *f. (2)*.

**Delivery of the Written Declaration to any one as a declaration of trust is not essential.** So writings found among the papers of a decedent have been held to establish trusts. *Janes v. Falk*, 50 N. J. Eq. 468, 35 Am. St. Rep. 783, reversing 49 N. J. Eq. 484; *Collins v. Stewart*, 58 N. J. Eq. 392, affirmed 60 N. J. Eq. 488. See also *Phipard v. Phipard*, 55 Hun (N. Y.) 433. And compare *In re Shield*, 53 L. T. N. S. 5; *Kreh v. Moses*, 22 Ont. 307.

**3.** *Schollmier v. Schoendelen*, 78 Iowa 426, 16 Am. St. Rep. 455; *Casteel v. Flint*, 112 Iowa 92; *Wentworth v. Shibbes*, 89 Me. 167; *Fellows v. Fellows*, 69 N. H. 339. See also *infra*, this section, *Deposits in Savings Banks.*

**4.** See *supra*, this section, 6. *c. Notification of and Acceptance by Beneficiary.*

**5.** *Casteel v. Flint*, 112 Iowa 92.

**6.** *Kaye v. Tydings*, 3 Met. (Ky.) 527; *Girard Trust Co. v. Mellor*, 156 Pa. St. 579. See also the titles FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 33 *et seq.*; RECORDING ACTS, vol. 24, p. 86 *et seq.*

**7. Irrevocability of Trust—England.**—*Bill v. Cureton*, 2 Myl. & K. 503; *Rycroft v. Christy*, 3 Beav. 238.

*Canada.*—*Honsberger v. Martin*, 8 Grant Ch. (U. C.) 361; *McGregor v. Rapelje*, 17 Grant Ch. (U. C.) 38, 18 Grant Ch. (U. C.) 446.

*United States.*—*Ireland v. Geraghty*, 15 Fed. Rep. 35.

*California.*—*Hellman v. McWilliams*, 70 Cal. 449.

*Illinois.*—*Padfield v. Padfield*, 72 Ill. 322; *Light v. Scott*, 88 Ill. 239; *Lawrence v. Lawrence*, 181 Ill. 248.



**Deeds upon Trusts Declared in Another Instrument.** — When a deed conveys lands upon such trusts as are declared in a will already made, neither the deed nor the will is revocable, in the absence of a power of revocation, for the trust arises by the deed.<sup>1</sup> But when lands are conveyed upon trusts to be afterwards declared by will or deed, if the declaration is by will then the will may be revoked and new trusts declared; but if the power is executed by deed, it is irrevocable in the absence of an express authority to revoke.<sup>2</sup>

(2) *Powers of Revocation.* — A Power of Revocation may, however, be reserved,<sup>3</sup> and is perfectly consistent with the creation of a valid trust.<sup>4</sup> If never exercised during the life of the donor, and according to the terms in which it is reserved, the validity of the trust remains unaffected.<sup>5</sup>

The Omission of a Power of Revocation in a voluntary settlement<sup>6</sup> has sometimes been considered as a circumstance of suspicion,<sup>7</sup> while at one time its absence was regarded as conclusive against the application of the settlor to revoke.<sup>8</sup> But the modern and better rule is that the absence of the power even in a

*Indiana.* — *Brunson v. Henry*, 140 Ind. 455.  
*Kentucky.* — *Lewis v. Citizens Nat. Bank*, 95 Ky. 79.

*Maine.* — *Northrop v. Hale*, 73 Me. 66; *Cobb v. Knight*, 74 Me. 253; *Hewett v. Hurley*, 88 Me. 434.

*Maryland.* — *Smith v. Darby*, 39 Md. 278; *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486; *Lowry v. Tiernan*, 2 Har. & G. (Md.) 34; *Rogers v. Rogers*, 97 Md. 573.

*Massachusetts.* — *Salisbury v. Bigelow*, 20 Pick. (Mass.) 174; *Belknap v. Belknap*, 128 Mass. 14; *Keyes v. Carleton*, 141 Mass. 45, 55 Am. Rep. 446.

*New Hampshire.* — *Minot v. Tilton*, 64 N. H. 371.

*New York.* — *Willis v. Smyth*, 91 N. Y. 297; *Mabie v. Bailey*, 95 N. Y. 206; *McPherson v. Rollins*, 107 N. Y. 316, 1 Am. St. Rep. 826; *New York L. Ins., etc., Co. v. Hoyt*, 161 N. Y. 1, affirming 31 N. Y. App. Div. 84; *Robertson v. McCarty*, 54 N. Y. App. Div. 103; *Moloney v. Tilton*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 682; *Meiggs v. Meiggs*, 15 Hun (N. Y.) 453; *McArthur v. Gordon*, 51 Hun (N. Y.) 511; *Foster v. Coe*, 4 Lans. (N. Y.) 53; *Brown v. Austen*, 35 Barb. (N. Y.) 341, 22 How. Pr. (N. Y.) 394; *Thebaud v. Schermerhorn*, (Supm. Ct. Spec. T.) 61 How. Pr. (N. Y.) 200.

*Pennsylvania.* — *Russell's Appeal*, 75 Pa. St. 269; *Brooke's Appeal*, 109 Pa. St. 188.

*Rhode Island.* — *Stone v. King*, 7 R. I. 358, 84 Am. Dec. 557; *Thurber v. Sprague*, 17 R. I. 634.

*South Carolina.* — *Henson v. Kinard*, 3 Strobb. Eq. (S. Car.) 371.

*Vermont.* — *Sargent v. Baldwin*, 60 Vt. 17.

*West Virginia.* — *Fry v. Feamster*, 36 W. Va. 454.

**The Declarations of the Settlor Made After the Creation of the Trust** cannot have any legitimate effect upon it. *Ray v. Simmons*, 11 R. I. 266, 23 Am. Rep. 447.

Redelivery of a deed of land or of securities by the trustee to the settlor of a trust does not affect the trust. *Williams v. Evans*, 154 Ill. 68; *Kelley v. Snow*, 185 Mass. 288.

A Voluntary Trust Subject to the Settlor's Legacies or Debts may in effect be revoked by creating new debts or by legacies. *Markwell v. Markwell*, 34 Beav. 12.

1. *Craven v. Winter*, 38 Iowa 471; *Baltimore v. Williams*, 6 Md. 235.

2. *Baltimore v. Williams*, 6 Md. 235. See also the title POWERS, vol. 22, pp. 1142, 1143.

3. See the title POWERS, vol. 22, p. 1141 *et seq.*; and *supra*, this section, *Statute of Wills*.

The Irrevocability provided for powers in trust in the *New York Revised Statutes*, in the absence of a power reserved or granted in the instrument creating the same, is applicable to trusts of real estate only. *Heermans v. Ellsworth*, 3 Hun (N. Y.) 473, 5 Thomp. & Co. (N. Y.) 605, affirmed 64 N. Y. 159.

4. *Powers of Revocation Reserved.* — *Barlow v. Loomis*, 19 Fed. Rep. 677; *Stone v. Hackett*, 12 Gray (Mass.) 227; *Kelley v. Snow*, 185 Mass. 288; *Mize v. Bates County Nat. Bank*, 60 Mo. App. 358, 1 Mo. App. Rep. 99; *Locke v. Farmers' L. & T. Co.*, 140 N. Y. 135, reversing 66 Hun (N. Y.) 428; *Reiff's Estate*, 16 Pa. Super. Ct. 80; *Dickerson's Appeal*, 115 Pa. St. 198, 2 Am. St. Rep. 547. But compare *Towle v. Wood*, 60 N. H. 434, 49 Am. Rep. 326; *Kreh v. Moses*, 22 Ont. 307.

5. *Barlow v. Loomis*, 19 Fed. Rep. 677; *Hiserodt v. Hamlett*, 74 Miss. 37; *Lines v. Lines*, 142 Pa. St. 149, 24 Am. St. Rep. 487; *Reiff's Estate*, 16 Pa. Super. Ct. 80. See also *Govin v. De Miranda*, 140 N. Y. 474, 79 Hun (N. Y.) 329.

**Partial Exercise of Power of Revocation.** — A power of revocation as to the whole may be exercised as to a part and when so exercised does not affect the remainder. *Booth v. Oakland Sav. Bank*, 122 Cal. 19.

**Power Not Exercisable by Will.** — A power of revocation and alteration to be exercised "at any time upon written notice to" the trustee can be exercised only during life and not by will. *Kelley v. Snow*, 185 Mass. 288.

6. A Provision for Volunteers in a Marriage Settlement seems to be within the consideration. *Tucker v. Bennett*, 38 Ch. D. 1.

7. See *Van Cott v. Prentice*, 104 N. Y. 45.

**Where the Intent to Make an Irrevocable Gift Appears**, the omission of a power of revocation is not even evidence of mistake. *Rogers v. Rogers*, 97 Md. 573; *Barber v. Thompson*, 49 Vt. 227.

8. *Villers v. Beaumont*, 1 Vern. 100; *Petre v. Espinasse*, 2 Myl. & K. 496.

voluntary settlement is only a circumstance to be taken into account, and is entitled to more or less weight according to the presence or absence of other circumstances in the case.<sup>1</sup>

**Equity May Relieve Against the Omission** where the omission is due to fraud or where the settlement was inadvised or improvident or contrary to the settlor's intention;<sup>2</sup> but this will be done only on the application of the settlor himself,<sup>3</sup> to the extent that it has not been acted on in good faith, and so far as the parties may be placed *in statu quo*.<sup>4</sup>

**7. Certain Types of Trusts — a. TRUSTS IMPLIED FROM PROVISIONS IN WILLS — Powers and Duties Inconsistent with Legal Title in Another.** — Wherever the terms of a gift by will evidently contemplate the enjoyment of the subject-matter by the person to whom the donation is made, but to another are intrusted powers and duties which make it necessary for him to have the legal estate, equity will effectuate the intent by vesting the legal title as trustee in him on whom the powers are conferred, and considering the grantee as *cestui que trust* merely.<sup>5</sup>

**When a Will Directs that Property Be Applied to Certain Specific Purposes**, he to whom the legal title passes by virtue of the will or of the laws of succession will hold it charged with a trust for the purposes declared,<sup>6</sup> or a devise or bequest in

**1. Omission of Power Only a Circumstance of Evidence.** — *Toker v. Toker*, 3 De G. J. & S. 487; *Hall v. Hall*, L. R. 8 Ch. 430, *reversing* L. R. 14 Eq. 365; *Finucan v. Kendig*, 109 Ill. 198; *Lawrence v. Lawrence*, 181 Ill. 248; *Middleton v. Shelby County Trust Co.*, (Ky. 1899) 51 S. W. Rep. 156; *Smith v. Boyd*, 61 N. J. Eq. 175; *Aylsworth v. Whitcomb*, 12 R. I. 298; *Neisler v. Pearsall*, 22 R. I. 367. See also *Brown v. Mercantile Trust, etc., Co.*, 87 Md. 377.

**The Propriety or Impropriety of the Clauses in the Instrument** will not be considered by the court, except as evidence that the settlor did not understand what he was doing. *Dutton v. Thompson*, 23 Ch. D. 278.

**2. Relief Against Omission of Power of Revocation.** — *Wollaston v. Tribe*, L. R. 9 Eq. 44; *Frideaux v. Lonsdale*, 1 De G. J. & S. 433; *James v. Couchman*, 29 Ch. D. 212; *Huguenin v. Baseley*, 14 Ves. Jr. 300; *Garnsey v. Mundy*, 24 N. J. Eq. 243; *Meiggs v. Meiggs*, 15 Hun (N. Y.) 453; *Gibbes v. New York L. Ins., etc., Co.*, (Supm. Ct. Spec. T.) 67 How. Pr. (N. Y.) 207; *Hays v. Union Trust Co.*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 240; *Russell's Appeal*, 75 Pa. St. 269; *Neisler v. Pearsall*, 22 R. I. 367. See also the titles **MISTAKE**, vol. 20, p. 805; **RESCISSION**, **REFORMATION**, and **CANCELLATION**, vol. 24, p. 604.

**Settlor's Want of Age and Experience.** — *Everitt v. Everitt*, L. R. 10 Eq. 405.

**Settlor's Want of Proper Professional Advice.** — *Coutts v. Acworth*, L. R. 8 Eq. 558; *Smith v. Boyd*, 61 N. J. Eq. 175.

**A Voluntary Settlement in Extremis** has been set aside on the settlor's recovery although no power of revocation was reserved. *Forshaw v. Welsby*, 30 Beav. 243.

**3. Sargent v. Baldwin**, 60 Vt. 24.

**4. Grant v. Baird**, 61 N. J. Eq. 389; *Fredrick's Appeal*, 52 Pa. St. 338, 91 Am. Dec. 159.

**5. Powers Inconsistent with Legal Estate in Another.** — *Jefferson v. Morton*, 2 Saund. 11, note 17, by Williams; *White v. Parker*, 1 Bing.

N. Cas. 573, 27 E. C. L. 493; *Bush v. Allen*, 5 Mod. 63; *South v. Allen*, 5 Mod. 102; *Braman v. Stiles*, 2 Pick. (Mass.) 460, 13 Am. Dec. 445; *Walker v. Whiting*, 23 Pick. (Mass.) 313; *Chesman v. Cummings*, 142 Mass. 65; *Forsyth v. Rathbone*, 34 Barb. (N. Y.) 388; *Tobias v. Ketchum*, 32 N. Y. 319; *Sheets's Estate*, 52 Pa. St. 257; *Cotton's Estate*, 6 Pa. Dist. 44.

Cases where the testator makes provision in his will for his widow and then grants powers over his real estate inconsistent with her dower therein, illustrate this principle. See the title **EQUITABLE ELECTION**, vol. 11, p. 90 *et seq.*

**Cases Wherein No Trust Was Held to Arise, but the Beneficiary Took Title.** — *Willard v. Davis*, 3 Penny. (Pa.) 86; *Schuldt v. Herbine*, 3 Pa. Super. Ct. 65.

**6. Devise or Bequest for Particular Purposes.** — Co. Litt. 113a, note 2, by Hargrave; *Tenant v. Brown*, 1 Ch. Cas. 180; *Locton v. Locton*, Freem. Ch. 136.

**Devise in Trust to Heir Implied.** — When from the will itself it is evident that the testator meant that the heir at law or any other person should take the legal estate for a particular object, the court will consider the estate as devised in trust although no formal words of devise to the trustee are used. *Hoxie v. Hoxie*, 7 Paige (N. Y.) 187. See also *McIntire Poor School v. Zanesville Canal, etc., Co.*, 9 Ohio 287, 34 Am. Dec. 436.

**A Bequest of Property to a Wife "to Be Divided Among the Children as she thinks proper,"** vests no beneficial interest in the wife, but creates a trust for the children. *Green v. Collins*, 6 Ired. L. (28 N. Car.) 139.

**Legacies and Devises Charged with Debts and Legacies, or Burdened with Conditions**, bind the legatee or devisee accepting as trusts or *quasi* trusts. *Mahar v. O'Hara*, 9 Ill. 424. See also the titles **LEGACIES AND DEVISES**, vol. 18, p. 746; **MARSHALING DECEDENTS' ESTATES**, vol. 19, p. 1288.

trust may be implied to the person charged with the execution of the purposes<sup>1</sup> unless the purpose may be effected by a power in trust.<sup>2</sup>

Words in a Will Creating a Condition at common law will not generally, in equity, be construed as rendering the estate granted forfeitable for a breach, but will be held to create a trust, binding on the conscience of the donee, which a court of equity will enforce at the instance of those interested.<sup>3</sup>

b. POWERS IN TRUST OR TRUSTS IMPLIED FROM POWERS. — Powers are not as such imperative, but leave the execution of the act authorized to the discretion of the donee,<sup>4</sup> and equity will not interfere in case of nonexecution, *i. e.*, a total want of any attempt to exercise the discretion reposed; although it may aid a defective execution.<sup>5</sup> On the other hand, a trust is always imperative, and the failure of the trustee to carry out the trust is not allowed to prejudice the *cestui que trust*.<sup>6</sup> Midway between trusts and mere powers stands the class of "powers implying a trust" or "powers in trust." The donee of such a power is in equity regarded as intrusted and required to execute it, and if he does not discharge this duty a court of equity will discharge it in his place even after the death of the donee.<sup>7</sup> Powers implying a trust, therefore, differ from trusts and partake of the character of mere powers in that no estate need be vested in the donee or trustee;<sup>8</sup> they differ from mere powers and partake of the nature of trusts in being imperative. But they may be imperative, although a limited discretion is vested in the donee to select individuals out of a designated class of objects.<sup>9</sup>

What Words Can Create a Power in the Nature of a Trust must depend, as in the case of precatory trusts generally, on whether the words used merely repose a discretion or confer an imperative duty capable of definite execution.<sup>10</sup>

Where the Power Authorizes an Appointment among a Class and shows a general intention in favor of the class and a particular intention in favor of individuals of the class which fails by reason of the donee's nonexecution of the power, equity will treat the power as a trust and carry into effect the general intention in favor of the class, acting on the principle that "equality is equity."<sup>11</sup>

1. Inferred from Powers to Executors. — Thus where powers in connection with property are conferred by will on executors, of such a character that it is necessary for them to have the legal title, a devise or bequest of the property to them in trust for the beneficiary will be implied. *Marx v. McGlynn*, 88 N. Y. 358; *Betts v. Betts*, (Supm. Ct. Spec. T.) 4 Abb. N. Cas. (N. Y.) 385; *Vail v. Vail*, 7 Barb. (N. Y.) 226; *Parker's Appeal*, 61 Pa. St. 478. See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1035 *et seq.*

No Trust Held Created by Certain Powers to Execution. — *Lansing v. Lansing*, 45 Barb. (N. Y.) 182.

Bequest of Life Interest in Money. — A bequest of money to one for life with a quasi remainder to another, or undisposed of, will, where no other trustee is named in the will, be effectuated by holding the executor trustee of the income for the life tenant, and of the principal for those entitled to succeed the life tenant. *Carson v. Carson*, 6 Allen (Mass.) 397. But see the titles LEGACIES AND DEVISES, vol. 18, p. 790; REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS, vol. 24, p. 440.

Directions to Continue Testator's Business. — Such trusts have been implied from directions in a will to continue testator's business. *Downing v. Marshall*, 4 Abb. App. Dec. (N. Y.) 662 (powers in trust); *Laible v. Ferry*, 32 N. J. Eq. 791, reversing 31 N. J. Eq. 566. See also

the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 973.

2. Power in Trust in Executors Implied. — *Horndorf v. Horndorf*, (Supm. Ct. Spec. T.) 13 Misc. (N. Y.) 343.

3. Condition Construed as Trust. — *Matter of Skingley*, 3 Macn. & G. 220; *Gregg v. Coates*, 23 Beav. 33; *Wright v. Wilkin*, 2 B. & S. 232, 110 E. C. L. 232; *Sohier v. Trinity Church*, 109 Mass. 1. But compare *Cunningham v. Foot*, 3 App. Cas. 974, reversing *Ir. R.* 11 Eq. 306. See also the titles CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 913; CONDITIONS, vol. 6, p. 504.

4. Powers in Trust. — 2 Spence Eq. Jur. 81; *Atty.-Gen. v. Downing*, *Wilmot* 23.

5. See the title POWERS, vol. 22, p. 1127.

6. *Brown v. Higgs*, 8 Ves. Jr. 561; *Atty.-Gen. v. Downing*, *Wilmot* 23, and see this title *passim*.

7. *Brown v. Higgs*, 8 Ves. Jr. 561. See also *Withers v. Yeadon*, 1 Rich. Eq. (S. Car.) 324.

8. See *Tobias v. Ketchum*, 32 N. Y. 319.

9. See *infra*, the paragraph *Where the Power Authorizes an Appointment Among a Class*.

10. *Smith v. Floyd*, 140 N. Y. 337; *Towler v. Towler*, 142 N. Y. 371, affirming 65 Hun (N. Y.) 457. See the title PRECATORY TRUSTS, vol. 22, p. 1172.

11. 2 Spence Eq. Jur. 82; *Burrough v. Philcox*, 5 Myl. & C. 72. And see the title POWERS,



But the rule of equality will not be followed where the instrument creating the power indicates a rule by which the discretion of the donee must be governed, and which the court may act upon, using its judgment as the donee would have done.<sup>1</sup>

**Legislation in New York and Other States.**—By the scheme of legislation of the New York Revised Statutes adopted in 1828, which has been followed in a number of other states, trusts of real property not valid because not within the enumerated purposes for which such trusts can be created, are, if the acts directed can be lawfully performed under a power, valid as powers in trust,<sup>2</sup> the performance of which may be compelled in equity for the benefit of those interested.<sup>3</sup>

**c. TRUSTS IMPLIED FROM PROVISIONS IN CONTRACTS**—(1) *In General.*—Trusts may arise from the acceptance of a gift or transfer of property imposing conditions and duties upon the donee or grantee, or from express contracts by reason either of the terms of the contract or of equitable implications from the contract which establish the relations of the parties toward the subject-matter.<sup>4</sup>

The Words "Implied Trusts" are used in a loose and inexact way sometimes to mean trusts arising by implication from the language used (answering by analogy to the term "implied contract" in the sense of contracts implied in fact); sometimes to signify trusts raised by the court from the relations of the parties under the contract or from their dealings with one another (answering to "implied contracts," meaning contracts implied in law or *quasi*-contracts).<sup>5</sup> Generally trusts by interpretation from the language used in an instrument are to be classed with express trusts, since they differ from a technically formed express trust only in the fact that technical language is not used. But a statute making special provision in case of funds received "in trust for any purpose" and held to include "only technical trusts and not those which the law implies from a contract,"<sup>6</sup> has been held not to embrace cases of money transferred for particular purposes,<sup>7</sup> or the fiduciary relation implied in a loan which, by

vol. 22, p. 1127, 1145; and as to the construction of gifts to particular classes of objects, see the same title, p. 1134 *et seq.*

1. *Gower v. Mainwaring*, 2 Ves. 87; *Potter v. Yale College*, 8 Conn. 52. In these cases the court held that a direction for distribution among the donor's most needy relations furnished a rule which the court might act upon. But in *McNeill v. Galbraith*, 8 S. & R. (Pa.) 43, 11 Am. Dec. 572, a direction for division among "my poor relations" was carried out as if the word "poor" had not been used, the court saying: "There is no distinguishing between the degrees of poverty," and the inquiry, if undertaken, would be "very difficult and embarrassing, if not impracticable."

2. See *supra*, this section, 2. d. *Object or Purpose*, where references to statutes are also given. See also *Post v. Hover*, 33 N. Y. 593; *Downing v. Marshall*, 4 Abb. App. Dec. (N. Y.) 662; *Sterrick v. Dickinson*, 9 Barb. (N. Y.) 516; *Clark v. Crego*, 47 Barb. (N. Y.) 599; *Ford v. Belmont*, 7 Robt. (N. Y.) 97; *McLenegan v. Yeiser*, 115 Wis. 304.

Where the Purpose Can Be Accomplished by a Power in Trust an intent to create an express trust will not be presumed. *Heermans v. Robertson*, 64 N. Y. 332.

**Reservation of Right to Dispose in Certain Ways of Property Held Not Power in Trust.**—*Towler v. Towler*, 65 Hun (N. Y.) 457.

In California, this provision, at one time forming Cal. Civ. Code, § 860, has been repealed, and the validity of powers in trust are

determined like the validity of trusts, and if such a power would be invalid as a trust, it cannot be saved as a power in trust. *Matter of Fair*, 132 Cal. 523, 84 Am. St. Rep. 70; *McCurdy v. Otto*, 140 Cal. 48.

**Deed Invalid as Express Trust and Conferring No Power on Trustee.**—A deed invalid as creating an express trust and not conferring on the trustee named authority to do any act in relation to the land, or to create or revoke any estate therein or any charge thereon, is invalid also as a power in trust. *Murphey v. Cook*, 11 S. Dak. 47.

3. Rev. Stat. N. Y., pt. 2, c. 1, §§ 96-101. See also the title POWERS, vol. 22, p. 1092, and *passim* especially the places cited in the last note *supra*.

**Assignee of Beneficiary of Power** may enforce execution. *Clark v. Crego*, 47 Barb. (N. Y.) 599.

4. See *infra*, 7. c. (2); also 7. e.

5. See *Emerson v. Galloupe*, 158 Mass. 146, and the title IMPLIED TRUSTS, vol. 15, p. 1123. For the analogous ambiguity in the words "implied contract," see the titles CONTRACTS, vol. 7, p. 91; IMPLIED CONTRACTS, vol. 15, p. 1078.

6. See the title DEBTS OF DECEDENTS, vol. 8, p. 1045. See further the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 779 *et seq.*

7. *Doyle v. Murphy*, 22 Ill. 502, 74 Am. Dec. 165 (money transferred to pay debts); *Ford v. Stuart First Nat. Bank*, 100 Ill. App. 70, reversed on other grounds 201 Ill. 120 (transfer

written agreement, is to be repaid to certain persons in certain proportions.<sup>1</sup>

(2) *Contracts Creating Trust Relations* — (a) **Generally.** — Where property is transferred and accepted on the agreement and understanding<sup>2</sup> that it or its proceeds are to be applied for certain designated purposes, an express trust is created complete upon the trustee's acceptance thereof,<sup>3</sup> and the application of the property as directed enters into the consideration of the transfer.<sup>4</sup> So transfers accompanied by the grantee's agreement to support the grantor or another create trusts,<sup>5</sup> and transfers with limitations on the right to redipose of the property have been held to create the relation of trustee and *cestui que trust*.<sup>6</sup> But such transaction must, of course, be examined in the light of all the circumstances, and where the whole transaction does not disclose a purpose to create an irrevocable trust, such a trust will not be decreed.<sup>7</sup>

**Contracts Creating Equitable Rights or Trust Fund.** — The broad distinction running through these cases is this: If a contract creates interests distinct from the legal ownership of the property involved,<sup>8</sup> or if a contract, being lawful and

of funds to invest and keep invested in real estate).

1. *Blair v. Follansbee*, 67 Ill. App. 144.

2. **The Minds of the Parties Must Meet.** — *Boessneck v. Cohn*, (Supm. Ct. Spec. T.) 7 N. Y. Supp. 620; *Harris v. Barnett*, 3 Gratt. (Va.) 323.

**As to the Authority to Bind the Principal of Agents** through whom the contract is made the usual rules of agency apply. *Bridges v. Yellow Springs College*, 19 Iowa 572.

3. **Acceptance of a Transfer on Express Agreement** — *California*. — *Bedell v. Scoggins*, (Cal. 1895) 40 Pac. Rep. 954; *Tyler v. Mayre*, 95 Cal. 160.

*Illinois*. — *Walden v. Karr*, 88 Ill. 49; *Light v. Scott*, 88 Ill. 239; *McCoy v. Fahrney*, 182 Ill. 60.

*Michigan*. — *Bostwick v. Mahaffy*, 48 Mich. 342; *A. P. Cook Co. v. Bell*, 114 Mich. 283.

*New Jersey*. — *Arnwine v. Carroll*, 8 N. J. Eq. 620, 886.

*New York*. — *Diefendorf v. Spraker*, 10 N. Y. 246; *McPherson v. Rollins*, 107 N. Y. 316, 1 Am. St. Rep. 826; *Matter of Carpenter*, 131 N. Y. 86, *reversing* (Supm. Ct. Gen. T.) 15 N. Y. Supp. 817; *Hirsh v. Auer*, 146 N. Y. 13, *affirming* 79 Hun (N. Y.) 493; *Lorillard v. Silver*, 35 Barb. (N. Y.) 132; *Rogers Locomotive, etc., Works v. Kelly*, 19 Hun (N. Y.) 399; *Todd v. Vaughan*, 90 Hun (N. Y.) 70; *Associate Alumni, etc., v. General Theological Seminary*, 26 N. Y. App. Div. 144; *Morris v. Webb*, 45 N. Y. Super. Ct. 305; *Warburton v. Camp*, 55 N. Y. Super. Ct. 290.

*North Carolina*. — *Patapasco Guano Co. v. Bryan*, 118 N. Car. 576.

*Ohio*. — *Schaff v. Ensley*, 7 Ohio Cir. Dec. 707, 14 Ohio Cir. Ct. 492.

*Pennsylvania*. — *Ivory v. Burns*, 56 Pa. St. 300; *Shearman v. Morrison*, 149 Pa. St. 386; *Ahl's Appeal*, 25 W. N. C. (Pa.) 113.

*South Carolina*. — *Menude v. Delaire*, 2 Desaus. (S. Car.) 564.

*Tennessee*. — *Springs v. Cooper*, (Tenn. Ch. 1898) 51 S. W. Rep. 997.

**Where Voluntary Subscriptions Are Made for a Charitable Purpose** at the call of a newspaper, by sending funds to the editor, the latter, upon receipt of the money, becomes a voluntary trustee thereof, charged with the duty of devoting it to the indicated objects. *Hallinan v. Hearst*,

133 Cal. 645. See also *Mt. Calvary Church v. Albers*, 174 Mo. 331; *Martin v. McCord*, 5 Watts (Pa.) 493, 30 Am. Dec. 342, and the title SUBSCRIPTIONS, vol. 27, p. 280.

But where a subscription has been raised by admirers for a public personage and placed in the hands of "treasurers," the money does not become a trust fund for his benefit, when it has been revoked by the subscribers before the time fixed for presentation. *O'Brien v. McMeel*, (1898) 1 Ir. 366.

**A Quitclaim Deed by One Joint Owner to Another** given for particular purposes only creates a trust. *Beadle v. Beadle*, 2 McCrary (U. S.) 586, 40 Fed. Rep. 315.

4. *Featherston v. Richardson*, 68 Ga. 501.

5. **Agreements for Maintenance.** — *Padfield v. Padfield*, 72 Ill. 322; *Funk v. Lawson*, 12 Ill. App. 229; *Brown v. Harris*, 25 Barb. (N. Y.) 134; *McArthur v. Gordon*, 51 Hun (N. Y.) 511, *modified* 126 N. Y. 597; *Barber v. Thompson*, 49 Vt. 213; *Pownall v. Taylor*, 10 Leigh (Va.) 179. See generally the title SUPPORT AND MAINTENANCE, vol. 27, p. 423.

**Acceptance of Testamentary Gift in Trust** to be used in support of certain persons creates a trust. *Haxtum v. Corse*, 2 Barb. Ch. (N. Y.) 506.

**The Personal Convenience of the Grantor** is a good consideration for such a transfer. *Townsend v. Allen*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 73, 59 Hun (N. Y.) 622, *affirmed* 126 N. Y. 646.

6. **Transfer with Limitations on Right of Disposal.** — *Kitchen v. Bedford*, 13 Wall. (U. S.) 413 (transfer of railroad bonds for certain uses); *International Pavement Co. v. Richardson*, 75 Fed. Rep. 590 (transfer of patent, subject to limitations). See also *Richtmyer v. Lasher*, 77 N. Y. App. Div. 574.

7. **Intent to Create Trust Necessary.** — *Butler v. Duprat*, 51 N. Y. Super. Ct. 77. See also *Gillies v. Commercial Bank*, 10 Manitoba 460.

So in *Fellows v. Fellows*, 69 N. H. 339, a conveyance by A to B, accompanied by a bond from B to A, conditioned for the support of A during life and on his death for payment of certain sums to C, was held not to create a complete trust, and a release of B by A from his liability to pay C was held valid.

8. **Contracts Creating Equitable Rights** — *Seymour v. Freer*, 8 Wall. (U. S.) 202; *Interna-*

enforceable, is made with the intention of devoting specific property to specific purposes,<sup>1</sup> equity, in order to give effect to the rights created or to the intention of the parties, will raise a trust in the property enforceable against the holder of the legal title and those claiming under him voluntarily or with notice.

**Contracts Creating Mere Personal Liability.** — But contracts under which the grantee or receiver of property assumes a mere personal liability in consideration of the grant or receipt, without impressing upon the property the character of a trust fund, while enforceable as contracts, do not create trusts, and must be distinguished from the agreements referred to above.<sup>2</sup>

(b) **Transfers as Security for or in Payment of Debts.** — Where one has obtained title<sup>3</sup>

tional Pavement Co. v. Richardson, 75 Fed. Rep. 590; *James v. Throckmorton*, 57 Cal. 381; *Freer v. Lake*, 115 Ill. 662, *affirming* 11 Ill. App. 576; *Barling v. Peters*, 131 Ill. 89; *Ellsworth v. Mace*, 33 Ind. 73; *Stoller v. Coates*, 88 Mo. 514; *Morris v. Shepard*, (N. J. 1902) 53 Atl. Rep. 172.

By arrangement between debtor and creditor, the former insured his life to secure the debt. The policy to provide the insurable interest necessary was made payable to the debtor's sister, who was the wife of the creditor. The proceeds of the policy, after satisfying the debt, were to be turned over to the debtor's wife. The debtor died, the policy was paid to the beneficiary therein by check which she indorsed to her husband. It was held that the provision in favor of the debtor's widow constituted a trust arising from a contract supported by valuable consideration, which she could enforce against the debtor and the beneficiary of the policy. *Steller v. Sell*, 55 N. J. Eq. 530.

**1. Contracts Impressing Fund with Trust Quality.** — *Legard v. Hodges*, 1 Ves. Jr. 478; *Fletcher v. Morey*, 2 Story (U. S.) 555; *Baylies v. Payson*, 5 Allen (Mass.) 473; *Stranahan v. Richardson*, 75 Minn. 402.

Land to which title is taken by a committee acting for a number of subscribers to an agreement by which the committee is to carry out certain improvements on the land and then to convey it in parcels in severalty to the subscribers, upon being reimbursed by each subscriber for his proportion of the expense, becomes impressed with a trust in favor of all the subscribers. *Baldwin v. Humphrey*, 44 N. Y. 609.

**Agreements for Liens.** — In general it has been said that every agreement for a lien or charge *in rem* constitutes a trust, and is accordingly governed by the general doctrine applicable to trusts. *Fletcher v. Morey*, 2 Story (U. S.) 555, *per* Story, J. See also the title LIENS, vol. 19, p. 13.

**2. Personal Liability Only Arising.** — *Saunderson v. Broadwell*, 82 Cal. 132; *Riddle v. Beattie*, 77 Iowa 168 (personal contract to support the grantor of land); *Matter of Brown*, 113 Iowa 351; *Bird v. Jacobus*, 113 Iowa 104 (agreement in consideration of a transfer of property to make a will in favor of the grantor); *Kershaw v. Snowden*, 36 Ohio St. 181; *Burris v. Rhind*, 29 Can. Sun. Ct. 408. See also *Chapman v. Beardslev*, 31 Conn. 115; *Huff v. Thomas*, 1 T. B. Mon. (Ky.) 160; *Matter of Walker*, 70 N. Y. App. Div. 263;

*Pittsburg Nat. Bank of Commerce v. McMurray*, 98 Pa. St. 538.

**A Promise to Pay Out of a Particular Fund** actually belonging to the promisor creates a personal liability and not a trust. *Wemple v. Hauenstein*, 19 N. Y. App. Div. 552. See also the title ASSIGNMENTS, vol. 2, p. 1068.

**A Deed in Fee with a Common-law Condition for the Grantor's Support** has been held not to create a trust, but only a fee on condition subsequent. *Birdsall v. Grant*, 37 N. Y. App. Div. 348.

**Failure to Pay the Consideration** agreed does not create a trust. *Dillon v. Farley*, 114 Iowa 631.

**Deposit in Bank Creates Relation of Debtor and Creditor, Not Trust.** — *Leaphart v. Commercial Bank*, 45 S. Car. 563, 55 Am. St. Rep. 800. See also the title BANKS AND BANKING, vol. 3, p. 826.

And a special deposit of money in a bank, with directions for payment to a third person, has been held to create no trust in his favor, the directions being revocable. *McDonald v. American Nat. Bank*, 25 Mont. 456. See also the title BANKS AND BANKING, vol. 3, p. 822 *et seq.* And compare *Gamble v. Lee*, 25 Grant Ch. (U. C.) 326.

**Agency and Trust Distinguished.** — *Flaherty v. O'Connor*, 24 R. I. 587.

**3. A Mortgage of chattels** conveys title, but subject to a right of redemption. See the titles CHATTEL MORTGAGES, vol. 5, p. 950; PLEDGE AND COLLATERAL SECURITY, vol. 22, p. 844.

**A Pledge** conveys possession without title, and is a special property only. See the title PLEDGE AND COLLATERAL SECURITY, vol. 22, p. 844.

**An Agreement of a Trust** conveys not only title but also the power of disposal, or all control over the property. *Cadwell's Bank v. Crittenden*, 66 Iowa 241 (*quoted* under the title ASSIGNMENTS FOR CREDITORS, vol. 3, p. 14. note; *Murdock v. Columbus Ins., etc., Co.*, 59 Miss. 152).

**Contract Not Passing Title — Creditors Incidentally Interested.** — Where a debtor, with the purpose of preventing annoyance from other creditors, assigns personal property to one creditor, who undertakes to sell the same subject to the assignor's approval as to price and to distribute the proceeds among several creditors including himself, the limitation on his power of sale renders him a mere agent without title to the property, and the creditors, since they are not parties to the contract and since it was made for the assignor's benefit and they are only incidentally interested in its



to either real<sup>1</sup> or personal property under a valid agreement to hold it as security for a debt and to reconvey on payment thereof,<sup>2</sup> or to hold the property and apply it on certain conditions to the payment of a debt or debts,<sup>3</sup> or to convert the property into money and pay debts,<sup>4</sup> a complete trust may be created for the purposes of the conveyance which equity will enforce.<sup>5</sup>

**Assignments for the Benefit of Creditors**, by which a debtor transfers the whole or a part of his property to some person as assignee or trustee in trust to apply the same to the payment of some or all of his debts and to return the surplus, if any, to the debtor,<sup>6</sup> have been fully considered elsewhere.<sup>7</sup>

**d. DEPOSITS IN SAVINGS BANKS.** — Some confusion exists in the cases as to when a deposit in bank made by one person to the credit of or in trust for another amounts to the creation of a trust, enforceable by the beneficiary. Under certain circumstances such a transaction may be regarded as an executed, direct gift, and this aspect of the subject has received treatment elsewhere.<sup>8</sup> But the delivery which is essential to a gift may be dispensed with in the case of a trust,<sup>9</sup> for the characteristic difference is that a gift transfers the whole title, legal as well as equitable, to the donee, while a trust is created by the transfer to the *cestui que trust* of the equitable title only, and to effect this delivery is not essential.<sup>10</sup> The existence of the trust in every such case is a question of fact involving the intention of the donor, and an apt declaration of that intention.<sup>11</sup>

performance (see the title **CONTRACTS**, vol. 7, p. 107), can claim no rights thereunder as *cestuis que trustent*. *Conley v. Dazian*, 114 N. Y. 161.

**1. Real Property Is Subject to the Statute of Frauds.** — *Byers v. McEniry*, 117 Iowa 499. See also the titles **IMPLIED TRUSTS**, vol. 15, p. 1192; **MORTGAGES**, vol. 20, p. 949 *et seq.*

**2. Agreement to Hold and Reconvey Real Property.** — *Peeler v. Lathrop*, (C. C. A.) 48 Fed. Rep. 780; *Barber v. Milner*, 43 Mich. 248. See also *King v. Remington*, 36 Minn. 15; *Pinson v. McGehee*, 44 Miss. 229.

**Agreement to Hold and Reconvey Personal Property.** — *Peeler v. Lathrop*, (C. C. A.) 48 Fed. Rep. 780; *Sayward v. Houghton*, 119 Cal. 545; *Ogden v. Larrabee*, 57 Ill. 389.

**3. Conveyance of Property to Be Applied to Payment of Debts.** — *Reid v. Mobile Bank*, 70 Ala. 199; *Rogers v. Johnson*, 113 Ala. 589; *Pratt v. Thornton*, 28 Me. 355, 48 Am. Dec. 492; *Murdock v. Columbus Ins., etc., Co.*, 59 Miss. 152; *Kingsbury v. Phelps*, *Wright* (Ohio) 370.

**Assignment of Bank Accounts to A to apply on certain executions has been held to create a trust.** *Ditmars v. Smith*, 3 N. Y. App. Div. 57.

**A Conveyance to a Surety to pay out of property the debt for which he stands as surety gives the grantee no right to apply the property to another debt owing to him by the grantor.** *Ware v. Otis*, 8 Me. 387.

**4. Walden v. Karr**, 88 Ill. 40; *Moore v. Triplett*, 96 Va. 603, 70 Am. St. Rep. 882.

**5. Where bills of sale and chattel mortgages may be shown to constitute trusts, the inference is that such transactions are only what their wording implies.** *Brown v. Guthrie*, 110 N. Y. 441; *Boessneck v. Cohn*, (Supm. Ct. Spec. T.) 7 N. Y. Supp. 620.

**6. Assignments for Benefit of Creditors.** — *Bartlett v. Teah*, 1 McCrary (U. S.) 178; *Weber v. Mick*, 131 Ill. 521; *Wiener v. Davis*,

18 Pa. St. 333. See also the title **FRAUDULENT SALES AND CONVEYANCES**, vol. 14, p. 384.

**Mutual Interest of Trustor and Trustee.** — A trust for the "joint and several interests" of trustor and trustee is not a trust for the benefit of creditors. *Burling v. Newlands*, 112 Cal. 476.

**7. See the titles ASSIGNMENTS FOR BENEFIT OF CREDITORS**, vol. 3, p. 1; **FRAUDULENT SALES AND CONVEYANCES**, vol. 14, p. 384.

**8. See the title GIFTS**, vol. 14, p. 1036 *et seq.*

**9. Delivery Dispensed With.** — *Cox v. Hill*, 6 Md. 284; *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486; *Smith v. Speer*, 34 N. J. Eq. 336; *Curry v. Powers*, 70 N. Y. 219; *Gaffney's Estate*, 146 Pa. St. 49.

In *Bath Sav. Inst. v. Hathorn*, 88 Me. 122, 51 Am. St. Rep. 382, it is said that a trust is as effectually executed by declaration as a gift by delivery.

**10. Norway Sav. Bank v. Merriam**, 88 Me. 146; *Hallowell Sav. Inst. v. Titcomb*, 96 Me. 60; *Atkinson's Petition*, 16 R. I. 413, 27 Am. St. Rep. 745; *People's Sav. Bank v. Webb*, 21 R. I. 220.

**11. Question One of Fact.** — *Milholland v. Whalen*, 89 Md. 213; *Eastman v. Woronoco Sav. Bank*, 136 Mass. 208; *Kelley v. Snow*, 185 Mass. 288; *Farleigh v. Cadman*, 159 N. Y. 173, *reversing* 11 N. Y. App. Div. 628; *Decker v. Union Dime Sav. Inst.*, 15 N. Y. App. Div. 553; *Dickie v. Adams*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 90; *Martin v. Martin*, 46 N. Y. App. Div. 445; *Schwind v. Ibert*, 60 N. Y. App. Div. 378; *Lee v. Kennedy*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 140, *affirming* (N. Y. City Ct. Gen. T.) 10 Misc. (N. Y.) 352; *Matter of Totten*, (Surrogate Ct.) 38 Misc. (N. Y.) 340; *Haux v. Dry Dock Sav. Inst.*, 2 N. Y. App. Div. 165, *affirmed* 154 N. Y. 736; *People's Sav. Bank v. Webb*, 21 R. I. 218. See generally the cases in this subsection.

**A Power of Attorney Without Words of Grant**, authorizing A to draw certain funds from a

**Inference from Form of Deposit Only.** — According to one group of authorities the fact that a deposit is in the depositor's name as trustee creates a presumption that a trust was intended, and unexplained is conclusive as establishing a trust.<sup>1</sup> Other cases hold that the mere deposit in this form is in itself insufficient to raise an inference of a trust though uncontradicted by the evidence, and require proof of "some further act or circumstance showing a perfected gift of the legal or equitable interest."<sup>2</sup> This last group of cases proceeds on the ground that such a deposit is ambiguous, as it may have been adopted for a collateral reason, such as a rule of the bank limiting deposits in any one name to a certain amount.<sup>3</sup>

savings bank, and to distribute the money among certain persons "after my death," does not pass a present title, nor any title before the funds are actually drawn; creates no trust; and is revoked by the maker's death. *Tusch v. German Sav. Bank*, 23 N. Y. App. Div. 279, reversing 20 Misc. (N. Y.) 571.

**If the Donor Intends to Retain Title and the Power of Disposing of the fund, a mere executory trust is created not enforceable in the absence of consideration.** *Bartlett v. Remington*, 59 N. H. 364; *Towle v. Wood*, 60 N. H. 434, 49 Am. Rep. 326.

Thus, when the donor retains control until his death when the beneficiary's enjoyment is to begin, some courts hold the transaction incomplete and testamentary in its nature. *Providence Sav. Inst. v. Carpenter*, 18 R. I. 287. While other courts regard the transaction as transferring a right in *presenti* to take effect in *futuro*, and therefore as complete and valid, though a power of revocation be reserved. *Hoboken Sav. Bank v. Schwoon*, 62 N. J. Eq. 503; *Millard v. Clark*, 80 Hun (N. Y.) 141; *Martin v. Martin*, 46 N. Y. App. Div. 445, affirmed 166 N. Y. 611. See also *Miller v. Clark*, 40 Fed. Rep. 15. See also *supra*, this section, 4. c. (4); 6. b. (3); 6. f. (2).

**1. Form of Deposit Raises Inference of Trust.** — *Sayre v. Weil*, 94 Ala. 466; *Gardner v. Merritt*, 32 Md. 78, 3 Am. Rep. 115; *Milholland v. Whalen*, 89 Md. 212; *Gaffney's Estate*, 146 Pa. St. 49; *Merigan v. McGonigle*, 205 Pa. St. 321; *Connecticut River Sav. Bank v. Albee*, 64 Vt. 571, 33 Am. St. Rep. 944. See also *Bath Sav. Inst. v. Hathorn*, 88 Me. 122, 51 Am. St. Rep. 382; *Hoboken Sav. Bank v. Schwoon*, 62 N. J. Eq. 503.

**The New York Cases support this view.** Matter of *Mueller*, 15 N. Y. App. Div. 69; *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Macy v. Williams*, 55 Hun (N. Y.) 489, affirmed 125 N. Y. 767, 83 Hun (N. Y.) 243, affirmed 144 N. Y. 701; *Miller v. Seamen's Sav. Bank*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 708; *Matter of Smith*, (Surrogate Ct.) 40 Misc. (N. Y.) 331; *Matter of George*, 1 Connolly (N. Y.) 241, 23 Abb. N. Cas. (N. Y.) 43.

In *Robertson v. McCarty*, 54 N. Y. App. Div. 103, the court says: "That the mere deposit in the form referred to [by A in trust for B] without qualification or explanation creates a valid trust has been frequently decided by the courts," citing as "the latest instances" of such cases: *Decker v. Union Dime Sav. Inst.*, 15 N. Y. App. Div. 553; *Williams v. Brooklyn Sav. Bank*, 51 N. Y. App. Div. 332; *Harrison*

*v. Totten*, 53 N. Y. App. Div. 178, reversing 29 Misc. (N. Y.) 700.

Other cases assert that a deposit in form a trust is not of itself conclusive; but these decisions apparently open the transaction for extrinsic evidence or differentiate the cases from cases where the depositor's death is held to render the *prima facie* inference conclusive. *Cunningham v. Davenport*, 147 N. Y. 43, 49 Am. St. Rep. 641, reversing 74 Hun (N. Y.) 53; *Dickie v. Adams*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 88. *Beaver v. Beaver*, 117 N. Y. 421, 15 Am. St. Rep. 531, reversing 53 Hun (N. Y.) 258, goes further in dicta than any other *New York* case, but the rule may be regarded as settled as above stated.

**A Deposit to the Credit of the Depositor and Another,** "and the survivor of them subject to order of either," may be shown to have been made not with the intention of creating a trust in favor of the other person but to subserve the depositor's convenience. *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486. See also *Marshall v. Crutwell*, L. R. 20 Eq. 328; *Norway Sav. Bank v. Merriam*, 88 Me. 146; *Skillman v. Wiegand*, 54 N. J. Eq. 198. But when the intention to create a complete trust is shown, the fund will be awarded to the survivor. *Hoboken Sav. Bank v. Schwoon*, 62 N. J. Eq. 503.

**That the Deposit Was in Trust for a Creditor** of the depositor does not change the inference that the intention was to create a trust. *Matter of Hewitt*, (Surrogate Ct.) 40 Misc. (N. Y.) 322.

**A Deposit in Daughter's Name "Subject to the Control of the Depositor"** has been held to create a trust. *Millard v. Clark*, 80 Hun (N. Y.) 141, reversing 7 Misc. (N. Y.) 366.

**2. Mere Deposit in Trust Raises No Inference.** — *Cummings v. Bramhall*, 120 Mass. 564; *Powers v. Provident Sav. Inst.*, 124 Mass. 377; *Idle v. Pierce*, 134 Mass. 260; *Sherman v. New Bedford Five Cents Sav. Bank*, 138 Mass. 582; *Alger v. North End Sav. Bank*, 146 Mass. 422, 4 Am. St. Rep. 331; *Parkman v. Suffolk Sav. Bank*, 151 Mass. 218; *Scrivens v. North Easton Sav. Bank*, 166 Mass. 255; *Cleveland v. Hampden Sav. Bank*, 182 Mass. 110; *Bartlett v. Remington*, 59 N. H. 364; *Marcy v. Amazeen*, 61 N. H. 131, 60 Am. Rep. 320; *People's Sav. Bank v. Webb*, 21 R. I. 218.

**Even Where the Intent to Create a Trust Is Shown**, the intent has been held to fail in the absence of some further definite act, rendering the intent effective. *Clark v. Clark*, 108 Mass. 522.

**3. Collateral Reasons for Adopting Such**  
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**Death of Depositor.** — The *prima facie* presumption of a trust in some states, from the form of deposit merely, is rendered conclusive by the death of the depositor leaving the account open and entirely unexplained.<sup>1</sup> But in those states where some positive act in addition to the deposit is essential the fact of the depositor's death does not raise an inference of trust.<sup>2</sup>

**Extrinsic Evidence Admissible.** — All the authorities agree that the bare fact of a deposit in trust may be controlled by extrinsic evidence<sup>3</sup> and may be strengthened into an inference of the creation of a trust,<sup>4</sup> or all inference of a trust may be rebutted<sup>5</sup> by parol evidence of contemporaneous facts and circumstances.<sup>6</sup> But where the trust is established by sufficient evidence, the act of the depositor in subsequently withdrawing the deposit for a purpose

**Deposit.** — *Brabrook v. Boston Five Cents Sav. Bank*, 104 Mass. 228, 6 Am. Rep. 222; *Broderrick v. Waltham Sav. Bank*, 109 Mass. 149; *Parkman v. Suffolk Sav. Bank*, 151 Mass. 218.

**1. Death of Depositor.** — *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Boone v. Citizens' Sav. Bank*, 84 N. Y. 83, 38 Am. Rep. 498, *reversing* 21 Hun (N. Y.) 235; *Willis v. Smyth*, 91 N. Y. 300; *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 10 Am. St. Rep. 479, *reversing* 47 Hun (N. Y.) 399; *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 15 Am. St. Rep. 494, *affirming* (Supm. Ct. Gen. T.) 13 N. Y. St. Rep. 413; *Cunningham v. Davenport*, 147 N. Y. 43, 49 Am. St. Rep. 641, *reversing* 74 Hun (N. Y.) 53; *Hyde v. Kitchen*, 69 Hun (N. Y.) 280; *Marsh v. Keogh*, 82 N. Y. App. Div. 503; *Meislahn v. Meislahn*, 56 N. Y. App. Div. 566; *Jenkins v. Baker*, 77 N. Y. App. Div. 509, *reversing* 36 Misc. (N. Y.) 55; *Matter of Biggars*, (Surrogate Ct.) 39 Misc. (N. Y.) 426.

**Depositor Leaving a Will** and no property other than the trust deposit, does not change the inference of a trust. *Weaver v. Emigrant Industrial Sav. Bank*, (Supm. Ct. Spec. T.) 17 Abb. N. Cas. (N. Y.) 82.

**When the Beneficiary Died Before the Depositor** who subsequently died, the presumption of a trust, the unexplained deposit being the only evidence, is not affected. *Bishop v. Seaman's Sav. Bank*, 33 N. Y. App. Div. 181.

**2. Clark v. Clark**, 108 Mass. 522; *Cleveland v. Hampden Sav. Bank*, 182 Mass. 110; *Bartlett v. Remington*, 59 N. H. 364. See also *Ide v. Pierce*, 134 Mass. 260.

**3. Extrinsic Evidence.** — *Bath Sav. Inst. v. Hathorn*, 88 Me. 122, 51 Am. St. Rep. 382. And see the cases in this subsection generally.

**Declarations of the Depositor** made at the time of opening the account are of course admissible. *Miller v. Clark*, 40 Fed. Rep. 15; *Merigan v. McGonigle*, 205 Pa. St. 321. And see *supra*, this section, 4. a. (2).

**4. As to Notification to the Beneficiary** see *supra*, this section, *Notification of and Acceptance by Beneficiary*.

**Deposit in Trust Taken in Connection with Evidence of Intention** to create a trust and publication of that intention establishes an irrevocable trust. *Barker v. Frye*, 75 Me. 29; *Farleigh v. Cadman*, 159 N. Y. 169, *modifying* 11 N. Y. App. Div. 628; *Hutton v. Smith*, 74 N. Y. App. Div. 284, *affirmed* 175 N. Y. 375.

**The Form of the Deposit with the Fact that the Beneficiary Was Informed** of the depositor's intent to convey an immediate title to him makes

a case from which the court or a jury may find that a trust was established. *Gerrish v. New Bedford Sav. Inst.*, 128 Mass. 159, 35 Am. Rep. 365; *Alger v. North End Sav. Bank*, 146 Mass. 418, 4 Am. St. Rep. 331. See also *Atkinson's Petition*, 16 R. I. 413, 27 Am. St. Rep. 745.

**5. Trust Inference Rebutted.** — *Stone v. Bishop*, 4 Cliff. (U. S.) 593; *Cleveland v. Hampden Sav. Bank*, 182 Mass. 110; *Weber v. Weber*, 9 Daly (N. Y.) 211, (Supm. Ct. Spec. T.) 58 How. Pr. (N. Y.) 255; *Matter of Barefield*, 177 N. Y. 387, *reversing* 82 N. Y. App. Div. 463, which *reversed* (Surrogate Ct.) 36 Misc. (N. Y.) 745; *Matter of Totten*, (Surrogate Ct.) 38 Misc. (N. Y.) 349; *Markey v. Markey*, (C. Pl. Gen. T.) 13 N. Y. Supp. 925; *Haux v. Dry Dock Sav. Inst.*, 2 N. Y. App. Div. 165, *affirmed* 154 N. Y. 736; *Devlin v. Hinman*, 34 N. Y. App. Div. 107.

In *Cunningham v. Davenport*, 147 N. Y. 43, 49 Am. St. Rep. 641, *reversing* 74 Hun (N. Y.) 53, the intent to create a trust by a deposit in trust was denied by the depositor who was living, and it appeared that he had never parted with the possession of the pass-book, had never informed the apparent beneficiary of the existence of the deposit, and that a few days after the death of the apparent beneficiary he changed the deposit to his own name. It was held that the evidence did not warrant the finding that a trust had been created. Very similar is the *Matter of Smith*, (Surrogate Ct.) 40 Misc. (N. Y.) 331.

**Collateral Reasons Influencing Form of Deposit.** — The inference arising from a deposit in form a trust may be rebutted by showing that the depositor adopted this method without intent to create a trust, for some collateral reason, such as a rule of the bank limiting deposits in one name. *Field v. Lonsdale*, 13 Beav. 78; *Washington v. Savings Bank*, 171 N. Y. 172, 89 Am. St. Rep. 800, *affirming* 65 N. Y. App. Div. 338.

**6. The Subsequent Dealings of the Depositor with the Fund** deposited would seem admissible as throwing light on his intention to make the deposit, when the case stands on a mere presumption of intent from the form of the deposit. See *Govin v. De Miranda*, 76 Hun (N. Y.) 419. Though of course evidence of surrounding facts strengthening the inference might exclude the subsequent dealings. Such evidence existed in *Mabie v. Bailey*, 95 N. Y. 206. In *Bishop v. Seaman's Sav. Bank*, 33 N. Y. App. Div. 181, declarations made twelve years after a deposit were held inadmissible to contradict the inference from the form of the deposit. See also *Merigan v. McGonigle*, 205 Pa. St. 326, where



of his own has been held not to affect the trust which has been enforced against him or his estate.<sup>1</sup>

**Retention of Possession by the Depositor** of the bank book or pass book is consistent with any aspect of the transaction; for, of course, the book would be retained when no trust was intended, and when a trust was intended the book may be retained by the depositor in the character of trustee of the trust created by himself without parting with the legal title to the fund.<sup>2</sup>

**Trust Created by Transfer of Fund Deposited** — After a deposit in one's own name, a trust may be created by a transfer of the pass book to another with a declaration of trust in favor of third persons.<sup>3</sup> Or such a trust may be created in any way which would create a trust of other personal property.<sup>4</sup>

**e. GIFTS WITH ADDED WORDS OF MOTIVE.** — In construing legacies or devises, superadded words explaining the testator's motive or purpose in making the gift, especially expressions indicating an intention to enable the donee who is a parent, or stands *in loco parentis*, to provide for his children, are taken usually as explaining the reason for a bounty and not as creating a trust.<sup>5</sup> But where the intention, as gathered from the whole instrument, shows that a trust was intended, a court of equity will declare and enforce it.<sup>6</sup>

it is said: "The subsequent declarations of the depositor against the interests of the *cestui que trust* were not competent to invalidate the trust."

**1. Complete Trust Irrevocable.** — *Minor v. Rogers*, 40 Conn. 512, 16 Am. Rep. 69; *Farleigh v. Cadman*, 159 N. Y. 169, *modifying* 11 N. Y. App. Div. 628; *Mabie v. Bailey*, 95 N. Y. 206; *Macy v. Williams*, 55 Hun (N. Y.) 489, *affirmed* 125 N. Y. 767; *Scott v. Harbeck*, 49 Hun (N. Y.) 292; *Barker v. Harbeck*, 49 Hun (N. Y.) 609, 2 N. Y. Supp. 425; *Marsh v. Keogh*, 82 N. Y. App. Div. 503; *Jenkins v. Baker*, 77 N. Y. App. Div. 509, *reversing* 36 Misc. (N. Y.) 55; *Robinson v. Appleby*, 69 N. Y. App. Div. 509, *affirmed* 173 N. Y. 626; *Robertson v. McCarty*, 54 N. Y. App. Div. 103; *Atkinson's Petition*, 16 R. I. 413, 27 Am. St. Rep. 745.

**Additions to the Original Trust Fund** made after a change in the depositor's intention and the transfer of the fund to another account, have been held to be impressed with the original trust, "in the absence of a finding that they were intended for some other purpose, or that they were not made for [the original *cestui que trust's*] benefit." *Farleigh v. Cadman*, 159 N. Y. 169, *modifying* 11 N. Y. App. Div. 628.

**The Withdrawal of Funds by the Depositor** may be for some purpose not inconsistent with the trust, and does not, *per se*, show an intention to repudiate. *Mabie v. Bailey*, 95 N. Y. 206; *Hutton v. Smith*, 74 N. Y. App. Div. 284, *affirmed* 175 N. Y. 375.

**2. Retaining Pass Book.** — *Minor v. Rogers*, 40 Conn. 512, 16 Am. Rep. 69; *Milholland v. Whalen*, 89 Md. 216; *Gerrish v. New Bedford Sav. Inst.*, 128 Mass. 159, 35 Am. Rep. 365; *Blasdel v. Locke*, 52 N. H. 238; *Millard v. Clark*, 80 Hun (N. Y.) 141, *reversing* 7 Misc. (N. Y.) 366; *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Marsh v. Keogh*, 82 N. Y. App. Div. 503; *Scallan v. Brooks*, 54 N. Y. App. Div. 248; *Ray v. Simmons*, 11 R. I. 268, 23 Am. Rep. 447; *Atkinson's Petition*, 16 R. I. 413, 27 Am. St. Rep. 745. But compare *Brabrook v. Boston Five Cents Sav. Bank*, 104 Mass. 231, 6 Am. Rep. 222.

A deposit very similar in form in an "employees' saving fund" has been held to make the depository a trustee, and not as in the cases here cited to make the donor trustee. See note to next paragraph *infra*.

**3. Fund Deposited in One's Own Name.** — *Hellman v. McWilliams*, 70 Cal. 449; *Peck v. Scofield*, (Mass. 1904) 71 N. E. Rep. 109; *Davis v. Ney*, 125 Mass. 590, 28 Am. Rep. 272.

**4. Booth v. Oakland Sav. Bank**, 122 Cal. 19. See also *Hallowell Sav. Inst. v. Titcomb*, 96 Me. 62; *Smith v. Speer*, 34 N. J. Eq. 336.

**Change in Form of Deposit.** — *Proseus v. Porter*, 20 N. Y. App. Div. 44; *Board of Domestic Missions v. Mechanic's Sav. Bank*, 40 N. Y. App. Div. 120, *affirming* 24 Misc. (N. Y.) 595; *Jennings v. Hennessey*, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 265.

**Deposit in Employees' Saving Fund.** — Where a railroad company created an "employees' saving fund," agreeing, subject to certain regulations, to which the depositor consented, to receive deposits of savings, to hold them subject to the employee's order during his life, and at his death to pay to the person designed by him in his application, the transaction created an executed trust, of which the depositor was donor, the company trustee, and the person designated the *cestui que trust*. *Pennsylvania R. Co. v. Stevenson*, 63 N. J. Eq. 634. See also *Reff's Estate*, 16 Pa. Super. Ct. 80.

**5. Expression of Motive Construed.** — *Brown v. Casamajor*, 4 Ves. Jr. 498; *Elliott v. Elliott*, 117 Ind. 380, 10 Am. St. Rep. 54; *Clarke v. Leupp*, 88 N. Y. 228; *Rhett v. Mason*, 18 Gratt. (Va.) 541; *Bain v. Buff*, 76 Va. 371; *Seamonds v. Hodge*, 36 W. Va. 304, 32 Am. St. Rep. 854. See also the title PRECATORY TRUSTS, vol. 22, p. 1166.

**6. Trusts Held to Be Created.** — *Foley v. Parry*, 2 Myl. & K. 138; *Cresswell v. Jones*, 68 Ala. 420; *Maxwell v. Hoppie*, 70 Ga. 152; *Bell v. Watkins*, 104 Ga. 351; *Elliott v. Elliott*, 117 Ind. 380, 10 Am. St. Rep. 54; *Warner v. Bates*, 98 Mass. 274; *Phelps v. Phelps*, 143 Mass. 570; *Lawrence v. Cooke*, 32 Hun (N. Y.) 126; *Carson v. Carson*, 1 Ired. Eq. (36 N. Car.) 329; *Citizens' Bank, etc., Co. v. Bradt*, (Tenn. Ch.

The same principles apply in construing deeds<sup>1</sup> and instruments claimed as satisfying the statute of frauds.<sup>2</sup>

**f. TRUSTS ESTABLISHED IN EQUITY TO PREVENT FRAUD.** — Whenever the title to real or personal property, or a profit therefrom, is obtained by one person under such circumstances as would render his retention of such title or profit an actual or constructive fraud on another who in justice and right is entitled thereto, equity in order to satisfy the demands of justice will consider the subject matter as impressed with a trust in favor of him who is beneficially entitled, enforceable against the holder of the legal title or any one claiming under him voluntarily or with notice.<sup>3</sup> Such trusts have been considered generally elsewhere,<sup>4</sup> and other instances of the application of the principles stated are found in the following paragraphs.

**Vendor's Lien.** — In this class of cases has generally been placed the vendor's lien for unpaid purchase money upon a sale of real property, upon the theory that the vendee becomes a trustee for the vendor.<sup>5</sup> But this explanation of the doctrine is open to grave objections.<sup>6</sup> The whole matter is discussed elsewhere.<sup>7</sup>

**Trust Fund Doctrine of Corporate Stock.** — Here also may be mentioned the doctrine prevailing in the *United States* that the capital and assets of a private corporation constitute a trust fund for creditors and stockholders which the officers and the majority of the stockholders are bound to preserve.<sup>8</sup>

**Money Equitably Belonging to Another.** — Where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter which he may enforce by bill in equity, if not by an action at law.<sup>9</sup>

**8. Construction of Instruments Creating Trusts** — *a. INTENT AND SUBSTANCE CONTROL.* — In construing instruments creating or declaring trusts the rule is that the intent of the parties controls and that the substance and effect of the instrument as a whole must be considered, and its mere form will be disregarded.<sup>10</sup> Thus, the use of the words "trust," "trustee," "confidence," or the

1898) 50 S. W. Rep. 778; *White v. White*, 30 Vt. 338. See also *Erickson v. Willard*, 1 N. H. 217; *Pierce v. M'Keehan*, 3 W. & S. (Pa.) 280.

1. **Transfers inter Vivos.** — *Bryan v. Howland*, 98 Ill. 625; *Brown v. Carter*, 111 N. Car. 183; *Thompson v. Thompson*, 18 Ohio St. 73.

2. *White v. Ross*, 160 Ill. 56.

3. **Constructive Trusts** — *Keech v. Sandford*, 1 White & T. Lead. Cas. (6th ed.) 53, and notes; *Moore v. Crawford*, 130 U. S. 128; *Waller v. Jones*, 107 Ala. 331; *Huxley v. Rice*, 40 Mich. 73; *Winn v. Dillon*, 27 Miss. 494; *Frethey v. Durant*, 24 N. Y. App. Div. 58; *Rose v. Durant*, 44 N. Y. App. Div. 384; *Fisher v. Fields*, 10 Johns. (N. Y.) 495.

4. See the title IMPLIED TRUSTS, vol. 15, p. 1184. See also AGENCY, vol. 1, p. 1082 *et seq.*; PARTNERSHIP, vol. 22, p. 93.

**Oral Agreements to Locate Mining Claims** and to share the proceeds, when the location was made by one of the parties in his own name, have been enforced on the theory of a trust. *Book v. Justice Min. Co.*, 58 Fed. Rep. 119; *Moore v. Hamerstag*, 109 Cal. 122; *Moritz v. Lavelle*, 77 Cal. 10, 11 Am. St. Rep. 229; *Gore v. McBrayer*, 18 Cal. 582; *Hirbour v. Reeding*, 3 Mont. 15; *Welland v. Huber*, 8 Nev. 203; *Reagan v. McKibben*, 11 S. Dak. 270.

5. See 2 Story's Eq. Jur., § 1218; 1 Perry on Trusts, § 232.

6. See *Ahrend v. Odiorne*, 118 Mass. 264, 19 Am. Rep. 449.

If a trust, it must be implied, or else it would be within the statute of frauds; but it arises from the terms of the express contract and "resembles those express trusts which are inferred from the entire provisions of an instrument." 2 Pom. Eq. Jur., § 1046 note.

7. See the title VENDOR'S LIEN.

8. See the titles DISSOLUTION OF CORPORATIONS, vol. 9, p. 108; DIVIDENDS, vol. 9, p. 701; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 21, p. 873; STOCK AND STOCKHOLDERS, vol. 26, p. 900.

9. **Deposit of Money with One for Delivery to Another.** — *McKee v. Lamon*, 159 U. S. 322 (*per Brown, J.*, who adds: "The acceptance of the money with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purposes intended by the bailor"); *McKee v. Latrobe*, 159 U. S. 327. See also the title IMPLIED OR QUASI CONTRACTS, vol. 15, p. 1096 *et seq.*

10. **Intent Controlling** — *England.* — *Kekewich v. Manning*, 1 De G. M. & G. 176; *Page v. Cox*, 10 Hare 169.

*Connecticut.* — *Donalds v. Plumb*, 8 Conn. 453; *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390.

*Georgia.* — *Mitchell v. Turner*, 117 Ga. 958.

*Illinois.* — *Hagan v. Varney*, 147 Ill. 281.

*Indiana.* — *Elliott v. Elliott*, 117 Ind. 380, 10 Am. St. Rep. 54.

*Iowa.* — *Quinn v. Shields*, 62 Iowa 144, 49 Am. Rep. 141.

*Maine.* — *Parker v. Murch*, 64 Me. 54.

like is not essential for the establishment of a trust,<sup>1</sup> and when used, such expressions are not conclusive of its existence.<sup>2</sup>

**The Intent Is to Be Gathered from the Whole Instrument**, looking to the language used where that is free from ambiguity<sup>3</sup> and admitting extrinsic evidence only where the intent expressed in the instrument is doubtful.<sup>4</sup>

**A Deed Conveying Property in Trust** is to be taken most strongly against the trustee.<sup>5</sup>

**The Burden of Proving** an express parol trust rests on the party who sets it up and claims rights under it.<sup>6</sup>

**b. RECITAL OF CONSIDERATION AND HABENDUM TO GRANTEE.**—The fact that a deed is a conveyance to a volunteer without consideration once raised a resulting trust in the grantor, which might, of course, be shown by parol, and to prevent this it has become usual to insert a recital of consideration,<sup>7</sup> although at the present day the mere fact that a deed is voluntary does not raise a presumption of an implied trust.<sup>8</sup> This recital is conclusive to prevent a trust resulting to the grantor,<sup>9</sup> but it may be contradicted for col-

*Maryland.*—*Brown v. Brown*, 12 Md. 87; *Mory v. Michael*, 18 Md. 227.

*Michigan.*—*Lyle v. Burke*, 40 Mich. 499.

*New Jersey.*—*Eaton v. Cook*, 25 N. J. Eq. 55.

*Ohio.*—*Wuest v. Wuest*, 11 Ohio Dec. 147.

*Pennsylvania.*—*Myers v. Bryson*, 158 Pa. St. 247.

*South Carolina.*—*Richardson v. Inglesby*, 13 Rich. Eq. (S. Car.) 59.

*Vermont.*—*Sturges v. Knapp*, 31 Vt. 1.

**Illustrations** and applications of this rule abound throughout this section. See for instance 2. b.; 4. b. (4) (d); 6. b. (1).

**Where an Instrument Is Susceptible of Two Constructions**, the construction which will best carry out the general scheme of the trust will be adopted. *Dexter v. Episcopal City Mission*, 134 Mass. 394. And inconsistent portions may be rejected. *State v. Trask*, 6 Vt. 355, 27 Am. Dec. 554.

**A Misdescription of the Property Conveyed** is not fatal to the trust. *Lynn v. Lynn*, 135 Ill. 18.

**1. Use of Words "Trust," "Confidence," Etc.**—*England.*—*Kekewich v. Manning*, 1 De G. M. & G. 176; *Page v. Cox*, 10 Hare 169; *King v. Denison*, 1 Ves. & B. 273.

*United States.*—*Colton v. Colton*, 127 U. S. 300.

*Alabama.*—*Cresswell v. Jones*, 68 Ala. 420.

*Arkansas.*—*Cockrell v. Armstrong*, 31 Ark. 580.

*Massachusetts.*—*Packard v. Old Colony R. Co.*, 168 Mass. 92.

*Missouri.*—*In re Soulard*, 141 Mo. 642.

*Pennsylvania.*—*Sheet's Estate*, 52 Pa. St. 266.

*South Carolina.*—*Wylie v. White*, 10 Rich. Eq. (S. Car.) 294.

"It is one of the fixed rules of equitable construction that there is no magic in particular words, and any expressions that show unequivocally the intention of the parties to create a trust will have that effect." *Tobias v. Ketchum*, 32 N. Y. 319.

**A Bequest to A "in Trust," etc.**, has been held, looking at the whole will, to make a *cestui que trust* of the trust created. *Wells v. Williams*, 136 Mass. 333.

*2. England.*—*Quayle v. Davidson*, 12 Moo. P. C. 268.

*Georgia.*—*Trammell v. Inman*, 115 Ga. 874; *Andrews v. Atlanta Real Estate Co.*, 92 Ga. 260.

*Illinois.*—*Hart v. Seymour*, 147 Ill. 598.

*Massachusetts.*—*Carr v. Richardson*, 157 Mass. 576.

*New York.*—*Treat v. Vose*, 63 N. Y. App. Div. 338.

*Pennsylvania.*—*Boyle v. Boyle*, 152 Pa. St. 108, 34 Am. St. Rep. 629 (quoted in the title PRECATORY TRUSTS, vol. 22, p. 1164, note 1).

*3. New York L. Ins., etc., Co. v. Hoyt*, 161 N. Y. 1, affirming 31 N. Y. App. Div. 84. See also the titles INTERPRETATION AND CONSTRUCTION, vol. 17, p. 1; WILLS.

**Words of Condition** may create a trust. *Richtmyer v. Lasher*, 77 N. Y. App. Div. 574; *Williams v. Fullerton*, 20 Vt. 346; *Barnes v. Traf-ton*, 80 Va. 524. See also *supra*, this section, 7. a., and compare *Birdsall v. Grant*, 37 N. Y. App. Div. 348.

*4. See supra*, this section, 4. d. See also *supra*, this section, 4. a. (2), and the titles AMBIGUITY, vol. 2, p. 287; PAROL EVIDENCE, vol. 21, p. 1077.

**Contemporaneous and Subsequent Declarations as Evidence of Intent.**—A trust being once created in writing in unambiguous language, subsequent declarations, either written or oral, cannot be admitted to explain the intent or raise an ambiguity. *New York L. Ins., etc., Co. v. Hoyt*, 161 N. Y. 1, affirming 31 N. Y. App. Div. 84. See *supra*, this section, 4. c. (1), note.

**When Several Instruments May Be Taken Together.**—See *supra*, this title, 4. b. (4) (e); 4. c. (1), note.

**5. Construction Against Trustee.**—*Jones v. Butler*, 30 Barb. (N. Y.) 641.

**6. Burden of Proof.**—*Carrard v. Niles*, (N. J. 1900) 45 Atl. Rep. 266; *Green v. Griswold*, 57 N. Y. Super. Ct. 24, affirming 2 N. Y. Supp. 624, and itself affirmed 127 N. Y. 682.

**7. Recital of Consideration.**—*Brisson v. Brisson*, 75 Cal. 525, 7 Am. St. Rep. 189.

**8. Lovett v. Taylor**, 54 N. J. Eq. 318. And see the title IMPLIED TRUSTS, vol. 15, p. 1124.

**9. Patton v. Beecher**, 62 Ala. 589; *Myers v.*



lateral purposes, as, for instance, to raise a trust in favor of a third person,<sup>1</sup> or where there is actual or constructive fraud in the transaction,<sup>2</sup> or the recital may be contradicted for the purpose of recovering the consideration money.<sup>3</sup>

**Habendum to Grantee.** — An habendum to the use of the grantee is in some jurisdictions conclusive against a resulting trust,<sup>4</sup> while in other jurisdictions its office is merely the formal one of raising a use which the statute of uses may execute and it creates no estoppel.<sup>5</sup> It does not, though contained in an absolute deed, prevent a written declaration of trust under the statute of frauds.<sup>6</sup>

**c. CONSTRUCTION OF LANGUAGE.** — The rules of construction for instruments creating trusts are the same as those for instruments conveying legal estates.<sup>7</sup> Words are presumed to be used in their ordinary and natural sense, and on this presumption, when technical legal terms are employed, they must receive their usual technical meaning, having regard, however, to the purpose of the instrument as gathered from its consideration as a whole.<sup>8</sup>

**Creation of Fee.** — Thus, where a fee is necessary for the purposes of a trust, it may be created without words of inheritance, such as "heirs," and, on the other hand, the employment of such words does not necessarily raise a trust in fee where the objects of its creation may be satisfied by a less estate.<sup>9</sup>

**Executed and Executory Trusts.** — Where a settlement to trustees is intended, a stricter employment of technical language is enforced with regard to formal instruments, by which the estate is finally limited, than in respect to settlements and wills creating executory trusts. For, in the first case, the conveyance is supposed to have been prepared with knowledge that it is to be final, while in the last case the settlor knew that other and formal conveyances

Myers, 167 Ill. 52; Acker v. Priest, 92 Iowa 617; Luckhart v. Luckhart, 120 Iowa 248. See the titles CONSIDERATION, vol. 6, p. 761; IMPLIED TRUSTS, vol. 15, p. 1124 *et seq.*

**Kind of Consideration Stated Controls Operation of Deed.** — Since the character of the consideration as either a valuable or a good consideration determines the operation of a deed as either a bargain and sale or a covenant to stand seized, it has been said that parol evidence is not admissible to contradict the recital on this point, since it would change the character and operation of the deed in the face of the rule against parol evidence. Patton v. Beecher, 62 Ala. 588.

1. Kintner v. Jones, 122 Ind. 148; Livermore v. Aldrich, 5 Cush. (Mass.) 431; Blodgett v. Hildreth, 103 Mass. 484.

2. Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189.

3. Smith v. Howell, 11 N. J. Eq. 359.

4. Myers v. Myers, 167 Ill. 52. See the title IMPLIED TRUSTS, vol. 15, p. 1125.

5. Hall v. Livingston, 3 Del. Ch. 375.

6. McLaurie v. Partlow, 53 Ill. 340.

7. See generally the title INTERPRETATION AND CONSTRUCTION, vol. 17, p. 1, and the cross-references there given.

**Declarations of Trust Are Construed in the Same Manner as Legal Conveyances,** where the estate is finally limited by the deed, and whether the subject is real or personal property. Badgett v. Keating, 31 Ark. 400; Price v. Sisson, 13 N. J. Eq. 174; Adamson v. Adamson, 17 Ont. 407.

**A Subsequent Memorandum Put in Writing to Satisfy the Statute of Frauds and to furnish evidence will not be required to be expressed in**

technical language. Dorr v. Clapp, 160 Mass. 538.

**8. Words Taken in Ordinary Sense.** — Johnson v. Whiton, 118 Mass. 340; Merrill v. Preston, 135 Mass. 455; New York L. Ins., etc., Co. v. Hoyt, 161 N. Y. 1, affirming 31 N. Y. App. Div. 84; Harrison v. Battle, 1 Dev. & B. Eq. (21 N. Car.) 213. See generally for this presumption the titles INTERPRETATION AND CONSTRUCTION, vol. 17, p. 13; STATUTES, vol. 26, p. 607.

**Technical Words Not Used Technically.** — Cornelius v. Smith, 55 Mo. 528 ("heirs").

**Trust to "Heirs at Law"** of real and personal property construed. Merrill v. Preston, 135 Mass. 451.

**Words of Condition Construed to Create Trust.** — See *supra*, this section, 7. a.

**For Illustrations of the Employment of Technical Terms,** see the titles HEIR, HEIRS, and THE LIKE, vol. 15, p. 318; ISSUE (DESCENDANTS), vol. 17, p. 542; SHELLEY'S CASE (RULE IN), vol. 25, p. 639, etc.

**9. Creation of Fee in Trust.** — Oates v. Cooke, 3 Burr. 1684; Barker v. Greenwood, 4 M. & W. 429.

Canada. — Adamson v. Adamson, 17 Ont. 412.

United States. — Doe v. Considine, 6 Wall. (U. S.) 458, quoted under the title ESTATES, vol. 11, p. 268 note.

Connecticut. — Chamberlain v. Thompson, 10 Conn. 243, 26 Am. Dec. 390.

Massachusetts. — Stearns v. Palmer, 10 Met. (Mass.) 32; Gould v. Lamb, 11 Met. (Mass.) 84, 45 Am. Dec. 187; McElroy v. McElroy, 113 Mass. 509.

New York. — Fisher v. Fields, 10 Johns. (N.

would be necessary.<sup>1</sup> Thus in the case of instruments directing executory trusts and settlements, the technical language employed will be disregarded in framing the settlement directed if it appears that its use would defeat the intention of the parties.<sup>2</sup>

*d. CERTAINTY REQUIRED IN INSTRUMENT OF CREATION.*—The court must be able to ascertain with reasonable certainty, not only the settlor's beneficial intention, but also the subject matter involved, the purpose or object, and the beneficiary in whose favor it is created,<sup>3</sup> for where the declaration is so vague and indefinite that a court of equity cannot ascertain these particulars the trust will be held to fail.<sup>4</sup>

Y.) 505; *Welch v. Allen*, 21 Wend. (N. Y.) 147.

*Ohio.*—*Williams v. First Presb. Soc.*, 1 Ohio St. 478.

*Pennsylvania.*—*Koenig's Appeal*, 57 Pa. St. 352.

See also *infra*, this title, *The Trust Estate*.

**1. Executed and Executory Trusts.**—*Glenorchy v. Bosville*, Cas. t. Talb. 19; *East v. Twyford*, 4 H. L. Cas. 517; *Tatham v. Vernon*, 29 Beav. 604; *Adamson v. Adamson*, 17 Ont. 407; *Mullany v. Mullany*, 4 N. J. Eq. 16, 31 Am. Dec. 238; *Cushing v. Blake*, 30 N. J. Eq. 689.

But where the words declaring an executory trust are so clear in themselves as to point out what the trust is to be, they must receive the same construction as would be given to them in the declaration of an executed trust. *Stonor v. Curwen*, 5 Sim. 264; *Gilpin v. Williams*, 17 Ohio St. 397.

**Technical Words Construed More Strictly in Deeds than in Wills.**—The rule that technical words are to be construed more strictly in a deed or grant than in a will applies in declarations of trust. *McPherson v. Snowden*, 19 Md. 197.

**2. Instruments Directing Executory Trusts.**—*Ellinstone on Deeds*, 534; *Rochfort v. Fitzmaurice*, 2 Dr. & War. 20; *Stamford v. Hobart*, 3 Bro. P. C. (Toml. ed.) 33; *Blandford v. Marlborough*, 2 Atk. 545; *Blackburn v. Stables*, 2 Ves. & B. 367.

In construing an executory trust the language is subordinate to the intent. *Sackville-West v. Holmesdale*, L. R. 4 H. L. 565, *per Lord Westbury*.

**The Construction of Marriage Settlements** forms a leading illustration of this rule. See the titles *MARRIAGE SETTLEMENT*, vol. 19, p. 1240; *SHELLEY'S CASE (RULE IN)*, vol. 25, p. 649.

**3. Certainty Necessary.**—*England.*—*Knight v. Knight*, 3 Beav. 172.

*United States.*—*McMonagle v. McGlinn*, 85 Fed. Rep. 88.

*California.*—*Lynch v. Rooney*, 112 Cal. 279; *Booth v. Oakland Sav. Bank*, 122 Cal. 19; *Barker v. Hurley*, 132 Cal. 21; *Wittfield v. Forster*, 124 Cal. 418; *Sheehan v. Sullivan*, 126 Cal. 189.

*Connecticut.*—*Harper v. Phelps*, 21 Conn. 257.

*Florida.*—*Lines v. Darden*, 5 Fla. 51.

*Illinois.*—*Blanchard v. Chapman*, 22 Ill. App. 341.

*Indiana.*—*Grimes v. Harmon*, 35 Ind. 198, 9 Am. Rep. 690.

*Maryland.*—*Reiff v. Horst*, 52 Md. 255; *American Casualty Ins. Co.'s Case*, 82 Md. 560.

*Montana.*—*McDonald v. American Nat. Bank*, 25 Mont. 494.

*New York.*—*Wilcox v. Gilchrist*, 85 Hun (N. Y.) 1. See also *Shepard v. Gassner*, 41 Hun (N. Y.) 326.

*North Carolina.*—*Spivey v. Harrell*, 101 N. Car. 48.

*Ohio.*—*McIntire Poor School v. Zanesville Canal, etc., Co.*, 9 Ohio 203, 34 Am. Dec. 436.

*Rhode Island.*—*Flaherty v. O'Connor*, 24 R. I. 587; *Wickford Sav. Bank v. Corey*, 25 R. I. 217.

*Tennessee.*—*Ensley v. Ensley*, 105 Tenn. 120; *Anderson v. McCullough*, 3 Head (Tenn.) 614.

*Vermont.*—*Cathcart v. Nelson*, 70 Vt. 317.

*Wisconsin.*—*Holmes v. Walter*, 118 Wis. 409.

See also the title *PRECATORY TRUSTS*, vol. 22, p. 1166, and *supra*, this section, 4. b. (4) (d); 4. e.

**Id Certum Est Quod Certum Reddi Potest.**—*Becker v. Chester*, 115 Wis. 90.

**Charitable Trusts—Indefiniteness of Beneficiary.**

—See the title *CHARITIES AND CHARITABLE TRUSTS*, vol. 5, p. 905. See also *Shanahan v. Kelly*, 88 Minn. 202.

**Certainty of Beneficiary.**—*Levy v. Levy*, 33 N. Y. 107; *Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487; *New York L. Ins., etc., Co. v. Hoyt*, 161 N. Y. 1, *affirming* 31 N. Y. App. Div. 84; *Ash v. Ash*, 4 Pa. Dist. 725 (parol evidence admissible to identify).

As to the authority of donees under a power in trust to select from a limited class, see *supra*, this section, 7. b.

**The Construction of Particular Terms Designating Beneficiaries** has been treated elsewhere, see for instance *CHILD—CHILDREN*, vol. 5, p. 1082; *DESCENDANT*, vol. 9, p. 399; *FAMILY*, vol. 12, p. 866; *HEIR, HEIRS, AND THE LIKE*, vol. 15, p. 318; *ISSUE (DESCENDANTS)*, vol. 17, p. 542; *NEXT OF KIN*, vol. 21, p. 537; *RELATIVE, RELATION, RELATIONSHIP*, vol. 24, p. 278, etc. See also the titles *PRECATORY TRUSTS*, vol. 22, p. 1162; *WILLS*.

**The Proportions in Which the Beneficiaries Take** must be established. *Harper v. Phelps*, 21 Conn. 257. And see *Obermiller v. Wylie*, 36 Fed. Rep. 641; *Kramer v. McCaughey*, 11 Mo. App. 426; *Bliss v. Fosdick*, (Supm. Ct. Spec. T.) 24 N. Y. Supp. 939 (parol evidence to remove ambiguity).

But where the proportion is not indicated equity will presume equality. *Loring v. Palmer*, 118 U. S. 321. See also *Davis v. Cain*, 1 Ired. Eq. (36 N. Car.) 304.

**4. Vague and Indefinite Trusts Fail.**—*England.*—*Briggs v. Penny*, 3 Macn. & G. 546.

**Effect of Giving Absolute Discretion to Trustee.**—A court of equity will never favor such a construction of the instrument creating a trust as to confer upon a trustee absolute and uncontrollable powers; and although the powers are in terms absolute, the trustee will, if possible, be held to be vested with a reasonable discretion only, reviewable in equity.<sup>1</sup> Any other construction would involve the anomaly of a trust without enforceable rights in the *cestui que trust*,<sup>2</sup> and when the amount of trust property to be devoted to the trust is, by discretionary powers vested in the trustee, rendered absolutely uncertain, the trust must fail.<sup>3</sup>

**V. THE TRUST ESTATE — 1. Of What It May Consist.**—A valid trust may be declared in any right, thing, or interest which a court of equity recognizes as a subject of property,<sup>4</sup> whether capable or incapable of manual delivery, whether in possession or reversionary, and howsoever circumstanced.<sup>5</sup> There can be no doubt, therefore, that whatever may be the subject of an assignment or transfer which a court of equity will recognize and enforce may be made the subject of a trust, and that only those rights or interests are not assignable in trust which, for remoteness or uncertainty or for reasons of public policy, cannot be assigned or conveyed at all.<sup>6</sup>

**Choses in Action**, while not assignable at common law, are now generally assignable in equity,<sup>7</sup> and where such is the case they may be the subject of a valid declaration of trust.<sup>8</sup> There are some choses in action, rights, and causes of action of which no conveyance or assignment can be made because of considerations of public policy, and in these no trust can be declared.<sup>9</sup>

**Expectant and Contingent Interests.**—Since courts of equity recognize both present and expectant or contingent property interests, there may be a valid trust in things which have no actual present existence, but a probable or anticipatory existence only.<sup>10</sup> Illustrations of this species of property are unaccrued rents and profits,<sup>11</sup> the freights of an intended voyage,<sup>12</sup> an animal not yet born,<sup>13</sup> growing crops,<sup>14</sup> a ship in course of construction;<sup>15</sup> and the

*California.*—Wittfield v. Forster, 124 Cal. 418.

*Georgia.*—Mitchell v. Turner, 117 Ga. 960.

*Maine.*—Murdock v. Bridges, 91 Me. 124.

*New York.*—Power v. Cassidy, 79 N. Y. 602, 35 Am. Rep. 550; Jarvis v. Babcock, 5 Barb. (N. Y.) 139; Weeks v. Cornwell, (Supm. Ct. Spec. T.) 64 How. Pr. (N. Y.) 276; Gross v. Moore, 68 Hun (N. Y.) 412, affirmed 141 N. Y. 559; Matter of Johnson, 1 Connolly (N. Y.) 518; Read v. Williams, 4 Silv. Sup. (N. Y.) 295; Matter of Foley, 2 Connolly (N. Y.) 298.

**Terms Capable of Ascertainment.**—Where by the terms of a trust the *cestui que trust* shall cease to enjoy the income therefrom whenever he becomes "heavily involved in debt," the condition, being capable of ascertainment by a court or by trustees, is not so indefinite as to render the trust void. Nashville First Nat. Bank v. Nashville Trust Co., (Tenn. Ch. 1901) 62 S. W. Rep. 392.

**1. Trustee's Discretion.**—McDonald v. McDonald, 92 Ala. 537; Haydel v. Hurck, 5 Mo. App. 267. See also Jones v. Newell, 78 Hun (N. Y.) 290, and *infra*, this title, VI. 8. *Powers of Trustees.*

**2.** McDonald v. McDonald, 92 Ala. 542.

**3.** Matter of Sanford, 136 Cal. 97. See also the title PRECATORY TRUSTS, vol. 22, p. 1168.

**4. Trust May Be in Any Property Recognized in Equity.**—Currence v. Ward, 43 W. Va. 367.

**What May Be Subject of Implied Trust.**—See the title IMPLIED TRUSTS, vol. 15, p. 1139 *et seq.*

**5. Property Generally Transferable in Trust.**—Kekewich v. Manning, 1 De G. M. & G. 176.

**6.** As to what may be the subject of a valid assignment or contract, see the title ASSIGNMENTS, vol. 2, p. 1015. See also the title ILLEGAL CONTRACTS, vol. 15, p. 927.

**7.** See the title ASSIGNMENTS, vol. 2, p. 1014 *et seq.*

**8. Choses in Action.**—*Ex p.* Alderson, 1 Madd. 51; Benbow v. Townsend, 1 Myl. & K. 506; Burn v. Corvalho, 4 Myl. & C. 690; Hinkle v. Wanzer, 17 How. (U. S.) 353; Danser v. Warwick, 33 N. J. Eq. 133; Tarbox v. Grant, 56 N. J. Eq. 199; Morton v. Naylor, 1 Hill (N. Y.) 583; Mordecai v. Seignious, 53 S. Car. 95. See also Ryall v. Rowles, 1 Ves. 348.

**9.** See the title ASSIGNMENTS, vol. 2, p. 1014 *et seq.*

**10. Equity Recognizes Expectant and Contingent Interests.**—Mitchell v. Winslow, 2 Story (U. S.) 630; Hinkle v. Wanzer, 17 How. (U. S.) 353; Field v. New York, 6 N. Y. 179, 57 Am. Dec. 435. See also the title ASSIGNMENTS, vol. 2, p. 1026 *et seq.*

**11. Unaccrued Rents and Profits.**—Gisborn v. Charter Oak L. Ins. Co., 142 U. S. 326.

**12. The Freights of an Intended Voyage.**—Douglas v. Russell, 4 Sim. 524. See also Langton v. Horton, 1 Hare 549.

**13. Unborn Animal.**—McCart v. Blevins, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262.

**14. Growing Crops.**—Petch v. Tutin, 15 M. & W. 110; Robinson v. Mauldin, 11 Ala. 977.

**15. A Ship in Course of Construction** is suffi-



expectant interest of an heir at law to the estate of his ancestor, or of the interest which a person may take under the will of another, then living, or the share to which such person may become entitled under an appointment or in personal estate as presumptive next of kin, is assignable in trust.<sup>1</sup> However, a mere expectancy arising out of the peculiar circumstances of the parties, but not coupled with any interest, either legal or equitable, cannot be made the subject of a trust.<sup>2</sup>

**Equitable Interest.** — A declaration of a valid trust may be made in an equitable title or interest.<sup>3</sup>

**Things Incorporeal.** — The cases furnish examples of trusts in various incorporeal rights and interests. A trust may exist in a naked power,<sup>4</sup> or a patent right,<sup>5</sup> or the secret of making a certain medicine contained in a receipt for preparing the same,<sup>6</sup> or in a copyright.<sup>7</sup>

**Purely Personal Rights** in which the public are interested cannot be held in trust.<sup>8</sup>

**Public Lands of the United States** cannot be pre-empted in trust for another.<sup>9</sup>

**2. Nature and Comprehensiveness of Estate** — *a. PROPERTY INCLUDED IN ESTATE* — (1) *In General.* — The quantity and kind of property which is the subject of an express trust is to be determined by the creating instrument and the circumstances, some illustrations of which are given in the notes below.<sup>10</sup>

(2) *Confusion of Property.* — The confusion of the trust estate with other property presents no obstacle to the separation of the former from the mass and dealing with it as trust estate;<sup>11</sup> and if a trustee or other person having the custody of trust funds confuse the same with his own, the whole will be

ciently in being to make it the subject of a transfer, either in whole or in part; legal or equitable, or of a valid declaration of a trust. *Starbuck v. Farmers' L. & T. Co.*, 28 N. Y. App. Div. 272.

**1. Expectancies as Heir or Legatee.** — *Hinkle v. Wanzer*, 17 How. (U. S.) 353.

**2. Mere Expectancy.** — Where one who formerly had a right to purchase certain property under a contract which had since become void by reason of failure to make the required payments desired and expected to purchase the property and employed an agent to carry out the transaction, but the agent purchased and sold the property to another, it was held that no trust in the property could be declared in favor of the intended purchaser. *Garrow v. Davis*, 15 How. (U. S.) 272.

**3. Equitable Interest.** — *Currence v. Ward*, 43 W. Va. 367; *Knight v. Bowyer*, 23 Beav. 609; *Luco v. De Toro*, 91 Cal. 405; *Tarbox v. Grant*, 56 N. J. Eq. 199.

**4. Naked Power.** — *Brown v. Higgs*, 8 Ves. Jr. 561.

**5. Patent Right.** — *Matter of Russell*, 3 De G. & J. 130.

**6. Receipt for Preparing a Medicine.** — *Green v. Folgham*, 1 Sim. & St. 398.

**7. Copyright.** — *Sims v. Marryat*, 17 Q. B. 281, 79 E. C. L. 281.

**8. A Peerage in England** cannot be held in trust. *Buckhurst Peerage*, 2 App. Cas. 10.

**Upon the Appointment to a Public Office** of one person in trust for another who is to have the profits for his own use, the trust agreement is void. *Garforth v. Fearon*, 1 H. Bl. 327. Such an agreement is in direct violation of the statutes forbidding trafficking in public offices. See the title **ILLEGAL CONTRACTS**, vol. 15, p. 966.

**9. Public Lands.** — *Warren v. Van Brunt*, 19 Wall. (U. S.) 646; *Robinson v. Jones*, 31 Neb. 20. See also the title **STATE AND PUBLIC LANDS**, vol. 26, p. 408 *et seq.*

**10. Property Subsequently Acquired.** — Property acquired by a testator subsequently to a devise by him creating a specific trust is not a part of the trust estate. *Curd v. Field*, 103 Ky. 293.

**Surplus of Mortgage Sale of Trust Property.** — Where a person had made himself trustee of certain property for the benefit of his wife and children, reserving to himself as trustee power to sell or convey as he should deem best and he afterwards mortgaged the property, which was sold under the mortgage, the surplus was held to belong to the trust estate and not to the trustee individually. *McAleer's Appeal*, 99 Pa. St. 138.

**"All Proceeds" Construed.** — Under a contract providing that "all proceeds" of certain sales are to be held in trust for one of the contracting parties, the trust will include the moneys received upon such sales and all promissory notes taken for purchase money. *Mordecai v. Seignious*, 53 S. Car. 95.

**Definiteness as to Subject-matter.** — The trust estate may include moneys the amount of which is not ascertainable until the time for the trustees to pay it over. *Atwater v. Russell*, 49 Minn. 57.

**The Income of a Railroad Conveyed in Trust** does not belong to the trustee where he has not taken possession of nor run the road, unless the income is collected by the company and deposited in trust. *Coe v. Beckwith*, 31 Barb. (N. Y.) 339.

**11. For a Full Discussion** of this subject, see *infra*, this title, *The Cestui Que Trust — Rights of Cestui Que Trust — Following Trust Property.*

treated as trust property except so far as he may be able to distinguish what is his.<sup>1</sup>

(3) *Transformation and Substitution of Property.* — Into whatever form or species of property a trust fund may be converted, it continues to be impressed with the trust as long as it is possible to trace it,<sup>2</sup> and property substituted by a trustee for assets which he had misappropriated becomes irrevocably impressed with the trust.<sup>3</sup>

*b. WHETHER TRUST PROPERTY REALTY OR PERSONALTY.* — If a trustee sells real estate under a power, but in the absence of any specific direction to convert real estate into personalty, the money derived from the sale will retain the character of real estate to descend and be dealt with as if it were actually so.<sup>4</sup> But if there be a clearly expressed intention on the part of the settlor that realty be sold and converted into personalty the proceeds of the sale will be personalty, and subject to all the incidental rights which attend that form of property.<sup>5</sup> It has been held that an annuity charged on real estate will be considered realty,<sup>6</sup> but the emblements of the land have been held to be personalty.<sup>7</sup>

The Doctrine of Equitable Conversion applies to trust property. Whether any

**Confusion with Other Property.** — *In re Hallett*, 13 Ch. D. 696; *Morrison v. Kinstra*, 55 Miss. 71; *Van Allen v. American Nat. Bank*, 52 N. Y. 1.

**1. Confusion with Trustee's Individual Funds.** — *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.*, 104 U. S. 54; *Snorgrass v. Moore*, 30 Mo. App. 232.

**Literal Identification Unnecessary.** — The fact that the trust property consists of money or is of such a character that it is not capable of literal identification is immaterial, as it is sufficient to identify it as a separate and independent amount or value. *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571; *Farmers', etc., Nat. Bank v. King*, 57 Pa. St. 202, 98 Am. Dec. 215.

**Money Remaining in the Trustee's Hands with the permission of the beneficiary is still impressed with the trust.** *Crisfield v. State*, 55 Md. 192.

**2. See infra, this title, *The Cestui Que Trust* — *Rights of Cestui Que Trust* — *Following Trust Property*.**

**Transformation of Property.** — *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.*, 104 U. S. 54; *Leake v. Watson*, 58 Conn. 332, 18 Am. St. Rep. 270; *Spicer v. Spicer*, 21 Ga. 200; *Ennor v. Hodson*, 134 Ill. 32; *Putnam v. Story*, 132 Mass. 205; *Morrison v. Kinstra*, 55 Miss. 71; *Thompson's Appeal*, 22 Pa. St. 16; *Marshall v. Hall*, 42 W. Va. 641. See also *Lippincott v. Williams*, 63 N. J. Eq. 130; *Stratton v. McKinnie*, (Tenn. Ch. 1900) 62 S. W. Rep. 636.

**Realty Transformed to Personalty.** — *Prather v. Weissiger*, 10 Bush (Ky.) 117; *Cowman v. Colquhoun*, 60 Md. 127; *Holland v. Cruft*, 3 Gray (Mass.) 162; *Slocum v. Ames*, 19 R. I. 401.

**Changed Jurisdiction by Division of Town.** — Where a town is divided by an act of the legislature and the portion in which certain trust lands are situated, the title of which the original town held as trustee for the benefit of the public, is severed from the rest, the legal title remains in the original town unaffected by the

change of territorial jurisdiction. *Troy v. Haskell*, 33 N. H. 533.

**3. Substituted Property.** — *Jones v. Byland*, 10 Ohio Dec. (Reprint) 712, 23 Cinc. L. Bul. 151; *Bloodgood v. Massachusetts Ben. L. Assoc.*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 460.

**4. Proceeds of Realty Considered Realty.** — *Holland v. Cruft*, 3 Gray (Mass.) 162; *Hovey v. Dary*, 154 Mass. 7; *Foster's Appeal*, 74 Pa. St. 391, 15 Am. Rep. 553. See also *Slocum v. Ames*, 19 R. I. 401.

**5. Proceeds of Realty Considered Personalty.** — *Hammond v. Putnam*, 110 Mass. 232. See also the cases cited in the preceding note.

**Mortgagees' Interest in Realty Converted into Personalty.** — Where mortgagees of land assign the mortgages to trustees, who, under authority conferred, foreclose the mortgages, purchase the property, and resell the same for division among the mortgagees, the interest of the mortgagees in the proceeds is personal property. *Sweeney v. Horn*, 7 Pa. Dist. 391, affirmed 190 Pa. St. 237.

**Accounting Between Trustee and Administrator of Beneficiary.** — In a suit for an accounting brought by the administrator of a beneficiary against the trustee, land mortgaged in favor of the trust estate, of which the trustee, in order to save the expense of foreclosure, took a conveyance after the death of the beneficiary, must be accounted for as personal property, but land sold under foreclosure and bought in prior to the beneficiary's death must be accounted for as realty. *Barclay v. Cooper*, 42 N. J. Eq. 516.

**6. An Annuity Charged on Real Estate** passes under a conveyance to trustees of all the grantor's interest in the real estate, notwithstanding a prior deed of trust of all his personal property and estate whatsoever. *Fidelity Ins., etc., Co. v. Fidelity Ins. Trust, etc., Co.*, 175 Pa. St. 13.

**7 Emblements.** — Where a testator devised all his real estate in trust for one person and bequeathed all the personal estate to another, the emblements on the real estate passed under the bequest of personalty. *Rudge v. Winnall*, 12 Beav. 357.

actual conversion of the property takes place or not, equity considers lands devised or conveyed in trust and directed to be sold and converted into money, as money;<sup>1</sup> and money or other personal property directed to be converted into land, as land.<sup>2</sup> When the purpose of the conversion is attained, reconversion takes place.<sup>3</sup>

c. **DISTINCTION BETWEEN CORPUS AND INCOME**—(1) *In General*.—Where property is given in trust, the income of which is to be paid to one for life and the principal paid to another after the death of the life tenant, questions of importance, and sometimes of difficulty, arise in determining whether certain receipts and profits are income and go to the life tenant, or are principal belonging to the remainderman.<sup>4</sup>

(2) *Specific Sources of Income*—(a) **Increased or Diminished Value of Estate**.—Unless a contrary intention appears from the trust instrument, any gain or loss in the value of trust property has always been regarded as an accretion or diminution, as the case may be, of the corpus of the trust estate, and therefore belonging to the remainderman.<sup>5</sup> Likewise, all profits arising from the judicious investment and reinvestment of trust funds, or other advantageous transactions in respect to the trust property which add to its value, go to the corpus of the estate;<sup>6</sup> as where the trustee buys in property sold under

**1. Equitable Conversion of Real into Personal Property.**—*Fletcher v. Ashburner*, 1 Bro. C. C. 497; *Craig v. Leslie*, 3 Wheat. (U. S.) 563; *Hammond v. Putnam*, 110 Mass. 232; *Martin v. Sherman*, 2 Sand. Ch. (N. Y.) 341; *Kane v. Gott*, 24 Wend. (N. Y.) 641, 35 Am. Dec. 641; *Van Zandt v. Garretson*, 21 R. I. 352; *Carney v. Kain*, 40 W. Va. 758. See the title **CONVERSION AND RECONVERSION**, vol. 7, p. 464. See also the title **PRIVATE INTERNATIONAL LAW**, vol. 22, p. 1370.

**Time of Conversion.**—If the testator directs land to be sold, but leaves it to the discretion of the trustee as to the time of sale, there will be no conversion until the sale actually takes place. If the trustee is not vested with this discretion, the conversion takes place at the testator's death. *Christler v. Meddis*, 6 B. Mon. (Ky.) 35; *Compton v. McMahan*, 19 Mo. App. 494; *Peterson's Appeal*, 88 Pa. St. 397.

**2. Equitable Conversion of Personalty into Realty.**—*Craig v. Leslie*, 3 Wheat. (U. S.) 563.

**Illustration.**—Where a settlor gave to trustees a power to invest money in land, and prescribed such subsequent limitations as could only apply to realty, the money was considered converted into land to prevent a failure of the limitations. *Earlon v. Saunders*, Ambl. 241.

**3. Reconversion.**—*Foster's Appeal*, 74 Pa. St. 391, 15 Am. Rep. 553.

**4.** See *infra*, this title, *The Trustee—Duties of Trustees—Treatment of Funds*.

**Necessity of Distinction.**—*D'Ooge v. Leeds*, 176 Mass. 558.

**Presumption.**—Where there is no evidence that certain property in the hands of a trustee is income, it is presumed to be capital. *Peirce v. Burroughs*, 58 N. H. 302.

**Accumulated Income Belongs to Life Tenant.**—*Ware v. M'Candlish*, 11 Leigh (Va.) 623. Compare *Minot v. Tappan*, 127 Mass. 333.

**Income, Although Invested and Charged to Principal, Still Income.**—*New York L. Ins., etc., Co. v. Kane*, 17 N. Y. App. Div. 542.

**5. Increased or Diminished Value of Estate**—*Bergen v. Valentine*, (Supm. Ct. Spec. T.) 63

*How. Pr. (N. Y.) 221; Matter of New York L. Ins., etc., Co., (Surrogate Ct.) 24 Misc. (N. Y.) 71; Matter of Gerry*, 103 N. Y. 445; *McLouth v. Hunt*, 154 N. Y. 179; *Whitemore v. Beekman*, 2 Dem. (N. Y.) 275; *Hubley's Estate*, 16 Phila. (Pa.) 327, 41 Leg. Int. (Pa.) 66; *Eisner's Estate*, 175 Pa. St. 143; *Graham's Estate*, 198 Pa. St. 216.

**Relation of Parties to Be Considered.**—Where the life beneficiary has stood in a close, dependent, and affectionate relation to the trust maker, such as parent and child or husband and wife, we may assume that the dominant intention in creating the trust is to provide a suitable and proper support for those to whom his affection runs, rather than the preservation or aggregation of the capital for the benefit of a remainderman, and as between their respective interests the life tenant should not be the one to suffer. *Matter of New York L. Ins., etc., Co., (Surrogate Ct.) 24 Misc. (N. Y.) 71.*

**Premium Received on Gold Coin** belonging to the trust estate is part of the corpus. *Van Blarcom v. Dager*, 31 N. J. Eq. 783.

**6. Profits Arising from Investments**—*Whittingham v. Schofield*, (Ky. 1902) 67 S. W. Rep. 846; *Mudge v. Parker*, 139 Mass. 153; *Stewart v. Phelps*, 71 N. Y. App. Div. 91, *affirmed* 173 N. Y. 621; *Matter of Kernochan*, 104 N. Y. 618; *Matter of Pollock*, 3 Redf. (N. Y.) 100; *Townsend v. U. S. Trust Co.*, 3 Redf. (N. Y.) 220; *Graham's Estate*, 198 Pa. St. 216.

**Profitable Exchange of Stock.**—Where the trustee, under authority conferred upon him, exchanged certain shares of stock belonging to the estate for shares of another corporation in the proportion of ten for twelve, the additional two shares are part of the principal of the estate whether they represent a profit or not. *Kemble's Estate*, 201 Pa. St. 523.

**The Words "Issues and Profits"** or income and profits in a will, as descriptive of the interest of a life tenant in the trust estate, do not in themselves indicate that it was the testator's intention that the life tenant should have the profits arising from the sale of various invest-



a mortgage belonging to the trust estate and resells the property for a sum in excess of the original mortgage debt.<sup>1</sup>

(b) **Corporate Earnings.** — Questions as to the distinction between the corpus and income of trust property have most often arisen in connection with the dividends and earnings of corporations. This subject has been fully considered under another title in this work.<sup>2</sup>

(c) **Interest.** — The interest on trust funds belongs to the life tenant if that be the intention of the settlor;<sup>3</sup> and where it is clearly intended that the entire annual interest on bonds held in trust should go to the life tenant, a depreciation in the value of such bonds will not be made good to the remainderman out of the interest;<sup>4</sup> but when such intention does not appear, an adequate proportion of the interest will be set aside to preserve the capital of the trust intact.<sup>5</sup> As a rule the life tenant takes the interest on a trust fund from the death of the testator,<sup>6</sup> but this may be regulated by testamentary provisions.<sup>7</sup>

(d) **Rents.** — Rents accruing from a lease of trust property are income and go to the life tenant.<sup>8</sup> In the case of a testamentary trust, the life tenant takes the rents from and after the death of the testator,<sup>9</sup> and all rents becoming due and payable after the death of the testator, although they have accrued in part prior to his death, belong to the life tenant.<sup>10</sup> But the beneficiaries

ments. *Stewart v. Phelps*, 71 N. Y. App. Div. 91, affirmed 173 N. Y. 621; *Matter of Roberts*, (Surrogate Ct.) 40 Misc. (N. Y.) 512.

**Loss Apportioned Between Principal and Income.** — Where the trustees purchased at their mortgage sale and subsequently sold the property for less than the mortgage indebtedness, the loss should be apportioned ratably between the principal and interest due on the mortgage. *Meldon v. Devlin*, 31 N. Y. App. Div. 146, affirmed 167 N. Y. 573.

**1. Profit on Purchase at Foreclosure Sale.** — *Parker v. Johnson*, 37 N. J. Eq. 366; *Van Vleck v. Lounsbury*, 34 Hun (N. Y.) 569; *Farmers' L. & T. Co. v. Hall*, 5 Dem. (N. Y.) 73; *Re Smith*, 25 Pittsb. Leg. J. N. S. (Pa.) 307.

**The Profit Will Be Apportioned** ratably between the life tenant and remainderman, where interest due the life tenant was tied up in the mortgaged property. *Parker v. Seeley*, 56 N. J. Eq. 110.

**Difference Between Purchase and Redemption Price.** — Where a testator purchased at a mortgage sale land which he afterwards devised in trust, and the life beneficiary received the income therefrom down to the time the land was redeemed by the mortgagor, the sum paid to the trustee to redeem, although in excess of the purchase money paid by the testator, was substituted for the land, and belongs wholly to the corpus of the trust estate. *Slocum v. Ames*, 19 R. I. 401.

**Case Apparently Contra.** — In *Park's Estate*, 173 Pa. St. 190, it was held that a profit realized by the foreclosure of a mortgage, purchase, and sale by the trustee went to the life tenant under a devise to the life tenant of the "income and profits." This decision was distinguished in *Graham's Estate*, 198 Pa. St. 216, as having been decided on the misapprehension that both income and profits were given to the life tenant.

**2.** See the title **DIVIDENDS**, vol. 9, p. 710 *et seq.*

**3.** *Townsend v. U. S. Trust Co.*, 3 Redf. (N. Y.) 220.

**How Intention Ascertained.** — The surrounding facts and circumstances and the relation and condition of the parties, as well as the language employed in the creation of the trust, are to be considered in determining the settlor's intention. *McLouth v. Hunt*, 154 N. Y. 179.

**4. Depreciation of Corpus Not Made Good from Interest.** — *McLouth v. Hunt*, 154 N. Y. 179, affirming 92 Hun (N. Y.) 607; *Matter of Hoyt*, 160 N. Y. 607, reversing 27 N. Y. App. Div. 285.

**5. Interest Used to Keep Corpus Intact.** — *New York L. Ins., etc., Co. v. Baker*, 165 N. Y. 484; *New York L. Ins., etc., Co. v. Sands*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 102.

**6. Interest after Testator's Death.** — *Pollock v. Learned*, 102 Mass. 49; *Sargent v. Sargent*, 103 Mass. 297.

**7.** *Keith v. Copeland*, 138 Mass. 303.

**8. Rents Are "Income."** — *Eley's Appeal*, 103 Pa. St. 300.

**"Net Income" on Land.** — Under a devise of lands to trustees to pay the net income, consisting of rents and profits, to a life tenant, with authority to sell the unproductive portions of the estate, the life tenant is not entitled to receive the interest on the fair market value of the unproductive portions. *Green v. Crapo*, 181 Mass. 55.

**After the Death of the Life Tenant** all rents go to the remaindermen. *Rhode Island Hospital Trust Co. v. Harris*, 20 R. I. 408.

**9. Rents after Death of Testator.** — *Dickinson v. Henderson*, 122 Mich. 583; *Cole v. Edwards*, (Tenn. Ch. 1900) 62 S. W. Rep. 641.

**Trust Created by Testator's Executors.** — Where the trust was to be created under the testator's will by his executors, it has been held that the life tenants are entitled to receive all the rents, issues, and profits that may accrue on their several shares of the estate, less those accruing within the first year after the testator's death. *Cole v. Edwards*, (Tenn. Ch. 1900) 62 S. W. Rep. 641.

**10.** *Sohier v. Eldredge*, 103 Mass. 345.

cannot take rents accruing prior to their reaching the age or condition when, under the terms of the trust, they were to receive them.<sup>1</sup>

**3. Title and Estate of the Trustee — a. OPERATION OF STATUTE OF USES.** — Prior to the statute of 27 Hen. VIII., c. 10, commonly known as the statute of uses, the feoffee to uses was always the holder of the legal title to the property.<sup>2</sup> The statute was designed to divest the trustee of any title to the property whatsoever and change the mere equitable interest of the *cestui que use* into a legal estate in the property itself, of the same quality and duration.<sup>3</sup> The logical effect of the statute has, under the construction of the courts, been obviated in a measure, the feoffee to uses under certain circumstances retaining the legal title as trustee,<sup>4</sup> but unless these circumstances exist, the statute of uses, which is now generally in force either in its original form as a part of the English common law or in substantially similar statutory enactments, places the entire interest, both legal and equitable, in the one beneficially entitled, or, as the expression goes, executes the use.<sup>5</sup>

**Dry or Passive Trusts.** — Although the decisions sometimes speak of uses which

**1. Beneficiary Must Have Attained Prescribed Qualifications.** — Where a testator gave his estate in trust to pay the rents and profits to his wife for life, and at her death to his niece for life, and at her decease to her child or children who should have attained the age of twenty-one, or being a daughter or daughters should have attained twenty-one or be married, and in default of such issue of his niece to go to the testator's residuary estate, and the niece died before her only child, an unmarried daughter, reached twenty-one, the intermediate rents fell into the residuary estate. *In re Eddels*, L. R. 11 Eq. 559.

**2. Prior to Statute of Uses.** — 2 Black. Com. 328.

**3. Purpose of Statute.** — 2 Black. Com. 332; *Vander Volgen v. Yates*, 3 Barb. Ch. (N. Y.) 242, affirmed 9 N. Y. 219; *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762. See also cases cited under the following note.

**4. See infra**, this subsection, *Exceptions to Operation of Statute*.

**5. Trustee's Estate Destroyed by Statute — England.** — *Baker v. White*, L. R. 20 Eq. 166. *United States.* — *Durant v. Ritchie*, 4 Mason (U. S.) 45; *Morgan v. Rogers*, (C. C. A.) 79 Fed. Rep. 577.

*Alabama.* — *Stoker v. Yerby*, 11 Ala. 322; *Tindal v. Drake*, 51 Ala. 574; *Jordan v. Phillips*, etc., Co., 126 Ala. 561; *Huntington v. Spear*, 131 Ala. 414.

*Colorado.* — *Teller v. Hill*, (Colo. App. 1903) 72 Pac. Rep. 811.

*Delaware.* — *Jones v. Bush*, 4 Harr. (Del.) 1.

*Georgia.* — *Pope v. Tucker*, 23 Ga. 484; *Bowman v. Long*, 26 Ga. 142; *Walker v. Watson*, 32 Ga. 264; *Loyless v. Blackshear*, 43 Ga. 327.

*Illinois.* — *O'Melia v. Mullarky*, 124 Ill. 506.

*Indiana.* — *Adkins v. Hudson*, 11 Ind. 372;

*Myers v. Jackson*, 135 Ind. 136.

*Kansas.* — *Bayer v. Cockrill*, 3 Kan. 282.

See also *Boyer v. Sims*, 61 Kan. 593.

*Maine.* — *Blake v. Collins*, 69 Me. 156.

*Maryland.* — *Rogers v. Sisters of Charity*, 97 Md. 550; *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762.

*Massachusetts.* — *Thatcher v. Omans*, 3 Pick. (Mass.) 521.

*Michigan.* — *Everts v. Everts*, 80 Mich. 222.

*Minnesota.* — *Thompson v. Conant*, 52 Minn. 208.

*Missouri.* — *Pugh v. Hayes*, 113 Mo. 432; *Cornwell v. Orton*, 126 Mo. 355; *Rector v. Dalby*, 98 Mo. App. 189.

*New Hampshire.* — *Upham v. Varney*, 15 N. H. 462; *Hayes v. Tabor*, 41 N. H. 521.

*New Jersey.* — *Melick v. Pidcock*, 44 N. J. Eq. 525, 6 Am. St. Rep. 901.

*New York.* — *Ramsay v. De Remer*, 65 Hun (N. Y.) 212; *Jackson v. Root*, 18 Johns. (N. Y.) 60; *De Peyster v. Clendinning*, 8 Paige (N. Y.) 295; *Reformed Protestant Dutch Church v. Veeder*, 4 Wend. (N. Y.) 494; *Moorehouse v. Hutchinson*, (Supm. Ct. Spec. T.) 2 N. Y. Supp. 215; *Seidelbach v. Knaggs*, 44 N. Y. App. Div. 169, affirmed 167 N. Y. 585; *Lewis v. Howe*, 64 N. Y. App. Div. 572; *Rawson v. Lampman*, 5 N. Y. 456; *Wendt v. Walsh*, 164 N. Y. 154.

*North Carolina.* — *McKenzie v. Sumner*, 114 N. Car. 425; *Hallyburton v. Slagle*, 130 N. Car. 482.

*North Dakota.* — *Smith v. Security L. & T. Co.*, 8 N. Dak. 451.

*Pennsylvania.* — *Kay v. Scates*, 37 Pa. St. 31, 78 Am. Dec. 399; *Harrisburg First Baptist Church v. Pennsylvania Baptist State Mission Soc.*, 15 Pa. Co. Ct. 332; *Rodrigue's Appeal*, (Pa. 1888) 15 Atl. Rep. 680.

*Rhode Island.* — *Sullivan v. Chambers*, 18 R. I. 799.

*South Carolina.* — *Ramsay v. Marsh*, 2 McCord L. (S. Car.) 252, 13 Am. Dec. 717; *Lamar v. Simpson*, 1 Rich. L. (S. Car.) 71; *Reeves v. Brayton*, 36 S. Car. 384; *Robinson v. Ostendorff*, 38 S. Car. 66; *Foster v. Glover*, 46 S. Car. 522; *Holmes v. Pickett*, 51 S. Car. 271; *Simms v. Buist*, 52 S. Car. 554; *Howard v. Henderson*, 18 S. Car. 184.

*Tennessee.* — See *Hooberry v. Harding*, 10 Lea (Tenn.) 392.

*Texas.* — *Lewis v. Castleman*, 27 Tex. 407.

*Utah.* — *Henderson v. Adams*, 15 Utah 30; *Schenck v. Wicks*, 23 Utah 576.

*Vermont.* — *Atkins v. Atkins*, 70 Vt. 565.

*Wisconsin.* — *Hannig v. Mueller*, 82 Wis. 235; *Tyson v. Tyson*, 96 Wis. 59; *Holmes v. Walter*, 118 Wis. 409.

In *Matter of Fair*, 132 Cal. 523, it was held

the statute executes as dry, formal, naked, or passive trusts, it is evident that in such cases there is no trust whatever, since the use is executed immediately and no title ever vests in the trustee;<sup>1</sup> or if the trustee has had title, and his duties come to an end, the statute executes the trust and the trustee's title is totally destroyed.<sup>2</sup> The authorities are not in accord upon the question whether a conveyance of the property must be made by the trustee before the estate can end, but that depends entirely on whether the conveyance is regarded as one of the essential duties of the trust, and in no way affects the rule that the trustee's title is divested by the statute when his duties are performed.<sup>3</sup>

**The Title of a "Bare Trustee."** — Where the *cestui que trust* has had to resort to a court of equity to obtain his property, the trustee has been referred to as holding the bare legal title, which he could be compelled to convey.<sup>4</sup> Such

that the English statute of uses is inconsistent with and repugnant to the whole system of conveyancing and registry under the laws of California and does not operate to execute any use or trust, and that the statute of uses and trusts now in force in that state contains no provision similar to that of the English statute of uses which vests the legal title in the *cestui que trust*.

**In Tennessee** the statute of uses has never, by either judicial decision or legislative enactment, been adopted. *Murdock v. Johnson*, 7 Coldw. (Tenn.) 605; *Hooberry v. Harding*, 10 Lea (Tenn.) 392.

**Implied Trust Executed by Statute.** — *Fellows v. Ripley*, 69 N. H. 410. See also *Winslow v. Young*, 94 Me. 145. Compare *Johnson v. Fleet*, 14 Wend. (N. Y.) 176. *Contra*, *United Brethren Church v. Maline* First M. E. Church, 138 Ill. 608.

**Occupancy of Person Not a Beneficiary.** — A provision in a conveyance in trust for the settlor's daughter-in-law that the settlor's son shall occupy the premises for as long as he shall desire will not prevent the execution of the trust in the daughter-in-law by the statute of uses, the trustee having no active duties to perform. *Foster v. Glover*, 46 S. Car. 522.

**In Pennsylvania**, it is declared, the English doctrine as to the execution of trusts has been extended, so that many trusts which in England would be regarded as alive are executed under the laws of Pennsylvania. *Kay v. Scates*, 37 Pa. St. 31, 78 Am. Dec. 399.

**Application of Statute of Uses to Devises.** — A use raised by a devise is not executed in the *cestui que use* on the ground that the statute of uses applies directly to wills, for that statute was passed before the statute of devises, but upon the assumption that the testator intended that the same rule which the statute of uses made applicable to settlements of real estate should be applied to gifts or devises by will. Beyond this the statute of uses has no direct bearing. *Baker v. White*, L. R. 20 Eq. 166.

**In Virginia and West Virginia** the statute of uses in effect does not apply to uses created by devise, the legal title in such cases remaining in the trustee. *Bass v. Scott*, 2 Leigh (Va.) 356; *Jones v. Tatum*, 19 Gratt. (Va.) 732; *Ocheltree v. McClung*, 7 W. Va. 232; *Carney v. Kain*, 40 W. Va. 758.

**The Michigan Statute**, How. Stat. Mich., §

5567, will not execute a trust which is not raised by the conveyance, but is expressed in certain letters written at a different time. *Loring v. Palmer*, 118 U. S. 321.

**Estate Executed Without Aid of Statute.** — The freehold estate which vests in a releasee, under deed of lease and release, by enlargement, is an estate at common law which did not require the aid of the statute of uses to execute the possession to their use. *Hurst v. M'Neil*, 1 Wash. (U. S.) 70.

**1. Title at No Time in Trustee** — *Alabama*. — *Tindal v. Drake*, 51 Ala. 574.

*Illinois*. — *Witham v. Brooner*, 63 Ill. 344.

*Minnesota*. — *Thompson v. Conant*, 52 Minn. 208.

*New York*. — *Ramsay v. De Remer*, 65 Hun (N. Y.) 212; *Welch v. Allen*, 21 Wend. (N. Y.) 147.

*North Dakota*. — *Smith v. Security L. & T. Co.*, 8 N. Dak. 451.

*Rhode Island*. — *Sullivan v. Chambers*, 18 R. I. 799.

*South Carolina*. — *Robinson v. Ostendorff*, 38 S. Car. 66; *Simms v. Buist*, 52 S. Car. 554.

*Utah*. — *Schenck v. Wicks*, 23 Utah 576.

*Wisconsin*. — *Hannig v. Mueller*, 82 Wis. 235; *Holmes v. Walter*, 118 Wis. 409.

**A Trust Is Defined** as a use not executed by the statute of uses in the *cestui que use*, but vesting the legal title in the grantee or trustee. *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762.

**"Momentary Seizin."** — In *O'Melia v. Mul-larky*, 124 Ill. 506, a "dry trust" is described as arising where a trustee acquired "a momentary seizin to serve the use which the statute executed by transferring legal estates to the beneficiaries."

**2.** See *infra*, this section, *Duration and Termination*.

**3.** See *infra*, this subsection, *Active or Special Trusts and How They Arise — Conveyance to Beneficiary*.

**4. "Bare Legal Title" in Trustee.** — *Winslow v. Young*, 94 Me. 145; *Ryland v. Banks*, 151 Mo. 1; *Brown v. Harris*, 7 Tex. Civ. App. 664.

**Bare Trustee Defined.** — A bare trustee is one to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trustent*, be compellable in equity to convey the estate to them. *Christie v. Ovington*, 1 Ch. D. 279.



expressions, however, cannot be allowed to militate against the rule just stated,<sup>1</sup> for no person can be a trustee in law unless he has a vested interest in the trust property.<sup>2</sup>

**Executed Trust Distinguished from Executed Use.** — A distinction has been pointed out between an "executed trust" and a use executed by the statute of uses and conferring no title on the trustee. The executed trust has been defined as a trust in which the purposes and limitations of the trust are fully and perfectly declared, as distinguished from the executory trust which is declared only in general terms, and the performance of which is left substantially to the discretion of the trustee. In the case of both executed and executory trusts, according to this classification, the legal title is in the trustee.<sup>3</sup>

*b. EXCEPTIONS TO OPERATION OF STATUTE* — (1) *Limitations of a Use upon a Use.* — It was held at an early date, and the rule has been subsequently followed, that no use could be limited upon a use, so that, upon a feoffment of lands to A to the use of B, with a further limitation in trust for C, the statute executed the first use only, thus fixing the entire legal estate in B. That, however, being manifestly contrary to the intention of the parties, equity proceeded to declare C the owner in equity of the lands, the legal title of which remained in B as trustee.<sup>4</sup>

(2) *Conveyances of Leaschold and Chattel Interests.* — The word "seized," employed by the statute of uses, has been construed to apply only to a freehold interest in lands, and hence upon a conveyance of lands for a term of years or of personal property in trust, the statute did not execute the trust, but the legal title to the property remained in the trustee and the equitable or beneficial interest passed to the *cestui que trust*.<sup>5</sup>

*West Virginia.* — In *Carney v. Kain*, 40 W. Va. 758, it is stated that the legal ownership in the trustee may consist of a dry passive trust — a mere resting place for the legal title. The case at bar, however, was a trust arising under a devise, which in that state is not within the statute of uses.

1 See cases cited under preceding notes.

2. *Owen v. Owen*, 1 Atk. 494.

3. **Executed Trust Distinguished from Executed Use.** — *Baker v. Nall*, 59 Mo. 265; *Martling v. Martling*, 55 N. J. Eq. 771; *Cushing v. Blake*, 30 N. J. Eq. 689. See also *Evans v. King*, 3 Jones Eq. (56 N. Car.) 387.

4. **Title in Trustee Because Second Use Not Executed.** — 2 Black. Com. 335. See also the following cases:

*England.* — *Tyrel's Case*, 2 Dyer 155a; *Doe v. Passingham*, 6 B. & C. 305, 13 E. C. L. 180; *Hopkins v. Hopkins*, 1 Atk. 581; *Symson v. Turner*, 1 Eq. Cas. Abr. 383, par. 1.

*United States.* — *Hurst v. McNeil*, 1 Wash. (U. S.) 76; *Croxall v. Sherer*, 5 Wall. (U. S.) 268.

*Illinois.* — *Kirkland v. Cox*, 94 Ill. 400.

*Maine.* — *Wyman v. Brown*, 50 Me. 157.

*Maryland.* — *Reid v. Gordon*, 35 Md. 183.

*Missouri.* — *Guest v. Farley*, 19 Mo. 147.

*New Hampshire.* — *Hutchins v. Heywood*, 50 N. H. 496.

*New Jersey.* — *Price v. Sisson*, 13 N. J. Eq. 168; *Cueman v. Broadnax*, 37 N. J. L. 508.

*South Carolina.* — *Ramsay v. Marsh*, 2 McCord L. (S. Car.) 252, 13 Am. Dec. 718; *Blount v. Walker*, 31 S. Car. 13.

5 **Trust in Chattel Interests Vests Legal Title in Trustee.** — 2 Black. Com. 336. See also the following cases:

*England.* — Question by Lord Chancellor, 3

*Dyer* 469a; *Symson v. Turner*, 1 Eq. Cas. Abr. 383, par. 1.

*United States.* — *Hurst v. McNeil*, 1 Wash. (U. S.) 70.

*Alabama.* — *Williams v. McConico*, 36 Ala. 22.

*Georgia.* — *Wynn v. Lee*, 5 Ga. 217; *Schley v. Lyon*, 6 Ga. 530.

*Illinois.* — *Kirkland v. Cox*, 94 Ill. 400; *Ure v. Ure*, 185 Ill. 216.

*Kentucky.* — See *Myers v. Daviess*, 10 B. Mon. (Ky.) 394.

*Maryland.* — *Hanson v. Worthington*, 12 Md. 418; *Denton v. Denton*, 17 Md. 403; *Milholand v. Whalen*, 89 Md. 212; *Byrne v. Gunning*, 75 Md. 30.

*Massachusetts.* — *Norton v. Leonard*, 12 Pick. (Mass.) 152.

*Missouri.* — *Slevin v. Brown*, 32 Mo. 176.

*New York.* — *Kane v. Gott*, 24 Wend. (N. Y.) 641, 35 Am. Dec. 641; *Savage v. Burnham*, 17 N. Y. 571; *Day v. Roth*, 18 N. Y. 448; *Gilman v. McArdle*, 99 N. Y. 451, 52 Am. Rep. 41; *Matter of Carpenter*, 131 N. Y. 86; *Bunn v. Vaughan*, (Ct. App.) 5 Abb. Pr. N. S. (N. Y.) 271; *Brown v. Harris*, 25 Barb. (N. Y.) 136; *Forsyth v. Rathbone*, 34 Barb. (N. Y.) 388; *Cutting v. Cutting*, 20 Hun (N. Y.) 371.

*North Carolina.* — *McKenzie v. Sumner*, 114 N. Car. 425.

*South Carolina.* — *Harley v. Platts*, 6 Rich. L. (S. Car.) 310; *Rice v. Burnett*, Spears Eq. (S. Car.) 579, 42 Am. Dec. 336; *Joar v. Hodges*, Spears Eq. (S. Car.) 593; *Ramsay v. Marsh*, 2 McCord L. (S. Car.) 252, 13 Am. Dec. 717.

**Rule of Construction** — The inclusion in the trust estate of property which cannot vest in the beneficiary under the statute of uses is a

**Execution of Trust in Personalty by Common Law.** — It has been held, however, that a trust in chattel interests, while not within the statute of uses, is executed at common law,<sup>1</sup> or by the delivery of the property to the beneficiary,<sup>2</sup> or, when there is no reason why the trustee should retain the title, equity will require a conveyance to the beneficiary.<sup>3</sup>

(3) *Active or Special Trusts and How They Arise* — (a) **Rules Governing the Trustee's Estate** — *aa.* **IN RESPECT TO TITLE.** — The instances heretofore noted in which the trustee takes the legal title arise, it will be observed, out of the technical construction of the statute of uses.<sup>4</sup> The class of trusts with which we are almost wholly concerned are denominated active, live, or special trusts, and owe their existence to the general principle of law that a trustee can perform his trust only by virtue and in respect of the estate vested in him,<sup>5</sup> and the general rule of convenience and necessity that where a trustee is given duties and powers, for the discharge or exercise of which it is requisite that he should take the legal estate, the statute does not execute the use and a valid trust arises,<sup>6</sup> regardless of the words of the creating instru-

circumstance favoring such a construction of the instrument creating the trust as will give the trustee the legal title to the entire property. *Ure v. Ure*, 185 Ill. 216.

**Trust in Freehold and Copyhold Estates.** — When freeholds and copyholds were devised in trust the legal title to the freeholds passed to the beneficiary, but the trustees took the legal title to the copyholds, the latter not being within the statute of uses. *Baker v. White*, L. R. 20 Eq. 166.

**Lands Equitably Converted** by reason of a direction by the testator that the lands should be sold, though no sale had taken place, are personalty to which the statute of uses does not apply. *Van Zandt v. Garretson*, 21 R. I. 352.

**The Mortgagee's Interest in Realty** covered by the mortgage, prior to entry for condition broken, is of such a nature that the statute of uses does not transfer it to the beneficiary. *Merrill v. Brown*, 12 Pick. (Mass.) 216.

**1. Trust in Personalty Executed at Common Law.** — *Bowman v. Long*, 26 Ga. 142. See also *McKenzie v. Sumner*, 114 N. Car. 425.

**2. Trust of Personalty Executed upon Delivery to Beneficiary.** — *Carradine v. Carradine*, 33 Miss. 698. See also *Bowen v. Bower*, 19 Mo. 399, holding that trustees cannot recover property in the possession of the grantee of the *cestui que trust* while the estate of the latter continues.

**3. Title Conveyed to Beneficiary.** — *Monroe v. Trenholm*, 114 N. Car. 590.

**4.** 2 Black. Com. 335, 336.

**5. Trusts Performed Only by Virtue of Trustee's Vested Estate.** — *Watson v. Pearson*, 2 Exch. 581.

**6. Legal Title in Trustee for Performance of Trust.** — 2 Black. Com. 336. See also the following cases.

*England.* — *Harton v. Harton*, 7 T. R. 650; *Nevil v. Saunders*, 1 Vern. 415; *Pybus v. Smith*, 3 Bro. C. C. 340; *Wright v. Pearson*, 1 Eden 125; *Davies v. Jones*, 24 Ch. D. 190; *Barker v. Greenwood*, 4 M. & W. 420.

*United States.* — *Title Guarantee, etc., Co. v. Northern Counties Invest. Trust*, 73 Fed. Rep. 931.

*Alabama.* — *You v. Flinn*, 34 Ala. 409.

*California.* — See *Hearst v. Pujol*, 44 Cal. 230.

*Connecticut.* — *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390.

*Georgia.* — *Byne v. Coker*, 100 Ga. 445; *Baillie v. Carolina Interstate Bldg., etc., Assoc.*, 100 Ga. 20; *Taylor v. Brown*, 112 Ga. 758.

*Illinois.* — *Meacham v. Steele*, 93 Ill. 135; *Kirkland v. Cox*, 94 Ill. 400; *Ure v. Ure*, 185 Ill. 216; *Preachers' Aid Soc. v. England*, 106 Ill. 129; *Kellogg v. Hale*, 108 Ill. 164; *Hart v. Seymour*, 147 Ill. 598.

*Maine.* — *Morton v. Barrett*, 22 Me. 257, 39 Am. Dec. 575.

*Massachusetts.* — *Cleveland v. Hallett*, 6 Cush. (Mass.) 403; *Fay v. Taft*, 12 Cush. (Mass.) 448; *Norton v. Leonard*, 12 Pick. (Mass.) 152; *Phelps v. Phelps*, 143 Mass. 570.

*Missouri.* — *Pugh v. Hayes*, 113 Mo. 424; *Webb v. Hayden*, 166 Mo. 39; *Newton v. Rebennack*, 90 Mo. App. 650.

*New Hampshire.* — *Exeter v. Odiorne*, 1 N. H. 232; *Upham v. Varney*, 15 N. H. 462; *Troy v. Haskell*, 33 N. H. 533; *Hutchins v. Heywood*, 50 N. H. 500.

*New Jersey.* — *Price v. Sisson*, 13 N. J. Eq. 168; *Cooper v. Cooper*, 36 N. J. Eq. 121.

*New York.* — *Vander Volgen v. Yates*, 3 Barb. Ch. (N. Y.) 242; *Wood v. Wood*, 5 Paige (N. Y.) 596, 28 Am. Dec. 451; *Welch v. Allen*, 21 Wend. (N. Y.) 147; *Brewster v. Striker*, 1 E. D. Smith (N. Y.) 321, *affirmed* (Ct. App.) 5 How. Pr. (N. Y.) 40, 2 N. Y. 19; *Leggett v. Perkins*, 2 N. Y. 297; *Manice v. Manice*, 43 N. Y. 303; *Bennett v. Garlock*, 79 N. Y. 302, 35 Am. Rep. 517; *Dyett v. Central Trust Co.*, 120 N. Y. 54.

*Ohio.* — *Williams v. First Presb. Soc.*, 1 Ohio St. 478.

*Pennsylvania.* — *Shallcross's Estate*, 13 Phila. (Pa.) 374, 37 Leg. Int. (Pa.) 283; *Kay v. Scates*, 37 Pa. St. 31, 78 Am. Dec. 390; *Girard L. Ins., etc., Co. v. Chambers*, 46 Pa. St. 485, 86 Am. Dec. 513; *Barnett's Appeal*, 46 Pa. St. 392, 86 Am. Dec. 502; *Philadelphia Trust, etc., Co.'s Appeal*, 93 Pa. St. 209; *Little v. Wilcox*, 119 Pa. St. 439.

*Rhode Island.* — *Sprague v. Sprague*, 13 R. I. 701.

*South Carolina.* — *Porter v. Doby*, 2 Rich. E. (S. Car.) 49; *Gadsden v. Cappedeville*, 3

ment;<sup>1</sup> and where there is a devise to trustees upon various trusts, some of which require the legal estate to remain in the trustee and others which in themselves would not do so, the whole legal fee remains in the trustee.<sup>2</sup> If, however, estates are conveyed in trust for different persons, the statute may execute the use in one case and not in another.<sup>3</sup>

*bb. IN RESPECT TO QUANTITY OR DURATION*—(aa) *Estate Adequate for Trust Implied*.—The same principle is applicable in determining the quantity of the trustee's estate. If there is an axiom in the law, it must be regarded as axiomatic, in the construction of active trusts, that the trustee will take precisely that quantum of legal estate which is necessary to the discharge of the declared powers and duties of the trust.<sup>4</sup> Thus, the trustee will take by implication of law a fee in the estate when the duties of the trust require it, although the conveyance is in terms of a life estate,<sup>5</sup> or fails to use the word "heirs."<sup>6</sup>

**Where a Mere Power Will Suffice** to enable trustees to perform the duties required,

Rich. L. (S. Car.) 467; *Howard v. Henderson*, 18 S. Car. 189; *Carrigan v. Drake*, 36 S. Car. 354; *Holmes v. Pickett*, 51 S. Car. 271; *Blount v. Walker*, 31 S. Car. 13.

*South Dakota*.—*Brace v. Van Eps*, 12 S. Dak. 191.

*Tennessee*.—*Turley v. Massengill*, 7 Lea (Tenn.) 353; *Hooberry v. Harding*, 10 Lea (Tenn.) 392; *Jourrolmon v. Massengill*, 86 Tenn. 81; *Henson v. Wright*, 88 Tenn. 501.

*Virginia*.—*Nickell v. Handly*, 10 Gratt. (Va.) 336.

*West Virginia*.—*Carney v. Kain*, 40 W. Va. 758.

*Wisconsin*.—*Perkins v. Burlington Land, etc., Co.*, 112 Wis. 509; *Holmes v. Walter*, 118 Wis. 409.

**The True Test of the Trustee's Estate** is whether a court of equity would decree a conveyance of the legal title. *Rife v. Geyer*, 59 Pa. St. 393, 98 Am. Dec. 351; *Little v. Wilcox*, 119 Pa. St. 439.

**Where the Purpose of the Trust Is Indefinite** or the beneficiaries are unknown, it has been held that the trustees take the legal title. *Silverman v. Kristufek*, 162 Ill. 222; *Collins v. Phillips*, 91 Iowa 210; *Boyer v. Sims*, 61 Kan. 593. See also *Brown v. Harris*, 7 Tex. Civ. App. 664.

**In New York** the particular purposes which will support an active trust are enumerated by statute (formerly 1 Rev. Stat. N. Y., p. 728, § 55). See *Cowen v. Rinaldo*, 82 Hun (N. Y.) 479; *McComb v. Title Guarantee, etc., Co.*, 70 N. Y. App. Div. 618.

*Statutes Not Retroactive*.—*Stewart v. McMartin*, 5 Barb. (N. Y.) 438; *Murray v. Miller*, 85 N. Y. App. Div. 414.

**1. Words of Creating Instrument**.—*Brewster v. Striker*, 1 E. D. Smith (N. Y.) 321.

**2. Various Trusts**.—*Brown v. Whiteway*, 8 Hare 145.

**Different Duties with Respect to Different Beneficiaries**.—A deed conveying property to a trustee in trust for the three grantors, who were to control all investments, and providing that the trustee should hold the share of one grantor free from the control of her husband, the share of another free from liability for any of his debts, and with respect to a piece of property held in common by the three grantors, that in the case of two of them, each might sell his undivided interest therein with the

"assent and concurrence of the trustee," and that the third grantor might sell and convey her interest, "said trustee co-operating and uniting," invested the trustee with the same kind and character of estate in all the property. *Warner v. Sprigg*, 62 Md. 14.

**3.** *Howard v. Henderson*, 18 S. Car. 184.

**4. Estate Adequate for Trust Implied**—*England*.—*Marshall v. Gingell* 21 Ch. D. 790; *Creaton v. Creaton*, 3 Smale & G. 386; *Spence v. Spence*, 12 C. B. N. S. 199, 104 E. C. L. 199; *Fenwick v. Potts*, 8 De G. M. & G. 506; *Gibson v. Montford*, 1 Ves. 485; *Collier v. Walters*, L. R. 17 Eq. 252.

*United States*.—*Young v. Bradley*, 101 U. S. 782; *Ward v. Amory*, 1 Curt. (U. S.) 419.

*Alabama*.—*Doe v. Ladd*, 77 Ala. 223; *Robinson v. Pierce*, 118 Ala. 273, 72 Am. St. Rep. 160.

*Georgia*.—*Liptrot v. Holmes*, 1 Ga. 390.

*Illinois*.—*Lawrence v. Lawrence*, 181 Ill. 248.

*Massachusetts*.—*Cleveland v. Hallett*, 6 Cush. (Mass.) 403; *Gould v. Lamb*, 11 Met. (Mass.) 84, 45 Am. Dec. 187; *Norton v. Leonard*, 12 Pick. (Mass.) 152; *Newhall v. Wheeler*, 7 Mass. 189; *Stearns v. Palmer*, 10 Met. (Mass.) 32.

*Mississippi*.—*Coulter v. Robertson*, 24 Miss. 278, 57 Am. Dec. 168.

*New York*.—*Norton v. Norton*, 2 Sandf. (N. Y.) 296; *Welch v. Allen*, 21 Wend. (N. Y.) 147.

*North Carolina*.—*Payne v. Sale*, 2 Dev. & B. Eq. (22 N. Car.) 455.

*Rhode Island*.—*Ames v. Ames*, 15 R. I. 12.

*South Carolina*.—*Williman v. Holmes*, 4 Rich. Eq. (S. Car.) 475; *McCaw v. Galbraith*, 7 Rich. L. (S. Car.) 74; *Blount v. Walker*, 31 S. Car. 13.

*Tennessee*.—*Henderson v. Hill*, 9 Lea (Tenn.) 25; *Jourrolmon v. Massengill*, 86 Tenn. 81; *Nashville First Nat. Bank v. Nashville Trust Co.*, (Tenn. Ch. 1901) 62 S. W. Rep. 392.

*Texas*.—*Cleveland v. Cleveland*, 89 Tex. 445.

*West Virginia*.—*Carney v. Kain*, 40 W. Va. 758.

**5. Conveyance for Life**.—*Robinson v. Pierce*, 118 Ala. 273, 72 Am. St. Rep. 160; *Matter of Fair*, 132 Cal. 523.

**6. Failure to Use Word Heirs Immaterial**.—



and no estate is given, it has been held that the trustees take no implied estate.<sup>1</sup>

(bb) *Estate Not Unnecessarily Extended.* — On the other hand, if the language by which the trust estate is vested conveys to the trustee and his heirs forever, or creates some other estate of greater quantity than the trust requires, or an estate of indefinite duration, the estate will nevertheless not extend beyond the term required by the exigencies of the trust,<sup>2</sup> the unnecessary portion of the estate becoming executed by the statute of uses.<sup>3</sup>

(cc) *Distinction Between Deeds and Wills.* — The general doctrine as to the quantity of the trustee's estate has been restricted by some authorities in cases where the trust is created by conveyance by deed. It is declared that courts are more cautious, when the trusts are created by deed, in restraining the title of the trustee to the mere purposes of the trusts, and will not cut down the title of the trustee to a life estate, or other less interest, in opposition to the language of the deed, merely because an estate in fee was unnecessary to the completion of the trusts.<sup>4</sup> Such a distinction is, however, of very limited application, especially in the United States, for a deed of conveyance, like other instruments, is to be construed according to the intention of the maker, subject only to certain rules necessary to the uniformity and certainty of the law, and where the intention may be clearly inferred from provisions in the deed which have acquired a legal signification, the duration of the trust will be governed accordingly.<sup>5</sup>

*Gibson v. Rogers*, Ambl. 93, 1 Ves. 485; *Shaw v. Weigh*, 1 Eq. Cas. Abr. 185, par. 28, 8 Mod. 253; *Bagshaw v. Spencer*, 1 Ves. 142; *Gibson v. Montford*, 1 Ves. 485; *Villiers v. Villiers*, 2 Atk. 72; *West v. Fitz*, 109 Ill. 425; *Neilson v. Lagow*, 4 Ind. 607; *Packard v. Old Colony R. Co.*, 168 Mass. 92; *Fisher v. Fields*, 10 Johns. (N. Y.) 495. Compare *In re Hudson*, 13 Reports 546.

**Adequate Estate Taken Regardless of Words of Creation.** — *Toronto Gen. Trust Co. v. Chicago*, etc., R. Co., 123 N. Y. 37; *Young v. Bradley*, 101 U. S. 782. See also *Showman v. Miller*, 6 Md. 479.

**1. Mere Power Sufficient.** — *Dean v. Dean*, (1891) 3 Ch. 150; *Henderson v. Henderson*, 113 N. Y. 1; *Holmes v. Walter*, 118 Wis. 409. See also *Brown v. Richter*, 25 N. Y. App. Div. 239; *Lewis v. Howe*, 64 N. Y. App. Div. 572.

**2. Estate Not Unnecessarily Extended.** — *England.* — *Doe v. Nicholls*, 1 B. & C. 336, 8 E. C. L. 144; *Ward v. Burbury*, 18 Beav. 190; *Doe v. Simpson*, 5 East 162; *Doe v. Davies*, 1 Q. B. 430, 41 E. C. L. 611, quoted in *Collier v. Walters*, L. R. 17 Eq. 252; *Curtis v. Price*, 12 Ves. Jr. 89; *Heardson v. Williamson*, 1 Keen 33.

*United States.* — *Young v. Bradley*, 101 U. S. 782.

*Alabama.* — *Comby v. McMichael*, 19 Ala. 747; *Schaffer v. Lavretta*, 57 Ala. 14; *Doe v. Ladd*, 77 Ala. 223; *Robinson v. Pierce*, 118 Ala. 273, 72 Am. St. Rep. 160; *Cherry v. Richardson*, 120 Ala. 242.

*District of Columbia.* — *Hamilton v. Clarke*, 3 Mackey (D. C.) 428.

*Georgia.* — *Milledge v. Bryan*, 49 Ga. 397; *Henderson v. Williams*, 97 Ga. 709.

*Illinois.* — *West v. Fitz*, 109 Ill. 425; *Kohtz v. Eldred*, 208 Ill. 60.

*Indiana.* — *Nelson v. Davis*, 35 Ind. 474.

*Mississippi.* — *Mitchell v. Mitchell*, 35 Miss. 108.

*New York.* — *Bellinger v. Shafer*, 2 Sandf. Ch. (N. Y.) 293; *Peck v. Brown*, 2 Robt. (N. Y.) 119; *Irving v. De Kay*, 9 Paige (N. Y.) 521; *Watkins v. Reynolds*, 123 N. Y. 211; *Salisbury v. Slade*, 22 N. Y. App. Div. 346; *Brown v. Richter*, 25 N. Y. App. Div. 239.

*Ohio.* — *Broadrup v. Woodman*, 27 Ohio St. 553.

*Pennsylvania.* — *Dodson v. Ball*, 60 Pa. St. 492, 100 Am. Dec. 586; *Wells v. McCall*, 64 Pa. St. 207; *Westcott v. Edmunds*, 68 Pa. St. 34; *Stokes's Appeal*, 80 Pa. St. 337; *Audenreid's Estate*, 4 Pa. Dist. 507. See also *Culbertson's Appeal*, 76 Pa. St. 145.

*South Carolina.* — *Williman v. Holmes*, 4 Rich. Eq. (S. Car.) 475.

*Tennessee.* — *Park v. Cheek*, 4 Coldw. (Tenn.) 20; *Murdock v. Johnson*, 7 Coldw. (Tenn.) 605; *Smith v. Metcalf*, 1 Head (Tenn.) 64; *Ellis v. Fisher*, 3 Sneed (Tenn.) 231, 65 Am. Dec. 52; *Temple v. Ferguson*, (Tenn. 1903) 72 S. W. Rep. 455; *Harding v. St. Louis L. Ins. Co.*, 2 Tenn. Ch. 465.

In *Tennessee* this rule obtains although the statute of uses is not in effect in that state. *Murdock v. Johnson*, 7 Coldw. (Tenn.) 605; *Turley v. Massengill*, 7 Lea (Tenn.) 353. See also *infra*, this section, *Duration and Termination*.

**Rule Applies to Express Trusts in Personality.** — *Brown v. Richter*, 25 N. Y. App. Div. 239.

**3. Unnecessary Portion of Estate Executed by Statute.** — *Doe v. Simpson*, 5 East 162; *Schaffer v. Lavretta*, 57 Ala. 14.

**Remainders and Reversions Executed.** — The statute of uses by its express terms embraces estates in remainders and reversions. *Williman v. Holmes*, 4 Rich. Eq. (S. Car.) 475.

**4. Distinction Between Deeds and Wills.** — *Lewis v. Rees*, 3 Kay & J. 132; *Wykham v. Wykham*, 18 Ves. Jr. 395; *Colmore v. Tyndall*, 2 Y. & J. 605; *Comby v. McMichael*, 19 Ala. 747; *Watkins v. Specht*, 7 Coldw. (Tenn.) 585.

**5. Distinction of Limited Application.** — *King*

*cc.* BURDEN OF PROOF. — A general conveyance or devise to trustees and their heirs under a trust the purposes of which require them to have some legal estate of freehold *prima facie* gives them the fee, and the burden of proof is on the parties alleging that they take a less estate to show what less estate will serve the purpose of the trust.<sup>1</sup>

**Purchase by Trustee Presumed to Be in Aid of Estate.** — Where a trustee takes land in trust the title to which is imperfect, and he afterwards buys and takes another title in his own name so that the title in him is complete, and continues to hold without renouncing the trust, the presumption is that the purchase was made in aid of the trust.<sup>2</sup>

(b) **General Discretionary Powers.** — Regardless of the particular power given a trustee, if it be one which calls for the exercise of judgment and discretion, an active trust which the statute of uses does not affect is created, and the legal title is vested in the trustee.<sup>3</sup> But although discretion in the management of the state be conferred upon the trustee, if he actually has no duties to perform and the beneficiaries are all *sui juris*, the rules of property govern against the intention of the donor and the trust is executed.<sup>4</sup>

(c) **Payment of Debts or Legacies.** — Trustees to whom an estate has been conveyed or devised in trust, to sell and convey the same, or so much as may be necessary to pay certain debts or legacies, take a legal estate in fee in the interest which they must sell in the execution of the trust, notwithstanding language in the deed which, taken by itself, might raise a use, executed in the *cestui que trust*.<sup>5</sup>

*v. Parker*, 9 Cush. (Mass.) 71; *Comby v. McMichael*, 19 Ala. 747. See the next preceding subdivision of this section, *Estate Not Unnecessarily Extended*.

**1. Trustees Prima Facie Take Fee.** — *Doe v. Davies*, 1 Q. B. 430, 41 E. C. L. 611; *Poau v. Watson*, 6 E. & Bl. 606, 88 E. C. L. 606; *Collier v. Walters*, L. R. 17 Eq. 252; *Baker v. White*, L. R. 20 Eq. 166; *Houston v. Hughes*, 6 B. & C. 403, 13 E. C. L. 213; *West v. Fitz*, 109 Ill. 425.

**2. Purchase by Trustee Presumed to Be in Aid of Estate.** — *McCormick v. Ocean City Assoc.*, 45 N. J. Eq. 561; *Slade v. van Vechten*, 11 Paige (N. Y.) 21. See also *Marshall v. Carson*, 38 N. J. Eq. 250.

**3. General Discretionary Powers — Illinois.** — *Kirkland v. Cox*, 94 Ill. 400.

*Georgia.* — *Henderson v. Williams*, 97 Ga. 709; *Byne v. Corker*, 100 Ga. 445.

*Massachusetts.* — *Packard v. Marshall*, 138 Mass. 301.

*Missouri.* — *Simpson v. Erisner*, 155 Mo. 157; *Webb v. Hayden*, 166 Mo. 39.

*New Hampshire.* — *Exeter v. Odiorne*, 1 N. H. 232.

*Pennsylvania.* — *Kay v. Scates*, 37 Pa. St. 31, 78 Am. Dec. 399; *In re Krebs*, 184 Pa. St. 222.

*Tennessee.* — *Nashville First Nat. Bank v. Nashville Trust Co.*, (Tenn. Ch. 1901) 62 S. W. Rep. 392.

*West Virginia.* — *Carney v. Kain*, 40 W. Va. 758.

*Wisconsin.* — *Holmes v. Walter*, 118 Wis. 409.

**"Executed or Dry Trust."** — In *Cornwell v. Orton*, 126 Mo. 355, it was held that where a beneficiary has the possession and enjoyment of the estate, with the right to alien or charge the same as he or she pleases and require the

trustee to execute such conveyance of the legal estate as he or she may direct, and no discretion of management is in the trustee, the trust is merely an "executed or dry trust."

**4. Rules of Property Governing Against Expressed Intention of Donor.** — *Lester v. Stephens*, 113 Ga. 495. See also *Newton v. Rebennack*, 90 Mo. App. 650.

**5. Payment of Debts or Legacies — England.** — *Marshall v. Gingell*, 21 Ch. D. 790; *Creton v. Creton*, 3 Smale & G. 386; *Spence v. Spence*, 12 C. B. N. S. 199, 104 E. C. L. 199; *Leonard v. Sussex*, 2 Vern. 526; *Davies v. Jones*, 24 Ch. D. 190; *Collier v. M'Bean*, 34 Beav. 426; *Houston v. Hughes*, 6 B. & C. 403, 13 E. C. L. 213; *Baker v. White*, L. R. 20 Eq. 166; *Bagshaw v. Spencer*, 1 Ves. 142; *In re Brooke*, (1894) 1 Ch. 43.

*United States.* — *Neilson v. Lagow*, 12 How. (U. S.) 106; *U. S. v. Devereux*, (C. C. A.) 90 Fed. Rep. 182.

*California.* — *Saunders v. Schmaelzle*, 49 Cal. 59.

*Massachusetts.* — *Dakin v. Savage*, 172 Mass. 23. See also *Munro v. Merchants' Bank*, 11 Allen (Mass.) 216.

*Mississippi.* — *Brown v. Barte*, 10 Smed. & M. (Miss.) 268.

*New York.* — *Augustus v. Graves*, 9 Barb. (N. Y.) 595, affirmed 7 N. Y. 305; *Hawley v. James*, 5 Paige (N. Y.) 318; *Coster v. Lorillard*, 14 Wend. (N. Y.) 265; *Kelly v. Hoey*, 35 N. Y. App. Div. 273. See also *Bennett v. Garlock*, 79 N. Y. 302, 35 Am. Rep. 517.

*Wisconsin.* — *Perkins v. Burlington Land, etc., Co.*, 112 Wis. 509.

See also *infra*, this subsection, (c) *Sale, Conveyance, or Leasing of Estate*.

**When Necessity for Sale Does Not Arise.** — Where a testator gave the trustees power to sell certain lands in the event that such a sale

An Ordinary Deed of Trust to secure the payment of a debt, and providing for sale in case of default, invests the trustee with the legal title,<sup>1</sup> which matures on the day fixed for payment.<sup>2</sup>

(d) **Collection and Application of Rents and Profits.** — The duty to collect or receive the rents, profits, and income of the estate, and pay over the same to the persons entitled thereto, is generally inseparable from the personal control and supervision of the estate by the trustee, and requires that the legal title to the corpus upon which the rents and profits accrue shall be in the trustee;<sup>3</sup> especially where it is provided that the income shall remain free from the debts and liabilities of the beneficiary,<sup>4</sup> or the trustees are invested with a discretion as to the time, manner, and amount of the payments.<sup>5</sup>

In New York one of the purposes specified by statute for which a valid trust may exist is to receive the rents and profits and apply them to the use of any person during the life of such person. The statute has been construed and

became necessary to pay his debts, but the necessity did not in fact arise, the trustees did not take a fee-simple estate. *Hawker v. Hawker*, 3 B. & Ald. 537, 5 E. C. L. 368; *Peck v. Brown*, 2 Robt. (N. Y.) 119.

The Power to Sell for Specific Debts does not vest in the trustees such an estate as will authorize a sale of the premises after the payment of those debts. *Murdock v. Johnson*, 7 Coldw. (Tenn.) 605.

**Charge of Debts Extending Estate Beyond Term of Life Tenants.** — Where, by a will, there was a general charge of debts and a devise to trustees upon trust for certain persons for life, the extent of the estate vested in the trustees cannot be measured by the length or continuance of the equitable interest of two life tenants. *Creaton v. Creaton*, 2 Jur. N. S. 1223.

Under the New York Statute of uses and trusts (Rev. Stat., p. 728, § 55), a trust to sell property for distribution among legatees or to satisfy a charge on the lands by selling, leasing, or mortgaging the premises is active. *Russell v. Hilton*, 80 N. Y. App. Div. 178, affirmed 175 N. Y. 525; *Becker v. Becker*, 13 N. Y. App. Div. 342; *Cowen v. Rinaldo*, (Supm. Ct. Spec. T.) 8 Misc. (N. Y.) 115.

**Declaration to Secure Costs of Litigation.** — A declaration that the title to property is held to secure costs, counsel fees, and advances made and incurred in suits concerning the premises is not an express trust of which the trustee takes the legal title, under the New York statute. *Knickerbocker Ins. Co. v. Hill*, 3 Hun (N. Y.) 577.

1. *Cameron v. Phillips*, 60 Ga. 434.

2. **Title Matures on Day Fixed for Payment.** — *Marriott v. Givens*, 8 Ala. 694.

**A Conveyance in Trust to Be Void on Condition,** with the manifest intention that the *cestui que trust* should not take a vested legal estate in the property, is not executed by the statute of uses. *Norton v. Leonard*, 12 Pick. (Mass.) 152.

3. **Collection and Application of Rents and Profits** — *England*. — *Baker v. White*, L. R. 20 Eq. 166; *Barker v. Greenwood*, 4 M. & W. 421; *Silvester v. Wilson*, 2 T. R. 444; *Reynell v. Reynell*, 10 Beav. 21; *Symson v. Turner*, 1 Eq. Cas. Abr. 383, par. 1; *Stile v. Tomson*, 2 Dyer 210a.

*United States*. — Title Guarantee, etc., Co. v. Northern Counties Invest. Trust, 73 Fed. Rep. 931.

*California*. — *Matter of Dolan*, 79 Cal. 65; *Blackburn v. Webb*, 133 Cal. 420.

*Illinois*. — *Kirkland v. Cox*, 94 Ill. 400; *Kellogg v. Hale*, 108 Ill. 164.

*Maine*. — *Morton v. Barrett*, 22 Me. 257, 39 Am. Dec. 575.

*Maryland*. — *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762; *Worthington v. Rich*, 77 Md. 265.

*Missouri*. — *Pugh v. Hayes*, 113 Mo. 424; *Walton v. Ketchum*, 147 Mo. 209; *Newton v. Rebenack*, 90 Mo. App. 650.

*New Jersey*. — *Force v. Brown*, 32 N. J. Eq. 118; *Cooper v. Cooper*, 36 N. J. Eq. 121.

*Pennsylvania*. — *Bacon's Appeal*, 57 Pa. St. 504; *Girard L. Ins., etc., Co. v. Chambers*, 46 Pa. St. 485, 86 Am. Dec. 513; *Barnett's Appeal*, 46 Pa. St. 392, 86 Am. Dec. 502; *Harbster's Estate*, 133 Pa. St. 351.

*Rhode Island*. — *Greene v. Wilbur*, 15 R. I. 251; *Payton v. Almy*, 17 R. I. 605. See also *Sprague v. Thurber*, 17 R. I. 454.

*South Carolina*. — *Ramsay v. Marsh*, 2 McCord L. (S. Car.) 252, 13 Am. Dec. 717; *Porter v. Doby*, 2 Rich. Eq. (S. Car.) 49; *Wieters v. Timmons*, 25 S. Car. 488.

*Tennessee*. — *Hoober v. Harding*, 10 Lea (Tenn.) 392; *Henson v. Wright*, 88 Tenn. 501.

*Wisconsin*. — *Webber v. Webber*, 108 Wis. 626; *Perkins v. Burlington Land, etc., Co.*, 112 Wis. 509.

In California, by Civ. Code, § 857, subd. 3, providing for trusts to receive and pay the rents and profits, the active duty of applying and distributing the rents must be expressly imposed, and the mere holding them for the beneficiary is insufficient. *Carpenter v. Cook*, 132 Cal. 621.

To "Receive" the Rents and Profits to the use of the beneficiaries is not of itself sufficient to give the trustee the legal estate. *Carwardine v. Carwardine*, 1 Eden 33. See also *Holmes v. Pickett*, 51 S. Car. 271.

4. **Payment Over Free from Cestui's Debts.** — *Bennett v. Bennett*, 66 Ill. App. 28; *Worthington v. Rich*, 77 Md. 265; *Shankland's Appeal*, 47 Pa. St. 113; *Rife v. Geyer*, 59 Pa. St. 303, 98 Am. Dec. 351; *Forney's Estate*, 161 Pa. St. 209. See SPENDTHRIFTS AND SPENDTHRIFT TRUSTS, vol. 26, p. 143.

5. **Discretion in Respect to Payments.** — *Hardenburgh v. Blair*, 30 N. J. Eq. 645. See also *Tucker v. Johnson*, 16 Sim. 341.



applied in numerous decisions.<sup>1</sup>

**Language Merely Permissive.** — It is necessary that the trustee have some active duty to perform in connection with the income of the estate, and where he is only to "permit" or "suffer" the beneficiary to enjoy the rents and profits, he takes no title,<sup>2</sup> unless he is required to protect the income from the creditors of the *cestui que trust*,<sup>3</sup> or from the liabilities of the husband, if the beneficiary is a married woman,<sup>4</sup> or such terms are used as indicate that some other duty devolves upon the trustee.<sup>5</sup>

**The Duty to Collect and Distribute the Rents Will Be Implied from General Expressions in the creating instrument,** such as "to hold, manage, and control the estate," and it is not necessary in order to give the trustee the legal title to the land that the duty should have been imposed in terms.<sup>6</sup>

**The Mere Payment of the Proceeds of the estate, however, to a beneficiary who is sui juris, with no limitation over, no future estate to be preserved, no duty to protect the income from creditors, and no ultimate purpose of any kind requiring the continuance of the trust, does not raise an active trust in which the trustee takes title.**<sup>7</sup>

**(e) Sale, Conveyance, or Leasing of Estate.** — When the trustee is required or permitted to sell and convey, or lease the trust property, he must take a legal estate, for it is evident that he could not convey or lease that to which he had no title,<sup>8</sup> and in accordance with the well-recognized principle that the

**1. Construction and Application of New York Statute.** — *Boynton v. Hoyt*, 1 Den. (N. Y.) 53; *Campbell v. Low*, 9 Barb. (N. Y.) 585; *Marx v. McGlynn*, 4 Redf. (N. Y.) 455; *McCosker v. Brady*, 1 Barb. Ch. (N. Y.) 329; *Rogers v. Ludlow*, 3 Sandf. Ch. (N. Y.) 104; *Gott v. Cook*, 7 Paige (N. Y.) 521, *affirming* 24 Wend. (N. Y.) 641, 35 Am. Dec. 641; *Van Epps v. Van Epps*, 9 Paige (N. Y.) 237; *Irving v. De Kay*, 9 Paige (N. Y.) 521, 5 Den. (N. Y.) 646; *McLean v. McLean*, 66 Hun (N. Y.) 631, 21 N. Y. Supp. 326; *Matthews v. Studley*, 17 N. Y. App. Div. 303; *Staples v. Hawes*, 39 N. Y. App. Div. 548, *affirming* 24 Misc. (N. Y.) 475; *McKinlay v. Van Dusen*, 76 N. Y. App. Div. 200; *Fenton v. Fenton*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 479; *Woodgate v. Fleet*, 64 N. Y. 566; *Heermans v. Burt*, 78 N. Y. 259; *Salisbury v. Slade*, 160 N. Y. 278, *reversing* 22 N. Y. App. Div. 346.

**The Trust Must Depend upon the Life of the Beneficiary,** and the payment of the rents and profits to the beneficiary during the lives of other persons will not support an active trust. *Downing v. Marshall*, 23 N. Y. 366, 80 Am. Dec. 290.

**2. To "Permit" Beneficiary to Enjoy Income Vests No Title** — *Broughton v. Langley*, 2 Ld. Raym. 873; *Baker v. White*, L. R. 20 Eq. 166; *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762; *Pugh v. Hayes*, 113 Mo. 424; *Upham v. Varney*, 15 N. H. 463; *Price v. Sisson*, 13 N. J. Eq. 168; *Parks v. Parks*, 9 Paige (N. Y.) 107; *Ramsay v. Marsh*, 2 McCord L. (S. Car.) 252, 13 Am. Dec. 717.

**Construction of Wills and Deeds.** — A devise in trust to pay unto or else to permit and suffer the beneficiary to receive the rents and profits of the estate, vests the legal estate in the beneficiary, since the words "to permit," etc., come last, and, according to the construction of wills, prevail over the preceding words. If the instrument were a deed the trustee would take a legal estate. *Doe v. Biggs*, 2 Taunt. 109.

**Distinction Criticised.** — In *Doe v. Biggs*, 2 Taunt. 109, Mansfield, C. J., while recognizing the distinction made between "to pay" and "to permit or suffer" to enjoy, said: "It is miraculous how the distinction ever became established; for good sense requires that in both cases it should equally be a trust, and that the estate should be executed in the trustee; for how can a man be said to permit and suffer who has no estate, and no power to hinder the *cestui que trust* from receiving?"

**3. Protection of Income Against Creditor.** — *Hooberry v. Harding*, 10 Lea (Tenn.) 392.

**4. Seaton v. Lunney**, 27 Grant Ch. (U. C.) 169.

**5. To Permit Beneficiary to Take "Net" Rents.** — Where a devise gave lands in trust to permit and suffer the *cestui que trust* to take the net rents, the trustee took the legal title, as the term "net" must be in contradistinction from "gross," and means that the trustees are to receive the gross rents and after paying out of them taxes or other charges on the estate, hand over the net rents to the beneficiary. *Barker v. Greenwood*, 4 M. & W. 421.

**"Clear" Rents.** — In *White v. Parker*, 1 Bing. N. Cas. 573, 27 E. C. L. 493, it was held that a devise in trust to permit the beneficiary to receive the "clear rents," must mean the residue of the rents after defraying all expenses, and that the trustee takes a legal estate.

**6. Control of Rents Implied from General Expressions.** — *Ure v. Ure*, 185 Ill. 216; *Fay v. Taft*, 12 Cush. (Mass.) 448; *Pugh v. Hayes*, 113 Mo. 424; *Robert v. Corning*, 89 N. Y. 225; *Steinhardt v. Cunningham*, 130 N. Y. 292.

**7. Mere Payment of Proceeds.** — *Rodrigue's Appeal*, (Pa. 1888) 15 Atl. Rep. 680; *Brown v. Richter*, 25 N. Y. App. Div. 239, *reversing* 21 Misc. (N. Y.) 755; *Turnage v. Greene*, 2 Jones Eq. (55 N. Car.) 63, 62 Am. Dec. 208; *Jasper v. Maxwell*, 1 Dev. Eq. (16 N. Car.) 361.

**8. Power to Sell or Lease Estate — England.** —

quantity of the trust estate must be commensurate with the trust to be performed,<sup>1</sup> the power to sell and convey in fee simple vests in the trustees not only the legal title but a fee-simple estate.<sup>2</sup>

**Distinction Between Valid Trust and Mere Power.** — There appears to be a well-settled

*Rackham v. Siddall*, 1 Macn. & G. 607; *Mott v. Buxton*, 7 Ves. Jr. 201.

*Georgia*. — *Bailie v. Carolina Interstate Bldg., etc., Assoc.*, 100 Ga. 20; *Taylor v. Brown*, 112 Ga. 758.

*Illinois*. — *Kellogg v. Hale*, 108 Ill. 164; *Hart v. Seymour*, 147 Ill. 598.

*Indiana*. — *McCoy v. Monte*, 90 Ind. 441.

*Maryland*. — *Devries v. Hiss*, 72 Md. 560.

*Massachusetts*. — *Stockbridge v. Stockbridge*, 99 Mass. 244.

*Missouri*. — *Pugh v. Hayes*, 113 Mo. 424; *Walton v. Ketchum*, 147 Mo. 209.

*New Jersey*. — *Zabriskie v. Morris, etc., R. Co.*, 33 N. J. Eq. 22; *Martling v. Martling*, 55 N. J. Eq. 771.

*Pennsylvania*. — *Barnett's Appeal*, 46 Pa. St. 392, 86 Am. Dec. 502.

*South Carolina*. — *People's Loan, etc., Bank v. Garlington*, 54 S. Car. 413, 71 Am. St. Rep. 800.

*South Dakota*. — *Brace v. Van Eps*, 12 S. Dak. 191.

*Texas*. — *Matthews v. Darnell*, 27 Tex. Civ. App. 181.

*West Virginia*. — *Carney v. Kain*, 40 W. Va. 758.

*Wisconsin*. — *Perkins v. Burlington Land, etc., Co.*, 112 Wis. 509.

**Absence of Clause in Restraint of Allegation Gives Trustees Title.** — Under the *Kansas* statute executing the trust in the beneficiary when the trustee has no power of disposition or management of the estate, a grant to trustees with no clause restraining alienation gives the trustees the legal title. *Webb v. Rockefeller*, 66 Kan. 160. See also *Boyer v. Sims*, 61 Kan. 593.

**In California** an express trust to convey real property to the beneficiaries is not lawful under the statutes of the state, but is forbidden thereby and is totally invalid. *Matter of Fair*, 132 Cal. 523, approved 136 Cal. 79.

Under the Civ. Code Cal., § 857, subd. 1, authorizing trusts for the sale of property and the disposition of proceeds, an imperative duty must be imposed in terms upon the trustee, both to sell the property and dispose of the money thus obtained. *Carpenter v. Cook*, 132 Cal. 621.

**New York.** — Under Rev. Stat. N. Y., vol. 1, p. 729, § 56, a devise of lands to be sold or mortgaged, but where no authority is given the trustees to receive the rents and profits, vests no estate in the trustees. *De Peyster v. Clendining*, 8 Paige (N. Y.) 295; *Steinhardt v. Cunningham*, 130 N. Y. 292. See also *Irving v. De Kay*, 9 Paige (N. Y.) 521. Compare *Kelly v. Hoey*, 35 N. Y. App. Div. 273.

1. See *supra*, this subsection, *Rules Governing the Trustee's Estate* — *Estate Adequate for Trust Implied*.

2. **Power of Sale Requires Fee in Trustee** — *England*. — *Longley v. Longley*, L. R. 13 Eq. 133; *Dunnage v. White*, 1 Jac. & W. 563;

*Wortham v. Mackinnon*, 8 Bing. 564, 21 E. C. L. 357; *Shaw v. Weigh*, 1 Eq. Cas. Abr. 185, par. 28; *Bagshaw v. Spencer*, 2 Atk. 578, 1 Ves. 142; *Hawker v. Hawker*, 3 B. & Ald. 537, 5 E. C. L. 368; *Gibson v. Montford*, 1 Ves. 485; *Watson v. Pearson*, 2 Exch. 594.

*United States*. — *Neilson v. Lagow*, 12 How. (U. S.) 98.

*Alabama*. — *Robinson v. Pierce*, 118 Ala. 273, 72 Am. St. Rep. 160.

*Illinois*. — *Preachers' Aid Soc. v. England*, 106 Ill. 125; *West v. Fitz*, 109 Ill. 425; *Lawrence v. Lawrence*, 181 Ill. 248; *Kirkland v. Cox*, 94 Ill. 402.

*Maryland*. — *Spessard v. Rohrer*, 9 Gill (Md.) 262; *Devries v. Hiss*, 72 Md. 560.

*Missouri*. — *Newton v. Rebenack*, 90 Mo. App. 650.

*New Jersey*. — *Stokes v. Middleton*, 28 N. J. L. 32.

*New York*. — *Coster v. Lorillard*, 14 Wend. (N. Y.) 265; *Gott v. Cook*, 7 Paige (N. Y.) 521, affirmed 24 Wend. (N. Y.) 641, 35 Am. Dec. 641.

*South Carolina*. — *Gadsden v. Cappedeveille*, 3 Rich. L. (S. Car.) 467; *Ayer v. Ritter*, 29 S. Car. 135; *Blount v. Walker*, 31 S. Car. 13; *Brown v. McCall*, 44 S. Car. 503.

**The Fee Vests in the Trustees at Once** upon the testator's death and cannot descend, as a qualified or determinable fee, to the heirs of the testator, pending and subject to the exercise of the power of sale by the trustees. *Blount v. Walker*, 31 S. Car. 13.

**Title in Trustees until Sale Is Accomplished.** — *Augustus v. Graves*, 9 Barb. (N. Y.) 595.

**Portion of Estate Exempted from Sale.** — Where a testator devised lands in trust, with a power of sale in the trustees, except as to a certain portion of the premises, the trustees took title to the whole for the purposes of the trust. *Cruse v. Axtell*, 50 Ind. 49.

**Power to Lease Conferring Fee.** — In *Collier v. Walters*, L. R. 17 Eq. 252, it was held that a trust to lease shows that trustees do not have a bare power but take a legal estate, which, being of indefinite duration, in order to allow a leasehold interest to take effect out of it must be a fee.

**The Payment of an Annuity** which may necessitate a sale or mortgage of the trust estate, vests an inheritance in the trustee. *Gibson v. Rogers*, Amb. 93, 1 Ves. 485; *Fenwick v. Potts*, 8 De G. M. & G. 506.

**Executor Designated as Trustee.** — The power to sell the property and compound the debts of the testator given to the executor, who is also named as trustee of the residue of the estate for the benefit of his children, does not confer upon the trustee any legal estate, as he is to exercise such power in the capacity of executor, and the trust for the children becomes executed in them by the statute of uses. *Reeves v. Brayton*, 36 S. Car. 384; *Reeves v. Tappan*, 21 S. Car. 1.

distinction between a devise of lands to executors or testamentary trustees to sell and a devise that they shall sell or that the land shall be sold by them.<sup>1</sup> In a devise of the first description there is a power coupled with an interest and the legal estate passes; but the latter confers merely a naked trust power to sell.<sup>2</sup>

(f) **Investment of Funds.** — Closely associated with the power of sale is the authority sometimes conferred upon trustees to invest the funds of the estate, as the funds for investment often consist of the proceeds of a sale of trust property which the trustee was authorized to make. In such cases the trust is, of course, active.<sup>3</sup> A general power of investment, however, is in itself sufficient to sustain the trustee's title, although such a power seldom exists alone, but necessarily involves the performance of other duties, such as the collection and distribution of the income of the investment and the general control and management of the estate.<sup>4</sup>

(g) **Trusts for Beneficiaries Not Sui Juris.** — The care and preservation of an estate for infant beneficiaries or persons *non compos mentis* is sufficient to support an active trust.<sup>5</sup>

**Organizations Without Capacity to Take.** — Where the trust is for the benefit of an organization or association without capacity to take the legal title, the trustee will take the legal estate.<sup>6</sup>

(h) **Preservation of Contingent Remainders.** — Contingent remainders cannot take effect without an immediately preceding particular estate, except by special statutory provision.<sup>7</sup> In order to guard against the possible destruction of

1. *Fay v. Fay*, 1 Cush. (Mass.) 93.

2. **Whether Legal Estate or Mere Power Passes.** — 4 Kent Com. (5th ed.) 320; *Fay v. Fay*, 1 Cush. (Mass.) 93; *Compton v. McMahan*, 19 Mo. App. 494.

3. **Investment of Proceeds of Sale** — *Georgia*. — *Headen v. Quillian*, 92 Ga. 220; *Henderson v. Williams*, 97 Ga. 709; *Baile v. Carolina Interstate Bldg., etc., Assoc.*, 100 Ga. 20; *Taylor v. Brown*, 112 Ga. 758.

*Indiana*. — *McCoy v. Monte*, 90 Ind. 441.

*Missouri*. — *Newton v. Rebenack*, 90 Mo. App. 650; *Pugh v. Hayes*, 113 Mo. 424.

*New Jersey*. — *Martling v. Martling*, 55 N. J. Eq. 771.

*New York*. — *Gott v. Cook*, 7 Paige (N. Y.) 521, *affirmed* 24 Wend. (N. Y.) 641, 35 Am. Dec. 641; *Augustus v. Graves*, 9 Barb. (N. Y.) 595.

*South Carolina*. — *Carrigan v. Drake*, 36 S. Car. 354.

*Wisconsin*. — *Perkins v. Burlington Land, etc., Co.*, 112 Wis. 509.

4. **General Power of Investment.** — *Davies v. Jones*, 24 Ch. D. 190; *Byne v. Corkes*, 100 Ga. 445; *Bennett v. Bennett*, 66 Ill. App. 28; *Webb v. Hayden*, 166 Mo. 39; *Newton v. Rebenack*, 90 Mo. App. 650; *Barnett's Appeal*, 46 Pa. St. 392, 86 Am. Dec. 502.

**Investment by Executors.** — A testamentary direction to executors to invest a specified sum in such stock as they may consider safe and permanent, does not repose any such special or personal confidence or discretion in the executors as would disassociate the trust confided to them from their office as executors, so as to prevent them or administrators *cum testamento annexo* from fully administering it. *Matter of Post*, 2 Connolly (N. Y.) 243. See also *Hood v. Hood*, 85 N. Y. 561; *Mott v. Ackerman*, 92 N. Y. 539; *Reeves v. Tappan*,

21 S. Car. 1. See further the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 1046.

5. **Preservation of Estate for Infants.** — *Blackburn v. Webb*, 133 Cal. 420; *Boyd v. England*, 56 Ga. 598; *Pearce v. Savage*, 45 Me. 90; *Rector v. Dalby*, 98 Mo. App. 189; *Wills v. Cooper*, 25 N. J. L. 137; *Vail v. Vail*, 4 Paige (N. Y.) 317; *Mullins v. Mullins*, 79 Hun (N. Y.) 421; *Mitchell v. Smellie*, 20 U. C. C. P. 389. See also *Clarke's Appeal*, 70 Conn. 195; *Dean v. Long*, 122 Ill. 447; *Fish v. Prior*, 16 R. I. 566; *Chambers v. Brown*, (Tex. 1886) 2 S. W. Rep. 518.

**Persons Non Compos Mentis.** — *Abend v. Endowment Fund Commission*, 74 Ill. App. 654.

**The Mere Fact of Infancy**, when the purpose of the trust was not the preservation of the estate during infancy, will not support an active trust. *Smith v. Metcalf*, 1 Head (Tenn.) 64.

6. **Trust for Church Without Present Capacity to Take.** — *Preachers' Aid Soc. v. England*, 106 Ill. 125; *Reformed Protestant Dutch Church v. Veeder*, 4 Wend. (N. Y.) 494.

**Beneficiaries Not Ascertained.** — A trustee to whom an estate is given in trust for the members of a certain lodge and those who may thereafter become members takes the legal title. *Vander Volgen v. Yates*, 3 Barb. Ch. (N. Y.) 242.

Under the *Illinois* statute executing trusts created for the use of any "person or persons or body politic," a trust for a firm or partnership without naming the partners is not executed, it being the duty of the trustee to ascertain who the beneficiaries are and convey to them. *Silverman v. Kristufek*, 162 Ill. 222.

See *infra*, this section, *Duration and Termination* — *When Beneficiary Acquires Capacity to Receive*.

7. See the title REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, vol. 24, pp. 410, 414.



the remainder by the failure of the particular estate before the remainder can vest, recourse has been had to the offices of a trustee, for it is well established that if the legal title reposes in a trustee pending the contingency by which the remainder is to vest, the untimely determination of the particular estate will not defeat the ultimate limitation.<sup>1</sup> Thus it has come about that limitations in trust to preserve contingent remainders are not executed by the statute of uses, the legal estate in such case remaining in the trustee to preserve the remainders, while contingent, from being defeated by the destruction, designed or casual, of the particular estate on which they depend;<sup>2</sup> and the fact that the ultimate remainder might be good as an executory devise would not affect the active character of the trust where it appears to have been the intention of the settlor to accomplish this through the instrumentality of trustees.<sup>3</sup>

**Vested Remainders.** — The existence of a vested remainder does not, without more, place the legal estate in the trustee, and where the instrument of creation discloses no intention on the part of the settlor that the trustee should take the legal title during the continuance of the particular estate, and there is nothing for the trustee to do, nor any opportunity to exercise a discretion, the statute of uses executes the entire estate in the *cestuis que trustent* according to their respective interests.<sup>4</sup> Where the trustee takes title during the running of the life estate it seems that it is due to the other duties of the trust and not to the necessity for preserving the interest of the remainderman,<sup>5</sup> except in so far as the duties incident to the life estate, such as the payment of the rents and profits, and similar duties, involve the preservation of the remainder.<sup>6</sup>

(i) **Trusts for Married Women** — *aa.* IN GENERAL. — A devise or conveyance of an estate in trust for a married woman for her sole and separate use, being designed to protect the estate during coverture, and to enable the wife to

**1. Trustee's Title Supports Contingent Remainder.** — *Berry v. Berry*, 7 Ch. D. 657; *In re Eddels*, L. R. 11 Eq. 559; *In re Brooke*, (1894) 1 Ch. 43. See also the title REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, vol. 24, p. 413.

**Case Contra.** — In *Festing v. Allen*, 5 Hare 575, where an estate was devised to A in trust for the children of A who should attain twenty-one, and in case A had no children, over, it was held that A having died leaving minor children, the remainder of the children was destroyed, and that as the alternative trust was to be raised in the event A had no children, that also was defeated.

**2. Contingent Remainder Requires Title in Trustee** — *England.* — *Hopkins v. Hopkins*, 1 Atk. 581; *Boteler v. Allington*, 1 Bro. C. C. 72; *Colmore v. Tyndall*, 2 Y. & J. 605; *Venables v. Morris*, 7 T. R. 434; *Bagshaw v. Spencer*, 1 Ves. 142, *explained and distinguished* in *Garth v. Baldwin*, 2 Ves. 646; *Habergham v. Vincent*, 2 Ves. Jr. 204; *Moody v. Walters*, 16 Ves. Jr. 283; *Biscoe v. Perkins*, 1 Ves. & B. 485. *Georgia.* — *Schley v. Brown*, 70 Ga. 64. *Illinois.* — *Kirkland v. Cox*, 94 Ill. 400.

*Massachusetts.* — *Brandenburg v. Thorndike*, 139 Mass. 102.

*Missouri.* — *Pugh v. Hayes*, 113 Mo. 424; *Walton v. Ketchum*, 147 Mo. 209.

*New York.* — *Vanderheyden v. Crandall*, 2 Den. (N. Y.) 9; *Striker v. Mott*, 2 Paige (N. Y.) 387, 22 Am. Dec. 646; *Wood v. Mather*, 38 Barb. (N. Y.) 473.

*North Carolina.* — *Battle v. Petway*, 5 Ired.

L. (27 N. Car.) 576, 44 Am. Dec. 59.

*Pennsylvania.* — *Kay v. Scates*, 37 Pa. St. 31, 78 Am. Dec. 399; *Little v. Wilcox*, 119 Pa. St. 439.

*South Carolina.* — *Jenney v. Laurens*, 1 Spears L. (S. Car.) 356.

*Tennessee.* — *Jourlmon v. Massengill*, 86 Tenn. 81; *Henson v. Wright*, 88 Tenn. 501.

*Wisconsin.* — See *Perkins v. Burlington Land, etc., Co.*, 112 Wis. 509.

**3. Immaterial that Remainder Good as Executory Devise.** — *Henson v. Wright*, 88 Tenn. 501; *Hooberry v. Harding*, 10 Lea (Tenn.) 392; *Aikin v. Smith*, 1 Sneed (Tenn.) 309.

**Limitation to Take Effect Preferably as Remainder.** — If a construction can be put upon a

limitation that it may take effect by way of remainder, it shall never take effect as a springing use or executory devise. *Carwardine v. Carwardine*, 1 Eden 27.

**4. Vested Remainder Not Requiring Trustee to Take Title.** — *Jones v. Bush*, 4 Harr. (Del.) 1; *O'Melia v. Mullarky*, 124 Ill. 506; *Hayes v. Tabor*, 41 N. H. 521; *Holmes v. Pickett*, 51 S. Car. 271; *Ramsay v. Marsh*, 2 McCord L. (S. Car.) 252, 13 Am. Dec. 717; *Esbridge v. Louisville Trust Co.*, 29 Tex. Civ. App. 571. *Compare Owens's Petition*, 3 Pa. Dist. 328; *Florance's Estate*, 8 Pa. Dist. 209.

**5.** See cases cited *supra*, this subsection, (d) *Collection and Application of Rents and Profits*.

**6. Preservation of Remainder Involved in Duties of Trust.** — *Bacon's Appeal*, 57 Pa. St. 504; *Davis v. Williams*, 85 Tenn. 646.

enjoy it free from her husband or his creditors, has, with general uniformity, been held to be outside the statute of uses, and to require the intervention of a trustee;<sup>1</sup> though as a rule the trustee does not take an estate in fee.<sup>2</sup> The beneficiary has only an equitable interest in the estate, with no power of anticipation,<sup>3</sup> and a conveyance of her interest by herself and her husband is obviously void,<sup>4</sup> though a conveyance in which the trustee joins will be valid.<sup>5</sup>

**Breadth of Rule.** — Trusts for married women usually involve the performance of duties besides the mere holding in trust, illustrations of which may be found in the cases cited in the note below.<sup>6</sup> This consideration has been taken as indicating that the general statement that trusts for married women are always active is too broad,<sup>7</sup> but whether the active nature of the trust is due to the fact that the beneficiary is a *feme covert*, or to the duties necessarily arising on that account, is a question of speculative learning rather than of practical importance, for the rule and its consequences remain.<sup>8</sup>

**1. Trusts for Married Women — England.** — *Hawkins v. Luscombe*, 2 Swanst. 375; *Nevil v. Saunders*, 1 Vern. 415. But see *Douglas v. Congreve*, 1 Beav. 59.

*United States.* — *Magniac v. Thompson, Baldw.* (U. S.) 344.

*Alabama.* — *Witter v. Dudley*, 36 Ala. 135; *Parish v. Balkum*, 40 Ala. 285.

*Arkansas.* — *Sidway v. Nichol*, 62 Ark. 146. *Georgia.* — *Boyd v. England*, 56 Ga. 598; *Sanders v. Houston Guano, etc., Co.*, 107 Ga. 49; *Cushman v. Coleman*, 92 Ga. 772.

*Illinois.* — *Dean v. Long*, 122 Ill. 447.

*Kentucky.* — *Martin v. Poague*, 4 B. Mon. (Ky.) 524.

*Maryland.* — *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762.

*Missouri.* — *Walter v. Walter*, 48 Mo. 140; *Baker v. Nall*, 59 Mo. 265; *Walton v. Drumtra*, 152 Mo. 489, affirming *Walton v. Ketchum*, 147 Mo. 209; *Schiffman v. Schmidt*, 154 Mo. 204.

*New York.* — *Noyes v. Blakeman*, 6 N. Y. 567.

*Pennsylvania.* — *Chadwick's Appeal*, (Pa. 1886) 7 Atl. Rep. 178; *Kay v. Scates*, 37 Pa. St. 31, 78 Am. Dec. 399; *Little v. Wilcox*, 119 Pa. St. 439.

*South Carolina.* — *Willman v. Holmes*, 4 Rich. Eq. (S. Car.) 475.

*Tennessee.* — *Park v. Cheek*, 4 Coldw. (Tenn.) 20; *Jouralmon v. Massengill*, 86 Tenn. 81; *Temple v. Ferguson*, (Tenn. 1903) 72 S. W. Rep. 455.

**Where the Conveyance Is Not to the Sole and Separate Use**, and is unaccompanied by any duties to be performed, the trust is executed. *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762; *McKenzie v. Sumner*, 114 N. Car. 425; *Hughes v. Farmers' Sav., etc., Assoc.*, (Tenn. Ch. 1897) 46 S. W. Rep. 362.

**Possession of Beneficiary Who Is Also Grantor.** — Where a woman by antenuptial agreement conveys lands to a trustee to permit her, if she should so elect, to hold and use the lands during her life and upon her death to convey them as she, by deed, appointment, or will, shall order, direct, or appoint, and in accordance with her power of election take possession, no title vests in the trustee. *Wainwright v. Low*, 132 N. Y. 313.

**Loan Superseded by Devisee in Trust.** — Where a father loaned personal property to his

daughter, and afterwards devised the same property to a trustee for the daughter's separate use, the possession of the husband of the daughter after the decease of the testator was not under the loan, but in subordination to the trust. *Gilliam v. Spence*, 6 Humph. (Tenn.) 160.

**2. Trustee Does Not Take Fee Simple Estate.** — *East Rome Town Co. v. Cothran*, 81 Ga. 359; *Bagley v. Kennedy*, 81 Ga. 721; *Norton v. Norton*, 2 Sandf. (N. Y.) 296. See also *infra*, this section, 8. *Duration and Termination.*

**3. No Power of Anticipation.** — *Turner v. Sargent*, 17 Beav. 515; *Loch v. Bagley*, L. R. 4 Eq. 122.

**4. Conveyance by Husband and Wife Void.** — *Sidway v. Nichol*, 62 Ark. 146; *Narron v. Wilmington, etc., R. Co.*, 122 N. Car. 856; *Shannon v. Lamb*, 126 N. Car. 38.

**5. Averett v. Lipscombe**, 76 Va. 404.

**6. Other Duties Involved in Trust.** — *Nevil v. Saunders*, 1 Vern. 415; *Seaton v. Lunney*, 27 Grant Ch. (U. C.) 169; *Gunn v. Barrow*, 17 Ala. 743; *Simmons v. Richardson*, 107 Ala. 697; *Adams v. Barlow*, 69 Ga. 302; *Matter of Bassett*, 70 Mo. App. 448; *Townshend v. Frommer*, 125 N. Y. 446; *Dyett v. Central Trust Co.*, 140 N. Y. 54; *Keene's Estate*, 9 Phila. (Pa.) 339, 30 Leg. Int. (Pa.) 404; *Hart v. Bayliss*, 97 Tenn. 72. See also *Strode v. McCormick*, 158 Ill. 142.

**7. Breadth of Rule Questioned.** — In *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762, while holding that a separate estate in real property could not be enjoyed by a married woman without the interposition of a trustee, the court said that while it is broadly asserted that "where the trustee is to hold in trust for the sole and separate use of a married woman, it is a trust and not a use executed under the statute, \* \* \* it is, however, to be regretted, for the sake of the simplification of this question, that the adjudications cited by the books do not with unanimity sustain the proposition to the length to which it is stated. Most of the cases cited by the text writers will be found to relate to deeds or wills which impose upon the trustee some active functions, such as collecting and paying over the rents, etc., and while, therefore, they do not contradict the proposition, they, notwithstanding, do not sustain it as it is broadly announced."

**8.** See the cases cited in the preceding notes,

**Marriage Must Exist or Be in Contemplation.** — Where the woman is neither married nor in immediate contemplation of marriage when the trust is to take effect, the estate has been held to vest in the woman under the statute of uses.<sup>1</sup>

*bb. UNDER MARRIED WOMEN'S ACTS.* — Under statutes and provisions in constitutions securing to a married woman a separate estate free from the control or liabilities of her husband, a conveyance in trust for a married woman of full age and sound mind, with no remainder to protect and nothing for the trustee to do, confers no title on the trustee, but the whole estate passes to the beneficiary.<sup>2</sup> This rule, of course, does not include trusts in which the trustee is required to perform active duties.<sup>3</sup>

(j) **Conveyance to Beneficiary.** — The statute of uses will not execute the use as long as there is anything remaining for the trustee to do which renders it necessary that he should retain title.<sup>4</sup> Accordingly it has been held in *England*, and by a portion of the authority in the *United States*, that the duty of the trustee to convey the estate to the beneficiary, although that is the only duty imposed, or is the only act which remains to be done, is sufficient to support the trustee's title, and that the trust continues until it is completely executed by the conveyance of the estate to those ultimately entitled,<sup>5</sup> or, in the case of personal property, to distribute it in the manner directed.<sup>6</sup> And it has been held that if the settlor's intention was that the trustees should make the conveyance, the active character of that duty will not be affected by the fact that the legal title might pass without an actual conveyance.<sup>7</sup>

**A Contrary View** has been taken by other decisions which hold that a conveyance by the trustee is unnecessary, or at most is a matter of form rather than of substance, where he has no other power or duty and is only an instrument to transfer the legal estate to the *cestui que trust*, the transfer being

**1. Marriage Must Exist or Be in Contemplation.** — *Florance's Estate*, 8 Pa. Dist. 209; *Kay v. Scates*, 37 Pa. St. 31, 78 Am. Dec. 399; *Wells v. McCall*, 64 Pa. St. 207; *Philadelphia Trust, etc., Co.'s Appeal*, 93 Pa. St. 209; *Yard v. Pittsburgh, etc., R. Co.*, 131 Pa. St. 205. See generally the title **MARRIAGE SETTLEMENTS**, vol. 19, p. 1224.

**"Immediate Contemplation of Marriage"** means a marriage presently in view of the donor to take place with a particular person a short time after the instrument is to go into effect. *Wells v. McCall*, 64 Pa. St. 207.

**2. Under Married Women's Acts** — *Georgia*. — *Sutton v. Aiken*, 62 Ga. 733; *Henderson v. Williams*, 97 Ga. 709; *Carswell v. Lovett*, 80 Ga. 36; *Rome v. Shropshire*, 112 Ga. 93; *Trammell v. Inman*, 115 Ga. 874; *Tillman v. Banks*, 116 Ga. 250.

*North Carolina*. — *McKenzie v. Sumner*, 114 N. Car. 425; *Johnson v. Blake*, 124 N. Car. 106.

*South Carolina*. — *Nix v. Bradley*, 6 Rich. Eq. (S. Car.) 43; *Howard v. Henderson*, 18 S. Car. 184; *Foster v. Glover*, 46 S. Car. 522; *Georgia, etc., R. Co. v. Scott*, 38 S. Car. 34; *Robinson v. Ostendorff*, 38 S. Car. 66.

**3. Active Trusts Not Within Rule.** — *Henderson v. Williams*, 97 Ga. 709; *Monroe v. Trenholm*, 114 N. Car. 590, *affirming* on rehearing 112 N. Car. 634.

**4. Trust Unexecuted as Long as Duty to Be Performed.** — *Ayer v. Ritter*, 29 S. Car. 135; *Bowen v. Humphreys*, 24 S. Car. 452; *Reeves v. Brayton*, 36 S. Car. 384.

**5. Conveyance to Beneficiary.** — *Preachers' Aid Soc. v. England*, 106 Ill. 125; *Lawrence v. Lawrence*, 181 Ill. 248; *Dakin v. Savage*, 172 Mass.

23; *Martling v. Martling*, 55 N. J. Eq. 771; *Sprague v. Sprague*, 13 R. I. 701; *Ames v. Ames*, 15 R. I. 12; *Huckabee v. Newton*, 23 S. Car. 291; *Ayer v. Ritter*, 29 S. Car. 135; *Blount v. Walker*, 31 S. Car. 13. *Compare Jenney v. Laurens*, 1 Spears L. (S. Car.) 356.

**English Rule.** — *Bacon's Appeal*, 57 Pa. St. 504 (stating English rule); *Mott v. Buxton*, 7 Ves. Jr. 201; *Davies v. Jones*, 24 Ch. D. 190.

**Rule Qualified.** — If the trustee, by reason of the exigencies of the trust, takes a fee-simple estate, it is necessary for him to make an actual surrender to the beneficiary; it is otherwise if an estate determinable at a fixed time is taken. *Doe v. Nicholls*, 1 B. & C. 336, 8 E. C. L. 144.

**Conveyance to More than One Beneficiary Involving Division of Property.** — *Sears v. Russell*, 8 Gray (Mass.) 86; *Bristow v. McCall*, 16 S. Car. 545.

**Conveyance Over on Failure of Contingent Remainder.** — *Kirkland v. Cox*, 94 Ill. 400.

**Provisions Construed.** — A conveyance to a trustee for the use of certain children, "to be divided amongst them, share and share alike," does not impose upon the trustee the duty of making a division, but simply indicates the share which the children are to take, and the statute executes the use in the children. *Reeves v. Brayton*, 36 S. Car. 398; *Reeves v. Tappan*, 21 S. Car. 1.

**6. Delivery of Personalty.** — *Bacot v. Heyward*, 5 S. Car. 441; *Davies v. Jones*, 24 Ch. D. 190.

**7. Conveyance by Trustee According to Settlor's Intention.** — *Aikin v. Smith*, 1 Sneed (Tenn.) 309; *Hooberry v. Harding*, 10 Lea (Tenn.) 392; *Henson v. Wright*, 88 Tenn. 501.



affected by operation of the statute of uses,<sup>1</sup> except where contingencies are involved.<sup>2</sup>

(k) **Miscellaneous Duties.** — The foregoing enumeration of powers and duties which are generally recognized as conferring the legal estate on the trustee is not exclusive, for the trustee takes title by reason of being given any duty or power of agency, such as to pay the taxes, in connection with the care and preservation of the estate,<sup>3</sup> or to raise an amount of money,<sup>4</sup> or to cut timber,<sup>5</sup> or to preserve the estate from the debts of the beneficiary,<sup>6</sup> or to protect the estate until an accounting<sup>7</sup> or until a division.<sup>8</sup>

**4. Interest of Beneficiary** — *a. RULES OF CONSTRUCTION.* — The limitations of equitable estates under a trust, either of real or personal property, are to be construed according to the construction given by courts of law to the limitations of legal estates,<sup>9</sup> with the distinction that the construction of equitable estates is more largely governed by the revealed intention of the testator or author of the trust.<sup>10</sup> Thus where lands are devised in fee in trust for another, without words of inheritance in respect to the beneficiary, the beneficiary will nevertheless take an equitable estate in fee, in accordance with the settlor's intention.<sup>11</sup> In the contemplation of a court of equity, the *cestui que trust* of lands is regarded as seized absolutely of the freehold.<sup>12</sup>

**Incidents.** — An equitable estate of a *cestui que trust* is subject to the same incidents, properties, and consequences as belong to similar estates at law. They are alienable, devisable, and descendible in the same manner.<sup>13</sup>

**6. WHO TAKE AS BENEFICIARIES** — (1) *Estate in One to Exclusion of Others.* — Who are to take an interest in an estate as beneficiaries is ordinarily fixed with certainty by the creating instrument. Questions arise, however, as to whether a particular beneficiary can take an entire interest to the exclusion of others, as where an estate is placed in trust for a woman and her children and conferring upon her certain powers of control and disposition.

**1. Contrary View** — *Georgia.* — Adams v. Guerard, 29 Ga. 651, 76 Am. Dec. 624.

*Mississippi.* — Mitchell v. Mitchell, 35 Miss. 108.

*New York.* — Welch v. Allen, 21 Wend. (N. Y.) 147; Watkins v. Reynolds, 123 N. Y. 211. Compare Wood v. Mather, 38 Barb. (N. Y.) 473.

*Pennsylvania.* — Shallcross's Estate, 13 Phila. (Pa.) 374, 37 Leg. Int. (Pa.) 283; Renziehausen v. Keyser, 48 Pa. St. 351; Bacon's Appeal, 57 Pa. St. 504; Rife v. Geyer, 59 Pa. St. 396, 98 Am. Dec. 351; Westcott v. Edmunds, 68 Pa. St. 34; Chamberlain v. Maynes, 180 Pa. St. 39.

*Virginia.* — Rowletts v. Daniel, 4 Munf. (Va.) 473.

**2. Payment on Contingencies.** — Harbster's Estate, 133 Pa. St. 351.

**3. Payment of Taxes.** — Pugh v. Hayes, 113 Mo. 424; Davis v. Williams, 85 Tenn. 646.

**4. To Raise an Amount of Money.** — Glover v. Monckton, 3 Bing. 13, 11 E. C. L. 9; Kirkland v. Cox, 94 Ill. 400.

**5. Power to Cut Timber.** — Authority conferred upon trustees to cut timber implies that the trustees have the fee in the trust estate, for with any estate less than a fee they would have no power by law to cut the timber on the estate. Collier v. Walters, L. R. 17 Eq. 252.

**6. Preservation from Debts of Beneficiary.** — The declaration by the donor of the trust estate that it shall not be subject to the debts of the beneficiary reposes the legal estate in the trustee, as this object could not be effected if the legal title were in the beneficiary. Posey

v. Cook, 1 Hill L. (S. Car.) 413; *In re* Soulard, 141 Mo. 642.

**7.** Smith v. A. D. Farmer Typefoundry Co., 16 N. Y. App. Div. 438.

**8. Preservation until Division.** — Devries v. Hiss, 72 Md. 560; Posey v. Cook, 1 Hill L. (S. Car.) 413.

**9. Construed as Legal Estate.** — Bagshaw v. Spencer, 1 Ves. 142; Garth v. Baldwin, 2 Ves. 646; Badgett v. Keating, 31 Ark. 400; Gill v. Logan, 11 B. Mon. (Ky.) 231; Cornwell v. Wulff, 148 Mo. 542; Price v. Sisson, 13 N. J. Eq. 168; Cushing v. Blake, 30 N. J. Eq. 689; Johnson v. Blake, 124 N. Car. 106; Bratton v. Massey, 15 S. Car. 277.

**The Declaration of an Executed Trust** of land will be construed as if it had been a conveyance of the legal estate; such a declaration, therefore, that does not contain words of inheritance, passes only an estate for life. Evans v. King, 3 Jones Eq. (56 N. Car.) 387.

**10. Effect of Creator's Intention.** — Counden v. Clerke, Hob. 29; Garth v. Baldwin, 2 Ves. 646; Bratton v. Massey, 15 S. Car. 277; Fuller v. Missroon, 35 S. Car. 314.

**11. Words of Inheritance Unnecessary as to Equitable Estate.** — Smith v. Smith, 11 C. B. N. S. 121, 103 E. C. L. 121; Challenger v. Sheppard, 8 T. R. 597; Greene v. Wilbur, 15 R. I. 251; Fuller v. Missroon, 35 S. Car. 314; Foster v. Glover, 46 S. Car. 522. See also Bayer v. Cockrill, 3 Kan. 282; Hallowell Sav. Inst. v. Titcomb, 96 Me. 62.

**12.** Badgett v. Keating, 31 Ark. 400.

**13. Incidents.** — Cornwell v. Orton, 126 Mo. 355.

If these powers are tantamount to a right of absolute dominion which would clearly enable her to defeat the interests of any other beneficiaries, the interests of the others will be cut off entirely and the beneficiary possessing such powers will take the entire estate.<sup>1</sup>

(2) *After-born Children*. — Where there is an immediate gift to children, only those living at the testator's death will take; but where a particular estate is carved out, with a gift over to the children of the person taking that interest or of any other person, the limitation will not only embrace the objects living at the death of the testator, but all who shall subsequently come into existence before the period of distribution.<sup>2</sup> It has been held that a conveyance by deed in trust for a woman and her children does not include children born thereafter,<sup>3</sup> unless the deed expressly so provides,<sup>4</sup> but this has been denied.<sup>5</sup>

c. *MANNER OF TENURE*. — Where two or more beneficiaries have a present interest in the same trust estate, they hold as tenants in common according to their respective interests<sup>6</sup> unless survivorship is expressly provided for, when they take as joint tenants.<sup>7</sup> There being no survivorship among tenants in common, their equitable estates will descend to their heirs, and in the same manner as estates at law.<sup>8</sup> The descent will be *per stirpes* and not *per capita* in the absence of a contrary provision.<sup>9</sup>

d. *INTEREST VESTED OR CONTINGENT* — (1) *In General*. — There is no rule peculiar to equitable estates for determining whether the interest of the beneficiary is vested or contingent. The question must depend on the terms of each trust and the rules applicable to estates generally.<sup>10</sup> An indefeasible interest is, of course, vested,<sup>11</sup> and may be devised and assigned,<sup>12</sup> but an

**Estate Is Inheritable.** — *Pierson v. Armstrong*, 1 Iowa 282, 63 Am. Dec. 440.

**Possessio Fratris.** — There may be *possessio fratris* of a trust estate as well as of a legal estate. *Banks v. Sutton*, 2 P. Wms. 700; *Buchanan v. Harrison*, 1 Johns. & H. 662.

1. **Absolute Estate in One Beneficiary to Exclusion of Others.** — *Weber v. Ueberroth*, (Pa. 1888) 13 Atl. Rep. 194; *Fackler v. Berry*, 93 Va. 565, 57 Am. St. Rep. 819; *Davis v. Hepert*, 96 Va. 775; *Jones v. Jones*, 96 Va. 749; *Walke v. Moore*, 95 Va. 729; *Tyack v. Berkeley*, 100 Va. 296, 93 Am. St. Rep. 963; *Slaughter v. Bernards*, 97 Wis. 184. See also *McNamara v. McDonald*, 69 Conn. 484, 61 Am. St. Rep. 48.

2. **After-born Children.** — *Minnig v. Batdorff*, 5 Pa. St. 503; *Landwehr's Estate*, 147 Pa. St. 121; *Darrah v. Darrah*, 202 Pa. St. 493.

3. **After-born Children Not Included.** — *Baird v. Brookin*, 86 Ga. 709; *Gay v. Baker*, 5 Jones Eq. (58 N. Car.) 344, 78 Am. Dec. 229.

4. **Children Take as Remaindermen.** — A deed from a husband to a trustee for the benefit of his wife and child, and children thereafter born, creates a life estate in the wife, with remainder in fee to the children. *Davis v. Hardin*, 80 Ky. 672.

5. *Dean v. Long*, 122 Ill. 447.

6. **Beneficiaries Hold as Tenants in Common.** — *Turner v. Sargent*, 17 Beav. 515; *Trevor v. Trevor*, 1 H. L. Cas. 239; *Webb v. Crawford*, 77 Ala. 440; *Ohmer v. Boyer*, 89 Ala. 273; *Dunn v. Bryan*, 38 Ga. 154; *Gay v. Baker*, 5 Jones Eq. (58 N. Car.) 344, 78 Am. Dec. 229; *Wilson v. Wilson*, 119 N. Car. 588; *Gadsden v. Cappedeville*, 3 Rich. L. (S. Car.) 467; *Foster v. Glover*, 46 S. Car. 522.

**Presumption of Equality of Interest.** — Two persons for whom a fund is placed in trust,

without specifying their respective shares, will be presumed to take equally. *Cowan v. Henika*, 19 Ind. App. 40.

7. **Survivorship Provided For.** — *Williams v. Papworth*, (1900) A. C. 563, 69 L. J. P. C. 129, 83 L. T. N. S. 184; *Moore v. Cleghorn*, 10 Beav. 423; *Milholland v. Whalen*, 89 Md. 212.

8. **Descent.** — *Gill v. Logan*, 11 B. Mon. (Ky.) 231; *Cornwell v. Orton*, 126 Mo. 355.

9. **Descent per Stirpes.** — *Turner v. Sargent*, 17 Beav. 515; *Tarbox v. Grant*, 56 N. J. Eq. 199; *Bacon's Estate*, 202 Pa. St. 535.

**Distribution per Capita.** — Where a testator intended to make his grandchildren beneficiaries of a trust, but was prevented from doing so by the promise of his wife to pay certain sums of money to his grandchildren, which she failed to do, the court will declare a trust for the grandchildren under which they will take *per capita* and not *per stirpes*. *Vance v. Park*, 7 Ohio Dec. 564.

10. See **REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS**, vol. 24, p. 374.

11. **Indefeasible Interests.** — *Thomson v. Peake*, 38 S. Car. 440; *Parker v. Converse*, 5 Gray (Mass.) 336; *Eldredge v. Greene*, 17 R. I. 17; *Baldwin v. Baldwin*, 76 Va. 345; *Stewart v. Glasgow*, 15 Grant Ch. (U. C.) 653.

**Vested Equitable Interests Subject to Be Divested on Contingency.** — See *Whipple v. Fairchild*, 139 Mass. 262.

12. **Devisable or Transferable Interests.** — *Fatjo v. Swasey*, 111 Cal. 628; *Newhall v. Wheeler*, 7 Mass. 189; *Norton v. Leonard*, 12 Pick. (Mass.) 152; *Conover v. Hewitt*, 125 Mich. 34.

**In Wisconsin**, by statute providing that the person for whose benefit an express trust is created "shall take no estate or interest in the lands, but may enforce the performance of the

interest which may never take effect by reason of the happening of some uncertain event is not vested,<sup>1</sup> but will become so when in the lapse of time the contingency which would defeat the estate becomes impossible.<sup>2</sup> The rule that no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested applies to the estate of the *cestui que trust*.<sup>3</sup>

(2) *Ascertainment of Beneficiaries*. — Where the beneficiaries become ascertained as a class, there being no possibility of further issue who would take as beneficiaries under the trust, their interests become vested.<sup>4</sup> But the possibility of further issue will not necessarily prevent the beneficiaries who are in existence from taking a vested interest in the estate, for the entire estate may vest in them, and subsequently open and let in beneficiaries born thereafter.<sup>5</sup>

*e. APPLICATION OF RULE IN SHELLEY'S CASE*. — The rule in Shelley's Case has its usual application to equitable estates, but the estates of both the ancestor and heir must be equitable before they will coalesce under the rule.<sup>6</sup>

*f. MISCELLANEOUS*. — Beyond the general rules stated, questions as to the interests of the *cestuis que trustent* depend entirely upon the terms of the trust and the facts of each case. The decisions are not susceptible of any classification on these grounds, and are simply cited in their several jurisdictions.<sup>7</sup>

**5. Title as Between Executor and Trustee**. — Where the trustee is also executor, the question arises as to when the title in the executor, as such, ceases and title as trustee begins. As a rule, the executor does not take a fund as trustee until the trust fund has been in some way legally ascertained, identified, and separated from the general funds of the estate, and the trustee has entered upon the duties of his office of trustee as distinct and separate from his functions as executor.<sup>8</sup> Beyond this general rule the question must

trust," a life beneficiary has no assignable interest in the rents and profits of the lands. *Webber v. Webber*, 108 Wis. 626.

**New York**. — Under the New York statutes (Laws 1893, p. 939, c. 452; Laws 1896, p. 559, c. 547; Laws 1897, p. 507, c. 417), the interest of the life tenant of a trust fund is not subject to assignment by him unless it is fixed, definite, and vested. *Matter of U. S. Trust Co.*, 175 N. Y. 304.

**1. Contingent Interests**. — *Turner v. Turner*, 4 Sim. 430; *Thomas v. Wallace*, 5 Ala. 268; *Abend v. Endowment Fund Commission*, 74 Ill. App. 654; *Strode v. McCormick*, 158 Ill. 142; *Megowan v. Way*, 1 Met. (Ky.) 418; *Winchester v. Machen*, 75 Md. 538; *Knowlton v. Atkins*, 134 N. Y. 313; *Striker v. Mott*, 2 Paige (N. Y.) 387, 22 Am. Dec. 646. See also *Snelling v. Lamar*, 32 S. Car. 72, 17 Am. St. Rep. 835.

**2. Impossibility of Contingency**. — *White v. Curtis*, 12 Gray (Mass.) 54; *Matter of Dekay*, 4 Paige (N. Y.) 403. See also *Hiserodt v. Hamlett*, 74 Miss. 37.

**3. Remainders Preferably Construed Vested**. — *Price v. Sisson*, 13 N. J. Eq. 168; *Whitehead v. Stryker*, 17 N. J. Eq. 278.

**4. Honnett v. Williams**, 66 Ark. 148; *Brown v. McCall*, 44 S. Car. 503.

**5. Vested Estate Opening to After-born Beneficiaries**. — *Dean v. Long*, 122 Ill. 447; *Hawley v. James*, 5 Paige (N. Y.) 318; *McNish v. Guerard*, 4 Strobh. Eq. (S. Car.) 66; *Ward v. Saunders*, 3 Sneed (Tenn.) 387; *Roy v. Garnett*, 2 Wash. (Va.) 9.

**6. See SHELLEY'S CASE (RULE IN)**, vol. 25, pp. 648, 649.

**7. Interests as Dependent upon Construction of Instrument — England**. — *Reynell v. Reynell*, 10 Beav. 21.

*Canada*. — *Jones v. Smythe*, 32 Nova Scotia 95; *Jones v. Smythe*, 32 Nova Scotia 66.

*United States*. — *U. S. v. American L. & T. Co.*, 120 Fed. Rep. 843.

*California*. — *Matter of Dolan*, 79 Cal. 65.

*Illinois*. — *Hart v. Seymour*, 147 Ill. 598.

*Kentucky*. — *Pogue v. Ross*, 74 S. W. Rep. 1101, 25 Ky. L. Rep. 187; *Rogers v. Payne*, 14 B. Mon. (Ky.) 135.

*Maine*. — *Paine v. Forsaith*, 84 Me. 66.

*Maryland*. — *Brown v. Renshaw*, 57 Md. 67.

*Massachusetts*. — *Root v. Blake*, 14 Pick. (Mass.) 271; *Codman v. Krell*, 152 Mass. 214.

*New Jersey*. — *Smith v. Baxter*, (N. J. 1902) 53 Atl. Rep. 1125.

*New York*. — *Carter v. Bloodgood*, 3 Sandf. Ch. (N. Y.) 293.

*North Carolina*. — *Wiggs v. Saunders*, 4 Dev. & B. L. (20 N. Car.) 480.

*Ohio*. — *U. S. Bank v. Ennis*, *Wright* (Ohio) 605.

*Pennsylvania*. — *Lipman's Appeal*, 30 Pa. St. 180, 72 Am. Dec. 692; *Huston v. Hamilton*, 2 Binn. (Pa.) 387.

*Rhode Island*. — *Greene v. Wilbur*, 15 R. I. 251.

*Virginia*. — *Lindsey v. Eckels*, 99 Va. 668.

**8. General Rule as to When Trustee's Estate Begins**. — *Matter of Williams*, (Surrogate Ct.) 26 Misc. (N. Y.) 636; *Matter of Hood*, 98 N.



be governed by the intention of the testator as revealed in the will and the particular circumstances of each case.<sup>1</sup>

**Must Clearly Appear that Executor Takes as Trustee.** — The law seems to favor the administration of the estate by the executor rather than by the trustee, and unless it clearly appears from the will that the testator intended it to be held by the trustee the executor is to be considered as holding it;<sup>2</sup> and where the will provides for the coexistence of the two functions of executor and trustee, the persons exercising those duties do so as executors and not as trustees.<sup>3</sup>

**Transfer of Funds.** — Where one is thus clothed with a double fiduciary capacity, and the balance remaining upon a full execution of one trust belongs to the other, if the amount has been definitely and authoritatively ascertained, and the fund is then in the trustee's hands, the law makes the transfer.<sup>4</sup> But this rule does not apply to a trustee appointed under a decree of a court of chancery, to sell property, where no time is fixed by law for the completion of his trust.<sup>5</sup>

**6. Properties and Incidents** — *a.* **DOWER AND CURTESY** — (1) *Estate of Trustee.* — Although formerly at common law the rights of dower and curtesy in the legal estate of the trustee existed,<sup>6</sup> this is now no longer true,<sup>7</sup> except in so far as the trustee has some beneficial interest.<sup>8</sup>

(2) *Estate of Cestui Que Trust.* — The equitable estate of the *cestui que trust* is subject to dower and curtesy in the same manner and under the same circumstances as legal estates.<sup>9</sup>

*b.* **FORFEITURE AND ESCHEAT.** — The doctrine of escheat in its application to trust estates has been treated under a preceding title in this work.<sup>10</sup>

*c.* **MERGER.** — Where the legal and equitable estates in the same land become vested in the same person, the equitable will merge in the legal estate, if the latter is equally extensive with the former;<sup>11</sup> but this is not an inflexible

Y. 369; Cluff v. Day, 124 N. Y. 195; Matter of Underhill, 35 N. Y. App. Div. 436, *affirmed* 158 N. Y. 721; Johnson v. Lawrence, 95 N. Y. 154; Matter of Mason, 98 N. Y. 527.

**Presumption that Executor Holds as Trustee by Lapse of Time.** — Cooper v. Illinois Cent. R. Co., 38 N. Y. App. Div. 22.

**1. Question Governed by Circumstances of Particular Cases.** — See De Peyster v. Clendinning, 8 Paige (N. Y.) 310; Pyron v. Mood, 2 McAll. L. (S. Car.) 288; Brougham v. Poulett, 19 Beav. 119.

**Trust to Executrix in Individual Capacity.** — Where the terms of the devise showed an intention on the part of the testator that the estate devised in trust should go to his executrix individually, and not as executor, the refusal of the executrix to qualify as such did not affect her right to administer the trust. Litchcock v. U. S. Bank, 7 Ala. 386.

**Title of Trustee Derived Directly from Will.** — Where a will authorized executors and trustees to appoint commissioners to partition the estate, who should convey the shares of the beneficiaries in severalty to the trustees, no title vested in the commissioners, and the trustees took their estate direct under the will and not by virtue of the conveyance from the commissioners. Whitney v. Phoenix, 4 Redf. (N. Y.) 180.

**2. That Trustee Takes Must Clearly Appear.** — State v. Nicols, 10 Gill & J. (Md.) 27; Perkins v. Moore, 16 Ala. 9; Newcomb v. Williams, 9 Met. (Mass.) 525; Miller v. Congdon, 14 Gray (Mass.) 114.

**3. Coexistence of Functions of Executor and**

**Trustee.** — Matter of Underhill, 35 N. Y. App. Div. 434, *affirmed* 158 N. Y. 721; Johnson v. Lawrence, 95 N. Y. 154; Lansing v. Lansing, 45 Barb. (N. Y.) 182.

**4. Transfer of Funds by Law.** — Williams's Estate, 1 Md. Ch. 25; Ruffin v. Harrison, 81 N. Car. 208.

**5. Williams's Estate,** 1 Md. Ch. 25.

**6. Caseburn v. English,** 2 Eq. Cas. Abr. 729, par. 6.

**At Common Law.** — 4 Kent Com. 43; Hinton v. Hinton, 2 Ves. 631; Bennet v. Davis, 2 1 Wms. 319; Prescott v. Walker, 16 N. H. 340.

**7. No Right of Dower or Curtesy.** — King v. Bushnell, 121 Ill. 656; Cooper v. Whitney, 3 Hill (N. Y.) 95; Gomez v. Tradesmen's Bank 4 Sandf. (N. Y.) 102; Derush v. Brown, 8 Ohio 412. See also the titles CURTESY, vol. 8, p. 513; DOWER, vol. 10, p. 132.

**8. Beneficial Interest in Trustee.** — Prescott v. Walker, 16 N. H. 340; Hopkinson v. Dumas, 42 N. H. 296.

**9. See the titles CURTESY, vol. 8, p. 520; DOWER, vol. 10, p. 162.**

**Estate of Cestui Subject to Dower and Curtesy** — Cornwell v. Orton, 126 Mo. 355; Cushing v. Blake, 30 N. J. Eq. 689.

**10. See ESCHEAT, vol. 11, p. 323.**

**11. Merger.** — Johnson v. Johnson, 5 Ala. 90; Badgett v. Keating, 31 Ark. 400; Tilton v. Davidson, 98 Me. 55; Brown v. Bartee, 10 Smed. & M. (Miss.) 268; Cooper v. Cooper, 5 N. J. Eq. 9; Bolles v. State Trust Co., 27 N. J. Eq. 308; Wills v. Cooper, 25 N. J. L. 137; Mason v. Mason, 2 Sandf. Ch. (N. Y.) 432; Ryan v. McGehee, 83 N. Car. 500; Peacock v.

or universal rule, and if the legal and equitable estates are not commensurate or their union would be contrary to the intent of the parties there can be no merger.<sup>1</sup>

*d. REVERSION.* — The settlor's interest in real estate or personalty is entirely divested by a conveyance absolutely or in fee simple to trustees, or by a devise with the manifest intention of disposing of his entire interest,<sup>2</sup> but every legal estate or interest not distinctly included in the trust and not otherwise disposed of remains in or reverts to the settlor, his heirs or personal representatives.<sup>3</sup> If the trust is inoperative on account of the invalidity of its purpose or uncertainty and indefiniteness,<sup>4</sup> or the *cestui* renounces the trust,<sup>5</sup> or the property is placed in trust for certain purposes only and ceases to be used in the manner provided,<sup>6</sup> or the life estate carved out of the estate of the settlor determines;<sup>7</sup> in all these cases there is a reversion to the

Stott, 101 N. Car. 149. See also *Paine v. Forsaith*, 86 Me. 357. And see the title *MERGER*, vol. 20, p. 588 *et seq.*

1. *Rule Not Universal.* — *Tilton v. Davidson*, 98 Me. 55; *Henderson v. Hill*, 9 Lea (Tenn.) 25.

2. *No Interest in Settlor* — *Indiana.* — *Cope-land v. Summers*, 138 Ind. 219.

*Kentucky.* — *Benning v. Benning*, 14 B. Mon. (Ky.) 470.

*Munc.* — *Spring v. Hight*, 22 Me. 408, 39 Am. Dec. 587.

*Massachusetts.* — *Stockbridge v. Stockbridge*, 99 Mass. 244.

*Mississippi.* — *Boone v. Davis*, 64 Miss. 133.

*Missouri.* — *Speed v. St. Louis Merchants Bridge Terminal R. Co.*, 163 Mo. 111.

*New Jersey.* — *Gulick v. Gulick*, 39 N. J. Eq. 401.

*New York.* — *Wright v. Miller*, 8 N. Y. 9, 59 Am. Dec. 438; *Von Hesse v. MacKaye*, 136 N. Y. 114.

*Vermont.* — *Sargent v. Baldwin*, 60 Vt. 17; *Howard v. Howard*, 60 Vt. 362.

*Wisconsin.* — *Strong v. Doty*, 32 Wis. 381.

**Although the Trustees Do Not Take a Fee**, a deed with covenants and general warranty will conclude the settlor and his heirs and confirm to the beneficiaries the entire beneficial estate. *Williams v. First Presby. Soc.*, 1 Ohio St. 478.

**Direction Not Amounting to Reservation.** — Where a sum of money was raised and placed in trust for a beneficiary on various trusts, one of which was that a certain sum and no more should be used to pay the beneficiary's debts, the difference between the sum allowed for debts and the amount actually required went to the beneficiary and not by reversion to the settlors. *Napier v. Napier*, 6 Ga. 404.

**A Reversion May Be Reserved Although the Conveyance Is in Fee**, as where the estate is conveyed to a trustee in fee for the life of a person with reversion to the grantor in case he survives the beneficiary. *Polard v. Union Nat. Bank*, 4 Mo. App. 408.

3. **Interest Not Disposed Of.** — *Langhorne v. Payne*, 14 B. Mon. (Ky.) 502; *Loring v. Eliot*, 16 Gray (Mass.) 568; *Speed v. St. Louis Merchants Bridge Terminal R. Co.*, 163 Mo. 111; *Matter of Brooklyn Trust Co.*, (Surrogate Ct.) 34 Misc. (N. Y.) 205; *White v. Howard*, 46 N. Y. 141; *Nearpass v. Newman*, 106 N. Y. 47.

4. **Invalid Trust.** — *Buchanan v. Harrison*, 8 Jur. N. S. 965; *Abercrombie v. Abercrombie*, 27

Ala. 489; *Stroup v. Stroup*, 140 Ind. 179; *Lanning v. Lanning*, 17 N. J. Eq. 228; *Meyer v. Holle*, 83 Tex. 623.

**Lapsed Legacy.** — The legal interest in a lapsed legacy devised in trust is in the executor, but the beneficial interest is in the next of kin to the testator. *Owen v. Owen*, 1 Atk. 494.

**Indefiniteness of Purpose.** — *Wittfield v. Forster*, 124 Cal. 418.

**Uncertainty as to Beneficiary.** — *Longley v. Longley*, L. R. 13 Eq. 133; *Dunnage v. White*, 1 Jac. & W. 563.

**Descent of Reversionary Interest.** — A devise to trustees, one of whom is the testator's heir at law (subject to certain prior estates), for conversion, the trust for conversion being void for remoteness, the equitable reversionary interest thus left undisposed of results as part of the old use and descent to the heir in his character of heir, and does not so merge in his legal interest under the devise to him as a trustee as to break the line of descent and constitute him a fresh stock from which on the decease of the intestate the descent is to be traced. *Buchanan v. Harrison*, 1 Johns. & H. 662.

5. **Renunciation of Trust by Cestui.** — *Skipwith v. Cunningham*, 8 Leigh (Va.) 271, 31 Am. Dec. 642.

6. *Jenkins v. Jenkins University*, 17 Wash. 160; *Armstrong v. Harrison*, 29 Ont. 174.

**Church Property.** — Where property is conveyed in trust for the special purpose of a meeting-house for worship, with the provision that if it should cease to be occupied and used as such it shall revert to the grantor and his heirs, the abandonment of the property for the intended use would cause a reversion to the grantor, but a temporary suspension of services or the destruction of the property by casualty would not cause a reversion while the intention to rebuild is entertained in good faith. *Howe v. School Dist. No. 3*, 43 Vt. 282; *Henderson v. Hunter*, 59 Pa. St. 335; *Pringle v. Dorsey*, 3 S. Car. 502.

**The Misapplication of Funds** placed in trust for a charitable purpose does not cause a reverter to the grantor or his heirs unless so provided in the creating instrument. *Brown v. Meeting St. Baptist Soc.*, 9 R. I. 177.

7. **Reversion upon Termination of Life Estate.** — *Speed v. St. Louis, etc., R. Co.*, (C. C. A.) 86 Fed. Rep. 235; *Cherry v. Richardson*, 120 Ala. 242; *Hobbie v. Ogden*, 178 Ill. 357; *Parker v. M'Millan*, 55 Mich. 265; *Davis v.*



settlor. The immediate effect of a failure of a trust is doubtless a resulting trust in favor of the settlor.<sup>1</sup>

*e. DEVOLUTION — (1) Devise.* — While a trust which is personal cannot be delegated or devised,<sup>2</sup> the estate of a trustee of a general trust will pass, at common law, by the usual words in a will passing other estates, unless it is to be collected from expressions in the will or the purposes and objects of the testator that his intention was otherwise.<sup>3</sup> Trust estates will not pass under a general devise where there is a charge of debts or legacies.<sup>4</sup>

(2) *Investiture in Court's Appointee.* — By statutory provision in some states, upon the death or resignation of a trustee, causing a vacancy, the trust devolves upon the court and upon the trustee appointed by the court to fill the vacancy,<sup>5</sup> and in such cases the appointee takes the estate without a conveyance or formal investiture.<sup>6</sup>

(3) *Descent — (a) To Heirs.* — In the absence of any testamentary disposition of the estate, or special statutes regulating its devolution, the trustee's title

Rhodes, 39 Miss. 152; *Jackson v. Myers*, 3 Johns. (N. Y.) 388, 3 Am. Dec. 504; *Bond v. Moore*, 90 N. Car. 239.

**Reversion on Death of Beneficiary with Unexercised Power of Disposition.** — *Walton v. Drumtra*, 152 Mo. 489.

1. See IMPLIED TRUSTS, vol. 15, p. 1127 *et seq.*

2. **Personal Trust Not Devisable.** — *Hinckley v. Hinckley*, 79 Me. 320.

3. **Trust Estate Passing by General Devise — England.** — *Braybrooke v. Inskip*, 8 Ves. Jr. 417; *Ex p. Morgan*, 10 Ves. Jr. 101; *Ex p. Brettell*, 6 Ves. Jr. 577; *Hawkins v. Obeene*, 2 Ves. 559; *Titely v. Wolstenholme*, 7 Beav. 425; *Merritt v. Farmers' F. Ins., etc., Co.*, 2 Edw. (N. Y.) 547; *Langford v. Auger*, 4 Hare 313; *Beasley v. Wilkinson*, 13 Jur. 649; *Lewis v. Mathews*, L. R. 2 Eq. 177, 12 Jur. N. S. 542; *Marlow v. Smith*, 2 P. Wms. 198; *Ex p. Shaw*, 8 Sim. 159; *Bainbridge v. Ashburton*, 2 Y. & C. Exch. 347.

**United States.** — *Taylor v. Benham*, 5 How. (U. S.) 270.

**Maine.** — *Richardson v. Woodbury*, 43 Me. 206.

**Massachusetts.** — *Ballard v. Carter*, 5 Pick. (Mass.) 112, 16 Am. Dec. 377.

**New York.** — *Jackson v. Delancy*, 13 Johns. (N. Y.) 537, 7 Am. Dec. 403.

**Pennsylvania.** — *Heath v. Knapp*, 4 Pa. St. 228.

**Virginia.** — *Hughes v. Caldwell*, 11 Leigh (Va.) 355, 36 Am. Dec. 385.

See *infra*, this title, *The Trustee — Appointment — Appointment by Donee of Power.*

**Where a Person Contracted to Sell Real Estate**, but before the sale was completed died, having by will devised all his real estate to certain persons upon trust for sale, and having also devised to one of the persons named as trustee all the real estate which at his death might be vested in him as trustee, the real estate which he had contracted to sell passed under the devise of trust estates. *Lysaght v. Edwards*, 2 Ch. D. 499. See also *Wall v. Bright*, 1 Jac. & W. 474.

**The Sole Survivor of Several Trustees** cannot by any act of his continue the trust in another person. *Fonda v. Penfield*, 56 Barb. (N. Y.) 503.

4. **Charge of Debts or Legacies.** — *Hope v.*

*Liddell*, 21 Beav. 183; *In re Packman*, 1 Ch. D. 214; *In re Smith*, 4 Ch. D. 70; *In re Bellis*, 5 Ch. D. 504; *Matter of Horsfall*, M'Clel. & Y. 292; *Rackham v. Siddall*, 16 Sim. 297, 12 Jur. 640.

5. **Investiture in Court's Appointee.** — *Spence v. Widney*, (Cal. 1896) 46 Pac. Rep. 463; *Collier v. Blake*, 14 Kan. 250; *Parker v. Converse*, 5 Gray (Mass.) 336; *Woodruff v. Woodruff*, 44 N. J. Eq. 349; *Robinson v. Schmitt*, 17 N. Y. App. Div. 628; *Matter of Levy*, 12 N. Y. App. Div. 341; *Royce v. Adams*, 123 N. Y. 402.

**Distribution by Court.** — If there be a gift in trust for a class of persons with a power of selection in the trustee, and the trustee die without exercising this power, the court, in distributing the fund, will ordinarily be governed by the statute of distributions, and divide it equally, unless the provisions of the will indicate a different distribution. *Portsmouth v. Shackford*, 46 N. H. 423.

**A Court of Equity Cannot Perform a Mere Power in Trust**, although it will execute a trust which the death of the trustee leaves vacant. *Brown v. Higgs*, 8 Ves. Jr. 570.

**Succession of Administrator with Will Annexed.** — Where an executor named in a will is thereby also appointed a trustee and renounces or dies, the administrator *c. t. a.* appointed in his place succeeds to the trusteeship, and an appointment of a trustee in place of the executor is void and clothes the appointee with no power. *Clark v. Peeples*, 120 N. Car. 31. See generally the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1320 *et seq.*

**Evidence as to Trust Funds in Hands of Trustee's Administrator.** — Upon an accounting between the administrator of a deceased trustee and the person appointed by the court to execute the trust, it was proper for the referee to require a member of a firm of which the deceased was a member to testify as to the amount standing upon the firm's books to the credit of the deceased at the time of his death, or to call for any other testimony tending to show the amount of trust property in the hands of the administrator. *Matter of Levy*, 12 N. Y. App. Div. 346.

6. **Estate Vests in Trustee Without Formal Conveyance.** — *Golder v. Bressler*, 105 Ill. 419; *Wooldridge v. Planter's Bank*, 1 Sneed (Tenn.) 297; *McNish v. Guerard*, 4 Strobb. Eq. (S.



will generally descend to the trustee's heirs at law subject to the trust.<sup>1</sup> It seems that the descent in such cases will be to the trustee's eldest son, as at common law.<sup>2</sup>

(b) **To Personal Representative.** — The duties and responsibilities of the trustee, his liabilities in action, and rights of action will, upon his death, devolve upon his executor, administrator, or personal representative.<sup>3</sup> This cannot occur while there are surviving cotrustees,<sup>4</sup> or where the trust terminates upon the trustee's death.<sup>5</sup>

(4) **Survivorship.** — Unless there is a provision to the contrary,<sup>6</sup> trustees hold as joint tenants rather than as tenants in common,<sup>7</sup> and consequently upon the death of one or more of several trustees leaving a survivor or survivors the administration of the trust devolves upon the trustees who survive.<sup>8</sup> The principle of survivorship also applies where cotrustees renounce the trust.<sup>9</sup> There is, however, no survivorship of a special power, trust, or confidence not coupled with an interest.<sup>10</sup>

**7. Liability for Debts** — *a.* OF SETTLOR — (1) *Direction that Debts Be Paid.* — Where the settlor directs that his debts be paid out of the trust estate, the debts become a charge upon the estate generally, and the entire property is liable for payment.<sup>11</sup>

Car.) 66; *Lewis v. Glenn*, 84 Va. 947; *Matter of Boyce*, 4 De G. J. & S. 205.

**1. Trustee's Title Descends to Heir at Law** — *England.* — *Heath v. Knapp*, 4 Pa. St. 228; *Christie v. Ovington*, 1 Ch. D. 279; *Morgan v. Swansea Urban Sanitary Authority*, 9 Ch. D. 582; *Cunningham v. Frayling*, (1891) 2 Ch. 567; *Martin v. Laverton*, L. R. 9 Eq. 563.

*Illinois.* — *Lawrence v. Lawrence*, 181 Ill. 248.

*Kentucky.* — *Bloom v. Ray*, (Ky. 1891) 16 S. W. Rep. 714.

*Maine.* — *Richardson v. Woodbury*, 43 Me. 206; *Abbott, Petitioner*, 55 Me. 580.

*Missouri.* — *Ewing v. Shannahan*, 113 Mo. 188.

*New Jersey.* — *Wills v. Cooper*, 25 N. J. L. 137.

*Tennessee.* — *Watkins v. Specht*, 7 Coldw. (Tenn.) 585.

**Title of Heir Divested by Appointment of Another Trustee.** — *West v. Fittz*, 109 Ill. 425.

**Testamentary Trustee Dying Before Testator.** — Upon the death of a person appointed trustee by will prior to the death of the testator the estate passes to the testator's heirs subject to the trust. *Atty.-Gen. v. Downing*, *Ambl.* 571; *Woodruff v. Woodruff*, 44 N. J. Eq. 349.

**Statutes Cutting Off Descent Construed Prospectively.** — The statutes of New York cutting off descent, in the case of trustees, are to be construed prospectively. *Wood v. Mather*, 38 Barb. (N. Y.) 473.

**2. Descent to Eldest Son as at Common Law.** — *McMullen v. Lank*, 4 Houst. (Del.) 648; *Duffy v. Calvert*, 6 Gill (Md.) 487; *Zabriskie v. Morris*, etc., R. Co., 33 N. J. Eq. 22; *Jenks v. Backhouse*, 1 Binn. (Pa.) 91; *Reynolds v. Reynolds*, 61 S. Car. 243; *Cone v. Cone*, 61 S. Car. 512.

**3. Duties and Liabilities Devolving upon Personal Representatives.** — *Mauldin v. Armistead*, 14 Ala. 702; *Tyler v. Mayre*, 95 Cal. 160; *Anderson v. Northrop*, 30 Fla. 612; *Schenck v. Schenck*, 16 N. J. Eq. 174; *Matter of Howell*, (C. Pl. Spec. T.) 61 How. Pr. (N. Y.)

179; *De Peyster v. Ferrers*, 11 Paige (N. Y.) 13. See also *Powell v. Knox*, 16 Ala. 364. Compare *McDougald v. Carey*, 38 Ala. 320.

**Burden of Proof as to Title to Land.** — In *Amos v. Livingston*, 26 Kan. 106, it was held that an administrator is entitled to treat land which his intestate held at his death as belonging to his estate, the burden of proof being upon anyone asserting an equitable title thereto. *Powell v. Knox*, 16 Ala. 364.

**4.** *Hayes v. Pratt*, 147 U. S. 557.

**5.** *Hook v. Dyer*, 47 Mo. 214.

**6.** *Owen v. Owen*, 1 Atk. 494.

**7. Trustees Hold as Joint Tenants.** — *Saunders v. Schmaelzle*, 49 Cal. 59; *Webster v. Vandeventer*, 6 Gray (Mass.) 428.

**8. Survivorship.** — *Saunders v. Schmaelzle*, 49 Cal. 59; *Spence v. Widney*, (Cal. 1896) 46 Pac. Rep. 463; *Goldner v. Bressler*, 105 Ill. 419; *Boyer v. Sims*, 61 Kan. 593; *Gray v. Lynch*, 8 Gill (Md.) 403; *Stewart v. Pettus*, 10 Mo. 755; *Zabriskie v. Morris*, etc., R. Co., 33 N. J. Eq. 22; *Rutherford Land*, etc., Co. v. *Sanntrock*, (N. J. 1899) 44 Atl. Rep. 938, *affirmed* 60 N. J. Eq. 471; *Williams v. Otey*, 8 Humph. (Tenn.) 563, 47 Am. Dec. 632; *Nixon v. Rose*, 12 Gratt. (Va.) 425.

**9. Renouncement by Cotrustees.** — *Ratcliffe v. Sangston*, 18 Md. 383; *Matter of Crossman*, (Supm. Ct. Gen. T.) 20 How. Pr. (N. Y.) 350; *Jones v. Maffet*, 5 S. & R. (Pa.) 523; *Trask v. Donoghue*, 1 Aik. (Vt.) 370. But see *Webster v. Vandeventer*, 6 Gray (Mass.) 428.

**10. No Survivorship of Special Trust or Confidence.** — *Hadley v. Hadley*, 147 Ind. 423; *Gray v. Lynch*, 8 Gill (Md.) 403; *Williams v. Otey*, 8 Humph. (Tenn.) 563, 47 Am. Dec. 632.

**11.** For matters relating to jurisdiction and the enforcement of claims against the trust estate, see *ENCYC. OF PL. AND PR.*, vol. 22, title TRUSTS AND TRUSTEES. See also in this work *JUDGMENTS*, vol. 17, pp. 778, 779; *EXECUTIONS*, vol. 11, p. 632 *et seq.*

**Entire Property Liable.** — *Tanqueray-Willame v. Landau*, 20 Ch. D. 465; *Perrin v. Lomax*, 2 Rob. (Va.) 133.

Assignments for Creditors, in their very nature, create an estate liable for the settlor's debts, but this subject is considered fully under another title.<sup>1</sup>

(2) *Payment Not Directed*. — An interest in the estate reserved to the settlor is usually subject to his debts,<sup>2</sup> although the debts sought to be enforced were contracted subsequent to the creation of the trust,<sup>3</sup> or if the settlor has reserved no interest but the estate has been conveyed in trust in fraud of existing claims, the estate may be subjected to the payment of such claims in a court of equity;<sup>4</sup> and legacies in trust are liable for debts due by the decedent's executor for administration.<sup>5</sup> But subsequent creditors cannot enforce their claims;<sup>6</sup> nor will the estate be liable after the *cestui que trust* has become the purchaser at a sale under the trust deed.<sup>7</sup>

*b. OF TRUSTEES*. — It is a well settled rule that trust property in which the trustee has no beneficial interest is not liable to be levied upon and sold for the personal debts of the trustee,<sup>8</sup> provided the property can be identi-

**Mortgage Debt Not Confined to Mortgaged Property.** — *Guild v. Walter*, 182 Mass. 225.

**Corpus Liable in Absence of Express Restriction of Liability to Rents and Profits.** — *Gisborn v. Charter Oak L. Ins. Co.*, 142 U. S. 326.

**Mortgages on Estate Paid Out of Principal and Not Income.** — *Hafner v. Hafner*, 62 N. Y. App. Div. 316.

**Claim of Trustee Not Given Priority.** — Where an estate is conveyed to a trustee for the payment of the debts of the grantor the fact that the trustee holds the legal title to the trust estate gives his debt no precedence in the order of payment. *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 457.

**Property in Hands of Grantee with Notice Liable.** — *Ward v. Brandt*, Phil. Eq. (62 N. Car.) 71; *Hobson v. Whitlow*, 80 Va. 784.

1. See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, p. 1.

2. **Liability of Interest in Settlor.** — *Schenck v. Barnes*, (Supm. Ct. App. T.) 50 N. Y. Supp. 1133, affirmed 156 N. Y. 316. *Compare Taylor v. Brown*, 112 Ga. 758. See also *supra*, this section, *Properties and Incidents—Reversion*.

3. **Future Debts.** — *Brown v. Macgill*, 87 Md. 161, 67 Am. St. Rep. 334. But see *Crawford v. Langmaid*, 171 Mass. 309.

4. See the title FRAUDULENT SALES AND CONCEALMENTS, vol. 14, p. 210.

**Trust Created in Fraud of Creditors.** — *Zimmerman v. Tucker*, 64 Ga. 432; *Cosby v. Ferguson*, 3 J. J. Marsh. (Ky.) 264.

5. **Legacies in Trust.** — *Myers v. Daviess*, 10 B. Mon. (Ky.) 394; *New York v. U. S. Trust Co.*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 639, affirmed 78 N. Y. App. Div. 366.

**The Title of a Purchaser from a Testamentary Trustee Is Defeated by the insolvency or the testator's estate and a sale of the property by the administration for debts.** *Hill v. Treat*, 67 Me. 501.

6. **Subsequent Levy of Execution.** — The interest of a *cestui que trust* who holds under a deed of trust executed prior to the levy of an execution against the grantor cannot be reached by the execution. *Major v. Deer*, 4 J. J. Marsh. (Ky.) 585.

7. *Brown v. Barte*, 10 Smed. & M. (Miss.) 268.

8. *England*. — *Langton v. Horton*, 1 Hare 549.

*Alabama*. — *Lavender v. Lee*, 14 Ala. 688; *Butler v. Merchants' Ins. Co.*, 14 Ala. 777.

*Illinois*. — *Woodburn v. Woodburn*, 123 Ill. 608.

*Indiana*. — *Anderson v. Crist*, 113 Ind. 65.

*Kentucky*. — *Bostick v. Keizer*, 4 J. J. Marsh. (Ky.) 597, 20 Am. Dec. 237; *Woolfolk v. Earle*, (Ky. 1897) 40 S. W. Rep. 247.

*Massachusetts*. — *Lerow v. Wilmarth*, 9 Allen (Mass.) 382; *Hunnewell v. Lane*, 11 Met. (Mass.) 163; *Mayo v. Moritz*, 151 Mass. 481; *Stratton v. Edwards*, 174 Mass. 374.

*Michigan*. — *Lee v. Enos*, 97 Mich. 276.

*Ohio*. — *Manley v. Hunt*, 1 Ohio 257; *McGovern v. Knox*, 21 Ohio St. 547, 8 Am. Rep. 80.

*Pennsylvania*. — *Shryock v. Waggoner*, 28 Pa. St. 430; *In re Foster*, 179 Pa. St. 610.

*Texas*. — *Parker v. Portis*, 14 Tex. 166.

*Vermont*. — *Williams v. Fullerton*, 20 Vt. 346.

**Property in Hands of Executor.** — The rule applies to property in the hands of an executor, whether real or personal. *Williams v. Fullerton*, 20 Vt. 346.

**No Title Passes to the Purchaser under Execution as against the beneficiaries.** *Booker v. Carlisle*, 14 Bush (Ky.) 154.

**The Fact that the Beneficiary Is Not Named in the Deed** does not affect the rule, if the trustee has acknowledged the trust. *Sleeper v. Iselin*, 62 Iowa 583; *Boardman v. Willard*, 73 Iowa 20.

**Debt Incurred for Beneficiaries.** — Property held by a man for his wife and children under a trust of general notoriety, is not liable for a debt which he incurred for their support. *Townesley v. Barber*, 27 Vt. 417; *Barber v. Chapin*, 28 Vt. 413.

**The Failure of the Trustee to Apply the Income to the Life Tenant** raises a personal liability which is no lien on the remainder of the estate. *McArthur v. Gordon*, 51 Hun (N. Y.) 511.

**Trustee Having Occupancy and Enjoyment of Lands.** — Where the trustee held lands for his family with powers of management, and to "enjoy the same as long as he may live and appropriate its benefits to the use of his family," a crop of wheat raised by the trustee was not liable for his debts. *Johnson v. Hurley*, 3 Tenn. Ch. 258.

So also when by the terms of a will the testator's sons are given property to have the use and occupation thereof and to give the widow whatever of the produce she might require for her maintenance and support, and to

fied,<sup>1</sup> nor for obligations or liabilities incurred by him without authority, even in the management of the estate and ostensibly for the benefit of the estate;<sup>2</sup> but any beneficial interest which the trustee may have is liable, and passes to the purchaser of the estate at the execution sale.<sup>3</sup> It is immaterial that the trustee may have taken the property in his own name and that his creditors in dealing with him acted under the belief that the estate was his own, or had no notice of the trust,<sup>4</sup> although it has been held that third parties are not chargeable with notice of a trust in personal property in the hands of a trustee who has complete control of the same and every appearance of ownership.<sup>5</sup>

**Torts of the Trustee.** — The trust estate will not generally be held liable for the negligence of the trustee,<sup>6</sup> on the principle that if the trustee cannot make the estate liable for his contract, the estate ought not to be mulcted for his careless act;<sup>7</sup> but under some circumstances the estate may be liable.<sup>8</sup>

**c. OF ESTATE — (1) Arising Out of Contract — (a) Nature of Contract and Liability.** — A transaction, to be valid and binding upon the estate, must have been made by the trustee<sup>9</sup> or by the concurrent action of all the trustees.<sup>10</sup> Then too, the transaction, to create a liability against the estate in favor of a third party, must be more than the personal engagement of the trustee;<sup>11</sup> for while the expenses of properly administering a trust are a lien on behalf of the trustee on the estate in his hands, this right against the estate, unless in exceptional cases, does not extend to persons employed by the trustee. In general their only remedy for compensation is against the trustee personally,<sup>12</sup>

keep up the farm, the sons have no leviable interest in the estate. *Lee v. Enos*, 97 Mich. 276.

**Title of Purchaser at Execution Sale.** — Trust lands sold under execution against the trustee can only stand as security for the money paid by a purchaser with notice of the trust. *Pearson v. Daniel*, 2 Dev. & B. Eq. (22 N. Car.) 360.

**Where the Holder of Funds Is Only a Bailee,** as where a person is given notes for collection and fails to turn over the proceeds, such proceeds are equally liable for the claims of other creditors of the bailee. *Tiedeman v. Imperial Fertilizer Co.*, 109 Ga. 661.

**A Husband Who Invests His Money in Lands** which are conveyed to a trustee for his wife's benefit has no estate which is liable for his debts. *Williams v. Council*, 4 Jones L. (49 N. Car.) 206.

**1. Confused Funds Incapable of Identification.** — Funds of an insolvent trustee which have passed into the hands of his assignee and are confused with the general assets are not exempt from the claims of the general creditors. *Seiter v. Mowe*, 81 Ill. App. 346; *Weir v. Mowe*, 81 Ill. App. 287.

2. See *infra*, this subsection, *Of Estate*.

**3. Beneficial Interest Liable.** — *Dickinson v. Conniff*, 65 Ala. 581; *Booker v. Carlile*, 14 Bush (Ky.) 154; *Hussey v. Arnold*, (Mass. 1904) 70 N. E. Rep. 87; *Rankin v. Metzger*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 581; *Stith v. Lookabill*, 71 N. Car. 25.

**Improvements on the Trust Property** made by the trustee with his own money for the purpose of defrauding his creditors may be subjected to his debts. *Lathrop v. Gilbert*, 10 N. J. Eq. 344.

**4. Estate in Trustee's Name.** — *Byrne v. McGrath*, 130 Cal. 316; *Lathrop v. Gilbert*, 10 N. J. Eq. 344. Compare *Hancock v. Titus*, 39 Miss. 224.

**Creditors Without Notice** of the trust can acquire no rights against the *cestui que trust*. *Shryock v. Waggoner*, 28 Pa. St. 430.

**Destruction of Record.** — Although the record of the trust deed limiting the power of the trustee to charge the estate was destroyed by fire, the estate could not become liable for an unauthorized contract by the trustee with a third party. *Franklin Sav. Bank v. Taylor*, 131 Ill. 376.

**5. Personal Property.** — *Lewis v. Castleman*, 27 Tex. 407.

**6. Negligence of Trustee.** — *Norling v. Allee*, (Brooklyn City Ct. Gen. T.) 10 N. Y. Supp. 97, 13 N. Y. Supp. 791, *affirmed* 131 N. Y. 622; *Keating v. Stevenson*, 21 N. Y. App. Div. 604; *Parmenter v. Barstow*, 22 R. I. 245.

**7. Grounds of Nonliability.** — *Norling v. Allee*, (Brooklyn City Ct. Gen. T.) 10 N. Y. Supp. 97. See also *Camp v. Barney*, 4 Hun (N. Y.) 373.

8. See *infra*, this subsection, *Of Estate*.

**9. Transaction Must Be by Trustee.** — *Leonard v. Powell*, 41 Ga. 598; *Beckwith v. McBride*, 70 Ga. 642; *Hill Estate Co. v. Whittlesey*, 21 Wash. 142.

**10. Concurrent Action of Trustees.** — *Fickett v. Cohu*, 14 Daly (N. Y.) 550.

**11. Purely Personal Contract Not Enforceable.** — *Gaudy v. Babbitt*, 56 Ga. 640; *Frost v. Schackletord*, 57 Ga. 260; *Hussey v. Arnold*, (Mass. 1904) 70 N. E. Rep. 87; *Truesdale v. Philadelphia Trust, etc., Co.*, 63 Minn. 40.

**12. Remedy Against Trustee Personally.** — *Worrall v. Harford*, 8 Ves. Jr. 4; *Seibert v. Minneapolis, etc., R. Co.*, 58 Minn. 58; *Truesdale v. Philadelphia Trust, etc., Co.*, 63 Minn. 49; *Wade v. Pope*, 44 Ala. 690; *Johnson v. Leman*, 131 Ill. 600, 19 Am. St. Rep. 63; *Clopton v. Gholson*, 53 Miss. 466; *O'Brien v. Jackson*, 167 N. Y. 31; *Rensselaer, etc., R. Co. v. Miller*, 47 Vt. 146. Compare *Darling v. Potts*, 118 Mo. 506.



unless the trustee is insolvent.<sup>1</sup> But a trustee will not be allowed to contract debts as trustee, under a power, and then deny the liability of the funds in his hands for their payment.<sup>2</sup>

(b) **Authority of Trustee.** — The estate is not liable for obligations assumed by the trustee in excess of his authority;<sup>3</sup> but the estate will be liable if the trustees are acting within the limits of their stated powers<sup>4</sup> or with implied authority.<sup>5</sup> Thus, trust property which has been embarked in business, under a power, is primarily liable to creditors for debts incurred in conducting the same;<sup>6</sup> but the debts of a hazardous business entered into by the trustees without authority can only be enforced against the trustee personally.<sup>7</sup>

(c) **Benefit of Estate.** — It is generally held that the trust estate may be made to bear expenses incurred for goods furnished, or services rendered to the estate, which were necessary and inured to the benefit of the estate,<sup>8</sup> or other

**Where a Claim Against the Estate Is Adjudicated** with all parties interested before the court, and the amount found due is adjudged to be made from the trust property, the trustee cannot complain because the judgment was not rendered against him personally. *Smith v. Walker*, 49 Iowa 289.

1. **Insolvency of Trustee.** — *Blackshear v. Burke*, 74 Ala. 239; *Kupferman v. McGehee*, 63 Ga. 250; *Dinsmoor v. Bressler*, 56 Ill. App. 207.

**Insolvency or Nonresidence.** — Where expenditures made for the benefit of the estate are not paid for, and the estate owes the trustee and the trustee is insolvent or nonresident so that the creditor cannot recover from him, the trust estate may be reached directly by a proceeding in chancery. *Clopton v. Gholson*, 53 Miss. 466; *Norton v. Phelps*, 54 Miss. 467.

2. *McClelland v. Hamilton*, (Ky. 1886) 1 S. W. Rep. 635.

3. **Liabilities Incurred Without Authority.** — *Leonard v. Powell*, 41 Ga. 598; *Butler v. Butler*, 164 Ill. 171; *Duffy v. Duncan*, 32 Barb. (N. Y.) 587; *Williams v. Tozer*, 185 Pa. St. 302, 64 Am. St. Rep. 650; *Pracht v. Lange*, 81 Va. 711.

**Consent of Beneficiary.** — Under the *New York* statute prohibiting the assignment of the estate by the beneficiary, the consent of the beneficiary to the deposit of certain stock certificates as security for a loan to the trustee personally will not render such certificates liable for the debt. *Paterson First Nat. Bank v. National Broadway Bank*, 22 N. Y. App. Div. 24.

**Unlawful Preference of Creditors.** — A confession of judgment by a trustee in behalf of creditors whom he had preferred after the estate became insolvent is void. *Woddrop v. Weed*, 154 Pa. St. 307, 35 Am. St. Rep. 832. See also *Wood v. Brett*, 14 Grant Ch. (U. C.) 72.

**Breach of Contract for Benefit of Estate.** — Where the breach of an option contract to sell a portion of the estate enabled the trustee to realize a larger price, any damages recovered by the holder of the option are payable out of the fund. *Yerkes v. Richards*, 170 Pa. St. 346.

4. *Fowler v. Mutual L. Ins. Co.*, 28 Hun (N. Y.) 195.

**Defaulting Trustee.** — A testamentary trust which was being administered by several trustees, one of whom was shown to be a defaulter, was, notwithstanding such default, lia-

ble for debts properly incurred by the trustees in carrying on the business of the trust estate. *Re Frith*, 86 L. T. N. S. 212, 71 L. J. Ch. 199, (1902) 1 Ch. 342.

5. **Implied Authority.** — *Yerkes v. Richards*, 170 Pa. St. 346.

6. **Trust Property in Business Enterprise.** — *Sanders v. Houston Guano, etc., Co.*, 107 Ga. 49; *North American Coal Co. v. Dyett*, 7 Paige (N. Y.) 9; *Mathews v. Stephenson*, 6 Pa. St. 496; *Woddrop v. Weed*, 154 Pa. St. 307, 35 Am. St. Rep. 832.

7. *Adams v. Nelson*, 1 Ohio Dec. 216, 31 Cinc. L. Bul. 46.

8. **Necessary Expenses.** — *Wylly v. Collins*, 9 Ga. 223; *Leonard v. Powell*, 41 Ga. 598; *Malone v. Buice*, 60 Ga. 152; *Moore v. Lampkin*, 63 Ga. 748; *Riggins v. Adair*, 105 Ga. 727; *Abend v. Endowment Fund Commission*, 74 Ill. App. 654; *Mander v. Low*, (Supm. Ct. Spec. T.) 12 Misc. (N. Y.) 321; *Stevens v. Melcher*, 80 Hun (N. Y.) 514; *Mills v. Cottle*, 17 Grant Ch. (U. C.) 335. See also *Ewart v. Steven*, 16 Grant Ch. (U. C.) 193.

**Illustrations of Necessary Expenses.** — A trustee of a resulting trust who is allowed by consent to retain the entire management of the property should be reimbursed, as a condition of enforcing the trust, for the expenses of erecting fences, constructing a windmill, laying water pipes, digging a well, and constructing a bridge, where it appeared that such improvements were absolutely necessary. Money paid for insurance should also be allowed when the liability of the estate for those expenses depends upon the knowledge and consent of the *cestui que trust*. *Woodard v. Wright*, 82 Cal. 202.

**Expense of Cultivating Trust Lands.** — Where a trustee carried on the business of farming on the trust lands, which he had authority to do, any debt contracted by him as trustee that was necessary to enable him to carry on such a business is a debt in the contemplation of law, created for the benefit of the trust estate, and the estate is liable therefor. *Sanders v. Houston Guano, etc., Co.*, 107 Ga. 49.

**The Cost of Improvements** on a trust estate, made in reliance on the estate and followed by a promise of the trustee to pay for them, is a proper charge upon the trust property. *Field v. Wilbur*, 49 Vt. 157.

**Legal Services** rendered at the instance of the trustee, necessary and beneficial to the estate,

necessary expenses, as an assessment of stock held in trust,<sup>1</sup> taxes, and the like.<sup>2</sup> This liability may arise in equity, where the estate was benefited, even though the trustee was without authority to control debts against the estate.<sup>3</sup> On the other hand, the estate cannot be charged with articles of which the estate did not actually receive any benefit.<sup>4</sup>

(a) **Liability of Corpus or Income.** — It is a well established principle that interest on mortgages, taxes, insurance, repairs, and all those current expenses which are fairly incidental to the maintenance of the estate used by a life tenant are payable out of the income unless there is a very clear expression of a contrary intention on the part of the settlor. But payments on account of the services and expenses of the trustee constitute a general charge upon the whole estate.<sup>5</sup>

(2) **Arising Out of Tort.** — A liability arising out of the negligence or wrongful act of the trustee is not usually a debt of the estate, but an individual liability of the trustee.<sup>6</sup> However, it seems that a tort committed by the trustee in the reasonable management of the estate, or arising out of a relationship which he had authority to establish, may create a liability against the estate;<sup>7</sup> and where the trustee is entitled to indemnity out of the estate for a judgment taken against him for his tort, one who has recovered judgment against the trustee should have the right to go directly against the estate just as an ordinary creditor of a business carried on by the trustee.<sup>8</sup>

**d. OF BENEFICIARY** — (1) **In General.** — It is a well-settled rule of law that all the property of a debtor, both legal and equitable, shall be responsible for his debts. This rule has generally been applied to the beneficial estate of the *cestui que trust* where there is an unqualified right of enjoyment and alienation.<sup>9</sup> Especially will claims for the support of the beneficiary or other

should be compensated out of the estate. *Manderson's Appeal*, 113 Pa. St. 631. *Compare* *Matter of Holden*, 126 N. Y. 589.

**Lack of Necessary Funds.** — Where a trustee is authorized to make an expenditure for the protection of the trust estate, and he has no fund for that purpose and is unwilling to make himself personally liable, he may charge the estate in favor of any person who will make the expenditure. *O'Brien v. Jackson*, 167 N. Y. 31.

In Georgia suits at law are authorized only for services rendered to the trust estate and not for goods furnished to the beneficiary. *Satterwhite v. Beall*, 28 Ga. 525.

**Necessary Expenses Borne Equally by Beneficiaries.** — Where an estate was given in trust for two children, and the trustee was directed to pay over to each child his share of the property upon his coming of age, the expense of continuing the trust after the share of one child had been paid over should be borne equally by both beneficiaries. *Thome v. Allen*, (Ky. 1902) 70 S. W. Rep. 410.

**Following Estate.** — A claim for services rendered to a trust estate cannot be enforced against a person because of his subsequent receipt of a portion of such estate, under the provisions of the will creating it. *Stanton v. King*, 8 Hun (N. Y.) 4.

1. **Assessment.** — *In re Bull*, (Surrogate Ct.) 23 N. Y. Supp. 283.

2. **Taxes.** — *Dewey v. Donovan*, 126 Mass. 335.

3. **Liability Without Authority to Contract.** — Where a trustee is given property for the benefit of children with authority to use rents and profits of the property for their benefit, but has no authority to contract debts against the

trust estate so as to make it liable therefor, the creditors have an equity to subject the rents, issues, and profits to the payment of their claims where they are for articles furnished and sold for the benefit of the trust estate. *Neal v. Bleckley*, 51 S. Car. 506.

4. **Estate Not Benefited.** — *Beckwith v. McBride*, 70 Ga. 642; *Herron v. Belt*, 99 Ga. 289; *Connor v. Vroom*, 24 Can. Sup. Ct. 701.

**Costs of Lunacy Proceedings Against Trustee.** — A trust fund is not liable for services rendered in defending one of the trustees against a proceeding to declare him a lunatic. *Bickham v. Smith*, 55 Pa. St. 335.

5. **Liability of Corpus or Income.** — *Brown v. Berry*, 71 N. H. 241; *Matter of Albertson*, 113 N. Y. 434. For a general discussion of this subject, see *infra*, this title, *The Trustee — Duties of Trustees — Management of Property — Treatment of Funds*.

6. See *supra*, this section, 7. *b. Liability for Debts — Of Trustees*.

7. **Torts Committed in Reasonable Management of Estate.** — *In re Raybould*, (1900) 1 Ch. 199; *Benett v. Wyndham*, 4 De G. F. & J. 259; *Ferrier v. Trépannier*, 24 Can. Sup. Ct. 86.

**Relation of Landlord and Tenant.** — Damages to a tenant to whom the trustee, with authority, had rented a storehouse, occasioned by the failure of the trustee to keep the building in repair, are collectible out of the estate. *Miller v. Smythe*, 92 Ga. 154.

8. **Indemnification of Trustee.** — *Raybould v. Turner*, 82 L. T. N. S. 46.

9. **United States.** — See *French v. Edwards*, 5 Sawy. (U. S.) 266.

**Connecticut.** — *Davenport v. Lacon*, 17 Conn. 278; *Johnson v. State Bank*, 21 Conn. 148.

**Georgia.** — *Henderson v. Zachry*, 80 Ga. 98,



necessary expenses incurred on his behalf be allowed out of the estate.<sup>1</sup> In some states the liability of the estate for the debts of the *cestui* is imposed by statute, and in such a manner as to extend the common-law liability.<sup>2</sup>

(2) *Sufficiency of Beneficiary's Interest* — (a) *In General*. — It is not every equitable interest under a trust that can be held for the owner's debts. A mere right to enforce the trust without any estate cannot be subjected,<sup>3</sup> nor can an interest of one beneficiary which is inseparable from the interests of the other beneficiaries be taken for his debts.<sup>4</sup> Where the *cestui* becomes the legal owner there is necessarily an interest which is liable.<sup>5</sup>

(b) *Income*. — Income directed to be paid over to the beneficiary for his own use and benefit or in which he has an absolute property can be taken for his liabilities,<sup>6</sup> but a right of support in a *cestui que trust* is not liable for his debts,<sup>7</sup> nor will equity apply to the *cestui's* debts an income which is directed to be applied in part to the support and education of those who are dependent on him;<sup>8</sup> and an income given in trust for the *cestui's* support cannot be reached by creditors and thus diverted from the purpose for which it has been set apart unless the creditor who seeks to subject it to his claim can show that the amount provided is more than adequate for the suitable maintenance of the beneficiary according to his rank and station in life.<sup>9</sup> In that event the

*Indiana*. — *State Bank v. Macy*, 4 Ind. 362.

*Iowa*. — *Doolittle v. Bridgeman*, 1 Greene (Iowa) 265.

*Kentucky*. — *Trabue v. Reynolds*, (Ky. 1887)

4 S. W. Rep. 33; *Marshall v. Rash*, 87 Ky. 116, 12 Am. St. Rep. 467; *Bland v. Bland*, 90 Ky. 400, 20 Am. St. Rep. 390; *Campbell v. Brannin*, 8 B. Mon. (Ky.) 478.

*Maryland*. — *Warner v. Rice*, 66 Md. 436.

*Massachusetts*. — *Forbes v. Lothrop*, 137 Mass. 523.

*Missouri*. — *McGregor-Noe Hardware Co. v. Horn*, 146 Mo. 129.

*New York*. — *Foote v. Colvin*, 3 Johns. (N. Y.) 216, 3 Am. Dec. 478; *Jackson v. Bateman*, 2 Wend. (N. Y.) 570; *Jackson v. Walker*, 4 Wend. (N. Y.) 462; *Wendt v. Walsh*, 164 N. Y. 154.

*Ohio*. — *Adams v. Nelson*, 1 Ohio Dec. 216, 31 Cinc. L. Bul. 46.

*Pennsylvania*. — *Griffith's Estate*, 147 Pa. St. 274.

*Rhode Island*. — *Ryder v. Sisson*, 7 R. I. 341.

*South Carolina*. — *Heath v. Bishop*, 4 Rich. Eq. (S. Car.) 46, 55 Am. Dec. 654.

*Texas*. — *Goodrich v. Hicks*, 19 Tex. Civ. App. 528.

*Virginia*. — *Hutchinson v. Maxwell*, 100 Va. 169, 93 Am. St. Rep. 944.

**A Debt Due by the Cestui to the Estate** must be paid before the *cestui* is entitled to have the property turned over by the trustees. *In re Weston*, (1900) 2 Ch. 164; *Iredell v. Langston*, 1 Dev. Eq. (16 N. Car.) 396.

**A Debt of the Cestui Takes Priority** over a charge for counsel fees incurred by the trustee in defending an action to subject the estate to the debt. *Young v. Bullen*, (Ky. 1897) 43 S. W. Rep. 687.

**1. Necessary Personal Expenses of Beneficiary**. — *Mandell v. Fulcher*, 86 Ga. 166; *Young v. Bullen*, (Ky. 1897) 43 S. W. Rep. 687; *Burroughs v. Bunnell*, 70 Md. 18; *Newton v. Rebenack*, 90 Mo. App. 650; *Patterson v. Read*, 42 N. J. Eq. 621; *Sherman v. Skuse*, 45 N. Y. App. Div. 335, *affirmed* 166 N. Y. 345; *Erisman*

*v. Directors of Poor*, 47 Pa. St. 509; *Doswell v. Anderson*, 1 Patt. & H. (Va.) 185.

**Cestui's Shares Liable for Advancements**. — *Sprague v. Moore*, 130 Mich. 92.

**2. Liability Imposed by Statute**. — *Marshall v. Rash*, 87 Ky. 116, 12 Am. St. Rep. 467; *Graves v. Reed*, (Ky. 1889) 12 S. W. Rep. 550; *Bull v. Kentucky Nat. Bank*, 90 Ky. 452; *Hancock v. Twyman*, (Ky. 1898) 45 S. W. Rep. 68; *Boswell v. Hall*, 8 Ohio Dec. 590; *Hutchinson v. Maxwell*, 100 Va. 169, 93 Am. St. Rep. 944.

**3. In South Dakota**, where by statute the *cestui que trust* has no estate, but a mere right to enforce the trust, he has no interest which can be subjected to his debts. *Brace v. Van Eps*, 12 S. Dak. 191.

**4. Inseparable Interest**. — *Brooks v. Reynolds*, (C. C. A.) 59 Fed. Rep. 923; *Cosby v. Ferguson*, 3 J. J. Marsh. (Ky.) 264; *Flournoy v. Johnson*, 7 B. Mon. (Ky.) 693; *Gillis v. McKay*, 4 Dev. L. (15 N. Car.) 172.

**5. When the Beneficiary Acquires the Legal Title by Descent** his share is liable to be sold for his debts. *Wills v. Cooper*, 25 N. J. L. 137.

**After the Husband's Death** the wife becomes the legal owner of an estate held in trust for her so that a judgment against her binds it. *Coughlin v. Seago*, 53 Ga. 250.

**6. Income Liable**. — *Havens v. Healy*, 15 Barb. (N. Y.) 296; *Girard L. Ins., etc., Co. v. Chambers*, 46 Pa. St. 485, 86 Am. Dec. 513; *Decker v. Directors of Poor*, 120 Pa. St. 272; *Conpropt v. Directors of Poor*, (Pa. 1888) 13 Atl. Rep. 927.

**7. Mere Right of Support**. — *Baker v. Brown*, 146 Mass. 369; *Moore v. Simmons*, 2 Head (Tenn.) 545.

**8. Support of Those Dependent on Cestui**. — *Pickrel v. Zell*, 2 MacArthur (D. C.) 65; *Markham v. Guarrant*, 4 Leigh (Va.) 279. See also *Brown v. Postell*, 4 Rich. Eq. (S. Car.) 71.

**9. Showing Income More than Sufficient**. — *Genet v. Beekman*, 45 Barb. (N. Y.) 382; *Stow v. Chapin*, (Supm. Ct. Spec. T.) 4 N. Y. Supp. 496; *Plainfield First Nat. Bank v. Mortimer*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 686;



surplus may be subjected to the beneficiary's debts.<sup>1</sup>

After the Death of the Life Tenant his debts cannot be collected out of the income.<sup>2</sup> A power in the life tenant to distribute the estate by will does not vest in the life tenant such estate as, after such distribution, is subject to the payment of his debts.<sup>3</sup>

(c) **Reservation of Powers and Discretion in Trustee.** — The interest of a *cestui que trust* which is controlled entirely by the trustees and payable to the beneficiary only in their discretion, and which the trustees have the power to defeat altogether, is not liable for his debts,<sup>4</sup> but if the discretion does not amount to a right to exclude the debtor, then the creditor can claim from the trustees the amount which the debtor could have claimed should have been applied to his benefit.<sup>5</sup>

(3) **Provisions for Nonliability.** — The effect of provisions in the creating instrument that the estate shall not be liable for the debts of the beneficiary is treated elsewhere in this work.<sup>6</sup>

**8. Duration and Termination** — *a.* BY OPERATION OF LAW — (1) *In General.* — The trust estate owes its continuance as well as its origin to the powers and duties of the trustee. It will endure while there are duties yet to be performed, but when these cease the trust is terminated by the statute of uses.<sup>7</sup> The courts will then, when resorted to, declare the trust at an end and require the trustee to convey to those entitled to the property.<sup>8</sup> Especially

*Keeney v. Morse*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 114; *Howard v. Leonard*, 3 N. Y. App. Div. 277; *Schuler v. Post*, 18 N. Y. App. Div. 374; *Everett v. Peyton*, 167 N. Y. 117; *Chosen Freeholders v. Henry*, 41 N. J. Eq. 388.

**Burden of Proof.** — The burden of proof is on one who alleges the income to be more than sufficient for the support of the beneficiary. *Bunnell v. Gardner*, 4 N. Y. App. Div. 321.

**A Fund in the Nature of a Charity** raised to relieve a person's necessities cannot be reached by his creditors. *Wilder v. Clark*, (N. Y. City Ct. Spec. T.) 11 N. Y. Supp. 683.

**A Remote and Incomputable Interest** in the income is not subject to debts. *Mander v. Low*, (Supm. Ct. Spec. T.) 12 Misc. (N. Y.) 316.

**The Right of the Life Beneficiary to Dispose of the Principal** by will does not render any part of the fund liable for his debts, the entire income being necessary for the support of himself and family. *Plainfield First Nat. Bank v. Mortimer*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 686.

**Income for Married Woman Not Liable.** — *Noyes v. Blakeman*, 6 N. Y. 567.

**1. Surplus Liable.** — *Spring v. Randall*, 107 Mich. 103; *Howard v. Leonard*, 3 N. Y. App. Div. 277; *Schuler v. Post*, 18 N. Y. App. Div. 374; *Spencer v. Richmond*, 46 N. Y. App. Div. 481.

**Laws of What Jurisdiction Control.** — The laws of the state in which the trust is being administered, and in which the application to reach the fund is made, will control the right of the creditor, although the creator of the trust was a resident of another state by whose laws the validity of the trust was determined. *Keeney v. Morse*, 71 N. Y. App. Div. 104.

**2. After Death of Life Tenant.** — *Rogers v. Payne*, 14 B. Mon. (Ky.) 135; *Metzger's Estate*, 18 Lanc. L. Rev. 43; *Buckingham's Estate*, 12 Phila. (Pa.) 105, 35 Leg. Int. (Pa.) 201. See also *Sachs v. Walsh*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 751; *Boggs v. Reid*, 3 Rich. L. (S. Car.) 450.

**3. Power of Distribution by Will.** — *Humphrey v. Campbell*, 59 S. Car. 39. See also *Patterson v. Lawrence*, 83 Ga. 703.

**4. Preservation of Discretion and Powers in Trustees.** — *Fearson v. Dunlop*, 21 D. C. 236; *Davidson v. Kemper*, 79 Ky. 5; *Foster v. Foster*, 133 Mass. 179; *Nickerson v. Van Horn*, 181 Mass. 562; *Banfield v. Wiggin*, 58 N. H. 155; *Vaux v. Parke*, 7 W. & S. (Pa.) 19; *Stone v. Westcott*, 18 R. I. 685; *Nashville First Nat. Bank v. Nashville Trust Co.*, (Tenn. Ch. 1901) 62 S. W. Rep. 392; *Roberts v. Hall*, 35 Vt. 28.

**In Kentucky** this rule has been modified by statute. *Marshall v. Rash*, 87 Ky. 116, 12 Am. St. Rep. 467.

**5. Discretion Without Power to Exclude Cestui.** — *Hutchinson v. Maxwell*, 100 Va. 169, 93 Am. St. Rep. 944; *Robertson v. Johnston*, 36 Ala. 197; *Samuel v. Ellis*, 12 B. Mon. (Ky.) 479. See also *Huntington v. Jones*, 72 Conn. 45.

**6.** See SPENDTHRIFT TRUSTS, vol. 26, p. 137.

**7.** See *supra*, this section, *Title and Estate of the Trustee*, in respect to quantity or duration.

**8. Termination and Conveyance Decreed by Court.** — *Obermiller v. Wylie*, 36 Fed. Rep. 641; *Flagg v. Walker*, 113 U. S. 659; *Frost v. Frost*, 63 Me. 399; *Stone, Petitioner*, 138 Mass. 476; *Consolidated Electric Storage Co. v. Atlantic Trust Co.*, 161 N. Y. 605; *Taylor v. Huber*, 13 Ohio St. 288; *Harrisburg First Baptist Church v. Pennsylvania Baptist State Mission Soc.*, 15 Pa. Co. Ct. 332. See also *Tierman v. Security Bldg., etc., Assoc.* No. 2, 152 Mo. 135.

**Reasonable Time for Performance of Trust Must Be Allowed.** — *Floyd v. Davis*, 98 Cal. 591; *Nichols v. Rogers*, 139 Mass. 146.

**When Trust Executed by a Court of Equity.** — If the gift is complete and the donor has parted with the legal title, a court of equity will then execute the trust, because the relation of trustee and *cestui que trust* is established by the act of the donor. But if the gift is not complete, and it requires another act of the donor to divest him of his legal title, a court of equity

will the termination of the trust and the proper disposition of the estate be ordered by the courts where the statute of uses, not being in effect, does not execute the trust, and there is no reason for its further continuance,<sup>1</sup> or where the subject-matter of the trust is not within the statute, as where the estate consists of personal property.<sup>2</sup>

(2) *When Beneficiary Acquires Capacity to Receive.* — As a general rule, a trust for the benefit of infants terminates when they come of age;<sup>3</sup> a trust for a person *non compos mentis*, upon the person's recovery;<sup>4</sup> a trust for persons not *in esse*, when they come into being and, being ascertained as to identity and number, become capable of taking a vested interest in the property;<sup>5</sup> and a trust for an association or corporation without capacity to receive the estate, when it acquires, by the perfection of its organization, such capacity.<sup>6</sup> However, if some, but not all, of the infant beneficiaries have reached their majority the trustee will still retain title for those who are minors;<sup>7</sup> and where a trust is in favor of the children now living or that may hereafter be born of certain parents, the trustees will retain the title as long as there is a possibility of issue, which, in the eye of the law, continues as long as the woman lives, or coverture exists.<sup>8</sup>

(3) *Death of Parties* — (a) *Of Trustee.* — A personal trust terminates at the death of the trustee,<sup>9</sup> but ordinarily the duration of the estate is not affected,

will never perform that act. *Evans v. Battle*, 19 Ala. 398.

*Intervention of Administrator.* — Where a person gave a deed for creditors and died before the execution of the trust, and the state of his affairs in respect to the trust was such as to necessitate the appointment of an administrator, the title of the trustee terminated. *Thaxton v. Smith*, (Tex. Civ. App. 1896) 38 S. W. Rep. 820.

*Sufficiency of Conveyance.* — A trustee, when directed to convey to the beneficiary by good and sufficient deed, need not make any other deed than a deed of release with covenants against acts done or suffered by himself. *Kirten v. Spears*, 44 Ark. 166.

*Objection on the Part of the Trustee to the termination of the trust is immaterial, if the purposes of the trust have been accomplished.* *Seventeenth Ward Bldg. Assoc. v. Fitzgerald*, 11 Ohio Dec. 133; *Armistead v. Hartt*, 97 Va. 316.

*Conclusiveness of Decree of Divorce Discharging Trust for Wife and Children.* — See *Reynolds v. Watkins*, (C. C. A.) 60 Fed. Rep. 824.

1. *Termination by Court Where Statute Not in Effect.* — *Schlessinger v. Mallard*, 70 Cal. 326; *Carney v. Kain*, 40 W. Va. 758.

2. *Trust in Personalty.* — *Paine v. Forsaith*, 86 Me. 357; *McKenzie v. Sumner*, 114 N. Car. 425.

3. *Trust for Infants.* — *Gray v. Obear*, 54 Ga. 231; *Turner v. Kirkpatrick*, 77 Ga. 794; *Parrott v. Dyer*, 105 Ga. 93.

*The Discharge of an Executor upon Whom a Trust Is Imposed in favor of minor legatees will not terminate the trust during such minority.* *Calvert v. Boullemet*, 46 La. Ann. 1132.

*Contrary Provisions in Instrument.* — The trust terminates when the beneficiary reaches her majority although the instrument provides that the trustee shall manage the property until she arrives at the age of thirty. *Rector v. Dalby*, 98 Mo. App. 189. But see *Claffin v. Claffin*, 149 Mass. 19, 14 Am. St. Rep. 393, holding that the trustee would continue to hold

so as not to contravene the intention of the settlor.

*Termination at Mature Age.* — A trust for children who by reason of their youth are not "accustomed to the proper management of estates" terminates when the beneficiaries reach a mature age. *Fisher v. Wister*, (Pa. 1893) 25 Atl. Rep. 1015.

*Trust Not Ipso Facto Terminated.* — A trust constituted during the minority of the beneficiary is not dissolved *ipso facto* by her arrival at majority. *Vaughn v. Tealey*, (Tenn. Ch. 1899) 58 S. W. Rep. 487; *Pilcher v. McHenry*, 14 Lea (Tenn.) 77.

4. *Recovery of Person Non Compos Mentis.* — *Webster v. Bush*, (Ky. 1897) 39 S. W. Rep. 411.

5. *When Beneficiaries Become in Esse.* — *McBrayer v. Cariker*, 64 Ala. 50; *Comby v. McMichael*, 19 Ala. 747; *Thompson v. Ballard*, 70 Md. 10.

6. *Associations or Corporations.* — Centenary M. E. Church v. Parker, 43 N. J. Eq. 307; *Henderson v. Adams*, 15 Utah 30.

7. *Where Some Beneficiaries Remain Infants.* — *Boyd v. England*, 56 Ga. 598; *Sanders v. Houston Guano, etc., Co.*, 107 Ga. 49; *Clarke v. East Atlanta Land Co.*, 113 Ga. 21; *Turnage v. Greene*, 2 Jones Eq. (55 N. Car.) 63, 62 Am. Dec. 208; *Bacot v. Heyward*, 5 S. Car. 441; *Bearden v. White*, (Tenn. Ch. 1897) 42 S. W. Rep. 476.

8. *Possibility of Further Issue.* — *Sanders v. Houston Guano, etc., Co.*, 107 Ga. 49; *Taylor v. Brown*, 112 Ga. 758; *Clarke v. East Atlanta Land Co.*, 113 Ga. 21; *In re Ricards*, 97 Md. 608; *Newton v. Rebenack*, 90 Mo. App. 650; *Bearden v. White*, (Tenn. Ch. 1897) 42 S. W. Rep. 476. But see *McNish v. Guerard*, 4 Strobb. Eq. (S. Car.) 66.

*Evidence that Further Issue Is Impossible during the lifetime of the parents is incompetent.* *In re Ricards*, 97 Md. 608.

9. *Personal Trust.* — *Hadley v. Hadley*, 147 Ind. 423; *Hinckley v. Hinckley*, 79 Me. 320; *Ferguson v. Stephens*, 5 Mo. 211.



as survivorship and reappointment of trustees is generally provided for.<sup>1</sup>

(b) **Of Beneficiary.** — Where the beneficial interest in the estate consists of a particular estate for life and a remainder, and the trustee's duties are wholly incident to the particular estate, the death of the life tenant marks the termination of the trust and the entire estate vests in the remaindermen.<sup>2</sup> Or if an estate be given on certain trusts until the beneficiary becomes of age, the death of the beneficiary during minority terminates the trust.<sup>3</sup>

**Duration of Estate Involving Additional Duties.** — Sometimes, after the termination of the particular estate, the trustee is required to care for and preserve the estate for the remaindermen, or make a division of the property. Then, of course, the trustee takes a legal estate of added duration,<sup>4</sup> but of no greater duration than is actually required.<sup>5</sup> The character of the trustee's estate in such cases has been held to be a life estate with a term of years in remainder when that is sufficient for the purposes of the trust,<sup>6</sup> but this theory has been declared untenable, on the ground that the entire estate taken must vest at once, and that the concurrent existence of a life estate with a chattel interest is unheard of in the law.<sup>7</sup>

(4) **Trusts for Married Women.** — Trusts for married women being designed for the protection of the estate from the husband during coverture, the estate ceases upon the death of the woman,<sup>8</sup> or the husband.<sup>9</sup> So also

1. See *supra*, this section, 6. *e. Properties and Incidents — Devolution.*

**Trust Not Terminated by Trustee's Death.** — *Witter v. Dudley*, 36 Ala. 135; *Dyer v. Leach*, 91 Cal. 191; *Robinson v. Schmitt*, 17 N. Y. App. Div. 628.

**Unessential Condition.** — Where property was directed to be sold under a trust to raise a certain fund, with the approval of four of the six trustees appointed, the death of three of the trustees before anything was accomplished did not defeat the trust. *Spence v. Widney*, (Cal. 1896) 46 Pac. Rep. 463.

2. **Death of Life Tenant — England.** — *Collier v. M'Bean*, 34 Beav. 426; *In re Lashmar*, (1891) 1 Ch. 258, *criticising and doubting* *Doe v. Biggs*, 2 Taunt. 109.

*Alabama.* — *Greenwood v. Coleman*, 34 Ala. 150; *McBrayer v. Cariker*, 64 Ala. 50; *Gandy v. Fortner*, 119 Ala. 303.

*Connecticut.* — *Bacon v. Taylor*, Kirby (Conn.) 368.

*Georgia.* — *Jordan v. Thornton*, 7 Ga. 517; *Fleming v. Hughes*, 99 Ga. 444.

*Maryland.* — *Hooper v. Felgner*, 80 Md. 262; *Numsen v. Lyon*, 87 Md. 31.

*Massachusetts.* — *Hyde v. Wason*, 131 Mass. 450.

*New York.* — *McArthur v. Gordon*, 51 Hun (N. Y.) 511.

*Pennsylvania.* — *Edmund's Appeal*, 68 Pa. St. 24; *Stokes's Appeal*, 80 Pa. St. 337.

*Tennessee.* — *Davis v. Williams*, 85 Tenn. 646.

**The New York Statute** (1 Rev. Stat., p. 729, § 60), providing that every valid express trust shall vest the entire estate in the trustee, does not apply to the legal remainder of the beneficiary, but only to the trust estate itself. *Losley v. Stanley*, 147 N. Y. 560.

**A Sale of the Life Interest under a Personal Trust in insolvency proceedings terminates the trust.** *Thompson v. Ballard*, 70 Md. 10.

3. **Death of Beneficiary During Minority.** — *Morant v. Gough*, 7 B. & C. 206, 14 E. C. L.

28; *Hersey v. Purington*, 96 Me. 166; *Newman v. Dotson*, 57 Tex. 117.

4. **Duties to Remaindermen.** — *Bryan v. Weems*, 29 Ala. 423, 65 Am. Dec. 407; *Bringinghurst v. Cuthbert*, 6 Binn. (Pa.) 399; *Gadsden v. Cappedeville*, 3 Rich. L. (S. Car.) 467; *Wieters v. Timmons*, 25 S. Car. 488; *Horn v. Broyles*, (Tenn. Ch. 1900) 62 S. W. Rep. 297.

**Division of Property.** — *Yates v. Thomas*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 552.

5. *Henderson v. Williams*, 97 Ga. 709.

6. **Life Estate with Term of Years in Remainder.** — *Doe v. Simpson*, 5 East 162.

**A New and Different Estate** arises upon the termination of the life estate where the trustees are required to divide the remainder, and hold the same for the remaindermen. *Matter of Opening One Hundred and Tenth St.*, 81 N. Y. App. Div. 27.

7. **Theory Declared Untenable.** — *Collier v. Walters*, L. R. 17 Eq. 252.

8. **Death of Woman.** — *Noble v. Andrews*, 37 Conn. 346; *Liptrot v. Holmes*, 1 Ga. 390; *Richardson v. Stodder*, 100 Mass. 528; *William v. Holmes*, 4 Rich. Eq. (S. Car.) 475; *Aikin v. Smith*, 1 Sneed (Tenn.) 304.

**Trust for Children of Married Woman.** — Where a bequest to a married woman is revoked and a trust in her children created instead, the sole purpose being to protect the property from the husband, the trust ceases on the mother's death. *Smith v. Metcalf*, 1 Head (Tenn.) 64.

9. **Death of Husband — England.** — *Loch v. Bagley*, L. R. 4 Eq. 122.

*Alabama.* — *Compare Parish v. Balkum*, 40 Ala. 285.

*Georgia.* — *Coughlin v. Seago*, 53 Ga. 250; *Carswell v. Lovett*, 80 Ga. 36.

*Massachusetts.* — *Parker v. Converse*, 5 Gray (Mass.) 336.

*Missouri.* — *Roberts v. Moseley*, 51 Mo. 282.

*New York.* — *Frazier v. Western*, 1 Barb. Ch. (N. Y.) 220.

*Pennsylvania.* — *Rea v. Cassel*, 13 Phila. (Pa.) 159, 36 Leg. Int. (Pa.) 157; *Bush's Ap-*



the trust will be terminated when the estate is freed from any liability or control on the part of the husband by the enactment of married women's acts,<sup>1</sup> or by divorce.<sup>2</sup>

**Preservation of Children's Interests.** — The death of the mother will not end the trust when it is necessary to continue it to protect the children's interests from the father,<sup>3</sup> or where the husband is trustee for the wife and children.<sup>4</sup>

(5) *Lapse of Time* — (a) **Adverse Possession by Cestui Que Trust.** — The presumption that a conveyance has been made by the trustee to the *cestui que trust* and that the trust is terminated may arise in support of long-continued possession by the parties having the beneficial interest,<sup>5</sup> the presumption being indulged equally whether the creation is by a deed or will.<sup>6</sup> This presumption arises because the law presumes that to have been done which ought to have been done,<sup>7</sup> but it may also arise on account of the policy of the law to quiet possession.<sup>8</sup>

**Prerequisites of Presumption.** — In order that the presumption of a conveyance or reliance by the trustee may arise it must have been the duty of the trustee to convey, there must be a sufficient reason for the presumption, and the object of the presumption must be to support a just title.<sup>9</sup> The usual reason for the presumption is adverse possession by the *cestui que trust* for a sufficient length of time,<sup>10</sup> and as the possession of the *cestui que trust* is considered the possession of the trustee, the adverse holding must consist of some positive act and not merely a failure to recognize the rights of the trustee,<sup>11</sup> although it is not necessary that the possession should have been adverse from the beginning.<sup>12</sup>

(b) **Adverse Possession by Trustee.** — Long-continued possession by the trustee, openly, adversely, and with the full knowledge of the *cestui que trust*, may give the trustee the complete legal and equitable title.<sup>13</sup> The mere lapse of

peal, 33 Pa. St. 85; *Renziehausen v. Keyser*, 48 Pa. St. 351; *Dodson v. Ball*, 60 Pa. St. 493, 100 Am. Dec. 586; *Wells v. McCall*, 64 Pa. St. 207; *Chadwick's Appeal*, (Pa. 1886) 7 Atl. Rep. 178.

*Rhode Island.* — *Rogers v. Rogers*, 10 R. I. 556.

*South Carolina.* — *Snelling v. Lamar*, 32 S. Car. 72, 17 Am. St. Rep. 835.

*Tennessee.* — *Temple v. Ferguson*, (Tenn. 1903) 72 S. W. Rep. 455.

**Effect of Remarriage.** — A provision in a deed of trust for a married woman that she may have a conveyance of the estate by requesting it upon the death of her husband, "and being discovert," she is entitled to a conveyance, although she may have remarried, if the request was made during her discoverture. *Winchester v. Machen*, 75 Md. 538.

1. **Married Women's Acts.** — *Carswell v. Lovett*, 80 Ga. 36; *Nightingale v. Nightingale*, 13 R. I. 113.

2. **Divorce.** — *Koenig's Appeal*, 57 Pa. St. 352.

3. *McChord v. Booker*, 6 Dana (Ky.) 260.

4. **Distinction Between Trusteeship of Stranger and Husband.** — The courts distinguish between a trust given to a stranger to protect the wife from her husband, and a case where the husband is selected to guard the interests of the wife and her children. In the latter case the husband will retain title after the death of the wife, to supervise the estate for the children. *Baker v. Nall*, 59 Mo. 265.

5. **Presumption of Termination by Lapse of Time.** — *Matthews v. Ward*, 10 Gill & J. (Md.) 443; *Leonard v. Diamond*, 31 Md. 536; *Taft v.*

*Decker*, 182 Mass. 106; *Moore v. Jackson*, 4 Wend. (N. Y.) 59. See also *Jackson v. Pierce*, 2 Johns. (N. Y.) 226. Compare *Brewster v. Striker*, 1 E. D. Smith (N. Y.) 321, *affirmed* (Ct. App.) 5 How. Pr. (N. Y.) 40, 2 N. Y. 19.

**Statute Not Retroactive.** — The *New York* statute providing that certain trusts shall be deemed to be discharged twenty-five years from the creation thereof is not retroactive, but only applies to estates conveyed for the purpose specified, after the passage of the act. *McCahill v. Hamilton*, 20 Hun (N. Y.) 388.

6. *Aikin v. Smith*, 1 Sneed (Tenn.) 304.

7. **That Presumed to Be Done Which Ought to Be Done.** — *Hillary v. Waller*, 12 Ves. Jr. 239; *Aikin v. Smith*, 1 Sneed (Tenn.) 304.

8. *Hillary v. Waller*, 12 Ves. Jr. 239.

9. **Prerequisites of Presumption.** — *Aikin v. Smith*, 1 Sneed (Tenn.) 309.

**Trustee Must Have Been Authorized to Convey.** — *Beach v. Beach*, 14 Vt. 28, 39 Am. Dec. 204.

**Evidence Establishing the Existence of a Trust** does not in itself authorize a presumption that the trust has been executed and the legal estate transferred to the *cestui que trust*. *Guphill v. Isbell*, 1 Bailey L. (S. Car.) 230, 19 Am. Dec. 675.

**Conduct of Parties Must Be Inconsistent with Continued Existence of Trust.** — *Garrard v. Tuck*, 8 C. B. 248, 65 E. C. L. 248.

10. **Adverse Possession.** — *Flournoy v. Johnson*, 7 B. Mon. (Ky.) 694; *Leonard v. Diamond*, 31 Md. 536.

11. *Matthews v. Ward*, 10 Gill & J. (Md.) 443.

12. *Hillary v. Waller*, 12 Ves. Jr. 239.

13. **Adverse Possession by Trustee.** — *Congre-*

time with the trustee in possession cannot divest the *cestuis que trustent* of their interest in the estate,<sup>1</sup> but they must have notice that the trustee has repudiated the trust and that his possession is adverse.<sup>2</sup>

**b. BY ITS OWN LIMITATIONS.** — If the instrument of creation places definite limitations upon the duration of the trust, it will end at the time stated; as upon the expiration of a period of specified duration,<sup>3</sup> or upon the happening of a specified event of uncertain occurrence,<sup>4</sup> or when the beneficiaries become of age,<sup>5</sup> or at the death of the beneficiary.<sup>6</sup> The trust will also be defeated by a violation of the conditions upon which it was created.<sup>7</sup>

**Trust Not Terminated on Trivial Grounds.** — When a trust is clearly established a court of equity looks at the substance, and will not defeat it upon light and trivial grounds, but will accord to each party his just and lawful rights, preserving them according to the original contemplation of the parties.<sup>8</sup> If the trust instrument obviously fails to conform to the intention of the settlor the court will sometimes modify it in conformity to the intention rather than set aside the trust.<sup>9</sup>

gational Soc. v. Newington, 53 N. H. 595; Matter of Roman Catholic Soc., 4 Lans. (N. Y.) 14; Morris's Appeal, 68 Pa. St. 16. See also Moore v. Green, 3 B. Mon. (Ky.) 407.

**1. Mere Lapse of Time.** — Baker v. Whiting, 3 Sumn. (U. S.) 475; Fleming v. Gilmer, 35 Ala. 62; Green v. Otter, 3 B. Mon. (Ky.) 102; Dunn v. Wheeler, 86 Me. 238.

**2. Cestuis Must Have Notice of Adverse Possession.** — Pulliam v. Pulliam, 10 Fed. Rep. 53; Baker v. Whiting, 3 Sumn. (U. S.) 475; Snyder v. McComb, 39 Fed. Rep. 292; Anderson v. Northrop, 30 Fla. 612.

**3. Limitation to Definite Period.** — Smith v. Kinney, 33 Tex. 283.

**The Trust Must Be Executed Within a Reasonable Time** when the precise period of termination is not stated. Taylor v. Abert, (Ky. 1893) 23 S. W. Rep. 962.

**Provisions of Trust Control Exclusively.** — Where the provision is that the trust shall cease when "the habits of the beneficiary shall be such as to render it prudent," the fact that the trustees have contracted with the beneficiary, or that he has capacity to contract, does not of itself terminate the trust. Avery v. Avery, 90 Ky. 613.

**4. Happening of Specified Event.** — Fox v. Storrs, 75 Ala. 265; Waring v. Waring, 10 B. Mon. (Ky.) 331; Winchester v. Machen, 75 Md. 538.

**5. When Beneficiaries Become of Age.** — Doe v. Martyn, 2 M. & R. 485, 8 B. & C. 497, 15 E. C. L. 276; Smithwick v. Wintersmith, (Ky. 1890) 14 S. W. Rep. 354; Pearce v. Savage, 45 Me. 90; Bellinger v. Shafer, 2 Sandf. Ch. (N. Y.) 293. See also Blackburn v. Webb, 133 Cal. 420.

**Terms of Trust Control Against Agreement Among Beneficiaries.** — Chandler v. Pomeroy, 87 Fed. Rep. 262.

**6. Death of Beneficiary.** — Speed v. St. Louis, etc., R. Co., (C. C. A.) 86 Fed. Rep. 235; Powell v. Glenn, 21 Ala. 458; Cherry v. Richardson, 120 Ala. 242; Smith v. Baxter, 62 N. J. Eq. 209; Fitzpatrick's Appeal, 49 Pa. St. 241; Park v. Cheek, 4 Coldw. (Tenn.) 20; Ellis v. Fisher, 3 Sneed (Tenn.) 231, 65 Am. Dec. 52.

**Consent of Trustee Essential to Earlier Termination.** — Metcalfe v. Union Trust Co., 87 N. Y. App. Div. 144.

**7. Violation of Conditions.** — Godfrey v. Walker, 42 Ga. 562; Cherbonnier v. Bussey, 92 Md. 413; Lee v. Kennedy, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 140, *affirming* (N. Y. City Ct. Gen. T.) 19 Misc. (N. Y.) 352; U. S. Mortgage, etc., Co. v. Marquam, 41 Oregon 391; Bruner v. Finley, 187 Pa. St. 389.

**Cesser Clause.** — A *cesser* clause providing that a trust to pay over the rents and profits of land to the beneficiary for life shall cease upon the alienation of the interest of the beneficiary is unnecessary, if appropriate words are used to indicate that the income is intended solely for the benefit of the beneficiary. Cherbonnier v. Bussey, 92 Md. 413.

**Bad Faith of Beneficiary.** — Stafford v. Carragan, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 61.

**8. Trust Not Terminated on Trivial Grounds.** — Currence v. Ward, 43 W. Va. 367; Smith v. Terry, 166 N. Y. 632.

**Unessential Condition.** — Where the trust was for the purpose of establishing an astronomical observatory on a spot to be selected with the approval of the settlor, the death of the settlor without approving a selection does not cause the trust to fail. Spence v. Widney, (Cal. 1896) 46 Pac. Rep. 463.

**Failure to Appoint Trustees.** — The failure of judges to appoint trustees of a fund bequeathed in trust to executors, in accordance with the will of the testator, does not defeat the trust. *In re John*, 30 Oregon 494.

**A Change of Custody of Minor Beneficiaries** by a decree of court contrary to the expectation of the testator does not affect their interest in a trust which he had created in their favor. Clausen v. Jones, 18 Tex. Civ. App. 376.

**Trust for Legal and Illegal Purposes.** — Where some of the objects or limitations of the trust are illegal but some of the purposes are valid, the legal title vests in the trustees and continues until the valid purposes of the trust are accomplished. This rule cannot apply where the legal and illegal objects of the trust are not capable of separation. Hawley v. James, 5 Paige (N. Y.) 318, *reversed* on other grounds 16 Wend. (N. Y.) 61.

**9. Parker v. Allen,** (Supm. Ct. Spec. T.) 14 N. Y. Supp. 265.

c. BY ACT OF PARTIES — (1) *The Settlor* — (a) *Power of Revocation*. — A trust with an express power of revocation reserved to the settlor is, of course, determinable by his act.<sup>1</sup> The settlor may also terminate the trust by virtue of an implied power of revocation which is deemed to exist when the creating instrument is testamentary in character,<sup>2</sup> or the creation is incomplete,<sup>3</sup> or the trust was for a limited purpose which is satisfied,<sup>4</sup> or there has been a breach of conditions.<sup>5</sup>

**Whether a Power of Revocation Exists** must be determined by the creating instrument and the circumstances. As a rule, a conveyance by deed, absolute in form and without a power of revocation, after deliberation and with a full understanding of its terms, conditions, and effect, is irrevocable,<sup>6</sup> unless it is apparent that the settlor did not intend to part with the estate finally and absolutely, and reserved, by implication at least, the power to revoke.<sup>7</sup> The trust will not be rendered terminable by the settlor by reason of the reservation of a life interest to the settlor,<sup>8</sup> nor the reservation of a limited discretion as

1. *Ewing v. Jones*, 130 Ind. 247.

**Second Conveyance an Effective Revocation.** — *Carroll v. Llewellyn*, 1 Har. & M. (Md.) 162; *Gaither v. Williams*, 57 Md. 625; *Carter v. Hough*, 86 Va. 668.

**Conveyance of Residuary Interest.** — Where a debtor conveyed lands to trustees to sell the same for certain creditors and to reconvey to him the residue, and afterwards conveyed to the trustees his residuary interest for the benefit of the same creditors and in satisfaction of their demands, the creditors accepting the trust fund as a satisfaction of their claims, the trust was determined. *Selden v. Vermilya*, 3 N. Y. 525.

**Revocation Subsequently Destroyed.** — A revocation executed by the settlor on account of a prospective settlement with his creditors which did not materialize, and subsequently destroyed by him, is no effective revocation. *Hill v. Cornwall*, 95 Ky. 512.

**Seal and Delivery Unessential to Revocation.** — *Barnard v. Gantz*, 140 N. Y. 249.

**A Will Disposing of All the Settlor's Property** is no revocation of a previous deed in trust where he had other property than that conveyed in trust. *Wilson v. Anderson*, 186 Pa. St. 531.

**The Death of the Settlor Without Exercising His Power of Revocation** renders the trust absolute. *Barlow v. Loomis*, 19 Fed. Rep. 677; *Moses v. Hatch*, 21 N. Y. App. Div. 468.

**2. Creating Instrument of Testamentary Character.** — *Massey v. Huntington*, 118 Ill. 80; *Rick's Appeal*, 105 Pa. St. 528; *Sturgeon v. Stevens*, 186 Pa. St. 350; *Chestnut St. Nat. Bank v. Fidelity Ins., etc., Co.*, 186 Pa. St. 333, 65 Am. St. Rep. 860.

**Where the Rights of the Settlor Over the Trust Estate Are Not Limited** the trust is revocable at his pleasure. *Sayre v. Sayre*, 17 N. J. Eq. 349; *Steeley v. Steeley*, 24 Pa. Co. Ct. 610. See also *Gardella v. Meeker*, 3 Wash. Ter. 178.

**The Grantor May Have His Income Increased** from a stated amount, provided it comes out of the rents and profits and does not affect the remaindermen. *Anderson v. Kemper*, (Ky. 1903) 76 S. W. Rep. 122.

**3. Incomplete Creation.** — *McCartney v. Ridgway*, 160 Ill. 129; *Yard v. Pittsburgh, etc., R. Co.*, 131 Pa. St. 205.

**A Voluntary Settlement Without Consideration**

for the settlor for life, with remainder to his legatees, or his heirs in case of his intestacy, is revocable, and the omission of a power of revocation is *prima facie* a mistake. *Aylsworth v. Whitcomb*, 12 R. I. 298.

**4. Limited Purposes Satisfied.** — *Smyth v. Carlisle*, 16 N. H. 464; *Eaton v. Tillinghast*, 4 R. I. 276. See also *Sturgeon v. Stevens*, 186 Pa. St. 350.

**5. Breach of Conditions.** — *Poirier v. Brulé*, 20 Can. Sup. Ct. 97.

**6. Deed Irrevocable.** — *Massey v. Huntington*, 118 Ill. 80; *Zinser v. Anderson*, 118 Mich. 654; *Reidy v. Small*, 154 Pa. St. 505; *Wilson v. Anderson*, 186 Pa. St. 531. See also *Riddle v. Cutter*, 49 Iowa 547; *Kerlin v. Campbell*, 15 Pa. St. 500.

**Where No Reason for the Creation Is Stated** and no power of revocation reserved, a change in the grantor's habits whereby he became capable of managing his own affairs will not authorize a termination of the trust. *Anderson v. Kemper*, (Ky. 1903) 76 S. W. Rep. 122.

**Where the Settlor Is of Weak Mind** an irrevocable deed of trust for his own benefit is revocable only with the permission of the courts, and that permission will not be given unless the revocation is clearly to the settlor's interest. *Neal v. Black*, 177 Pa. St. 83.

**Want of Consideration Immaterial.** — *Massey v. Huntington*, 118 Ill. 80.

**Terms of Trust Set Out in Contemporaneous Will.** — A conveyance in trust, accepted by the trustee with the understanding that the terms and conditions thereof are to be set out in the settlor's will made the same day, is not testamentary in its nature, or affected by a revocation of the will, where the will expressly distinguishes the estate conveyed in trust. *Kopp v. Gunther*, 95 Cal. 63.

**A Deposit by the Settlor to Himself as "Trustee"** for his children is irrevocable. *Sayre v. Weil*, 94 Ala. 466.

**7. Changed Condition of Settlor.** — Where a person transferred a note in trust for the expressed reason that he was sick and expected to die, and he subsequently recovered, he was entitled to the note freed from the trust. *Paul v. Paul*, 10 N. H. 117.

**8. Reservation of Life Interest in Settlor.** — *Brown v. Mercantile Trust, etc., Co.*, 87 Md. 377; *Townsend v. Allen*, (Supm. Ct. Gen. T.)



to the principal of the estate.<sup>1</sup>

(b) **No Power of Revocation.**—One who makes a deed of real or personal estate in trust without reserving the authority to alter or revoke it, and an interest in the estate passes to the beneficiaries, has no right to terminate the trust,<sup>2</sup> nor to change its character,<sup>3</sup> in the absence of fraud, imposition, mistake, or misapprehension,<sup>4</sup> without the consent of the beneficiaries.<sup>5</sup> A trust thus established is not destroyed or in any manner impaired by the subsequent conveyance, settlement, or devise of the same property,<sup>6</sup> or by any other conduct on the part of the settlor inconsistent with the trust.<sup>7</sup> A conveyance by the settlor's heir is equally inoperative.<sup>8</sup>

**Trust for Creditors.**—Where property is assigned by a debtor in trust for

13 N. Y. Supp. 73; *Fellow's Appeal*, 93 Pa. St. 470; *Kraft v. Neuffer*, 202 Pa. St. 558.

**1. Reservation of Discretion as to Principal.**—A stipulation that the trustee shall pay over to the grantor "such portion of the principal as he [the grantor] in his judgment may deem necessary for his comfort and support" is not a power of revocation, and the grantor cannot revoke by demanding the principal as being necessary to his support when in fact it is not necessary. *Lovett v. Farnham*, 169 Mass. 1.

**2. No Power of Revocation — Alabama.**—*Andrews v. Hobson*, 23 Ala. 219.

*California.*—*Nichols v. Emery*, 109 Cal. 323.

*Indiana.*—*Ewing v. Jones*, 130 Ind. 247, following *Ewing v. Warner*, 47 Minn. 446.

*Kentucky.*—*Anderson v. Kemper*, (Ky. 1903) 76 S. W. Rep. 122.

*Massachusetts.*—*Ward v. Lewis*, 4 Pick. (Mass.) 521.

*Mississippi.*—*Brown v. Bartee*, 10 Smed. & M. (Miss.) 268; *Sevier v. McWhorter*, 27 Miss. 442; *Nelson v. Ratliff*, 72 Miss. 656.

*New Jersey.*—*Beekman v. Hendrickson*, (N. J. 1891) 21 Atl. Rep. 567.

*New York.*—*Thebaud v. Schermerhorn*, (Supm. Ct. Spec. T.) 61 How. Pr. (N. Y.) 200; *Messonnier v. Kauman*, 3 Johns. Ch. (N. Y.) 3; *Richtmyer v. Lasher*, 77 N. Y. App. Div. 574; *Marvin v. Smith*, 46 N. Y. 571.

*North Carolina.*—*Walker v. Crowder*, 2 Ired. Eq. (37 N. Car.) 478.

*Ohio.*—See also *Jones v. Byland*, 10 Ohio Dec. (Reprint) 712, 23 Cinc. L. Bul. 151.

*Pennsylvania.*—*Stockett v. Ryan*, 176 Pa. St. 71; *Potter v. Fidelity Ins., etc., Co.*, 199 Pa. St. 360.

*Rhode Island.*—*Stone v. King*, 7 R. I. 358, 84 Am. Dec. 557.

*Texas.*—*Monday v. Vance*, 11 Tex. Civ. App. 374.

*Virginia.*—*Skipwith v. Cunningham*, 8 Leigh (Va.) 271, 31 Am. Dec. 642.

*Wisconsin.*—*Milwaukee Trust Co. v. Lancashire Ins. Co.*, 95 Wis. 192.

**A Mutual Written Agreement to Convey in Trust** for stated reasons is irrevocable even prior to the execution of the conveyance. *P'Pool v. Union Bank, etc., Co.*, 102 Tenn. 29.

**Effect of Terms.**—A conveyance of an estate, for the support and maintenance of the grantor for life, and then to "descend" to his "legal representatives," created an irrevocable trust, the terms used meaning to descend to his heirs, who took a vested interest. *Ewing v. Jones*, 130 Ind. 247.

**Evidence Varying Terms of Trust.**—Evidence of statements made by the settlor after the trust had been carried into effect, and not in the presence or with the consent of the beneficiaries, is incompetent to vary the terms of a declaration of trust. *Richardson v. Adams*, 171 Mass. 447. See also the title EVIDENCE, vol. 11, p. 548.

**3. No Power to Alter Trust.**—*State Bank v. Lobbell*, 78 Ill. App. 600; *Rife's Appeal*, 110 Pa. St. 232; *Fish v. Prior*, 16 R. I. 566.

**4. Absence of Fraud, Imposition, or Mistake.**—*Nichols v. Emery*, 109 Cal. 323; *Reidy v. Small*, 154 Pa. St. 505; *Potter v. Fidelity Ins., etc., Co.*, 199 Pa. St. 360; *Aylsworth v. Whitcomb*, 12 R. I. 298.

**5. Consent of Beneficiaries.**—*Hellman v. McWilliams*, 70 Cal. 449; *State Bank v. Lobbell*, 78 Ill. App. 600; *Krankel v. Krankel*, 104 Ky. 745; *Thurston, Petitioner*, 154 Mass. 596, 26 Am. St. Rep. 278; *Ewing v. Shannahan*, 113 Mo. 188; *Minot v. Tilton*, 64 N. H. 371; *Harris v. Harris*, 205 Pa. St. 460.

**Consent of Married Woman Ineffectual.**—*Twining's Appeal*, 97 Pa. St. 36.

**6. Second Conveyance Ineffectual — Indiana.**—*Haxton v. McClaren*, 132 Ind. 235; *McCleary v. Chipman*, (Ind. App. 1903) 68 N. E. Rep. 320.

*Iowa.*—*Ewing v. Buckner*, 76 Iowa 467.

*Kentucky.*—*Anderson v. Kemper*, 76 S. W. Rep. 122, 25 Ky. L. Rep. 538.

*Massachusetts.*—*Sewall v. Roberts*, 115 Mass. 262.

*Minnesota.*—*Ewing v. Warner*, 47 Minn. 446.

*Mississippi.*—*Brown v. Bartee*, 10 Smed. & M. (Miss.) 268.

*Missouri.*—*Ewing v. Shannahan*, 113 Mo. 188.

*New York.*—*Nearpass v. Newman*, 106 N. Y. 47; *Williams v. Charlier*, 15 N. Y. App. Div. 128; *Marvin v. Smith*, 46 N. Y. 571; *Thebaud v. Schermerhorn*, (Supm. Ct. Spec. T.) 61 How. Pr. (N. Y.) 200.

*Pennsylvania.*—*Wilson v. Anderson*, 13 Montg. Co. Rep. (Pa.) 185; *Patrick v. Smith*, 39 W. N. C. (Pa.) 4; *Rife's Appeal*, 110 Pa. St. 232; *Rynd v. Baker*, 193 Pa. St. 486.

*Virginia.*—*Rowletts v. Daniel*, 4 Munf. (Va.) 473.

**7. Withdrawing Money Deposited on Trust.**—*Robertson v. McCarthy*, 54 N. Y. App. Div. 103; *United Nat. Bank v. Weatherby*, 70 N. Y. App. Div. 279.

**8. Conveyance by Settlor's Heir Inoperative.**—*Belknap v. Belknap*, 128 Mass. 14.

creditors and the instrument creating the trust is delivered to and accepted by the assignee, the relation of trustee and *cestui que trust* between the assignee and creditors arises and the trust cannot, as a rule, be revoked.<sup>1</sup>

(2) *The Trustee* — (a) **General Rule.** — A trustee having accepted a trust and proceeded in its execution cannot thereafter, by his own act or default, bring the trust to an end,<sup>2</sup> nor will his refusal to serve originally cause the trust to fail.<sup>3</sup>

(b) **Estoppel.** — The doctrine of estoppel operates to save the trust from defeasance by the trustee. Thus the trustee is estopped to set up in himself any title adverse to those for whom he holds, or to deny their title.<sup>4</sup> Neither can he deny the legality or validity of the trust,<sup>5</sup> or deny that the creator of the trust held the title to the property which the trust instrument conveys, the trustee being estopped by the terms of the deed under which he takes.<sup>6</sup>

(c) **Exceptions to the Rule.** — Exceptions to the rule that the trustee cannot terminate the trust arise where the trustee has an unconditional power of alienation and conveys the estate accordingly,<sup>7</sup> or reconveys to the settlor under circumstances which made it his duty to reconvey,<sup>8</sup> or purchases the interest of the *cestui*,<sup>9</sup> or the beneficiaries consent to the termination.<sup>10</sup> However, the trustee cannot divest himself of the trust if some of the beneficiaries do not consent,<sup>11</sup> or being minors cannot consent.<sup>12</sup> What acts of the trustee will be construed to be a surrender of the trust depend on the circumstances

1. See the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, pp. 103, 104.

2. **No Termination by the Trustee.** — *Iowa.* — Zunkel v. Colson, 109 Iowa 695.

*Michigan.* — Henderson v. Sherman, 47 Mich. 267.

*Minnesota.* — Ewing v. Warner, 47 Minn. 446.

*Mississippi.* — Nelson v. Ratliff, 72 Miss. 656.

*Missouri.* — Cornwell v. Wulff, 148 Mo. 542.

*New York.* — Brennan v. Wilson, 71 N. Y. 502; Richtmyer v. Lasher, 77 N. Y. App. Div. 574; Cruger v. Halliday, 11 Paige (N. Y.) 314; McArthur v. Gordon, 126 N. Y. 597.

*North Carolina.* — Roseman v. Roseman, 127 N. Car. 494; McEachern v. Stewart, 114 N. Car. 370.

*Tennessee.* — Armstrong v. Campbell, 3 Yerg. (Tenn.) 201, 24 Am. Dec. 556.

*Virginia.* — Skipwith v. Cunningham, 8 Leigh (Va.) 271, 31 Am. Dec. 642.

**Declarations by the Trustee** cannot vary a trust created in writing. Burling v. Newlands, 112 Cal. 476.

**A Trustee Cannot Change the Legal Effect of a conveyance duly made and delivered to him without the assent of any other party at interest.** Vason v. Gilbert, 99 Ga. 220.

**A Petition by Trustees to Be Discharged** will be refused pending proceedings by the *cestui que trust* to compel the sale by the trustees of certain real estate. Longstreth's Estate, 12 Phila. (Pa.) 86, 35 Leg. Int. (Pa.) 192.

3. **Refusal to Serve.** — De Peyster v. Clendinning, 8 Paige (N. Y.) 295. See *supra*, this section, 6. *c. Devolution.*

4. See the title ESTOPPEL, vol. 11, p. 444.

**Estoppel to Deny Title of Cestui.** — Willison v. Watkins, 3 Pet. (U. S.) 43; Guilfoil v. Arthur, 158 Ill. 600; Green v. Otter, 3 B. Mon. (Ky.) 102; Sterling v. Sterling, 77 Minn. 12; Betts v. Van Dyke, 40 N. J. Eq. 149; Sweet v. Jackson, 6 Paige (N. Y.) 355, 31 Am. Dec. 252;

Central Trust Co. v. Weeks, 15 N. Y. App. Div. 598; Stetson v. Rosenberger, 15 Montg. Co. Rep. (Pa.) 14; Anderson v. Smoot, Spears Eq. (S. Car.) 312; Morris v. Morris, 48 W. Va. 430.

**Although Not Formally Appointed**, a trustee cannot claim ignorance of a trust which he accepts. Pearce v. Pearce, 22 Beav. 248.

5. **Legality or Validity.** — Thompson v. Finch, 22 Beav. 316; Guilfoil v. Arthur, 158 Ill. 600; Cassagne v. Marvin, 143 N. Y. 292.

**Fraud Cannot Be Set Up by Trustee.** — Byington v. Moore, 62 Iowa 470.

**Estoppel to Deny Validity of Appointment.** — Wagnon v. Pease, 104 Ga. 417.

6. See the title ESTOPPEL, vol. 11, p. 444.

**Estoppel to Deny Title of Creator.** — Colburn v. Broughton, 9 Ala. 351; Duncan v. Bryan, 11 Ga. 63; O'Halloran v. Fitzgerald, 71 Ill. 53; Guilfoil v. Arthur, 158 Ill. 600; Von Hurter v. Spengeman, 17 N. J. Eq. 185; McLeran v. Melvin, 3 Jones Eq. (56 N. Car.) 195; Neyland v. Bendy, 69 Tex. 711; State v. Merrill, 1 Chand. (Wis.) 258. See also Russell v. Peyton, 4 Ill. App. 473.

7. Thatcher v. St. Andrew's Church, 37 Mich. 264.

8. **Reconveyance to Settlor.** — Huckabee v. Billingsby, 16 Ala. 414, 50 Am. Dec. 183; Ewing v. Wilson, 132 Ind. 223.

9. **Purchase of Cestui's Interest.** — Johnson v. Johnson, 5 Ala. 90.

**Implied Interest.** — A trust is terminated when one who pays nothing for land conveys it at the request of those who paid for it. Stringer v. Montgomery, 111 Ind. 489.

10. **Termination with Consent of Beneficiaries.** — Ormsby v. Dumesnil, 91 Ky. 601; Tinsley v. Magnolia Park Co., (Tex. Civ. App. 1900) 59 S. W. Rep. 629.

11. **Beneficiaries Failing to Consent.** — Henderson v. Sherman, 47 Mich. 267; Owens's Petition, 3 Pa. Dist. 328.

12. **Minor Beneficiaries.** — Henderson v. Sher-

of each case.<sup>1</sup>

**Conveyance to Purchasers Without Notice.**—The trustee, being vested with the legal title, may, by conveying the estate to a purchaser without notice of the trust, effectually terminate it, but a purchaser with notice would take the estate impressed with the trust.<sup>2</sup> If the trustee reacquires the estate from a *bona fide* purchaser, the trust is at once restored.<sup>3</sup>

(3) *The Beneficiary.*—The united consent of all the *cestuis que trustent*, or the application of one having the entire beneficial interest, will, in most cases, authorize a decree of court terminating the trust.<sup>4</sup> A termination may also be effected by a conveyance or contract by or between the beneficiaries by which they dispose of the estate to a stranger,<sup>5</sup> or divide it among themselves,<sup>6</sup> or by which the beneficiary entitled to the income releases to the remainderman,<sup>7</sup> or the remainderman conveys his interest to the life tenant entitled to the income;<sup>8</sup> but in order that the trust may be terminated in this manner the right to the income<sup>9</sup> and the remainder must be absolute and not conditional.<sup>10</sup> The trust will be terminated by acts on the part of the *cestuis que trustent* wholly inconsistent therewith.<sup>11</sup>

**The Trust Is Not Terminated**, however, except upon the application or with the consent of all who at present have, or in future can have, an interest,<sup>12</sup> or until the purposes of the trust are accomplished.<sup>13</sup> Nor can the beneficiary destroy the trust without the joinder of the trustee, when that is required.<sup>14</sup> The

man, 47 Mich. 267; *Jones v. McNeil*, 1 Bailey L. (S. Car.) 235.

**1. What Acts Operate as a Surrender of Trust.**—See *Zunkel v. Colson*, 109 Iowa 695; *American Casualty Ins. Co.'s Case*, 82 Md. 535; *Campbell v. Clough*, 71 N. H. 181; *Brown v. Combs*, 29 N. J. L. 36; *Metcalf v. Union Trust Co.*, 87 N. Y. App. Div. 144; *Irving v. Irving*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 743; *Duncan v. Lawrence*, 24 Pa. St. 154.

**2.** See *infra*, this subsection, *The Beneficiary*.

**3. Reacquisition by Trustee.**—*Church v. Ruland*, 64 Pa. St. 432.

**4. Termination Decreed at Instance of Beneficiaries.**—*Tilton v. Davidson*, 98 Me. 55; *Hunnewell v. Lane*, 11 Met. (Mass.) 163; *Sears v. Choate*, 146 Mass. 395, 4 Am. St. Rep. 320; *Van Vactor v. McWillie*, 31 Miss. 563; *Soteldo v. Clement*, 11 Ohio Dec. (Reprint) 802, 29 Cinc. L. Bul. 384; *Thompson's Estate*, 10 Pa. Co. Ct. 472; *Seipe's Estate*, 11 Pa. Co. Ct. 27; *Armistead v. Hartt*, 97 Va. 316.

**Beneficiaries under a Deed of Trust** to secure certain bonds need not surrender the bonds secured in order to terminate the trust, as they are entitled to continue to hold such bonds as the personal obligation of the grantors. *Pearce v. Bryant Coal Co.*, 25 Ill. App. 51.

**5. Conveyance to Stranger.**—*Parker v. Converse*, 5 Gray (Mass.) 336.

**6. Division.**—*Culver v. Culver*, 58 Ohio St. 172; *Kennedy v. Badgett*, 19 S. Car. 591.

**7. Releasing Income to Remainderman**—*Matter of U. S. Trust Co.*, 175 N. Y. 304; *Matter of Barber*, (Surrogate Ct.) 36 Misc. (N. Y.) 433.

**Statute Not Retroactive.**—The New York Personal Property Act, § 3, providing for the termination of a trust by the remainderman conveying to the life beneficiary, and by the life beneficiary then releasing to himself as remainderman, applies only to trusts created after the passage of the act, where the effect of the act would be to destroy the estate of a trustee

and enlarge the interest of a life beneficiary beyond that given by the will creating the trust. *Metcalf v. Union Trust Co.*, 87 N. Y. App. Div. 144.

**8. Conveying Remainder to Life Tenant.**—*Yerkes's Appeal*, 2 Chest. Co. Rep. (Pa.) 410; *Sharpless's Estate*, 151 Pa. St. 214; *Owens's Estate*, 3 Pa. Dist. 331; *Thom v. Thom*, 95 Va. 413.

**9. Right to Income Must Be Absolute.**—*Matter of U. S. Trust Co.*, 80 N. Y. App. Div. 77; *Metcalf v. Union Trust Co.*, 87 N. Y. App. Div. 144; *Cook v. Straiton*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 206.

**10. Right to Remainder Must Be Absolute.**—*Thall v. Dreyfuss*, 84 N. Y. App. Div. 569.

**11. Acts of Cestui Inconsistent with Trust.**—*Falconer v. Sawyer*, 2 Nova Scotia 277.

**An Assignment in Trust for Creditors Who Have the Same Set Aside** is no longer binding on the assignor. *Witt v. Carroll*, 37 S. Car. 388.

**Resulting Trust May Be Released to Trustee by Parol.**—*Gorrell v. Alsbaugh*, 120 N. Car. 362.

**12. Consent of All Beneficiaries Essential.**—*Barcroft v. Lessieur*, 48 Mo. 418; *Godfrey v. Roberts*, (N. J. 1903) 55 Atl. Rep. 353; *Bayard's Estate*, 19 Pa. Co. Ct. 317; *Monday v. Vance*, 11 Tex. Civ. App. 374.

**Life Tenant Cannot Defeat Interest of Remainderman.**—*Brown v. Wadsworth*, 168 N. Y. 225.

**Beneficiary Must Be Sui Juris.**—*Ray v. Kelly*, (Miss. 1903) 35 So. Rep. 165.

**13. Purposes Must Be Accomplished.**—*Carney v. Kain*, 40 W. Va. 758; *Brandenburg v. Thorndike*, 139 Mass. 102; *Young v. Snow*, 167 Mass. 287; *Wirth v. Wirth*, 183 Mass. 527; *Guerney v. Moore*, 131 Mo. 650; *Story v. Palmer*, 46 N. J. Eq. 1, and cases cited in note p. 2; *Lent v. Howard*, 89 N. Y. 169; *Twining v. Girard L. Ins., etc., Co.*, 14 Phila. (Pa.) 74, 37 Leg. Int. (Pa.) 282.

**14. Joinder of Trustee.**—*Lippincott v. Williams*, 63 N. J. Eq. 130.

**Releasing Trustee.**—Where a trust was cre-



beneficiary will not be bound by an agreement to dissolve the trust, made without a knowledge of the facts,<sup>1</sup> or by an agreement on implied conditions which fail;<sup>2</sup> and acts not inconsistent with the continuance of the trust, and not intended to terminate it, will not have that effect.<sup>3</sup>

**VI. THE TRUSTEE — 1. Who May Be Trustee — a. SCOPE OF SECTION.** — This section treats only of the inquiry what constitutes legal capacity to hold property in trust. The question who should be appointed and the considerations guiding a court in making or confirming an appointment will be found elsewhere in this article.<sup>4</sup>

**b. IN GENERAL.** — Before the statute of uses, 27 Hen. VIII., c. 10, there was a limitation or restriction as to those who could stand seized to uses; but since the passage of that statute, trusts have been adopted to supply the place of uses, and the former inability to stand seized to a use no longer prevails. The general rule now is that all persons capable of confidence and of holding real or personal property may hold as trustees.<sup>5</sup>

**c. SOVEREIGN — (1) England.** — In England the sovereign has legal capacity to take and hold a trust estate and execute the trust, but the question whether a subject can, by any legal process, enforce its performance seems to be in doubt.<sup>6</sup> Under Stat. 39 and 40 Geo. III., c. 88, and 13 and 14 Vict., c. 60, §§ 15, 46, 47, where property vests in the crown by escheat, the king may grant it to trustees for the purpose of executing the trust, and in such cases it has been held that the difficulty of enforcing an equity against the lords of the fee has been removed by the escheat act.<sup>7</sup>

**(2) United States.** — It is probable that the United States may be a trustee and execute a trust,<sup>8</sup> though there is no direct decision to this effect, and though the contrary opinion has been intimated.<sup>9</sup> But there is no way of enforcing the trust save by an appeal to the legislature.<sup>10</sup> Each one of the separate states may be trustees and take and hold trust property and execute the same.<sup>11</sup> But in the absence of a general or special statute authorizing it,

ated by parol for a person for life to provide for her funeral expenses, remainder to her two children, and the life tenant and remainderman call for the trust fund, the trustee, before making payment, is entitled to a release under seal. *King v. Mullins*, 1 Drew. 308. See also *Matter of Wright*, 3 Kay & J. 419. Compare *Chadwick v. Heatley*, 2 Coll. Ch. Cas. 137.

**1. Agreement Without Knowledge of Facts.** — *Newman v. Schwerin*, (C. C. A.) 109 Fed. Rep. 942.

**2. Failure of Implied Conditions.** — Where a plaintiff in attachment compromised the suit upon the execution of a deed of trust by the defendant, and, upon ascertaining that the grantor had only a life interest in the land conveyed in the deed, repudiated the trust and sought unsuccessfully to have his attachment lien restored, the repudiation of the trust was not final, but conditioned upon the restoration of the lien. *Arnold v. Jones*, 9 Lea (Tenn.) 545.

**3. A Change of Trustees** at the instance of a beneficiary who also has the control of the estate does not terminate the trust. *Nixon's Trust*, 188 Pa. St. 621. See also *Stearns v. Fraleigh*, 39 Fla. 603.

**Effect of Cohabitation Between Husband and Wife After Trust Settlement on Separation.** — Where, upon a separation, the husband settled property in trust for his wife for her life, to be reconveyed to him at her death, or to his heirs in case he did not survive her, subsequent cohabitation did not affect the trust in respect

to the heirs. *Smith v. Terry*, 38 N. Y. App. Div. 394.

**The Failure of the Beneficial Owner of Stock to Pay an Assessment Thereon** is no abandonment of the stock. *Loetscher v. Dillon*, 119 Iowa 202.

**4. Who Should Be Appointed.** — See *infra*, this section, *Appointment by Court — Who Will Be Appointed; Appointment by Donee of Power — Exercise of the Power — Who May Be Appointed.*

**Grounds of Removal.** — See *infra*, this section, *Removal.*

**5. Who May Be Trustees in General.** — *Sinking Fund Com'rs v. Walker*, 6 How. (Miss.) 165.

**6. Eurgess v. Wheate**, 1 Eden 177, where it was said that "the arms of equity are very short against the prerogative."

**7. Hughes v. Wells**, 9 Hare 749, 13 Eng. L. & Eq. 389.

**8. United States as Trustee.** — See *Perry on Trusts*, vol. 1, § 41.

**9. United States Not a Trustee.** — *Per Wright and Brown, JJ.*, in *Levy v. Levy*, 33 N. Y. 122.

**10. United States Cannot Be Sued.** — See the title *UNITED STATES.*

**11. State as Trustee.** — *Yale College's Appeal*, 67 Conn. 237; *Shoemaker v. Grant County*, 36 Ind. 175; *Bedford v. Bedford*, 99 Ky. 273; *Pinson v. Ivey*, 1 Yerg. (Tenn.) 332. See also *State v. Rusk*, 21 Wis. 212. But see *contra* opinion expressed *per Wright, J.*, in *Levy v. Levy*, 33 N. Y. 123.

a sovereign state cannot be sued to enforce the execution of the trust.<sup>1</sup>

d. PUBLIC OFFICERS. — A public officer may be a trustee, if he acts as an individual, and not in his official capacity,<sup>2</sup> and a bequest to the chancellor of the exchequer for the benefit of Great Britain is a good bequest.<sup>3</sup>

e. DONOR. — The donor may constitute himself trustee, there being no rule of law which prohibits it.<sup>4</sup>

f. CESTUI QUE TRUST. — While it is a general rule that the same person cannot be trustee and *cestui que trust* of the same identical interest,<sup>5</sup> a *cestui que trust* is not absolutely excluded from occupying the office of trustee,<sup>6</sup> especially where he is one of several trustees,<sup>7</sup> or where he is trustee for himself and others.<sup>8</sup>

g. CORPORATIONS. — A corporation may acquire and hold property and execute trusts not repugnant to or inconsistent with the purposes of its original institution and corporate existence, in the same manner and to the same extent as a private person,<sup>9</sup> but it cannot be a trustee for purposes foreign to its institution.<sup>10</sup> The fact that the trust is repugnant to or inconsistent with the purposes for which the corporation was created is not ground to declare the trust itself void, for while the corporation may not be compelled to execute the trust, a court of equity may substitute a new trustee to execute the objects of the trust.<sup>11</sup>

1. See the title STATES, vol. 26, p. 486 *et seq.*

2. Public Officer. — Mitford v. Reynolds, 1 Phil. 185; Dunbar v. Soule, 129 Mass. 284; Sinking Fund Com'rs v. Walker, 6 How. (Miss.) 165; Delaplaine v. Lewis, 19 Wis. 476. See also Inglis v. Sailors' Snug Harbor, 3 Pet. (U. S.) 99; State v. Merrill, 1 Chand. (Wis.) 258; State v. Rusk, 21 Wis. 212.

3. Chancellor of Exchequer. — Nightingale v. Goulbourn, 2 Phil. 594.

4. Donor. — Yokem v. Hicks, 93 Ill. App. 667; In re Helliwell, 21 Grant Ch. (U. C.) 346.

In *In re Helliwell*, 21 Grant Ch. (U. C.) 346, it was held that where a trust was created to two trustees and the survivor, and the executors and administrators of the survivor, one of whom was the creator of the trust, proved his will and probate thereof was granted to them, the effect of proving the will was to make the creator of the trust a trustee thereof. In such a case the position of the trustee was not an anomalous one, nor was there any incompatibility in the creator of the trust being a trustee thereof and seeing to the due execution of the trust. But the fact that they acquired the position of trustee by a legal effect that was a surprise to them was sufficient reason for relieving them, if suitable persons could be found to take their places.

5. Cestui Not Proper Trustee. — Nellis v. Rickard, 133 Cal. 617, 85 Am. St. Rep. 227; Greene v. Greene, 125 N. Y. 506, 21 Am. St. Rep. 743; Matter of Hitchins, (Surrogate Ct.) 39 Misc. (N. Y.) 767; Woodbridge v. Bockes, 170 N. Y. 596, affirming 59 N. Y. App. Div. 503. See also Coster v. Lorillard, 14 Wend. (N. Y.) 265.

6. Cestui Not Excluded. — Nellis v. Rickard, 133 Cal. 617, 85 Am. St. Rep. 227.

7. One of Several. — Story v. Palmer, 46 N. J. Eq. 1; Moke v. Norrie, 14 Hun (N. Y.) 128; Rogers v. Rogers, 18 Hun (N. Y.) 409, affirmed 111 N. Y. 229; Tiffany v. Clark, 58 N. Y. 632; People v. Donohue, 70 Hun (N. Y.) 317; Cocks v. Barlow, 5 Redf. (N. Y.) 406.

8. Trustee for Himself and Others. — In Craig v. Hone, 2 Edw. (N. Y.) 554, it was intimated that a person cannot be a trustee where he is at the same time made a *cestui que trust* of a certain part of the rents and profits, as he would be thus, in form, a trustee for himself.

But where a will gives to the wife one-half the income of the whole estate, and appoints her trustee of the whole property, the appointment is not void, but the trust ranges over the whole estate for the purposes of management and disposition. Woodward v. James, 115 N. Y. 346. See also Cocks v. Barlow, 5 Redf. (N. Y.) 406; Mulry v. Mulry, 89 Hun (N. Y.) 531.

9. Corporation May Be Trustee. — See the titles CORPORATIONS, vol. 7, pp. 731, 732; CHARITIES, vol. 5, p. 922; and also the following cases: Atty.-Gen. v. Foundling Hospital, 2 Ves. Jr. 46; Amherst Academy v. Cows, 6 Pick. (Mass.) 427, 17 Am. Dec. 387; De Camp v. Dobbins, 29 N. J. Eq. 36; Columbia Bridge Co. v. Kline, 4 Pa. L. J. Rep. 39, 6 Pa. L. J. 317.

As to the Right of Religious Societies to Hold as Trustee, see the titles RELIGIOUS SOCIETIES, vol. 24, p. 323; CHARITIES, vol. 5, p. 893; CORPORATIONS, vol. 7, p. 732.

An Incorporated Savings Institution may be a trustee, subject to equitable control. Matter of Newark Sav. Inst., 28 N. J. Eq. 552.

An Incorporated School Society is competent to act as trustee of a fund created for educational purposes. First Cong. Soc. v. Atwater, 23 Conn. 34.

10. Purposes Foreign to Institution. — South Newmarket Methodist Seminary v. Peaslee, 15 N. H. 317. See also State v. Bates, 2 Harr. (Del.) 18.

11. Vidal v. Philadelphia, 2 How. (U. S.) 127. And see *infra*, this section. Appointment by Court — When Exercised — Incompetency or Incapability.

The Question as to the Right of a corporation to execute trusts under a will which are repugnant to or inconsistent with its charter

**Municipal Corporations.**—The rule applies to municipal as well as private corporations, at least as to trusts for charitable or public purposes.<sup>1</sup> It has been said that a municipal corporation may hold as trustee for a private purpose,<sup>2</sup> but the weight of authority is to the contrary.<sup>3</sup>

*h.* **UNINCORPORATED ASSOCIATIONS.**—An unincorporated society or association is incapable of holding the legal title to real or personal property,<sup>4</sup> but a devise to such a body for charitable purposes is upheld.<sup>5</sup>

*i.* **MARRIED WOMEN.**—Apart from statute a married woman may be a trustee, subject, of course, to her legal incapacity to deal with the estate vested in her.<sup>6</sup> Although she cannot act in the administration of the trust without the concurrence or consent of her husband,<sup>7</sup> the latter has no estate in property which is the subject of the trust and to which the wife, as trustee, holds only the bare legal title.<sup>8</sup>

*j.* **INFANTS.**—An infant may be nominated as a trustee in any instrument creating a trust, and the estate will pass to him thereby,<sup>9</sup> but a court of equity

can be inquired into only by the state which granted the charter. Neither the heirs of the testator nor a private person may contest such a right. *Wade v. American Colonization Soc.*, 7 Smed. & M. (Miss.) 663, 45 Am. Dec. 324; *Vidal v. Philadelphia*, 2 How. (U. S.) 127.

**1. Municipal Corporations.**—See the title CHARITIES, vol. 5, p. 922, and also the following cases: *Phillips v. Harrow*, 93 Iowa 92; *Piper v. Moulton*, 72 Me. 155; *Higginson v. Turner*, 171 Mass. 586; *Sargent v. Cornish*, 54 N. H. 18; *Cresson's Appeal*, 30 Pa. St. 437; *Bell County v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268.

**If Such Power Be Given by the Charter**, the city may hold property in trust. *Barnum v. Baltimore*, 62 Md. 275, 50 Am. Rep. 219.

**2. Municipal Corporation Trustee for Private Purpose.**—*Gloucester v. Osborn*, 1 H. L. Cas. 272.

**3. Philadelphia v. Fox**, 64 Pa. St. 169; *Franklin's Estate*, 150 Pa. St. 437, 30 Am. St. Rep. 817. See also *Cresson's Appeal*, 30 Pa. St. 437; *Philadelphia v. Elliott*, 3 Rawle (Pa.) 170.

In *Franklin's Estate*, 150 Pa. St. 437, 30 Am. St. Rep. 817, *Sharswood, J.*, said: "A municipal corporation, like a private corporation, is a legal entity, existing only in contemplation of law and in virtue of law. Being the creature of law, it can have only those capacities which are imparted and exercise only those powers which are expressly or by necessary implication granted to it. Its objects being governmental, its appropriate functions are all necessarily governmental. In the absence, therefore, of an express grant of power to accept and hold property upon purely private trusts, and to execute such trusts, it can no more do so than can a nonentity. Indeed, as to everything *dehors* its legitimate field of operations it is as if it were not. Instances are not wanting in which municipal corporations have executed trusts committed to them by private persons germane to the objects of the corporation, and they have been upheld for that reason."

**4. Unincorporated Associations.**—See the title SOCIETIES, CLUBS, AND UNINCORPORATED ASSOCIATIONS, vol. 25, p. 1132.

**5. Trusts for Charity**—*Iowa*.—*Johnson v. Mayne*, 4 Iowa 180.

*Massachusetts*.—*Burbank v. Whitney*, 24 Pick. (Mass.) 146, 35 Am. Dec. 312; *Washburn v. Sewall*, 9 Met. (Mass.) 280; *Tucker v. Seaman's Aid Soc.*, 7 Met. (Mass.) 188; *Winslow v. Cummings*, 3 Cush. (Mass.) 358.

*North Carolina*.—*Griffin v. Graham*, 1 Hawks (8 N. Car.) 96, 9 Am. Dec. 619; *Allen v. Baskerville*, 123 N. Car. 126; *Keith v. Scales*, 124 N. Car. 497.

*Pennsylvania*.—*Magill v. Brown, Bright*. (Pa.) 350.

*Vermont*.—*Burr v. Smith*, 7 Vt. 241, 29 Am. Dec. 154; *Smith v. Nelson*, 18 Vt. 511.

*Virginia*.—*Charles v. Hunnicutt*, 5 Call (Va.) 311.

**Contra**—*United States*.—*Philadelphia Baptist Assoc. v. Hart*, 4 Wheat. (U. S.) 1. But see *Vidal v. Philadelphia*, 2 How. (U. S.) 187; *Ould v. Washington Hospital*, 95 U. S. 303.

*New York*.—*Owens v. Missionary Soc.*, 14 N. Y. 380, 67 Am. Dec. 160; *Hart v. Hamburger*, (N. Y. City Ct. Tr. T.) 1 N. Y. St. Rep. 293; *Bascom v. Albertson*, 34 N. Y. 584; *Holmes v. Mead*, 52 N. Y. 337.

**6. Married Women.**—*U. S. Trust Co. v. Sedgwick*, 97 U. S. 304; *Moore v. Cottingham*, 90 Ind. 239; *Claussen v. La Franz*, 1 Iowa 226; *Springer v. Berry*, 47 Me. 330; *Bouldin v. Reynolds*, 58 Md. 491; *Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257; *People v. Webster*, 10 Wend. (N. Y.) 554; *Dundas v. Biddle*, 2 Pa. St. 160; *Still v. Ruby*, 35 Pa. St. 373; *Curran v. Green*, 18 R. I. 329. See also *Harden v. Darwin*, 66 Ala. 55.

**A Married Woman** is capable of acting as trustee for her children. *Sumpter v. Carter*, 115 Ga. 893; *Springer v. Berry*, 47 Me. 330.

**Or for Her Husband.**—*Moore v. Cottingham*, 90 Ind. 239.

**In Maryland** it is said that where the sale or disposition of property is to be confided to a trustee, the fact that a bond must be executed renders a *feme covert* incompetent as a trustee in such a case, she being unable to contract. *Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257.

**7. Consent of Husband.**—*U. S. Trust Co. v. Sedgwick*, 97 U. S. 304. But see the codes and statutes in the various states.

**8. Husband Has No Title to Trust Estate.**—*Claussen v. La Franz*, 1 Iowa 226.

**9. Infant May Be Trustee.**—*King v. Denison*,



will direct the execution of the trust either by the infant himself or his guardian.<sup>1</sup>

*k.* LUNATICS. — A lunatic may be a trustee,<sup>2</sup> but the court will generally remove him, or authorize his committee or guardian to act for him.<sup>3</sup>

*l.* ALIENS. — An alien may be a trustee to the extent to which he can hold the legal title.<sup>4</sup> And a state statute requiring every trustee to be a resident of that state is repugnant to the United States Constitution, art. 4, § 2, and to the Fourteenth Amendment.<sup>5</sup>

*m.* BANKRUPTS AND INSOLVENTS. — A person is not disqualified to act as trustee because he is bankrupt or hopelessly insolvent.<sup>6</sup>

**2. Appointment** — *a.* APPOINTMENT BY SETTLOR. — The creator of a trust may, subject to the limitations of the last section, appoint as trustee whomsoever he desires,<sup>7</sup> and may provide for the succession in the office of trustee.<sup>8</sup> Whether or not he intends a person to be a trustee must be ascertained from a construction of the instrument.<sup>9</sup>

**Not Necessary to Name Trustee.** — It is not necessary, however, that the trustee be named as trustee; if it appear that he is meant to be a trustee, it is enough.<sup>10</sup> Thus, an executor may become a trustee without any definite provision in the will to that effect, if the legal duty to act as trustee is cast upon him by the will;<sup>11</sup> and where property is bequeathed to one for the support of another,

1 Ves. & B. 260; *Jevon v. Bush*, 1 Vern. 342; *Irvine v. Irvine*, 9 Wall. (U. S.) 617.

1. **Court Will Direct Execution of Trust.** — *Whitmore v. Weld*, 1 Vern. 326; *Ex p. Sergison*, 4 Ves. Jr. 147.

2. **Lunatic.** — *Eyrick v. Hetrick*, 13 Pa. St. 488.

3. **Execution of Trust by Committee.** — *Matter of Bloomer*, 2 De G. & J. 88. See also *infra*, this section, *Removal*, and see generally the title *INSANITY*, vol. 16, p. 558.

**Where a Trustee Is a Lunatic**, his acts are not binding on the beneficiaries. *Bailey v. Hill*, 77 Va. 492.

4. **Alien.** — See the title *ALIENS*, vol. 2, p. 83.

5. **Unconstitutional.** — *Roby v. Smith*, 131 Ind. 342, 31 Am. St. Rep. 439; *Shirk v. La Fayette*, 52 Fed. Rep. 857. See also *Farmers' L. & T. Co. v. Chicago, etc., R. Co.*, 27 Fed. Rep. 146.

6. *Scott v. Surman*, Willes 400; *Carpenter v. Marnell*, 3 B. & P. 40; *Rankin v. Barcroft*, 114 Ill. 441; *Shryock v. Waggoner*, 28 Pa. St. 430. See also *Cohn v. Ward*, 32 W. Va. 34.

**The Fact that a Husband Is Totally Insolvent** will not disqualify him from acting as trustee for his wife and children. *De Roy v. Richards*, 8 Pa. Super. Ct. 119.

7. See *supra*, this section, *Who May Be Trustee*.

8. See *infra*, this section, *Appointment by Donee of Power*.

**Creator Not Allowed to Change Trustees.** — Where a life insurance policy is made payable to one in trust for an infant, a new trustee cannot afterward be substituted by the insured with the consent of the company, but without the consent of the beneficiary; and a payment to such substituted trustee of the amount of the policy does not relieve the company of liability, and it may be compelled to pay again at the suit of the executor of the original trustee. *Butler v. State Mut. L. Assur. Co.*, 55 Hun (N. Y.) 296.

9. **Construction of Instrument.** — *Clark v. Powell*, 62 Vt. 442.

Thus, where a testator gave his property to

C and D on various trusts, such as trusts for sale, and empowered them to give receipts for the purchase money, and then appointed his wife and C and D "trustees and executors of this will," it was held that this appointment conferred on his wife only the general powers and duties of executrix, and did not make her a trustee with C and D under the specific trusts of the will. *Sidebotham v. Watson*, 11 Hare 170.

But where a testator appointed his wife and A as trustees and his wife as executrix, and by a codicil revoked her appointment as executrix, her appointment as trustee still remained in force. *Graham v. Graham*, 16 Beav. 550, 17 Jur. 569.

10. **Intention Sufficient.** — *Porter v. Rutland Bank*, 19 Vt. 410. And see generally the title *IMPLIED TRUSTS*, vol. 15, p. 1119.

11. **Executor May Be Trustee** — *Kentucky.* — *Berry v. Hamilton*, 10 B. Mon. (Ky.) 129.

*Maine.* — *Howard v. American Peace Soc.*, 49 Me. 288; *Pettingill v. Pettingill*, 60 Me. 412; *Nutter v. Vickery*, 64 Me. 490; *Nason v. First Bangor Christian Church*, 66 Me. 100; *Richardson v. Knight*, 69 Me. 285. See also *Groton v. Ruggles*, 17 Me. 137.

*Massachusetts.* — *Saunderson v. Stearns*, 6 Mass. 37; *Carson v. Carson*, 6 Allen (Mass.) 397; *Hall v. Cushing*, 9 Pick. (Mass.) 395; *Dorr v. Wainwright*, 13 Pick. (Mass.) 328. See also *Nash v. Cutler*, 19 Pick. (Mass.) 69.

*New Hampshire.* — *Claggett v. Hardy*, 3 N. H. 147; *Wheeler v. Perry*, 18 N. H. 307.

*New Jersey.* — *Terry v. Smith*, 42 N. J. Eq. 504.

*Vermont.* — *Clark v. Powell*, 62 Vt. 442; *In re Hodges*, 63 Vt. 661.

**Desire that Executrix Serve as Trustee.** — In *Augusta v. Walton*, 77 Ga. 517, it was held that where a testator made his wife his residuary legatee and executrix, and without expressly naming her as trustee expressed the hope that she would carry out every part of his will relating to certain bequests set apart and created as a trust fund after her death, the

the legatee will hold as trustee.<sup>1</sup> So, too, if land is left to a minor, with the proviso that he shall not come into possession, except through his guardian, until he comes of age, and his guardian is appointed executor, the guardian and not the heir of the testator holds the land as trustee for the minor until he attains his majority.<sup>2</sup>

**Intention Effectuated.** — In accordance with the well-settled rules for the construction of wills, the intent of a testator is carried out whenever possible. Thus, where a testator leaves property in such a way as to show that a trust was intended, the court will appoint a trustee although none is named in the will;<sup>3</sup> and until the trustee is appointed the executors will hold the property in trust.<sup>4</sup> So an attempt by a testator to create by will a guardian for minors, which fails because of lack of capacity so to create a guardian, may take effect by constituting the intended guardian a trustee of the property bequeathed by the will.<sup>5</sup> And if a will names one as executor and trustee, but contains no devise or bequest to him as trustee, but the provisions of the will make it necessary that some one should act as trustee, the executor may be appointed.<sup>6</sup>

**b. APPOINTMENT BY COURT** — (1) *Power of Court* — (a) **Inherent and Statutory Power.** — It is a universal rule that equity will never allow a trust to fail for the lack of a trustee, and whenever a vacancy occurs in the office of trustee, from whatsoever cause, the court will supply the deficiency.<sup>7</sup> The power is inherent in courts of equity, but is also very generally conferred by statute.<sup>8</sup>

**Statutes Declaratory.** — These statutes are merely declaratory of the existing law, however, and their provisions are auxiliary, so that the appointment may be made in other ways,<sup>9</sup> provided that the court is one having equity jurisdiction.<sup>10</sup>

**Vesting of the Estate.** — The court also usually has power to decree the vesting of the trust estate in the appointee.<sup>11</sup> But it should be borne in mind that it is not the vesting of the estate in the new trustee which constitutes him trustee. This is effected by the order of the court, or by the operation of the will.<sup>12</sup>

**Appointment of Trustee of Part of the Trust Estate.** — It is a general rule that a new

executrix had the right to control the trust fund thus created during her life, and the appointment by the court of others as trustees was premature.

1. **Legatee as Trustee.** — *Bufinton v. Maxam*, 140 Mass. 557.

2. **Guardian as Trustee.** — *Smithwick v. Jordan*, 15 Mass. 113.

3. **Appointment by Court.** — *Dodkin v. Brunt*, L. R. 6 Eq. 580; *In re Gillett*, 25 W. R. 23; *Quigley v. Gridley*, 132 Mass. 35; *Bailey v. Kilburn*, 10 Met. (Mass.) 176, 43 Am. Dec. 423; *Maus v. Maus*, 80 Pa. St. 194; *Loveman v. Taylor*, 85 Tenn. 1. See generally *infra*, this section, *Appointment by Court*.

**Trustee of Wife's Separate Estate.** — If a testator by his will creates a separate estate for a *feme covert*, but appoints no trustee, the court will supply the deficiency, *Goodrum v. Goodrum*, 8 Ired. Eq. (43 N. Car.) 313; *Varners's Appeal*, 80 P. St. 140, or treat the executor of the will as trustee, *Tinnin v. Womack*, 1 Jones Eq. (54 N. Car.) 135.

**Trustees to Preserve Contingent Remainders** — Where in a will no trustees to preserve contingent remainders are named or provided for, the court will order them to be inserted, if, on the construction of the whole instrument, such seems to be the intention of the testator. *Baskerville v. Baskerville*, 2 Atk. 279; *Harrison*

*v. Naylor*, 2 Cox Ch. 247; *Stamford v. Hobart*, 1 Bro. P. C. 288.

4. **Executor Temporary Trustee.** — *Quigley v. Gridley*, 132 Mass. 35; *Goodrum v. Goodrum*, 8 Ired. Eq. (43 N. Car.) 313.

5. **Guardian Invalidly Appointed May Be Trustee.** — *Matter of Lichtenstadter*, 5 Dem. (N. Y.) 214.

6. **No Devise to Trustee.** — *Leonard v. Haworth*, 171 Mass. 496.

7. **Trust Never Fails for Want of Trustee.** — See the cases cited *infra*, this subsection, *When Exercised*.

8. See the statutes and codes in the various states.

9. **Statutes Declaratory.** — *Anson, Petitioners*, 85 Me. 79; *Pillsbury v. Consolidated European etc., R. Co.*, 69 Me. 394.

10. **Court Must Have Jurisdiction.** — *Leman v. Sherman*, 117 Ill. 657, holding that in the absence of statute a court of equity is the only court having inherent power to appoint trustees. See also *Shaw v. Paine*, 12 Allen (Mass.) 293; *Harwood v. Tracy*, 118 Mo. 631.

11. **Vesting of the Estate.** — See, as to this point, and as to the necessity of such an order, *supra*, this title, *The Trust Estate — Properties and Incidents — Devolution*.

12. **Trustee Not Constituted Such by the Vesting of the Estate.** — *Noble v. Meymott*, 14 Beav. 471.

trustee will be appointed of the whole of a trust, and not merely of a part;<sup>1</sup> but when a trust can be divided into separate and distinct parts, the court may appoint a trustee of one of these parts.<sup>2</sup> But this is a matter within the discretion of the court.<sup>3</sup>

**Appointment to Do Special Act.** — So too a trustee may be appointed to do a special act, such as to sell land,<sup>4</sup> especially if this is necessary in order to safeguard the interests of both the life tenants and the remainderman.<sup>5</sup>

(b) **As Donee of Power of Appointment.** — This power of the court is treated later in this section.<sup>6</sup>

(2) **When Exercised** — (a) **Death of Trustee.** — On the death of a trustee land which he held in trust descends to his heirs, and trusts in personalty devolve upon his personal representatives;<sup>7</sup> but if no provision be made in the instrument creating the trust, on the application of the beneficiaries, the court will appoint new trustees.<sup>8</sup>

**Death of Trustee Before He Qualifies.** — And in case of the death of a trustee

1. **General Rule.** — *Bennett v. Burgis*, 5 Hare 295, 15 L. J. Ch. 231, where it was held that although part of the trust funds had been lost, the new trustee would be appointed of the whole, and not merely of the part remaining.

2. **Trustee of Part of Trust Estate.** — *In re Cunards*, 48 L. J. Ch. 192; *In re Dennis*, 10 L. T. N. S. 688; *In re Grange*, 44 L. T. N. S. 469; *In re Aston*, 25 L. R. Ir. 96; *In re Paine*, 28 Ch. D. 725; *In re Hetherington*, 34 Ch. D. 211; *In re Moss*, 37 Ch. D. 513. See also St. 45 & 46 Vict., c. 39 (Conveyancing Act of 1882); *Carruth v. Carruth*, 148 Mass. 431; *Craig v. Craig*, 3 Barb. Ch. (N. Y.) 76; *Matter of Wadsworth*, 2 Barb. Ch. (N. Y.) 381; *Palmer v. Dunham*, 53 Hun (N. Y.) 637, 6 N. Y. Supp. 262.

3. **Matter of Discretion.** — *In re Nesbitt*, 19 L. R. Ir. 509, holding that under the Conveyancing Act of 1882 and the Trustee Act of 1850 a new trustee will not be appointed of a separate part of the trust estate, unless on an appointment of new trustees for the entire property. This decision was affirmed in the Court of Appeal on the ground that this was a matter of discretion and not of jurisdiction.

4. **Appointment to Do Special Act.** — *Baldrige v. Coffey*, 184 Ill. 73; *Dorsey v. Thompson*, 37 Md. 25.

5. **Safeguard Various Interests.** — *Baldrige v. Coffey*, 184 Ill. 73.

6. **Court as Donee of Power of Appointment.** — See *infra*, this section, 2. c. (2) (b) *Courts*.

7. **Devolution of Estate on Death of Trustee.** — See, as to this and all questions as to the trust estate, *supra*, this title, *The Trust Estate*.

8. **Vacancy Caused by Death** — *England.* — *In re Mathews*, 26 Beav. 463, 5 Jur. N. S. 184; *Hibbard v. Lamb*, Amb. 309; *Reeves v. Neville*, 10 W. R. 335; *Devey v. Pearce*, Tamlyn 77; *Ockleston v. Heap*, 1 De G. & Sm. 640.

*Canada.* — *Lyon v. Radenhurst*, 5 Grant Ch. (U. C.) 544.

*California.* — *Matter of Gay*, 138 Cal. 552, 94 Am. St. Rep. 70; *Fay v. Howe*, 136 Cal. 599; *Dyer v. Leach*, 91 Cal. 191, 25 Am. St. Rep. 171.

*Georgia.* — *O'Brien v. Battle*, 98 Ga. 766.

*Illinois.* — *People v. Petrie*, 94 Ill. App. 652.

*Indiana.* — *State v. Roudelush*, 114 Ind. 347.

*Kentucky.* — *Kean v. Kean*, (Ky. 1892) 19 S. W. Rep. 184.

*Maryland.* — *Gorsuch v. Briscoe*, 56 Md. 573.

*Massachusetts.* — *Bliss v. Bradford*, 14 Gray (Mass.) 407; *Schouler, Petitioner*, 134 Mass. 426; *Bassett v. Crafts*, 129 Mass. 513.

*Michigan.* — *Matter of Kingsbury*, 51 Mich. 623.

*Montana.* — *Tuttle v. Merchant's Nat. Bank*, 19 Mont. 11.

*New Jersey.* — *Weiland v. Townsend*, 33 N. J. Eq. 393.

*New York.* — *Clark v. Crego*, 47 Barb. (N. Y.) 599; *Jewett v. Schmidt*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 502; *Farmers' L. & T. Co. v. Pendleton*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 256; *Matter of Hecht*, 71 Hun (N. Y.) 62; *Hawley v. Ross*, 7 Paige (N. Y.) 103; *Matter of Morian*, 1 Connolly (N. Y.) 503.

*North Carolina.* — *Young v. Young*, 97 N. Car. 132.

*Pennsylvania.* — *Stearly's Appeal*, 3 Grant Cas. (Pa.) 270; *Ex p. Conrad*, 2 Ashm. (Pa.) 527; *Bloom v. Miller*, 11 Pa. Co. Ct. 620.

*Rhode Island.* — *Meeting St. Baptist Soc. v. Hail*, 8 R. I. 234.

*South Carolina.* — *Ex p. Knust*, Bailey Eq. (S. Car.) 489; *Sullivan v. Latimer*, 35 S. Car. 422.

*Virginia.* — *Dunscomb v. Dunscomb*, 2 Hen. & M. (Va.) 11.

*Wisconsin.* — *Reigart v. Ross*, 63 Wis. 449.

**Statutory Guardian Not Trustee.** — A testator left property to a trustee in trust for his infant son, and provided that the trustee should also act as guardian until the son should be twenty-eight years old. On the death of this trustee, it was held that the statutory guardian appointed by the court could not exercise the powers of trustee and that a new trustee must be appointed. *Kean v. Kean*, (Ky. 1892) 19 S. W. Rep. 184.

**Decisions under New York Statutes.** — Under 1 Rev. Stat. N. Y., p. 730, § 68, it has been held that on the death of a trustee the Supreme Court will appoint a successor. *Milbank v. Crane*, (Supm. Ct. Spec. T.) 25 How. Pr. (N. Y.) 193; *Kortright v. Storminger*, 49 Hun (N. Y.) 249; *Matter of Laing*, 59 N. Y. App. Div. 612. See also *Royce v. Adams*, 123 N. Y. 402.

And under Laws N. Y. 1882, c. 185, upon the death of a surviving trustee, it has been held that a new trustee may be appointed, upon



before he has qualified as such the court will appoint a successor.<sup>1</sup>

a *prima facie* case being made, showing that property in the hands of the executor or administrator of a decedent was either held by him at the time of his decease as trustee, or was the proceeds of the trust estate. *Matter of Carpenter*, 131 N. Y. 86 (but see language of this case criticised in *Wetmore v. Wetmore*, 44 N. Y. App. Div. 52).

But the true view seems to be that the Supreme Court has no power to appoint a new trustee in case of the death of the surviving trustee of an express trust, but may appoint some one to execute the trust as the agent and under the direction of the court. But in case of the removal or resignation of the trustee, the court may either appoint a successor or appoint an agent to execute the trust. *Willey v. Robinson*, 85 Hun (N. Y.) 362; *Mulry v. Mulry*, 89 Hun (N. Y.) 531. See also *Robinson v. Schmitt*, 17 N. Y. App. Div. 628.

And under 2 Rev. Stat. N. Y. (6th ed.), p. 1110, § 81, the Supreme Court has no power to appoint a trustee to succeed a trustee who has died. It should appoint an agent to execute the trust. But the executors of the deceased trustee cannot question the validity of an appointment. *Elsworth v. Hinton*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 573.

Under Laws N. Y. 1882, c. 185, as amended by Laws 1896, c. 547, and Laws 1902, c. 151, on the death of a testamentary trustee, the Supreme Court must appoint some one, not as a new trustee, but as the representative of the court, to carry out the trust. *Jewett v. Schmidt*, 83 N. Y. App. Div. 276, *modifying* decree in 39 Misc. (N. Y.) 502.

And under Laws N. Y. 1897, c. 417, § 8, on the death of a trustee, the trust devolves on the Supreme Court, whose duty it is to appoint some one to execute the trust and invest the appointee with all or any of the powers of the original trustee. But the fact that the order purports to appoint a new trustee does not invalidate the appointment. It is at most an irregularity. *Wetmore v. Wetmore*, 44 N. Y. App. Div. 52.

Under these various statutes, giving the Supreme Court power to execute unexecuted express trusts on the death of the surviving trustee, the court, in considering an application for the appointment of a new trustee, should inquire only whether the deceased trustee was a trustee of an express trust and whether that trust is unexecuted, and if these facts appear, the court must make the appointment. *Matter of Waring*, 99 N. Y. 114. See also *Matter of Levy*, 12 N. Y. App. Div. 341.

Under Code Civ. Pro. N. Y., § 2818, as amended by Laws 1903, a surrogate has power to appoint a successor to a deceased testamentary trustee. *Matter of Chase*, (Surrogate Ct.) 40 Misc. (N. Y.) 616.

And the provision that the surrogate may appoint a trustee in place of a sole testamentary trustee who has died or resigned extends to cases where there are several testamentary trustees, and all have died or resigned. *Royce v. Adams*, 123 N. Y. 402.

Section 2818 of the code makes no provision for the mode of appointing a successor to a deceased testamentary trustee, though provision is

made in case the trustee resigns or is removed. But the court is relieved from embarrassment by section 2481, subd. 11, which provides that in all cases not otherwise provided for the court is to follow the usual chancery practice. *Tompkins v. Moseman*, 5 Redf. (N. Y.) 402.

The surrogate may appoint a successor trustee to an executor who has died without fulfilling an express trust imposed upon him by the will, even though he did not hold the trust distinct from his office as executor. *Matter of Hecht*, 71 Hun (N. Y.) 62.

**Powers in Trust under N. Y. Statute.**—Under 1 Rev. Stat. N. Y., p. 730, § 68, providing that on the death of a trustee of an express trust the trust vests in the Supreme Court, which may appoint a person to execute the trust, and page 734, § 102, making this provision applicable to powers in trust, it was held that where the executor in a will is the donee of an imperative power of sale, the court may, on the death of the executor, appoint a trustee to carry out the power of sale. *Delaney v. McCormack*, 88 N. Y. 174; *Farrar v. McCue*, 89 N. Y. 139.

But in *Mott v. Ackerman*, 92 N. Y. 539, and *Cooke v. Platt*, 98 N. Y. 35, it was held that where a power of sale is given to the executors, and this power is imperative and does not grow out of personal discretion, it may be exercised by the administrator with the will annexed.

These cases were distinguished in *Greenland v. Waddell*, 116 N. Y. 234, 15 Am. St. Rep. 400, on the ground that in the former cases the appointment of a new trustee was essential to the execution of the trusts, and the question was left open whether, on the death of the executor, the power must necessarily be executed by an administrator with the will annexed, or whether the court might appoint a trustee. See also *Lahey v. Kortright*, 132 N. Y. 450, and see generally the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 1320 *et seq.*

**Under the Alabama Act of 1829** the Circuit Court might appoint a trustee, on the death of the existing trustee, though such power was not expressly conferred by the act. *State Bank v. Smith*, 6 Ala. 75.

**The Georgia Act of 1854**, February 20, giving power to a judge in chambers to appoint and remove trustees, applied only to trust estates which were in the hands of the trustees, and where the beneficiaries under a will have the legal estate, there is no power to appoint a trustee to fill a vacancy. *Milledge v. Bryan*, 49 Ga. 397.

**Under the Virginia Code of 1873** the Circuit Court may appoint a trustee where the trustees have died or removed from the state, and where the trust deed is recorded in the clerk's office in the county. *Hunter v. Vaughan*, 24 Gratt. (Va.) 400.

**Virginia Code, 1873, c. 174, § 9**, provides that upon the death of a sole trustee his representatives may execute the trust; but if these do not act, the court may appoint a new trustee, under section 8, which provides that in case of the death of a trustee the court may appoint a successor. *Fisher v. Dickenson*, 84 Va. 318.

**1. Death Before Qualification.**—*Schouler, Petitioner*, 134 Mass. 426.

(b) **Refusal or Disclaimer.** — It is the right of every trustee to refuse to accept the trust sought to be imposed upon him,<sup>1</sup> and in case no provision is made for such a contingency, the court will fill the vacancy so caused.<sup>2</sup>

(c) **Resignation or Removal.** — In like manner the court will supply a deficiency caused by the retirement or resignation<sup>3</sup> or by the removal<sup>4</sup> of one or more trustees.

(d) **Incompetency or Incapability.** — Where vacancy occurs by reason of a lack of capacity for any cause on the part of the trustee named to act as trustee or to receive the legal title, the trust does not fail, but the court will itself execute the trust by the appointment of new trustees.<sup>5</sup>

**Trust for Charity.** — Especially is this true in the case of trusts for charity. Such a trust is never defeated for the lack of a trustee, but the court will in all cases appoint trustees to carry out the intention of the donor.<sup>6</sup>

(e) **Vacancies Created in Various Ways.** — So, too, where a vacancy occurs by reason of the absconding of the trustee,<sup>7</sup> by his lunacy,<sup>8</sup> by the dissolution of a municipal corporation named as trustee,<sup>9</sup> by reason of the trustee being missing<sup>10</sup> or out of the country and refusing to act,<sup>11</sup> where no trustee is

1. **Right to Refuse.** — See *infra*, this section, *Acceptance*.

2. **Vacancy Caused by Refusal to Act** — *England*. — Jones v. Jones, 22 W. R. 1; Buchanan v. Hamilton, 5 Ves. Jr. 722; Legg v. Mackrell, 2 De G. F. & J. 551; *Re* Tyler, 5 De G. & Sm. 56.

*United States*. — Irvine v. Dunham, 111 U. S. 327; Adams v. Adams, 21 Wall. (U. S.) 185. *Connecticut*. — Dailey v. New Haven, 60 Conn. 314; Storrs Agricultural School v. Whitney, 54 Conn. 342.

*Delaware*. — Griffith v. State, 2 Del. Ch. 421. *Florida*. — Braswell v. Downs, 11 Fla. 62.

*Georgia*. — Mitchell v. Pitner, 15 Ga. 319. *Illinois*. — French v. Northern Trust Co., 197 Ill. 30, affirming 98 Ill. App. 410.

*Iowa*. — White v. Hampton, 13 Iowa 259; *In re* Petranek, 79 Iowa 410.

*Kentucky*. — Tucker v. Grundy, 83 Ky. 540; Harris v. Rucker, 13 B. Mon. (Ky.) 564.

*Maine*. — Williams v. Cushing, 34 Me. 370. *Massachusetts*. — Greene v. Borland, 4 Met. (Mass.) 330.

*Missouri*. — Brandon v. Carter, 119 Mo. 572, 41 Am. St. Rep. 673; Webb v. Hayden, 166 Mo. 39; Compton v. McMahan, 19 Mo. App. 494. *New Jersey*. — Brush v. Young, 28 N. J. L. 237.

*New Hampshire*. — Adams v. Adams, 64 N. H. 224; Wilson v. Tuttle, 36 N. H. 129.

*New York*. — King v. Donnelly, 5 Paige (N. Y.) 46; Matter of Robinson, 37 N. Y. 261; Williams v. Conrad, 30 Barb. (N. Y.) 524; Burrill v. Sheil, 2 Barb. (N. Y.) 457; McCosker v. Brady, 1 Barb. Ch. (N. Y.) 329; De Peyster v. Clendinning, 8 Paige (N. Y.) 295; Matter of Stuyvesant, 3 Edw. (N. Y.) 299.

*North Carolina*. — Roseman v. Roseman, 127 N. Car. 494.

*Pennsylvania*. — Read v. Robinson, 6 W. & S. (Pa.) 329.

*Tennessee*. — Field v. Arrowsmith, 3 Humph. (Tenn.) 442, 39 Am. Dec. 185; Furman v. Fisher, 4 Coldw. (Tenn.) 626, 94 Am. Dec. 210; Saunders v. Harris, 1 Head (Tenn.) 185. *Texas*. — Gamble v. Dabney, 20 Tex. 69.

*Virginia*. — Lee v. Randolph, 2 Hen. & M. (Va.) 12.

And see also the cases cited *infra*, this section, *Disclaimer*.

**Trustee de Facto.** — Where only one trustee is appointed and he does not act, and the will does not provide for the substitution of another trustee, the trust does not fail, but one who shows no title in himself cannot break down the title of the one acting as trustee, whether the latter be legally appointed or not. Webb v. Hayden, 166 Mo. 39.

3. **Resignation.** — Kenaday v. Edwards, 134 U. S. 117; Hallinan v. Hearst, 133 Cal. 645; Cauhape v. Barnes, 135 Cal. 107; French v. Northern Trust Co., 98 Ill. App. 410, affirmed 197 Ill. 30; Ligon v. Foster, 63 Miss. 241; Dillon v. Stevens, 62 Mo. App. 479; Green v. Blackwell, 31 N. J. Eq. 37; Matter of Jones, 4 Sandf. Ch. (N. Y.) 615; Lahey v. Kortright, 132 N. Y. 450; Stearly's Appeal, 3 Grant Cas. (Pa.) 270. See also the cases cited *infra*, this section, *Resignation*.

4. **Removal.** — See the cases cited *infra*, this section, *Removal*.

5. **Incompetency.** — Atty.-Gen. v. Stephens, 3 Myl. & K. 347; *In re* Boyce, 3 New Reports 396; Wellbeloved v. Jones, 1 Sim. & St. 40; *In re* Porter, 2 Jur. N. S. 349; Matter of Upham, 127 Cal. 90; Treat's Appeal, 30 Conn. 113; Washburn v. Sewall, 9 Met. (Mass.) 280; Taylor v. Watkins, (Miss. 1893) 13 So. Rep. 811; Schmidt v. Hess, 60 Mo. 591; Lanning v. Public Instruction Com'rs, 63 N. J. Eq. 1; Mason v. M. E. Church, 27 N. J. Eq. 47; Allen v. Baskerville, 123 N. Car. 126; Willis v. Alvey, 30 Tex. Civ. App. 96.

6. **Trusts for Charity.** — See the title CHARITIES, vol. 5, p. 920.

7. **Absconding.** — Matter of Friendly Soc., 1 Sim. & St. 82; Shepard v. Meridian Nat. Bank, 149 Ind. 532.

8. **Lunacy.** — Matter of Ward, 2 Macn. & G. 73; Matter of Davies, 3 Macn. & G. 278.

9. **Dissolution of Municipal Corporation.** — Montpelier v. East Montpelier, 29 Vt. 12, 67 Am. Dec. 748.

10. **Missing.** — Jackson v. Warde, 9 Bing. 399, 23 E. C. L. 315.

11. **Out of Jurisdiction.** — Woods v. Fisher, 3 W. Va. 536. See also *infra*, this section, *Removal*.

named,<sup>1</sup> or there is uncertainty as to who is trustee,<sup>2</sup> where the method, if any, provided in the trust instrument for filling vacancies fails or becomes impossible of exercise,<sup>3</sup> or whenever necessary to protect, defend, or assert a right to property which is in the custody of the court,<sup>4</sup> new trustees will be appointed; and although, as stated above, an infant may be a trustee,<sup>5</sup> still the court may appoint another trustee to act in his place; but on the coming of age of the infant he will be restored to the trusteeship.<sup>6</sup>

(3) *When Not Exercised.*—The mere fact that there is a vacancy in the office of trustee does not render the appointment of a successor imperative, if such appointment would serve no useful purpose. Accordingly, the court will refuse to make an appointment of a new trustee where it appears that the trust is invalid,<sup>7</sup> or that the original trustee was not a trustee, but merely a debtor,<sup>8</sup> or that the only effect of the appointment would be to diminish the income of the *cestui que trust*,<sup>9</sup> or that the beneficiary can call for a conveyance at any time,<sup>10</sup> or that the trust was created to secure a debt which is barred by the statute of limitations,<sup>11</sup> or that the trust estate is in litigation in a court of equity, for in such a case the proper proceeding is to apply to the court having jurisdiction of the whole subject-matter.<sup>12</sup> So, too, the mere fact that the court removes a trustee is not *per se* a reason for appointing a successor, if no useful result will be obtained thereby.<sup>13</sup>

**Execution of Trust by Court.**—In case of a vacancy the court may, instead of making an appointment, execute the trust through its own officers and agents.<sup>14</sup>

(4) *Who Will Be Appointed*—(a) *In General.*—As a general rule the court, in making the appointment, is ready to listen to the suggestions of the parties in interest, but the matter is wholly within the discretion of the court,<sup>15</sup>

**1. No Trustee Named**—*England.*—*In re Gillett*, 25 W. R. 23; *Dodkin v. Brunt*, L. R. 6 Eq. 580.

*Massachusetts.*—*Bailey v. Kilburn*, 10 Met. (Mass.) 176, 43 Am. Dec. 423; *Quigley v. Gridley*, 132 Mass. 35.

*North Carolina.*—*Goodrum v. Goodrum*, 8 Ired. Eq. (43 N. Car.) 313.

*Pennsylvania.*—*Varner's Appeal*, 80 Pa. St. 140; *Maus v. Maus*, 80 Pa. St. 194.

*Tennessee.*—*Loveman v. Taylor*, 85 Tenn. 1.

**Trust Created by Statute.**—The court may appoint trustees where no express provision therefor is made by a statute creating the trust. *Matter of Eastern R. Co.*, 120 Mass. 412.

**2. Uncertainty.**—*Keith v. Scales*, 124 N. Car. 497. See also *Porter v. Rutland Bank*, 19 Vt. 410.

**3. Failure of Method Prescribed by Power of Appointment.**—See *infra*, this section, 2. c. (3) (a) *bb. Appointment by Court When Power Fails.*

**4. Protecting Property in Custody of Court.**—*U. S. Casualty Co. v. Kacer*, 169 Mo. 301, 92 Am. St. Rep. 641.

**Appointment of New Trustee in One Country.**—Where one of three trustees is dead, another refuses to act, and the third lives in England and desires the appointment of a trustee in the United States, the court will make the appointment if it seems necessary. *Gleitsmann v. Gleitsmann*, 60 N. Y. App. Div. 371.

**5. Infant as Trustee.**—See *supra*, this section, *Who May Be Trustee.*

**6. Appointment in Place of Infant.**—*In re Sheldermine*, 33 L. J. Ch. 474.

**7. Trust Invalid.**—*Matter of Christie*, 133 N. Y. 473.

The Executor of a Testamentary Trustee will

be required to pay over the trust fund in his hands to the beneficiaries, if no other duties are connected therewith. There is no necessity for the appointment of a new trustee. *Boyer v. Decker*, 5 N. Y. App. Div. 623.

*In North Carolina* a trust created in the executor of a will passes on his death to the administrator with the will annexed, so that no necessity arises for an appointment by the court. *Clark v. Peebles*, 120 N. Car. 31. And see generally the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1320 *et seq.*

**8. Original Trustee Merely a Debtor.**—*In re Carpenter*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 817.

**9. Appointment Diminishing Income.**—*Lare's Estate*, 8 Pa. Dist. 265, in which case the trust was merely to convey, and by the law of Pennsylvania such an estate vests without a conveyance.

**10. Cestui May Call for Conveyance.**—*Matter of Craig*, 1 Barb. (N. Y.) 33.

**11. Trust Created to Secure Debt.**—*Fuller v. Oneal*, 82 Tex. 417.

**12. Trust Estate in Litigation.**—*Mask v. Miller*, 7 Baxt. (Tenn.) 527.

**13. Removal Not Cause.**—*Schlessinger v. Mallard*, 70 Cal. 326. See also *In re Chetwynd*, (1902) 1 Ch. 692.

**14. Execution of Trust by Court.**—See *infra*, this section, *Administration of Trust by Court*, and *supra*, this subsection, *When Exercised*—*Death of Trustee*, note *Decisions under New York Statutes.*

**15. Appointment in Discretion of Court.**—*In re Tempest*, L. R. 1 Ch. 485; *In re Ratcliff*, (1808) 2 Ch. 352; *Douglas v. Bolan*, (1900) 2 Ch. 749; *Re Bossi*, 4 British Columbia 584; *McKim v. Handy*, 4 Md. Ch. 228; *Scott v. State*,



which may appoint some one desired by none of the parties.<sup>1</sup>

**Reference to a Master.** — In *England* the mode of procedure is to refer the matter to a master, who hears all the parties and proposes a suitable nominee for the consideration of the court.<sup>2</sup> Even in case of charitable trusts this course is pursued.<sup>3</sup> The master's appointment is usually adopted unless it can be shown to be objectionable.<sup>4</sup> In some cases, where the fund is small, the court, in order to save expense, will dispense with this procedure and will make the appointment directly,<sup>5</sup> or will authorize the master to make the appointment without bringing the matter again before the court.<sup>6</sup>

(b) **Specific Instances.** — The court will not, as a rule, appoint a *cestui que trust* as a trustee,<sup>7</sup> especially when such seems to be contrary to the intention of the creator of the trust;<sup>8</sup> but if the trusts are onerous, and it is difficult to find any one else, a *cestui que trust* may be appointed;<sup>9</sup> and if an appointment of a *cestui que trust* be made, it is not void but merely error.<sup>10</sup> So, a near relative,<sup>11</sup> guardian,<sup>12</sup> or employee<sup>13</sup> of a beneficiary will not be appointed; but an appointment already made will not be disturbed on that ground alone, since the matter is in the discretion of the court below.<sup>14</sup> A married woman is not a suitable appointee,<sup>15</sup> nor is the husband of a *cestui*

2 Md. 284; *Schott's Estate*, 11 Phila. (Pa.) 120, 33 Leg. Int. (Pa.) 92.

**Considerations Influencing Court.** — The leading case on this subject is *In re Tempest*, L. R. 1 Ch. 485, where Lord Justice Turner laid down the following rules: (1) Regard should be had to the wishes of the creator of the trust, as manifested in express declarations or clearly to be collected from the instrument. (2) Regard should be had to the wishes of the *cestui que trust*, and an appointment should not be made prejudicial to the interests of any one or more of them. (3) Regard should be had to the question whether the appointment will or will not promote the execution of the trust.

1. **Appointment Desired by None.** — *Gaul's Estate*, 12 Phila. (Pa.) 13, 34 Leg. Int. (Pa.) 159; *Allen's Appeal*, 69 Conn. 702.

**Failure of Donee to Appoint.** — Where the ment, and the court is asked to appoint, it will use its discretion, and need not appoint in accordance with the wishes of the donee. *Middleton v. Reay*, 7 Hare 106, 13 Jur. 116. donee fails to exercise his power of appoint-

**Approval of Parties.** — Where a will provides that the appointment shall be made by the court, "subject to the approval of the parties interested," the court cannot make an arbitrary selection, but must listen to the suggestions of the parties in interest. *Cole v. Watertown*, (Wis. 1903) 96 N. W. Rep. 538.

A testator having provided that the court should fill any vacancies "with the advice of the other trustees," both trustees died, and their places were filled, and one of these successors died. It was held that the court should appoint without the advice of the other trustee. The provision in the will extended only to the original trustees. *Tarrant v. Backus*, 63 Conn. 277.

2. **Reference to Master.** — *O'Keeffe v. Calthorpe*, 1 Atk. 17; — *v. Roberts*, 1 Jac. & W. 251.

And this seems to be the rule in *New York*. *Matter of Stuyvesant*, 3 Edw. (N. Y.) 299.

Where the original trustee refuses to act, and a decree is made ordering the master to

appoint new trustees, and then the original trustee decides to act, the proper method is to have the master decline to appoint new trustees. *Miles v. Neave*, 1 Cox Ch. 159.

3. **Charitable Trusts.** — *Atty.-Gen. v. Arran*, 1 Jac. & W. 229; *Matter of Shrewsbury Municipal Charities*, 13 Jur. 201.

4. **Master's Appointment Adopted.** — *Matter of Norwich Charities*, 2 Myl. & C. 275; *Atty.-Gen. v. Dyson*, 2 Sim. & St. 528.

5. **Direct Appointment by Court.** — *Ex p. Tunstall*, 15 Jur. 645, 981; *Robinson's Trust*, 15 Jur. 187.

6. *Clinton v. Watkins*, 7 Ir. Eq. 489.

7. **Appointment of Cestui.** — *Nellis v. Rickard*, 133 Cal. 617, 85 Am. St. Rep. 227; *Losey v. Stanley*, 147 N. Y. 560; *People v. Donohue*, 70 Hun (N. Y.) 317; *Woodbridge v. Bockes*, 170 N. Y. 596.

8. **Intention of Creator of Trust.** — *Ligon v. Foster*, 63 Miss. 241.

9. **When Cestui May Be Appointed.** — *Ex p. Clutton*, 17 Jur. 988.

10. **Appointment Not Void.** — *People v. Donohue*, 70 Hun (N. Y.) 317; *Losey v. Stanley*, 147 N. Y. 560; *Woodbridge v. Bockes*, 59 N. Y. App. Div. 503; *Mulry v. Mulry*, 89 Hun (N. Y.) 531.

11. **Appointment of Near Relative.** — *Wilding v. Bolder*, 21 Beav. 222.

12. **Guardian.** — *Wallace's Estate*, 206 Pa. St. 105.

13. **Employee.** — *Matter of Welch*, 20 N. Y. App. Div. 412.

**Employee and Son of Trustee Not Appointed.** — *Lafferty's Estate*, 198 Pa. St. 433.

14. **Appointment Not Disturbed.** — *Re Cronan*, 31 Nova Scotia 477.

**A Surety on a Bond of the Beneficiary** as executrix of the will of a former trustee is not "necessarily and as a matter of law" incompetent to act as trustee where the estate of the former trustee, amounting to much more than the trust fund, is devised to the beneficiary free from debts. *Gaskill v. Green*, 152 Mass. 526.

15. **Married Woman.** — *Curran v. Green*, 18 R. I. 329.

*que trust*,<sup>1</sup> but in some cases a married woman may be appointed.<sup>2</sup> So, too, the court will not generally appoint a foreigner, or a person residing out of the jurisdiction;<sup>3</sup> but mere nonresidence is not sufficient cause for rejecting a nomination,<sup>4</sup> and where all the beneficiaries and the trust estate are outside the jurisdiction, trustees resident with the beneficiaries may be appointed.<sup>5</sup>

c. APPOINTMENT BY DONEE OF POWER—(1) *Creation of the Power*—

(a) *By Settlor*.—It is the right of the creator of a trust to provide a method for filling vacancies occurring in the office of trustee,<sup>6</sup> subject to the statutory requirements to be found in most jurisdictions, that the trustee so appointed must be accepted by the court.<sup>7</sup>

(b) *By Statute*.—So, too, the legislature may confer the power of appointing new trustees in particular cases; and in *England* a statute confers such power generally on all surviving trustees.<sup>8</sup>

(c) *By Court*.—It has been held that the court may insert, in a decree appointing new trustees, a clause giving such trustees the power to appoint others in their stead;<sup>9</sup> but these cases are not good law, and are not followed,<sup>10</sup>

1. *Husband of Cestui*.—*In re Helliwell*, 21 Grant Ch. (U. C.) 346. See also *Porter v. Rutland Bank*, 19 Vt. 410.

2. *Re Gough*, 3 Ont. L. Rep. 206.

3. *Nonresident*.—*In re Guibert*, 16 Jur. 852, 13 Eng. L. & Eq. 372.

Rev. Stat. Ind. 1881, § 2988, forbidding the appointment of nonresident trustees, does not apply to the case of a trustee becoming such by operation of law. *Reinker v. Bissell*, 90 Ind. 375. And see *supra*, this section, *Who May Be Trustee—Aliens*.

4. *Nonresidence Not a Cause for Rejection*.—*Wilcox's Appeal*, 54 Conn. 320.

5. *Appointment of Nonresidents*.—*In re Liddiard*, 14 Ch. D. 310; *In re Austen*, 38 L. T. N. S. 601; *Ex p. Lunno*, Bailey Eq. (S. Car.) 395.

But a bond will be required in such cases. See *infra*, this section, *Trustee's Bond*.

6. *Right of Creator to Provide for Filling Vacancies*.—*Golder v. Bressler*, 105 Ill. 419; *Shaw v. Paine*, 12 Allen (Mass.) 293; *Pierce v. Weaver*, 65 Tex. 44. And see the cases cited *infra*, this section, (3) *Exercise of the Power*, (a) *How Exercised*.

*Power to Call for Conveyance*.—When the instrument creating the trust gives the *cestui que trust* the power to request the trustee to convey the trust estate to whomsoever she may direct, and the trustee on such request conveys to a third person, upon the same trusts as are contained in the original deed, this does not affect the equitable interest. It remains in the *cestui*, and the only change is in the trustees. The grantee of the second deed holds as trustee, just as did the original trustee. *Cueman v. Broadnax*, 37 N. J. L. 508.

*Power Continued by New Instrument*.—The power to substitute a new trustee, given to the *cestuis que trustent* by a deed of trust, is not revoked by the execution of a subsequent instrument which does not give such power, but which declares that it is not a new deed, but an "extension" of the old, and which refers to the first deed and incorporates all its provisions. *McConnell v. Day*, 61 Ark. 464.

7. *Appointee Accepted by Court*.—See the codes and statutes in the various states.

*Right to "Name" Trustee Not a Power of Ap-*

*pointment*.—Where a testator by his will gives the beneficiaries the right to "choose" or "name" a trustee in case of vacancy, this is taken to mean merely a right to suggest a name to the court. *Schott's Estate*, 11 Phila. (Pa.) 120, 33 Leg. Int. (Pa.) 92.

8. *Power Conferred by Statute*.—*Golder v. Bressler*, 105 Ill. 419. See also *Wall St. M. E. Church v. Johnson*, 140 Ind. 445; 44 & 45 Vict., c. 41 (Conveyancing Act of 1881).

*Decisions under English Conveyancing Acts*.—Under the Conveyancing Act of 1881 the executor of a sole trustee has the power of appointing new trustees. *In re Shafto*, 29 Ch. D. 247. But is not bound to exercise this power. *In re Knight*, 26 Ch. D. 82. But if a sole trustee wishes to exercise his power of appointing new trustees, this cannot be taken away from him. *In re Higginbottom*, (1892) 3 Ch. 132. A sole surviving trustee, however, cannot appoint his own successor by will. *In re Parker*, (1894) 1 Ch. 707. Nor can the personal representative of the survivor of two trustees appointed by the will, but dying before the testator, appoint new trustees. *Nicholson v. Field*, (1893) 2 Ch. 511. But recourse should be had to the court, who will appoint new trustees. *In re Ambler*, 59 L. T. N. S. 210.

Under the Conveyancing Act of 1882, § 5, subsec. 1, a separate set of trustees for a distinct part of the trust property may be appointed only when new trustees of the whole property are being appointed. The trustees of the whole cannot retire from one part by appointing new trustees of that part. *Savile v. Couper*, 36 Ch. D. 520.

Under the Trustee Act of 1893, where the will gives the power to appoint in case of the trustee becoming incapable, and the trustee becomes unfit, but not incapable, the power of appointment should be exercised not by the donees of the power, but by the continuing trustees, under the provisions of the act. *In re Wheeler*, (1896) 1 Ch. 315.

9. *Insertion of Power in Decree*.—*Joyce v. Joyce*, 2 Molloy 276; *White v. White*, 5 Beav. 221, 6 Jur. 160.

10. *Power Not Inserted*.—*Holder v. Durbin*, 11 Beav. 594; *Southwell v. Ward*, Tambyn 314;

except possibly in cases of trusts for charity.<sup>1</sup>

(2) *Who May Be Donee* — (a) **Individuals.** — The donor of the power may designate whomsoever he wishes to exercise the power of naming trustees to fill a vacancy; thus the trustee,<sup>2</sup> or the *cestuis que trustent*,<sup>3</sup> or the assigns of the *cestuis que trustent*,<sup>4</sup> or the donor himself,<sup>5</sup> may be clothed with this power.<sup>6</sup>

(b) **Courts** — *aa.* **IN OFFICIAL CAPACITY.** — The donor may provide that a court, in its official capacity, may make the appointment, and if it is invested with general equity powers, or a statutory power to appoint, it may perform this function;<sup>7</sup> but if the court has no jurisdiction by the law of its creation, the appointment is void, for no one, save the legislature, can confer on a court powers which it does not already possess.<sup>8</sup>

*bb.* **AS INDIVIDUALS.** — Where, however, it is clearly the intention of the donor to name the individual who happens to be judge of the court, his description as judge will be taken to be merely *descriptio personæ*, and the appointment will be valid.<sup>9</sup> On the other hand, if the donor, although designating the judge, indicates his intention to designate the court in its official capacity, the result may be different.<sup>10</sup>

(3) *Exercise of the Power* — (a) **How Exercised** — *aa.* **IN GENERAL.** — When the creator of the trust has provided a method for the filling of vacancies, this method will be carried out whenever possible, and vacancies can be filled in no other way.<sup>11</sup> The appointment is governed by the terms of the instrument creating the power, and not by the general law,<sup>12</sup> and an appointment not in

Bayley v. Mansell, 4 Madd. 226; Bowles v. Weeks, 14 Sim. 591; Brown v. Brown, 3 Y. & C. Exch. 395; Atty.-Gen. v. Madden, 2 Con. & Law. 519.

**Insertion of Such Power in Settlement.** — But such a power is a proper and usual power to be inserted in settlements. Lindow v. Fleetwood, 6 Sim. 152; Sampayo v. Gould, 12 Sim. 426.

**1. Charitable Trusts.** — In the Matter of 52 Geo. III., c. 101, 12 Sim. 262. See also Bowles v. Weeks, 14 Sim. 591.

**2. Trustee as Donee.** — Whelan v. Reilly, 3 W. Va. 597.

**3. Cestuis Que Trustent.** — McConnell v. Day, 61 Ark. 464.

**4. Assigns of Cestui.** — Miller v. Knowles, (Tex. Civ. App. 1898) 44 S. W. Rep. 927, holding that the assignee may appoint without the cestui joining. Leggett v. Grimmer, 36 Ark. 496.

**5. Donor.** — Finlay v. Howard, 2 Dr. & War. 490.

**6. Who May Be Donee.** — See also the cases cited *infra*, this section, *Exercise of the Power*.

**Assignment for Benefit of Creditors.** — A provision in a deed of assignment for the benefit of creditors, reserving to the assignor the power to appoint a successor to the trustee, is void, as abridging the rights of the creditors. Planck v. Schermerhorn, 3 Barb. Ch. (N. Y.) 644. See also Riggs v. Murray, 2 Johns. Ch. (N. Y.) 565, reversed in 15 Johns. (N. Y.) 571. A contrary decision is Robins v. Embry, Smed. & M. Ch. (Miss.) 207.

But where the appointment is to be made with the consent of a majority of the creditors there can be no objection. Smith v. Bowdre, 69 Miss. 692.

**7. Court in Official Capacity.** — Tarrant v. Backus, 63 Conn. 277; Wilcox's Appeal, 54

Conn. 320; Morrison v. Kelly, 22 Ill. 610, 74 Am. Dec. 169; Moore v. Isabel, 40 Iowa 383; Harris v. Rucker, 13 B. Mon. (Ky.) 564; *In re MacEwen*, 177 Pa. St. 638; Griswold v. Sackett, 21 R. I. 206; Cole v. Watertown, (Wis. 1903) 96 N. W. Rep. 538.

**8. Appointment by Court Void.** — Leman v. Sherman, 117 Ill. 657; Shaw v. Paine, 12 Allen (Mass.) 293; Harwood v. Tracy, 118 Mo. 631. See also Allen's Appeal, 69 Conn. 702.

**9. Court as Individual.** — Pool v. Potter, 63 Ill. 533; Shaw v. Paine, 12 Allen (Mass.) 293; National Webster Bank v. Eldridge, 115 Mass. 424.

**10. Judge in Official Capacity.** — Allen's Appeal, 69 Conn. 702.

**Acting Judge.** — Where the power is given to the "acting county judge," this is taken to mean the judge acting at the time the appointment is to be made, and not the one acting at the time of the execution of the deed. Moore v. Isabel, 40 Iowa 383.

**11. Method Provided Must Be Followed.** — Lancashire v. Lancashire, 1 De G. & Sm. 288, 11 Jur. 1024; Fordyce v. Bridges, 10 Beav. 90, 2 Phil. 497; Macon, etc., R. Co. v. Georgia R. Co., 63 Ga. 103; French v. Northern Trust Co., 197 Ill. 30; Golder v. Bressler, 105 Ill. 419; Pillsbury v. Consolidated European, etc., R. Co., 69 Me. 394; Shaw v. Paine, 12 Allen (Mass.) 293; Rogers v. Rogers, 4 Redf. (N. Y.) 521; Belmont v. O'Brien, 12 N. Y. 394; Naylee's Estate, 52 Pa. St. 154; Pierce v. Weaver, 65 Tex. 44.

**12. Terms of Instrument Govern.** — Macon, etc., R. Co. v. Georgia R. Co., 63 Ga. 103.

**Limitation on the Power.** — Where the power was to the continuing trustee to fill, with the consent of the *cestuis que trustent*, vacancies caused by any trustee appointed by the will, or under the power, wishing to retire, and



conformity with the power confers no title on the new trustee.<sup>1</sup>

**Power Strictly Construed.** — The power must be strictly construed; thus a trustee who is empowered to appoint his successor by will cannot appoint by deed,<sup>2</sup> and where an appointment is to be under hand and seal, an appointment not under seal is void.<sup>3</sup> But a reasonable construction must be employed, and where the appointment is to be by deed of the trustees, an appointment made by a deed executed by two trustees, and another deed executed by the third trustee, is held to be a valid exercise of the power.<sup>4</sup> And even if the appointment is not made in conformity with the power, it will not be declared invalid where there has been no fraud, and where it has remained unquestioned for a number of years.<sup>5</sup>

**Fraud on the Power.** — Any fraud on the power will, of course, vitiate the appointment. Thus, where a testator appointed A and B as his trustees, and then by a codicil revoked the appointment and appointed C and D in their place, with a power to fill vacancies, and where C, in consideration of money paid him by B, resigned and induced D to appoint B, this was an invalid appointment.<sup>6</sup>

**Appointment by Parol.** — Where the trust instrument is silent as to the manner of exercising the power, it may be exercised by parol as well as by deed.<sup>7</sup>

*bb. APPOINTMENT BY COURT WHEN POWER FAILS.* — If it becomes impossible to exercise the power, as where the donee becomes a lunatic;<sup>8</sup> or is out of the jurisdiction;<sup>9</sup> or fails to act;<sup>10</sup> or where a will provides that the appointment shall be made on the joint application of two or more parties and they cannot agree;<sup>11</sup> or where the surviving trustee is to apply to the court, and all the trustees are dead;<sup>12</sup> or if it is inadvisable to exercise the power,<sup>13</sup> or the contingency is not provided for,<sup>14</sup> or the power is not fully exercised,<sup>15</sup> the court may exercise its inherent power, and by appointing a new trustee prevent a failure of the trust. And in a proper case the court may appoint even against the consent of the donee of the power, although the latter is also the donor.<sup>16</sup>

(b) **By Whom Exercised** — *aa. IN GENERAL.* — No one can appoint to fill a vacancy unless such power be expressly conferred upon him.<sup>17</sup> Thus a trustee appointed

where all the trustees had retired and their places were filled by the court, it was held that a continuing trustee could appoint without the consent of the *cestuis que trustent*, since this limitation applied only to trustees appointed under the power, and not to trustees who derived their power to appoint from the Conveyancing Act of 1881. *Cecil v. Langdon*, 28 Ch. D. 1.

1. **Invalid Appointment Confers No Title.** — *Lancashire v. Lancashire*, 1 De G. & Sm. 288, 11 Jur. 1024; *Sharpley v. Plant*, 79 Miss. 175, 89 Am. St. Rep. 588. And see *Pearce v. Pearce*, 22 Beav. 248.

2. **Appointment by Will.** — *Abbott, Administrator*, 55 Me. 580.

3. **Appointment under Seal.** — *Sharpley v. Plant*, 79 Miss. 175, 89 Am. St. Rep. 588.

**Power to Nominate Successor.** — Where the power was to "nominate" a successor, it was held that the successor was not "nominated" by merely naming him. A conveyance to him was necessary. *Warburton v. Sandys*, 14 Sim. 622, 9 Jur. 503.

4. **Reasonable Construction.** — *Warburton v. Sandys*, 14 Sim. 622, 9 Jur. 503; *Crosby v. Huston*, 1 Tex. 203.

5. **Lapse of Time.** — *Atty.-Gen. v. Cuming*, 2 Y. & C. Ch. 139, 7 Jur. 187.

6. **Fraud on the Power.** — *Sugden v. Crossland*, 3 Smale & G. 192, 2 Jur. N. S. 318.

7. **Appointment by Parol.** — *Leggett v. Grimmett*, 36 Ark. 496.

8. **Donee a Lunatic.** — *In re Sparrow*, L. R. 5 Ch. 662; *In re Heaphy*, 18 W. R. 1070; *In re Foxhall*, 2 Phil. 281.

In *Matter of Bowmer*, 3 De G. & J. 658, where the donee was a lunatic, the court authorized his committee to make the appointment.

9. **Donee Out of Jurisdiction.** — *In re Fauntleroy*, 10 Sim. 252; *Tripp v. Martin*, 9 Grant Ch. (U. C.) 20.

10. **Failure of Donee to Act.** — *Middleton v. Reay*, 7 Hare 106, 13 Jur. 116; — *v. Roberts*, 1 Jac. & W. 251; *Harris v. Rucker*, 13 B. Mon. (Ky.) 564.

11. **Donees Cannot Agree.** — *Griswold v. Sackett*, 21 R. L. 206; *Cone v. Cone*, 61 S. Car. 512.

12. **Death of Person Entitled to Nominate.** — *In re MacEwen*, 177 Pa. St. 638.

13. **Inadvisability.** — *Matter of Davies*, 3 Macn. & G. 278.

14. **Contingency Not Provided For.** — *People v. American L. & T. Co.*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 76; *In re Cooper*, 25 L. J. Ch. 685; *In re Harrison*, 22 L. J. Ch. 69; *Ex p. Greenville Academies*, 7 Rich. Eq. (S. Car.) 471.

15. **Power Not Fully Exercised.** — *In re Humphrey*, 1 Jur. N. S. 921.

16. **Appointment Against Consent of Donee.** — *Finlay v. Howard*, 2 Dr. & War. 490.

17. **No Power Unless Expressly Given.** — *Grundy*

by the court cannot exercise such a power even though the trust instrument provides that it shall appertain to the trustees therein named,<sup>1</sup> or to the trustees appointed under a power of appointment.<sup>2</sup> Nor can the power be delegated by the donee to another.<sup>3</sup> But where a power is given to a man so long as he lives, he may exercise it although he has parted with a portion of his interest in the trust;<sup>4</sup> and the donee may exercise the power, even though he resides abroad.<sup>5</sup> So, too, where the power is given to a man and his executors, and he leaves three executors, one of whom renounces probate, the other two may exercise the power.<sup>6</sup>

**Surviving or Continuing Trustees.** — Where the power is given to the surviving or continuing trustee or trustees to appoint new trustees in case of vacancy, a retiring trustee is not considered to be a continuing trustee, and the survivor or survivors cannot retire from the trust and by the same instrument appoint their successors;<sup>7</sup> but where the power is to the "surviving or continuing or other trustee or trustees," the survivor may retire and at the same time appoint new trustees.<sup>8</sup>

**Surviving or Acting Trustee.** — Where the power is given to the "survivors or survivor of the trustees so acting in the trust," then in case both trustees refuse to act, an appointment by them is invalid;<sup>9</sup> but in case the power is given to the survivor of three trustees, and one disclaims, the power may be exercised by the survivor of the remaining two.<sup>10</sup>

**bb. NUMBER WHO MUST EXERCISE POWER.** — Where the power of appointment is given to a particular number of persons, it must be exercised by that number,<sup>11</sup> but an appointment will not be invalid where the instrument of appointment is executed by all the donees save one, and that one writes on the same paper his assent to the appointment, asserting that all his interest in the trust estate

*v. Drye*, 104 Ky. 825; *Wilson v. Tuttle*, 36 N. H. 129; *Fonda v. Penfield*, 56 Barb. (N. Y.) 503.

**Power Dependent on Condition.** — Where a testator left his property to three trustees, and provided that his son should become a trustee if he should reform his habits and conduct himself properly for a space of five years, it was held that in the absence of any further provision, the trustees were the ones to determine whether the son was worthy of becoming a trustee, and the court would not interfere so long as they did not abuse their discretion. *Edgerly v. Barker*, 67 N. H. 443.

**1. No Power in Appointees of Court.** — *Cooper v. Macdonald*, 35 Beav. 504. And see *supra*, this section, 2. c. (1) *Creation of the Power*; (c) *By Court*.

**2. Oglander v. Oglander**, 2 De G. & Sm. 381.

**3. Power Cannot Be Delegated.** — *Clark v. Wilson*, 53 Miss. 119; *Porter v. West*, 64 Miss. 548.

**4. Power to Man for Life.** — *Hardaker v. Moorhouse*, 26 Ch. D. 417.

**5. Residence Abroad.** — *O'Reilly v. Alderson*, 8 Hare 101.

**6. Power to Man and His Executors.** — *Granville v. McNeile*, 7 Hare 156.

**7. Surviving or Continuing Trustee.** — *Stonor v. Rowton*, 17 Beav. 308, cited in *Camoys v. Best*, 19 Beav. 415; *Travis v. Illingworth*, 2 Drew & Sm. 344, 11 Jur. N. S. 215; *Nicholson v. Smith*, 3 Jur. N. S. 313, *sub nom. Nicholson v. Wright*, 26 L. J. Ch. 312.

**A Contrary Opinion** was expressed in *In re Glenny*, 25 Ch. D. 611, but this is not adhered to. See *In re Norris*, 27 Ch. D. 333; *In re Coates*, 34 Ch. D. 370.

**8. Surviving or Continuing or Other Trustee.** — *Camoys v. Best*, 19 Beav. 414.

**9. Surviving or Acting Trustee.** — *Sharp v. Sharp*, 2 B. & Ald. 405.

**Acting Trustees for the Time Being.** — A deed of trust provided that in case of the death of the trustees it should be lawful for the "acting trustee or trustees for the time being, or the executor and administrator of the last acting trustee," to appoint new trustees. A and B were the original trustees. A died and B died, leaving C his heir. C died, leaving D his heir. D died, leaving E, F, and G his heirs. E, F, and G did not act in the trust, but executed a deed appointing X, Y, and Z as trustees. It was held that A, B, and C were trustees "for the time being," and were "acting trustees" by reason of their making the appointment. *Cunningham v. Frayling*, (1891) 2 Ch. 567.

**10. "Survivor" of Disclaiming Trustee.** — *Cafe v. Bent*, 5 Hare 24, 9 Jur. 653.

**11. Power Must Be Exercised by All.** — *Brasier v. Hudson*, 9 Sim. 11; *Tripp v. Martin*, 9 Grant Ch. (U. C.) 20; *O'Brien v. Battle*, 98 Ga. 766.

**Power of One Given to Two Must Be Exercised by Both.** — Where a testator appointed his wife trustee, and provided that she could appoint her successor, and the wife died and the testator appointed two trustees in her place and gave them all powers given to the wife, it was held that on the death of one of the co-trustees the survivor could not appoint to the vacancy, and that this duty devolved on the court at the suit of the *cestuis que trustent*. *O'Brien v. Battle*, 98 Ga. 766.

**Power to Surviving Brothers or Majority of Them.** — Where the power is given by will to

is gone.<sup>1</sup> Where it is provided that in the event of the trustees being reduced to a certain number, these shall fill the vacancies, this is merely directory, and the vacancies may be filled up either before the prescribed limit is reached,<sup>2</sup> or afterwards.<sup>3</sup> The contrary rule, laid down in *Perry on Trusts*, seems not to be supported either on principle or by the cases cited by the learned author.<sup>4</sup>

(c) **When Exercised** — *aa. IN GENERAL.* — It may be stated as a general rule that a power cannot be exercised unless the trust instrument authorizes it in the particular event which has occurred. Thus, if the power be to appoint in case of neglect or refusal to act, the power cannot be exercised in case of death;<sup>5</sup> and where a will provides that on the death of the trustee a certain person is to become trustee unless the original trustee shall have previously appointed some one else in his place, an appointment to take effect in the lifetime of the original trustee is void.<sup>6</sup> So, too, if the power is to appoint in case of a refusal to act, no title is conferred on a person appointed while the trustee is acting,<sup>7</sup> and a power to appoint in case of the desertion or removal of a trustee does not extend to a case where the trustee has left the trust on account of its having been converted, against his will, to purposes foreign to the intent of the creator of the trust.<sup>8</sup> Where the contingency is unwillingness to act, and the trustee acts but afterwards wishes to be discharged, the appointment must be made by the court, and not by the donees,<sup>9</sup> and so where the contingency is incapacity to act.<sup>10</sup>

**Incapacity Not Unfitness.** — Where the power is to appoint in case of "incapacity" on the part of the trustee, this is taken to mean lack of legal capacity, and the fact that the trustee has removed to a foreign country does not *per se* justify an exercise of the power.<sup>11</sup> The contrary view has been expressed,<sup>12</sup> but the facts in these cases were peculiar, and the better rule is to require the power to contain a provision for appointment in case of unfitness, if such be the intention of the donor. Nor does bankruptcy<sup>13</sup> or absconding<sup>14</sup> make the trustee "incapable" within the meaning of the word.<sup>15</sup> But bankruptcy is an "unfitness" to act.<sup>16</sup>

**Reasonable Construction.** — In the construction of powers, as elsewhere, the intention of the creator governs, and a reasonable construction will be adopted.

"my surviving brothers and sisters or a majority of them," it seems that this means those surviving at the time of the exercise of the power. *Saunders v. Bradley*, 6 Ont. L. Rep. 250.

1. **Appointment Good though Not Executed by All.** — *Cates v. Mayes*, (Tex. 1889) 12 S. W. Rep. 51.

2. *Doe v. Roe*, 1 Anstr. 86.

3. *Atty.-Gen. v. Floyer*, 2 Vern. 748; *Atty.-Gen. v. Litchfield*, 5 Ves. Jr. 825.

4. See *Perry on Trusts*, 4th ed., pp. 391, 392.

5. **Occurrence of Particular Event.** — *Guion v. Pickett*, 42 Miss. 77.

Where the Legislature of Ohio had the power to fill a vacancy caused by the death, removal, etc., of a trustee of Ohio University, it was held that no vacancy was caused by the removal of one of the trustees out of the state. Resignation or judicial decision were the only ways in which a vacancy could exist. *State v. Bryce*, 7 Ohio (pt. ii) 82. And see also *State v. Vincennes University*, 5 Ind. 77.

6. **Appointment in Lifetime of Trustee.** — *McLachlin v. Osborne*, 7 Ont. 297.

7. **Appointment on Refusal to Act.** — *Chestnutt v. Gann*, 76 Tex. 150.

8. **Excusable Refusal No Refusal.** — *Atty.-Gen. v. Pearson*, 3 Meriv. 412.

9. **Unwillingness to Act.** — *In re Woodgate*, 5 W. R. 448.

10. **Appointment in Case of Incapacity.** — *In re Armstrong*, 5 W. R. 448.

11. **Residence Abroad.** — *Withington v. Withington*, 16 Sim. 104; *Matter of Watts*, 9 Hare 106, 15 Jur. 459; *In re Harrison*, 22 L. J. Ch. 69. See also *In re Bignold*, L. R. 7 Ch. 223; *Millard v. Eyre*, 2 Ves. Jr. 94.

12. **Residence Abroad Considered an Incapacity.** — *Mennard v. Welford*, 1 Smale & G. 426, 17 Jur. 815; *Farmers L. & T. Co. v. Hughes*, 11 Hun (N. Y.) 130.

13. **Bankruptcy Not Incapacity.** — *Turner v. Maule*, 15 Jur. 761, 5 Eng. L. & Eq. 222; *Matter of Watts*, 9 Hare 106, 15 Jur. 459.

14. **Absconding.** — *Millard v. Eyre*, 2 Ves. Jr. 94.

15. **Under the Trustee Act of 1893**, where the will gives the power to appoint in case of a trustee becoming incapable, and the trustee becomes unfit, but not incapable, the power of appointment should be exercised not by the donees of the power, but by the continuing trustees, under the provisions of the act. *In re Wheeler*, (1806) 1 Ch. 315.

16. **Bankruptcy an "Unfitness."** — *In re Roche*, 2 Dr. & War. 287.



Thus, where the power is to appoint in case of a refusal to act, it may be exercised if the trustee demands money as a condition precedent to serving,<sup>1</sup> or pays into court the money constituting the trust fund,<sup>2</sup> or refuses after many years to act.<sup>3</sup> So where a trustee is to be appointed in case of a vacancy caused by "death, removal from the United States, or otherwise," a vacancy caused by a refusal to act may be filled by the donee of the power.<sup>4</sup> So, too, a power to appoint in case of the trustee residing abroad may be exercised where the trustee takes a lease of a house for five years in a foreign country.<sup>5</sup> It has even been held that, where the contingency on which the appointment may be made is death or refusal to act, the power of the donee extends to a vacancy created by resignation,<sup>6</sup> and the language of the court goes even further than necessary to the actual decision of the case. But it is extremely doubtful whether either decision or opinion can be supported on principle or authority.

**Death of Trustee in Lifetime of Testator.** — It was formerly held that a power given by will to appoint on the death of a trustee did not extend to the event of a trustee dying in the lifetime of the testator,<sup>7</sup> but the law is now otherwise.<sup>8</sup>

*bb. HOW OFTEN EXERCISED.* — In the absence of a provision to the contrary, the power of the donee is not exhausted by a single exercise of the power.<sup>9</sup> On the other hand, the power may be merely directory, and not mandatory, and in such case it need not be exercised at all.<sup>10</sup>

(d) **Who May Be Appointed** — *aa. IN GENERAL.* — The donee may, as a general rule, appoint any proper person to be trustee.<sup>11</sup> Thus, he may appoint the tenant for life to be trustee of a power of sale,<sup>12</sup> or his own solicitor,<sup>13</sup> or a nonresident, if the *cestui que trustent* are nonresidents.<sup>14</sup> And a donee may appoint her husband trustee.<sup>15</sup> But a donee cannot appoint himself<sup>16</sup> or his son;<sup>17</sup> nor, where the trustee is donee, should the power be exercised without consulting the beneficiaries.<sup>18</sup>

**How Many Appointed.** — The question as to how many trustees should be appointed will be found treated elsewhere.<sup>19</sup>

*bb. WHEN COURT IS DEALING WITH TRUST.* — When the court is already dealing with the trust estate, it looks more closely to the exercise of the power by the

1. **Demand of Money a Refusal to Act.** — *Klein v. Glass*, 53 Tex. 37.

2. **Paying Money into Court.** — *Matter of Williams*, 4 Kay & J. 87.

3. **Refusal After Many Years.** — *Noble v. Meymott*, 14 Beav. 471.

4. **Vacancy by Death or "Otherwise."** — *Cruger v. Halliday*, 3 Edw. (N. Y.) 565.

5. **Residence Abroad.** — *In re Stamford*, (1896) 1 Ch. 288.

Under the Conveyancing Act of 1881, where a trust deed contained a clause that a husband and wife should have power to appoint new trustees, but did not specify in what contingencies, it was held that in the event of a trustee remaining out of the country for over a year, the husband and wife could appoint a successor. *In re Walker*, 24 Ch. D. 698.

6. *Cole v. Watertown*, (Wis. 1903) 96 N. W. Rep. 538.

7. **Death in Testator's Lifetime.** — *Winter v. Rudge*, 15 Sim. 596. See also *Walsh v. Gladstone*, 14 Sim. 5.

8. *Matter of Hadley*, 5 De G. & Sm. 67, 16 Jur. 98. And see also *Noble v. Meymott*, 14 Beav. 471; *Saunders v. Bradley*, 6 Ont. L. Rep. 250.

9. **Not Exhausted by One Exercise** — *Foster v. Goree*, 4 Ala. 440; *Bowditch v. Banuelos*, 1 Gray (Mass.) 220, in which last case it was

held that, where the power was reserved to the creator of the trust to appoint on the resignation "of the said trustee," and where it was provided that the "said E." (the trustee) should convey to such new trustee, the donee might appoint a successor to E.'s successor.

10. **Power Directory.** — *Belmont v. O'Brien*, 12 N. Y. 394. See also *Atty.-Gen. v. Floyer*, 2 Vern. 748.

11. **Proper Person.** — *Bowditch v. Banuelos*, 1 Gray (Mass.) 220. See also *Kennedy v. Turnley*, 6 Ir. Eq. 399. And see generally *supra*, this section, *Who May Be Trustee*.

12. **Tenant for Life.** — *Forster v. Abraham*, L. R. 17 Eq. 351.

13. **Solicitor.** — *In re Stamford*, (1896) 1 Ch. 288. See also *In re Norris*, 27 Ch. D. 333.

14. **Nonresidents.** — *Meinertzhagen v. Davis*, 1 Coll. Ch. Cas. 335, 8 Jur. 973.

15. **Husband of Donee.** — *Tweedy v. Urquhart*, 30 Ga. 446.

16. **Donee Cannot Appoint Himself.** — *In re Skeats*, 42 Ch. D. 522; *In re Newen*, (1894) 2 Ch. 297.

17. **Son of Donee.** — *Bailey v. Bailey*, 2 Del. Ch. 95.

18. **Consulting Beneficiaries.** — *Marshall v. Sladden*, 7 Hare 428.

19. **How Many Appointed.** — See *infra*, this section, *Number of Trustees*.

donee, and the appointment must receive the sanction of the court.<sup>1</sup> But the court will not interfere with the nomination unless it be clearly an improper one.<sup>2</sup>

**d. NUMBER OF TRUSTEES.** — The number of trustees to be appointed by the court or by the donee of a power is to be determined by construction of the instrument creating the trust, and by regard to surrounding circumstances.<sup>3</sup> When it is once determined how many trustees the creator desired this number should not be altered.<sup>4</sup> But in cases where it seems proper the court may either increase<sup>5</sup> or decrease<sup>6</sup> the number of trustees.

**Opposition of Court to Single Trustee.** — The courts, however, are much opposed to the appointment of but a single trustee, especially where the estate is large, or is being held for a minor,<sup>7</sup> but such appointment may be made with consent of all the parties in interest,<sup>8</sup> or if beneficial to all the *cestuis que trustent*.<sup>9</sup>

**1. Funds in Hands of Court.** — *Wibb v. Shaftesbury*, 7 Ves. Jr. 480; *Atty.-Gen. v. Clack*, 1 Beav. 467.

**Mere Filing of a Bill** does not have this effect. *Cafe v. Bent*, 3 Hare 245, 8 Jur. 141. See also *May v. May*, 167 U. S. 310.

**A Trustee Appointed During a Suit** is not entitled to any costs. *Peatfield v. Benn*, 17 Beav. 522.

**Appointment of Solicitor of Trustee Not Satisfied.** — *In re Norris*, 27 Ch. D. 333. But see *supra*, this section, *Appointment by Court*, (4) *Who Will Be Appointed*.

**2. No Interference Unless Unfitness** — *In re Gadd*, 23 Ch. D. 134; *Thomas v. Williams*, 24 Ch. D. 558; *Tempest v. Camoys*, 58 L. T. N. S. 221.

**3. Question of Intention.** — *Meinertzhagen v. Davis*, 1 Coll. Ch. Cas. 335, 8 Jur. 973; *In re Coates*, 34 Ch. D. 370; *Matter of Bathurst*, 2 Smale & G. 169, 18 Jur. 568; *Lonsdale v. Beckett*, 4 De G. & Sm. 73; *Hulme v. Hulme*, 2 Myl. & K. 682; *Tarrant v. Backus*, 63 Conn. 277; *Atty.-Gen. v. Barbour*, 121 Mass. 568.

*In Matter of Bathurst*, 2 Smale & G. 169, 18 Jr. 568, *Stuart, V. C.*, said: "It must be borne in mind that, on questions of this kind, the court must be a good deal governed by the selection of the *cestuis que trustent*, the state of the property, and the time at which the appointment is brought to the notice of the court."

**Where a Will Named** the testator's wife and two sons as trustees and provided as a substitute for the widow on her decease, "such one of my grandsons [naming two] as the then surviving or acting trustee shall select;" and where one son died in the testator's lifetime, and the testator named one grandson in his place, it was held that the power of selection had become impossible by the act of the testator, and since the will disclosed no settled intention to always have three trustees, the survivors could not add to their number on the death of the widow. *Mallory v. Mallory*, 72 Conn. 494.

**4. Number Should Remain the Same.** — *Meinertzhagen v. Davis*, 1 Coll. Ch. Cas. 335, 8 Jur. 973; *Buckley v. Buckley*, 14 Jur. 189; *Nicholson v. Smith*, 3 Jur. N. S. 313, *sub nom.* *Nicholson v. Wright*, 26 L. J. Ch. 312; *Ex p. Davis*, 2 Y. & C. Ch. 468; *Proudfoot v. Tiffany*, 11 Grant Ch. (U. C.) 461; *Kingsmill v. Miller*, 15 Grant Ch. (U. C.) 171.

**But an Appointment of a less number** is not necessarily void. *Reid v. Reid*, 30 Beav. 388.

**The Mere Reduction** of the number from seventeen to ten is not enough to justify a petition for the appointment of new trustees, but if inconvenience results, the court may appoint. *Matter of Shrewsbury Municipal Charities*, 13 Jur. 201.

**5. Increase May Be Proper.** — *Meinertzhagen v. Davis*, 1 Coll. Ch. Cas. 335, 8 Jur. 973; *In re Boycott*, 5 W. R. 15. Thus, three may be appointed in place of two, *Birch v. Cropper*, 2 De G. & Sm. 255; or four in place of three, *Plenty v. West*, 16 Beav. 356; or two in place of one, *Ex p. Wilkinson*, 3 Mont. & A. 145.

**Under Section 32 of the Trustee Act of 1850**, the court has power to appoint an additional trustee, even though there is no vacancy in the trusteeship. *In re Brackenbury*, L. R. 10 Eq. 45; *In re Gregson*, 34 Ch. D. 209.

**6. Decrease.** — *Matter of Bathurst*, 2 Smale & G. 169, 18 Jur. 568; *Emmet v. Clark*, 3 Giff. 32, 7 Jur. N. S. 404.

**Where It Is Impossible** to find a third trustee, two may be appointed in place of three. *Bulkeley v. Eglinton*, 1 Jur. N. S. 994.

**Under the Conveyancing Act of 1881**, and the Lunacy Act of 1890, the court will allow three trustees to act in place of four, the fourth being a lunatic. *In re Leon*, (1892) 1 Ch. 348.

**Under the Trustee Act of 1850**, if one of the four trustees absconds, the court will appoint the other three in place of themselves and the fourth. *In re Harford*, 13 Ch. D. 135; *In re Shipperdson*, 49 L. J. Ch. 619. Not followed in *In re Aston*, 23 Ch. D. 217; *In re Colyer*, 50 L. J. Ch. 79. And also under Act of 1893, *In re Chetwynd*, (1902) 1 Ch. 692.

**7. One Trustee Not Allowed** — *England*. — *D'Adhemar v. Bertrand*, 35 Beav. 19; *Grant v. Grant*, 34 L. J. Ch. 641; *In re Dickinson*, 1 Jur. N. S. 724; *In re Ellison*, 2 Jur. N. S. 62.

*Canada*. — *Re Bossi*, 4 British Columbia 584; *Proudfoot v. Tiffany*, 11 Grant Ch. (U. C.) 461; *Kingsmill v. Miller*, 15 Grant Ch. (U. C.) 171.

*Massachusetts*. — *Massachusetts Gen. Hospital v. Amory*, 12 Pick. (Mass.) 445; *Dixon v. Homer*, 12 Cush. (Mass.) 41.

**Under 23 & 24 Vict., c. 145, § 27**, the appointment of one trustee in place of two is valid but not proper. *West of England, etc., Bank v. Murch*, 23 Ch. D. 138.

**8. Appointment of Only One Trustee.** — *Greene v. Borland*, 4 Met. (Mass.) 330.

**9. Beneficial to Cestuis.** — *Sitwell v. Heron*, 14 Jur. 848.

or if the trust is to be wound up very shortly.<sup>1</sup>

**Appointment under Power.** — Where it is clear from a reading of the trust instrument that it was intended that a certain number should be kept up, an appointment of a less number is a breach of trust and invalid.<sup>2</sup> Nor should a greater number be appointed.<sup>3</sup>

**3. Acceptance** — *a. NECESSITY OF.* — No person can be compelled to undertake the duties of trustee of an express trust,<sup>4</sup> and not even the legislature can impose the duty on him.<sup>5</sup> Where a trust is created in a public officer and his successors in office, the successors are not bound unless they accept the trust.<sup>6</sup> But acceptance on the part of the trustee named is not necessary to the validity of the trust as against the creator,<sup>7</sup> and, as already seen, the court will not allow a trust to fail for want of a trustee, but will appoint another one in his stead.<sup>8</sup> The mere fact that a person named as trustee in a will signifies, in the lifetime of the testator, his intention to accept, does not prevent him on the death of the testator from refusing to serve,<sup>9</sup> and, on the other hand, delay in accepting, and the expressing of doubts as to willingness to accept, are not a bar to subsequent acceptance.<sup>10</sup> But an absolute refusal to serve as one of several trustees cannot be retracted, and the person so refusing cannot, as a matter of right, afterward be appointed trustee.<sup>11</sup>

*b. WHAT CONSTITUTES.* — No express method of acceptance is required. The most obvious way is to join in the execution of the instrument making the conveyance,<sup>12</sup> or to execute a separate declaration of trust;<sup>13</sup> but this is not necessary, and the acceptance may be shown by acts as well as by an express written acceptance.<sup>14</sup> Any interference with the trust fund in such a

**1. Winding Up of Trust.** — *In re Reynault*, 16 Jur. 233.

**2. Invalid.** — *Hulme v. Hulme*, 2 Myl. & K. 682; *Lonsdale v. Beckett*, 4 De G. & Sm. 73.

But if Within the Terms of the instrument, such an appointment is not invalid. *Miller v. Priddon*, 1 De G. M. & G. 335.

**3. Appointment of Greater Number.** — *Ex p. Davis*, 2 Y. & C. Ch. 468, 7 Jur. 430, *distinguishing Sands v. Nugee*, 8 Sim. 130, where it was held that the donee might appoint three in place of one.

**4. Necessity of Acceptance.** — See the cases cited in the next following subdivision of this section, *b. What Constitutes*.

The fact that a trustee named has no power to accept the trust does not prevent him from declining it. *Dailey v. New Haven*, 60 Conn. 314.

**Implied Trusts** may, of course, be imposed on any one against his will by operation of law. See the title IMPLIED TRUSTS, vol. 15, p. 1129.

**5. Power of Legislature.** — *Bethune v. Dougherty*, 21 Ga. 257, 7 Ga. 90.

**6. Successors of Public Officers Not Bound.** — *Delaplaine v. Lewis*, 19 Wis. 476.

**7. Valid as Against Creator.** — *Minot v. Tilton*, 64 N. H. 371; *Stone v. King*, 7 R. I. 358, 84 Am. Dec. 557.

Thus where land is conveyed to a trustee in trust to hold as security for the payment to the *cestui que trust* of a certain note, it is no objection to the validity of a sale made by the sheriff, as substituted trustee, the original trustee having left the jurisdiction, that such trustee had never accepted the trust. *Martin v. Paxson*, 66 Mo. 260.

**8. Trust Will Not Fail.** — See *supra*, this section, *Appointment, b. Appointment by Court*.

**9. Acceptance in Lifetime of Testator.** — *Crook v. Ingoldsby*, 2 Ir. Eq. 375; *Smith v. Knowles*, 2 Grant Cas. (Pa.) 413.

**10. Prior Unwillingness.** — *Christian v. Yancey*, 2 Patt. & H. (Va.) 240.

**11. Refusal Cannot Be Retracted.** — *Matter of Van Schoonhoven*, 5 Paige (N. Y.) 559.

**12. Execution of Deed.** — *Jones v. Higgins*, L. R. 2 Eq. 538; *Lewis v. Baird*, 3 McLean (U. S.) 56; *Patterson v. Johnson*, 113 Ill. 559. But it must be read over to the trustee. *Jones v. Higgins*, L. R. 2 Eq. 538.

**13. Declaration of Trust.** — *Stearns v. Fraleigh*, 39 Fla. 603.

**Writing Acceptance on Trust Deed.** — Where a contract between A and B makes C a trustee for A, and C writes his acceptance of the trust on the contract, he thereby becomes a trustee. *Laclede Firebrick Mfg. Co. v. Williams*, 14 Colo. 37.

**Fulfillment of Statutory Requirements.** — **Where Money Is Left by Will** for the support of a person and the executors acknowledge in writing that they have received the money for his benefit, this is a sufficient acceptance to make them chargeable, under Civ. Code Cal., § 2222. *Elizalde v. Elizalde*, 137 Cal. 634.

Where a statute requires that a trust to be valid must be created or declared by a written instrument subscribed by the trustee, a verified answer in an action, which contains a declaration by the trustee that the property was conveyed to him on trust, is a sufficient declaration in writing, within the requirements of the statute. *Garnsey v. Gothard*, 90 Cal. 603.

**14. Acceptance Shown by Act.** — *Cook v. Fryer*, 1 Hare 498; *Embree v. Dixon*, 2 Nova Scotia 326; *Malzy v. Edge*, 2 Jur. N. S. 80; *Ewing v. Buckner*, 76 Iowa 467; *Roberts v. Moseley*,



way that no other inference can be drawn is sufficient to show an acceptance;<sup>1</sup> and the bringing of a suit as trustee is enough.<sup>2</sup> But an acceptance is not presumed if the trustee named does acts which cannot be fairly said to point toward an acceptance, as where he acts as an agent,<sup>3</sup> or receives the trust deed merely for purposes of safekeeping,<sup>4</sup> or does an act merely for the preservation of the estate.<sup>5</sup>

**Presumption from Lapse of Time.** — Acceptance may, in the absence of disclaimer, be presumed from lapse of time.<sup>6</sup>

**Acceptance of Part of Trust.** — As a general rule the acceptance must be of the whole of the trust, and if the trustee named accepts as to part, he is deemed a trustee of the whole,<sup>7</sup> but if the trusts are separate and distinct, the trustee may, at least in the United States, accept as to one part and disclaim as to the rest.<sup>8</sup>

**Executor as Trustee.** — When a trust is imposed on an executor, the probate of the will is considered an acceptance of the trust as well as of the executorship.<sup>9</sup> But the executor will be considered as holding a legacy in his capacity as executor, unless it clearly appear from the will that the testator intended

51 Mo. 282; *Flint v. Clinton Co.*, 12 N. H. 430; *Daly v. Bernstein*, 6 N. Mex. 380.

Where an Assignment Is Made to A in trust for B, and another assignment of the same property is made to C in trust for B, and A and C fight it out in court, and A gets the decision, this is conclusive of his having accepted the trust. *Feamster v. Feamster*, 35 W. Va. 1.

Where a Person Permits Trust Property to be transferred from the name of an executor of a will into their joint names, and acts as trustee with the consent of all the *cestuis*, he is thereby constituted a trustee, even though no declaration has been executed. *Cocks v. Smith*, 2 L. J. Ch. 205.

**1. Interference with Trust Fund.** — *Conyngham v. Conyngham*, 1 Ves. 522; *Montgomery v. Johnson*, 11 Ir. Eq. 476; *Kennedy v. Winn*, 80 Ala. 165; *Freeman v. Brown*, 115 Ga. 23; *Crocker v. Lowenthal*, 83 Ill. 579; *Maccubbin v. Cromwell*, 7 Gill & J. (Md.) 157; *McBride v. McIntyre*, 91 Mich. 406; *Crist v. Hovis*, 12 N. J. Eq. 84; *Wadd v. Hazleton*, 62 Hun (N. Y.) 602; *Chaplin v. Givens*, Rice Eq. (S. Car.) 132.

**2. Bringing Suit.** — *O'Neill v. Henderson*, 15 Ark. 235, 60 Am. Dec. 568; *Taylor v. Atwood*, 47 Conn. 498; *Salter v. Salter*, 8 Ga. 178, 12 Am. St. Rep. 249; *Breedlore v. Stump*, 3 Yerg. (Tenn.) 257.

**3. Acting as Agent.** — *Stacy v. Elph*, 1 Myl. & K. 195; *Dove v. Everard*, 1 Russ & M. 231; *Lowry v. Fulton*, 9 Sim. 123.

**4. Custody of Deed.** — *Evans v. John*, 4 Beav. 35.

**5. Acting for Preservation of Estate.** — *Atty.-Gen. v. Andrew*, 3 Ves. Jr. 633.

**6. Lapse of Time.** — *In re Needham*, 1 J. & La T. 34; *In re Uniacke*, 1 J. & La T. 1; *Penny v. Davis*, 3 B. Mon. (Ky.) 313; *Barclay v. Goodloe*, 83 Ky. 493; *Roberts v. Moseley*, 64 Mo. 507.

But if this presumption is contrary to the other evidence in the case it will not be drawn. *Archibald v. Blois*, 2 Nova Scotia 307.

**An Executor of a Surviving Trustee** who declines for thirty-one days to act is a trustee, under 1 Will. IV., c. 60. *Cockell v. Pugh*, 6 Beav. 293.

**7. Acceptance of Part.** — *In re Lord*, (1896) 1 Ch. 228.

**8. Acceptance of Part.** — *Malzy v. Edge*, 2 Jur. N. S. 80; *Carruth v. Carruth*, 148 Mass. 431; *Matter of Wadsworth*, 2 Barb. Ch. (N. Y.) 381.

Where a Testator leaves a legacy to a trustee on trust for certain *cestuis que trustent*, and then devises a piece of land to the same trustee, to be conveyed to a grandson on his attaining twenty-one, and the trustee never accepts the trust, but on the grandson's reaching twenty-one executes a conveyance to him of the land, reciting that since the grandson has reached twenty-one it becomes unnecessary for him to act in the trusts of the will; this is an acceptance of the trust, and he is liable to the other *cestuis* for the amount of the legacy. *Urch v. Walker*, 3 Myl. & C. 702.

But where a marriage settlement contains trusts of various sums an acceptance of the trusts of one only does not constitute acceptance of the whole. *Malzy v. Edge*, 2 Jur. N. S. 80, *distinguishing Urch v. Walker*, 3 Myl. & C. 702, on the ground that in that case the property was devised by will and a disclaimer was necessary.

**9. Probate of Will.** — *Mucklow v. Fuller*, Jac. 198; *Ward v. Butler*, 2 Molloy 533; *Baldwin v. Porter*, 12 Conn. 473; *Hanson v. Worthington*, 12 Md. 418; *Sangston v. Hack*, 52 Md. 173; *Earle v. Earle*, 48 N. Y. Super. Ct. 18; *Green v. Green*, 4 Redf. (N. Y.) 357; *Worth v. M'Aden*, 1 Dev. & B. Eq. (21 N. Car.) 199; *Clark v. Powell*, 62 Vt. 442. See also *Freeman v. Brown*, 115 Ga. 23. But see *Perkins v. Moore*, 16 Ala. 9; *Cocks v. Barlow*, 5 Redf. (N. Y.) 406.

**Giving Receipt as Trustee.** — Where two trustees and executors are appointed and one pays money as executor to the other as trustee, and takes the latter's receipt as trustee, this is conclusive that the first disclaimed and the second accepted. *Anderson v. Earle*, 9 S. Car. 460.

**Failure to Conform to Statutory Requirement.** — Where a statute requires every trustee to give a bond, an executor on whom a trust is imposed does not accept the trust unless he gives bond as trustee. *Groton v. Ruggles*, 17 Me. 137; *Williams v. Cushing*, 34 Me. 370; *Deer-*

him to hold as trustee.<sup>1</sup> A person named as trustee who is subsequently appointed administrator *c. t. a.* does not thereby accept the trust.<sup>2</sup>

4. **Disclaimer** — *a.* **NECESSITY OF.** — Since an acceptance may be presumed from lapse of time,<sup>3</sup> the trustee should disclaim; but since the disclaimer will operate *ab initio*,<sup>4</sup> there is no rule that it must be executed within any particular time.<sup>5</sup>

*b.* **WHAT CONSTITUTES.** — It was formerly held that a disclaimer must be by deed or by matter of record,<sup>6</sup> but it is now settled that a disclaimer need not be by matter of record,<sup>7</sup> and may be by appearance in court,<sup>8</sup> or by parol,<sup>9</sup> or by acts.<sup>10</sup> Thus, holding out another as trustee for thirty years,<sup>11</sup> or refusal to take the estate on the death of the life tenant,<sup>12</sup> or demanding compensation as a condition precedent to acting,<sup>13</sup> or refusing for many years to qualify,<sup>14</sup> or the failure to file a bond as required,<sup>15</sup> are held to be disclaimers. And where several trustees are appointed and only one of them ever does any act connected with the trust estate, the presumption is strong that he alone has accepted.<sup>16</sup>

**Release Without Disclaimer.** — A troublesome question is whether a release by the trustee named will operate as a disclaimer. It has been held that such a release, though intended to be a disclaimer, necessarily presupposes an acceptance, for otherwise the trustee could have no title to release;<sup>17</sup> but the more sensible view is that of Lord Eldon; namely, that if the intent of the trustee is to disclaim, this intention should be effectuated. But the point is in doubt.<sup>18</sup>

**Trust Imposed on Executor.** — Where the trust imposed is distinct from the office of executor, a refusal to serve as executor is not *per se* a disclaimer of the trust,<sup>19</sup> but the trust may be disclaimed by acts, and a deed is not necessary.<sup>20</sup> If the trust is annexed to the office of executor, the latter cannot

ing *v.* Adams, 37 Me. 265; Sawyer's Appeal, 16 N. H. 459.

1. **Holding as Executor.** — Perkins *v.* Moore, 16 Ala. 9; State *v.* Nicols, 10 Gill & J. (Md.) 27.

2. **Administrator c. t. a.** — Freeman *v.* Brown, 115 Ga. 23.

3. **Lapse of Time.** — See *supra*, this section, *Acceptance — What Constitutes.*

4. **Disclaimer Ab Initio.** — Peppercorn *v.* Wayman, 5 De G. & Sm. 230.

5. **No Particular Time.** — Jago *v.* Jago, 68 L. T. N. S. 654; Doe *v.* Harris, 16 M. & W. 517.

6. **Deed or Matter of Record.** — *In re* Martinez, 22 L. T. N. S. 403; *In re* Ellison, 2 Jur. N. S. 62.

7. **Without Matter of Record.** — Begbie *v.* Crook, 2 Bing. N. Cas. 70, 29 E. C. L. 259; Townson *v.* Tickell, 3 B. & Ald. 31, 5 E. C. L. 219.

8. **Disclaimer in Court.** — Foster *v.* Dawber, 1 Drew. & Sm. 172; Burritt *v.* Silliman, 13 N. Y. 93, 64 Am. Dec. 532; Goss *v.* Singleton, 2 Head (Tenn.) 67.

9. **Parol.** — Bingham *v.* Glamorris, 2 Molloy 253.

10. **Acts.** — Stacy *v.* Elph, 1 Myl. & K. 195; *In re* Birchall, 40 Ch. D. 436; Brandon *v.* Carter, 119 Mo. 572, 41 Am. St. Rep. 673; Adams *v.* Adams, 64 N. H. 224; Green *v.* Green, 4 Redf. (N. Y.) 357; Cocks *v.* Barlow, 5 Redf. (N. Y.) 406.

11. **Holding Out Another.** — Lathrop *v.* Baubie, 106 Mo. 470.

12. **Refusal to Take.** — Atty.-Gen. *v.* Andrew, 3 Ves. Jr. 633.

**When Disclaimer Should Be Made.** — Where property is left to A for life and on his death to the trustees of a school, on trust for charity in both cases, the trust does not devolve on the trustees of the school until after the death of A; and so a disclaimer by the trustees of the school during the life of A is of no effect. Augusta *v.* Walton, 77 Ga. 517.

**Disclaimer by Election to Take Dower.** — It seems that if a widow elects to take her dower instead of taking under the will she thereby disclaims a trust imposed on her by the will. Meyer's Estate, 8 Pa. Co. Ct. 374.

13. **Demanding Compensation.** — Klein *v.* Glass, 53 Tex. 37.

14. **Refusal for Many Years.** — Matter of Robinson, 37 N. Y. 261.

15. **Failure to File Bond.** — Daggett *v.* White, 128 Mass. 398; Williams *v.* Cushing, 34 Me. 370; Deering *v.* Adams, 37 Me. 265; Sawyer's Appeal, 16 N. H. 459.

16. **Activity of One of Several.** — Trask *v.* Donoghue, 1 Aik. (Vt.) 373.

17. **Release an Acceptance.** — Crew *v.* Dicken, 4 Ves. Jr. 97.

18. **Release a Disclaimer.** — Nicloson *v.* Wordsworth, 2 Swanst. 369.

19. **Renunciation of Executorship.** — Tainter *v.* Clark, 13 Met. (Mass.) 220; Clark *v.* Tainter, 7 Cush. (Mass.) 567; Judson *v.* Gibbons, 5 Wend. (N. Y.) 224; Garner *v.* Dowling, 11 Heisk. (Tenn.) 48.

**And a Release by the executor does not amount to relinquishing the trust.** Doe *v.* Hiscott, 6 U. C. Q. B. O. S. 23.

20. **Disclaimer by Acts.** — Beekman *v.* Bonsor,

resign the executorship and retain the trust.<sup>1</sup>

**5. Trustee's Bond** — *a. SCOPE OF SECTION.* — It is intended to treat here only of the necessity and sufficiency of the trustee's bond. The nature and extent of the liability of the surety does not fall within the scope of this section, since such liability arises only on the default of his principal.<sup>2</sup>

*b. WHEN REQUIRED* — (1) *Trustee Appointed by Trust Instrument.* — It may be that a court of equity has inherent power to require a bond from a trustee appointed by the instrument creating the trust,<sup>3</sup> but if the trust instrument exempts the trustee from giving bond, he cannot be required to do so by the court, in the absence of a statute.<sup>4</sup> Poverty alone is not enough to call for the giving of security.<sup>5</sup> If the creator provides that the trustee shall give bonds, he must do so, and he must furnish sufficient sureties.<sup>6</sup> A trust, however, is not rendered invalid by reason of no bond having been given.<sup>7</sup>

**Statutory Power.** — In a number of states, statutes provide that a trustee must give a bond unless exempt by the provisions of the will.<sup>8</sup> The exemption in the will need not be in terms, if it may fairly be inferred from the reading of the will.<sup>9</sup>

**Bond as Condition Precedent.** — In some jurisdictions the giving of a bond is a condition precedent to holding the office of trustee,<sup>10</sup> and in such case the

23 N. Y. 298, 80 Am. Dec. 269; *Mutual L. Ins. Co. v. Woods*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 133.

**1. Trust Annexed to Executorship.** — *Strobel's Estate*, 11 Phila. (Pa.) 122, 33 Leg. Int. (Pa.) 101.

**2. Liability of Surety.** — See in general the title SURETYSHIP, vol. 27, p. 541. As to the liability of the trustee, see *infra*, this section, *Liabilities of Trustees*.

**As to Liability of Surety for Breaches Occurring Before Execution of Bond**, see the following cases: *Ladd v. Smith*, (Ala. 1892) 10 So. Rep. 836; *State v. Howarth*, 48 Conn. 207; *State v. Hunter*, 73 Conn. 435; *Lamar v. Walton*, 99 Ga. 356; *McIntire v. Linehan*, 178 Mass. 263; *Matter of Williams*, (Surrogate Ct.) 26 Misc. (N. Y.) 636. And see the title SURETYSHIP, vol. 27, p. 442.

**3. Inherent Power of Court.** — *Thiebaud v. Du-four*, 54 Ind. 320; *Tucker v. State*, 72 Ind. 242; *State v. Roudebush*, 114 Ind. 347; *Ex p. Kilgore*, 120 Ind. 94; *Hinds v. Hinds*, 85 Ind. 312. But see *Kerr v. White*, 9 Baxt. (Tenn.) 161.

**A Trustee of an Implied Trust** may be required to give security as well as a trustee of an express trust. *Clarke v. Saxon*, 1 Hill Eq. (S. Car.) 69.

**4. Exemption by Creator.** — *Ex p. Kilgore*, 120 Ind. 94.

**5. Poverty Not Cause for Giving Bond.** — *Berry v. Williamson*, 11 B. Mon. (Ky.) 245.

**6. Bond Required by Creator.** — *Gaskill v. Gaskill*, 7 R. I. 478.

**7. Trust Valid Though No Bond.** — *Regan v. West*, 115 Ill. 603; *Butler v. Hill*, 1 Baxt. (Tenn.) 375.

**8. Bond Required by Statute.** — *Perry v. Drury*, 56 Iowa 60; *Groton v. Ruggles*, 17 Me. 137; *Dresser v. Dresser*, 46 Me. 48; *Stevens v. Burgess*, 61 Me. 80; *Parker v. Sears*, 117 Mass. 513; *Buffinton v. Maxam*, 140 Mass. 557; *Gartside v. Gartside*, 113 Mo. 348; *Yore v. Crow*, 90 Mo. App. 562; *Sawyer's Appeal*, 16 N. H. 459.

**In Massachusetts** the Probate Court determines, in the first instance, as to the necessity of giving bond and the amount thereof. *Bullard v. Atty.-Gen.* 153 Mass. 249.

*Under Gen. Stat. Mass.*, c. 100, trustees for charitable trusts need not give bonds. *Drury v. Natick*, 10 Allen (Mass.) 169. And the same was held under *Rev. Stat. Mass.*, c. 69, § 1. *Lowell, Appellant*, 22 Pick. (Mass.) 215.

**Under Code Civ. Proc. N. Y. § 2815**, the surrogate may require a bond from a testamentary trustee only in those circumstances which would justify a demand of security from an executor, even though a breach of trust may have been committed. *Matter of Lawrence*, 6 Dem. (N. Y.) 342.

**The Virginia Act of March 6, 1886**, requiring trustees to give bonds, applies to trusts created before, as well as after, its passage. *Lackland v. Davenport*, 84 Va. 638.

**9. Intention to Exempt Enough.** — *Lowell, Appellant*, 22 Pick. (Mass.) 215.

**Exemption of Original Trustee Only.** — Where the exemption is personal to the trustee named in the will his successor is not exempt. *Sneer v. Stutz*, 102 Iowa 462.

**Exemption Subject to Discretion of Court.** — Even though the testator exempt the trustee, still a bond may be required if there is a change in circumstances or other cause deemed sufficient by the court. *Foss v. Sowles*, 62 Vt. 221.

**10. Bond as Condition Precedent.** — *Mahony v. Hunter*, 30 Ind. 246; *Pittsburgh, etc., R. Co. v. Schmidt*, 4 Ohio Cir. Dec. 535, 8 Ohio Cir. Ct. 355.

**Agreement Among Parties.** — Where, by an agreement among the parties to a trust deed, the trustee was to give "good and sufficient bond," to be approved by the judge, and the trustee gave a bond which was approved by the judge, but which was not good and sufficient, it was held that the trustee could not act. *Pool v. Potter*, 63 Ill. 533.

**Exaction of Bond on Appointment.** — Where an executor assumes the duties of a trustee,



failure to give bond is considered a disclaimer of the trust,<sup>1</sup> or it may be a ground for removing the trustee from his office.<sup>2</sup>

**Trust and Executorship in Same Person.** — Where the same person is created trustee and executor under a will, his bond as executor does not cover the execution of the trust, and a separate bond must be given.<sup>3</sup>

(2) **Appointment of New Trustee.** — The power of the court at common law to require a bond of a new trustee may be doubtful,<sup>4</sup> but the power is now generally conferred by statutes, which leave the matter to the discretion of the court.<sup>5</sup>

**Exercise of Discretion.** — The court, in the exercise of its discretionary power, will require security whenever it considers that the trust fund is in danger.<sup>6</sup> Insolvency may be good cause for requiring security,<sup>7</sup> and the insolvent trustee cannot excuse himself on the ground that his cotrustee is solvent.<sup>8</sup> So, too, a bond will be required from a nonresident appointed a trustee,<sup>9</sup> and it is a rule never to appoint a trustee of an infant's estate without requiring security.<sup>10</sup>

**c. VALIDITY OF BOND.** — As in the case of all official bonds, a trustee's bond may be valid at common law though not fulfilling all the statutory requirements,<sup>11</sup> and if a court has the power to require a bond, a voluntary

and the guardian of a legatee brings suit, alleging that the trustee has given no bond, and the court order him to give a bond, which is done, this is equivalent to appointing him as trustee, and he cannot be ousted on the ground that he is not a trustee. *Webb v. Hayden*, 166 Mo. 39.

**1. Failure to Give Bond a Disclaimer.** — *Groton v. Ruggles*, 17 Me. 137; *Williams v. Cushing*, 34 Me. 370; *Deering v. Adams*, 37 Me. 265; *Sawyer's Appeal*, 16 N. H. 459.

**2. Ground for Removal.** — See *infra*, this section, *Removal*.

Under Maryland Act of 1870, c. 370, if no bond, or an insufficient one, has been given, the court may order the execution of a new bond, and may remove the trustee and appoint another in case the order is not complied with. *Suit v. Creswell*, 45 Md. 529. And the same is provided by the Code, art. 16, § 203. *Talbott v. Leatherbury*, 92 Md. 166.

**3. Separate Bond as Trustee.** — *Hinds v. Hinds*, 85 Ind. 312; *Daggett v. White*, 128 Mass. 398. And see the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 888 *et seq.* But not if no one objects to the lack of such a bond. *Dorr v. Wainwright*, 13 Pick. (Mass.) 328.

**4. No Power in Court.** — *O'Hara v. Cuthbert*, 1 Ch. Chamb. (Ont.) 304; *Re Helps*, 15 Ont. Pr. 7. But see *Bradstreet v. Butterfield*, 129 Mass. 339.

In *O'Hara v. Cuthbert*, 1 Ch. Chamb. (Ont.) 304, the court expressed its surprise at the paucity of decisions on this point.

**5. Bond Required of New Trustee** — *Alabama*. — *Witter v. Dudley*, 36 Ala. 135.

*Connecticut*. — *Tarrant v. Backus*, 63 Conn. 277.

*Kentucky*. — *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171.

*New York*. — *Matter of Stuyvesant*, 3 Edw. (N. Y.) 299; *Tompkins v. Moseman*, 5 Redf. (N. Y.) 402; *Lane v. Lewis*, 4 Dem. (N. Y.) 468; *Russak v. Tobias*, (Supm. Ct. Gen. T.) 12 Civ. Pro. (N. Y.) 300; *Matter of Burk*, (Surrogate Ct.) 1 N. Y. St. Rep. 316, 3 N. Y. St. Rep. 208.

*North Carolina*. — *Strayhorn v. Green*, 92 N. Car. 119.

*Pennsylvania*. — *Johnson's Appeal*, 9 Pa. St. 416; *Ex p. Conrad*, 2 Ashm. (Pa.) 527; *Leedom v. Lombaert*, 80 Pa. St. 381.

*South Carolina*. — *Gibbes v. Guignard*, 1 S. Car. 359.

*Virginia*. — *Dunscomb v. Dunscomb*, 2 Hen. & M. (Va.) 11; *Lee v. Randolph*, 2 Hen. & M. (Va.) 12.

Under Pa. Act of June 14, 1836, a trustee appointed by the court need not give security. *Rigler v. Cloud*, 14 Pa. St. 361.

Under N. Y. Code Civ. Proc., § 2818, the surrogate may require security from a successor to a deceased testamentary trustee, as well as from a successor to a trustee resigned or removed. *Matter of Whitehead*, 3 Dem. (N. Y.) 227.

In New York the Surrogate, under Code Civ. Proc., has no power to require a bond of a trustee appointed by the donee of a power to appoint. *Rogers v. Rogers*, 4 Redf. (N. Y.) 521.

**6. Trust Fund in Danger.** — *Holcomb v. Coryell*, 12 N. J. Eq. 289.

**7. Insolvency.** — *Bailey v. Bailey*, 2 Del. Ch. 95; *Matter of Sears*, 5 Dem. (N. Y.) 497; *McDowell's Estate*, 10 Pa. Dist. 223.

**8. Solvency of Cotrustee No Excuse.** — *Matter of Sears*, 5 Dem. (N. Y.) 497.

**9. Nonresident.** — *In re Satterthwaite*, (N. J. 1900) 47 Atl. Rep. 227; *Strobel's Estate*, 11 Phila. (Pa.) 122, 33 Leg. Int. (Pa.) 101; *Ex p. Robert*, 2 Strohh. Eq. (S. Car.) 86. See also *Carr v. Bredenberg*, 50 S. Car. 471.

**10. Trustee of Infant's Estate.** — *Matter of Jones*, 4 Sandf. Ch. (N. Y.) 615; *Re Thin*, 10 Ont. Pr. 490.

Where the trustee has already given security as guardian in another jurisdiction, it seems that the rule is not altered. *Re Slosson*, 15 Ont. Pr. 156. *Contra, Re Andrews*, 11 Ont. Pr. 199.

**11. Good at Common Law.** — *McIntire v. Linehan*, 178 Mass. 263. And see generally the titles BONDS, vol. 4, p. 618, and SURETYSHIP, vol. 27, pp. 539-540.

bond may be binding.<sup>1</sup> But if a bond be given under the mistaken supposition that the trustee has been validly appointed, it cannot be enforced.<sup>2</sup>

*d. SIZE OF BOND.* — The size of the bond to be taken is a matter governed by statute, but is generally left to the discretion of the court.<sup>3</sup>

**6. Resignation.** — It is well settled that a trustee who has accepted the trust cannot, at his own pleasure, retire therefrom. He must, unless he retire in the manner, if any, pointed out by the instrument creating the trust,<sup>4</sup> obtain the consent of the court or of the *cestuis que trustent*.<sup>5</sup> The resignation is not complete until accepted, so that it may be withdrawn at any time before acceptance.<sup>6</sup>

**Rule in England.** — It was at one time supposed that in England a trustee would never be discharged on his own motion,<sup>7</sup> but at the present day he may always retire on the payment of the expenses of the suit,<sup>8</sup> unless he is a sole trustee and no one can be found to take his place, in which case he may be retained against his will.<sup>9</sup> But if there be a sufficient reason for his asking to be relieved from the duties of the trust, he does not have to pay costs.<sup>10</sup>

**1. Voluntary Bond Binding.** — *Bates v. State*, 75 Ind. 463. See also *Lamar v. Walton*, 99 Ga. 356.

**2. Invalid Appointment.** — *Conant v. Newton*, 126 Mass. 105. But see *Clay v. Edwards*, 84 Ky. 548, holding that where a trustee resigns from the trust in an invalid proceeding, and becomes surety on the bond of his successor, he cannot set up that the bond was illegally exacted.

**3. Size of Bond.** — *Yore v. Crow*, 90 Mo. App. 562; *Palmer v. Dunham*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 262. And see the codes and statutes in the various states.

Under the *New York* statute, several persons unitedly worth the full amount of the penalty may be accepted in the place of one person worth such amount. *Trask v. Annett*, 1 Dem. (N. Y.) 171.

**4. Retirement under Power.** — *Lancashire v. Lancashire*, 12 Jur. 363; *Stearns v. Fraleigh*, 39 Fla. 603; *Ross v. Crockett*, 14 La. Ann. 823; *Ellis v. Boston*, etc., R. Co., 107 Mass. 1.

**5. No Renunciation After Acceptance.** — *England.* — *Chalmer v. Bradley*, 1 Jac. & W. 51.

*Alabama.* — *Drane v. Gunter*, 19 Ala. 731; *Dillard v. Winn*, 60 Ala. 285.

*Arkansas.* — *Badgett v. Keating*, 31 Ark. 400. *California.* — *Cauhape v. Barnes*, 135 Cal. 107.

*Florida.* — *Strong v. Willis*, 3 Fla. 124, 52 Am. Dec. 364; *Saunders v. Richard*, 35 Fla. 28.

*Georgia.* — *Benjamin v. Gill*, 45 Ga. 110; *New South Bldg.*, etc., Assoc. v. Gann, 101 Ga. 678; *McCreary v. Gewinner*, 103 Ga. 528.

*Kentucky.* — *Tucker v. Grundy*, 83 Ky. 540. *Maryland.* — *Hanson v. Worthington*, 12 Md. 418; *Jones v. Stockett*, 2 Bland (Md.) 409.

*Massachusetts.* — *Drury v. Natick*, 10 Allen (Mass.) 169.

*Michigan.* — *Henderson v. Sherman*, 47 Mich. 267.

*Nebraska.* — *Carter v. Gibson*, 29 Neb. 324, 26 Am. St. Rep. 381.

*New York.* — *Shepherd v. M'Evers*, 4 Johns. Ch. (N. Y.) 136, 8 Am. Dec. 561; *Cruger v. Halliday*, 11 Paige (N. Y.) 314; *Matter of Curtiss*, 9 N. Y. App. Div. 285; *Craig v. Craig*, 3 Barb. Ch. (N. Y.) 76; *Diefendorf v. Spraker*,

10 N. Y. 246; *Jenkins v. Hammerschlag*, 38 N. Y. App. Div. 209.

*Pennsylvania.* — *Read v. Robinson*, 6 W. & S. (Pa.) 329.

*South Carolina.* — *Nobles v. Hogg*, 36 S. Car. 322; *Du Rant v. Du Rant*, 36 S. Car. 49.

*Tennessee.* — *Perkins v. McGavock*, 3 Hayw. (Tenn.) 265; *Breedlove v. Stump*, 3 Yerg. (Tenn.) 257.

*Utah.* — *Felkner v. Dooly*, (Utah 1904) 75 Pac. Rep. 854.

*Vermont.* — *Sturges v. Knapp*, 31 Vt. 1.

A college is under no obligation to accept an accession to its foundation, or any other trust, but if it does accept it without any arrangement made for a modification at the time of acceptance, it is bound to adhere strictly to the trust. *Atty.-Gen. v. Caius College*, 2 Keen 152.

**Acceptance of New Trust Held Invalid.** — Where the trustees and the *cestuis que trustent* join in a new deed, wherein the trustees renounce their trusteeship of the old trust, and accept new trusts, and the new deed is for any reason void, the trustees still remain trustees of the old trust. *Avery v. Avery*, 90 Ky. 613.

**6. Withdrawal Before Acceptance by Court.** — *Dillard v. Winn*, 60 Ala. 285.

**7. Trustee Not Removed on Own Motion.** — *Hamilton v. Fry*, 2 Molloy 458.

**8. Payment of Costs.** — *Forshaw v. Higginson*, 20 Beav. 485; *Greenwood v. Wakeford*, 1 Beav. 576; *Porter v. Watts*, 16 Jur. 757; *Howard v. Rhodes*, 1 Keen 581.

**9. Sole Trustee Retained.** — *Ardill v. Savage*, 1 Ir. Eq. 79. But the court will not let him suffer in such a case. *Courtenay v. Courtenay*, 3 J. & La. T. 519.

**10. Discharge Without Payment of Costs.** — *Gardiner v. Downes*, 22 Beav. 395; *Courtenay v. Courtenay*, 3 J. & La. T. 519; *Coventry v. Coventry*, 1 Keen 758. *Mitchell v. Ritchey*, 13 Grant Ch. (U. C.) 445.

**As to Sufficient Reason**, see *Greenwood v. Wakeford*, 1 Beav. 576; *In re Chetwynd*, (1902) 1 Ch. 692; *Mitchell v. Richey*, 13 Grant Ch. (U. C.) 445; *Gardiner v. Downes*, 22 Beav. 397.

**Resignation by Answer.** — On the application

It seems that he is not freed from the trust until his successor has been appointed,<sup>1</sup> but if there is more than one trustee, the court may accept the resignation without filling the vacancy.<sup>2</sup>

**Rule in United States.**—The rule in the United States seems to be the same, and the court may receive the resignation of the trustee, both at common law and by statute;<sup>3</sup> and if the trustee acts without compensation, he may be dismissed on his own petition whenever he so desires.<sup>4</sup> Where the trusts are separate and distinct the court may accept the resignation of a trustee as to a part of the trust.<sup>5</sup> But the court will not accept a resignation as a matter of course, and some valid reason must be shown,<sup>6</sup> such as disagreement between the trustees and the *cestuis que trustent*,<sup>7</sup> or large increase of the trust fund,<sup>8</sup> or long service, coupled with intended removal out of the jurisdiction,<sup>9</sup> or even unwillingness to continue in office, if the trust can be executed by another.<sup>10</sup> But if he acts capriciously he must pay costs.<sup>11</sup>

**7. Removal**—*a. POWER OF REMOVAL*—(1) *Power Given by Trust Instrument*.—The instrument creating the trust may give to certain persons the right to remove the trustee at any time and fill the vacancy thus created. This power must be exercised in a reasonable manner,<sup>12</sup> but the court will not interfere unless there has been a flagrant abuse of the power.<sup>13</sup>

(2) *Power of Court*.—The power of courts of equity to remove a trustee on sufficient cause is undisputed, and like power has very generally been conferred on other courts by statute.<sup>14</sup> The court may remove a trustee before

of one trustee asking to be relieved, and the answer of the other trustees, who are defendants, asking for the same relief, the court will appoint new trustees to fill the places of all, and will not make the defendant trustees file separate applications. *Proudfoot v. Tiffany*, 11 Grant Ch. (U. C.) 461.

**1. Appointment of Successor.**—*Adams v. Paynter*, 1 Coll. Ch. Cas. 530.

As to the Appointment of a Successor, see cases cited *supra*, this section, *Appointment by Court*—*When Exercised*—*Resignation or Removal*.

**2. Vacancy Not Filled.**—*In re Chetwynd*, (1902) 1 Ch. 692.

**3. Court May Accept Resignation.**—*Kenady v. Edwards*, 134 U. S. 117; *Fatjo v. Swasey*, 111 Cal. 628; *Leggett v. Hunter*, 25 Barb. (N. Y.) 81, affirmed in 19 N. Y. 440; *Culbross v. Gibbons*, 130 N. Y. 447; *In re Engel*, 180 Pa. St. 215; *Wooldridge v. Planter's Bank*, 1 Sneed (Tenn.) 297; and see the codes and statutes in the various states.

**Petition to Court a Resignation.**—Where the trustee petitions to be removed, this is a resignation, under a statute authorizing a court to appoint a trustee in place of one who has resigned. *Lahey v. Kortright*, 132 N. Y. 450.

The *New York* statute, conferring on the surrogate of New York city and county the power to accept the resignation of a trustee, is not in violation of art. 6, § 6, of the state constitution, which provides that the Supreme Court shall have general jurisdiction in equity. *Matter of Bernstein*, 3 Redf. (N. Y.) 26.

*Rev. Stat. N. Y.*, 730, § 69, which permits a court of chancery to accept a resignation of a trustee, applies only to the trustee of a trust authorized by *Rev. Stat.* 728, § 55. *Matter of Hall*, 24 Hun (N. Y.) 153.

Under *New York Code Civ. Pro.*, § 2814, the surrogate may accept the resignation of a trustee, and appoint a successor. *Rogers v. Rogers*, 4 Redf. (N. Y.) 521.

**4. Trustee Without Compensation.**—*Hallinan v. Hearst*, 133 Cal. 645; *Bogle v. Bogle*, 3 Allen (Mass.) 158. But see *Switzer v. Skiles*, 8 Ill. 529, 44 Am. Dec. 723.

**5. Resignation as to Part of Trust.**—*Craig v. Craig*, 3 Barb. Ch. (N. Y.) 76.

**6. Good Reason Shown.**—*Matter of Miller*, (Supm. Ct.) 15 Abb. Pr. (N. Y.) 277.

**7. Disagreement with Cestui.**—*Parker v. Allen*, (Supm. Ct. Spec. T.) 14 N. Y. Supp. 265.

**8. Increase of Trust Fund.**—*Green v. Blackwell*, 31 N. J. Eq. 37.

**9. Long Service and Intended Removal.**—*Tilden v. Fiske*, 4 Dem. (N. Y.) 357.

**10. Unwillingness.**—*Matter of Curtiss*, 9 N. Y. App. Div. 285.

**11. Payment of Costs.**—*Matter of Jones*, 4 Sandf. Ch. (N. Y.) 615; *Matter of Abbott*, (Surrogate Ct.) 39 Misc. (N. Y.) 760; *Matter of Edwards*, 10 Daly (N. Y.) 68; *Brantigan v. Escher*, 2 Dem. (N. Y.) 269.

**12. Power to Remove Must Be Reasonably Exercised.**—*May v. May*, 167 U. S. 310, affirming 5 App. Cas. (D. C.) 552; *March v. Romare*, 114 Fed. Rep. 200.

**Under a Power in a Trust Deed the cestuis que trustent may remove a trustee and appoint another in his place, but the court would not, under 1 Will. IV., c. 60, order the old trustee to transfer the fund to the new trustee, where such a proceeding did not seem to be a proper one.** *Pepper v. Tuckey*, 2 J. & La T. 95.

**13. Abuse of Power.**—*March v. Romare*, (C. C. A.) 116 Fed. Rep. 355.

**14. Court May Remove for Cause**—*Alabama*.—*Chambers v. Mauldin*, 4 Ala. 477.

*Arkansas*.—*Williams v. Nichol*, 47 Ark. 254.

*California*.—*Schlessinger v. Mallard*, 70 Cal. 326; *Fatjo v. Swasey*, 111 Cal. 628.

*Delaware*.—*Massey v. Stout*, 4 Del. Ch. 274.

*Illinois*.—*People v. Petrie*, 94 Ill. App. 652.

*Indiana*.—*Ex p. Kilgore*, 120 Ind. 94;

*Mazelin v. Rouyer*, 8 Ind. App. 27.



he enters on his duties,<sup>1</sup> but where a trust is not to take effect until a certain time, the trustee will not be removed before that time.<sup>2</sup> The court may, if it thinks proper, refuse to divest the trustee of his title, and may merely appoint some one to perform the active duties of the trust,<sup>3</sup> or it may order the portion of a missing beneficiary divided among the other beneficiaries, the latter to give bond to the trustees to account for such portion as they may receive, in case the missing man should be found.<sup>4</sup>

*b. CAUSES OF REMOVAL* — (1) *General Rules*. — What constitutes a sufficient reason for removing a trustee is a matter peculiarly within the discretion of the court,<sup>5</sup> which should be guided by considerations of the welfare of the beneficiaries and of the trust estate.<sup>6</sup> It will require a strong case to cause the court to remove a trustee against the wishes of a majority of the beneficiaries;<sup>7</sup> but on the other hand a trustee will not be removed if he is willing to act and competent to do so, merely at the whim of the *cestuis que trustent*,<sup>8</sup> and long acquiescence by the beneficiaries in an irregular appointment or in misconduct is a bar to removal.<sup>9</sup> It is not *per se* a cause for removal that a person has been appointed whom the court would not itself have appointed, and in the absence of other circumstances such an appointment will stand.<sup>10</sup>

**Discretionary Powers.** — If a trustee be invested with discretionary powers, it will require the very clearest proof to induce the court to remove him,<sup>11</sup> but

*Kentucky*. — *Lasley v. Lasley*, 1 Duv. (Ky.) 117.

*Massachusetts*. — *Atty.-Gen. v. Barbour*, 121 Mass. 568.

*Missouri*. — *Gaston v. Hayden*, 98 Mo. App. 683.

*New Jersey*. — *Lanning v. Public Instruction Com'rs*, 63 N. J. Eq. 1.

*New York*. — *People v. Norton*, 9 N. Y. 176; *People v. American L. & T. Co.*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 76.

*Virginia*. — *Lewis v. Glenn*, 84 Va. 947.

See also the cases cited *infra*, this section, *Causes of Removal*. And see the codes and statutes in the various states.

**The Appointment of a Receiver** is in effect the removal of the trustee. *Burroughs v. Gaither*, 66 Md. 171.

**Removal May Be Impairment of Obligation of Contract.** — Where, in articles of separation, the trustee agrees to indemnify the husband against the debts of the wife, the trustee cannot be removed against the will of the husband, since it would be an impairment of the obligation of the contract of indemnity. *Hughes v. Cuming*, 165 N. Y. 91, *reversing* 36 N. Y. App. Div. 302.

**Under the English Trustee Act of 1850** the court cannot remove a trustee who is unwilling to be displaced. The remedy is by bill in equity. *In re Garty*, 10 L. T. N. S. 331; *In re Combs*, 51 L. T. N. S. 45; *Matter of Blanchard*, 3 De G. F. & J. 131, 7 Jur. N. S. 505; *In re Hodgson*, 15 Jur. 552.

**The Chancery Court of Maryland** could, in 1849, remove the trustee of an insolvent, when he has been duly appointed by a court of law. *Powles v. Dilley*, 2 Md. Ch. 119, *affirmed* in 9 Gill (Md.) 222.

**In Missouri** an assignee under a voluntary assignment for the benefit of creditors may be summarily removed for any cause for which a trustee may be removed under § 3929 of the Rev. Stat. *State v. Hunt*, 46 Mo. App. 616.

**The Surrogate Court in New York** had no power to remove a testamentary trustee under the

Revised Statutes. *Blake v. Sands*, 3 Redf. (N. Y.) 168.

But under the *New York Code Civ. Proc.*, § 2817, the surrogate may remove a nonresident alien trustee, appointed by will, who has never accepted nor assumed the duties of trustee. *Lane v. Lewis*, 4 Dem. (N. Y.) 468.

**In Ohio** the probate court may remove a trustee. *Stafford v. American Missionary Assoc.*, 12 Ohio Cir. Dec. 442.

**Under Virginia Act, April 15, 1874**, amending Code of 1873, c. 155, § 6, and Act of March 31, 1875, amending Code of 1873, c. 174, § 8, the court has power to remove a trustee and substitute another. *Lewis v. Glenn*, 84 Va. 947.

**1. Removal Before Duties Commenced.** — *Piper's Appeal*, 20 Pa. St. 67.

**2. No Removal Before Trust Is Created.** — *Sloot v. Law*, 1 Blatchf. (U. S.) 512.

**3. Partial Removal.** — *Franklin v. Franklin*, 2 Swan (Tenn.) 521.

**4. Division of Fund Among Beneficiaries.** — *Chapman v. Kimball*, 83 Me. 389.

**5. Discretion of Court.** — *Ward v. Dortch*, 69 N. Car. 277.

**6. Welfare of Trust Estate.** — *Letterstedt v. Broers*, 9 App. Cas. 371.

**7. Regard to Wishes of Beneficiaries.** — *Morgan's Estate*, 8 Pa. Co. Ct. 260.

**8. Whim of Cestuis Not Regarded.** — *Assets Realisation Co. v. Trustees, etc., Ins. Corp.*, 65 L. J. Ch. 74; *Clerks' Invest. Co. v. Sydnor*, 19 App. Cas. (D. C.) 89.

**9. Acquiescence a Bar.** — *Ketchum v. Mobile, etc., R. Co.*, 2 Woods (U. S.) 532; *Dugan's Estate*, 12 Pa. Co. Ct. 591.

**10. Improper Appointment Not Cause Per Se.** — *Atty.-Gen. v. Clapham*, 10 Hare 613; *Re Crona*, 31 Nova Scotia 477; *Wallace's Estate*, 206 Pa. St. 105; *In re Satterthwaite*, (N. J. 1900) 47 Atl. Rep. 227; *Curran v. Green*, 18 R. I. 329.

**11. Discretionary Powers.** — *Shea v. Dulin*, 3 MacArthur (D. C.) 339; *Preston v. Wilcox*, 38 Mich. 578; *Read v. Patterson*, 44 N. J. Eq. 211,

if an abuse of such discretion can be shown he may be removed.<sup>1</sup>

**Must Be Act Endangering Trust Fund.** — The rule is very generally laid down that it is not every act of neglect of duty or of mismanagement, nor is it every improper circumstance attending the performance of a trustee's duties, that necessitates his removal. The principle underlying all the decisions is, that it must be an act or circumstance endangering the trust fund.<sup>2</sup>

(2) *Specific Instances* — (a) **Actual Fraud or Dishonesty.** — Where the trustee is guilty of actual fraud or dishonesty, such as converting the trust fund or deceiving the beneficiaries, he will, of course, be removed,<sup>3</sup> and an agreement by the trustees with some of the beneficiaries, whereby they release him from liability for a conversion of part of the trust fund, is no bar to his subsequent removal at the suit of another beneficiary.<sup>4</sup>

(b) **Acting for Own Benefit.** — Even though there be no actual fraud, yet if the trustee act for his own benefit instead of for the benefit of the *cestuis que trustent*,<sup>5</sup> or if he occupy antagonistic positions, as where he is president of a corporation in which the trust estate is a stockholder, or partner in a bank in which he deposits the trust funds,<sup>6</sup> he may be removed.

(c) **Threats and Violence.** — Threats and violence may be cause for removal, as where a trustee threatens to expose a scandal concerning the father of the beneficiaries if they attempt to interfere with his management of the trust,<sup>7</sup> or where a husband, who is trustee of his wife's separate estate, extorts from her a conveyance by threats and violence.<sup>8</sup>

(d) **Incompetency.** — Incompetency for any cause, if the trust fund is thereby endangered, is a reason for removal. Thus a trustee may be removed for drunkenness,<sup>9</sup> lunacy,<sup>10</sup> or lack of power to execute the objects of the trust.<sup>11</sup>

**Leaving the Country.** — If the trustee goes out of the jurisdiction he may be removed if the court considers he can no longer perform his duties by reason of such change of residence,<sup>12</sup> but a mere temporary absence is not

6 Am. St. Rep. 877. See also *Olive v. Olive*, 117 Iowa 383.

**College as Trustee.** — It is not cause for the removal of a college as trustee that some of the members of the corporation have committed errors, if the intention of the creator of the trust seems to be that the college shall be trustee. *Atty.-Gen. v. Caius College*, 2 Keen 150.

1. **Abuse of Discretionary Power.** — *Jones v. Jones*, (Supm. Ct. Spec. T.) 8 Misc. (N. Y.) 660.

2. **Fundamental Principle.** — *Matthews v. Murchison*, 17 Fed. Rep. 760; *Satterfield v. John*, 53 Ala. 127; *Waterman v. Alden*, 144 Ill. 90; *Preston v. Wilcox*, 38 Mich. 578; *Matter of O'Hara*, 62 Hun (N. Y.) 531; *Savage v. Gould*, (Supm. Ct. Gen. T.) 60 How. Pr. (N. Y.) 234. And see generally the cases cited in the following notes.

**Security May Be Enough.** — It may be sufficient, instead of removing the trustee, to require him to give bond. *Berry v. Williamson*, 11 B. Mon. (Ky.) 245, and see *supra*, this section, *Trustee's Bond — When Required*.

3. **Actual Fraud or Dishonesty.** — *Smyth v. Oliver*, 31 Ala. 30; *Kraft v. Lohman*, 79 Ala. 323; *Massey v. Stout*, 4 Del. Ch. 274; *Nevitt v. Woodburn*, 100 Ill. 283; *Thompson v. Thompson*, 2 B. Mon. (Ky.) 161; *Sparhawk v. Sparhawk*, 114 Mass. 356; *Gaston v. Hayden*, 68 Mo. App. 683; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Matter of Mallon*, (Surrogate Ct.) 38 Misc. (N. Y.) 27; *Matter of Durfee*, 4 R. I. 401; *Geisse v. Beall*, 3 Wis. 367.

**Under Laws N. Y. 1871, p. 1010**, as amended by c. 79 of Laws of 1873, p. 159, the surrogate may remove trustees for dishonesty. *Savage v. Gould*, (Supm. Ct. Gen. T.) 60 How. Pr. (N. Y.) 234.

4. **Agreement with Some of Beneficiaries No Bar.** — *Matter of Wiggins*, 29 Hun (N. Y.) 271.

5. **Acting for Own Benefit.** — *Ex p. Phelps*, 9 Mod. 357.

6. **Antagonistic Position.** — *Gartside v. Gartside*, 113 Mo. 348; *Elias v. Schwyer*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 707; *North Carolina R. Co. v. Wilson*, 81 N. Car. 223. But see *Dailey v. Wight*, 94 Md. 269.

A trustee appointed on an *ex parte* proceeding may be removed during the same term of court, it appearing that he is the confidential clerk of the person who applied for his appointment. *In re Mayfield*, 17 Mo. App. 684.

7. **Threats.** — *Grant v. Maclaren*, 23 Can. Sup. Ct. 310.

8. **Violence and Threats.** — *Fisk v. Stubbs*, 30 Ala. 335.

9. **Drunkenness.** — *Bayles v. Staats*, 5 N. J. Eq. 513; *Matter of Cady*, 103 N. Y. 678.

**Infidelity to Wife Not Cause.** — *Abernathy v. Abernathy*, 8 Fla. 243, holding that where a husband is trustee for his wife he should be dealt with more leniently than an ordinary trustee.

10. **Lunacy.** — *Matter of Wadsworth*, 2 Barb. Ch. (N. Y.) 381.

11. **Lack of Power.** — *Lanning v. Public Instruction Com'rs*, 63 N. J. Eq. 1.

12. **Leaving Country.** — *Lill v. Neafie*, 31 Ill.

enough.<sup>1</sup> Where a nonresident trustee is named by the trust instrument the court will not remove him.<sup>2</sup>

**Neglect of Duty Showing Incompetency.** — While mere neglect of duty or mismanagement may not be ground for removal, yet where such neglect amounts to incompetency, or shows ignorance or unfitness, the trustee will be removed.<sup>3</sup>

(e) **Insolvency.** — As a general rule the insolvency of a trustee will authorize the court to remove him,<sup>4</sup> but the court will exercise its discretion,<sup>5</sup> and if it appear that he was, to the knowledge of the creator, insolvent when appointed,<sup>6</sup> or that the trust fund is not in danger by reason of his insolvency, as where the sureties on his bond are amply sufficient,<sup>7</sup> or where the estate can be fully protected by exacting security,<sup>8</sup> the court will not exercise its power of removal. The fact that the trustee has been insolvent at some prior time is no reason for removing him, it appearing that he is once more solvent.<sup>9</sup>

(f) **Refusal to Carry Out Trust.** — If the trustee wilfully refuse to carry out the trust imposed upon him,<sup>10</sup> or if he deny the trust or any part of it,<sup>11</sup> he will be removed. But here, as in all cases, the trust fund must be in danger,<sup>12</sup> and a trustee will not be removed for a mere failure to invest as the beneficiaries desire,<sup>13</sup> or to permit a *cestui que trust* to have the use of a part of the trust estate, where there is a plain remedy in equity.<sup>14</sup> And it seems that the disregard of the provisions of the trust instrument must be intentional.<sup>15</sup>

(g) **Disobedience of Order of Court.** — Disobedience of an order of the court is always a ground of dismissal, besides being a contempt of court.<sup>16</sup>

(h) **Hostility and Discord.** — The existence of inharmonious and hostile relations between a trustee and his *cestuis que trustent*, or between two trustees, is a

101; *Dorsey v. Thompson*, 37 Md. 25; *Bloomer's Appeal*, 83 Pa. St. 45. See also *Woods v. Fisher*, 3 W. Va. 536.

**Going into Enemy's Country a Cause.** — *Ketchum v. Mobile*, etc., R. Co., 2 Woods (U. S.) 532.

**Female Trustee Marrying Foreigner Removed.** — *Lake v. De Lambert*, 4 Ves. Jr. 592.

1. **Temporary Absence.** — *In re Moravian Soc.*, 26 Beav. 101, 4 Jur. N. S. 703; *Re Mais*, 16 Jur. 608.

2. **Foreign Trustee Named in Will.** — *In re Satterthwaite*, (N. J. 1900) 47 Atl. Rep. 227.

3. **Neglect Amounting to Incompetency.** — *Matter of Smith*, 2 Connoly (N. Y.) 152; *Deen v. Cozzens*, 7 Robt. (N. Y.) 178; *Piper's Appeal*, 20 Pa. St. 67; *Bradish's Estate*, 8 Pa. Dist. 38.

4. **Insolvency.** — *Ex p. Wilkinson*, 3 Mont. & A. 145; *Ex p. Vaughan*, 13 L. J. Bankr. 22; *In re Foster*, 55 L. T. N. S. 479; *Gray v. Hatch*, 18 Grant Ch. (U. C.) 72; *Brown v. Vandermeulen*, 41 Mich. 418; *People v. American L. & T. Co.*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 76; *New York Security, etc., Co. v. Saratoga Gas, etc., Co.*, 88 Hun (N. Y.) 560.

5. **Discretion of Court.** — Where a statute provides that bankruptcy is a cause for removal, still the court will exercise its discretion, and where it appears that the application is made several years after the bankruptcy, and that the real ground on which removal is sought is the vexatious conduct of the trustee, the court will not remove the trustee in a summary proceeding, but will compel the parties to go into a court of equity. *Re Bridgman*, 1 Drew. & Sm. 164.

6. **Insolvent When Appointed.** — *Williams v. Nichol*, 47 Ark. 254; *Paddock v. Palmer*, (Supm. Ct.) 6 How. Pr. (N. Y.) 215.

7. **Sureties Sufficient.** — *Moorman v. Crockett*, 90 Va. 185.

8. **Estate Protected by Exacting Security.** — *Morgan v. Morgan*, 3 Dem. (N. Y.) 612.

9. **Past Insolvency No Cause.** — *Assets Realisation Co. v. Trustees, etc., Ins. Corp.*, 65 N. J. Ch. 74. But see *In re Foster*, 55 L. T. N. S. 479.

10. **Refusal to Carry Out Trust.** — *Palairat v. Carew*, 32 Beav. 564; *Legg v. Mackrell*, 5 Jur. N. S. 1154; *Garesche v. Garesche*, 4 British Columbia 310; *Cavender v. Cavender*, 114 U. S. 464 (*affirming* 3 McCrary (U. S.) 158); *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171; *Clark v. Wilson*, 53 Miss. 119; *Lathrop v. Baubie*, 106 Mo. 470; *Matter of Mechanics' Bank*, 2 Barb. (N. Y.) 446; *Matter of McGillivray*, 138 N. Y. 308; *Matter of Hoysradt*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 265; *Hawley v. James*, 5 Paige (N. Y.) 468; *Backhaus v. Backhaus*, 70 Wis. 518; *Geisse v. Beall*, 3 Wis. 367. See also *Fickett v. Cohu*, 14 Daly (N. Y.) 550; *Matter of Potts*, 1 Ashm. (Pa.) 340.

11. **Denying Trust.** — *Irvine v. Dunham*, 111 U. S. 327; *Cooper v. Day*, 1 Rich. Eq. (S. Car.) 26.

12. **Trust Fund Must Be in Danger.** — *Williams v. Nichol*, 47 Ark. 254.

13. **Failure to Invest as Beneficiaries Desire.** — *Lewis v. Cook*, 18 Ala. 334.

14. **Adequate Remedy Elsewhere.** — *Parsons v. Jones*, 26 Ga. 644.

15. **Intentional Disobedience.** — *Ferris v. Ferris*, 2 Dem. (N. Y.) 336.

16. **Refusal to Obey Order of Court.** — *Ehlen v. Ehlen*, 63 Md. 267; *Suit v. Creswell*, 35 Md. 529; *Atty.-Gen. v. Garrison*, 101 Mass. 223; *Harrison v. Union Trust Co.*, 144 N. Y. 326; *Matter of McKeon*, (Surrogate Ct.) 37 Misc.



proper ground for removal, if it appears that the trust fund is in danger,<sup>1</sup> especially where the exercise of discretionary powers demands cordial relations.<sup>2</sup> The fact that the trustee, with no bad motive, has taken sides with the creator of the trust in a quarrel between the latter and the *cestui que trust*, has been held a ground for removal.<sup>3</sup> In *New York* the rule is carried still further, and the trustee will be removed if it appears that the other trustees and the beneficiaries wish it, or that the sole beneficiary is old enough to know his own mind and desires his removal.<sup>4</sup> But the true rule seems to be that the trust fund must be in danger, and if business can be transacted, the existence of discord is not enough.<sup>5</sup> Thus, a refusal by the trustee to have any social intercourse with the beneficiaries is not a sufficient cause,<sup>6</sup> nor is a disagreement as to the proper management of the trust,<sup>7</sup> nor hostility between the trustee and one of several beneficiaries,<sup>8</sup> nor a mere unreasonable fit of anger on the part of some of the trustees toward those sought to be removed.<sup>9</sup>

(i) **Acts of Cotrustees.** — A trustee may be removed for the acts of his cotrustee, if he knew of them, or should have known of them.<sup>10</sup>

**8. Powers of Trustees** — *a.* **GENERAL SCOPE AND LIMITATIONS** — (i) *Classification.* — The powers of trustees are either general or special; the former being such as by construction of law are incident to the office of trustee, and the latter being such as are conferred by the settlor himself by express provisions in the instrument creating the trust.<sup>11</sup>

(*N. Y.*) 658; *McDowell's Estate*, 10 Pa. Dist. 223; *Johnson's Appeal*, 9 Pa. St. 416.

**1. Hostility Endangering the Trust Fund.** — *Uvedale v. Ettrick*, 2 Ch. Cas. 130; *Gartside v. Gartside*, 113 Mo. 348; *Quackenboss v. Southwick*, 41 N. Y. 117; *Disbrow v. Disbrow*, 46 N. Y. App. Div. 111, *affirmed* 167 N. Y. 606; *Deraismes v. Dunham*, 22 Hun (N. Y.) 86.

In *Uvedale v. Ettrick*, 2 Ch. Cas. 130, the leading case on this subject, Lord Chancellor Nottingham said: "I like not that a man should be ambitious of a trust, when he can get nothing but trouble by it."

**2. Exercise of Discretionary Power.** — *May v. May*, 167 U. S. 310, *affirming* 5 App. Cas. (D. C.) 552; *McPherson v. Cox*, 96 U. S. 404; *Wilson v. Wilson*, 145 Mass. 490, 1 Am. St. Rep. 477.

**3. Taking Sides in a Quarrel.** — *Scott v. Rand*, 118 Mass. 215.

**4. New York Doctrine.** — *Matter of Morgan*, 63 Barb. (N. Y.) 621; *In re Chapman*, (Supm. Ct. Spec. T.) 2 N. Y. Supp. 218.

**5. Discord Not Enough if Business Can Be Transacted.** — *McPherson v. Cox*, 96 U. S. 404; *Parsons v. Jones*, 26 Ga. 644; *Berry v. Williamson*, 11 B. Mon. (Ky.) 245; *Anderson v. Kemper*, (Ky. 1903) 76 S. W. Rep. 122; *Clark v. Anderson*, 10 Bush (Ky.) 99; *Syfert's Estate*, 9 Phila. (Pa.) 320, 30 Leg. Int. (Pa.) 36.

In *Atty.-Gen. v. Hardy*, 1 Sim. N. S. 357, Lord Cranworth expressed it as his opinion that the mere existence of unsympathetic relations between the trustees and the beneficiaries was enough to call for a removal of the trustee, but he subsequently retracted this dictum. See *Atty.-Gen. v. Clapham*, 4 De G. M. & G. 501.

Under the *Pennsylvania* Act of April 9, 1868, giving the court the power to appoint and remove trustees at the petition of a majority of the beneficiaries, it was at first held that the statute was merely directory, and that the

court would exercise its discretion in determining the necessity of a removal. *Stevenson's Appeal*, 68 Pa. St. 101.

The later cases, while laying down the same doctrine, held that the power of the court was not dependent on the misconduct of the trustee. It was enough if it appeared that hostile relations existed, or great discomfort to the beneficiaries. *Marsden's Estate*, 166 Pa. St. 213, *affirming* 14 Pa. Co. Ct. 602, 3 Pa. Dist. 281; *Nathans's Estate*, 191 Pa. St. 404, *reversing* 7 Pa. Dist. 314; *Martin's Estate*, 4 Pa. Dist. 219; *Hilles's Estate*, 9 W. N. C. (Pa.) 421.

But in *Neafie's Estate*, 199 Pa. St. 307, *Nathan's Estate*, 191 Pa. St. 404, was *overruled*, and it was held that *Stevenson's Appeal*, 68 Pa. St. 101, laid down the true rule, *i. e.*, that the court would exercise its discretion, and that the trustee would not be removed in the absence of misconduct on his part.

But if the trustee be in fault, and hostile relations ensue, he will be removed. *Myers's Estate*, 205 Pa. St. 413.

**6. Denial of Social Intercourse Not Cause.** — *Nickels v. Philips*, 18 Fla. 732.

**7. Disagreement as to Management Not Cause.** — *Gibbes v. Smith*, 2 Rich. Eq. (S. Car.) 131.

**8. Hostility Between Trustee and One Beneficiary.** — *Forster v. Davies*, 4 De G. F. & J. 133, 8 Jur. N. S. 65.

**9. Unreasonable Fit of Anger on Part of Trustee.** — *Russak v. Tobias*, (Supm. Ct. Gen. T.) 12 Civ. Pro. (N. Y.) 390.

**10. Acts of Cotrustees.** — *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Matter of Mallon*, (Surrogate Ct.) 38 Misc. (N. Y.) 27.

**11. Mayfield v. Kilgour**, 31 Md. 241; 2 *Lewin on Trusts* \*572. See also the title **POWERS**, vol. 22, p. 1088.

**Construction of Powers Governed by Law of What State.** — The exercise of powers conferred by a testator is controlled by the law of the testator's domicile both as to the execution

(2) *General Powers*—(a) *In General*.—Generally speaking, a trustee possesses such powers over the subject-matter of the trust as will enable him to carry out the lawful provisions and intent of the settlement as indicated by its directions, nature, and purposes.<sup>1</sup>

(b) *Powers Limited to Uses and Objects of Trust*.—The powers of a trustee to deal with the fund are limited, not only by the express provisions of the settlement, but to the uses and objects for which the fund is committed to his management by the settlor, and a trustee cannot legally appropriate the fund to other purposes; his control, however, over the property is co-extensive with those objects.<sup>2</sup>

(c) *Powers of Absolute Owner*.—A trustee is capable of exercising the discretionary powers of the *bona fide* proprietor under particular circumstances, even where no such authority is given by the instrument creating the trust, as otherwise the trust estate might be injuriously affected. The necessity of the case may demand an immediate decision, as where the *cestui que trust* is under disability, or not yet in existence.<sup>3</sup>

(d) *Power to Do What Court Would Order*.—The rule has been adopted in equity

of the power and the interpretation of it. *Rosenbaum v. Garrett*, 57 N. J. Eq. 186.

**Meaning of "Unlimited Powers" Given to Trustees.**—In *Weld v. Weld*, 23 R. I. 311, it was held that "unlimited powers" given to trustees under a will meant full powers of management and investment, including reinvestment.

1. **General Scope of Powers.**—*Thomas v. Davis*, 6 Ala. 113; *Murphy v. Delano*, 95 Me. 229; *In re Reynolds*, 2 Ohio Dec. 11.

**Power over Person of Beneficiary.**—The trustee of a fund bequeathed for the support of a beneficiary has no power, express or implied, over the person of such beneficiary, and cannot dictate where the latter must reside. *Riley's Estate*, (Surrogate Ct.) 4 Misc. (N. Y.) 338.

**Power to Appropriate Assets to Residuary Legatee.**—Where there are several beneficiaries of a residuary trust fund the trustees have power to appropriate specific investments to any one thereof before final division without also appropriating for the others. *In re Nickels*, (1898) 1 Ch. 630, 67 L. J. Ch. 406.

2. **Powers of Trustee Limited to Objects and Uses of Trust.**—*Balls v. Strutt*, 1 Hare 146; *Thomas v. James*, 32 Ala. 726; *Nevitt v. Woodburn*, 190 Ill. 283; *Angell v. Jewett*, 58 Ill. App. 596; *Madison Academy v. Board of Education*, (Ky. 1894) 26 S. W. Rep. 187; *Clark v. Maguire*, 16 Mo. 302; *Hildreth v. Pinkerton Academy*, 29 N. H. 227; *Richardson v. Cole*, 2 Swan (Tenn.) 100; *Carter v. Rolland*, 11 Humph. (Tenn.) 333; *Heth v. Richmond*, etc., R. Co., 4 Gratt. (Va.) 482, 50 Am. Dec. 88. See also *Atty.-Gen. v. Munro*, 9 Jur. 461.

**No Power to Convert Trust Fund into Annuity.**—*Eldredge v. Greene*, 17 R. I. 17.

**No Power to Vary Terms of Mortgage Security.**—*McPherson v. Rollins*, 107 N. Y. 316, 1 Am. St. Rep. 826.

**No Power to Vary Terms of Contingent Payment.**—*Spencer v. Spencer*, 11 Paige (N. Y.) 159.

**Power to Loan Money to a Particular Business Firm** does not authorize a loan made to a different firm. *Smith v. Patrick*, 84 L. T. N. S. 740.

**A Power of Advancement** was held unauthoritatively executed contrary to the terms of the

settlement in *Molyneux v. Fletcher*, 78 L. T. N. S. 111.

**Permission of Court Unnecessary.**—A trustee may execute the powers as conferred, and in the manner designated in the deed of trust, without the interposition of the chancellor. *O'Bannon v. Musselman*, 2 Duv. (Ky.) 523. See also *Lowe v. Protestant Episcopal Church Convention*, 83 Md. 409.

**Where the Original Plan of the Donor Has Become Impracticable** by reason of a change of circumstances, the trustees may adopt any mode of administering the trust which will accomplish the donor's ultimate purpose. *Adams Female Academy v. Adams*, 65 N. H. 225.

**Power to Pay New Debts of Settlor.**—Where property is conveyed to a trustee to pay the settlor's debts and to devote the balance for the benefit of the beneficiaries, such trustee has no power to pay debts of the settlor contracted subsequently to the conveyance. *Miles v. Monarch*, (Ky. 1888) 6 S. W. Rep. 715.

**The Power of Trustees to Change the Site of a University** from the original site granted was sustained, where the object of the settlement was to found a college, but not to restrict the location of the buildings forever to any one particular spot. *Cincinnati v. McMicken*, 3 Ohio Cir. Dec. 409, 29 Cinc. L. Bul. 168.

3. **Powers of Absolute Owner.**—*Thomas v. Davis*, 6 Ala. 113; *McBrayer v. Cariker*, 64 Ala. 50; *Druid Park Heights Co. v. Oettinger*, 53 Md. 63; *Perry on Trusts* (4th ed.), vol. 2, § 475. See also *infra*, 8. f. *Power to Sell, Lease, or Mortgage Trust Property*.

**Trustees to Hold Property for a Limited Period**, and then to pay to persons named, have no option or discretion in the matter. They have power only to execute the trust without imposing terms or conditions not contained in it. *Waldo v. Cummings*, 45 Ill. 421.

**Power to Cultivate Land.**—Where a trustee is given power to exercise any control or act of ownership over the real estate composing the trust fund of which the settlor himself is capable, he is not bound to rent the same, but may cultivate it for the benefit of the *cestui que trust*. *Dennis v. Dennis*, 15 Md. 73. See also *Mayfield v. Kilgour*, 31 Md. 240.

that a trustee has the power to do that without a special order, which the court under proper proceedings would order.<sup>1</sup>

**Power to Compromise.** — While a trustee has no general power incident to his office to compromise a debt of the estate,<sup>2</sup> yet if the nature of the transaction shows that he was actuated by good intentions and exercised due caution and fidelity in respect to the interests of his *cestui que trust*, a court of equity will confirm what it would, on due application, have ordered.<sup>3</sup>

**Power to Make Improvements.** — A trustee has power to make such permanent improvements as are necessary for the enjoyment of the trust estate, and such as the court would have sanctioned if application had been made to it for permission to invest the income therein.<sup>4</sup>

(e) **Implied Powers.** — A power may be said to be conferred on the trustee by implication to do that which is necessary to the proper performance of the powers and duties actually expressed. Thus, the trustee may have an implied power to sell, mortgage, partition, or lease trust property,<sup>5</sup> to continue<sup>6</sup> or discontinue<sup>7</sup> a business, to make investments,<sup>8</sup> to assign a note and mortgage,<sup>9</sup> to ratify a purchase,<sup>10</sup> or to enter on land,<sup>11</sup> where, though no such powers are expressly granted, the due execution of the trust is impossible without their exercise.

(f) **Power to Do Particular Acts** — *aa. To Make Admissions.* — As a general rule, a trustee is not authorized to make admissions to the prejudice of the trust fund and against the *cestui que trust*.<sup>12</sup>

*bb. To Waive Formal Matters.* — A trustee may waive all matters of mere form, such as the issuance of an execution upon a judgment rendered against the trust estate,<sup>13</sup> when such course is obviously for the best interests of his trust. But no act or waiver, or otherwise, can be performed by him to the prejudice of the rights of the *cestui que trust*.<sup>14</sup>

*cc. To Bind Trust Estate by Contract.* — A trustee cannot charge the trust estate by his executory contracts unless authorized to do so by the terms of the instrument creating the trust. On such contracts he is personally liable.<sup>15</sup>

*dd. To Repair Trust Property.* — A trustee having the possession, control, and management of the estate, can make necessary repairs, and incur other expenditures requisite for the protection of the property.<sup>16</sup> But he cannot,

1. **Power to Do That Which Court Would Order.** — *Thomas v. Davis*, 6 Ala. 113; *Druid Park Heights Co. v. Oettinger*, 53 Md. 63; *Abell v. Brown*, 55 Md. 225; *Stitzer v. Whittaker*, (Neb. 1902) 91 N. W. Rep. 713; *Williams v. Smith*, 10 R. I. 280.

**The Burden Is on the Trustee** to show that his acts were such as the court would have sanctioned. *Nelson v. Duncombe*, 9 Beav. 211.

2. **No General Power to Compromise.** — *Hollingsworth v. Knox County*, 22 Ind. App. 232; *Bizzell v. McKinnon*, 121 N. Car. 186.

3. **Power to Compromise When Court Would Have So Ordered.** — *Caldwell v. Brown*, 66 Md. 293; *Bacot v. Heyward*, 5 S. Car. 441; *Pool v. Dial*, 10 S. Car. 440.

4. **Power to Make Improvements.** — *Neal v. Bleckley*, 51 S. Car. 506. See also *infra*, this subdivision, *To Repair Trust Property*.

5. See *infra*, this section, 8. f. *Power to Sell, Lease, or Mortgage Trust Property*. And see the title **POWERS**, vol. 22, p. 1094.

**Implied Power to Sell Products of Land.** — *Neal v. Bleckley*, 51 S. Car. 506.

6. **Implied Power to Continue Business.** — *In re Crowther*, (1895) 2 Ch. 56. Compare *Eufaula Nat. Bank v. Manassas*, 124 Ala. 379.

7. **Implied Power to Discontinue Business.** — *Jones v. Procter*, 24 Ohio Cir. Ct. 80.

8. **Implied Power to Invest.** — *Stambaugh's Estate*, 135 Pa. St. 585. See also generally the title **INVESTMENTS**, vol. 17, p. 423.

9. **Implied Power to Assign Note and Mortgage.** — *Gisselman v. Starr*, 106 Cal. 651. See also *Dillaye v. Commercial Bank*, 51 N. Y. 345.

10. **Power to Ratify Purchase Implied from Power to Purchase.** — *Kohn v. Miller*, 97 Ill. App. 487.

11. **Implied Power to Enter on Land of Which Trustee Entitled to Income.** — *Dean v. Dean*, (1891) 3 Ch. 150.

12. **Power to Make Admissions.** — *Thomas v. Bowman*, 29 Ill. 426, 30 Ill. 84; *Bragg v. Geddes*, 93 Ill. 39; *McKissick v. Pickle*, 16 Pa. St. 140. See also the title **ADMISSIONS**, vol. 1, p. 678.

13. **Power to Waive Formal Matters.** — *Stitzer v. Whittaker*, (Neb. 1902) 91 N. W. Rep. 713.

**A Trustee Has No Power to Confess Judgment** in order to prefer certain creditors of the trust estate. *Woddrop v. Weed*, 154 Pa. St. 307, 35 Am. St. Rep. 832.

14. **No Power to Prejudice Rights of Cestui Que Trust.** — *Mayrant v. Guignard*, 3 Strobb. Eq. (S. Car.) 112; *Calwell v. Prindle*, 19 W. Va. 604.

15. See *infra*, this section, *Liabilities of Trustees* — *For Contracts Relating to Estate*.

16. **Power to Make Repairs.** — *United States.* — *Burr v. M'Ewen, Baldw.* (U. S.) 154.



unless authorized in the trust instrument, make large and expensive improvements.<sup>1</sup>

*ee.* TO INSURE TRUST PROPERTY. — A trustee may insure the trust property, even though he have no beneficial interest therein.<sup>2</sup>

(3) *Special Powers* — (a) *In General.* — The special powers of a trustee may be divided into powers in the nature of a trust, and naked or discretionary powers.<sup>3</sup>

(b) *Power in Nature of Trust.* — A power in the nature of a trust, or a mixed trust and power, is a power annexed to the office of trustee for the purposes of the trust and to promote its objects. It is an imperative power, imposing a duty on the trustee which must be executed and the performance of which can be enforced.<sup>4</sup>

*Power Coupled with Interest.* — Powers in the nature of trusts are sometimes "coupled with an interest" and sometimes not,<sup>5</sup> by which must be under-

*Alabama.* — See *Browning v. Kelly*, 124 Ala. 645.

*Arkansas.* — See *Cagwin v. Buerkle*, 55 Ark. 5.

*California.* — *Woodard v. Wright*, 82 Cal. 202.

*Illinois.* — *Fischbeck v. Gross*, 112 Ill. 208. See also *Patterson v. Johnson*, 113 Ill. 559.

*Iowa.* — *Booth v. Bradford*, 114 Iowa 562.

*Kentucky.* — *Laurel County Ct. v. Laurel Seminary*, 93 Ky. 379.

*Maine.* — *Veazie v. Forsaith*, 76 Me. 176.

*Massachusetts.* — *Watts v. Howard*, 7 Met. (Mass.) 478; *Parsons v. Winslow*, 16 Mass. 361; *Sohier v. Eldredge*, 103 Mass. 345; *Little v. Little*, 161 Mass. 188.

*Minnesota.* — *Smith v. Gibson*, 15 Minn. 89.

*Mississippi.* — See *Tatum v. McLellan*, 56 Miss. 352.

*New Jersey.* — *Kearney v. Kearney*, 17 N. J. Eq. 59; *Jacobus v. Munn*, 37 N. J. Eq. 48; *Perrine v. Newell*, 49 N. J. Eq. 57.

*New York.* — *Noyes v. Blakeman*, 6 N. Y. 567; *Herbert v. Herbert*, (C. Pl.) 57 How. Pr. (N. Y.) 333; *Matter of O'Dell*, 1 Connolly (N. Y.) 94; *Hepburn v. Hepburn*, 2 Bradf. (N. Y.) 74; *Green v. Winter*, 1 Johns. Ch. (N. Y.) 26; *Disbrow v. Disbrow*, 46 N. Y. App. Div. 111, affirmed 167 N. Y. 606; *Garvey v. Owens*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 349, 58 Hun (N. Y.) 609. See *Bellinger v. Shafer*, 2 Sandf. Ch. (N. Y.) 293; *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111, affirming 12 Hun (N. Y.) 431.

*North Carolina.* — *Cheatham v. Rowland*, 92 N. Car. 340.

*Ohio.* — *Mannix v. Purcell*, 46 Ohio Ct. 148.

*Pennsylvania.* — *Dilworth v. Sinderling*, 1 Binn. (Pa.) 488, 2 Am. Dec. 469; *Rankin's Estate*, 5 Pa. Co. Ct. 603; *Griffith's Estate*, 16 Pa. Co. Ct. 477. See also *Patterson's Appeal*, 104 Pa. St. 369.

*Rhode Island.* — *Thurston v. Thurston*, 6 R. I. 296. See also *Williams v. Smith*, 10 R. I. 280.

*South Carolina.* — *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214, 16 Am. Dec. 648; *Neal v. Bleckley*, 51 S. Car. 506.

*Tennessee.* — See *Kilebrew v. Murphy*, 3 Heisk. (Tenn.) 546.

*Texas.* — *Franks v. Williams*, 37 Tex. 24. See also *Blum v. Rogers*, 71 Tex. 668.

*Vermont.* — *Field v. Wilbur*, 49 Vt. 157.

*Wisconsin.* — See *Cole's Estate*, 102 Wis. 1,

72 Am. St. Rep. 854; *Thompson v. Thompson*, 16 Wis. 91.

See also *infra*, this section, *Duties of Trustees*. And, as to whether expenditures for repairs and improvements are chargeable to income or to capital, see *infra*, this section, *Accounting*.

1. *Power to Make Extensive Improvements.* — *McKinley v. Irvine*, 13 Ala. 705; *Dickinson v. Conniff*, 65 Ala. 581; *Booth v. Bradford*, 114 Iowa 562; *Pratt v. Thornton*, 28 Me. 355, 48 Am. Dec. 492; *Green v. Winter*, 1 Johns. Ch. (N. Y.) 26; *Herbert v. Herbert*, (C. Pl.) 57 How. Pr. (N. Y.) 333; *Taylor v. Baldwin*, 10 Barb. (N. Y.) 582; *Matter of Odell*, 1 Connolly (N. Y.) 94; *Wykoff v. Wykoff*, 3 W. & S. (Pa.) 481; *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214, 16 Am. Dec. 648; *Hughes v. Williams*, 99 Va. 312. See also *Austin v. Munro*, 47 N. Y. 360; *Thornton v. Ogden*, 41 N. J. Eq. 345.

The Court May Allow Extensive Improvements when the estate will be appreciably benefited thereby. *Re Bender*, 8 Ont. 399; *Smith v. Keteltas*, 62 N. Y. App. Div. 174.

Where It Is Doubtful whether improvements proposed to be made by trustees, under the *New Jersey* act empowering trustees to improve real estate held in trust, will be beneficial to the trust, they should not receive judicial sanction. *Matter of Miller*, 62 N. J. Eq. 764.

A Trustee Will Be Allowed the amount expended by him in improvements when acting under the honest belief that the estate was his own. *Pratt v. Thornton*, 28 Me. 355, 48 Am. Dec. 492.

Where the Will Directs a Sale of the land, the trustees cannot hold it and charge the estate with improvements, even if such improvements result in an increased rent. *Tatum v. McLellan*, 56 Miss. 352.

2. *Power to Insure Trust Property.* — *Howard Ins. Co. v. Chase*, 5 Wall. (U. S.) 509. See also *Moore v. Home Ins. Co.*, 14 L. C. Jur. 77. And see *infra*, this section, *Duties of Trustees*.

3. See generally the title POWERS, vol. 22, p. 1091.

4. *Power in Nature of Trust.* — *Freeman v. Prendergast*, 94 Ga. 369; *Osborne v. Gordon*, 86 Wis. 92. See also *Nugent v. Cloon*, 117 Mass. 219; *Wemyss v. White*, 159 Mass. 484; *Smith v. Keteltas*, 62 N. Y. App. Div. 174.

5. 2 Perry on Trusts (4th ed.), § 473.

stood not a personal beneficial interest in the trustee, but simply that the latter is possessed of the legal title to the subject-matter of the power, or of a right therein.<sup>1</sup>

(c) **Naked or Discretionary Powers.** — Naked, or collateral, or discretionary powers are powers to be exercised, or not, by trustees at their sole discretion, and according to their own judgment, and to be forever discharged and obsolete if the trustees do not see fit to execute them.<sup>2</sup>

**Discretionary Power Annexed to Trust.** — A so called discretionary power exists where the discretion of the trustee is confined to the time, manner, or place of exercise of an imperative power, or to the selection of or appropriation to the objects of the trust.<sup>3</sup> This kind of power is looked on by the courts with favor, and a trust instrument will always be construed, if possible, to create a power in the nature of a trust rather than an arbitrary power.<sup>4</sup>

**Ministerial and Personal Discretion.** — Discretionary powers are sometimes considered to be merely ministerial in character, such as the power to sell or lease, as distinguished from personal powers, to be exercised entirely as a matter of personal judgment, as where it is left to the discretion of the trustee to make or withhold a gift or consent to a marriage.<sup>5</sup>

**Manner of Exercise.** — When a trustee is not limited or directed by the instrument under which he acts, and is left to the discretion of his own judgment, his discretion must be exercised reasonably and with the same diligence and care that a prudent man would bestow on his own concerns.<sup>6</sup> And the court will always control discretionary powers to the end that they be not abused.<sup>7</sup>

**Termination of Discretionary Powers.** — Payment by the trustees of the trust fund into court terminates their discretionary power of applying the same.<sup>8</sup> But mere application to the court for advice will not authorize the court to take

1. *Freeman v. Prendergast*, 94 Ga. 391. See also *Mansfield v. Mansfield*, 6 Conn. 559, 16 Am. Dec. 76.

2. **Naked or Discretionary Powers.** — 2 Perry on Trusts, § 473; *In re Strickland*, 1 New Reports 164; *Taylor v. Benham*, 5 How. (U. S.) 267; *Shelton v. Homer*, 5 Met. (Mass.) 462; *Osborne v. Gordon*, 86 Wis. 92. See also *Proctor v. Scharpf*, 80 Ala. 227; *McGriff v. Porter*, 5 Fla. 373; *Clark v. Wilson*, 53 Miss. 119; *Steele v. Farber*, 37 Mo. 71; *Sites v. Eldredge*, 45 N. J. Eq. 632, 14 Am. St. Rep. 769; *Jackson v. Davenport*, 18 Johns. (N. Y.) 300; *Root v. Stuyvesant*, 18 Wend. (N. Y.) 283; *Atkinson v. Dowlings*, 33 S. Car. 414.

3. **Discretionary Power Annexed to Trust** — 2 Perry on Trusts, § 507; *Minors v. Battison*, 1 App. Cas. 428, 46 L. J. Ch. 2; *Brown v. Higgs*, 4 Ves. Jr. 708; *Ward v. Tyrrell*, 4 Jur. N. S. 779, 27 L. J. Ch. 749; *Safe Deposit, etc. Co. v. Sutro*, 75 Md. 361; *Loring v. Blake*, 98 Mass. 253; *National Exch. Bank v. Sutton*, 147 Mass. 131; *Portsmouth v. Shackford*, 46 N. H. 423; *Gladding v. Follett*, 2 Dem. (N. Y.) 58, *affirmed* 95 N. Y. 652; *Cassidy v. Hynton*, 44 Ohio St. 532; *Pulpress v. African M. E. Church*, 48 Pa. St. 204; *Downer v. Downer*, 9 Vt. 231.

**A Power to Select a Beneficiary** cannot be exercised unless the class from which the beneficiary is to be selected is designated by the settlor with such certainty that the court can ascertain who are the objects of the power. *Tilden v. Green*, 130 N. Y. 45.

4. **Construction Against Arbitrary Power.** — *McDonald v. McDonald*, 92 Ala. 537; *Haynes v. Carr*, 70 N. H. 463; *Meldon v. Devlin*, 38 N. Y. App. Div. 624, *affirmed* 167 N. Y. 573; *Jones v. Jones*, (Supm. Ct. Spec. T.) 8 Misc. (N. Y.)

660; *Aldrich v. Aldrich*, 12 R. I. 141. See also *Milington v. Musgrave*, 3 Madd. 491.

5. **Safe Deposit, etc.**, *Co. v. Sutro*, 75 Md. 365; *Kennard v. Bernard*, (Md. 1904) 56 Atl. Rep. 793.

6. **Reasonable Exercise of Discretion.** — *Webb v. Shaftesbury*, 7 Ves. Jr. 480; *Security Co. v. Cone*, 64 Conn. 579, 31 Atl. Rep. 7; *Druid Park Heights Co. v. Oettinger*, 53 Md. 63; *Mason v. Jones*, 2 Barb. (N. Y.) 248; *Gott v. Cook*, 7 Paige (N. Y.) 538; *Matter of Stevens*, (Surrogate Ct.) 20 Misc. (N. Y.) 157; *Mayer v. Mordecai*, 1 S. Car. 383.

**The Directions of the Testator**, as contained in an unattested codicil to the will, may be considered by the trustee in exercising his discretion. *Hitch v. Leworthy*, 2 Hare 200, 15 L. J. Ch. 235.

**It Is an Abuse of Discretion** for the trustee to pay a debt due him from the beneficiary out of the income belonging to the latter, *Clement's Appeal*, 49 Conn. 519; or to mortgage the trust property to secure a personal debt, *Boscowitz v. Held*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 674.

**Keeping Alive Insurance Benefits.** — Where part of the trust fund consists of an assignment of the interests of two members of a relief society, it is for the trustee to decide as to the advisability of continuing the payments or assessments necessary to secure the benefits from such society on the death of the two members. *Morse v. Morrell*, 82 Me. 80.

7. See *infra*, this section, *c. Control by Court of Powers of Trustees*.

8. *Ex p. Mulqueen*, 7 L. R. Ir. 127; *In re Tegg*, 15 L. T. N. S. 236. See also *In re Landon*, 40 L. J. Ch. 370.

away a discretion reposed in the trustee.<sup>1</sup> Discretionary powers given to trustees by will are not affected by directions contained in an instrument exercising a power of appointment given to a beneficiary,<sup>2</sup> nor will proceedings by the creditors of a beneficiary destroy the power of a trustee to postpone the distribution of the residuary fund.<sup>3</sup> Though trustees fail to exercise a discretionary power to pay a particular fund to the beneficiary within a certain time, they may nevertheless pay over the fund subsequently under other provisions of the trust instrument conferring discretion to pay other moneys to the same beneficiary.<sup>4</sup>

**6. Powers of Joint Trustees — (1) General Rule.** — The general doctrine does not appear to admit of dispute that, when the administration of a trust is vested in several trustees, they all form but one collective trustee and must exercise the powers of the office in their joint capacity. Their interests and authority being equal and undivided, they cannot act separately, but all must join.<sup>5</sup> Thus, one trustee alone has no power to convey,<sup>6</sup>

1. *Rutland Trust Co. v. Sheldon*, 59 Vt. 374. See also *Sillibourne v. Newport*, 1 Kay & J. 602, 1 Jur. N. S. 608.

2. *White v. Grane*, 18 Beav. 571.

3. *Chambers v. Smith*, 3 App. Cas. 795.

4. *Hoffman v. Van Syckel*, 44 N. J. Eq. 359.

5. **Cotrustees Must Act Jointly — England.** — *Luke v. South Kensington Hotel Co.*, 11 Ch. D. 121. See *Palmer v. Wakefield*, 3 Beav. 227.

*Alabama.* — *Williams v. Taylor*, 4 Port. (Ala.) 234; *Chambers v. Perry*, 17 Ala. 726.

*Connecticut.* — *Smith v. Wildman*, 37 Conn. 384.

*District of Columbia.* — *Colburn v. Grant*, 16 App. Cas. (D. C.) 113.

*Georgia.* — *Beall v. State*, 9 Ga. 367.

*Illinois.* — *Golder v. Bressler*, 105 Ill. 419.

*Maine.* — *Cox v. Walker*, 26 Me. 504.

*Maryland.* — *Latrobe v. Tiernan*, 2 Md. Ch. 474.

*Massachusetts.* — *Boston v. Robbins*, 126 Mass. 384. See also *Ames v. Armstrong*, 106 Mass. 15.

*Michigan.* — *Shaw v. Canfield*, 86 Mich. 1.

*Mississippi.* — *Hill v. Josselyn*, 13 Smed. & M. (Miss.) 597.

*Missouri.* — *White v. Watkins*, 23 Mo. 423.

*New Jersey.* — *Holcomb v. Holcomb*, 11 N. J. Eq. 281.

*New York.* — *Brennan v. Willson*, 71 N. Y. 507; *Cooper v. Illinois Cent. R. Co.*, 38 N. Y. App. Div. 28; *Thatcher v. Candee*, 4 Abb. App. Dec. (N. Y.) 387; *Ridgeley v. Johnson*, 11 Barb. (N. Y.) 527; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; *Busse v. Schenck*, 12 Daly (N. Y.) 12; *Anonymous v. Gelpcke*, 5 Hun (N. Y.) 255; *Berger v. Duff*, 4 Johns. Ch. (N. Y.) 368; *Hertell v. Bogert*, 9 Paige (N. Y.) 52. See also *Shook v. Shook*, 19 Barb. (N. Y.) 653; *Green v. Miller*, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184.

*Pennsylvania.* — *Vandever's Appeal*, 8 W. & S. (Pa.) 405, 42 Am. Dec. 305.

**A Majority of a Board of Trustees** cannot by any rule or resolution which they may adopt exclude one of their number, and so divest him of his rights as to make his subsequent acts of obtaining possession a tort. *M. E. Church First Soc. v. Stewart*, 27 Barb. (N. Y.) 553.

**Where Trustees Unable to Agree.** — Where a will authorizes the trustees to appoint an

agent, and such agent is necessary to the proper execution of the trust, a court of equity will, if the trustees are unable to agree on a particular person, appoint the one nominated by the majority of the trustees. *Daring v. Willing*, 4 Wash. (U. S.) 248.

**If One of Two Trustees Refuses to Execute the Trust** according to its true intent and meaning, or abuses it, the fact that he alone is responsible for the nonexecution or abuse furnishes no reason why a court of equity should not interfere. *Smith v. Wildman*, 37 Conn. 384.

**A Trustee Who Has Held Aloof** for a long series of years from all participation in the trust, and who alleges no mismanagement on the part of the active trustee, will not be allowed to obtrude himself as a disturbing factor into a system which has worked successfully. *Borhek's Estate*, 5 Pa. Dist. 597.

**6. Power of Cotrustee to Convey.** — *Ex p. Rigby*, 19 Ves. Jr. 463; *Wilbur v. Almy*, 12 How. (U. S.) 191; *Learned v. Welton*, 40 Cal. 349; *Austin v. Shaw*, 10 Allen (Mass.) 552; *Chapin v. First Universalist Soc.*, 8 Gray (Mass.) 580; *Ham v. Ham*, 58 N. H. 70; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; *Kirby v. Turner, Hopk.* (N. Y.) 309; *Williams v. Mattocks*, 3 Vt. 189.

**Conveyance of Real and of Personal Property.** — In *Wildner v. Ranney*, 95 N. Y. 7, it is said that one trustee may dispose of personal property to a *bona fide* purchaser without the consent of the other, but as to real property one cannot convey without the other, or enter into any agreement to convey that would be binding on the other.

**One Trustee May Not Mortgage Estate.** — *Carr v. Hertz*, 54 N. J. Eq. 127.

**One Trustee May Not Assign Bond and Mortgage.** — *Fritz v. City Trust Co.*, 72 N. Y. App. Div. 532, affirmed 173 N. Y. 622.

**One Trustee May Not Release Mortgage Security.** — *Van Rensselaer v. Akin*, 22 Wend. (N. Y.) 549.

**Sale of Security.** — One trustee has no power to authorize a broker to sell stock standing in joint names of trustees. *Leyton v. Sneyd*, 8 Taunt. 532, 4 E. C. L. 200, 2 Moo. 583.

**Refusal of One Trustee to Act** — The act of cotrustees in inserting in their deed the fact that one of their number refused to intermeddle with the trust cannot be received as



lease,<sup>1</sup> or bind<sup>2</sup> the trust property, or to perform any act resting in the sound discretion of the trustees as a body.<sup>3</sup>

**Delegation of Powers Inter Sese.** — Within this rule, trustees may not expressly delegate to one of their number the performance of any act requiring the deliberate judgment and discretion of all.<sup>4</sup> But they may delegate the performance of ministerial acts to an agent, and are not precluded from appointing as such one of their own number.<sup>5</sup>

(2) **Exceptions to Rule** — (a) **When Majority Expressly Authorized to Act.** — The execution of a trust by less than the whole number of trustees is valid when the trust instrument expressly authorizes a majority to act.<sup>6</sup>

(b) **Public Trusts.** — Trustees are within the rule that when a number of persons are intrusted with power of a private nature, they cannot act separately; but when the power is of a public nature, the act of the majority is the act of the whole.<sup>7</sup>

(c) **Ministerial Acts.** — Acts that are of a mere ministerial nature,<sup>8</sup> such as

evidence of the fact. *Milne v. Cummings*, 4 Yeates (Pa.) 576.

**The Court Cannot Compel a Dissenting Trustee** to join in a conveyance and execute a sale which has been made without his approval or consent. *Mannhardt v. Illinois Staats Zeitung Co.*, 90 Ill. App. 315.

**1. Power of Cotrustee to Lease.** — *Winslow v. Baltimore*, etc., R. Co., 188 U. S. 646; *Cox v. Walker*, 26 Me. 504; *McKelvey v. Rourke*, 15 Grant Ch. (U. C.) 380.

**One Trustee May Not Terminate Lease.** — *Kingsley v. School Directors*, 2 Pa. St. 28.

**2. Power of Cotrustee to Bind Estate by Contract.** — *Shaw v. Canfield*, 86 Mich. 1; *Ham v. Ham*, 58 N. H. 70; *Busse v. Schenck*, 12 Daly (N. Y.) 12; *Lafferty's Estate*, 5 Pa. Dist. 75; *Vandever's Appeal*, 8 W. & S. (Pa.) 405, 42 Am. Dec. 305.

**A Court of Equity Will Enforce a Contract** made by one trustee, under certain circumstances, as for instance, where the trustees not acting knew of the same and were guilty of laches. *Philadelphia Trust, etc., Co. v. Philadelphia, etc., Coal, etc., Co.*, 27 W. N. C. (Pa.) 325.

**3. Discretionary Acts to Be Performed Jointly.** — *Wilbur v. Almy*, 12 How. (U. S.) 180; *Smith v. Wildman*, 37 Conn. 384; *Mannhardt v. Illinois Staats-Zeitung Co.*, 90 Ill. App. 315; *Heard v. March*, 12 Cush. (Mass.) 580; *Morville v. Fowle*, 144 Mass. 109; *Crane v. Hearn*, 26 N. J. Eq. 378; *Carr v. Hertz*, 54 N. J. Eq. 127; *Cooper v. Illinois Cent. R. Co.*, 38 N. Y. App. Div. 28; *Fritz v. City Trust Co.*, 72 N. Y. App. Div. 532; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 583; *Vandever's Appeal*, 8 W. & S. (Pa.) 405, 42 Am. Dec. 305; *Mallet v. Smith*, 6 Rich. Eq. (S. Car.) 22, 60 Am. Dec. 107; *Dillard v. Dillard*, 97 Va. 434.

**4. Delegation of Discretionary Powers to Cotrustee.** — *Colburn v. Grant*, 181 U. S. 606; *Winslow v. Baltimore*, etc., R. Co., 188 U. S. 646; *Casey v. Canavan*, 93 Ill. App. 538; *Crowe v. Craig*, 29 Nova Scotia 304.

**5. Delegation of Ministerial Powers to Cotrustee.** — *Howard Ins. Co. v. Chase*, 5 Wall. (U. S.) 509; *Purdy v. Lynch*, 145 N. Y. 462. See also *Davis v. Lewis*, 8 Ont. 1; *Messeena v. Carr*, L. R. 9 Eq. 260.

**Delegated Powers Strictly Construed.** — Power given by joint trustees to one of their number

to extend a lease and collect rents cannot be construed as giving him authority to purchase a building on such property. *Shaw v. Canfield*, 86 Mich. 1.

**6. When Majority Expressly Authorized to Act.** — *Ratcliffe v. Sangston*, 18 Md. 383; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; *Crane v. Decker*, 22 Hun (N. Y.) 452.

**An Arbitrary and Inequitable Exercise of Power** will not be permitted, under a trust provision giving the majority of the trustees power to control the management of the estate. *Hogg v. Hoag*, 107 Fed. Rep. 807.

**Election to Act Jointly.** — Where a deed gives the trustees authority to act separately or jointly in making the sale, and they elect to act jointly, they cannot afterwards act separately. *White v. Watkins*, 23 Mo. 423.

**Trustees Situate in Different Countries.** — Where a will provides that trustees situate in different countries shall each have the management of the trust estate in his own country each trustee is thereby authorized to exercise all the powers and duties conferred by the will as to the particular property situate in his country, and need not seek the consent or participation of the trustee residing elsewhere. *Duckworth v. Ocean Steamship Co.*, 98 Ga. 193.

**7. Majority of Public Trustees May Act.** — *Wilkinson v. Malin*, 2 Crompt. & J. 636; *Sloo v. Law*, 3 Blatchf. (U. S.) 459; *Chambers v. Perry*, 17 Ala. 726; *Beall v. State*, 9 Ga. 367; *Chapin v. First Universalist Soc.*, 8 Gray (Mass.) 580; *Hill v. Josselyn*, 13 Smed. & M. (Miss.) 597; *McCready v. Guardians of Poor*, 9 S. & R. (Pa.) 94, 11 Am. Dec. 667; *Ex p. Greenville Academies*, 7 Rich. Eq. (S. Car.) 471; *Low v. Perkins*, 10 Vt. 532, 33 Am. Dec. 217. See also *North Bennington First Nat. Bank v. Mt. Tabor*, 52 Vt. 87, 36 Am. Rep. 734.

**Where an Association Imposes a Trust upon Itself** the association alone can discharge it by the action of a majority of its members, and the minority cannot discharge the same. *Ostrom v. Greene*, 161 N. Y. 353, affirming 30 N. Y. App. Div. 621.

**8. One Trustee May Perform Ministerial Acts.** — *Heard v. March*, 12 Cush. (Mass.) 580; *Cooper v. Illinois Cent. R. Co.*, 38 N. Y. App. Div. 28; *Vandever's Appeal*, 8 W. & S. (Pa.) 405, 42 Am. Dec. 305.

collecting rents and dividends,<sup>1</sup> or receiving payment of a mortgage,<sup>2</sup> may be performed by one trustee without the consent or co-operation of his associates.

(d) **Case of Emergency.** — In a case of emergency, when there is no opportunity for consultation between the trustees, one trustee may enter into a contract binding on the trust estate. But it must appear that such act was necessary and essential to the interests of the trust and could not have been avoided by prior diligence. In such case, the assent of the cotrustees is presumed.<sup>3</sup>

(e) **Ratification by Nonjoining Trustees.** — Where a trustee performs an act on behalf of the trust estate without previous authorization, a subsequent ratification of his act by his associates will bind them all. But such ratification must be shown to have been founded upon a full knowledge of all the facts.<sup>4</sup>

c. **POWERS OF SUCCEEDING AND SURVIVING TRUSTEES.** — Where several persons have been named as trustees, and one of them renounces, or resigns, or dies, the validity of the exercise of the trust powers by the survivors or by the substituted trustees depends on the nature of such powers.<sup>5</sup> Powers that are considered to be purely discretionary, or naked, or collateral, can be exercised only by the designated donees in person and acting jointly.<sup>6</sup> On the other hand, those powers which are coupled with an interest or annexed to the office of the trustee will pass with the trust to the successors or survivors of the original trustees and can be exercised by them.<sup>7</sup>

1. *Williams v. Nixon*, 2 Beav. 472.

2. *Bowes v. Seeger*, 8 W. & S. (Pa.) 222.

3. *Busse v. Schenck*, 12 Daly (N. Y.) 12; *Vandever's Appeal*, 8 W. & S. (Pa.) 405, 42 Am. Dec. 305.

4. *Wilbur v. Almy*, 12 How. (U. S.) 191; *Howard Ins. Co. v. Chase*, 5 Wall. (U. S.) 509; *Winslow v. Baltimore, etc., R. Co.*, 188 U. S. 646. But compare *Fritz v. City Trust Co.*, 72 N. Y. App. Div. 532, affirmed 173 N. Y. 622.

5. See the title **POWERS**, vol. 22, p. 1099 *et seq.*

6. **Discretionary or Naked Powers** — *England*. — *Hibbard v. Lamb*, Amb. 309; *Newman v. Warner*, 1 Sim. N. S. 457; *Browne v. Paull*, 16 Jur. 707; *Byam v. Byam*, 19 Beav. 58.

*Canada*. — *Tripp v. Martin*, 9 Grant Ch. (U. C.) 20; *Ridout v. Howland*, 10 Grant Ch. (U. C.) 547. See also *Re Curry*, 23 Grant Ch. (U. C.) 277.

*United States*. — *Peter v. Beverly*, 10 Pet. (U. S.) 532.

*Alabama*. — *Doe v. Ladd*, 77 Ala. 223; *Wernborn v. Austin*, 77 Ala. 381.

*Arkansas*. — See *Gregg v. Gabbert*, 62 Ark. 602.

*Connecticut*. — *Security Co. v. Snow*, 70 Conn. 288, 66 Am. St. Rep. 107.

*District of Columbia*. — *Edwards v. Maupin*, 18 D. C. 39.

*Georgia*. — *Simmons v. McKinlock*, 98 Ga. 738; *Freeman v. Prendergast*, 94 Ga. 388; *O'Brien v. Battle*, 98 Ga. 769.

*Maryland*. — *Zimmerman v. Fraley*, 70 Md. 561; *Lowe v. Protestant Episcopal Church Convention*, 83 Md. 409; *Mercer v. Safe Deposit, etc., Co.*, 91 Md. 119; *Snyder v. Safe Deposit, etc., Co.*, 93 Md. 225; *Kennard v. Bernard*, (Md. 1904) 56 Atl. Rep. 793.

*Massachusetts*. — *Shelton v. Homer*, 5 Met. (Mass.) 462.

*New Jersey*. — *Dillingham v. Martin*. 61 N. J. Eq. 276.

*North Carolina*. — *Young v. Young*, 97 N. Car. 132.

*Pennsylvania*. — *Woodward's Estate*, 8 Phila. (Pa.) 211.

*Tennessee*. — *Robertson v. Gaines*, 2 Humph. (Tenn.) 367; *Williams v. Otey*, 8 Humph. (Tenn.) 567.

*Virginia*. — *Dillard v. Dillard*, 97 Va. 434.

*Wisconsin*. — *Osborne v. Gordon*, 86 Wis. 95.

The Office of Cotrustee is a Joint Office. If one refuse or be incapable of acting, the other cannot proceed alone, and the administration devolves on the court. *Davis v. Lewis*, 8 Ont. 1.

That There Is No One Who Can Exercise the personal discretion will not authorize the court to confer such power on a trustee appointed by it. *French v. Northern Trust Co.*, 197 Ill. 30.

When Trust Devolves on Court. — Where a will gives a power of conveyance on the concurrence of all the trustees named therein, and the trustees all die and the trust devolves on the Supreme Court, together with the power of concurring in the sale, no conveyance without such concurrence by the court will be good. *Correll v. Lauterbach*, 12 N. Y. App. Div. 531, affirmed 159 N. Y. 553.

7. **Powers Annexed to Office** — *England*. — *Crewe v. Dicken*, 4 Ves. Jr. 100; *Nicloson v. Wordsworth*, 2 Swanst. 365; *Cafe v. Bent*, 5 Hare 24.

*United States*. — *Peter v. Beverly*, 10 Pet. (U. S.) 532; *Taylor v. Benham*, 5 How. (U. S.) 273; *Glenn v. Soule*, 22 Fed. Rep. 417.

*Connecticut*. — *Wheeler's Appeal*, 70 Conn. 511.

*Georgia*. — *Freeman v. Prendergast*, 94 Ga. 370.

*Illinois*. — *French v. Northern Trust Co.*, 197 Ill. 30.

*Kentucky*. — *Price v. Swager*, (Ky. 1887) 4 S. W. Rep. 34.

*Maryland*. — *Druid Park Heights Co. v. Oettinger*, 53 Md. 46; *Safe Deposit, etc., Co. v. Sutro*, 75 Md. 361; *Mercer v. Safe Deposit, etc., Co.*, 91 Md. 119; *Kennard v. Bernard*, (Md. 1904) 56 Atl. Rep. 793.

*Massachusetts*. — *Gibbs v. Marsh*, 2 Met.

**Intention of Donor to Govern.** — In all cases, however, the intention of the donor of the power must govern, so far as the same can be ascertained.<sup>1</sup> Thus, if the trust instrument contain expressions showing that the execution of the trust by less than the whole number of trustees is contemplated, a disclaimer by any one of them will neither invalidate the instrument nor impair the power of the others to execute the trust.<sup>2</sup> So, words of survivorship or succession will be construed to confer on the survivor or successor all the powers of the original trustee.<sup>3</sup>

**When Trustees Have Power to Fill Vacancy.** — Where a trust deed gives authority to the survivors of the trustees to fill vacancies in their number, but does not require them to do so, they can execute the powers conferred on them in the original instrument without appointing a new trustee.<sup>4</sup>

**When Trustees Have Power to Appoint Successors.** — If trustees who have power to appoint their successors by will fail to exercise such power, a new trustee appointed by the court does not possess the discretion reposed in the original trustees by the trust instrument.<sup>5</sup>

**Statutory Provisions.** — In some jurisdictions it is expressly provided by statute that a new trustee shall have all the powers of his predecessor in the trust.<sup>6</sup>

**d. DELEGATION OF POWERS** — (1) *Discretionary Powers.* — A trustee cannot, in general, delegate his trust, or throw his responsibility on another person, even though such person be a cotrustee.<sup>7</sup> Particularly can there be no valid delegation of a power involving the exercise of personal discretion and judgment, unless such delegation be expressly authorized by the instrument creating the trust.<sup>8</sup> It is said that there is but one exception to the

(Mass.) 243; *Bradford v. Monks*, 132 Mass. 405; *Schouler, Petitioner*, 134 Mass. 426.

*Missouri.* — *Shockley v. Fisher*, 75 Mo. 498.

*New Jersey.* — *Scully v. Reeves*, 3 N. J. Eq. 84, 29 Am. Dec. 694; *Weiland v. Townsend*, 33 N. J. Eq. 393.

*New York.* — *Niles v. Stevens*, 4 Den. (N. Y.) 399; *Matter of Bernstein*, 3 Redf. (N. Y.) 20; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1; *Matter of Stevenson*, 3 Paige (N. Y.) 420; *Matter of Crossman*, (Supm. Ct. Gen. T.) 20 How. Pr. (N. Y.) 350; *Burrill v. Sheil*, 2 Barb. (N. Y.) 468; *King v. Donnelly*, 5 Paige (N. Y.) 46; *Matter of Van Schoonhoven*, 5 Paige (N. Y.) 559; *Matter of Reynolds*, 11 Hun (N. Y.) 44.

*Rhode Island.* — *Boutelle v. City Sav. Bank*, 17 R. I. 81, 33 Am. St. Rep. 855; *Blakely's Petition*, 19 R. I. 324; *Smith v. Hall*, 20 R. I. 170.

*South Carolina.* — *De Saussure v. Lyons*, 9 S. Car. 492; *Reeves v. Tappan*, 21 S. Car. 1; *Smith v. Winn*, 27 S. Car. 591; *Bredenburg v. Bardin*, 36 S. Car. 197; *Robinson v. Ostendorff*, 38 S. Car. 66; *Dick v. Harby*, 48 S. Car. 516.

*Tennessee.* — *Robertson v. Gaines*, 2 Humph. (Tenn.) 367; *Williams v. Otey*, 8 Humph. (Tenn.) 567.

*Texas.* — See *Blanton v. Mayes*, 58 Tex. 422.

*Virginia.* — *Hughes v. Williams*, 99 Va. 312.

**Where a Trustee Has Been Ordered by the Court** to perform certain acts, a substituted trustee can continue so to act without further order of the court. *In re Appley*, (Supm. Ct. Spec. T.) 24 Civ. Pro. (N. Y.) 386.

**1. Intention of Donor Controlling.** — *Loring v. Marsh*, 6 Wall. (U. S.) 352; *Edwards v. Maupin*, 18 D. C. 39; *Chase v. Davis*, 65 Me. 102; *Ratcliffe v. Sangston*, 18 Md. 383; *Druid Park Heights Co. v. Oettinger*, 53 Md. 46; *Shelton v. Homer*, 5 Met. (Mass.) 462.

*2. Ratcliffe v. Sangston*, 18 Md. 383.

**3. Words of Survivorship or Succession.** — *Security Co. v. Cone*, 64 Conn. 579, 31 Atl. Rep. 7; *Freeman v. Prendergast*, 94 Ga. 389; *Moore v. Isbel*, 40 Iowa 383; *Shortz v. Unangst* 3 W. & S. (Pa.) 45; *Williams v. Moliere*, 60 Vt. 378. See also *Safe Deposit, etc., Co. v. Sutro*, 75 Md. 361; *Dillard v. Dillard*, 97 Va. 434.

**A Power Given to the "Survivors"** of trustees cannot be executed by the assigns of the surviving trustee. *Cooke v. Crawford*, 13 Sim. 91.

**4. Atty.-Gen. v. Floyer**, 2 Vern. 748; *Golder v. Bressler*, 105 Ill. 434; *Belmont v. O'Brien*, 12 N. Y. 394. See also *supra*, this section, *Appointment — Appointment by Donee of Power*.

**5. Lowe v. Protestant Episcopal Church Convention**, 83 Md. 409.

**6. Statutory Provisions.** — *Chase v. Davis*, 65 Me. 102; *Wemyss v. White*, 159 Mass. 484; *Stanwood v. Stanwood*, 179 Mass. 223; *Yard v. Larison*, 39 N. J. Eq. 386; *Matter of Bierbaum*, 40 Hun (N. Y.) 504; *Kortright v. Storminger*, 49 Hun (N. Y.) 249; *Leggett v. Hunter*, 19 N. Y. 445; *Farrar v. McCue*, 89 N. Y. 142; *Greenland v. Waddell*, 116 N. Y. 234, 15 Am. St. Rep. 400; *Royce v. Adams*, 123 N. Y. 402; *Lahey v. Kortright*, 132 N. Y. 450; *Faile v. Crawford*, 30 N. Y. App. Div. 536; *Stearley's Appeal*, 3 Grant Cas. (Pa.) 270; *Wilson v. Pennock*, 27 Pa. St. 238; *Cresson v. Ferree*, 70 Pa. St. 446.

**7. See supra**, this subsection, *Powers of Joint Trustees*.

**8. Discretionary Powers May Not Be Delegated** — *England.* — *Wilson v. Dennison*, Amb. 82; *Ingram v. Ingram*, 2 Atk. 88; *Turner v. Corney*, 5 Beav. 515; *In re Speight*, 22 Ch. D. 727; *Combe's Case*, 9 Coke 75; *Bulteel v. Abinger*, 6 Jur. 412; *Bradford v. Belfield*, 2 Sim. 264;



rule, and that is when the trustee delegates the trust to another with the consent of the beneficiaries and of all other interested parties.<sup>1</sup>

**Power to Make General Assignment.**—Under the above rule, a trustee has no authority to make an assignment of the trust property for the benefit of creditors.<sup>2</sup>

**Ratification of Act of Agent.**—It seems, however, that although the delegation of a discretionary power to an agent be without authority, yet if the agent reports his act thereunder to the trustee and the latter ratifies it, thus exercising his discretion, the act will be valid.<sup>3</sup>

(2) **Ministerial Powers.**—On the other hand, a trustee is not bound to do everything himself. He may delegate mere ministerial powers not requiring the exercise of personal discretion, and thus may employ agents, attorneys, accountants, auctioneers, collectors, and other necessary assistants in executing his trust, and may pay them out of the trust funds. It will be sufficient if the trustee retains the supervision and control of the persons so employed.<sup>4</sup>

*Alexander v. Alexander*, 2 Ves. 643; *Hawkins v. Kemp*, 3 East 410; *Atty.-Gen. v. Scott*, 1 Ves. 413.

*Canada.*—*Crowe v. Craig*, 29 Nova Scotia 394.

*United States.*—*Pearson v. Jamison*, 1 McLean (U. S.) 197; *Coquard v. Chariton County*, 14 Fed. Rep. 203.

*Arkansas.*—*North American Trust Co. v. Chappell*, 70 Ark. 507.

*California.*—*Saunders v. Webber*, 39 Cal. 287.

*Georgia.*—*Neal v. Patten*, 47 Ga. 73.

*Illinois.*—*Mason v. Wait*, 5 Ill. 127; *Taylor v. Hopkins*, 40 Ill. 442. See also *Sebastian v. Johnson*, 72 Ill. 283, 22 Am. Rep. 144.

*Iowa.*—*Singleton v. Scott*, 11 Iowa 589.

*Massachusetts.*—*Winthrop v. Atty.-Gen.*, 128 Mass. 258.

*Mississippi.*—*Doe v. Robinson*, 24 Miss. 688.

*Missouri.*—*Whittelsey v. Hughes*, 39 Mo. 13; *Graham v. King*, 50 Mo. 22, 11 Am. Rep. 401; *Howard v. Thornton*, 50 Mo. 291; *Bales v. Perry*, 51 Mo. 449; *St. Louis v. Priest*, 88 Mo. 612; *Polliham v. Reveley*, (Mo. 1904) 81 S. W. Rep. 182.

*New Jersey.*—*Keim v. Lindley*, (N. J. 1895) 30 Atl. Rep. 1074.

*New York.*—*Newton v. Bronson*, 13 N. Y. 593, 67 Am. Dec. 89; *Niles v. Stevens*, 4 Den. (N. Y.) 399; *Merrill v. Farmers' L. & T. Co.*, 24 Hun (N. Y.) 297; *Heyer v. Deaves*, 2 Johns. Ch. (N. Y.) 154; *Berger v. Duff*, 4 Johns. Ch. (N. Y.) 368; *Hawley v. James*, 5 Paige (N. Y.) 487; *Suarez v. Pumpelly*, 2 Sandf. Ch. (N. Y.) 336; *Andrew v. New York Bible, etc., Soc.*, 4 Sandf. (N. Y.) 175. See also *Powell v. Tuttle*, 3 N. Y. 396.

*Pennsylvania.*—*McMurtie v. Pennsylvania L. Ins. Co.*, 9 Phila. (Pa.) 529, 29 Leg. Int. (Pa.) 108.

*Texas.*—*Fuller v. O'Neil*, 69 Tex. 351, 5 Am. St. Rep. 59.

**In England**, a trustee may appoint an attorney to act for him in a foreign county or a colony in matters of discretion. *Stuart v. Norton*, 14 Moo. P. C. 17.

**A Municipal Body** is vested with the power of legislation as a public trust, and such power cannot be delegated by it to others or its exercise made dependent on the consent of others. *In re Quong Woo*, 13 Fed. Rep. 229.

**A Trustee's Creditors Cannot Object** to the delegation by him of the trust. *Plummer v. Green*, 49 Neb. 316.

1. *Seely v. Hills*, 49 Wis. 473.

**A Power Coupled with an Interest** will authorize the delegation of the trust by making an attorney. *Mason v. Wait*, 5 Ill. 127.

2. *Woddrop v. Weed*, 154 Pa. St. 307, 35 Am. St. Rep. 832.

3. **Ratification of Act of Agent.**—*Singleton v. Scott*, 11 Iowa 589; *Newton v. Bronson*, 13 N. Y. 594, 67 Am. Dec. 89; *McMurtie v. Pennsylvania L. Ins. Co.*, 9 Phila. (Pa.) 529, 29 Leg. Int. (Pa.) 108.

4. **Ministerial Powers May Be Delegated**—*England.*—*In re Speight*, 22 Ch. D. 727; *Edmonds v. Peake*, 7 Beav. 239; *Wilkinson v. Wilkinson*, 2 Sim. & St. 237. See also *Hitch v. Leworthy*, 2 Hare 200.

*Canada.*—*Taylor v. Magrath*, 10 Ont. 669.

*United States.*—*Pearson v. Jamison*, 1 McLean (U. S.) 197. See also *Connolly v. Belt*, 5 Cranch (U. S.) 405; *Oliver v. Piatt*, 3 How. (U. S.) 333.

*Alabama.*—*Marks v. Semple*, 111 Ala. 637.

*California.*—*Kennedy v. Dunn*, 58 Cal. 339; *Matter of Pratt*, 119 Cal. 156.

*Illinois.*—*Constant v. Matteson*, 22 Ill. 546; *Gillespie v. Smith*, 29 Ill. 473, 81 Am. Dec. 328; *Taylor v. Hopkins*, 40 Ill. 442.

*Iowa.*—*Singleton v. Scott*, 11 Iowa 589. See also *Telford v. Barney*, 1 Greene (Iowa) 575.

*Maryland.*—*Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257.

*Mississippi.*—*Johns v. Sergeant*, 45 Miss. 332; *Tyler v. Herring*, 67 Miss. 169, 19 Am. St. Rep. 263.

*Missouri.*—*Bales v. Perry*, 51 Mo. 449; *Polliham v. Reveley*, (Mo. 1904) 81 S. W. Rep. 182.

*New Jersey.*—*Parker v. Johnson*, 37 N. J. Eq. 366; *Keim v. Lindley*, (N. J. 1895) 30 Atl. Rep. 1074.

*New York.*—*Fisher v. Fisher*, 1 Bradf. (N. Y.) 335; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; *Purdy v. Lynch*, 145 N. Y. 462; *Meeker v. Crawford*, 5 Redf. (N. Y.) 450; *Garvey v. Owens*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 349. See also *Willcox v. Smith*, 26 Barb. (N. Y.) 330; *McWhorter v. Benson*, Hopk. (N. Y.) 28; *Vanderheyden v. Vanderheyden*, 2 Paige

*e. CONTROL BY COURT OF POWERS OF TRUSTEES.* — As a general rule, a court of equity will not interfere with or attempt to exercise discretionary powers conferred on trustees.<sup>1</sup> But the court never loses its power to review the use of such discretion and to correct any abuse in its exercise.<sup>2</sup> More-

(N. Y.) 287, 21 Am. Dec. 86; *Hawley v. James*, 5 Paige (N. Y.) 484.

*Ohio.* — *Ingham v. Lindemann*, 37 Ohio St. 218.

*Pennsylvania.* — *McMurtrie v. Pennsylvania L. Ins. Co.*, 9 Phila. (Pa.) 529, 29 Leg. Int. (Pa.) 108; *Hemphill's Appeal*, 18 Pa. St. 303.

**Where a Particular Thing Is to Be Done**, and the manner of its execution is particularly directed by the instrument containing the power, so that the exercise of judgment is not required, the power may be delegated. *Singleton v. Scott*, 11 Iowa 589; *Pearson v. Jamison*, 1 McLean (U. S.) 197.

**Implied Power of Agent.** — An attorney for one of several trustees of a public trust, acting as an attorney, has no implied power to consent to a decree which has the effect of taking the trust out of the hands of the trustees, or of placing the execution of it, in whole or in part, in other hands. *Vose v. Internal Imp. Fund*, 2 Woods (U. S.) 647.

**Agent May Be Relative of Trustee.** — *Matter of Pratt*, 119 Cal. 156.

**Appointment of Agent by Settlor.** — A wish expressed by a testator that a certain person should be employed by or retained in the employ of his trustees does not create a trust enforceable by such person. *Finden v. Stephens*, 2 Phil. 142, 17 L. J. Ch. 342; *Shaw v. Lawless*, 5 Cl. & F. 129, 1 Dr. & Wal. 512; *Foster v. Elsley*, 19 Ch. D. 518, 51 L. J. Ch. 275. See also *Hibbert v. Hibbert*, 3 Meriv. 681; *Williams v. Corbet*, 8 Sim. 349, 6 L. J. Ch. 182. An agent appointed by the settlor may be dismissed by the trustees for misconduct. *Belaney v. Kelly*, 24 L. T. N. S. 738, 19 W. R. 1171.

**1. Powers Purely Discretionary and Coupled with Trust.** — In *Temper v. Camoys*, 21 Ch. D. 571, *Jessel, M. R.*, said: "It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power the court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly. The court says that the power, if exercised at all, is to be properly exercised. \* \* \* But in all cases where there is a trust or duty coupled with the power the court will then compel the trustees to carry it out in a proper manner and within a reasonable time." In *Kintner v. Jones*, 122 Ind. 148, it was said that for the nonexecution of mere naked and purely discretionary powers equity provides no remedy, but the execution of a power coupled with a trust for third parties, or in the execution of which third parties are interested, may be coerced. See also *supra*, this title, IV. 7. *b. Powers in Trust or Trusts Implied from Powers*, and the title **POWERS**, vol. 22, p. 1127.

**2. Interference by Court with Discretion of Trustee** — *England.* — *Potter v. Chapman*, Ambli. 98; *In re Hodges*, 7 Ch. D. 754, 47 L. J. Ch. 335; *In re Roper*, 11 Ch. D. 272; *Collins v. Vining*, Coop. Pr. Cas. 472; *Talbot v. Marsh-*

*field*, 2 Drew. & Sm. 285; *Costobadie v. Costobadie*, 6 Hare 410, 11 Jur. 345; *Douglas v. Andrews*, 3 Jur. 949; *Tabor v. Brooks*, 10 Ch. D. 273, 48 L. J. Ch. 130; *Camden v. Murray*, 16 Ch. D. 161, 50 L. J. Ch. 282; *In re Loft-house*, 29 Ch. D. 921, 54 L. J. Ch. 1087; *In re Courtier*, 34 Ch. D. 136, 56 L. J. Ch. 350; *In re Bryant*, (1894) 1 Ch. 324, 63 L. J. Ch. 197; *In re Wilkes*, 3 Macn. & G. 440; *Kekewich v. Marker*, 3 Macn. & G. 311; *Pink v. De Thuissey*, 2 Madd. 157; *French v. Davidson*, 3 Madd. 396; *Walker v. Walker*, 5 Madd. 424; *Wain v. Egmont*, 3 Myl. & K. 445; *Livesey v. Harding*, Tamlyn 460; *Kemp v. Kemp*, 5 Ves. Jr. 849; *Clarke v. Parker*, 19 Ves. Jr. 1. See also *Byam v. Byam*, 19 Beav. 58, 1 Jur. N. S. 79; *Warburton v. Warburton*, 4 Bro. P. C. (Toml. ed.) 1; *Mullick v. Mullick*, 1 Knapp 245; *Brophy v. Bellamy*, L. R. 8 Ch. 798, 43 L. J. Ch. 183; *Longmore v. Elcum*, 2 Y. & C. Ch. 363, 12 L. J. Ch. 469; *Stephens v. Lawry*, 2 Y. & C. Ch. 87.

*Canada.* — *Hospital for Sick Children v. Chute*, 3 Ont. L. Rep. 590; *In re Parker*, 20 Grant Ch. (U. C.) 389. See also *Coy v. Coy*, 25 Grant Ch. (U. C.) 267.

*United States.* — *Wormley v. Wormley*, 8 Wheat. (U. S.) 421; *Bound v. South Carolina R. Co.*, 50 Fed. Rep. 853; *Colton v. Colton*, 127 U. S. 300.

*Alabama.* — *McDonald v. McDonald*, 92 Ala. 537; *Moses v. Micou*, 79 Ala. 564; *Taylor v. Harwell*, 65 Ala. 1. See also *Creamer v. Holbrook*, 99 Ala. 52.

*California.* — *Hallinan v. Hearst*, 133 Cal. 645.

*Connecticut.* — *Smith v. Wildman*, 37 Conn. 384.

*Illinois.* — *French v. Northern Trust Co.*, 197 Ill. 30; *Mannhardt v. Illinois Staats Zeitung Co.*, 90 Ill. App. 315.

*Kentucky.* — *Cromie v. Bull*, 81 Ky. 646. See also *Chambers v. Baptist Educational Soc.*, 1 B. Mon. (Ky.) 215.

*Maine.* — *Morton v. Southgate*, 28 Me. 41.

*Maryland.* — *Pole v. Pietsch*, 61 Md. 570.

*Massachusetts.* — *Atty.-Gen. v. Butler*, 123 Mass. 304.

*Michigan.* — *Hathaway v. New Baltimore, etc.*, School Dist., 48 Mich. 251.

*Missouri.* — *Ames v. Scudder*, 11 Mo. App. 168.

*New Hampshire.* — *Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333; *Portsmouth v. Shackford*, 46 N. H. 423; *Adams Female Academy v. Adams*, 65 N. H. 225.

*New Jersey.* — *Holcomb v. Holcomb*, 11 N. J. Eq. 281; *Read v. Patterson*, 44 N. J. Eq. 211, 6 Am. St. Rep. 877.

*New York.* — *Ireland v. Ireland*, 84 N. Y. 321; *Holden v. Strong*, 116 N. Y. 471; *Bryan v. Knickerbacker*, 1 Barb. Ch. (N. Y.) 409; *Collister v. Fassitt*, 7 N. Y. App. Div. 20; *Hancox v. Wall*, 28 Hun (N. Y.) 214; *Merritt v. Corlies*, 71 Hun (N. Y.) 612; *Banning v. Gunn*, 4 Dem. (N. Y.) 337; *Forman v. Whit-*

over, equity will always so control a trustee that he shall not disappoint the true intent and purpose of the donor, as gathered from the instrument containing the power.<sup>1</sup> Thus, the court will see to it that a power coupled with a trust is exercised, though it will not interfere with the time or manner of its exercise.<sup>2</sup>

**Court May Authorize Trustees to Act in Emergency.** — As a rule, the court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts not authorized by the terms of the trust instrument. But in the case of an emergency, not foreseen or anticipated by the author of the trust, and where the consent of all the beneficiaries cannot be obtained, the court will sanction on behalf of all concerned the contemplated acts of trustees which under ordinary circumstances they would have no power to perform.<sup>3</sup>

**f. POWER TO SELL, LEASE, OR MORTGAGE TRUST PROPERTY** — (1) *Power to Sell* — (a) *In General.* — A trustee has no power to sell the trust property, in the absence of authority from the court, unless such power be conferred on him expressly or by necessary implication in the instrument creating the trust.<sup>4</sup> A trustee may, however, convey any interest which he

ney, 2 Keyes (N. Y.) 165; *Mason v. Jones*, 4 Sandf. Ch. (N. Y.) 623; *Riley's Estate*, (Surrogate Ct.) 4 Misc. (N. Y.) 338; *Jones v. Jones*, (Supm. Ct. Spec. T.) 8 Misc. (N. Y.) 660; *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272; *Matter of Stevens*, (Surrogate Ct.) 20 Misc. (N. Y.) 157.

*North Carolina.* — *Albright v. Albright*, 91 N. Car. 220; *Young v. Young*, 97 N. Car. 132.

*Pennsylvania.* — *Pulpress v. African M. E. Church*, 48 Pa. St. 204; *Beaumont's Estate*, 195 Pa. St. 1; *Geiger's Estate*, 9 Pa. Dist. 457; *Lafferty's Estate*, 20 Pa. Co. Ct. 632; *Chandler v. Gardner*, 2 Pa. Co. Ct. 407.

*Vermont.* — *Bacon v. Bacon*, 55 Vt. 243.

*Virginia.* — *Cochran v. Paris*, 11 Gratt. (Va.) 348; *Dillard v. Dillard*, 97 Va. 434; *National Valley Bank v. Hancock*, 100 Va. 101, 93 Am. St. Rep. 933; *Dillard v. Dillard*, (Va. 1895) 21 S. E. Rep. 669; *Faulkner v. Davis*, 18 Gratt. (Va.) 651, 98 Am. Dec. 698; *Payne v. Morris*, (Va. 1888) 5 S. E. Rep. 568.

**Where the Discretion Is to Be Exercised on Matters of Fact**, the court may substitute a master. *Walker v. Walker*, 5 Madd. 424.

**Though the Trustees Petition the Court for authority to do a certain act**, the court will not interfere when the matter is entirely subject to the control, judgment, and discretion of the trustees. *Allison's Estate*, 11 Pa. Co. Ct. 18.

**1. Intent of Donor to Be Carried Out.** — *Eland v. Baker*, 29 Beav. 137, 7 Jur. N. S. 956; *Cowley v. Hartstonge*, 1 Dow. 361; *Tempest v. Camoys*, 21 Ch. D. 576; *Bullock v. Bullock*, 11 Jur. N. S. 29; *Kingsman v. Kingsman*, 2 Vern. 559; *Williams's Appeal*, 73 Pa. St. 249; *Bacon v. Bacon*, 55 Vt. 243.

**Court Cannot Change Purpose of Trust Expressly Declared.** — *Price v. M. E. Church*, 4 Ohio 547.

**2. Enforcement of Power Coupled with Trust.** — *Tempest v. Camoys*, 21 Ch. D. 571, 51 L. J. Ch. 785; *In re Blake*, 29 Ch. D. 913; *Saul v. Pattinson*, 55 L. J. Ch. 831; *Weller v. Ker*, L. R. 1 H. L. Sc. 11; *In re Burrage*, 62 L. T. N. S. 752; *Colton v. Colton*, 127 U. S. 300; *Collins v. Serverson*, 2 Del. Ch. 324; *French v. Northern Trust Co.*, 197 Ill. 30; *Read v. Paterson*, 44 N. J. Eq. 211, 6 Am. St. Rep. 877; *Plummer v. Gibson*, 59 N. J. Eq. 68; *Clark v.*

*Keefer*, 29 Ont. 557. See also *Biggs v. Peacock*, 22 Ch. D. 284.

**A Feme Covert Trustee** may be compelled by the court to execute her trust. *Moore v. Cottingham*, 90 Ind. 239; *Dundas v. Biddle*, 2 Pa. St. 160. See also *Avery v. Griffin*, L. R. 6 Eq. 606.

**3. In re New**, (1901) 2 Ch. 534, in which case the court allowed trustees to concur in a shareholders' scheme for the reconstruction of a limited company. See also *Curtiss v. Brown*, 29 Ill. 201; *Voris v. Sloan*, 68 Ill. 588; *Hale v. Hale*, 146 Ill. 227. And see *Marsh v. Reed*, 64 Ill. App. 525, affirmed 184 Ill. 263, in which case was upheld the power of the court to authorize the trustee to lease the estate for a term of ninety-nine years, notwithstanding a provision contained in the will that no lease should be for a longer term than ten years.

**The Duty of the Court** in dealing with a trust is to observe and carry out the purposes and plans of the donor, unless the preservation of the subject-matter of the trust, or some other like necessity, demands interference with his will and intention. *Johns v. Johns*, 172 Ill. 472.

**Anticipation of Payment.** — A court of chancery has power, in a proper case, to order a trustee to anticipate the time of payment, under a will, so far as it may be shown to be necessary for the maintenance of the devisees. *Rhoads v. Rhoads*, 43 Ill. 239.

See also *infra*, this section, *Administration of Trust by Court*.

**4. No Power to Sell Unless Given by Instrument** — *England.* — *Sheffield v. Orrery*, 3 Atk. 287; *In re Head*, 45 Ch. D. 310; *In re Holloway*, 60 L. T. N. S. 46.

*Canada.* — *Raphael v. McFarlane*, 18 Can. Sup. Ct. 183.

*United States.* — *Jaudon v. National City Bank*, 8 Blatchf. (U. S.) 430.

*Alabama.* — *Foscue v. Lyon*, 55 Ala. 440.

*California.* — *Goad v. Montgomery*, 119 Cal. 552, 63 Am. St. Rep. 145.

*District of Columbia.* — *Johns v. Herbert*, 2 App. Cas. (D. C.) 485.

*Georgia.* — *Hufbauer v. Jackson*, 91 Ga. 208.

*Michigan.* — *Potter v. Ranlett*, 116 Mich. 454.



may have individually in the subject-matter of the trust; such a conveyance not being regarded as a contravention of the trust.<sup>1</sup>

**Specific Performance of an Agreement to Sell** trust property will not be decreed where the trustee's power to sell is doubtful,<sup>2</sup> or where the sale involves a breach of trust.<sup>3</sup>

**Unauthorized Sale Passes Legal Title.** — Where a trustee is clothed with the legal title and not restrained by the terms of the trust, a conveyance by him, although in violation of the trust, carries the legal title, and the beneficiaries must seek their remedy in equity.<sup>4</sup>

*New York.* — *Cuthbert v. Chauvet*, 136 N. Y. 326; *Priessenger v. Sharp*, 59 N. Y. Super. Ct. 315. See also *Clapp v. Byrnes*, 3 N. Y. App. Div. 284; *Cass v. Cass*, 15 N. Y. App. Div. 235.

*North Carolina.* — *Maxwell v. Barringer*, 110 N. Car. 76, 28 Am. St. Rep. 668.

*Pennsylvania.* — *Nauman v. Weidman*, 182 Pa. St. 263; *Caldwell's Appeal*, (Pa. 1886) 7 Atl. Rep. 211; *Cotton's Estate*, 21 Pa. Co. Ct. 451.

*Rhode Island.* — *Thurston v. Thurston*, 6 R. I. 296. See also *Goddard v. Brown*, 12 R. I. 31.

*South Carolina.* — *Thompson v. Peake*, 38 S. Car. 440. And see *Sullivan v. Latimer*, 35 S. Car. 422.

*Texas.* — *Blanton v. Mayes*, 58 Tex. 422. See also *Brown v. Harris*, 7 Tex. Civ. App. 664.

*Virginia.* — *Mundy v. Vawter*, 3 Gratt. (Va.) 494; *Brown v. Lambert*, 33 Gratt. (Va.) 256.

As to when a power of sale will be implied, see *infra*, this subsection, *f. 1. (c) Implied Power.*

As to the power to sell under deeds of trust given to secure debts, see the title TRUST DEEDS AND POWER OF SALE MORTGAGES, *ante*, p. 743.

As to the power of executors and administrators to sell the land of a decedent, see the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1040.

In *O'Connor v. Waldo*, 83 Hun (N. Y.) 489, *affirmed* (N. Y. 1899) 52 N. E. Rep. 1125, the court said: "A trustee has no general power of disposition of a trust estate, but must derive such power from the instrument creating the trust, or in special circumstances it has been held that such power might be implied."

**Nothing That Amounts to an Alienation** can be done by the trustee where the instrument gives him no power of sale. Thus he cannot stipulate for the entry of a judgment which would practically amount to an alienation of the estate. *Cuthbert v. Chauvet*, 136 N. Y. 326.

**Charitable Trust.** — An alienation of the trust estate by the trustee of a charitable trust, he being given no power to sell by the trust instrument, is a breach of trust. *Beckwith v. St. Philip's Parish*, 69 Ga. 564; *Pierce v. Weaver*, 65 Tex. 44.

**A Trustee to Manage Lands for the Sole Use and Benefit of a Woman**, has no power to convey to another, by means of a submission and award, the right for a series of years to enter upon her land and cut down the timber thereon and carry it away. Such a right would be an interest in the lands, which such a trustee cannot create by means of a submission and award not

assented to by the *cestui que trust*. *Thomas v. James*, 32 Ala. 723.

**1. Trustee May Convey His Own Interest.** — *Tripp v. Duane*, (Cal. 1887) 13 Pac. Rep. 860.

**Estate Charged with Money in Trust.** — A trustee of a sum of money charged on land who is also owner of the land subject to the charge may sell any portion thereof discharged from the trust provided he reserves a portion sufficient to answer the charge. *Grundy v. Heathcote*, 1 Hem. & M. 172.

**2. No Specific Performance if Power Doubtful.** — *Brewster v. Angell*, 1 Jac. & W. 605; *Horne v. Barton*, Jac. 437; *Crewe v. Dicken*, 4 Ves. Jr. 97; *Wheate v. Hall*, 17 Ves. Jr. 80; *Paget v. Melcher*, 42 N. Y. App. Div. 76.

**3. Sale Involving Breach of Trust.** — *Wood v. Richardson*, 4 Beav. 174; *Maw v. Topham*, 19 Beav. 576; *Ord v. Noel*, 5 Madd. 438; *Turner v. Harvey*, Jac. 178; *Dunn v. Flood*, 25 Ch. D. 639, 53 L. J. Ch. 537; *Tolson v. Sheard*, 5 Ch. D. 19, 46 L. J. Ch. 815; *Dance v. Goldingham*, L. R. 8 Ch. 902, 42 L. J. Ch. 777.

**An Agreement Entered into under Mistake** by the trustees to sell for an inadequate consideration will not be specifically enforced. *Bridger v. Rice*, 1 Jac. & W. 74.

**4. Sale Passes Legal Title.** — *Doe v. Gilbert*, 6 N. Bruns. 520; *Campbell v. Equitable Securities Co.*, 12 Colo. App. 544; *McBrayer v. Cariker*, 64 Ala. 50; *Robinson v. Pierce*, 118 Ala. 273, 72 Am. St. Rep. 160; *Amberson v. Johnson*, 127 Ala. 490; *Taft v. Decker*, 182 Mass. 106; *Hannibal, etc., R. Co. v. Green*, 68 Mo. 169; *Lindley v. O'Reilly*, 50 N. J. L. 636, 7 Am. St. Rep. 802; *Holly v. Hirsch*, 135 N. Y. 590; *Creighton v. Pringle*, 3 S. Car. 77.

**New York — Sale Declared Void by Statute.** — *Laws N. Y.*, 1886, c. 257, amending Rev. Stat. N. Y., part 2, art. 2, tit. 2, c. 1, § 65. See *Cuthbert v. Chauvet*, 136 N. Y. 326; *Priessenger v. Sharp*, 59 N. Y. Super. Ct. 315.

**Only the Cestuis Que Trustent** whose interests are prejudiced by the conveyance can seek relief in equity. *Lindley v. O'Reilly*, 50 N. J. L. 636, 7 Am. St. Rep. 802.

**Relief Barred by Laches.** — The right of action of one injured by a conveyance in violation of a trust accrues at the time the conveyance is executed, and a failure to proceed for forty years thereafter constitutes such laches as will bar equitable relief. *Robinson v. Pierce*, 118 Ala. 273, 72 Am. St. Rep. 160.

**Where the Legal Title Is Not in the Trustee** his conveyance has no validity either at law or in equity — as where the trust estate has expired and the legal and equitable titles have united in the *cestui que trust*. *McBrayer v. Cariker*, 64 Ala. 50. Or where the trustee is

**Sale by Consent of Beneficiaries.** — Where the instrument does not expressly forbid a sale and contains no limitation over, a sale with the consent of all the beneficiaries may be valid, where such beneficiaries are all *sui juris*.<sup>1</sup>

**Sale Authorized by Legislature.** — The legislature may authorize a trustee to sell the trust property.<sup>2</sup>

**Power of Court to Order Sale.** — Where the trust instrument gives the trustee no power to sell, a court of equity will not ordinarily, in the absence of statutory authority, contravene the evident intention of the grantor by ordering a sale.<sup>3</sup> But sometimes, in cases of urgent necessity and in order to preserve the subject-matter of the trust, a sale will be ordered.<sup>4</sup> Before a sale will be

the holder of a dry, naked trust. *Huntington v. Spear*, 131 Ala. 414; *McCreary v. Bomberger*, 11 Pa. Co. Ct. 68.

1. **Sale by Consent of Beneficiaries.** — *Arrington v. Cherry*, 10 Ga. 429; *Dykes v. McVay*, 67 Ga. 502; *Guthrie v. Tullock*, 5 Wash. 283. See also *Witter v. McCarthy Co.*, (Cal. 1896) 43 Pac. Rep. 969.

2. **Legislature May Authorize Sale.** — *Williamson v. Suydam*, 6 Wall. (U. S.) 723; *Littell v. Wallace*, 80 Ky. 252; *Clarke v. Hayes*, 9 Gray (Mass.) 426; *Leggett v. Hunter*, 19 N. Y. 445; *Welch v. Silliman*, 2 Hill (N. Y.) 491; *Kerr v. Kitchen*, 17 Pa. St. 433. See also *Matter of Bull*, 45 Barb. (N. Y.) 334; *Martin's Appeal*, 23 Pa. St. 433; *Barr v. Weld*, 24 Pa. St. 84.

3. **Equity Will Usually Not Order Sale.** — *Carlyon v. Truscott*, L. R. 20 Eq. 348, 44 L. J. Ch. 186; *Burroughs v. Gaither*, 66 Md. 171; *Troy v. Troy*, Busb. Eq. (45 N. Car.) 85.

In *Johns v. Johns*, 172 Ill. 472, the court said: "The duty of the court in dealing with such a trust is to observe and carry out the purposes and plans of the donor, unless the preservation of the subject-matter of the trust, or some other like necessity, demands interference with his will and intention."

4. **May Order Sale in Case of Urgent Necessity.** — *Curtiss v. Brown*, 29 Ill. 201; *Voris v. Sloan*, 68 Ill. 588; *Dodge v. Coe*, 97 Ill. 338, 37 Am. Rep. 111; *Longwith v. Riggs*, 123 Ill. 258; *Hall v. Hall*, 146 Ill. 227; *Gavin v. Curtin*, 171 Ill. 640; *Mayall v. Mayall*, 63 Minn. 511; *Weld v. Weld*, 23 R. I. 311; *Ruggles v. Tyson*, 104 Wis. 500. See also *Ansley v. Pace*, 68 Ga. 402; *Oliver v. Oliver*, 179 Ill. 9.

**New York.** — *Power Not Limited by Statute.* — 1 Rev. Stat. N. Y. 730, § 65, declaring that conveyances in violation of the trust are void, was not a limitation upon the inherent powers of equity to order sales, but merely a restriction upon the trustee. *Anderson v. Mather*, 44 N. Y. 249.

**Where the Necessity for the Trust Ceases to Exist** a sale may be ordered if all the interested parties are before the court and a sale will be beneficial to them. *Browning v. Ficklin*, (Ky. 1889) 12 S. W. Rep. 714.

**Authority by Statute to Order Sales.** — *Kentucky.* — Under Code Civ. Pro. Ky., § 498, a sale may be ordered if beneficial to all the parties concerned. *Burge v. Fidelity Trust Co.*, 112 Ky. 683; *Robinson v. Fidelity Trust, etc., Co.*, (Ky. 1880) 11 S. W. Rep. 806.

*Maryland.* — Code Md., art. 16, § 108, authorizing courts of equity to order a sale under certain circumstances, does not authorize a decree where it is possible that contingent re-

maindermen, yet unborn, may become entitled to the property. *Ball v. Safe Deposit, etc., Co.*, 92 Md. 503.

*Massachusetts.* — Gen. Stat. Mass., c. 100, § 16, gives the court power to order a sale when "necessary or expedient." This does not give the court discretionary power to act in entire disregard of the objects of the trust; and where it is uncertain whether the interests of the beneficiaries would be promoted by a sale, the decree will not be granted. *Davis, Petitioner*, 14 Allen (Mass.) 24.

*New York.* — Laws N. Y. 1886, c. 257, authorized the court to order the sale or mortgage of trust property "whenever it shall appear to the satisfaction of the court \* \* \* that it is for the best interest of said estate so to do, and that it is necessary and for the benefit of the estate to raise by mortgage thereon, or by a sale thereof, funds for the purpose of preserving or improving such estate." Under this statute a sale may be ordered though the trust estate is contingent. *Matter of Asch*, 75 N. Y. App. Div. 486. But to authorize an order, the case must be one within the contemplation of the statute. It is not enough that the sale is advisable; it must be necessary and for the best interests of the estate. *Matter of Roe*, 119 N. Y. 509, *affirming* 53 Hun (N. Y.) 433; *Matter of Mills*, 28 N. Y. App. Div. 258, *affirming* (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 629. Notice of the application must be served on the "beneficiary or beneficiaries" as directed by statute. *Duffy v. Durant Land Imp. Co.*, 78 Hun (N. Y.) 314.

*Pennsylvania.* — Under Act Pa. April 18, 1853, a sale may be ordered by the court when "for the interest and advantage of all interested in the property" although the instrument gives the trustee no authority to sell, or expressly prohibits a sale. *Brock v. Pennsylvania Steel Co.*, 203 Pa. St. 249; *Phillips's Estate*, 10 Pa. Dist. 99. And the fact that a conditional power of sale is given in the instrument does not deprive the court of power to order a sale in a proper case, although outside such conditions. *Phillips's Estate*, 7 Pa. Dist. 422. The court may order a private sale if the circumstances warrant it. *Moorhead v. Wolff*, 123 Pa. St. 365. The decree need not contain a formal finding of the essential facts justifying a sale. *Brock v. Pennsylvania Steel Co.*, 203 Pa. St. 249.

*Rhode Island.* — Under a statute giving the court power to order a sale where the *cestui que trust* is an infant, the court cannot order a sale if the *cestui que trust* is *sui juris*. *Thurston v. Thurston*, 6 R. I. 296.



ordered in any case all the persons interested in the estate, or their legal representatives, must be before the court.<sup>1</sup>

(b) **Express Power** — *aa. IN GENERAL.* — Power to sell the trust property may be expressly conferred by the instrument creating the trust,<sup>2</sup> and, when so given, a conveyance by the trustee in accordance with the power passes a good title.<sup>3</sup>

**Must Act as Trustee.** — The power of sale must be exercised by the trustee as such,<sup>4</sup> but if the body of a deed shows that the grantor conveyed in the

**Ratification of Sale by Trustee.** — Where the circumstances are such that the court would, if applied to, have authorized a sale under its statutory power, it will ratify a sale made by the trustee without application to the court. *Lenow v. Arrington*, (Tenn. 1902) 69 S. W. Rep. 314. See also *supra*, this subsection, *a.* (2) (d) **Power to Do What Court Would Order.**

**1. All Interests Must Be Before the Court.** — See *East Rome Town Co. v. Cothran*, 81 Ga. 359; *Lamar v. Pearre*, 82 Ga. 354, 14 Am. St. Rep. 186; *Shields v. Hinkle*, (Ky. 1897) 43 S. W. Rep. 485; *Bush v. Bush*, 2 Duv. (Ky.) 269; *Sloan v. Safe Deposit, etc., Co.*, 73 Md. 239; *Speed v. Smith*, 4 Md. Ch. 299; *Correll v. Lauterbach*, 12 N. Y. App. Div. 531, *affirmed* 159 N. Y. 553; *Matter of Turner*, 10 Barb. (N. Y.) 552; *Smith v. Smith*, 118 N. Car. 735; *Greene v. Aborn*, 10 R. I. 10; *Lyman's Petition*, 11 R. I. 157; *Williams v. Holmes*, 4 Rich. Eq. (S. Car.) 475.

**2. Express Power to Sell.** — For instruments held to confer such power, see *Minors v. Battison*, 1 App. Cas. 428, 46 L. J. Ch. 2; *Fisher v. Fairbank*, 188 Ill. 187; *McCleary v. Chipman*, (Ind. App. 1903) 68 N. E. Rep. 320; *Neilson's Appeal*, (Pa. 1888) 13 Atl. Rep. 943; *Whately v. Oglesby*, (Tex. Civ. App. 1898) 44 S. W. Rep. 44; *Kable v. Stone*, 95 Tex. 106.

**Alternative Powers.** — Trustees were given a power of sale to raise a portion for A, one of the testator's children, and in order to avoid a sale were authorized, if they should think fit, to ascertain the amount of A's share by valuation of the whole estate. It was held that they had power to sell in their discretion if they did not think fit to proceed by way of valuation. *Bird v. Fox*, 11 Hare 40.

**Disclaimer — Exercise of Power by the Court.** — Where trustees having a power of sale disclaim, the court can exercise the discretion of the trustees and sell if necessary. *Browne v. Paull*, 16 Jur. 707.

**What Not a Renunciation of Power.** — Where the same person was, by will, appointed executor and trustee, it was held that a renunciation by him of the office of executor did not take away a power of sale given him as trustee. *Clark v. Tainter*, 7 Cush. (Mass.) 567.

**Revocation.** — A power of sale given by will may be revoked by a codicil devoting the property to a different purpose. *Bridger v. Rice*, 1 Jac. & W. 74.

**Passive Trust Executed by Statute.** — Where, by statute, a formal, passive trust is executed by vesting the title in the beneficiaries, a power of sale conferred on the trustee by the trust instrument continues as a valid power. *Syracuse Sav. Bank v. Holden*, 105 N. Y. 415.

**Where Trust Void, Power Void.** — Where the trust is void, because suspending the power of

alienation, a power of sale conferred on the trustee is also void. *Penfield v. Tower*, 1 N. Dak. 216.

**Evidence of Power.** — A power to sell is not sufficiently proven by a mere recital in the trustee's deed that it was executed under such a power. The instrument conferring the power must be put in evidence. *Hershy v. Berman*, 45 Ark. 309.

**3. Valid Exercise of Power Passes Title.** — *In re Dyson*, (1896) 2 Ch. 720; *Taylor v. Kleier*, (Ky. 1894) 26 S. W. Rep. 3; *Belmont v. O'Brien*, 12 N. Y. 394.

**Beneficiary Cannot Interfere with Power.** — *Vanderveer v. Conover*, 40 N. J. Eq. 161; *Leggett v. Dubois*, 5 Paige (N. Y.) 114, 28 Am. Dec. 413.

**Beneficiaries Need Not Join in Conveyance.** — *Rutland v. Wakeman*, 8 Bro. P. C. (Toml. ed.) 145; *Norvell v. Hedrick*, 21 W. Va. 523.

**Necessity of Deed to Pass Title.** — When a trustee appointed by the court sells land and the sale is ratified and the purchase money received, if the purchaser dies thereafter the legal estate does not vest in his heir at law without a deed from the trustee. *Massey v. Massey*, 4 Har. & J. (Md.) 141.

**Deed Need Not Refer to Power.** — *Gindrat v. Montgomery Gas-Light Co.*, 82 Ala. 596, 60 Am. Rep. 769; *Terry v. Rodahan*, 79 Ga. 278, 11 Am. St. Rep. 420. See also *Hamilton v. Crosby*, 32 Conn. 342. And see the title **POWERS**, vol. 22, p. 1112.

**Deed Must Show Compliance with Statute.** — Where it was provided by statute that the property should not be sold for less than two-thirds of its appraised value, but that if so much could not be realized, then, after a certain time, it might be sold to the highest bidder, it was held that the trustee's deed must show compliance with the statute. *Muense v. Harper*, 70 Ark. 309.

**Conveyance by Two Deeds.** — Where a purchaser at a trustee's sale, supposing that a part only of a certain tract had been sold, took a deed to that part only, although the whole tract had been put up, it was held that the trustee could, on discovery of the mistake, convey the remainder by another deed. *O'Day v. Vansant*, 3 Mackey (D. C.) 196.

**When Trustee's Report Conclusive.** — Where a trustee is appointed by the court to sell property, his report, when ratified by the court, is conclusive of the terms of sale, unless fraud or mistake be shown. *Brown v. Wallace*, 2 Bland (Md.) 585.

**4. Must Act as Trustee.** — *Brooks v. Terry*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 238. Compare *Terry v. Rodahan*, 79 Ga. 278, 11 Am. St. Rep. 420.



capacity of trustee, the omission of the word "trustee" after his signature is not material.<sup>1</sup>

**The Trustee Cannot Delegate** his power of sale to another.<sup>2</sup>

**Right of Successors to Exercise Power.** — A special discretionary power of sale will not devolve upon a new trustee appointed by the court.<sup>3</sup> But where the power is merely incidental to the trusteeship it will pass to the trustee's successor.<sup>4</sup> Where, on the death of a trustee with power to sell, the legal estate passes to his heirs or personal representatives, the power of sale also passes to them.<sup>5</sup>

**Cotrustees — Exercise of Power by Survivor.** — On the death of one of several trustees with power to sell, the survivors may execute the power.<sup>6</sup>

*bb. DISCRETIONARY POWER.* — Where a trustee is given a discretionary power of sale, this does not give him arbitrary and unqualified authority to sell whenever and in whatever manner he may please, or to refuse to sell at all. He is to exercise, not his will, but his judgment, and must use the discretion vested in him fairly and honestly and for the best interests of the trust.<sup>7</sup> The power is given for the purposes of the trust, and when occasion demands a sale for such purposes it is the trustee's duty to sell.<sup>8</sup>

*cc. LIMITED POWER — CONSENT — REQUEST.* — Where an express power of sale is conditional, as where its exercise is made to depend upon the request or

**1. Omission of Word "Trustee" Immaterial.** — *Bogess v. Scott*, 48 W. Va. 316. See also *Renner v. Marshall*, (Tenn. Ch. 1900) 58 S. W. Rep. 863.

**Sufficient Showing of Fiduciary Character.** — Where a trustee had also a beneficial interest in the subject-matter of the trust, it was held that a deed by him, describing himself as trustee and designating the land conveyed was sufficient to show that he was acting as trustee, and did not merely intend to convey his beneficial interest. *Hannibal, etc., R. Co. v. Green*, 68 Mo. 169.

**2. Cannot Delegate Power of Sale.** — *Bohlen's Estate*, 75 Pa. St. 304. And see *supra*, this subsection, *Delegation of Powers*, and the title *POWERS*, vol. 22, p. 1105.

**3. When Power Will Not Devolve upon New Trustee.** — *Bailey v. Burges*, 10 R. I. 422. See also *supra*, this subsection, *Powers of Succeeding and Surviving Trustees*, and the title *POWERS*, vol. 22, p. 1103.

**4. Power Passes to Successor.** — *Lahey v. Kortright*, 56 N. Y. Super. Ct. 527; *Myers v. McCullagh*, 63 N. Y. App. Div. 321. And see *Drayson v. Pocock*, 4 Sim. 283.

**Effect of Failure to Convey to Successor.** — Where a trustee with a power of sale was authorized by the instrument to resign and power was given to a beneficiary to appoint a successor, a successor so appointed has power to convey, although the resigning trustee has failed to convey the trust property to him. *Stearns v. Fraleigh*, 39 Fla. 603.

**Must Be Properly Appointed.** — Where the instrument gives authority "by deed duly executed" to appoint other trustees who should by such deed be vested with power to execute the trust, the succeeding trustees cannot convey unless appointed by "deed duly executed." *Bungarner v. Cogswell*, 49 Mo. 259.

**5. Sale by Trustee's Heirs.** — *Anderson v. Mather*, 44 N. Y. 249.

**Sale by Executor.** — *In re Pixton*, 46 W. R. 187.

**6. Survivors May Execute Power.** — *Saunders v. Schmaelzle*, 49 Cal. 59; *Belmont v. O'Brien*, 12 N. Y. 394; *Hunter v. Anderson*, 152 Pa. St. 386. See also *supra*, this subsection, *Powers of Joint Trustees*, and generally the title *POWERS*, vol. 22, pp. 1101, 1102.

**Although the Survivor Be a Beneficiary** he may execute the power of sale. *Rankine v. Metzger*, 69 N. Y. App. Div. 264, *affirmed* 174 N. Y. 540.

**7. Extent of Discretion — Not Absolute.** — *Newman v. Sinclair*, 81 L. T. N. S. 421; *Wormley v. Wormley*, 8 Wheat. (U. S.) 421, *affirming* 1 Brock. (U. S.) 330; *Kintner v. Jones*, 122 Ind. 148; *Gould v. Chappell*, 42 Md. 466, wherein it was said that, if the trustee does not use such care and prudence in making the sale as a prudent owner would exercise in regard to his own property, equity will not ratify the sale.

In *Noel v. Henley*, 7 Price 242, a power to trustees to sell at such times after the testator's death "as should seem most advisable" was held to mean "with all convenient speed." And see *CONVENIENT*, vol. 7, p. 460, note.

In *Taylor v. Tabrum*, 6 Sim. 281, trustees who were directed to sell as soon as convenient after the testator's death were held liable for the loss where, after refusing an offer of 6,600 pounds for the property, they sold it for 3,600 pounds. See also *Hanchett v. Smith*, 1 L. J. Ch. 218.

**8. Duty to Sell.** — *Nickisson v. Cockill*, 9 Jur. N. S. 975. 32 L. J. Ch. 753. 2 New Reports 557, wherein the trustees were given power, if they should consider it advisable, to sell as they should think proper.

In *Hull v. Holloway*, 58 Conn. 210, the trustee was given power, with the consent of A, to sell the land. It appearing that a sale would be advantageous to the beneficiaries, and A having given his consent, the trustee brought an action to ascertain his duty under the will. The court held it to be his duty to sell and hold the proceeds for the purposes of the trust.

consent of a third person, the trustee cannot make a valid sale without observing the condition;<sup>1</sup> and equity cannot remedy the defective execution of the power in a suit by the purchaser for specific performance,<sup>2</sup> nor will it enjoin the dispossession of the purchaser in order to decree specific performance.<sup>3</sup>

Where a Request or Consent in Writing Is Required such condition cannot be waived or subsequently ratified by the person authorized to make the request or consent,<sup>4</sup> and neither his parol consent nor his conduct and acquiescence will be considered sufficient unless such conduct can be held to have created an estoppel.<sup>5</sup>

The Person or Persons Whose Request or Consent will authorize a sale must be determined from the instrument.<sup>6</sup>

**1. Request or Consent Necessary.**—*In re Beddingfield*, (1893) 2 Ch. 332; *Berrien v. Thomas*, 65 Ga. 61; *Loring v. Salisbury Mills*, 125 Mass. 138; *O'Connor v. Waldo*, 83 Hun (N. Y.) 489, *affirmed* (N. Y. 1899) 52 N. E. Rep. 1125; *Suarez v. De Montigny*, (Supm. Ct. Spec. T.) 12 Misc. (N. Y.) 259; *Correll v. Lauterbach*, (Supm. Ct. Spec. T.) 14 Misc. (N. Y.) 469; *Clemens v. Heckscher*, 185 Pa. St. 476; *Creighton v. Pringle*, 3 S. Car. 77. And see the title POWERS, vol. 22, p. 1121.

**Sale on Proper Request Passes Good Title.**—*Headen v. Quillian*, 92 Ga. 220; *Pyron v. Mood*, 2 McMull. L. (S. Car.) 281.

**Performance of Condition Essential to Making Good Title.**—Where lands were devised in trust for the payment of the testator's debts generally, with a direction that his estate at A should first be sold, and, if that were not sufficient, then his estate at B, it was held that a good title could not be made to the estate at B, unless the vendors showed clearly that the produce arising from the sale of A would be insufficient for the purpose of the trust. *Pierce v. Scott*, 1 Y. & C. Exch. 257.

**Failure to Observe a Condition** attached to a power of sale will invalidate the sale as to a purchaser chargeable with notice of the extent of the power. *Sears v. Livermore*, 17 Iowa 297, 85 Am. Dec. 564.

But compare *Minuse v. Cox*, 5 Johns. Ch. (N. Y.) 441, 9 Am. Dec. 313, wherein a failure by the trustee to give public notice of the sale, as required by the trust deed, was held not to invalidate the sale, the remedy, if any, being against the trustee for the loss occasioned by his neglect.

**Condition Not Applying to Personalty.**—A trust of real and personal property containing a power, "with the consent in writing" of the beneficiary, "to dispose of the whole or any part of the said real estate and other property hereinbefore mentioned and to substitute other property, real or personal, in the stead thereof," did not make the beneficiary's written consent necessary to a change in the investment of the personalty. *Pearce v. Venning*, 14 Rich. Eq. (S. Car.) 84.

**Bankruptcy of the Life Tenant Whose Consent Is Necessary** to an exercise of the power of sale and an incumbrance by him of his life estate will not obviate the necessity for such consent; and in such case the concurrence of the trustee in bankruptcy and the incumbrancer of the life estate is also necessary. *In re Beddingfield*, (1893) 2 Ch. 332.

**An Alienation by the Life Tenant** of his life estate was held not to extinguish his power to request a sale, such power being exercisable with the concurrence of his alienee. *Alexander v. Mills*, L. R. 6 Ch. 124.

**Statute Authorizing Sale Without Consent.**—*In Pennsylvania*, under Act of April 18, 1853, the court may authorize a sale without the consent contemplated by the power, where such consent is "unreasonably" withheld. For a case in which the refusal to consent was held to be unreasonable, see *Freeman's Estate*, 181 Pa. St. 405, 59 Am. St. Rep. 659.

**2. Equity Cannot Remedy Defective Execution.**—*Correll v. Lauterbach*, (Supm. Ct. Spec. T.) 14 Misc. (N. Y.) 469.

**3. Will Not Enjoin Dispossession of Purchaser.**—*Berrien v. Thomas*, 65 Ga. 61.

**4. Cannot Be Waived or Ratified.**—*Suarez v. De Montigny*, (Supm. Ct. Spec. T.) 12 Misc. (N. Y.) 259.

**5. Written Consent Necessary.**—*Clemens v. Heckscher*, 185 Pa. St. 476. Compare *Rogers v. Tyley*, 144 Ill. 652.

In *Loring v. Salisbury Mills*, 125 Mass. 138, it was held that neither a direction by the beneficiary to the trustee to pledge the property for her benefit, nor her consent to a sale of another portion, nor directions in her husband's letters not shown to have been authorized by her, would entitle the trustee to pledge a portion of the trust property for his own debt, where the power of sale required the consent of the beneficiary.

**Sufficient Evidence of Consent.**—If the person whose consent is required join with the trustee in executing a deed to the property it is a sufficient consent in writing. *Gindrat v. Montgomery Gas Light Co.*, 82 Ala. 596, 60 Am. Rep. 769; *Clarke v. East Atlanta Land Co.*, 113 Ga. 21.

And where, at the same time, the purchaser received one deed from the trustee and another from the beneficiaries, whose joint written request was necessary, it was held sufficient, the instrument providing that the required request should be signified by their joining in the trustee's deed. *Franklin Sav. Bank v. Taylor*, 131 Ill. 376.

**6. "Legal and Natural Guardian."**—A request by the father of infant beneficiaries will authorize a sale under a power to sell on the request of their "legal and natural guardian." *Harris v. Petty*, 66 Tex. 514.

**Wife and Sons, if of Full Age.**—Where the power requires the consent of the grantor's

*dd.* NO APPLICATION TO COURT NECESSARY.—Where the trust instrument gives the trustee a power of sale he need not apply to a court of equity before exercising such power,<sup>1</sup> unless he is also the beneficiary.<sup>2</sup>

*ee.* POWERS INCIDENT TO POWER OF SALE.—A power of sale includes incidentally such other powers as are usual and necessary for accomplishing the purpose of the power.<sup>3</sup> Thus, it has been held that, where such course is advantageous to the estate, trustees may convey an easement in favor of lands already sold,<sup>4</sup> or dedicate a portion of the land to the public for use as a street.<sup>5</sup> But trustees cannot be allowed to dispose of the trust property under any other circumstances or in any other manner than the power contemplates.<sup>6</sup> Thus, a mere power of sale does not ordinarily include a power

wife and sons, if of full age, the consent of the wife alone is sufficient if none of the sons are of age, and if some of the sons are of age and others not, only those of age need consent. *Hamilton v. New York Stock Exch. Bldg. Co.*, 20 Hun (N. Y.) 88.

**Husband Need Not Join in Request.**—Under a power to sell at A's written request, the husband of A need not join with her in such request. *Norvell v. Hedrick*, 21 W. Va. 523.

**Life Tenant.**—Where a trust for the use of A for life, and after his death for others, authorized a sale on the written assent "of the said *cestui que trust*," A's assent alone was necessary. *Gindrat v. Montgomery Gas-Light Co.*, 82 Ala. 596, 60 Am. Rep. 769.

**Right to Sell to Tenant for Life.**—Where trustees of a settlement have a power of sale and exchange over the settled estates, to be exercised at the request or with the consent of the tenant for life, they may sell to the tenant for life just as they may to any other person. *Dicconson v. Talbot*, L. R. 6 Ch. 32, 19 W. R. 138; *Howard v. Ducane*, T. & R. 81.

**1. Application to Court Unnecessary.**—*United States*.—*Hiller v. Ladd*, 80 Fed. Rep. 794.

*Arkansas*.—*Ludlow v. Flournoy*, 34 Ark. 451.

*California*.—Matter of *Williams*, 92 Cal. 183; *Morffew v. San Francisco, etc.*, R. Co., 107 Cal. 587.

*Connecticut*.—*Beers v. Narramore*, 61 Conn. 13.

*Illinois*.—*White v. Glover*, 59 Ill. 459.

*Indiana*.—*Iles v. Martin*, 69 Ind. 114. See also *Munson v. Cole*, 98 Ind. 502.

*Kentucky*.—*O'Bannon v. Musselman*, 2 Duv. (Ky.) 523. See also *Prather v. McDowell*, 8 Bush (Ky.) 46.

*New York*.—*Pollock v. Hooley*, 67 Hun (N. Y.) 370.

*South Carolina*.—*Ex p. Greenville Academies*, 7 Rich. Eq. (S. Car.) 471.

*Texas*.—*Cooper v. Horner*, 62 Tex. 356.

**An Application to the Court** under the erroneous impression that it is necessary does not affect the trustee's power to sell independently of any court order. *Pollock v. Hooley*, 67 Hun (N. Y.) 370.

**A Chancery Decree Authorizing a Sale** will not abridge a power to sell and convey expressly given by the instrument. *White v. Glover*, 59 Ill. 459.

**2. If Beneficiary, Must Apply to Court.**—*Irving v. Irving*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 743.

**3. Includes Usual and Necessary Powers.**—*Re Peyton*, 30 Beav. 252, wherein an absolute power of sale was held to authorize the trustees to fix a reserved bidding.

**Power to Pay Off a Legacy** in order to satisfy the purchaser was held to be included in the power of sale, the trustees having acted *bona fide* for the benefit of the estate. *Forshaw v. Higginson*, 8 De G. M. & G. 827, 26 L. J. Ch. 342.

**Power to Pay for Setting Out the Lands and Making Roads** will be implied where, having regard to the purpose of the trust, such payments are necessary to bring the lands into fit condition for the market. *Cookson v. Lee*, 23 L. J. Ch. 473.

**Power to Give Receipts** to purchasers may be implied from the power to sell. *Sowarsby v. Lacy*, 4 Madd. 142; *Lavender v. Stanton*, 6 Madd. 46.

**4. May Convey Easement.**—*Valentine v. Schreiber*, 3 N. Y. App. Div. 235.

**5. Direction to Use as Street.**—Matter of *Opening Sixty-seventh St.*, (Supm. Ct. Spec. T.) 60 How. Pr. (N. Y.) 264. And see the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1042.

**6. Must Follow Power.**—*Huntt v. Townshend*, 31 Md. 336, 100 Am. Dec. 63, wherein it was held that the trustees had no power to confess a judgment binding on the property, the trust instrument having minutely and particularly prescribed the circumstances under which and the manner in which they should have authority to sell the property.

In *O'Connor v. Waldo*, 83 Hun (N. Y.) 489, affirmed (N. Y. 1899) 52 N. E. Rep. 1125, the court said: "Where there is a designation of the method in which the trust estate is to be sold, if at all, there can be no question but that the trustee cannot convey any title except in the manner provided for by the trust deed. The provision in the deed necessarily excludes all other powers."

**Authority to Settle Ejectment Suits** pending against him by agreeing to allow verdicts for the plaintiff in some and for the defendant in others is not included in the trustee's power to sell and reinvest. *Lemon v. Jennings*, 52 Ga. 452.

**No Power to Reinvest** is given by a power to sell in case the income should prove insufficient to maintain the beneficiary, except to obtain interest on such surplus proceeds as may from time to time be in the trustee's hands, till needed for the beneficiary's support. *Bailey v. Burges*, 10 R. I. 422.



to barter or exchange,<sup>1</sup> or to partition,<sup>2</sup> or to give long options,<sup>3</sup> or to contract to sell at a time certain, under a penalty binding on him personally.<sup>4</sup> And, as a general rule, a mere power to sell will not authorize a direct conveyance without a sale,<sup>5</sup> although the terms and circumstances of the trust will not infrequently render such a course proper.<sup>6</sup>

*ff. TIME WHEN POWER MAY BE EXERCISED.*—The duration of an express power of sale is a question depending for the most part upon the intention of the grantor as shown by the terms of the instrument creating the trust.<sup>7</sup> Where the arising of the right to exercise the power is limited upon a future event, the trustees cannot sell before the happening of such event.<sup>8</sup> Where the instrument provides for the termination of the trust upon the happening of a

**Power to Release Part of the Security** for a mortgage given in trust cannot be implied from a discretionary power to act in the premises as the grantor might have done and to accept part of the debt in satisfaction of the whole. *Dawes v. Betts*, 12 Jur. 709, 17 L. J. Ch. 315.

**1. Does Not Include Power to Exchange.**—*Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; *Cleveland v. State Bank*, 16 Ohio St. 236, 88 Am. Dec. 445. And see the title *POWERS*, vol. 22, p. 1156.

**An Exchange Is Authorized** under a power to transfer or otherwise dispose of the property for the best interests of the grantor's family. *Brace v. Van Eps*, 12 S. Dak. 191.

**What Not a Barter.**—By an agreement between a trustee and an adjoining owner, the former, for a consideration of \$2,000, released half of a gangway between the trust property and that of the adjoining owner, the latter releasing the other half to the trustee and agreeing to erect on the dividing line a party wall with a right to the trust estate to make free use thereof. This was held to constitute a sale and not a barter. *Lilley v. Providence Journal Co.*, 16 R. I. 245.

**2. Does Not Include Power to Partition.**—*Paget v. Melcher*, 42 N. Y. App. Div. 76; *Carr's Petition*, 16 R. I. 645, 27 Am. St. Rep. 773.

**Under a Power "to Sell or Exchange,"** it was held that while this did not authorize a partition yet it did give power to convey an undivided interest in the whole land in consideration of a sole and separate interest in part thereof. *Phelps v. Harris*, 51 Miss. 789.

**3. Does Not Include Power to Grant Long Options.**—*Matter of Armory Board*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 174; *Hickok v. Still*, 168 Pa. St. 155, 47 Am. St. Rep. 880. An option is not a use of the power of sale but a temporary surrender of it.

**4. Cannot Contract to Sell at Times Certain.**—*Ricketts v. Montgomery*, 15 Md. 46.

**5. Cannot Convey Without a Sale.**—*Ex p. Custer*, (D. C.) 17 Wash. L. Rep. 173; *French v. Westgate*, 71 N. H. 510; *Russell v. Russell*, 36 N. Y. 581, 93 Am. Dec. 540. See also *Engles v. Engles*, 4 Ark. 286, 38 Am. Dec. 37.

**6. To Satisfy a Debt or Claim Against the Estate** the trustee may sometimes convey direct without a sale. *White v. Glover*, 59 Ill. 459; *Stokes v. Stokes*, 66 Miss. 456.

**A Conveyance Direct to the Beneficiaries** on attaining their majority was held to be a valid execution of a power to sell lands and pay over the proceeds to the beneficiaries when they

should come of age. *Gibson v. Gains*, 28 S. W. Rep. 781, 16 Ky. L. Rep. 475.

**An Agreement to Provide for the Beneficiary for Life** was held to justify a conveyance direct to the promisor under a power to sell or to convey to the beneficiary in fee. *Hackett v. Hackett*, 67 N. H. 424.

**Trustees May Convey to the Executrix** of the grantor so that she may mortgage the property for payment of the grantor's debts, where the trustees are given power to sell for the payment of such debts. *Duval's Appeal*, 38 Pa. St. 112.

**Title May Be Transferred to a Corporation** for convenience in selling and handling the estate, under Gen. Laws R. I. 1896, c. 208, § 14, allowing trustees with a power of sale to sell, or concur with others in selling, subject to such conditions as they think fit.

**7.** See generally the title *POWERS*, vol. 22, p. 1123.

**A General Power of Sale** given to trustees may be exercised so long as any of the trusts remain unperformed. *Cresson v. Ferree*, 70 Pa. St. 446.

Where property was given in trust for the grantor's children, with power to the trustees to purchase and sell, and in their discretion either to hold the land in trust for the beneficiaries or to give it to them, it was held that the power of sale was absolutely discretionary and could be exercised regardless of lapse of time or the fact that the trustees had previously sold part of the property. *Marshall's Estate*, 138 Pa. St. 260.

**After a Reconveyance to the Grantor** by the trustee, investing the former with the legal title, no valid sale can be made by the trustee. *Huckabee v. Billingsly*, 16 Ala. 414, 50 Am. Dec. 183.

**The Power May Be Revived** by another conveyance to the trustees to hold for the same uses as by the first conveyance. *Salisbury v. Bigelow*, 20 Pick. (Mass.) 174.

**8. Power Limited upon Future Event.**—*In re Head*, 45 Ch. D. 310, wherein it was held that the trustees had no power of sale during the lifetime of the life tenant. But compare *Blackwood v. Borrowes*, 2 Con. & Law. 459, 4 Dr. & War. 441, wherein the trustees were held authorized to sell the reversion before the death of the life tenant.

In *Isham v. Delaware, etc., R. Co.*, 11 N. J. Eq. 227, it was held that where the instrument prohibited a sale before a specified date, a deed executed before that time was invalid although joined in by the beneficiaries.

certain event, the power will ordinarily terminate upon the occurrence of such event,<sup>1</sup> but it may be exercised thereafter if an intention on the part of the grantor to continue it is apparent on construction of the instrument.<sup>2</sup>

*gg.* PURPOSES FOR WHICH SALE MAY BE MADE. — An express power to sell can be exercised only for the purposes contemplated thereby.<sup>3</sup> Thus, where the power is given merely for the purpose of paying debts, no valid sale can be

In *Wolley v. Jenkins*, 23 Beav. 53, a power given by will to sell estates, which were the subject of a settlement containing also a power of sale, was held to be in abeyance so long as the trusts of that settlement remained unperformed.

**Acceleration of Power — Surrender by Life Tenant.** — Where a testator, entitled to an estate in remainder after the life estate of A, devised such remainder in trust for B for life, with remainders over, with a power of sale in the trustees, exercisable with the consent of the tenant for life, in possession under the will (*i. e.* B), it was held that on a surrender by A of her life estate to B, the power to sell was accelerated, and the trustees could sell during A's lifetime. *Truell v. Tysson*, 21 Beav. 437.

**1. Where Death Terminates the Trust Relation** no valid sale can thereafter be made by the trustee. *Harmon v. Smith*, 38 Fed. Rep. 482; *Gartland v. Nunn*, 11 Ark. 720; *Bradstreet v. Kinsella*, 76 Mo. 63.

**Where the Power Is to Pay Specific Debts** and the land is devised subject thereto to the testator's children, the trustees cannot sell after the debts have been discharged. *Murdock v. Johnson*, 7 Coldw. (Tenn.) 605.

But in *Affleck v. James*, 17 Sim. 121, it was held that the trustee was authorized to sell land contained in a residuary devise, notwithstanding all the testatrix's debts had been paid, where such residuary devise was given to the trustees to invest or to keep in the existing state of investment, and a subsequent part of the will declared that the trustees' receipts for the purchase money of any property sold under the will should be a good discharge to the purchasers.

In *Scarlett v. Linckels*, 56 N. J. Eq. 777, the trustee was authorized to sell and pay off mortgage debts, and thereafter, on the written request of the beneficiaries, convey to them such portion as remained unsold, the trustee "in the meantime" to have power to sell and convey such lands. It was held that, under this, the trustee had power to sell until requested to convey to the beneficiaries, although the mortgage debts had previously been paid off.

**After the Expiration of His Estate** and when the legal and equitable estates have united in the *cestui que trust* the trustee can convey no title. *McBrayer v. Cariker*, 64 Ala. 50.

**Where the Life Tenant Was Non Compos Mentis**, and therefore not in a position to call for a transfer of the legal title to himself, it was held that the trustee's power of sale did not terminate when such life tenant became absolutely entitled in possession. *In re Jump*, (1903) 1 Ch. 129, 72 L. J. Ch. 16.

**Where the Legal Title Remains in the Trustee** after the termination of the trust a conveyance by him jointly with the persons entitled to the

estate carries a good title. *Clarke's Petition*, 19 R. I. 110.

**2. Grantor's Intention to Continue Apparent.** — *In re Cotton*, 19 Ch. D. 624; *Millspaugh v. Van Zandt*, 55 Hun (N. Y.) 463, wherein the testator devised land in trust "for and during the natural life of my said wife," but a subsequent clause of the will directed a sale and a division of the proceeds into such parts "as will give one share to my wife, if then living."

Under a trust to sell with the consent of the tenants for life, and, after their death, to divide the property between the three children of one of them on their marrying or coming of age, it was held that the power of sale, having never been exercised, still existed in the trustees after all three of the children had come of age. *In re Tweedie*, 27 Ch. D. 315.

A trustee with power to sell was directed by the instrument, "immediately" on the occurrence of a certain event, to pay over, "transfer and convey" to certain beneficiaries. It was held that after the happening of such event the trustee had power to make a sale, the circumstances of the case being such that the grantor must have intended the power to continue. *Rhude Island Hospital Trust Co. v. Harris*, 20 R. I. 160.

**After Death of Cestui Que Trust.** — Where the power of sale is not limited to the lifetime of the *cestui que trust*, it may be validly exercised after his death. *Welch v. Silliman*, 2 Hill (N. Y.) 491.

**Trust Commencing in Futuro — Perpetuities.** — Property was devised to A for life and then in trust to divide among several, with power to the trustee to sell at such times as he should think fit. It was held that this power did not infringe the rule against perpetuities, but could be exercised within a reasonable time after the death of A and after the property had become absolutely vested in possession, it appearing from the instrument that the grantor intended it to be then exercised. *In re Sudeley*, (1894) 1 Ch. 334.

**3. Only for Purposes Contemplated by Trust.** — *Jordan v. Phillips, etc.*, Co., 126 Ala. 567; *Brome v. Pembroke*, 66 Md. 193; *Rathbun v. Colton*, 15 Pick. (Mass.) 471; *Loring v. Salisbury Mills*, 125 Mass. 138; *Scholle v. Scholle*, 113 N. Y. 261, *affirming* 55 N. Y. Super Ct. 474; *McKnight v. Wilson*, 2 Jones Eq. (55 N. Car.) 491. See also *Beers v. Narramore*, 61 Conn. 13.

**Sale for Division.** — A power to sell the trust property for division among the testator's children does not extend to a further trust created in the share of one of the children. The power was only for the purpose of making the division. *Cruikshank v. Parker*, 51 N. J. Eq. 21.

**Power to Exchange for Lands Better Suited** to the purposes of the trust will not support

made for any other purpose than the discharge of such debts.<sup>1</sup> And so, under a power to sell for the benefit of the estate, there is no authority to make a sale which is not for the benefit of the estate.<sup>2</sup> But any conveyance coming within the terms of the authority and tending to promote the grantor's object, will be regarded as a valid exercise of the power.<sup>3</sup>

**Presumption in Favor of Valid Exercise.**—Where trustees are invested with the legal title and a general power to sell and convey, it will be presumed, in the absence of evidence to the contrary, that a conveyance made by them was in accordance with the trust.<sup>4</sup>

**h. WHAT PROPERTY MAY BE SOLD.**—The terms of the instrument conferring the power furnish the chief guide to a determination of what property may be sold thereunder.<sup>5</sup> If the instrument specifies the lands to be sold this will exclude any implied power to sell lands other than those specified;<sup>6</sup> and of

an exchange for lands not so suitable. *Morville v. Fowle*, 144 Mass. 109.

**Payment of the Trustee's Individual Debts** is not a consideration which will justify a sale of the trust property. *Cohen v. Parish*, 105 Ga. 339.

**1. Can Sell Only to Pay Debts.**—*Brome v. Pembroke*, 66 Md. 193; *Murdock v. Johnson*, 7 Coldw. (Tenn.) 605.

**Debts Incurred by the Trustee without Authority** will not authorize a sale under a power to sell to discharge debts on the property, where the rights of the remainderman would be prejudiced thereby. *Martin's Appeal*, 23 Pa. St. 433.

**2. Sale Not for Benefit of Estate.**—*Winslow v. Miller*, 10 N. Y. App. Div. 406; *Young v. Weed*, 154 Pa. St. 316.

**3. Valid Execution of Power.**—*Mutual L. Ins. Co. v. Woods*, 121 N. Y. 302; *Dyett v. Central Trust Co.*, 140 N. Y. 54; *Reade v. Continental Trust Co.*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 721.

For other instances of valid exercise of a power of sale, see *Manser v. Dix*, 8 De G. M. & G. 703; *Hamilton v. Crosby*, 32 Conn. 342; *Sellew's Appeal*, 36 Conn. 196; *Gilmore v. Tuttle*, 32 N. J. Eq. 611; *Dillaye v. Commercial Bank*, 51 N. Y. 345; *Mutual L. Ins. Co. v. Woods*, 121 N. Y. 302, *affirming* (Supm. Ct. Gen. T.) 4 N. Y. Supp. 133; *Belding v. Archer*, 131 N. Car. 287; *Hamilton v. Mound City Mut. L. Ins. Co.*, 3 Tenn. Ch. 124.

**Under a Power to Sell for the Payment of Legacies** it was held that a sale was valid the proceeds of which were applied in part to the payment of such legacies and in part to investment in personal estate. *Penniman v. Sander-son*, 13 Allen (Mass.) 193.

**A Sale for Payment of a Debt Due the Trustee** is authorized by a power to sell for the payment of debts. *O'Flynn v. Powers*, 136 N. Y. 412.

Trustees were given power to sell so as "to convey a fee." Under a mortgage the life estate of the beneficiary was sold, and at the same time, for a sufficient consideration, the trustees conveyed the remainder to the purchaser of the life estate. It was held that this was a valid exercise of the power. *Dyett v. Central Trust Co.*, 140 N. Y. 54, *affirming* (Supm. Ct. Gen. T.) 19 N. Y. Supp. 19.

**4. Presumed to Have Been Properly Exercised.**—*Morrison v. McMillan*, 4 Litt. (Ky.) 210, 14 Am. Dec. 115; *Storms v. Simpson*, (Ky. 1891)

16 S. W. Rep. 371; *Barr v. Weld*, 24 Pa. St. 84; *Olcott v. Gabert* 86 Tex. 121. And see *Champlin v. Haight*, 7 Hill (N. Y.) 245, *reversing* 10 raige (N. Y.) 274.

**5. A General Power Given by Will to Executors** to sell the testator's land covers lands devised to them in trust. *Pollock v. Hooley*, 67 Hun (N. Y.) 370; *McCreedy v. Metropolitan L. Ins. Co.*, 83 Hun (N. Y.) 526. See also *Ness v. Davidson*, 45 Minn. 424. But see *Goad v. Montgomery*, 119 Cal. 552, 63 Am. St. Rep. 145, wherein it was held that the power must be given them *as trustees* in order to extend to the trust property.

**Land Given to Several Distinct Trustees.**—Express power to trustees to sell and invest was held to extend to the whole land devised in trust, although the will gave equal shares of the estate to distinct trustees for the life of the testator's several children, and after the death of one of them to go according to the intestate laws. *Cresson v. Ferree*, 70 Pa. St. 446.

**Quantity Sold.**—Where trustees are given power to sell so much of the land as will raise a specified amount, it is not a breach of trust if the amount sold brings more than the required sum, in the absence of any palpable abuse of discretion. *Thomas v. Townsend*, 16 Jur. 736; *Sea v. McLean*, 14 Can. Sup. Ct. 632.

**Mines and Minerals under the Land** cannot be excepted from the sale where the power is merely to sell the land without any authority to make such exception. *Buckley v. Howell*, 29 Beav. 546. But by statute, 25 & 26 Vict., c. 108, the chancery court is authorized to order a sale of the land with a reservation of the minerals, or of the minerals apart from the land. *In re Willway*, 32 L. J. Ch. 226; *In re Powell*, 23 W. R. 151.

**6. Specification of Lands to Be Sold.**—*Officer v. Simpson*, 27 Minn. 147, *following* *Simpson v. Cook*, 24 Minn. 180.

**Property Excepted from Power.**—Where the instrument gave power to sell all the unproductive real estate except such as would likely soon increase in value, "and excepting especially my eight-acre lot in the city of P., on part of which said \* \* \* hospital is to be erected," it was held that the trustees could sell such portion of the designated lot as was not devised to or to be occupied by the hospital. *Pennsylvania L. Ins. Co. v. Leggate*, 166 Pa. St. 147.



course the trustee cannot convey a greater estate than is given him by the instrument.<sup>1</sup>

**Property Purchased for Reinvestment.** — In the absence of anything to the contrary in the terms of the trust instrument, a power to sell and reinvest is not exhausted by a single sale, but extends over the property purchased for reinvestment.<sup>2</sup>

**After-acquired Property.** — The power also extends to property which, after the execution of the trust instrument, comes within the operation of its terms in accordance with the intent of the grantor.<sup>3</sup>

*ii. WHAT MAY BE RECEIVED IN CONSIDERATION FOR TRANSFER.* — As to what a trustee may accept in consideration of a transfer under a power of sale, the question depends very largely upon the terms of the power. Unless expressly so directed he need not ordinarily sell for cash.<sup>4</sup> But, in any event, he must exact a valuable consideration and has no power to make a gift of the property or convey it for a merely nominal consideration.<sup>5</sup>

(c) **Implied Power.** — Although no express power of sale be conferred by the instrument creating the trust, such power will be implied wherever duties are imposed on the trustee which cannot be performed without it,<sup>6</sup> or, in other

**1. Cannot Convey More than the Trust Estate.** — *Fleming v. Hughes*, 99 Ga. 444; *Walton v. Follansbee*, 131 Ill. 147, 165 Ill. 480, in which cases it was held that the trustees could not convey the fee since they had no more than a life estate. *Compare Kortright v. Storminger*, 49 Hun (N. Y.) 249.

**2. May Sell Land Purchased for Reinvestment.** — *Gait v. Lathbury*, 35 Beav. 112, L. R. 1 Eq. 174; *Hays v. Applegate*, 101 Ky. 22; *Creighton v. Pringle*, 3 S. Car. 77. See also *Clements v. Henry*, 10 Ir. Ch. 79.

But see *Hall v. Hagaman*, (Supm. Ct. Spec. T.) 12 Misc. (N. Y.) 171, wherein a power to sell and reinvest in productive land "or in such other safe and permanent securities as he may consider proper" was held to be exhausted by a single sale and reinvestment, it evidently being the grantor's intention that such reinvestment should be permanent.

**Second Sale After Reacquiring Same Land.** — Where trustees sold and reinvested in a second mortgage, which was in violation of the power which required investment in a first mortgage, it was held that the trustees, having righted their wrong by reacquiring the land, could then proceed to sell it in accordance with the power. *Siegel v. Anger*, (N. Y. Super. Ct. Spec. T.) 13 Abb. N. Cas. (N. Y.) 362.

**3. May Sell After-acquired Property.** — *Giles v. Holmes*, 15 Sim. 359; *Roney v. Stiltz*, 5 Whart. (Pa.) 381; *Martin v. Baily*, 13 Leg. Int. (Pa.) 189, 3 Pittsb. Leg. J. (Pa.) 61.

**4. Sale Need Not Be for Cash.** — *White v. Glover*, 59 Ill. 459; *Speigle v. Meredith*, 4 Biss. (U. S.) 120, wherein it was held that a conveyance in consideration of personal property or choses in action was valid.

**Right to Take Purchase Money Mortgage.** — In the absence of any inhibition in the trust instrument, a trustee may properly take a purchase-money mortgage. *Re Graham*, 17 Ont. 570; *Leggett v. Hunter*, 19 N. Y. 445.

And even where the grantor directed a sale for cash it was held that a purchase-money mortgage might be taken under a direction in the instrument to invest the proceeds in bonds and mortgages. *Faile v. Crawford*, 30 N. Y. App. Div. 536.

But where the power directed a sale "either for a price or consideration to be paid out and out in money, or upon the reservation of a ground rent," it was held that the trustee had no power to take a purchase-money mortgage. *Philadelphia, etc., R. Co. v. Lehigh Coal, etc., Co.*, 36 Pa. St. 204.

**A Sale for Confederate Money** was held to constitute a breach of trust under the circumstances of the particular case. *Bedinger v. Wharton*, 27 Gratt. (Va.) 857. See also *Creighton v. Pringle*, 3 S. Car. 77.

But in *Schley v. Brown*, 70 Ga. 64, a conveyance in exchange for Confederate bonds was upheld where the trustee had power to sell for reinvestment in more profitable securities, and had made the conveyance under the sanction of the court.

**Corporate Stock.** — In *Adair v. Brimmer*, 74 N. Y. 539, the trustees were held liable where, under a power of sale, they transferred the trust property for the purpose of forming a mining corporation and accepted stock of the corporation in payment.

**5. Cannot Make Gift.** — *De Everett v. Texas Mexican R. Co.*, 67 Tex. 430.

**6. Power Implied from Nature of Trustee's Duties.** — *Flux v. Best*, 31 L. T. N. S. 645, 23 W. R. 228; *Casey v. Canavan*, 93 Ill. App. 538; *Cook v. Young*, (Mass. 1887) 11 N. E. Rep. 752; *Boston Safe Deposit, etc., Co. v. Mixer*, 146 Mass. 100; *Heard v. Read*, 169 Mass. 216; *Ames v. Ames*, 15 R. I. 12. See also *Goad v. Montgomery*, 119 Cal. 552; *Stoff v. McGinn*, 178 Ill. 46; *Parker v. Seeley*, 56 N. J. Eq. 110; *Oland v. McNeil*, 34 Nova Scotia 453. And see the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1043.

**Property Charged with Payment of Debts.** — Where property is given in trust, charged with the payment of the grantor's debts, the trustee has an implied power to sell for the purpose of paying such debts. *Goodrich v. Proctor*, 1 Gray (Mass.) 567. And see the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1043.

**Authority to trustees** to "adjust and pay all claims upon my estate, and generally to act in the premises as my said trustees shall in their discretion think fit," was held not to charge

words, wherever it can be gathered from the instrument that the grantor must have intended that he should have such power,<sup>1</sup> and in such case no previous application to the court is necessary.<sup>2</sup> Thus, a power of sale has been implied from a power to "manage and invest" the estate to the best advantage,<sup>3</sup> from a power to change the investment,<sup>4</sup> from a direction that the trust estate be equally divided amongst certain named persons,<sup>5</sup> from a declaration that the trustee should hold the property "absolutely and at her own disposal,"<sup>6</sup> from a direction to settle certain of the grantor's property on his daughter,<sup>7</sup> from a direction to set apart certain sums out of the proceeds arising from the sale of the estate.<sup>8</sup> But the power is not to be implied unless it is manifestly intended or necessary to the execution of the trust.<sup>9</sup> Thus, it has been held that a power of sale would not be implied from a direction to "dispose of"<sup>10</sup> or to hold and "manage" the trust estate.<sup>11</sup>

the debts on the real estate so as to raise an implied power of sale. *In re Head*, 45 Ch. D. 310.

**To Pay Expenses of Litigation** sustained for the protection of the trust estate the trustee may sell, although no express power of sale be given him by the instrument. *White v. Dinkins*, 19 Ga. 285.

**1. Power Evidently Intended.**—*McCreedy v. Metropolitan L. Ins. Co.*, 83 Hun (N. Y.) 526; *Yerkes v. Richards*, 170 Pa. St. 346; *Tiffany v. Munroe*, 19 R. I. 584.

**Adoption of Church Regulations into Trust.**—In 1860, K. conveyed by deed to S. and others, trustees of the M. E. Church South, at Hazelhurst, a lot of ground in said town, on which to build a house of worship "for the use of the members of the M. E. Church South, according to the rules of the discipline which may, from time to time, be agreed upon and adopted by the ministers of said church at their general conferences." In 1871 the church authorities sold the lot, tore down the house, and rebuilt it on another lot in the same town. Under the discipline of the M. E. Church South the trustees of a church, with the consent of the quarterly conference, have the power to sell any church property that has become useless or inconvenient, and to invest the proceeds in other church property. It was held that the primary inducement of the donation was a site for the Methodist church in Hazelhurst, the gift subject to be dealt with according to the rules and regulations of that church, and that the grantor adopted the discipline of the church, as affording the rules and regulations for the use of the grant, as fully as if he had embodied them in his deed of conveyance, and that the changing of the site for a building to a more eligible place for a house of worship was not a breach of the conditions of the trust. *Kilpatrick v. Graves*, 51 Miss. 432.

**"Usual Powers."**—A clause in articles for a marriage settlement stipulating that the trustees shall be given all the powers usually contained in settlements of a like nature authorizes the insertion in such settlement of a power to sell, exchange, and reinvest, they being usually included in like settlements. *Peake v. Penlington*, 2 Ves. & B. 311; *Hill v. Hill*, 6 Sim. 136; *Bedford v. Abercorn*, 1 Myl. & C. 312.

**Trustees of a Charity** may make an absolute alienation if beneficial to the charity. *Atty.-Gen. v. Warren*, 2 Swanst. 302.

**Personal Property.**—A trustee intrusted with

the care and management of personal property has full power to sell, transfer, invest, and reinvest, unless restricted by the trust instrument. *Washburn v. Benedict*, 46 N. Y. App. Div. 484.

**2. No Application to Court Necessary.**—*Goodrich v. Proctor*, 1 Gray (Mass.) 567; *Yerkes v. Richards*, 170 Pa. St. 346.

**3. Examples of Implied Power.**—*Harvard College v. Weld*, 159 Mass. 114. But compare *Goad v. Montgomery*, 119 Cal. 552, 63 Am. St. Rep. 145.

**4. Carlisle First Nat. Bank v. Lee**, 66 S. W. Rep. 413, 23 Ky. L. Rep. 1897.

**5. Flux v. Best**, 31 L. T. N. S. 645, 23 W. R. 228. And see *Waddington's Estate*, 7 Pa. Dist. 697, where a provision that the trustee "shall take such steps for division of the real estate among children, etc., exactly as I have heretofore provided with reference to distribution of rents during the trust," was held to give a power of sale.

**6. Wood v. Richardson**, 4 Beav. 174.

**7. Wise v. Piper**, 13 Ch. D. 848, 49 L. J. Ch. 611.

**8. Flux v. Best**, 31 L. T. N. S. 645, 23 W. R. 228.

**9. Not Implied Unless Manifestly Intended or Necessary.**—*Brewster v. Angell*, 1 Jac. & W. 605; *Horne v. Barton*, Jac. 437. And see *Paget v. Melcher*, 42 N. Y. App. Div. 76; *Maxwell v. Barringer*, 110 N. Car. 76, 28 Am. St. Rep. 668; *Goddard v. Brown*, 12 R. I. 31. See also the cases cited *supra*, this section, *Power to Sell*—*In General*.

**Power to Invest and Lend.**—Trustees were empowered, in their discretion, to continue the investment of all or any part of testator's estate in the firm of which he was a member, or to invest, reinvest, and lend any part of the estate to such firm. It was held that no power to sell the real estate would be implied from this power to invest and lend, the trust not being one for investment, but merely containing a discretionary power to invest in a certain way which the trustee could not have done but for the power. *In re Holloway*, 60 L. T. N. S. 46, 39 W. R. 77.

**10. "Dispose of."**—*Sheffield v. Orrery*, 3 Atk. 287.

**11. "Manage."**—*Goad v. Montgomery*, 119 Cal. 552, 63 Am. St. Rep. 145. And see *Roosevelt v. Fulton*, 7 Cow. (N. Y.) 81; *Blanton v. Mayes*, 58 Tex. 422. But compare *Harvard College v. Weld*, 159 Mass. 114.



(d) **Authority of Court over Exercise of Power** — *aa. To COMPEL EXERCISE* — **Where Power Discretionary.** — If trustees with a discretionary power of sale arbitrarily refuse to exercise it in a case where the best interests of the trust demand that they do so, a court of equity may compel them to sell,<sup>1</sup> but this will not be done unless it is clearly shown that the trustees are abusing their discretion.<sup>2</sup>

If the Power Is Peremptory, the trustees have no right to hold the property, and the court can compel them to sell or else hold them liable for the loss occasioned by their not selling.<sup>3</sup>

*bb. TO PREVENT EXERCISE.* — Unless it be shown that the trustees are proceeding from improper motives, equity will not enjoin them from exercising their power of sale.<sup>4</sup> But it will prevent an improper exercise of the power.<sup>5</sup>

(e) **Manner and Terms of Sale.** — Where the instrument creating the trust prescribes the manner and terms of the sale, the trustee must follow its directions,<sup>6</sup> but if he is acting under a general power which does not prescribe any particular mode, he will be allowed considerable discretion, and the court will sanction any ordinary mode that is for the advantage of the estate.<sup>7</sup> Thus,

**1. Equity May Compel Exercise of Power,** when it is not a mere naked power, purely discretionary, but is coupled with a trust for the benefit of third persons. *Saunders v. Schmaelzle*, 49 Cal. 59; *Kintner v. Jones*, 122 Ind. 148; *Matter of Rogers*, 185 Pa. St. 428. See generally *supra*, this section, *Control by Court of Powers of Trustees*; and *supra*, this title, IV. 7. b.

**Extent of Control.** — The court may enforce the timely and proper exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bona fide* exercise of it. *Tempest v. Camoys*, 21 Ch. D. 571, 51 L. J. Ch. 785.

**Duty to Convey Legal Title.** — After trustees have sold the property in accordance with their power, and have received the consideration, equity will compel them to convey the legal title. *Saunders v. Schmaelzle*, 49 Cal. 59.

**2. Compelled Only When Abuse of Discretion Shown.** — *Tempest v. Camoys*, 21 Ch. D. 571, 51 L. J. Ch. 785; *Camden v. Murray*, 16 Ch. D. 161; *Bowden v. Bowden*, 17 Sim. 65; *Thomas v. Dering*, 1 Keen 729, 6 L. J. Ch. 267; *Shipperdson v. Tower*, 1 Y. & C. Ch. 441; *In re Van Brocklin*, 74 Iowa 412.

**3. Peremptory Power — Court Can Compel Sale.** — *Matter of Fargo*, (Surrogate Ct.) 20 Misc. (N. Y.) 137. See also *Anslay v. Pace*, 68 Ga. 402, wherein power to sell was given by the court. See also *infra*, this section, *Liabilities of Trustees*.

**Postponement Authorized by Court.** — Where trustees were empowered by the instrument to postpone the sale for a period not longer than ten years, a court of equity authorized them to postpone for a longer period, the circumstances rendering such course necessary to prevent a sacrifice of the trust estate. *Cuff v. Hall*, 1 Jur. N. S. 972.

**4. Exercise of Power Not Enjoined.** — *Thomas v. Williams*, 24 Ch. D. 558; *Champlin v. Champin*, 3 Edw. (N. Y.) 571. See also *Van Boskerck v. Herrick*, 65 Barb. (N. Y.) 250.

In *Pechel v. Fowler*, 2 Anstr. 549, a suggestion of improper conduct on the part of the trustees in not giving sufficient notice of the sale was held not to be ground for an injunction to stop the intended sale, the remedy at

law being ample, and the injury not irreparable.

**Inability of the Trustees to Show a Good Title** is not ground for restraining them from completing a sale. *Roberts v. Bozon*, 3 L. J. Ch. 113.

**Specific Performance Decreed Against Purchaser.** — Where the trustees were given a power to sell if, in their opinion, a sale should be necessary, it was held that the trustees were given discretion to decide as to the necessity for a sale, and the court decreed specific performance against a purchaser. *Rendlesham v. Meux*, 14 Sim. 249.

**5. Will Prevent Improper Exercise.** — *Dance v. Goldingham*, L. R. 8 Ch. 902, 42 L. J. Ch. 777; *Tempest v. Camoys*, 21 Ch. D. 571, 51 L. J. Ch. 785.

**Duty of Trustee to Appeal.** — Where some of the beneficiaries applied to the probate judge to restrain a contemplated sale, it was held not to be the trustee's duty to appeal from the decree forbidding the sale, unless requested to do so by some interested party. *Rathbun v. Colton*, 15 Pick. (Mass.) 471.

**6. Must Follow Directions of Instrument.** — *Hunt v. Townshend*, 31 Md. 336, 100 Am. Dec. 63; *O'Connor v. Waldo*, 83 Hun (N. Y.) 489, affirmed 158 N. Y. 672, 52 N. E. Rep. 1125. And see the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 1047.

Many points relating to the exercise of an express power of sale have already been discussed in this section, *supra*, *Power to Sell — Express Power — In General*, and the following subdivisions.

**7. Court Will Sanction any Advantageous Mode.** — Where it was shown that the trust property could be most profitably disposed of by first putting it up at auction to be let on a building lease to the highest bidder and then selling the reversion, the court authorized the trustees to proceed in that way. *In re James*, 64 L. J. Ch. 686.

**Sale in Bulk Authorized by Court.** — Where the trust estate can most advantageously be sold in bulk, the court will authorize a sale in that mode. *Quidnick Co. v. Chafee*, 13 R. I. 367.

**Right to Sell with Other Property.** — While there is no rule positively forbidding the sale of trust



where the instrument conferring the power directs that the sale shall be public, the trustee has no authority to sell privately,<sup>1</sup> but where the instrument does not prescribe the manner of the sale the trustee may sell privately.<sup>2</sup> The trustee must give the required notice,<sup>3</sup> see to it that the sale is fairly made,<sup>4</sup> and must get the best price obtainable.<sup>5</sup>

(f) **Setting Sale Aside.**—A sale of trust property by the trustee in breach of his trust is invalid as to persons charged with notice, and equity will set it aside<sup>6</sup> at the instance of a beneficiary injured thereby.<sup>7</sup> But the sale will not be set aside in the absence of a clear showing that the trustee has violated

property conjointly with other property, yet where it does not clearly appear that the conjunction is beneficial to the trust property, or that the portion of the proceeds attributable to such property can be readily ascertained, a contract to sell in this mode will not be specifically enforced. *Rede v. Oakes*, 4 De G. J. & S. 505, 34 L. J. Ch. 145. As to the duties of the trustees when the trust property is sold conjointly with other property, see *In re Cooper*, 4 Ch. D. 802, 46 L. J. Ch. 133.

**1. Direction for Public Auction Forbids Private Sale.**—*Greenleaf v. Queen*, 1 Pet. (U. S.) 138.

**Where a Sale Before a Master Is Directed by Decree** a contract by a trustee for a private sale will not be enforced. *Raymond v. Webb*, Lofft 66.

**The Court May Order a Private Sale**, where given power by statute to order sales, if it appears that the interests of the trust estate will be advanced thereby. *Shacklett v. Ransom*, 54 Ga. 350; *Moorhead v. Wolff*, 123 Pa. St. 365.

**By Statute in Massachusetts** a private sale may be authorized when necessary or expedient, and the license to sell is not limited to a year. *Boston Safe Deposit, etc., Co. v. Mixer*, 146 Mass. 100.

**Trustees Appointed by the Court** to sell property at public sale may sell privately if their efforts to effect a public sale prove unsuccessful. The court will ratify such a sale whenever it would have given authority to sell privately if previously applied to. *Tyson v. Mickle*, 2 Gill (Md.) 376; *Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257.

**2. Where Mode Not Prescribed May Sell Privately.**—*White v. Glover*, 59 Ill. 459. And see *Anderson v. Holland*, 83 Ga. 330; *Belding v. Archer*, 131 N. Car. 287.

**A Statute Requiring a Public Sale** does not apply to a trust instrument which became operative before the adoption of such statute although the sale be made after its adoption. *Smith v. Hulse*, 62 Ga. 341.

**3. Sufficiency of Notice.**—See *Johnson v. Dorsey*, 7 Gill (Md.) 269; *Gibbs v. Cunningham*, 1 Md. Ch. 44; *Boston Safe Deposit, etc., Co. v. Mixer*, 146 Mass. 100.

**Notice to the Beneficiaries** should be given before an order is made approving the trustee's sale. *Kenaday v. Edwards*, 134 U. S. 117.

**Failure to Give Notice** of the sale to the beneficiaries as ordered is cured by an order of confirmation entered after notice to them. *Dorsey v. Banks*, 88 Iowa 595.

**4. Must See that Sale Fairly Made.**—*Fairfax v. Hopkins*, 2 Cranch (C. C.) 134; *Johnston v. Eason*, 3 Ired. Eq. (38 N. Car.) 330.

**5. Must Get Best Price Obtainable.**—*Harper v. Hayes*, 2 Gill. 210, 7 Jur. N. S. 245. As to inadequacy of price as a ground for setting the sale aside, see *infra*, this section, *Setting Sale Aside*.

**Not Always Bound to Accept Highest Bid.**—The trustee must necessarily have certain discretion, and the court will uphold his refusal of the highest bid where its acceptance would frustrate the purpose of the sale. *Gray v. Viers*, 33 Md. 18. See also *Murdock's Case*, 2 Bland (Md.) 461, 20 Am. Dec. 381.

**6. Sale in Breach of Trust Set Aside.**—*Silkstone, etc., Coal Co. v. Edey*, (1900) 1 Ch. 167, 69 L. J. Ch. 73; *Macartney v. Blackwood*, 1 Ridg. L. & S. 602; *Jefferson v. Tyrer*, 9 Jur. 1083; *Hoppes v. Cheek*, 21 Ark. 585; *Kent v. Plumb*, 57 Ga. 207; *Morgan v. Clayton*, 61 Ill. 35; *Hazeltine v. Fournery*, 120 Ill. 493; *Towle v. Ambs*, 123 Ill. 410; *Romaine v. Hendrickson*, 27 N. J. Eq. 162, 28 N. J. Eq. 275; *Bassett v. Shoemaker*, 46 N. J. Eq. 538, 19 Am. St. Rep. 435; *Winslow v. Miller*, 10 N. Y. App. Div. 406. As to the rights of third persons, see *infra*, this title, *Rights and Liabilities of Purchasers*. And see generally the title *PURCHASERS FOR VALUE AND WITHOUT NOTICE*. See also the title *TRUSTS AND TRUSTEES*, 22 ENCYC. OF PL. AND PR., p. 85 *et seq.*

**Acts of the Trustee which Prevent Competition** in bidding, or cause a sacrifice of the property, furnish grounds for setting the sale aside. *Hoppes v. Cheek*, 21 Ark. 585; *Goodwin v. Mix*, 38 Ill. 115.

**7. No One Except a Beneficiary** can attack the sale. Neither the trustee nor any third person can set up the breach of trust. *Gary v. Colgin*, 11 Ala. 514; *Herbert v. Hanrick*, 16 Ala. 581; *Larco v. Casaneuava*, 30 Cal. 560; *Prouty v. Edgar*, 6 Iowa 353; *Den v. McKnight*, 11 N. J. L. 385; *Den v. Newark India-Rubber Co.*, 24 N. J. L. 467; *Obert v. Obert*, 10 N. J. Eq. 98, 12 N. J. Eq. 423; *Brace v. Van Eps*, 12 S. Dak. 191.

**The Maker of a Trust Deed** cannot object to irregularities in the sale where such irregularities were brought about by him. *Beebe v. De Baun*, 8 Ark. 510.

**Ratification by Beneficiary a Bar to Relief.**—Where the complainant had received the purchase money and ratified the sale with a full knowledge of the facts, it was held that he was barred from equitable relief. *Scott v. Gamble*, 9 N. J. Eq. 218.

his trust,<sup>1</sup> and the burden of proof is on the party attacking the sale.<sup>2</sup>

**Inadequacy of Price** is not alone sufficient ground for setting aside a trustee's sale unless so gross as to shock the conscience and raise a presumption of fraud, unfairness, or mistake.<sup>3</sup> But if the trustees sell under conditions calculated to prevent the property from bringing its true value the court will restrain the purchaser from completing the sale.<sup>4</sup>

(2) **Power to Lease** — (a) **In General.** — **Express Power** to lease the trust property is frequently conferred upon trustees by the instrument creating the trust,<sup>5</sup> and, when such is the case, a lease, to be valid, must conform to the power.<sup>6</sup>

1. **A Subsequent Larger Offer** by a disappointed competitor of the purchaser is not ground for setting the sale aside, he having formally offered a much smaller amount. *Wickersham v. Ricker*, (C. C. A.) 58 Fed. Rep. 282. See also *Casey v. Canavan*, 93 Ill. App. 538; *Selby v. Bowie*, 9 Jur. N. S. 432, 2 New Reports 2.

**An Irregularity in Advertising the Sale** will not be ground for setting it aside unless competition was thereby restricted or the sale prejudiced in some way. *Gibbs v. Cunningham*, 1 Md. Ch. 44.

**Failure to Ask for Higher Bid.** — The fact that a trustee for sale had not promoted competition by asking one or two persons proposing to purchase by private contract to bid higher before closing with the rival bidder was held not to be a ground for setting aside or canceling the contract. *Harper v. Hayes*, 2 De G. F. & J. 542, 7 Jur. N. S. 245, 3 L. T. N. S. 530, 9 W. R. 504.

**The Practice of Opening the Bidding** after a sale is not to be extended to sales by trustees under a power. *Harper v. Hayes*, 2 De G. F. & J. 542.

2. **Burden of Proof on Party Attacking Sale.** — *Edmonds v. Millett*, 20 Beav. 54; *Selby v. Bowie*, 9 Jur. N. S. 432, 2 New Reports 2; *McConnell v. Day*, 61 Ark. 464; *Goodwin v. Mix*, 38 Ill. 115.

3. **Inadequacy of Consideration.** — *Edmonds v. Millett*, 20 Beav. 54; *Clark v. Freedman's Sav., etc., Co.*, 100 U. S. 149; *Goodwin v. Mix*, 38 Ill. 115; *Warfield v. Ross*, 38 Md. 85; *Horsey v. Hough*, 38 Md. 130; *Johnson v. Dorsey*, 7 Gill (Md.) 269; *Gibbs v. Cunningham*, 1 Md. Ch. 44; *Hintze v. Stingel*, 1 Md. Ch. 283. See also *Sharp v. Greene*, 22 Wash. 693. Compare *Gould v. Chappell*, 42 Md. 466.

In *Barnett v. Higgins*, 2 W. Va. 485, where it appeared that the property had been variously estimated at amounts above and below the price for which it was sold, the court refused to set the sale aside.

**The Basis of Valuation**, where the land is burdened with an incumbrance, is the value of the land subject to such incumbrance. *School Trustees v. Galveston, etc., R. Co.*, (Tex. Civ. App. 1902) 67 S. W. Rep. 147.

**The Marketable Value**, and not a valuation, is the test of adequacy of price. *Wilton v. Hill*, 25 L. J. Ch. 156.

4. **Completion of Sale Restrained.** — *Dance v. Goldingham*, L. R. 8 Ch. 902; *Harper v. Hayes*, 2 Giff. 210, 7 Jur. N. S. 245.

5. See generally the title **POWERS**, vol. 22, p. 1157.

**Power to Grant a Building Lease** is included

in an unrestricted power to lease. *In re James*, 64 L. J. Ch. 686.

**A Lease to a Corporation Is Authorized** by an express power to lease to "any person or persons" the trustees shall think fit. *In re Jeffcock*, 51 L. J. Ch. 507.

**Lease to One of the Beneficiaries.** — Where trust property is leased to one of the cestuis *que trustent* the trustee cannot agree to charge the rent against such beneficiary's share of the property. *Ulrich v. Ulrich*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 570.

**Power Not in Restraint of Alienation.** — Under a grant to a trustee and his representatives for the use of A for life and after his death for the use of his children, a power to lease, limited to the trustee by name and not extended to his heirs, representatives, or successors, is not within the rule against perpetuities as restraining alienation by the children of A. *Collins v. Foley*, 63 Md. 158, 52 Am. Rep. 505.

**Liability on Covenants.** — Where the trustee covenants to renew the lease or else to pay for certain erections on the land, he and his successor are personally liable on such covenant. *Greason v. Keteltas*, 17 N. Y. 491. See also *Robinson v. Ketteltas*, 4 Edw. (N. Y.) 67. If the trustee make an unauthorized covenant for quiet enjoyment he is liable personally thereon, but the beneficiary is not bound by such covenant. *Chestnut v. Tyson*, 105 Ala. 149, 53 Am. St. Rep. 101.

**Insolvency of Lessee — Specific Performance.** — The court will not refuse to order specific performance by a trustee of an agreement to lease on the ground of the insolvency of the lessee, unless there is proof of a general insolvency. *Neale v. Mackenzie*, 1 Keen 474, 1 Jur. 149.

6. **Lease Must Conform to Power.** — *Hallett v. Martin*, 52 L. J. Ch. 804, 48 L. T. N. S. 894; *Doe v. Withers*, 2 B. & Ad. 896, 22 E. C. L. 207; *Bowes v. East London Water Works Co.*, Jac. 324, 23 Rev. Rep. 84.

**Lease to Commence in Futuro.** — A power to make leases "for twenty-one years from the making thereof" does not authorize a lease for twenty-one years to commence at a future date. *Griffen v. Ford*, 1 Bosw. (N. Y.) 123.

**Inadequacy of Rent.** — In *Griffen v. Ford*, Bosw. (N. Y.) 123, it was held that where a trustee was given power to lease for the best rent obtainable, a lease for a much smaller rent than might have been obtained by the exercise of reasonable diligence was invalid.

In *Atty.-Gen. v. Cashel Corp.*, 2 Con. & Law. 1, 3 Dr. & War. 294, a lease by trustees for ninety-nine years at a gross undervaluation was set aside.

Such a power cannot be exercised by a stranger to it.<sup>1</sup> If litigation in which the trust property is involved be pending it is proper for the trustees to obtain the sanction of the court before exercising an express power of sale.<sup>2</sup> And although the power to lease be a discretionary one, equity may in a proper case compel the trustees to exercise such power.<sup>3</sup>

**Implied Power.** — Where the legal title to land is vested in trustees, charged with the performance of active duties, with the intention that they shall raise an income therefrom, a power to lease for such terms as are reasonable and necessary to carry out the intent of the grantor will be implied.<sup>4</sup> But no such power can be implied where it would be contrary to the intention of the instrument creating the trust,<sup>5</sup> or where the trustees have no active duties to perform.<sup>6</sup>

(b) **Length of Term.** — The length of the term for which a trustee is authorized to let is a matter depending for the most part upon the provisions of the instrument and the facts and circumstances surrounding the particular trust.<sup>7</sup> Long

**Lease of Different Trust Properties Together.** — In *Tolson v. Sheard*, 5 Ch. D. 19, 46 L. J. Ch. 815, an agreement by the trustees of two properties held on different trusts to lease both together at a rent of so much per acre was held to be in breach of trust, and the court refused to compel specific performance at the suit of the trustees.

**A Trustee Cannot Divest the Title of Infant Donees,** or subject the property to the payment of his own or a third person's debts by permitting a slave held in trust to be hired out by another. *Easley v. Dye*, 14 Ala. 158.

**Valid Exercise of Power.** — A lease covenanting for "the lessee to do the necessary repairs" is a valid execution of a power to lease to any person who should improve or repair the property, or covenant or agree to improve or repair. *Truscott v. Diamond Rock Boring Co.*, 20 Ch. D. 251, 51 L. J. Ch. 259.

**A Lease for a Gross Sum for a term of ninety-nine years, not reserving an annual rent, was held to have been warranted under the circumstances of the case.** *Black v. Ligon*, Harp. Eq. (S. Car.) 205.

**1. Cannot Be Exercised by Stranger.** — *Robson v. Flight*, 11 Jur. N. S. 147, 34 L. J. Ch. 226, 11 L. T. N. S. 725, wherein the trustees disclaimed and the testator's heir at law attempted to grant a lease.

**2. Pending Litigation — Sanction of Court.** — *Turner v. Turner*, 30 Beav. 414.

**3. Exercise of Discretionary Power Compelled.** — *Tempest v. Camoys*, 21 Ch. D. 576, note 2.

**4. Power to Lease Implied — England.** — *Naylor v. Arnitt*, 1 Russ. & M. 501; *Fitzpatrick v. Waring*, 11 L. R. Ir. 35. But compare *Wood v. Patteson*, 10 Beav. 541; *In re Shaw*, L. R. 12 Eq. 124.

*Canada.* — *Brooke v. Brown*, 19 Ont. 124.

*Georgia.* — *Hutcheson v. Hodnett*, 115 Ga. 990.

*Illinois.* — *Hale v. Hale*, 146 Ill. 227.

*Indiana.* — *Richmond v. Davis*, 103 Ind. 449.

*New York.* — *Hedges v. Riker*, 5 Johns. Ch. (N. Y.) 163; *Matter of Odell*, 1 Connolly (N. Y.) 94.

*South Carolina.* — *Black v. Ligon*, Harp. Eq. (S. Car.) 205.

As to the power of executors and administrators to lease the lands of decedents, see the title **EXECUTORS AND ADMINISTRATORS**.

**Lease Necessary to Realize Object of Trust.** — In *Madison Academy v. Board of Education*, (Ky. 1894) 26 S. W. Rep. 187, the power to lease trust property was sustained on the ground that by leasing it the object of the trust could be realized, which would otherwise have failed, because of the run-down condition of the property and the lack of means to carry out the trust.

**Michigan — Trust to Sell for Benefit of Creditors.** — A trustee holding land to sell for the benefit of creditors, under 3 Comp. Laws Mich., § 8839, has implied power to let the land previous to a sale. *Geer v. Traders' Bank*, (Mich. 1903) 93 N. W. Rep. 437.

**No Power to Grant a Mining Lease Will Be Implied** where no authority is given by the instrument creating the trust; and equity cannot, independently of statute, authorize trustees for infants to grant such leases. *Wood v. Patteson*, 10 Beav. 541.

But such power can, of course, be expressly conferred by the grantor. See *Leigh v. Balcarres*, 6 C. B. 847, 60 E. C. L. 847.

**5. Lease Inconsistent with Grantor's Intent.** — Where the instrument gave a peremptory power of sale it was held that the grant of a lease would be inconsistent with the purpose of the trust, and the court refused to compel specific performance of an agreement to lease. *Evans v. Jackson*, 8 Sim. 217, 6 L. J. Ch. 8.

And so under a trust to receive the rents and profits and to sell the land "within a reasonable and convenient time" after the death of the testator and invest the proceeds for the beneficiaries, it was held that the trustee had no power to lease. *Matter of Hoysradt*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 265.

**6. Where No Active Duties Cast on Trustees.** — Under an instrument giving land in trust for the life of A, with remainder to A's adult children, and imposing no active duties on the trustees during the continuance of the life estate, it was held that the power of leasing was in the life tenant, and a lease by the trustees without the sanction of the life tenant was set aside. *Hefferman v. Taylor*, 15 Ont. 670.

**7. Term of Ten Years.** — In *Naylor v. Arnitt*, 1 Russ. & M. 501, a lease for a term of ten years was held to be authorized where the trust was for the life of A, to pay annuities



leases will be upheld when in accord with the spirit and purpose of the trust,<sup>1</sup> and trustees may even grant a perpetual lease where an intent to confer such power can be gathered from the instrument.<sup>2</sup>

If the Instrument Expressly Grants Power to Lease for a Specified Term, no authority can be implied to grant a longer lease,<sup>3</sup> though equity will sometimes enlarge a trustee's power in this regard.<sup>4</sup>

In the Absence of Express Power from the Instrument, the trustees cannot grant a lease or provide for a renewal to extend beyond the life of the trust estate,<sup>5</sup> but such a lease, if made, may be sustained to the extent of the trust estate.<sup>6</sup>

(3) *Power to Mortgage* — (a) *In General*. — Trustees have no power to mortgage the trust property unless power be expressly given by the instrument creating the trust, or an intention on the part of the grantor to give it can be implied from the terms of such instrument and the circumstances surrounding the trust,<sup>7</sup> and, of course, no such power exists when expressly

and subject thereto to pay over rents and profits. But this case was disapproved in *In re Shaw*, L. R. 12 Eq. 124, wherein it was said to have been practically overruled by *Wood v. Patteson*, 10 Beav. 541.

**Term Not to Exceed Twenty-one Years.** — In *Hedges v. Riker*, 5 Johns. Ch. (N. Y.) 163, the court gave authority to lease for a term not to exceed twenty-one years, where property was given in trust for A for life with remainder to A's children, and on A's death without issue remainder over, the trustees being authorized "to sell and dispose of so much of the real estate as should be necessary to fulfil the will."

**1. Long Leases Upheld.** — In *Goddard v. Brown*, 12 R. I. 31, a power "to lease any portion of said real estate for such period and upon such terms and conditions as they shall think best" was held to authorize long leases by the trustees.

In *Black v. Ligon*, Harp. Eq. (S. Car.) 205, a lease for ninety-nine years was upheld, it appearing that a shorter lease could not have been advantageously made.

**2. Perpetual Leases.** — In *Collins v. MacTavish*, 63 Md. 166, a lease for ninety-nine years, renewable forever, was held to be authorized.

In *Prather v. Foote*, 1 Disney (Ohio) 434, a power to "dispose of any of my real estate, in fee simple, or for a term of years, or otherwise," was held to authorize a perpetual lease.

**A Trust for Charitable Purposes** being perpetual, the trustees have a sufficient estate to grant a perpetual lease; and such a lease granted by them without any order of court is not open to collateral attack by a stranger unless it can be shown to be unreasonable and against the interests of the *cestui que trustent*. *Richmond v. Davis*, 103 Ind. 449.

**3. Express Power to Lease for Twenty-one Years** excludes any implication of power to make a longer lease from a general grant of "usual powers" in the instrument creating the trust. *Pearse v. Baron*, Jac. 158.

**The Receipt of Rent by the Beneficiary** under a lease for a longer term than the trustees had power to grant does not operate as a new agreement if he receives in ignorance of the invalidity of the lease. *Bowes v. East London Water-works Co.*, 3 Madd. 375, 23 Rev. Rep. 84.

**4. Enlargement of Power by Court.** — In *Marsh v. Reed*, 184 Ill. 263, affirming 64 Ill. App. 535, the trustees were given express power to lease for a term not longer than ten years. It being shown to the court that a lease for ninety-nine years would be very beneficial to the estate, and that all the beneficiaries desired such lease to be made, a decree granting the power was made.

**5. Cannot Lease Beyond Trust Estate.** — *Bergengren v. Aldrich*, 139 Mass. 259; *Gomez v. Gomez*, 81 Hun (N. Y.) 566, affirmed 147 N. Y. 195; *Matter of McCaffrey*, 50 Hun (N. Y.) 371; *Matter of Opening One Hundred and Tenth St.*, 81 N. Y. App. Div. 27; *Matter of Armory Board*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 174.

**Equity Cannot Authorize** such a lease where no power to make it is conferred by the trust instrument. *Gomez v. Gomez*, 81 Hun (N. Y.) 566, affirmed 147 N. Y. 195.

**Trust of Indefinite Duration.** — In *Greason v. Keteltas*, 17 N. Y. 491, it was held that where the trust was to continue for an indeterminate period the trustee could lease for a term which might extend beyond the life of the trust estate, subject to the jurisdiction of equity to annul the lease if unreasonable or improvident.

**6. Valid During Life of Trust Estate.** — *Matter of Opening One Hundred and Tenth St.*, 81 N. Y. App. Div. 27; *Griffen v. Ford*, 1 Bosw. (N. Y.) 123.

**Voidable Lease.** — Where the trustee of a life estate leased the property after the death of the life tenant, of which both parties to the lease were ignorant, it was held that as the trustee had not conveyed the legal title to the remainderman, his lease was not void, but voidable only, and could be avoided by no one except the person entitled to a conveyance from the trustee. *Pennock v. Lyons*, 118 Mass. 92.

**7. No Power to Mortgage** — *In re Webb*, 63 L. T. N. S. 545; *Honnett v. Williams*, 66 Ark. 148; *Cruger v. Jones*, 18 Barb. (N. Y.) 467; *Sehorn v. Beckwith*, 30 W. Va. 774.

As to the power of executors and administrators to mortgage a decedent's land, see the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 1050.

In *Hewitt v. Phelps*, 105 Pa. St. 393, it was held that the trustee had no power to charge the property, where the instrument reserved to

prohibited by the instrument.<sup>1</sup>

**Power of Court to Authorize Mortgage.** — Ordinarily, equity has no power, in the absence of statute, to order a mortgage of the trust estate where no power to mortgage is expressed or implied in the instrument creating the trust,<sup>2</sup> but sometimes, in cases of necessity and in order to save the trust estate, a mortgage will be ordered although no authority to mortgage is given by the instrument.<sup>3</sup> In some states the court is authorized by statute to order a mortgage where it is for the best interest of the trust estate,<sup>4</sup> and it has been

the beneficiary the right to sell, exchange, manage, and control the property.

**At Law,** the trustee can execute a mortgage by virtue of the legal title being in him, but, if the mortgage be one that he cannot properly make, equity will protect the rights of the beneficiaries. *Magraw v. Pennock*, 2 Grant Cas. (Pa.) 89.

**Confession of Judgment.** — In the absence of power from the instrument, a trustee cannot bind the trust property by confessing judgment. *Wilhelm v. Folmer*, 6 Pa. St. 296. Compare *Dickerson's Appeal*, 7 Pa. St. 255.

**The Trustee of a Naked Trust** cannot mortgage the trust estate. *Griffin v. Blanchar*, 17 Cal. 70; *McCreary v. Bomberger*, 11 Pa. Co. Ct. 68.

**Beneficiaries Are Estopped** to question the trustee's power to grant a mortgage, where, before its execution, they stipulate for an order of court authorizing him to grant such mortgage. *Boon v. Hall*, 76 N. Y. App. Div. 520.

**Power Given by Beneficiaries.** — Land was devised to A in trust for the use of herself and her children during her life, to be divided between her and the children according to the rules of descent. On coming of age each child was to receive half his share, and the remainder when there was no longer any possibility of litigation against the estate. All the children having come of age before a division of the estate, it was held that they could give A power to mortgage by quitclaiming to her. *Stern v. Hampton*, 73 Miss. 555.

**I. Incumbrances Forbidden** — Where the instrument creating the trust expressly prohibited the trustee from creating any "lien, incumbrance, or charge," it was held that no valid mechanic's lien against the property could be acquired by virtue of any contract made by the trustee. *Franklin Sav. Bank v. Taylor*, 131 Ill. 376; *Taylor v. Franklin Sav. Bank*, 50 Fed. Rep. 289.

**Sale Includes Mortgage.** — Where trustees were authorized to discharge incumbrances on the trust property by any means they might think proper, except by a sale or sales, it was held that mortgaging was prohibited, the word "sale" virtually including mortgage. *Bennett v. Wyndham*, 23 Beav. 521, 3 Jur. N. S. 1143, 5 W. R. 410.

**2. No Power to Order Mortgage in Contravention of Trust.** — See *Jamison v. McWhorter*, 7 Houst. (Del.) 242; *Cruger v. Jones*, 18 Barb. (N. Y.) 467; *U. S. Trust Co. v. Roche*, 41 Hun (N. Y.) 549.

**3. Mortgage Authorized by Court** — *Frith v. Cameron*, L. R. 12 Eq. 169, 19 W. R. 886; *Burroughs v. Gaither*, 66 Md. 171; *Schulting v. Schulting*, 41 N. J. Eq. 130; *Rogers v. Rogers*, 111 N. Y. 228. See also *Carr v. Branch*, 85 Va. 597.

**On Petition of the Beneficiary** the court ordered the trust property to be mortgaged in order to erect a dwelling thereon, where the trustee was given power by the instrument to sell and re-invest, and "an unlimited discretion to commute said lot into other property." *Christian v. Worsham*, 78 Va. 100.

**The Beneficiaries Must Be Made Parties** to a proceeding by the trustee to obtain authority to mortgage the trust property. *Sampson v. Mitchell*, 125 Mo. 217; *Horspool v. Davis*, 6 Bosw. (N. Y.) 581.

**Mortgagee Entitled to Enforce Mortgage.** — Where a trustee executed a mortgage under authority from the court and applied the most of it for the legitimate and necessary protection of the estate, it was held that the mortgagee was entitled to enforce it, whether the trust was executed or executory. *Inman v. Crawford*, 89 Fed. Rep. 232.

**4. In New York,** by Laws 1886, c. 257, the Supreme Court is empowered to authorize a mortgage of the trust estate when it appears "that it is for the best interest of said estate so to do, and that it is necessary, and for the benefit of the estate, to raise by mortgage thereon, or by a sale thereof, funds for the purpose of preserving or improving such estate." For facts held to justify the granting of an order under this statute, see *U. S. Trust Co. v. Roche*, 116 N. Y. 120; *Matter of Morris*, 63 Hun (N. Y.) 619.

But this section will not warrant an order for the mortgaging of a testator's real estate to pay an annuity charged thereon by the will, or to pay taxes and assessments not constituting liens thereon at the time the application was made, where no trust estate was created by the will. The statute refers to the trust estate and not to the general estate. *Matter of Clarke*, 59 Hun (N. Y.) 557, affirmed 128 N. Y. 658.

So where the trust covers a life estate only, this act gives the court no power to order a mortgage of the remainderman's estate. *Goebel v. Imla*, 48 Hun (N. Y.) 21.

**What Not Equivalent to Order.** — The action of the court in granting foreclosure of a mortgage given by a trustee without authority from the instrument will not be deemed equivalent to an order for such mortgage to be made, there being nothing to show any necessity for the mortgage or that the funds were applied to the benefit of the *cestui que trust*. *Potter v. Hodgman*, 81 N. Y. App. Div. 233.

**In Pennsylvania,** under a statute giving the court power to order a mortgage of the trust estate where it is "for the interest or advantage of those interested therein," it was held that a mortgage should not be ordered for the purpose of paying a debt which had not been reduced to judgment, and which was dis-



held that a statute giving power to order a sale includes power to order a mortgage.<sup>1</sup> Where power to mortgage is conferred by order, it must be strictly pursued.<sup>2</sup>

(b) **Express Power.** — Frequently a power to mortgage the trust estate is expressly conferred on the trustee by the instrument creating the trust.<sup>3</sup> Such a power can be exercised for such purposes only as were contemplated by the grantor.<sup>4</sup> In executing it the trustee must profess to act as such, and

puted by the beneficiaries. *Reilly's Estate*, 13 Phila. (Pa.) 201, 36 Leg. Int. (Pa.) 49.

**Georgia.** — For the sufficiency of an order under the Georgia statute, and the right of the trustee to attack the order, see *Wagnon v. Pease*, 104 Ga. 417 (*overruling* *Rutherford v. Larned*, 102 Ga. 50).

**1. Power to Order Sale Includes Power to Order Mortgage.** — *Weems v. Coker*, 70 Ga. 746 (*overruling* *Iverson v. Saulsbury*, 68 Ga. 790). *Contra*, *Patapasco Guano Co. v. Morrison*, 2 Woods (U. S.) 395.

**2. Order Must Be Strictly Followed.** — *Williamson v. Field*, 2 Sandf. Ch. (N. Y.) 533; *Pitcher v. Carter*, 4 Sandf. Ch. (N. Y.) 1, in which cases it was held that an order authorizing a mortgage for one purpose did not authorize one for a different purpose.

**Estoppel of Trustee.** — A trustee who mortgages the trust estate for a purpose different from that contemplated by the order of court is estopped to set up his breach of trust against a purchaser for value and without notice. *Leedom v. Lombaert*, 80 Pa. St. 381.

**Unauthorized Stipulation.** — A stipulation for the payment of interest semi-annually, and that the whole debt shall become due on a default in payment of interest, taxes, or insurance, and a ten per cent attorney's fee be allowed for collection, is not authorized by a decree ordering a mortgage for the purpose of securing a loan at eight per cent per annum, and authorizing the trustee to waive homestead. *Bolles v. Munnerlyn*, 83 Ga. 727.

**The Entire Instrument Is Not Necessarily Invalidated** by the insertion of stipulations not authorized by the order. *Wagnon v. Pease*, 104 Ga. 417.

**3. Mortgage to Pay Debts of Beneficiary.** — Where trustees were empowered to mortgage the property for the discharge of the debts of the *cestui que trust*, and the latter paid such debts with his own money, it was held that a subsequent mortgage by the trustees on the direction of the *cestui que trust* for the amount of such debts was a valid execution of the power, there being no presumption that the *cestui que trust* intended to exonerate the estate. *Redington v. Redington*, 1 Ball & B. 131.

**Authority to Insert a Power of Sale** in the mortgage is implied from the power to mortgage. *In re Chawner*, L. R. 8 Eq. 569, 38 L. J. Ch. 726.

**Power to Give a Note** with a mortgage as security therefor is not included in a mere power to mortgage the trust estate. *Ballou v. Young*, 42 S. Car. 170. See also *Beatty v. Clark*, 20 Cal. 11; *Connor v. Vroom*, 24 Can. Sup. Ct. 701. But compare *Bailie v. Carolina Interstate Bldg., etc., Assoc.*, 100 Ga. 20; *Cottingham v. Equitable Bldg., etc., Assoc.*, 114 Ga. 944.

**Right to Foreclose During Life Tenant's Life.** — Under a devise in trust for A for life, with power to the trustee to mortgage for the payment of a charge and to sell, after A's death, for the same purpose, a mortgage executed during A's life need not be made payable after his death, and such mortgage may be foreclosed in the lifetime of A. *Miller v. Schlegel*, 10 W. N. C. (Pa.) 521.

**Where the Trustee and Beneficiary Join** in executing a mortgage of the trust estate, such mortgage constitutes a valid exercise of the power. *Hughes v. Farmers Sav., etc., Assoc.*, (Tenn. Ch. 1897) 46 S. W. Rep. 362.

**Allowing Beneficiary to Disburse Money.** — That a trustee with power to mortgage allowed the beneficiary to receive the money raised by mortgage and to disburse it for the purposes of the trust, instead of doing so himself, was held not to be material, it appearing that the trustee resided at a distance, and there being nothing to show that the disbursements were not properly made. *Boon v. Hall*, 76 N. Y. App. Div. 520.

**Where the Trustee Is the Beneficiary** he must apply to the court for authority to mortgage, although given express power to sell and mortgage by the instrument. *Irving v. Irving*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 743.

**4. Purpose Not Contemplated by Power.** — *Calloway v. Gleason*, 1 Mo. App. Rep. 288; *Syracuse Sav. Bank v. Holden*, 105 N. Y. 415; *Merriman v. Russell*, 39 Tex. 278. See also *Beatty v. Clark*, 20 Cal. 11.

**Mortgage to Trustee.** — In *Perrine v. Perrine*, 11 N. J. Eq. 142, a mortgage to the trustee by the beneficiary to secure a debt due him from her husband was held void as in violation of the trust.

But see *Atty.-Gen. v. Hardy*, 1 Sim. N. S. 338, 20 L. J. Ch. 450, wherein it was held that any of the trustees of certain chapels might be mortgagees under a power to raise money by mortgage for the purposes of the trusts, and might exercise all the rights of mortgagees, although in opposition to the trusts.

**Trustees Were Enjoined** from mortgaging the trust property where there was no apparent necessity for the mortgage and the plaintiff undertook to abide any order the court might make as to the payment of the debt proposed to be secured by such mortgage. *Rigall v. Foster*, 18 Jur. 39.

**Mortgage to Pay Borrowed Money.** — Where power is given to mortgage the trust property to pay borrowed money, this refers to money borrowed by the trustee and not to money borrowed on mortgage by the grantor. *Mulford v. Mulford*, 42 N. J. Eq. 68.

**Mortgage Direct to Creditors.** — Power to mortgage for payment of debts authorizes a mortgage directly to the creditors. *Magraw v. Pennock*, 2 Grant Cas. (Pa.) 89.



a mortgage executed in his individual capacity will not bind the trust estate.<sup>1</sup>

(a) **Implied Power.**—A power to mortgage the trust property, although not expressly granted by the trust instrument, will be implied where reasonable and necessary for the execution of the trust, in the absence of any expression of a contrary intent on the part of the grantor.<sup>2</sup>

**Implication from Power of Sale.**—It is generally held that no power to mortgage the trust property will be implied from a mere power to sell and convey,<sup>3</sup> and, where this is the case, a trustee cannot effect a mortgage indirectly under cover of a pretended sale.<sup>4</sup> But where the purpose of the power of sale is to

**A Power to Mortgage Whenever Necessary** for the execution of the trust was held to authorize a mortgage to erect buildings on the property and so make it productive, it being in its then condition inadequate to support the beneficiaries. *Boon v. Hall*, 76 N. Y. App. Div. 520.

**A Debt Contracted in Making Improvements** may be met by raising money on mortgage, under a power to raise money by mortgage for the improvement of the estate. *Cumming v. Williamson*, 1 Sandf. Ct. (N. Y.) 17.

**1. Must Act as Trustee.**—*Gilbert v. Gilbert*, 39 Iowa 657.

**The Omission of the Word "Trustee"** after the trustee's signature does not invalidate a mortgage, the body of which recites that he is acting as a trustee and intends to bind himself to that capacity. *Lawrence's Estate*, 3 Pa. Dist. 356.

**2. Implied Power to Mortgage.**—*In re Jones*, 59 L. J. Ch. 31, 61 L. T. N. S. 661; *In re Bellinger*, (1898) 2 Ch. 534, 67 L. J. Ch. 580; *In re Dimmock*, 52 L. T. N. S. 494; *Vansickle v. Moore*, 22 Ont. 560. See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1060.

A trustee has an implied power to mortgage where he is authorized to take up an outstanding mortgage to prevent foreclosure and to hold the property until it can be sold to advantage. In the event of an advantageous sale being impossible there is no other way for him to take up the mortgage than by remortgaging. *Gilbert v. Penfield*, 124 Cal. 234.

**Authority to Repair, Improve, and Borrow Money** raises an implied power to mortgage. *Wetmore v. Holsman*, (Supm. Ct. Spec. T.) 14 Abb. Pr. (N. Y.) 311, 23 How. Pr. (N. Y.) 202.

**Discretionary Power to Manage and Control** the estate for the interest of the beneficiaries and to "sell, exchange, and dispose of" it, was held to confer authority to give a deed of trust containing a power of sale. *Faulk v. Dashiell*, 62 Tex. 642, 50 Am. Rep. 542. See also *Brown v. Crittenden*, (Ky. 1886) 1 S. W. Rep. 421.

**A Trust for Payment of Debts** gives power to raise by mortgage the amount required. *Bath v. Bradford*, 2 Ves. 590.

**3. Not Implied from Mere Power to Sell**—*England*.—*Haldenby v. Spofforth*, 1 Beav. 390, 8 L. J. Ch. 238, 3 Jur. 241; *Page v. Cooper*, 16 Beav. 396, 1 W. R. 136; *Devaynes v. Robinson*, 24 Beav. 86, 27 L. J. Ch. 157, 3 Jur. N. S. 707, 5 W. R. 509; *Stronghill v. Anstey*, 1 De G. M. & G. 635, 22 L. J. Ch. 130, 16 Jur. 671; *Walker v. Southall*, 56 L. T. N. S. 882.

*Canada*.—*Gordon v. Gordon*, 11 Ont. 611, affirmed 12 Ont. 593; *Nowlan v. Logie*, 7 Grant

Ch. (U. C.) 88; *Edinburgh L. Assur. Co. v. Allen*, 18 Grant Ch. (U. C.) 425.

*United States*.—*Patapasco Guano Co. v. Morrison*, 2 Woods (U. S.) 395.

*Alabama*.—*Butler v. Gazzam*, 81 Ala. 491.

*Maryland*.—*Tyson v. Latrobe*, 42 Md. 325; *Wilson v. Maryland L. Ins. Co.*, 60 Md. 150.

*Michigan*.—*Hannah v. Carnahan*, 65 Mich. 601.

*New Jersey*.—See *Ferry v. Laible*, 31 N. J. Eq. 566; *Rutherford Land, etc.*, 3 v. Sanntrock, (N. J. 1899) 44 Atl. Rep. 938.

*New York*.—*Bloomer v. Waldron*, 3 Hill (N. Y.) 361 (in effect overruling contrary dictum in *Williams v. Woodard*, 2 Wend. (N. Y.) 492); *Cumming v. Williamson*, 1 Sandf. Ch. (N. Y.) 17; *Albany F. Ins. Co. v. Bay*, 4 N. Y. 9; *Paterson First Nat. Bank v. National Broadway Bank*, 156 N. Y. 459; *Arnoux v. Phye*, 6 N. Y. App. Div. 605; *Benedict v. Arnoux*, 7 N. Y. App. Div. 1; *Griswold v. Caldwell*, 65 N. Y. App. Div. 371; *Potter v. Hodgman*, 81 N. Y. App. Div. 233; *Coutant v. Servoss*, 3 Barb. (N. Y.) 128.

*Rhode Island*.—*Rhode Island Hospital Trust Co. v. Commercial Nat. Bank*, 14 R. I. 629; *Green v. Greene*, 19 R. I. 619.

*Texas*.—*Willis v. Smith*, 66 Tex. 31.

*Virginia*.—*Green v. Claiborne*, 83 Va. 386.

See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1060.

**Contra.**—In *Georgia and Pennsylvania* a power to sell and reinvest is held to include a power to mortgage. *Wayne v. Myddleton*, 2 Ga. 383; *Miller v. Redwine*, 75 Ga. 130; *Pennsylvania L. Ins. Co. v. Austin*, 42 Pa. St. 257; *Zane v. Kennedy*, 73 Pa. St. 182; *McCreary v. Bomberger*, 151 Pa. St. 323, 31 Am. St. Rep. 760.

**Mortgage at Request of Life Tenant.**—If such a mortgage be given on the request of the life tenant of the trust estate, it conveys his interest alone, and does not bind the remaindermen. *Butler v. Gazzam*, 81 Ala. 491.

**Trustees Are Liable for the Loss Occasioned** by reason of their giving an unauthorized mortgage. *Devaynes v. Robinson*, 24 Beav. 86.

**The Beneficiary May Confirm and Validate** such an unauthorized mortgage, but if he does so through mistaking his legal rights and the facts, equity will grant him relief. *Wilson v. Maryland L. Ins. Co.*, 60 Md. 150.

**4. Cannot Mortgage under Pretended Sale.**—*Arnoux v. Phye*, 6 N. Y. App. Div. 605; *Benedict v. Arnoux*, 7 N. Y. App. Div. 1; *Griswold v. Caldwell*, 65 N. Y. App. Div. 371.

**Innocent Mortgagee Protected.**—Under a trust giving power to sell only, the trustee, to obtain a loan on the land, conveyed it to a third person, the deed containing no reference to the trust. The grantee subsequently mortgaged the

pay debts or to subject the property to a particular charge, a power to mortgage for that purpose may be implied, in the absence of any indication of a contrary intent in the trust instrument.<sup>1</sup> And it is held that a trustee with power to sell and reinvest may, on reinvesting, give a purchase-money mortgage, although given no express power to mortgage by the instrument creating the trust.<sup>2</sup>

**g. POWERS AS TO MAINTENANCE OF BENEFICIARY — (1) *Infant Beneficiary* — In Absence of Express Trust for Maintenance.** — Trustees have no power, in the absence of an express provision for the maintenance of infant beneficiaries, to devote any part of the income of the trust fund to such purposes, so long as the father of the beneficiaries has sufficient ability to support them.<sup>3</sup> If the father is not able to provide suitable support, the court will direct the trustee to expend the necessary amount therefor out of the income belonging to the infants.<sup>4</sup>

**When Express Trust for Maintenance Declared.** — Where a trust is expressly created to collect income and use the same for the education and support of an infant, the power conferred upon the trustees is imperative and must be executed irrespective of the ability of the infant's father to support him.<sup>5</sup>

**When Trustees Have Discretion.** — If the trust instrument clothes the trustees with discretionary power as to maintenance, they may exercise the same without interference by the court, so long as they act fairly and reasonably, and may provide, or refuse to provide, for the whole support of the infant where the latter has other property, or the situation of the father is such that he is able to support his family during the existence of the trust fund.<sup>6</sup> But

land to a person who had no notice of the trustee's purpose in making the conveyance. It was held that the mortgage was binding on the *cestui que trust*. *Rutherford Land, etc., Co. v. Sanntrock*, (N. J. 1899) 44 Atl. Rep. 938.

**1. Power Sometimes Implied from Power to Sell.** — *Stronghill v. Anstey*, 1 De G. M. & G. 635, 22 L. J. Ch. 130; *Orford v. Albemarle*, 12 Jur. 811, 17 L. J. Ch. 396; *Waterman v. Baldwin*, 68 Iowa 255; *Lorbenenthal v. Raleigh*, 36 N. J. 149, 169. And see *In re Dimmock*, 52 L. T. N. S. 494; *Orr v. Rode*, 101 Mo. 387. See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1061.

In *Vansickle v. Moore*, 22 Ont. 560, it was held that trustees with a power of sale could properly mortgage the trust estate for the purpose of paying a part of a prior incumbrance thereon, with a view to saving the property from foreclosure.

**Mortgage Not Excluded by Power of Sale.** — In *Wood v. Kice*, 103 Mo. 329, it was held that power to grant a mortgage at the request and for the benefit of the beneficiaries was not excluded by an express power to sell at their request and hold the proceeds upon a like trust, where the deed creating the trust was upon valuable consideration and was not a gift.

**May Mortgage Lands Purchased for Reinvestment.** — Where land was given on trust, subject to be charged for payment of debts, with power to the trustees to sell and reinvest, it was held that they had an implied power to mortgage lands purchased with the proceeds of a sale made by them. *Ball v. Harris*, 8 Sim. 485, 4 Myl. & C. 264.

**2. Power to Give Purchase-money Mortgage Implied.** — *Hannah v. Carnahan*, 65 Mich. 601; *Mavrich v. Grier*, 3 Nev. 52, 93 Am. Dec.

373; *Coutant v. Servoss*, 3 Barb. (N. Y.) 128; *Gernert v. Albert*, 160 Pa. St. 95.

**3. In Absence of Express Trust.** — *Fawcner v. Watts*, 1 Atk. 408; *Bethea v. McColl*, 5 Ala. 308; *McKnight v. Walsh*, 23 N. J. Eq. 136; *Matter of Kane*, 2 Barb. Ch. (N. Y.) 375; *Walker v. Crowder*, 2 Ired. Eq. (37 N. Car.) 478; *Matter of Harland*, 5 Rawle (Pa.) 323; *National Valley Bank v. Hancock*, 100 Va. 107, 93 Am. St. Rep. 933.

**4. When Father Unable to Support Infant.** — *Matter of Beisel*, 110 Cal. 267; *McKnight v. Walsh*, 24 N. J. Eq. 498; *Matter of Kane*, 2 Barb. Ch. (N. Y.) 375; *Gladding v. Follett*, 2 Dem. (N. Y.) 58; *Rice v. Tonnele*, 4 Sandf. Ch. (N. Y.) 568; *Matter of Burke*, 4 Sandf. Ch. (N. Y.) 617; *Williams v. Smith*, 10 R. I. 283. See *Aveline v. Melhuish*, 10 Jur. N. S. 788, 2 De G. J. & S. 288; *Worthington v. M'Craer*, 23 Beav. 81; *Osborne v. Van Horn*, 2 Fla. 360; *Newport v. Cook*, 2 Ashm. (Pa.) 332.

**5. Power of Maintenance Imperative.** — *Hoste v. Pratt*, 3 Ves. Jr. 730; *Sisson v. Shaw*, 9 Ves. Jr. 285; *Fairman v. Green*, 10 Ves. Jr. 45; *Bethea v. McColl*, 5 Ala. 308; *Gladding v. Follett*, 2 Dem. (N. Y.) 58; *Matter of McCormick*, (Surrogate Ct.) 22 Misc. (N. Y.) 309; *National Valley Bank v. Hancock*, 100 Va. 107, 93 Am. St. Rep. 933. See also *Andrews v. Partington*, 3 Bro. C. C. 60; *McKnight v. Walsh*, 23 N. J. Eq. 136; *Hughes v. Williams*, 99 Va. 312.

**6. When Trustees Have Discretion.** — *Douglas v. Andrews*, 3 Jur. 949; *Costabadie v. Costabadie*, 6 Hare 410; *Brophy v. Bellamy*, L. R. 8 Ch. 798; *Tempest v. Camoys*, 21 Ch. D. 571; *Pole v. Pietsch*, 61 Md. 570; *Kilburn v. Hosmer*, 10 Cush. (Mass.) 146; *Hills v. Putnam*, 152 Mass. 123; *Read v. Patterson*, 44 N. J. Eq. 211, 6 Am. St. Rep. 877; *Matter of McCormick*,

the trustees must exercise a reasonable discretion, and should pay over the income to the beneficiary only at such times and in such amounts as his necessities and comfort may require.<sup>1</sup>

**Use of Principal.**—The rule is that trustees for infants should never on their own authority break in upon the capital of the trust fund for the maintenance, and seldom for the advancement, of infant beneficiaries. But the rule is not inflexible, and the court in a plain case will sanction the expenditure of the principal fund if proper and judicious,<sup>2</sup> and such as it would have authorized had application to it been previously made.<sup>3</sup> Where there is a limitation over to a stranger neither the trustee nor the court can expend any part of the capital.<sup>4</sup> If the trustees are expressly authorized by the trust instrument to devote the principal as well as the income to the support of the beneficiaries, equity will not interfere with a reasonable exercise of such discretion,<sup>5</sup> though it will, if necessary, enforce the use of the principal fund for such purpose.<sup>6</sup>

(2) *Adult Beneficiary*—In Absence of Express Trust for Maintenance.—It has been held that a trustee, though he does not hold the funds under an express trust for maintenance, may expend such sums as may be necessary and proper for the protection and maintenance of his adult beneficiary when the latter is unable to take care of himself.<sup>7</sup>

**When Express Trust for Maintenance Declared.**—When a fund is bequeathed to trustees merely to collect the income and apply the same to the support, maintenance, and education of an adult beneficiary, the trustees have no dis-

(Surrogate Ct.) 22 Misc. (N. Y.) 309; *National Valley Bank v. Hancock*, 100 Va. 101, 93 Am. St. Rep. 933.

**Assignment by Cestui of Right to Maintenance.** Where trustees have discretion as to payments for maintenance until all the beneficiaries are of age, an assignment by one cestui before such time of all his interest conveys nothing unless the trustees choose to apply the funds towards the benefit of the cestui. *In re Coleman*, 39 Ch. D. 443, 58 L. J. Ch. 226.

1. *Demeritt v. Young*, (N. H. 1903) 55 Atl. Rep. 1047; *McKnight v. Walsh*, 24 N. J. Eq. 498.

**Unless a Trustee Has Wilfully Refused** to provide for his cestui *que trust*, or has neglected his duties, he will not be ordered to pay over to the minor's guardian sums for past and future maintenance. *Colehower's Estate*, 13 Phila. (Pa.) 243, 36 Leg. Int. (Pa.) 235.

2. **Use of Principal for Maintenance**—*England*.—*Ex p. Green*, 1 Jac. & W. 253; *Barlow v. Grant*, 1 Vern. 255; *Franklin v. Green*, 2 Vern. 137; *Davies v. Austen*, 1 Ves. Jr. 247; *Lee v. Brown*, 4 Ves. Jr. 362; *Walker v. Wetherell*, 6 Ves. Jr. 473; *Bridge v. Brown*, 2 Y. & C. Ch. 181; *Prince v. Hine*, 26 Beav. 634.

*Canada*.—*Stewart v. Fletcher*, 16 Grant Ch. (U. C.) 235.

*California*.—*Matter of Beisel*, 110 Cal. 267.

*Florida*.—See *Osborne v. Van Horn*, 2 Fla. 360.

*Kentucky*.—*Bates v. Montgomery*, (Ky. 1894) 28 S. W. Rep. 784.

*Maryland*.—*Williams's Case*, 3 Bland (Md.) 186; *Hatton v. Weems*, 12 Gill & J. (Md.) 83.

*New Hampshire*.—*Portsmouth v. Shackford*, 46 N. H. 423.

*New York*.—*Deen v. Cozzens*, 7 Robt. (N. Y.) 178; *Matter of Bostwick*, 4 Johns. Ct. (N. Y.) 100.

*North Carolina*.—*Long v. Norcom*, 2 Ired. Eq. (37 N. Car.) 354.

*Pennsylvania*.—*Martin's Appeal*, 23 Pa. St. 433.

*South Carolina*.—*Haigood v. Wells*, 1 Hill Eq. (S. Car.) 59; *Villard v. Robert*, 2 Strobb. Eq. (S. Car.) 40, 49 Am. Dec. 654.

*Tennessee*.—*Hester v. Wilkinson*, 6 Humph. (Tenn.) 219, 44 Am. Dec. 303; *Carter v. Roland*, 11 Humph. (Tenn.) 333.

*Virginia*.—*Sedgwick v. Taylor*, 84 Va. 820.

3. *Sedgwick v. Taylor*, 84 Va. 820. See also *supra*, this section, *a. General Scope and Limitations*—(2) *General Powers*—(d) *Power to Do What Court Would Order*.

4. *Sedgwick v. Taylor*, 84 Va. 820.

**Where the Intention of the Testator** is clearly to provide for the maintenance of infants, the corpus may be encroached upon, even though there is a limitation over of the fund to other parties. *Barlow v. Grant*, 1 Vern. 255; *Longwirth v. Riggs*, 123 Ill. 258; *Elder v. Elder*, 50 Me. 535; *Matter of Potts*, 1 Ashm. (Pa.) 340.

5. *Beaumont's Estate*, 195 Pa. St. 1; *Hospital for Sick Children v. Chute*, 3 Ont. L. Rep. 590. See also *Hughes v. Williams*, 99 Va. 312.

**Discretion as to Purchase of Annuity.**—Where trustees have power to pay the income to a certain person for life or to purchase an annuity with the principal, payments of sums to him amounting to more than the income but less than the principal are proper. *Messeena v. Carr*, L. R. 9 Eq. 260, 39 L. J. Ch. 216.

6. *Plummer v. Gibson*, 59 N. J. Eq. 68.

7. **Adult Beneficiary**.—*Nelson v. Duncombe*, 9 Beav. 211, in which case the trustee was allowed the expenses incurred in maintaining his beneficiary in an insane asylum during a temporary unsoundness of mind.



cretionary powers in the matter and the beneficiary may compel the payment to him of the entire net income derived from the trust fund.<sup>1</sup>

*h.* POWER TO APPOINT SUCCESSOR. — The power of a trustee to appoint his own successor does not exist unless specially conferred by the trust instrument.<sup>2</sup>

*i.* POWER TO INVEST TRUST FUNDS. — The powers of a trustee in relation to the investment of trust funds are fully treated elsewhere in this work.<sup>3</sup>

*j.* POWER TO BRING SUIT. — Generally, a trustee has power to sue, in his own name, upon any cause of action accruing to the trust estate during the existence of the trust.<sup>4</sup>

**9. Rights of Trustees** — *a.* RIGHT TO PROFIT FROM OFFICE — (1) *In General.* — A trustee is not permitted in the absence of express contract<sup>5</sup> to derive any profit to himself from the administration of his duties as trustee,<sup>6</sup>

1. Matter of McCormick, (Surrogate Ct.) 22 Misc. (N. Y.) 309, affirmed 40 N. Y. App. Div. 73; Gasquet v. Pollock, 1 N. Y. App. Div. 512, affirmed 158 N. Y. 734.

2. See *supra*, this section, 2. Appointment — *c.* Appointment by Donce of Power.

3. See the title INVESTMENTS, vol. 17, p. 423.

4. See the title TRUSTS AND TRUSTEES, 22 ENCYC. OF PL. AND PR. 1.

**One Holding a Judgment** as the trustee of an express trust is entitled to enforce it for the beneficial owners according to the terms of the trust. German Nat. Bank v. Hastings First Nat. Bank, 59 Neb. 9.

5. *Ex p.* Wynch, 5 De G. M. & G. 209; Stanes v. Parker, 9 Beav. 385; Crosskill v. Bower, 32 Beav. 86; Nicholls v. Hodges, 1 Pet. (U. S.) 562. See also Miller v. Dodge, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 640.

**Right to Profit by Contract.** — A trustee may by an express contract with the beneficiary secure the right to profit from the trust estate whether by settlement or otherwise. Cook v. Sherman, 20 Fed. Rep. 167; Voltz v. Voltz, 75 Ala. 555; Cleveland v. Pollard, 37 Ala. 556; Tompkins v. Hollister, 60 Mich. 470; Matter of Ledrich, 68 Hun (N. Y.) 396; Hope v. Beard, 8 Grant Ch. (U. C.) 380. But such dealings will be scrutinized by the court with the utmost diligence to detect traces of inequality or unfairness. Parker v. Bloxam, 20 Beav. 295; Wedderburn v. Wedderburn, 3 Jur. 596; Wormeley v. Wormeley, 1 Brock. (U. S.) 330; Kendall v. New England Carpet Co., 13 Conn. 383; Casey v. Casey, 14 Ill. 112; Ringgold v. Ringgold, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; Mitchell v. Colburn, 61 Md. 244; Bowker v. Pierce, 130 Mass. 262; Schwarz v. Wendell, Walk. (Mich.) 267; Newton v. Rebenack, 90 Mo. App. 650; Danforth v. Moore, 55 N. J. Eq. 127; Smith v. Howlett, 29 N. Y. App. Div. 182; Charleston College v. Willingham, 13 Rich. Eq. (S. Car.) 195; and the trustee must exercise the utmost good faith, disclosing all information regarding the estate and the beneficiary's rights. Todd v. Wilson, 9 Beav. 486; Wedderburn v. Wedderburn, 3 Jur. 596; Hope v. Beard, 8 Grant Ch. (U. C.) 380; Danforth v. Moore, 55 N. J. Eq. 127; Neely's Estate, 155 Pa. St. 133.

**For Full Discussion** of the requirements of a valid contract between beneficiary and trustee, see *infra*, this section, *Right of Trustee to*

*Purchase or Lease Trust Property — By Agreement with Beneficiaries.*

**Beneficiary's Claim Not Assignable.** — The cestui que trust cannot assign the claim against the trustee for profits made by him from the trust. Hill v. Boyle, L. R. 4 Eq. 260.

**6. Trustees Cannot Profit from Their Office** — *England.* — Rochefoucauld v. Boustead, (1898) 1 Ch. 550; Broughton v. Broughton, 5 De G. M. & G. 160; Hamilton v. Wright, 9 Cl. & F. 111; Clack v. Carlon, 7 Jur. N. S. 441; Aberdeen Town Council v. Aberdeen University, 2 App. Cas. 544; Thompson v. Blackstone, 6 Beav. 470; Williams v. Stevens, 4 Moo. P. C. C. N. S. 235; Cook v. Collingridge, Jac. 607; Winchelsea v. Norcliffe, 1 Vern. 435.

*Canada.* — Robinson v. Coyne, 14 Grant Ch. (U. C.) 561; Hope v. Beard, 8 Grant Ch. (U. C.) 380.

*United States.* — Levi v. Evans, (C. C. A.) 57 Fed. Rep. 677.

*California.* — Faulkner v. Hendy, 103 Cal. 15; Page v. Nagler, 6 Cal. 241. See Burling v. Newlands, 112 Cal. 476.

*Georgia.* — Maynard v. Cleveland, 76 Ga. 52.

*Illinois.* — Thorp v. McCullum, 6 Ill. 614.

*Kansas.* — Frazier v. Jeakins, 64 Kan. 615.

*Kentucky.* — Richardson v. Spencer, 18 B. Mon. (Ky.) 450; Clark v. Anderson, 10 Bush (Ky.) 99; McClanahan v. Henderson, 2 A. K. Marsh. (Ky.) 388, 12 Am. Dec. 412; McCall v. Burk, 76 S. W. Rep. 177, 25 Ky. L. Rep. 643.

*Maryland.* — Higgins v. Higgins, 4 Md. Ch. 238; Dillenderffer v. Winder, 3 Gill & J. (Md.) 311.

*Massachusetts.* — Arnold v. Brown, 24 Pick. (Mass.) 89, 35 Am. Dec. 296.

*Michigan.* — Petrie v. Badenoch, 102 Mich. 45, 47 Am. St. Rep. 503.

*Mississippi.* — Jones v. Smith, 33 Miss. 215.

*Missouri.* — Jamison v. Glascock, 29 Mo. 191; Stine v. Wilkison, 10 Mo. 75.

*New Jersey.* — Blauvelt v. Ackerman, 20 N. J. Eq. 141. But see Brinkerhoff v. Banta, 26 N. J. Eq. 157.

*New York.* — Sweet v. Jacobs, 6 Paige (N. Y.) 355, 31 Am. Dec. 252; Flagg v. Ely, 1 Edm. Sel. Cas. (N. Y.) 206.

*North Carolina.* — Huntly v. Huntly, 8 Ired. Eq. (43 N. Car.) 250; Fox v. Horah, 1 Ired. Eq. (36 N. Car.) 358, 36 Am. Dec. 48.

*Oregon.* — Hill v. Cooper, 8 Oregon 254.

*Pennsylvania.* — Cake's Estate, 157 Pa. St. 457; Baker's Appeal, 120 Pa. St. 33; Sharpe's

and all profits made by the trustee must be accounted for to the trust estate.<sup>1</sup>

**User of Trust Funds.** — The profits of all transactions in which trust funds or property have been used by the trustee belong to the trust estate.<sup>2</sup>

Estate, 2 Phila. (Pa.) 280, 14 Leg. Int. (Pa.) 140.

*South Carolina.* — Thomson v. Peake, 38 S. Car. 446; Raineford v. Raineford, McMull. Eq. (S. Car.) 16.

*Utah.* — Felkner v. Dooly, (Utah 1904) 75 Pac. Rep. 854.

*Virginia.* — Baugh v. Walker, 77 Va. 99; Coltrane v. Worrell, 30 Gratt. (Va.) 434.

*West Virginia.* — Feamster v. Feamster, 35 W. Va. 1.

*Wisconsin.* — Ludington v. Patton, 111 Wis. 208.

**It Is Held in Kentucky** that where the profit is not made by the trustee by directly dealing with the trust property, but is gained in some other manner, although connected with the trust estate, the trustee may retain the profit. Bush v. Webster, 72 S. W. Rep. 364, 24 Ky. L. Rep. 1894; Lexington Hydraulic, etc., Co. v. Preston, (Ky. 1898) 47 S. W. Rep. 330.

**Warehousemen** occupy a fiduciary relationship to those who deposit grain with them and cannot profit in their character as trustees. Hannah v. People, 198 Ill. 77.

**Where a Trustee Was a Member of an Insurance Company** he was required to account to the trust estate for commissions on premiums obtained by him, by the insurance of trust property. White v. Sherman, 168 Ill. 589, 61 Am. St. Rep. 132.

**Allowing Debtor Credit for Debt Due Trustee Individually.** — A trustee cannot receive in payment of debts owed to the trust estate, demands on himself individually. Maynard v. Cleveland, 76 Ga. 52; Manning v. Manning, 61 Ga. 137. See Bird v. Johnson, 18 Jur. 976.

**1. All Profits Made by Trustee Belong to Trust Estate** — *England.* — Crosskill v. Bower, 32 Beav. 86; Bowes v. Toronto, 11 Moo. P. C. 463; Bate v. Scales, 12 Ves. Jr. 402; Vandebende v. Livingston, 3 Swanst. 625; Shallcross v. Oldham, 2 Johns. & H. 609; Green v. Folgham, 1 Sim. & St. 398; Anonymous, 1 P. Wms. 648.

*Canada.* — Hewson v. Smith, 17 Grant Ch. (U. C.) 407; Robinson v. Coyne, 14 Grant Ch. (U. C.) 561.

*United States.* — Williamson v. Krohn, (C. C. A.) 66 Fed. Rep. 655; De Chambrun v. Cox, (C. C. A.) 60 Fed. Rep. 471; Hazard v. Dillon, 34 Fed. Rep. 485.

*Alabama.* — Smith v. McGehee, 14 Ala. 404.

*Illinois.* — Mansfield v. Alwood, 84 Ill. 497; Lyon v. Taylor, 49 Ill. App. 639.

*New Jersey.* — Voorhees v. Stoothoff, 11 N. J. L. 145.

*New York.* — Hayes v. Kerr, 40 N. Y. App. Div. 348; Penman v. Slocum, 41 N. Y. 53; New York L. Ins. Co. v. Cuthbert, 31 N. Y. App. Div. 191; Averell v. Barber, 24 N. Y. App. Div. 53; Forker v. Brown, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 161; Johnstone v. O'Connor, 66 Hun (N. Y.) 632, 21 N. Y. Supp. 487; People v. Merchants Bank, 35 Hun (N. Y.) 97; Matter of Oakley, 2 Edw. (N. Y.) 476;

Woodruff v. Boyden, (N. Y. Super. Ct. Spec. T.) 3 Abb. N. Cas. (N. Y.) 29.

*North Carolina.* — Owens v. Williams, 130 N. Car. 165.

*Pennsylvania.* — Dickey's Appeal, 73 Pa. St. 218.

*South Carolina.* — McFall v. McFall, 35 S. Car. 559; Whitman v. Bowden, 27 S. Car. 53.

*Wisconsin.* — Ludington v. Patton, 111 Wis. 208.

**Usurious Loans — Trustee Must Account for Profits Made Thereby.** — Barney v. Saunders, 16 How. (U. S.) 535.

**Actual Value of Profits Accounted For.** — A trustee is required to account only to the actual extent of the profits made by him; he cannot be required to account for the rental value of trust property, without regard to the advantage derived therefrom by him. Thomson v. Peake, 38 S. Car. 440. See Doom v. Howard, (Ky. 1901) 64 S. W. Rep. 469.

**If the Trustee Receives Any Bonus** or additional remuneration for his actions in trust matters from third parties, the profits thereof inure to the trust. Levi v. Evans, (C. C. A.) 57 Fed. Rep. 677; Sherman v. Lanier, 39 N. J. Eq. 249; Jacobus v. Munn, 37 N. J. Eq. 48; Redhead v. Parkway Driving Club, (Brooklyn City Ct. Gen. T.) 7 Misc. (N. Y.) 275.

**2. Profits by Using Trust Funds** — *England.* — Robinson v. Robinson, 11 Beav. 371; Stroud v. Gwyer, 28 Beav. 130; *In re* Norrington, 13 Ch. D. 654; Whitney v. Smith, L. R. 4 Ch. 513; Vyse v. Foster, L. R. 8 Ch. 309; Docker v. Somes, 2 Myl. & K. 655; Heathcote v. Hulme, 1 Jac. & W. 122; Robinson v. Robinson, 1 De G. M. & G. 247.

*Canada.* — Robinson v. Coyne, 14 Grant Ch. (U. C.) 561.

*Alabama.* — Mosely v. Lane, 27 Ala. 62, 62 Am. Dec. 752.

*California.* — Matter of Thompson, 101 Cal. 349. See Birmingham v. Wilcox, 120 Cal. 467.

*Indiana.* — Pugh v. Pugh, 9 Ind. 132.

*New Jersey.* — Deegan v. Capner, 44 N. J. Eq. 339; Durling v. Hammar, 20 N. J. Eq. 220.

*Pennsylvania.* — Baker's Appeal, 120 Pa. St. 33; Frank's Appeal, 59 Pa. St. 190; Mueller's Estate, 8 Pa. Dist. 70, affirmed 190 Pa. St. 601.

*South Carolina.* — Myers v. Myers, 2 McCord Eq. (S. Car.) 214, 16 Am. Dec. 648.

**For Full Discussion**, see the title INVESTMENTS, vol. 17, p. 470.

**If the Profits Can Be Traced** the trustee will usually be required to account therefor; if they cannot, the trustee will be charged with interest on the trust funds used, although the adoption of either remedy is optional with the beneficiary. Vyse v. Foster, L. R. 8 Ch. 309; Heathcote v. Hulme, 1 Jac. & W. 122; Wedderburn v. Wedderburn, 3 Jur. 596; Anonymous, 2 Ves. 630; Faulkner v. Hendy, 103 Cal. 15; Asay v. Allen, 124 Ill. 391; Matthewson v. Davis, 91 Ill. App. 153; Ogden v. Larrabee, 57 Ill. 389. See also *infra*, this section, *Liabilities of Trustees; Accounting.*

(2) *Right to Satisfy His Own Debts.* — A trustee has no right to avail himself of his office in order to secure the payment to him of a debt owed to him by the *cestui que trust*,<sup>1</sup> when not provided for in the instrument of trust<sup>2</sup> or incurred to him as trustee.<sup>3</sup>

**b. RIGHT OF TRUSTEE TO PURCHASE OR LEASE TRUST PROPERTY —**

(1) *In General* — **Trustee's Purchase Voidable.** — In accordance with that fixed rule of equity that a trustee shall not be allowed to profit by the administration of his duties as trustee,<sup>4</sup> as well as that other equally well-settled principle that a trustee cannot occupy the dual position of buyer and seller, which incapacitates him from discharging his duty of gaining the most advantageous bargain possible for the *cestui que trust*,<sup>5</sup> the purchase by a trustee of trust

**1. Trust Funds Cannot Be Applied to Debts Due from Beneficiary.** — *Bain v. Sadler*, L. R. 12 Eq. 570; *Batten v. Dartmouth Harbour Com'rs*, 45 Ch. D. 612; *Orr v. Pickett*, 3 J. J. Marsh. (Ky.) 269; *Abbott v. Foote*, 146 Mass. 333, 4 Am. St. Rep. 314; *Terry v. Bale*, 1 Dem. (N. Y.) 452; *Hart v. Bulkley*, 2 Edw. (N. Y.) 70; *Irwin v. Harris*, 6 Ired. Eq. (41 N. Car.) 215. See also *Robinson v. Robinson*, 11 Beav. 371; *Clement's Appeal*, 49 Conn. 519; *Abell v. Bradner*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 64; *Sifton v. Coldwell*, 11 Manitoba 653. And see the title SET-OFF, RECOURPMENT, AND COUNTERCLAIM, vol. 25, p. 533.

Nor does the fact that a trustee is also an executor alter the situation; a trustee under no circumstances is allowed to retain trust property to satisfy his private claims. *Bain v. Sadler*, L. R. 12 Eq. 570.

**Effect of Contract with Cestui.** — A trustee to whom a debt is owed by the *cestui que trust* may in good faith, with her consent, which should be clearly established by the evidence, appropriate trust property to the satisfaction of a private claim against her, but in the absence of contract this cannot be done. *Owens v. Barroll*, 88 Md. 204; *Poe v. Snowden*, 70 Md. 383.

And this agreement must be in point of time before the rights of any other parties attach. *Abbott v. Foote*, 146 Mass. 333, 4 Am. St. Rep. 314.

**2. Provision Made in Trust for Debt.** — *In re Weston*, (1900) 2 Ch. 164; *O'Donnell v. Faulkner*, 1 Ont. L. Rep. 21; *Reiner v. Brown*, (N. J. Eq. 1899) 42 Atl. Rep. 329; *Patterson v. Lennig*, 118 Pa. St. 571.

**Account Rendered Necessary.** — A trustee cannot privately appropriate trust property to satisfy his claim for services against the estate. *Geisse v. Beall*, 3 Wis. 367.

**3. In re Weston**, (1900) 2 Ch. 164; *Bain v. Sadler*, L. R. 12 Eq. 570; *Dodd v. Winship*, 133 Mass. 359.

**Borrowing Money from Estate.** — Neither can a trustee borrow money for his own personal advantage upon the securities of the trust estate. *Brewster v. Galloway*, 4 Lea (Tenn.) 558; *Graff v. Castleman*, 5 Rand. (Va.) 195, 16 Am. Dec. 741. See *Thompson v. Blackstone*, 6 Beav. 470.

**4. Trustee Not Allowed to Profit.** — *Campbell v. Walker*, 5 Ves. Jr. 678; *Whitchote v. Lawrence*, 3 Ves. Jr. 740; *Lenox v. Notrebe*, Hempst. (U. S.) 251; *Staats v. Bergen*, 17 N. J. Eq. 554; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252.

**A Trustee Cannot Lease** trust property to himself. *Ex p. Bennett*, 10 Ves. Jr. 381.

**Trustee's Sale to Cestui Voidable.** — A trustee cannot purchase on behalf of the *cestui que trust* that which he sells himself. *Boyd v. Clements*, 14 Ga. 639; *St. Paul Trust Co. v. Strong*, 85 Minn. 1; *Smith v. Howlett*, 29 N. Y. App. Div. 182; *Harrison v. Harrison*, 14 Grant Ch. (U. C.) 586. See also *Crosskill v. Bower*, 32 Beav. 86.

Neither is a trustee allowed to purchase from a cotrustee. *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 19, 18 Am. Dec. 250; *Smith v. Miller*, 98 Va. 535.

**Illegal Agreement Between Cotrustees.** — Where trustees had entered into an agreement by which one of them agreed to purchase trust property and then to divide the property with his cotrustee, upon a bill by the latter to enforce partition of the land, the court denied relief agreeably to the principle in *pari delicto potior est conditio defendentis*. *Saltmarsh v. Beene*, 4 Port. (Ala.) 283, 30 Am. Dec. 525.

**5. Trustee Cannot Be Buyer and Seller** — *England*. — *Whitchote v. Lawrence*, 3 Ves. Jr. 740; *Williams v. Scott*, (1900) A. C. 499.

*Canada.* — *Gastonguay v. Savoie*, 29 Can. Sup. Ct. 613.

*United States.* — *Michoud v. Girod*, 4 How. (U. S.) 503.

*Florida.* — *Bellamy v. Sheriff*, 6 Fla. 62.

*Iowa.* — *Sypher v. McHenry*, 18 Iowa 232.

*Maine.* — *Freeman v. Harwood*, 49 Me. 195.

*Minnesota.* — *St. Paul Trust Co. v. Strong*, 85 Minn. 1; *King v. Remington*, 36 Minn. 15.

*Mississippi.* — *Joor v. Williams*, 38 Miss. 546.

*New Hampshire.* — *Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316.

*New York.* — *Conger v. Ring*, 11 Barb. (N. Y.) 356; *Gallatien v. Cunningham*, 8 Cow. (N. Y.) 361. See *St. James' Church v. Church of the Redeemer*, 45 Barb. (N. Y.) 356.

*Pennsylvania.* — *Campbell v. Pennsylvania Ins. Co.*, 2 Whart. (Pa.) 53.

Said Chief Justice Gibson in *Chronister v. Bushey*, 7 W. & S. (Pa.) 152: "Indeed, where he is himself the bidder, the contract is void, even at law, for want of parties; for an individual cannot contract with himself or convey to himself; and where this legal objection is obviated by the interposition of an agent equity allows the sale to be avoided at the election of the *cestui que trust*, who may set it aside without regard to its fairness."

**Trustee Acting Gratuitously.** — That the trustee has undertaken the office of trustee gratui-



property is not generally allowed to stand, and the title secured thereby to the trustee is voidable.<sup>1</sup>

tously or officiously in no way alters the situation. These trustees as well as those engaged and paid for their services acquire only a voidable title where they purchase trust property. *Wright v. Smith*, 23 N. J. Eq. 106.

**Facts Held to Show Contract to Purchase Trust Property.**—Where a life estate was vested in a wife under a will, upon the termination of which the property was to be divided between her and several beneficiaries, and she and these beneficiaries were trustees for an incompetent member of the family, also a beneficiary, the court refused to enforce an agreement by which the property was to be divided between them without waiting for the termination of the trust, holding that such agreement amounted to a contract to purchase trust property. *Rochevot v. Rochevot*, 74 N. Y. App. Div. 585.

**1. Trustee Not Allowed to Purchase Trust Property**—*England*.—*Campbell v. Walker*, 5 Ves. Jr. 678; *Whicote v. Lawrence*, 3 Ves. Jr. 740; *Fox v. Mackreth*, 2 Bro. C. C. 400.

*Canada*.—*Lamont v. Lamont*, 7 Grant Ch. (U. C.) 258; *Foster v. McKinnon*, 5 Grant Ch. (U. C.) 510.

*United States*.—*Michoud v. Girod*, 4 How. (U. S.) 503; *Wormley v. Wormley*, 8 Wheat. (U. S.) 421; *Lenox v. Notrebe, Hempst.* (U. S.) 251; *Piatt v. Oliver*, 2 McLean (U. S.) 267; *Price v. Morris*, 5 McLean (U. S.) 4.

*Alabama*.—*Charles v. Dubose*, 29 Ala. 367; *Andrews v. Hobson*, 23 Ala. 219.

*Arkansas*.—*McNeil v. Gates*, 41 Ark. 264.

*California*.—*Page v. Naglee*, 6 Cal. 241.

*Florida*.—*Bellamy v. Sheriff*, 6 Fla. 62.

*Georgia*.—*Renew v. Butler*, 30 Ga. 954.

*Iowa*.—*Sypher v. McHenry*, 18 Iowa 232; *Old Dominion Bank v. Dubuque, etc., R. Co.*, 8 Iowa 277, 74 Am. Dec. 302.

*Kentucky*.—*Faucett v. Faucett*, 1 Bush (Ky.) 511, 89 Am. Dec. 639.

*Maryland*.—*Hoffman Steam Coal Co. v. Cumberland Coal, etc., Co.*, 16 Md. 456, 77 Am. Dec. 311; *Mason v. Martin*, 4 Md. 124; *Davis v. Simpson*, 5 Har. & J. (Md.) 147, 9 Am. Dec. 500. See *Kuykendall v. Devconon*, 82 Md. 643, 33 Atl. Rep. 717.

*Minnesota*.—*St. Paul Trust Co. v. Strong*, 85 Minn. 1; *King v. Remington*, 36 Minn. 15.

*Michigan*.—*Schwarz v. Wendell, Walk.* (Mich.) 267.

*Missouri*.—*Darling v. Potts*, 118 Mo. 506; *Tuggles v. Callison*, 143 Mo. 527; *Newton v. Rebenack*, 90 Mo. App. 650.

*Nebraska*.—*Shelby v. Creighton*, (Neb. 1902) 91 N. W. Rep. 369.

*New Jersey*.—*Bassett v. Shoemaker*, 46 N. J. Eq. 538, 19 Am. St. Rep. 435; *Blauvelt v. Ackerman*, 20 N. J. Eq. 141; *Colgate v. Colgate*, 23 N. J. Eq. 372; *Staats v. Bergen*, 17 N. J. Eq. 554; *Huston v. Cassedy*, 13 N. J. Eq. 228; *Scott v. Gamble*, 6 N. J. Eq. 218.

*New York*.—*Conger v. Ring*, 11 Barb. (N. Y.) 356; *De Caters v. Le Ray De Chaumont*, 3 Paige (N. Y.) 178; *Ames v. Downing*, 1 Bradf. (N. Y.) 321.

*North Carolina*.—*Brothers v. Brothers*, 7 Ired. Eq. (42 N. Car.) 150.

*South Carolina*.—*Mathews v. Dragaud*, 3 Desaus. (S. Car.) 25.

*Tennessee*.—*Conce v. Ruffin*, 4 Coldw. (Tenn.) 487; *Armstrong v. Campbell*, 3 Yerg. (Tenn.) 201, 24 Am. Dec. 550; *Collins v. Smith*, 1 Head (Tenn.) 251.

*Utah*.—*Hamilton v. Dooly*, 15 Utah 280.

*Virginia*.—*Smith v. Miller*, 98 Va. 535.

*Wisconsin*.—*Puzev v. Senier*, 9 Wis. 370.

**In Alabama** a trustee was formerly allowed to purchase at his own sale provided it was public and made fairly and in good faith. *McCartney v. Calhoun*, 17 Ala. 301; *Brannan v. Oliver*, 2 Stew. (Ala.) 47, 19 Am. Dec. 37. But see *Saltmarsh v. Beene*, 4 Port. (Ala.) 283, 30 Am. Dec. 525.

**Illustrations—Purchases by Fiduciaries.**—An inspector of an insolvent estate cannot be allowed to purchase any of the property of the insolvent. *Gastonguay v. Savoie*, 29 Can. Sup. Ct. 613.

The president of a steamship company cannot sell the boats to his son. *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140.

The mayor of a city, since he occupies the relation of trustee to the municipality, cannot by private arrangement with the contractors purchase the debentures of the city, issued in accordance with a city by-law. *Toronto v. Bowes*, 4 Grant Ch. (U. C.) 489, *affirmed* 11 Moo. P. C. 463. Neither can a mayor of a town purchase town property at a tax sale. *Greenstreet v. Paris Hydraulic Co.*, 21 Grant Ch. (U. C.) 229.

A purchase by a receiver of trust property will be set aside. *Roediger v. Gleason*, 89 Hun (N. Y.) 254, 11 Misc. (N. Y.) 483.

A trustee of the equity of redemption cannot purchase the trust property upon a foreclosure of the mortgage, for his own benefit. *Hubbell v. Medbury*, 53 N. Y. 98.

Where a trustee had the management of a railroad placed in his hands in order to secure the payment of the bonds to the beneficiaries, towards whom he stood in the relation of trustee, he was held to have also stood in the relation of trustee to the railroad company, and bonds purchased by him were decreed to belong to the railroad company. *Ashuelot R. Co. v. Elliot*, 57 N. H. 397.

A confidential adviser of the *cestui que trust* in regard to the trust business and the sale was held to be in effect a trustee, and therefore not entitled to purchase the trust property. *Wakeman v. Dodd*, 27 N. J. Eq. 564. See also *Carter v. Palmer*, 8 Cl. & F. 657.

There is no such fiduciary relation between mortgagor and mortgagee as will prevent the mortgagee from acquiring a valid title to the property mortgaged. See the title MORTGAGES, vol. 20, p. 1013. See also *Ten Eyck v. Craig*, 2 Hun (N. Y.) 452, *affirmed* 62 N. Y. 406.

In *Paul v. Johnson*, 12 Grant Ch. (U. C.) 474, the purchase of the trust estate by a brother of a trustee was allowed to stand, although he had voluntarily aided the trustee in the administration of the estate. See *Smith v. Reber*, 1 Grant Cas. (Pa.) 217.

**Rule Against Trustee's Purchase Generally Strictly Enforced.** — Nor does the fact that the trustee derived no advantage from the sale,<sup>1</sup> or that the sale was at public auction<sup>2</sup> or was a judicial sale<sup>3</sup> conducted in good faith,<sup>4</sup> and the property was purchased by the trustee for a fair price, affect the situation; the trustee's title is voidable.<sup>5</sup> This rule is strictly enforced, and a trustee is not allowed

**1. Whether Trustee Derived Advantage from the Sale Immaterial.** — *Ex p. James*, 8 Ves. Jr. 337; *James v. James*, 55 Ala. 525; *Star F. Ins. Co. v. Palmer*, 41 N. Y. Super. Ct. 267; *De Bevoise v. Sanford*, Hoffm. (N. Y.) 192; *In re Randall*, (Supm. Ct. Gen. T.) 29 N. Y. Supp. 1019; *Piatt v. Oliver*, 2 McLean (U. S.) 267; *Campbell v. Pennsylvania L. Ins. Co.*, 2 Whart. (Pa.) 53; *Hamilton v. Dooly*, 15 Utah 280. See *Ex p. Bennett*, 10 Ves. Jr. 381; *Whelpdale v. Cookson*, 1 Ves. 9.

**Trustee Forbidden to Speculate.** — The Florida court says: "The weight of English authority is against the right of the trustee to purchase the estate of his *cestui que trust*, and is predicated upon reasoning the force of which must impress itself upon every mind. To permit a trustee to purchase while he is enjoying the confidence of his *cestui que trust*, it is said, would be to license him to speculate by abusing his situation. His duty obliges him to exert all the care and industry necessary to dispose of the estate as advantageously for his *cestui que trust* as if he were selling for himself. His interest would sometimes thwart his duty, and the infirmity of human testimony would render it impracticable at all times to prove its violation; hence the policy of the rule which divests him of a legal capability to purchase. The great difficulty of discovering a disregard of the rights and interests of the *cestui que trust* induced the determination of the courts that the trustee had no right to purchase so long as his vicarial character continued." *Bellamy v. Sheriff*, 6 Fla. 62.

**2. Title Voidable Though Procured at Public Auction** — *United States*. — *Lenox v. Notrebe*, Hempst. (U. S.) 251.

*Florida*. — *Bellamy v. Sheriff*, 6 Fla. 62.

*Georgia*. — *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399.

*Maryland*. — *Mason v. Martin*, 4 Md. 124.

*Michigan*. — *Schwarz v. Wendell*, Walk. (Mich.) 267.

*New Jersey*. — *Deegan v. Capner*, 44 N. J. Eq. 339; *Den v. Hammel*, 18 N. J. L. 73.

*New York*. — *Fulton v. Whitney*, 5 Hun (N. Y.) 16; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252.

*North Carolina*. — *Cole v. Stokes*, 113 N. Car. 270.

*Pennsylvania*. — *Fisk v. Sarber*, 6 W. & S. (Pa.) 18; *Campbell v. Pennsylvania L. Ins. Co.*, 2 Whart. (Pa.) 53.

*South Carolina*. — *Clarke v. Deveaux*, 1 S. Car. 172.

*Tennessee*. — *Collins v. Smith*, 1 Head (Tenn.) 251.

**3. Title Procured at Judicial Sale Voidable.** — *Carter v. Burr*, 46 N. J. Eq. 134; *Chapin v. Weed*, *Clarke* (N. Y.) 464; *Fisk v. Sarber*, 6 W. & S. (Pa.) 18; *Collins v. Smith*, 1 Head (Tenn.) 251; *Newcomb v. Brooks*, 16 W. Va. 32. See also the title JUDICIAL SALES, vol. 17, p. 965.

**Trustee Not on Equality with Other Bidders.** —

"The trustee was presumed to have made itself acquainted with the lands which constituted the trust estate, and if permitted to purchase for himself 'he would have it in his power to obtain the best parts of it upon his own terms, merely by withholding information which the *cestuis que trust* could never have it in their power to obtain. And \* \* \* if he, by virtue of his trust, had superior advantages of information in respect to the situation and value of the property, so that he could not come to the sale upon terms of equity with other bidders, the court would not put him in a situation where his duty and his interest would come in conflict.'" *Conger v. Ring*, 11 Barb. (N. Y.) 356.

**4. Title Voidable Although Trustee Acted in Perfect Good Faith** — *Arkansas*. — *McNeil v. Gates*, 41 Ark. 264.

*Florida*. — *Bellamy v. Sheriff*, 6 Fla. 62.

*Georgia*. — *Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399.

*Iowa*. — *Sypher v. McHenry*, 18 Iowa 232; *Old Dominion Bank v. Dubuque, etc.*, R. Co., 8 Iowa 277, 74 Am. Dec. 302.

*Michigan*. — *Schwarz v. Wendell*, Walk. (Mich.) 267.

*Minnesota*. — *Baldwin v. Allison*, 4 Minn. 25.

*New Jersey*. — *Deegan v. Capner*, 44 N. J. Eq. 339; *Den v. Hammel*, 18 N. J. L. 73.

*New York*. — *Boerum v. Schenck*, 41 N. Y. 182; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 522; *Johnson v. Bennett*, 39 Barb. (N. Y.) 237.

*South Carolina*. — *Clarke v. Deveaux*, 1 S. Car. 172; *Zimmerman v. Harmon*, 4 Rich. Eq. (S. Car.) 165.

*Utah*. — *Hamilton v. Dooly*, 15 Utah 280.

*Virginia*. — *Howery v. Helms*, 20 Gratt. (Va.) 1.

**5. Although Trustee Paid Fair Price Sale May Be Avoided** — *England*. — *Randall v. Errington*, 10 Ves. Jr. 423.

*Illinois*. — *Thorp v. McCullum*, 6 Ill. 614.

*Iowa*. — *Old Dominion Bank v. Dubuque, etc.*, R. Co., 8 Iowa 277, 74 Am. Dec. 302.

*Maryland*. — *Mason v. Martin*, 4 Md. 124.

*Missouri*. — *Newton v. Rebenack*, 90 Mo. App. 650.

*New Jersey*. — *Culver v. Culver*, 11 N. J. Eq. 215.

*New York*. — *Boerum v. Schenck*, 41 N. Y. 182; *Fulton v. Whitney*, 5 Hun (N. Y.) 16; *Davour v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Johnson v. Bennett*, 39 Barb. (N. Y.) 237.

*North Carolina*. — *Brothers v. Brothers*, 7 Ired. Eq. (42 N. Car.) 150.

*Pennsylvania*. — *Campbell v. Pennsylvania L. Ins. Co.*, 2 Whart. (Pa.) 53; *Fisk v. Sarber*, 6 W. & S. (Pa.) 18.

*South Carolina*. — *Anderson v. Butler*, 31 S. Car. 183; *Clarke v. Deveaux*, 1 S. Car. 172.

*Tennessee*. — *Armstrong v. Campbell*, 3 Yerg. (Tenn.) 201, 24 Am. Dec. 556.

to occupy any position inconsistent with the performance of his duty. Whenever he has become interested in the purchase of trust property at an open sale, the title is voidable.<sup>1</sup> Neither can he purchase as agent of another.<sup>2</sup>

**Courts Allowing Purchase at Public Sale.** — By the courts of some states, however, it is held that where the property has passed into the court's or sheriff's hands for the purposes of sale and there is a sale at public auction a trustee may purchase thereat, since he does not occupy the inconsistent positions of vendor and purchaser and the duties of his trust are over.<sup>3</sup>

*West Virginia.* — *Newcomb v. Brooks*, 16 W. Va. 32.

**Trustee Not Fiduciary as to Property Sold.** — Where, however, a trustee does not occupy a fiduciary relationship to the trust property sold, he is at perfect liberty to consult his own interest with regard to the purchase of that part of the estate of which he is not trustee. *Crompton v. Huber*, 1 Jur. N. S. 465; *Abell v. Bradner*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 64; *Tuggles v. Callison*, 143 Mo. 527; *Sheldon v. Sheldon*, 13 Johns. (N. Y.) 220; *Ten Eyck v. Craig*, 2 Hun (N. Y.) 452, *affirmed* 62 N. Y. 406; *Kern v. Kern*, 36 Oregon 5; *Eldridge v. Smith*, 34 Vt. 484; *Barker v. Barker*, 14 Wis. 131; *Chatham Nat. Bank v. McKeen*, 24 Can. Sup. Ct. 348; *Kilbourn v. Arnold*, 6 Ont. App. 158. See *Knight v. Marjoribanks*, 2 Macn. & G. 10.

A trustee of personality may purchase realty belonging to the trust. *Den v. Hillman*, 7 N. J. L. 180. But see *Cake's Estate*, 157 Pa. St. 457.

**Trustee Guilty of Conversion.** — A trustee of a railroad corporation has no right to purchase bonds issued by it, and if he does so and refuses to deliver them to the corporation he is guilty of conversion. *Smith v. Frost*, 42 N. Y. Super. Ct. 87, *affirmed* 70 N. Y. 65. See *Freeman v. Harwood*, 49 Me. 195.

**1. In Whatever Manner Trustee Interested in Purchase, Title Voidable.** — *Keith v. Kellam*, 35 Fed. Rep. 243; *Robbins v. Butler*, 24 Ill. 387; *Sypher v. McHenry*, 18 Iowa 232; *Ricketts v. Montgomery*, 15 Md. 46; *Spindler v. Atkinson*, 3 Md. 409, 56 Am. Dec. 755; *Williams v. Williams*, 118 Mich. 477; *Bassett v. Shoemaker*, 46 N. J. Eq. 538, 19 Am. St. Rep. 435; *Fisk v. Sarber*, 6 W. & S. (Pa.) 18; *Armstrong v. Campbell*, 3 Yerg. (Tenn.) 201, 24 Am. Dec. 556; *Bowes v. Toronto*, 11 Moo. P. C. 463.

**Trustee Cannot Purchase Through Agent or Intermediary.** — The court will rigidly scrutinize the transaction, and if it appears by a subsequent reconveyance to the trustee that the purchaser at the sale acted as the trustee's agent or intermediary, the sale will be at the beneficiary's option set aside. *MacGregor v. Gardner*, 14 Iowa 326; *Hoffman Steam Coal Co. v. Cumberland Coal, etc., Co.*, 16 Md. 456, 77 Am. Dec. 311; *Mason v. Martin*, 4 Md. 124; *Davis v. Simpson*, 5 Har. & J. (Md.) 147, 9 Am. Dec. 500; *Dorsey v. Dorsey*, 3 Har. & J. (Md.) 470, 6 Am. Dec. 506; *Culver v. Culver*, 11 N. J. Eq. 215; *Scott v. Gamble*, 9 N. J. Eq. 218; *Pitt v. Petway*, 12 Ired. L. (34 N. Car.) 69; *Painter v. Henderson*, 7 Pa. St. 48; *Campbell v. Pennsylvania L. Ins. Co.*, 2 Whart. (Pa.) 53; *Howery v. Helms*, 20 Gratt. (Va.) 1.

**Purchase by Trustee's Wife or Son.** — A trustee's sale of trust property to his wife, *Frazier*

*v. Jeakins*, 64 Kan. 615; *Dundas's Appeal*, 64 Pa. St. 325, or son, *Carter v. Burr*, 46 N. J. Eq. 134, will generally be set aside.

**2. Trustee Cannot Purchase as Agent of Another.** — *Whitcomb v. Minchin*, 5 Madd. 91; *Carr v. Houser*, 46 Ga. 477; *North Baltimore Bldg. Assoc. v. Caldwell*, 25 Md. 420, 90 Am. Dec. 67; *Romaine v. Hendrickson*, 27 N. J. Eq. 162; *Star F. Ins. Co. v. Palmer*, 41 N. Y. Super. Ct. 267; *Hawley v. Cramer*, 4 Cow. (N. Y.) 717.

**3. When Trustee Allowed to Purchase at Public Sale** — *United States.* — *Allen v. Gillette*, 127 U. S. 589; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Prevost v. Gratz*, Pet. (C. C.) 364. *Iowa.* — *Clark v. Holland*, 72 Iowa 34, 2 Am. St. Rep. 230.

*Minnesota.* — *Barber v. Bowen*, 47 Minn. 118.

*Missouri.* — *Dillinger v. Kelley*, 84 Mo. 561. *Ohio.* — *Glemser v. Glemser*, 5 Ohio Dec. 267; *English v. Monypeny*, 3 Ohio Cir. Dec. 582.

*Pennsylvania.* — *Bruner v. Finley*, 187 Pa. St. 389; *Lusk's Appeal*, 108 Pa. St. 152; *Chorpenning's Appeal*, 32 Pa. St. 315, 72 Am. Dec. 789; *Meanor v. Hamilton*, 27 Pa. St. 137; *Hallman's Estate*, 13 Phila. (Pa.) 562, 34 Leg. Int. (Pa.) 169; *Fisk v. Sarber*, 6 W. & S. (Pa.) 18.

*South Carolina.* — *Anderson v. Butler*, 31 S. Car. 183. But see *Chapin v. Weed*, *Clarke* (N. Y.) 464; *Newcomb v. Brooks*, 16 W. Va. 32; *Hopper v. Hopper*, 79 Md. 400; *Callis v. Ridout*, 7 Gill & J. (Md.) 1; *Bell v. Webb*, 2 Gill (Md.) 163.

**Trustee Allowed to Purchase at Sheriff's Sale.** — In *Fisk v. Sarber*, 6 W. & S. (Pa.) 18, it was said: "Where the debt for which the property in such cases is taken in execution is just, and the property liable to the payment of it, and the trustee without funds in his hands, or power to pay it, so as to relieve the property, what can he do? He is certainly not required to advance moneys out of his own pocket for the purpose of redeeming it; and it being taken out of his possession, as it were, and certainly out of his power, by the authority of the law, which is paramount to any that he has as trustee, and placed in the hands of the officer of the law, to whom full power is given to sell and dispose of the same, it is perfectly manifest that he thereby becomes divested of his trusteeship in regard to it; that all his power and control over it cease; so that he has no duty whatever to perform in respect to it in the slightest degree incompatible with his buying at the lowest price for which it may be obtained; and as to the sale to be made by the sheriff, it is impossible to conceive how the trustee can exercise any control or influence



**A Trustee Who Has an Individual Interest to Preserve**, as where he owns a share or part in the trust estate, is generally held to have secured a valid title where he purchases at the court's or sheriff's sale or at any sale where he is not the vendor.<sup>1</sup>

**Purchase of Outstanding Liens.**—The same rule applies in the purchase of outstanding liens or incumbrances against the trust estate or in which the trust estate is interested. Wherever such purchase affects the trust estate, the trustee will, at the beneficiaries' option, hold the property thus acquired as trustee,<sup>2</sup> although he will be reimbursed for his money expended in the purchase.<sup>3</sup>

(2) *By Agreement with Beneficiaries.*—Where a clear contract for the purchase of the trust property or a portion thereof by the trustee has been entered into between the trustee and the *cetui que trust*, the latter being *sui juris* and

over it to the prejudice of those whose interest it is to have the property sold for the highest possible price, that any other individual disposed to buy may not exert."

**1. Trustee Not Vendor Entitled to Purchase to Preserve Interest**—*United States.*—Twin-Lick Oil Co. v. Marbury, 91 U. S. 587; Prevost v. Gratz, Pet. (C. C.) 364.

*Alabama.*—Frazer v. Lee, 42 Ala. 25; McLane v. Spence, 6 Ala. 896; Saltmarsh v. Beene, 4 Port. (Ala.) 283, 30 Am. Dec. 525.

*Kansas.*—Harrison v. Mulvane, 62 Kan. 454. *New York.*—Corbin v. Baker, 167 N. Y. 128; Webster v. Kings County Trust Co., 80 Hun (N. Y.) 420. But see Green v. Winter, 1 Johns. Ch. (N. Y.) 26, 7 Am. Dec. 475.

*Ohio.*—Glemser v. Glemser, 5 Ohio Dec. 267, 5 Ohio N. P. 170. See English v. Monypeny, 11 Ohio Dec. (Reprint) 394, 26 Cinc. L. Bul. 250.

*Texas.*—Goodgame v. Rushing, 35 Tex. 722; Scott v. Mann, 33 Tex. 725; Howard v. Davis, 6 Tex. 183.

See also Reid v. Clendenning, 193 Pa. St. 406. But see Bell v. Webb, 2 Gill (Md.) 163; Re Iron Clay Brick Mfg. Co., 19 Ont. 113.

An heir is allowed to purchase at a partition sale although he is trustee for another heir, since he has an interest to preserve. Hopper v. Hopper, 79 Md. 400.

Where the preservation of such interest is manifestly incompatible with the execution of the trust, the trustee by assumption of the trust will be deemed to have waived his right. Hawley v. Mancius, 7 Johns. Ch. (N. Y.) 174.

A trustee can purchase trust property at a judicial sale not controlled by himself to protect interest of the beneficiaries. Spindler v. Alkinson, 3 Md. 409, 56 Am. Dec. 755; Lusk's Appeal, 108 Pa. St. 152.

**2. Benefit of Trustees' Purchase of Outstanding Titles Goes to Trust Estate**—*England.*—*Ex p.* James, 8 Ves. Jr. 337; Hamilton v. Wright, 9 Cl. & F. 111.

*Canada.*—Hewson v. Smith, 17 Grant Ch. (U. C.) 407; McDonnell v. Smyth, 26 Nova Scotia 259.

*United States.*—Savings, etc., Soc. v. Davidson, (C. C. A.) 97 Fed. Rep. 606; Lenox v. Notrebe, Hempst. (U. S.) 251; De Chambrun v. Cox, (C. C. A.) 60 Fed. Rep. 471.

*Alabama.*—Wiswall v. Stewart, 32 Ala. 433, 70 Am. Dec. 549; Crutchfield v. Haynes, 14 Ala. 49.

*Florida.*—Broome v. Alston, 8 Fla. 307.

*Georgia.*—Renew v. Butler, 30 Ga. 954.

*Illinois.*—Cushman v. Bonfield, 139 Ill. 219, affirming 36 Ill. App. 436. See Moore v. Titman, 44 Ill. 367.

*Indiana.*—Taylor v. Calvert, 138 Ind. 67.

*Kentucky.*—McClanahan v. Henderson, 2 A. K. Marsh. (Ky.) 388, 12 Am. Dec. 412.

*Michigan.*—Petrie v. Badenoch, 102 Mich. 45, 47 Am. St. Rep. 503.

*Missouri.*—McAllen v. Woodcock, 60 Mo. 174; Lass v. Sternberg, 50 Mo. 124.

*New York.*—Fulton v. Whitney, 66 N. Y. 548; Hawley v. Mancius, 7 Johns. Ch. (N. Y.) 174; Matter of Oakley, 2 Edw. (N. Y.) 476.

*North Carolina.*—Brantly v. Kee, 5 Jones Eq. (58 N. Car.) 332; Boyd v. Hawkins, 2 Ired. Eq. (37 N. Car.) 304.

*Pennsylvania.*—Ricketts's Appeal, (Pa. 1888) 12 Atl. Rep. 60; Campbell v. McLain, 51 Pa. St. 200.

*Texas.*—Rio Grande R. Co. v. Armendaiz, 5 Tex. Civ. App. 449; Neyland v. Bendy, 69 Tex. 711.

*Virginia.*—Baugh v. Walker, 77 Va. 99.

*West Virginia.*—Feamster v. Feamster, 35 W. Va. 1.

A trustee cannot defeat the trust by securing for himself property in which the trust estate is interested, by means of a paramount lien. O'Halloran v. Fitzgerald, 71 Ill. 53; Turner v. Butler, 126 Mo. 131; Kirsch v. Tozier, 63 Hun (N. Y.) 607, affirmed 143 N. Y. 390, 42 Am. St. Rep. 729; Fulton v. Whitney, 5 Hun (N. Y.) 16. Nor does it affect the case that the title or lien procured by the trustee is superior to the lien or incumbrance of the trust estate, nor that such title was acquired by the trustee at a judicial sale. Baker v. Springfield, etc., R. Co., 86 Mo. 75; Roberts v. Moseley, 64 Mo. 507; Jewett v. Miller, 10 N. Y. 402; Van Epps v. Van Epps, 9 Paige (N. Y.) 237; Slade v. Van Vechten, 11 Paige (N. Y.) 21.

An assignee for the benefit of creditors cannot under any circumstances buy a debt for his own benefit. *Ex p.* Lacey, 6 Ves. Jr. 626. See also the TITLE ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, p. 115.

**3. Trustee Reimbursed.**—McClanahan v. Henderson, 2 A. K. Marsh. (Ky.) 388, 12 Am. Dec. 412; Matter of Oakley, 2 Edw. (N. Y.) 476; Mathews v. Dragaud, 3 Desaus. (S. Car.) 25; Baugh v. Walker, 77 Va. 99.

under no disability,<sup>1</sup> by the operation of which the trustee has divested himself of his fiduciary relationship,<sup>2</sup> the court will generally enforce the contract.<sup>3</sup> But the court will subject the transaction to a jealous and searching investigation,<sup>4</sup> and the contract will be set aside if they find

**1. Trustee May Enter into a Contract with Beneficiary to Purchase Trust Estate—England.** — *Ex p. Bennett*, 10 Ves. Jr. 381; *Randall v. Errington*, 10 Ves. Jr. 423; *Coles v. Trecothick*, 9 Ves. Jr. 234.

*United States.* — *Michoud v. Girod*, 4 How. (U. S.) 503; *Mills v. Mills*, 63 Fed. Rep. 511. *Colorado.* — *Lathrop v. Pollard*, 6 Colo. 424. *District of Columbia.* — *Beckett v. Tyler*, 3 MacArthur (D. C.) 319.

*Florida.* — *Saunders v. Richards*, 35 Fla. 28. *Georgia.* — *Bryan v. Duncan*, 11 Ga. 67. *Iowa.* — *Booth v. Bradford*, 114 Iowa 562. See *Clark v. Lee*, 14 Iowa 425.

*Maryland.* — *Smith v. Townshend*, 27 Md. 368, 92 Am. Dec. 637; *Hoffman Steam Coal Co. v. Cumberland Coal, etc., Co.*, 16 Md. 486, 77 Am. Dec. 311; *Mason v. Martin*, 4 Md. 124.

*Massachusetts.* — *Barnard v. Stone*, 159 Mass. 224; *Morse v. Hill*, 136 Mass. 60; *Brown v. Cowell*, 116 Mass. 461.

*New York.* — *Stuart v. Kissam*, 11 Barb. (N. Y.) 271; *Conger v. Ring*, 11 Barb. (N. Y.) 356; *Matter of Ledrich*, 68 Hun (N. Y.) 396.

*North Carolina.* — *Cole v. Stokes*, 113 N. Car. 270; *Villines v. Norfleet*, 2 Dev. Eq. (17 N. Car.) 167.

*Pennsylvania.* — *Brownfield's Estate*, 193 Pa. St. 151; *Miggett's Appeal*, 109 Pa. St. 520; *Spencer's Appeal*, 80 Pa. St. 317; *Chronister v. Bushey*, 7 W. & S. (Pa.) 152.

*South Carolina.* — *Butler v. Haskell*, 4 Desaus. (S. Car.) 651. See *M'Guire v. M'Gowen*, 4 Desaus. (S. Car.) 486.

*Virginia.* — *Bresee v. Bradfield*, 99 Va. 331.

*Wisconsin.* — *Ludington v. Patton*, 111 Wis. 208.

See *Newcomb v. Brooks*, 16 W. Va. 32; *McKnight v. McKnight*, 12 Grant Ch. (U. C.) 363.

**2. Trustee Must Divest Himself of His Fiduciary Character.** — *Lathrop v. Pollard*, 6 Colo. 424; *Beckett v. Tyler*, 3 MacArthur (D. C.) 319; *Saunders v. Richards*, 35 Fla. 28; *Smith v. Townshend*, 27 Md. 368, 92 Am. Dec. 637; *Dyer v. Shurtleff*, 112 Mass. 165, 17 Am. Rep. 77; *Newman v. Newman*, 152 Mo. 308; *De Caters v. Le Ray De Chaumont*, 3 Paige (N. Y.) 178; *Cole v. Stokes*, 113 N. Car. 270; *Hamilton v. Dooly*, 15 Utah 280; *Newcomb v. Brooks*, 16 W. Va. 32.

**Relation of Trustee to Estate When Severed.** — In *Ex p. Lacey*, 6 Ves. Jr. 625, Lord Eldon said: "The rule is this. A trustee who is intrusted to sell and manage for others undertakes in the same moment in which he becomes a trustee not to manage for the benefit and advantage of himself. It does not preclude a new contract with those who have intrusted him. It does not preclude him from bargaining that he will no longer act as a trustee. The *cestui que trust* may by a new contract dismiss him from that character, but even then that transaction, by which they dismiss him, must, according to the rules of this court, be watched with infinite and the most guarded jealousy;

and for this reason, that the law supposes him to have acquired all the knowledge a trustee may acquire, which may be very useful to him, but the communication of which to the *cestui que trust* the court can never be sure he has made, when entering into the new contract by which he is discharged. \* \* \* I say, whether he makes advantage or not, if the connection does not satisfactorily appear to have been dissolved, it is in the choice of the *cestuis que trust*, whether they will take back the property or not."

**3. Contract Enforced—England.** — *Coles v. Trecothick*, 9 Ves. Jr. 234.

*Canada.* — *McKnight v. McKnight*, 12 Grant Ch. (U. C.) 363.

*United States.* — *Michoud v. Girod*, 4 How. (U. S.) 503; *Mills v. Mills*, 63 Fed. Rep. 511.

*Iowa.* — *Buell v. Buckingham*, 16 Iowa 284, 85 Am. Dec. 516.

*Maryland.* — *Pairo v. Vickery*, 37 Md. 467.

*Massachusetts.* — *Brown v. Cowell*, 116 Mass. 461.

*New York.* — *Stuart v. Kissam*, 11 Barb. (N. Y.) 271.

*North Carolina.* — *Villines v. Norfleet*, 2 Dev. Eq. (17 N. Car.) 167.

*Pennsylvania.* — *Miggett's Appeal*, 109 Pa. St. 520; *Brownfield's Estate*, 193 Pa. St. 151.

*Tennessee.* — *Coffee v. Ruffin*, 4 Coldw. (Tenn.) 487; *Marshall v. Stephens*, 8 Humph. (Tenn.) 159, 47 Am. Dec. 601; *Birdwell v. Cain*, 1 Coldw. (Tenn.) 301.

*Virginia.* — *Bresee v. Bradfield*, 99 Va. 331.

*West Virginia.* — *Newcomb v. Brooks*, 16 W. Va. 32.

*Wisconsin.* — *Ludington v. Patton*, 111 Wis. 208.

**Trustee May Profit by the Contract.** — In *Brownfield's Estate*, 193 Pa. St. 151, the court sustained a clear contract entered into between trustee and *cestui que trust*, where the trustee acted in good faith, although it subsequently turned out much to the trustee's advantage.

**4. Court Will Make Searching Investigation of the Facts—England.** — *Coles v. Trecothick*, 9 Ves. Jr. 234.

*United States.* — *Michoud v. Girod*, 4 How. (U. S.) 503.

*Alabama.* — *Voltz v. Voltz*, 75 Ala. 555; *McKinley v. Irvine*, 13 Ala. 681.

*Colorado.* — *Lathrop v. Pollard*, 6 Colo. 424.

*District of Columbia.* — *Beckett v. Tyler*, 3 MacArthur (D. C.) 319.

*Georgia.* — *Bryan v. Duncan*, 11 Ga. 67.

*Kentucky.* — *Richardson v. Spencer*, 18 B. Mon. (Ky.) 450.

*Michigan.* — *Dwight v. Blackmar*, 2 Mich. 330, 57 Am. Dec. 130; *Schwarz v. Wendell*, Walk. (Mich.) 267.

*North Carolina.* — *Cole v. Stokes*, 113 N. Car. 270; *Vestal v. Sloan*, 76 N. Car. 127; *Allen v. Bryant*, 7 Ired. Eq. (42 N. Car.) 276.

*Pennsylvania.* — *Chronister v. Bushey*, 7 W. & S. (Pa.) 152.

any inequality in the bargain or that to enforce it would be unconscionable,<sup>1</sup> or should there appear to be inadequacy of price,<sup>2</sup> or any concealment on the part of the trustee of information relative to estates,<sup>3</sup> or

*South Carolina.* — *M'Cants v. Bee*, 1 McCord Eq. (S. Car.) 383, 16 Am. Dec. 610.

*Virginia.* — *Bresee v. Bradfield*, 99 Va. 331.

*West Virginia.* — *Newcomb v. Brooks*, 16 W. Va. 32.

*Wisconsin.* — *Puzey v. Senier*, 9 Wis. 370.

**Courts Will Set Aside a Doubtful Case.** — *Wallace v. Associate Reformed Church*, 10 Ind. 162.

**Even Where a Trustee Has a Right to Purchase Property**, the court will scrutinize the transaction to see whether he has not allowed the property to depreciate in value in order to increase the value of the sale to him, and, if he has done so, will require him to account for the real value. *Prichard v. Farrar*, 116 Mass. 213.

**1. There Must Be No Inequality in the Agreement** — *England.* — *Fox v. Mackreth*, 2 Bro. C. C. 400.

*United States.* — *Michoud v. Girod*, 4 How. (U. S.) 503.

*Alabama.* — *Voltz v. Voltz*, 75 Ala. 555.

*Colorado.* — *Ponard v. Lathrop*, 12 Colo. 171.

*Florida.* — *Saunders v. Richard*, 35 Fla. 28.

*Georgia.* — *Bryan v. Duncan*, 11 Ga. 67.

*Maryland.* — *Pairo v. Vickery*, 37 Md. 467.

*Michigan.* — *Tompkins v. Hollister*, 60 Mich. 470.

*North Carolina.* — *Cole v. Stokes*, 113 N. Car. 270; *Vestal v. Sloan*, 76 N. Car. 127.

*Pennsylvania.* — *Spencer's Appeal*, 80 Pa. St. 317.

*South Carolina.* — *M'Cants v. Bee*, 1 McCord Eq. (S. Car.) 383, 16 Am. Dec. 610.

*Tennessee.* — *Coffee v. Ruffin*, 4 Coldw. (Tenn.) 487.

*Virginia.* — *Bresee v. Bradfield*, 99 Va. 331.

*West Virginia.* — *Newcomb v. Brooks*, 16 W. Va. 32.

*Wisconsin.* — *Ludington v. Patton*, 111 Wis. 208; *Puzey v. Senier*, 9 Wis. 370.

**2. There Must Be an Adequate Consideration** — *England.* — *Dougan v. Macpherson*, (1902) A. C. 197.

*Canada.* — *Blain v. Terryberry*, 11 Grant Ch. (U. C.) 286.

*United States.* — *Michoud v. Girod*, 4 How. (U. S.) 503; *Mills v. Mills*, 63 Fed. Rep. 511.

*Alabama.* — *Johnson v. Johnson*, 5 Ala. 90.

*Florida.* — *May v. May*, 7 Fla. 207, 68 Am. Dec. 431.

*Illinois.* — *Whitesides v. Taylor*, 105 Ill. 496.

*Kentucky.* — *Pugh v. Bell*, 1 J. J. Marsh. (Ky.) 399.

*Maryland.* — *Smith v. Townshend*, 27 Md. 368, 92 Am. Dec. 637.

*Missouri.* — *Newman v. Newman*, 152 Mo. 398.

*Pennsylvania.* — *Brownfield's Estate*, 193 Pa. St. 151.

*South Carolina.* — *Butler v. Haskell*, 4 Desaus. (S. Car.) 651.

*Tennessee.* — *Talbot v. Provine*, 7 Baxt. (Tenn.) 502.

*West Virginia.* — *Newcomb v. Brooks*, 16 W. Va. 32.

*Wisconsin.* — *Ludington v. Patton*, 111 Wis. 208; *Puzey v. Senier*, 9 Wis. 370.

**3. Trustee Must Impart All the Information He Possesses** — *England.* — *Coles v. Trecothick*, 9 Ves. Jr. 234; *Fox v. Mackreth*, 2 Bro. C. C. 400.

*Canada.* — *Dougan v. Macpherson*, (1902) A. C. 197.

*United States.* — *Michoud v. Girod*, 4 How. (U. S.) 503; *Cook v. Sherman*, 20 Fed. Rep. 167.

*Alabama.* — *McKinley v. Irvine*, 13 Ala. 681; *Johnson v. Johnson*, 5 Ala. 90.

*Colorado.* — *Lathrop v. Pollard*, 6 Colo. 424.

*District of Columbia.* — *Beckett v. Tyler*, 3 MacArthur (D. C.) 319.

*Georgia.* — *Bryan v. Duncan*, 11 Ga. 67.

*Iowa.* — *Booth v. Bradford*, 114 Iowa 562; *Barton v. Fuson*, 81 Iowa 575.

*Maryland.* — *Smith v. Townshend*, 27 Md. 368, 92 Am. Dec. 637.

*Massachusetts.* — *Brown v. Cowell*, 116 Mass. 461.

*Michigan.* — *Tompkins v. Hollister*, 60 Mich. 470.

*Mississippi.* — *Jones v. Smith*, 33 Miss. 215.

*New York.* — *Greagan v. Buchanan*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 580.

*North Carolina.* — *Cole v. Stokes*, 113 N. Car. 270.

*Pennsylvania.* — *Miggett's Appeal*, 109 Pa. St. 520; *Spencer's Appeal*, 80 Pa. St. 317; *Chronister v. Bushey*, 7 W. & S. (Pa.) 152.

*South Carolina.* — *Butler v. Haskell*, 4 Desaus. (S. Car.) 651; *M'Cants v. Bee*, 1 McCord Eq. (S. Car.) 383, 16 Am. Dec. 610.

*Tennessee.* — *Talbot v. Provine*, 7 Baxt. (Tenn.) 502; *Coffee v. Ruffin*, 4 Coldw. (Tenn.) 487.

*Utah.* — *Hamilton v. Dooly*, 15 Utah 280.

*Virginia.* — *Bresee v. Bradfield*, 99 Va. 331.

*West Virginia.* — *Newcomb v. Brooks*, 16 W. Va. 32.

*Wisconsin.* — *Ludington v. Patton*, 111 Wis. 208; *Creamer v. Ingalls*, 89 Wis. 112.

**Where Cestui Has Full Knowledge.** — Where from the position or situation of the beneficiary, however, he is already fully acquainted with all the circumstances of the case, including the value of the property, for the trustee to impart information to him would be unnecessary, and therefore is not required. *Whitesides v. Taylor*, 105 Ill. 496; *Mills v. Mills*, 63 Fed. Rep. 511.

**Mistake of Law.** — The trustee must inform the *cestui que trust* of the legal consequences and effect of any arrangement entered into by them, and if he fails to do so equity will afford relief, although as a general rule equity does not relieve against mistakes of law. *Voltz v. Voltz*, 75 Ala. 555; *Saunders v. Richard*, 35 Fla. 28; *Pairo v. Vickery*, 37 Md. 467; *Ludington v. Patton*, 111 Wis. 208. See *Pugh v. Bell*, 1 J. J. Marsh. (Ky.) 399.

In *Tompkins v. Hollister*, 60 Mich. 470, where relief is afforded the beneficiary against an act caused by the trustee's concealment of the beneficiary's legal rights, the court said: "But it is also true that there are cases of fraudulent misrepresentations or concealments



fraud,<sup>1</sup> or that the parties were not dealing at arm's length, as they should upon termination of the relationship, but the trustee still retained influence over the *cestui que trust*.<sup>2</sup>

**Burden of Proof on Trustee.** — In all cases the burden of proof rests upon the trustee to establish all those requirements necessary for the validity of his title to the trust property, whether he relies upon a private agreement<sup>3</sup> or proves

of matters of law by those holding confidential relations to the person wronged thereby which equity will relieve against. Where one relies upon another, and has a right to so rely, and the person relied upon omits to state a most material legal consideration within his knowledge of which the other is ignorant, affecting his rights, and the person thus ignorant acts under this misplaced confidence and is misled by it, a court of equity will afford relief, especially if such action is to the advantage of the person whose advice is taken, even though no fraud was intended."

**1. Trustee Must Not Be Guilty of Fraud** — *United States*. — *Mills v. Mills*, 63 Fed. Rep. 511, affirming 57 Fed. Rep. 873; *Cook v. Sherman*, 20 Fed. Rep. 167.

*Alabama*. — *McKinley v. Irvine*, 13 Ala. 681.  
*Colorado*. — *Lathrop v. Pollard*, 6 Colo. 424.  
*District of Columbia*. — *Beckett v. Tyler*, 3 MacArthur (D. C.) 319.

*Florida*. — *Saunders v. Richard*, 35 Fla. 28.

*Georgia*. — *Bryan v. Duncan*, 11 Ga. 67.

*Kentucky*. — *Richardson v. Spencer*, 18 B. Mon. (Ky.) 450.

*Maryland*. — *Smith v. Townshend*, 27 Md. 368, 92 Am. Dec. 637.

*Massachusetts*. — *Barnard v. Stone*, 159 Mass. 224.

*Missouri*. — *Newman v. Newman*, 152 Mo. 398; *Newton v. Rebenack*, 90 Mo. App. 650.

*North Carolina*. — *Vestal v. Sloan*, 76 N. Car. 127; *Roberts v. Roberts*, 65 N. Car. 27.

*Pennsylvania*. — *Brownfield's Estate*, 193 Pa. St. 151.

*South Carolina*. — *M'Cants v. Bee*, 1 McCord Eq. (S. Car.) 383, 16 Am. Dec. 610.

*Tennessee*. — *Talbot v. Provine*, 7 Baxt. (Tenn.) 502.

Where a trustee has been guilty of fraud all his rights are forfeited. *Wright v. Smith*, 23 N. J. Eq. 106; *Beeson v. Beeson*, 9 Pa. St. 279.

**Constructive Fraud.** — Where a bill stated that the trustee stood in a fiduciary capacity to the estate and purchased trust property at less than its actual value, and charged fraud, the court refused to dismiss the bill on the ground that the allegations as to actual fraud were unsupported by the evidence, since the facts alone set out constituted a case of constructive fraud. *Ricketts's Appeal*, (Pa. 1888) 12 Atl. Rep. 60.

**2. Trustee and Beneficiary Must Deal at Arm's Length** — *England*. — *Williams v. Scott*, (1900) A. C. 499; *Randall v. Errington*, 10 Ves. Jr. 423; *Gibson v. Jeyes*, 6 Ves. Jr. 266.

*Canada*. — *Blain v. Terryberry*, 11 Grant Ch. (U. C.) 286.

*United States*. — *Mills v. Mills*, 63 Fed. Rep. 511.

*Alabama*. — *Voltz v. Voltz*, 75 Ala. 555; *Johnson v. Johnson*, 5 Ala. 90.

*Iowa*. — *Buell v. Buckingham*, 16 Iowa 284, 85 Am. Dec. 516.

*Maryland*. — *Pairo v. Vickery*, 37 Md. 467; *Smith v. Townshend*, 27 Md. 368, 92 Am. Dec. 637.

*Massachusetts*. — *Barnard v. Stone*, 159 Mass. 224; *Brown v. Cowell*, 116 Mass. 461.

*Michigan*. — *Tompkins v. Hollister*, 60 Mich. 470.

*Mississippi*. — *Jones v. Smith*, 33 Miss. 215.

*Missouri*. — *Newman v. Newman*, 152 Mo. 398; *Newton v. Rebenack*, 90 Mo. App. 650; *Sallee v. Chandler*, 26 Mo. 124.

*New York*. — *Greagan v. Buchanan*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 580.

*North Carolina*. — *Villines v. Norfleet*, 2 Dev. Eq. (17 N. Car.) 167; *Baxter v. Costin*, Busb. Eq. (45 N. Car.) 262.

*Pennsylvania*. — *Spencer's Appeal*, 80 Pa. St. 317; *Chronister v. Bushey*, 7 W. & S. (Pa.) 152.

*South Carolina*. — *Butler v. Haskell*, 4 Desaus. (S. Car.) 651; *M'Cants v. Bee*, 1 McCord Eq. (S. Car.) 383, 16 Am. Dec. 610.

*Tennessee*. — *Talbot v. Provine*, 7 Baxt. (Tenn.) 502; *Marshall v. Stephens*, 8 Humph. (Tenn.) 159, 47 Am. Dec. 601.

*Wisconsin*. — *Ludington v. Patton*, 111 Wis. 208; *Creamer v. Ingalls*, 89 Wis. 112.

**"The Court Should Be Satisfied** not only that there was no fraud, but that no use had been made by the trustee of the relation existing between him and the *cestui que trust* to bring it about; that it was fair in all its parts, and such a transaction throughout as the trustee himself would have approved of had it been with a third person instead of himself. When the court is fully satisfied on all these points the sale or contract — for it is not necessary that it should be a sale of trust property — should be set aside. *Schwarz v. Wendell*, Walk. (Mich.) 267.

**Mere Silence on Beneficiary's Part Not Sufficient** — Said the Canada court in *Morrison v. Watts*, 19 Ont. App. 622: "To put the trustee at arm's length the *cestui que trust* must actually enter upon negotiations with the trustee; he cannot do that by mere silence. A trustee cannot say to his *cestui que trust*, 'Unless I hear from you to the contrary by a certain day, I will myself become the purchaser of the trust property at a certain price.' The *cestui que trust* is not bound to take any notice of such a proposal."

**3. Burden of Proof Rests on Trustee** — *England*. — *Williams v. Scott*, (1900) A. C. 499; *Harrison v. Guest*, 6 De G. M. & G. 424.

*Canada*. — *Blain v. Terryberry*, 11 Grant Ch. (U. C.) 286.

*Alabama*. — *Thompson v. Lee*, 31 Ala. 292.

*Maryland*. — *Pairo v. Vickery*, 37 Md. 467.

*New York*. — *Smith v. Howlett*, 29 N. Y. App. Div. 182.

*Mississippi*. — *Jones v. Smith*, 33 Miss. 215.

*Missouri*. — *Newton v. Rebenack*, 90 Mo. App. 650; *Sallee v. Chandler*, 26 Mo. 124.

lapse of time by which acquiescence or ratification by the *cestui* in the purchase is presumed.<sup>1</sup>

(3) *After Termination of the Trust.*—After the trust has been fully discharged and all fiduciary relations are terminated, the trustee, acting in good faith, may become the owner of the trust property.<sup>2</sup> Such transactions will be confirmed only where the court can plainly see that the trustee has acted in absolute good faith throughout, and has preserved to the best of his ability the interests of the trust estate.<sup>3</sup> The court will jealously scrutinize the transaction by which the title was reconveyed to him for evidence of fraud or collusion by which trustees had obtained an interest in the first sale.<sup>4</sup>

*North Carolina.*—*Cole v. Stokes*, 113 N. Car. 270; *Allen v. Bryant*, 7 Ired. Eq. (42 N. Car.) 276.

*Ohio.*—*English v. Monypeny*, 11 Ohio Dec. (Reprint) 394, 26 Cinc. L. Bul. 250.

*Tennessee.*—*Coffee v. Ruffin*, 4 Coldw. (Tenn.) 487; *Field v. Arrowsmith*, 3 Humph. (Tenn.) 442, 39 Am. Dec. 185.

*Wisconsin.*—*Ludington v. Patton*, 111 Wis. 208; *Creamer v. Ingalls*, 89 Wis. 112.

**Cestui Advised by Counsel.**—That the *cestui que trust's* lawyer advised him to allow the trustee to purchase on the terms agreed does not shift the burden of proof from the trustee to establish a binding and valid contract. *Cole v. Stokes*, 113 N. Car. 270.

1. *Randall v. Errington*, 10 Ves. Jr. 423. See also *infra*, this subsection, *Rights Secured by Ratification*.

2. **After Termination of Trust, Trustee May Repurchase Trust Property**—*England.*—*In re Boles*, (1902) 1 Ch. 244.

*Canada.*—*Chatham Nat. Bank v. McKeen*, 24 Can. Sup. Ct. 348; *In re Mabou Coal, etc.*, Co., 27 Nova Scotia 305.

*United States.*—*Stephen v. Beall*, 22 Wall. (U. S.) 329.

*Arkansas.*—*Wright v. Campbell*, 27 Ark. 637.

*Illinois.*—*Bush v. Sherman*, 80 Ill. 160; *Munn v. Burges*, 70 Ill. 604.

*Maine.*—*Boynton v. Brastow*, 53 Me. 362.

*New Jersey.*—*Wortman v. Skinner*, 12 N. J. Eq. 358.

*New York.*—*De Bevoise v. Sanford, Hoffm.* (N. Y.) 192.

*Pennsylvania.*—*Bruner v. Finley*, 187 Pa. St. 406; *Painter v. Henderson*, 7 Pa. St. 48; *Hallman's Estate*, 13 Phila. (Pa.) 562, 34 Leg. Int. (Pa.) 169.

*South Carolina.*—*Britton v. Lewis*, 8 Rich. Eq. (S. Car.) 271.

**Where the Title of the Cestui Que Trust has been destroyed the trustee may acquire real title for his own benefit.** *Price v. Evans*, 26 Mo. 30.

**Exchange of Lands by Trustee.**—In confirming an exchange by trustee of his own lands for those which formerly belonged to the beneficiary, but were then vested in the hands of a *bona fide* purchaser, the court said: "But if the property is sold under hostile proceedings—by a judicial sentence—under an incumbency made prior to the creation of the trust, the relation must be presumed to be destroyed. Proof must then be adduced that the trustee unwarrantably promoted or permitted the proceeding, and had a connection with the actual purchaser, to realize an advantage to himself." *De Bevoise v. Sanford, Hoffm.* (N. Y.) 192.

3. **Absolute Good Faith Required.**—*Bowes v. Toronto*, 11 Moo. P. C. 463; *Cook v. Collingridge*, Jac. 607; *Stephen v. Beall*, 22 Wall. (U. S.) 329; *Bush v. Sherman*, 80 Ill. 160; *Munn v. Burges*, 70 Ill. 604; *Walker v. Carrington*, 74 Ill. 446; *Boehlert v. McBride*, 48 Mo. 505; *Oberlin College v. Blair*, 45 W. Va. 812.

**So Long as There Is an Executory Contract** by which the trustee is bound, upon compliance by the purchaser with the terms of the agreement, to convey to him the trust property, the trustee cannot repurchase the property and secure absolute title thereto, since this would be incompatible with the performance of his duties, either to enforce or rescind the agreement, as might seem best for the trust, if the first purchaser should not comply with his contract. *Delves v. Gray*, (1902) 2 Ch. 606, 87 L. T. N. S. 425; *Parker v. McKenna*, L. R. 10 Ch. 125; *Williams v. Scott*, (1900) A. C. 499; *Wing v. Hartuppee*, (C. C. A.) 122 Fed. Rep. 897; *Boynton v. Brastow*, 53 Me. 362; *Toole v. McKiernan*, 48 N. Y. Super. Ct. 163.

4. *In re Boles*, (1902) 1 Ch. 244; *Bowes v. Toronto*, 11 Moo. P. C. 463; *Cook v. Collingridge*, Jac. 607; *Williams v. Williams*, 118 Mich. 477; *Minneapolis Trust Co. v. Menage*, 73 Minn. 441; *Smith v. Isaac*, 12 Mo. 106; *Creveling v. Fritts*, 34 N. J. Eq. 134; *Wortman v. Skinner*, 12 N. J. Eq. 358; *Culver v. Culver*, 11 N. J. Eq. 215; *Mullen v. Doyle*, 147 Pa. St. 512; *Re Follis*, 6 Ont. Pr. 160.

**That the Trustee's Relationship to the Estate Has Terminated** does not necessarily affect the case; the trustee's conduct, although he may have completed his duties as trustee, will still be subject to a rigid surveillance. *Carter v. Palmer*, 8 Cl. & F. 657; *De Chambrun v. Cox*, (C. C. A.) 60 Fed. Rep. 471; *Voltz v. Voltz*, 75 Ala. 555; *Coffee v. Ruffin*, 4 Coldw. (Tenn.) 487; *Morris v. Joseph*, 1 W. Va. 256, 91 Am. Dec. 386.

**Trustee's Title from Bona Fide Purchaser for Value Voidable.**—Although the trustee has reacquired the trust property from a *bona fide* purchaser without notice, the court will frequently decree that he holds the property subject to the original trust. *Church v. Ruland*, 64 Pa. St. 432. See *McDonald v. McDonald*, 21 Can. Sup. Ct. 201.

**After Lapse of Thirteen Years the Trustee was allowed to repurchase.** *Stephen v. Beall*, 22 Wall. (U. S.) 329.

**Presumption Where Trust Property Is Immediately Reconveyed to Trustee.**—"The rights of *cestuis que trust* require in such cases that the law should presume that the intermediate taker of the property was but the agent and

(4) *By Court's Consent.* — If trustees desire to purchase trust property they should file a bill of equity requesting the court to investigate the circumstances of the case and to allow them to bid, which the court will, in its discretion, grant.<sup>1</sup>

(5) *Rights Secured by Ratification.* — The *cestui que trust* may, if *sui juris* and fully apprised of all his rights, ratify the purchase by the trustee of trust property, thereby confirming the title of the latter.<sup>2</sup> In order for such ratification to be valid and effectual, the trustee must assure himself that the *cestui que trust* has knowledge of every fact necessary to assist him in forming a correct judgment, so far as such facts are within the trustee's knowledge,<sup>3</sup> and the *cestui que trust's* ratification must be voluntary<sup>4</sup> and

instrument of the trustee — a means of conveyance. The contrary of the presumption ought not to be proven, or even alleged. It would be unsafe to uphold a transfer under such circumstances, for the want of express proof of the actual intent of the parties, from the facts or upon their oath, that the repurchase of the trustee was an afterthought. When the title remains in the immediate grantee but for a moment, or a very brief period of time, and is at once transferred to the trustee, or for his benefit, the presumption that the two transfers were only intended to effect the object, that of conveying the property to or for the benefit of the trustee, is as strong as is the malicious intent to kill from the deliberate use of a deadly weapon." *Abbot v. American Hard Rubber Co.*, 33 Barb. (N. Y.) 578. See *Cook v. Collingridge*, Jac. 607.

1. *Trustee Should Ask Consent of Court.* — *Campbell v. Walker*, 5 Ves. Jr. 678; *Frazier v. Jeakins*, 64 Kan. 615; *Morse v. Hill*, 136 Mass. 60; *Scott v. Gamble*, 9 N. J. Eq. 218; *Scholle v. Scholle*, 101 N. Y. 167; *Corbin v. Baker*, 56 N. Y. App. Div. 35, *affirmed* 167 N. Y. 128; *Patterson v. Lennig*, 118 Pa. St. 571; *Hallman's Estate*, 13 Phila. (Pa.) 562, 34 Leg. Int. (Pa.) 169; *Felkner v. Dooly*, (Utah 1904) 75 Pac. Rep. 854. See *Rice v. Cleghorn*, 21 Ind. 80; *Prichard v. Farrar*, 116 Mass. 213.

The court will cause the trustee to impart full information to bidders of value of property, and to advise the court as to best manner of sale. *De Caters v. Le Ray De Chaumont*, 3 Paige (N. Y.) 178.

Either the written consent of the beneficiaries, *De Caters v. Le Ray De Chaumont*, 3 Paige (N. Y.) 178, or a hearing of all parties interested, will be required. *Scholle v. Scholle*, 101 N. Y. 167; *Corbin v. Baker*, 167 N. Y. 128; *Felkner v. Dooly*, (Utah 1904) 75 Pac. Rep. 854. See *Crump's Estate*, 13 Pa. Co. Ct. 286.

Good faith on the part of the trustee, *Cadwalader's Appeal*, 64 Pa. St. 293; *Felkner v. Dooly*, (Utah 1904) 75 Pac. Rep. 854; *Ricker v. Ricker*, 7 Ont. App. 282, and a full price to be approved by the court, is necessary, *Colgate v. Colgate*, 23 N. J. Eq. 372; *Ricker v. Ricker*, 7 Ont. App. 282.

**Sale of Trustee to Himself May Be Ratified by Court.** — *Corbin v. Baker*, 56 N. Y. App. Div. 35; *Morse v. Hill*, 136 Mass. 60.

**Bidding by Trustee to Protect His Beneficial Interests Allowed.** — *Cadwalader's Appeal*, 64 Pa. St. 293.

**After a Sale at Auction Has Proved Abortive** the court may accept a private bid of the trustee for the estate. *Hutton v. Justin*, 2 Ont. L. Rep. 713.

2. **Cestui May Ratify.** — *Newton v. Rebenack*, 90 Mo. App. 650.

The *cestui que trust* must be under no disability at the time of ratification. *Boerum v. Schenck*, 41 N. Y. 182.

**Cestui Must Be Fully Informed of His Rights.** — *Walker v. Symonds*, 3 Swanst. 64; *Beeson v. Beeson*, 9 Pa. St. 300.

3. **Trustee Must Impart All Information in His Power** — *England.* — *Randall v. Errington*, 10 Ves. Jr. 423; *Williams v. Scott*, (1900) A. C. 499.

*Canada.* — See *Robinson v. Coyne*, 14 Grant Ch. (U. C.) 561.

*United States.* — *Piatt v. Oliver*, 2 McLean (U. S.) 267. See also *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587.

*Alabama.* — *Voltz v. Voltz*, 75 Ala. 555; *Thompson v. Lee*, 31 Ala. 292; *Andrews v. Hobson*, 23 Ala. 219; *Johnson v. Johnson*, 5 Ala. 90.

*Arkansas.* — *McNeil v. Gates*, 41 Ark. 264.

*Illinois.* — *Miles v. Wheeler*, 43 Ill. 123.

*Maryland.* — *Pairo v. Vickery*, 37 Md. 467; *Hoffman Steam Coal Co. v. Cumberland Coal, etc., Co.*, 16 Md. 456, 77 Am. Dec. 311; *Mason v. Martin*, 4 Md. 124; *Bell v. Webb*, 2 Gill (Md.) 163.

*Minnesota.* — *St. Paul Trust Co. v. Strong*, 85 Minn. 1.

*Mississippi.* — *Scott v. Freeland*, 7 Smed. & M. (Miss.) 409, 45 Am. Dec. 310.

*Missouri.* — *Newton v. Rebenack*, 90 Mo. App. 650.

*New Jersey.* — *Scott v. Gamble*, 9 N. J. Eq. 218; *Mulford v. Minch*, 11 N. J. Eq. 16.

*New York.* — *Boerum v. Schenck*, 41 N. Y. 182. See also *Smith v. Howlett*, 29 N. Y. App. Div. 182; *Adair v. Brimmer*, 74 N. Y. 539.

*North Carolina.* — *Cole v. Stokes*, 113 N. Car. 270.

*Pennsylvania.* — *Campbell v. McLain*, 51 Pa. St. 200.

*Virginia.* — *Smith v. Miller*, 98 Va. 535.

*Wisconsin.* — *Creamer v. Ingalls*, 89 Wis. 112; *Luddington v. Patton*, 111 Wis. 208.

4. **There Must Be No Undue Influence.** — *Newton v. Rebenack*, 90 Mo. App. 650; *Boerum v. Schenck*, 41 N. Y. 182; *McCants v. Bee*, 1 McCord Eq. (S. Car.) 383, 16 Am. Dec. 610.

**The Beneficiary Must Know the transaction**



distinct.<sup>1</sup> If under these circumstances the trustee's title is confirmed the sale cannot be set aside.<sup>2</sup>

(6) *Nature of Beneficiary's Rights* — (a) *In General*. — Only the beneficiary, however, can exercise the option of avoiding or approving the sale by the trustee to himself.<sup>3</sup> As against all others the title is good,<sup>4</sup> but if he desires to avoid the sale he may do so, regardless of attendant circumstances, since it is matter absolutely vested in his discretion,<sup>5</sup> provided only he acts in a reasonable time; or, to state the proposition specifically, the trustee purchases subject to the equity of having the sale set aside by the *cestui* within a reasonable time.<sup>6</sup>

with the *cestui que trust* to be impeachable when he confirms it. *Thompson v. Lee*, 31 Ala. 292; *Newton v. Rebenack*, 90 Mo. App. 650; *M'Cants v. Bee*, 1 McCord Eq. (S. Car.) 383, 16 Am. Dec. 610.

**1. Trustee Must Distinctly Acquiesce and Agree.** — *Williams v. Scott*, (1900) A. C. 499; *Randall v. Errington*, 10 Ves. Jr. 423; *Miles v. Wheeler*, 43 Ill. 123; *Cole v. Stokes*, 113 N. Car. 270; *Johnson v. Johnson*, 5 Ala. 90; *Ricketts v. Montgomery*, 15 Md. 46; *Mulford v. Minch*, 11 N. J. Eq. 16.

**Receipt of Purchase Money Not per Se Ratification.** — *Williams v. Scott*, (1900) A. C. 499; *Morrison v. Watts*, 19 Ont. App. 622; *Cook v. Sherman*, 20 Fed. Rep. 167, 4 McCrary (U. S.) 20; *Scott v. Gamble*, 9 N. J. Eq. 218; *Boerum v. Schenck*, 41 N. Y. 182; *Woodruff v. Boyden*, (N. Y. Super. Ct. Spec. T.) 3 Abb. N. Cas. (N. Y.) 29.

**The Acceptance of Part** of the proceeds of sale, under the circumstances stated, does not estop the parties entitled from claiming the residue. Such an act might bind them not to disturb the title of a purchaser, but surely the payment of part of what the executors owed is no reason why they should not pay the residue. *Rosenberger's Appeal*, 26 Pa. St. 67.

But where the *cestui que trust*, under no disability, in full knowledge of his rights, and by a perfectly *bona fide* transaction accepts the purchase money, such conduct will amount to ratification. *Scott v. Freeland*, 7 Smed. & M. (Miss.) 409, 45 Am. Dec. 310; *Howery v. Helms*, 20 Gratt. (Va.) 1.

**2. Prevost v. Gratz**, Pet. (C. C.) 364; *Andrews v. Hobson*, 23 Ala. 219; *Scott v. Gamble*, 9 N. J. Eq. 218.

**3. Beneficiary Only May Avoid Sale.** — *Connecticut Mut. L. Ins. Co. v. Stinson*, 62 Ill. App. 319; *Rice v. Cleghorn*, 21 Ind. 80; *Kern v. Chalfant*, 7 Minn. 487; *Tatum v. McLellan*, 50 Miss. 1; *Boerum v. Schenck*, 41 N. Y. 182.

**Creditors** do not stand in the shoes of the beneficiaries. *Bresee v. Bradfield*, 99 Va. 331.

**The Natural Guardian of Infant Beneficiaries** has no power to ratify a sale to trustees, although he is the creator of the trust. *Andrews v. Hobson*, 23 Ala. 219.

**Estoppel.** — Beneficiaries are not estopped from avoiding a sale by a trustee to himself by reason of having taken legacies under his will, where the legacies were not made, or charged on the property derived by the trustee from the purchase of the trust estate. *Smith v. Townshend*, 27 Me. 368, 92 Am. Dec. 637.

**4. Title Good Against All Save Beneficiaries.** — *McKinley v. Irvine*, 13 Ala. 681; *Baldwin v.*

*Allison*, 4 Minn. 25; *Jackson v. Van Dalfsen*, 5 Johns. (N. Y.) 43; *Ten Eyck v. Craig*, 5 Thomp. & C. (N. Y.) 65, 2 Hun (N. Y.) 452; *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; *Painter v. Henderson*, 7 Pa. St. 48; *Woelper's Appeal*, 2 Pa. St. 71; *McNish v. Pope*, 8 Rich. Eq. (S. Car.) 112.

**5. Beneficiaries' Right to Set Sale Aside Absolute** — *England.* — *Campbell v. Walker*, 5 Ves. Jr. 678.

*Canada.* — *Harrison v. Harrison*, 14 Grant Ch. (U. C.) 586.

*Alabama.* — *Andrews v. Hobson*, 23 Ala. 219; *Charles v. Dubose*, 29 Ala. 367; *Saltmarsh v. Beene*, 4 Port. (Ala.) 283, 30 Am. Dec. 525.

*Arkansas.* — *Searcy v. Yarnell*, 47 Ark. 269.

*Colorado.* — *French v. Woodruff*, 25 Colo. 339.

*Georgia.* — *Renew v. Butler*, 30 Ga. 954;

*Worthy v. Johnson*, 8 Ga. 236, 52 Am. Dec. 399.

*Illinois.* — *Thorp v. McCullum*, 6 Ill. 614.

*Indiana.* — *Rice v. Cleghorn*, 21 Ind. 80.

*Iowa.* — *Sypher v. McHenry*, 18 Iowa 232;

*Old Dominion Bank v. Dubuque*, etc., R. Co.,

8 Iowa 277, 74 Am. Dec. 302.

*Maryland.* — *Mason v. Martin*, 4 Md. 124;

*Davis v. Simpson*, 5 Har. & J. (Md.) 147, 9 Am.

Dec. 500.

*Massachusetts.* — *Jennison v. Hapgood*, 7 Pick. (Mass.) 1, 19 Am. Dec. 258.

*Mississippi.* — *Scott v. Freeland*, 7 Smed. &

M. (Miss.) 409, 45 Am. Dec. 310.

*New Hampshire.* — *Remick v. Butterfield*, 31

N. H. 70, 64 Am. Dec. 316.

*New Jersey.* — *Staats v. Bergen*, 17 N. J. Eq.

554; *Huston v. Cassedy*, 13 N. J. Eq. 228.

*New York.* — *Jackson v. Walsh*, 14 Johns.

(N. Y.) 407; *Johnson v. Bennett*, 39 Barb. (N.

Y.) 237; *Campbell v. Johnson*, 1 Sandf. Ch.

(N. Y.) 148; *Ames v. Downing*, 1 Bradf. (N.

Y.) 321.

*Pennsylvania.* — *Campbell v. Pennsylvania*

L. Ins. Co., 2 Whart. (Pa.) 53.

*South Carolina.* — *Zimmerman v. Harmon*, 4

Rich. Eq. (S. Car.) 165; *Ex p. Wiggins*, 1 Hill

Eq. (S. Car.) 353.

*Tennessee.* — *Armstrong v. Campbell*, 3 Yerg.

(Tenn.) 201, 24 Am. Dec. 556.

*Texas.* — *Everett v. Henry*, 67 Tex. 402.

*Utah.* — *Hamilton v. Dooly*, 15 Utah 280.

*West Virginia.* — *Newcomb v. Brooks*, 16 W.

Va. 32.

**6. Beneficiaries Must Repudiate Sale in a Reasonable Time** — *England.* — *Campbell v. Walker*, 5 Ves. Jr. 678.

*United States.* — *Hammond v. Hopkins*, 143

U. S. 224; *Twin-Lick Oil Co. v. Marbury*, 91

U. S. 587.

**When Beneficiary's Remedies Barred.** — An affirmation of the sale will be implied from an unreasonable delay,<sup>1</sup> since unexplained acquiescence operates as a waiver of the right, and establishes confirmation and approval,<sup>2</sup> but knowledge of the facts which give rise to equitable relief,<sup>3</sup> and a want of diligence in acting on those facts must coexist to bar the beneficiaries' right.<sup>4</sup>

**(b) Remedies of Cestui Que Trust.** — Where the trustee has purchased trust property at a public sale,<sup>5</sup> or where the trustee has not secured the right to purchase to himself by a private contract which the court allows to stand,<sup>6</sup> the *cestui que trust* may elect one of several courses. He may affirm the sale and hold the trustee to his purchase,<sup>7</sup> or he may disaffirm the

*Alabama.* — *Carter v. Thompson*, 41 Ala. 375; *Wiswall v. Stewart*, 32 Ala. 433, 70 Am. Dec. 549; *Charles v. Dubose*, 29 Ala. 367; *Andrews v. Hobson*, 23 Ala. 219; *Saltmarsh v. Beene*, 4 Port. (Ala.) 283, 30 Am. Dec. 525.

*Georgia.* — *Carr v. Houser*, 46 Ga. 477.

*Illinois.* — *Higgins v. Curtiss*, 82 Ill. 28; *Farrar v. Payne*, 73 Ill. 82; *Thorp v. McCullum*, 6 Ill. 614.

*Indiana.* — *Rice v. Cleghorn*, 21 Ind. 80; *Wallace v. Associate Reformed Church*, 10 Ind. 162.

*Maryland.* — *Davis v. Simpson*, 5 Har. & J. (Md.) 147, 9 Am. Dec. 500; *Mason v. Martin*, 4 Md. 124.

*Massachusetts.* — *Jennison v. Hapgood*, 7 Pick. (Mass.) 1, 19 Am. Dec. 258.

*Mississippi.* — *Scott v. Freeland*, 7 Smed. & M. (Miss.) 409, 45 Am. Dec. 310.

*New York.* — *Jackson v. Walsh*, 14 Johns. (N. Y.) 407; *Conger v. Ring*, 11 Barb. (N. Y.) 356.

*Pennsylvania.* — *Costen's Appeal*, 13 Pa. St. 292.

*Texas.* — *Connolly v. Hammond*, 51 Tex. 635.

*Utah.* — *Hamilton v. Dooley*, 15 Utah 280.

*West Virginia.* — *Newcomb v. Brooks*, 16 W. Va. 32.

**Prompt Action Required.** — In *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, Miller, J., said: "In fixing this period in any particular case, we are but little aided by the analogies of the statutes of limitation; while, though not falling exactly within the rule as to time for rescinding, or offering to rescind, a contract by one of the parties to it for actual fraud, the analogies are so strong as to give to this latter great force in the consideration of the case. In this class of cases the party is bound to act with reasonable diligence as soon as the fraud is discovered, or his right to rescind is gone. No delay, for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain or rescind it, is allowed in a court of equity." See generally on this subject **LIMITATION OF ACTIONS**, vol. 19, p. 136.

**1. Affirmance Implied from Unreasonable Delay.** — *Hoyt v. Latham*, 143 U. S. 553; *Voltz v. Voltz*, 75 Ala. 555; *Johnson v. Johnson*, 5 Ala. 90; *Morse v. Hill*, 136 Mass. 60; *Jones v. Smith*, 33 Miss. 215; *Shelby v. Creighton*, (Neb. 1902) 91 N. W. Rep. 369; *Meanor v. Hamilton*, 27 Pa. St. 137; *Connolly v. Hammond*, 51 Tex. 635.

**Illustrations.** — Thus a delay of ten years, *Scott v. Freeland*, 7 Smed. & M. (Miss.) 409, 45 Am. Dec. 310; *Hubbell v. Medbury*, 53 N.

Y. 98; eighteen years, *Costen's Appeal*, 13 Pa. St. 292; or twenty years, *Greagan v. Buchanan*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 580, has been held fatal.

**Delay with Elements of Estoppel.** — If parties knowing all the circumstances of the sale lay by and allow the trustees to expend their money on valuable improvements and also receive the purchase money, such conduct will estop them from avoiding the sale. *Davis v. Simpson*, 5 Har. & J. (Md.) 147, 9 Am. Dec. 500. See also the title **ESTOPPEL**, vol. 11, p. 434 *et seq.*

**2. Prevost v. Ghatz.** Pet. (C. C.) 364; *James v. James*, 55 Ala. 525; *Veasey v. Graham*, 17 Ga. 99, 63 Am. Dec. 228. See *Kahn v. Chapin*, 84 Hun (N. Y.) 541, *affirmed* 152 N. Y. 305.

**Rights of Third Parties Intervening.** — The disallowance must be made before the rights of third parties have intervened. *Patten v. Pearson*, 60 Me. 220; *Pairo v. Vickery*, 37 Md. 467; *Stuart v. Kissam*, 11 Barb. (N. Y.) 271. See *Morse v. Hill*, 136 Mass. 60.

**3. Beneficiary Must Have Knowledge of All Facts.** — *Johnson v. Johnson*, 5 Ala. 90; *Higgins v. Curtiss*, 82 Ill. 28; *Bell v. Webb*, 2 Gill (Md.) 163; *Bruner v. Finley*, 187 Pa. St. 389; *Campbell v. McLean*, 51 Pa. St. 200.

**Where the Cestui Is Ignorant of His Rights** a lapse of fifteen years is insufficient. *Pairo v. Vickery*, 37 Md. 477. And where the *cestui* is ignorant of the fact of the sale, he is not barred by lapse of sixteen years. *Bell v. Webb*, 2 Gill (Md.) 163.

**The Lapse of Time Unexplained by Equitable Circumstances** may be so extended as to furnish an absolute presumption that the *cestui que trust* had notice of sale by the trustee to himself. *Prevost v. Gratz*, 6 Wheat. (U. S.) 481; *Bush v. Sherman*, 80 Ill. 168; *Villines v. Norfleet*, 2 Dev. Eq. (17 N. Car.) 167.

**4. Beneficiary Must Be Guilty of Want of Diligence.** — *Hoyt v. Latham*, 143 U. S. 553; *Prevost v. Gratz*, Pet. (C. C.) 364; *Cook v. Sherman*, 20 Fed. Rep. 167; *James v. James*, 55 Ala. 525; *Johnson v. Johnson*, 5 Ala. 90; *Higgins v. Curtiss*, 82 Ill. 28; *Pairo v. Vickery*, 37 Md. 467; *Bell v. Webb*, 2 Gill (Md.) 163; *Villines v. Norfleet*, 2 Dev. Eq. (17 N. Car.) 167; *Bruner v. Finley*, 187 Pa. St. 389; *Connolly v. Hammond*, 51 Tex. 635. See *Marsh v. Whitmore*, 21 Wall. (U. S.) 178.

**5. Ex p. James**, 8 Ves. Jr. 337.

**6. See supra**, this section, 9. b. (2) *By Agreement with Beneficiaries*.

**7. Cestui May Hold Trustee to His Purchase.** — *Thorp v. McCullum*, 6 Ill. 614; *Huff v. Earl*, 3 Ind. 306; *Union Slate Co. v. Tilton*, 69 Me. 244; *Scott v. Freeland*, 7 Smed. & M. (Miss.)

sale,<sup>1</sup> insisting upon a reconveyance of the property,<sup>2</sup> or, when a reconveyance is not desired, the property may be exposed for resale either absolutely or at a minimum price.<sup>3</sup> He may require the trustee to account for accrued rents and profits,<sup>4</sup> and when the trustee has resold the property, he may be compelled to account as trustee for the price he has received.<sup>5</sup>

409, 45 Am. Dec. 310; *Benson v. Benson*, 97 Mo. App. 460; *Remick v. Butterfield*, 31 N. H. 70, 64 Am. Dec. 316; *Deegan v. Capner*, 44 N. J. Eq. 339; *Dodge v. Stevens*, 94 N. Y. 209; *Boerum v. Schenck*, 41 N. Y. 182; *Jackson v. Van Dalfsen*, 5 Johns. (N. Y.) 43; *Pitt v. Petway*, 12 Ired. L. (34 N. Car.) 69; *McGinn v. Shaeffer*, 7 Watts (Pa.) 412; *McClure v. Miller*, Bailey Eq. (S. Car.) 107, 21 Am. Dec. 522. See also *supra*, this subsection.

**1. Portion Only of Beneficiaries May Disaffirm.**—Although several beneficiaries have ratified the sale it is the privilege of any beneficiary to demand that the entire property be resold, including not only his own share, but those of his fellow beneficiaries who have ratified the sale. *Howery v. Helms*, 20 Gratt. (Va.) 1. See also *Morse v. Hill*, 136 Mass. 60.

**2. Reconveyance Required.**—*Higgins v. Curtiss*, 82 Ill. 28; *Morse v. Hill*, 136 Mass. 60; *Gilman v. Healy*, 49 Hun (N. Y.) 274; *Dodge v. Stevens*, 94 N. Y. 209; *Powers v. Black*, 159 Pa. St. 153. See also *Smith v. Frost*, 70 N. Y. 65.

**3. Cestui May Have Property Re-exposed for Sale**—*United States*.—*Prevost v. Gratz*, Pet. (C. C.) 364.

*Canada*.—*Ricker v. Ricker*, 7 Ont. App. 282.

*Illinois*.—*Stokes v. Frazier*, 72 Ill. 428; *Ogden v. Larrabee*, 57 Ill. 389.

*Maryland*.—*Mason v. Martin*, 4 Md. 124.

*Michigan*.—*Schwarz v. Wendell*, Walk. (Mich.) 267.

*New Jersey*.—*Carter v. Burr*, 46 N. J. Eq. 134; *Bassett v. Shoemaker*, 46 N. J. Eq. 538, 19 Am. St. Rep. 435; *Deegan v. Capner*, 44 N. J. Eq. 339; *Carson v. Marshall*, 37 N. J. Eq. 213.

*New York*.—*Hubbell v. Medbury*, 53 N. Y. 98; *Jewett v. Miller*, 10 N. Y. 402; *Johnson v. Bennett*, 39 Barb. (N. Y.) 237; *Campbell v. Johnston*, 1 Sandf. Ch. (N. Y.) 148.

*North Carolina*.—*Pitt v. Petway*, 12 Ired. L. (34 N. Car.) 69; *Brothers v. Brothers*, 7 Ired. Eq. (42 N. Car.) 150.

*Pennsylvania*.—*Fisk v. Sarber*, 6 W. & S. (Pa.) 18.

*Tennessee*.—*Coffee v. Ruffin*, 4 Coldw. (Tenn.) 487; *Field v. Arrowsmith*, 3 Humph. (Tenn.) 442, 39 Am. Dec. 185.

*Utah*.—*Hamilton v. Dooley*, 15 Utah 280.

**Upset Sale.**—Both in *England* and *America* it has been held that where a trustee has purchased trust property and he has not divested himself of the title, at the beneficiary's option, the property may be again put up for sale, with all improvements made thereon by the trustee, who is to be credited therefor and debited with the rents and profits received; and if the sale brings no more than the bid of the trustee coupled with the amount expended by him in improvements, the trustee will be held to his purchase; but if the would-be purchaser's offer exceeds this sum, the sale to the trustee will be set aside.

*England*.—*In re Norrington*, 13 Ch. D. 654; *Lister v. Lister*, 6 Ves. Jr. 631; *Ex p. Reynolds*, 5 Ves. Jr. 707; *Ex p. Hughes*, 6 Ves. Jr. 617.

*Canada*.—*Re Follis*, 6 Ont. Pr. 160.

*Illinois*.—*Ogden v. Larrabee*, 57 Ill. 389; *Thorp v. McCullum*, 6 Ill. 614.

*New York*.—*Hawley v. Cramer*, 4 Cow. (N. Y.) 717. See *Rogers v. Rogers*, Hopk. (N. Y.) 515.

*Ohio*.—*English v. Monypeny*, 11 Ohio Dec. (Reprint) 394, 26 Cinc. L. Bul. 250.

*Pennsylvania*.—*Beeson v. Beeson*, 9 Pa. St. 279.

*South Carolina*.—*Ex p. Wiggins*, 1 Hill Eq. (S. Car.) 353.

*Virginia*.—*Howery v. Helms*, 20 Gratt. (Va.) 1; *Bailey v. Robinson*, 1 Gratt. (Va.) 4, 42 Am. Dec. 540; *Buckles v. Lafferty*, 2 Rob. (Va.) 292, 40 Am. Dec. 752.

**4. Trustee Required to Account for Rents and Profits of Property Purchased.**—*Keith v. Kellam*, 35 Fed. Rep. 243; *Prevost v. Gratz*, Pet. (C. C.) 364; *Bradford v. Clayton*, (Ky. 1897) 39 S. W. Rep. 40; *Freeman v. Harwood*, 49 Me. 195; *Morse v. Hill*, 136 Mass. 60; *Schwarz v. Wendell*, Walk. (Mich.) 267; *Baldwin v. Allison*, 4 Minn. 25; *Mulford v. Minch*, 11 N. J. Eq. 16; *Carson v. Marshall*, 37 N. J. Eq. 213; *Hubbell v. Medbury*, 53 N. Y. 98; *Jewett v. Miller*, 10 N. Y. 402; *In re Randall*, (Supm. Ct. Gen. T.) 29 N. Y. Supp. 1019; *Hunt v. Bass*, 2 Dev. Eq. (17 N. Car.) 292, 24 Am. Dec. 274; *Fisk v. Sarber*, 6 W. & S. (Pa.) 18; *Everett v. Henry*, 67 Tex. 402.

**Not Required to Account for Probable Value of Property.**—Where the *cestui* avoids the sale, the trustee is not to be called upon to make up the difference between what he paid and what was the true or probable value of the property; the sale can only be set aside, and if the beneficiary desires, the property may be placed on the market to secure its probable value. *Connecticut Mut. L. Ins. Co. v. Stinson*, 62 Ill. App. 319; *Wright v. Bruschke*, 62 Ill. App. 358; *Mareck v. Minneapolis Trust Co.*, 74 Minn. 538; *Bailey v. Robinson*, 1 Gratt. (Va.) 4, 42 Am. Dec. 540.

What the property brought at the sale cannot be admitted as evidence for the jury of its real value. *Pettyjohn v. Liebscher*, 92 Ga. 149.

**When Reconveyance Not Possible.**—The trustee may be required to account for property which, by reason of a sale to a *bona fide* purchaser, he cannot reconvey. *Higgins v. Curtiss*, 82 Ill. 28.

When the property cannot be put into condition to be resold, the *cestui* is entitled to the full value of the property at the time of sale by trustee. *Ricketts v. Montgomery*, 15 Md. 46.

**5. Trustee Accountable for Profits Derived from Resale by Him of Trust Property**—*England*.—*Randall v. Errington*, 10 Ves. Jr. 423; Which-



**Trustee Reimbursed for Purchase Price.** — Where a trustee who has been guilty of no fraud<sup>1</sup> has purchased trust property, and the sale is set aside by the court, he will be reimbursed to the extent of the money expended by him in the purchase.<sup>2</sup>

**c. RIGHT TO REIMBURSEMENT** — (1) *In General.* — As a general rule where a trustee, in furtherance of the trust, advances money to the estate or to the *cestui que trust*, he is entitled to be reimbursed therefor,<sup>3</sup> as well as for all legitimate expenses incurred by him in executing the trust.<sup>4</sup>

(2) *For Substantial Improvements.* — Where a trustee, acting in good faith, has increased the permanent value of the estate by expending his money in substantial improvements thereto,<sup>5</sup> or by the removal of incumbrances there-

cote v. Lawrence, 3 Ves. Jr. 740; Fox v. Mackreth, 2 Bro. C. C. 400.

Canada. — *Re Iron Clay Brick Mfg. Co.*, 19 Ont. 113.

United States. — *Michoud v. Girod*, 4 How. (U. S.) 503; *Wing v. Hartuppee*, (C. C. A.) 122 Fed. Rep. 897.

Alabama. — *James v. James*, 55 Ala. 525.

Colorado. — *French v. Woodruff*, 25 Colo. 339.

Illinois. — *Higgins v. Curtiss*, 82 Ill. 28. See *Elting v. Biggsville First Nat. Bank*, 173 Ill. 368.

Massachusetts. — *Morse v. Hill*, 136 Mass. 60; *Jennison v. Hapgood*, 7 Pick. (Mass.) 1, 19 Am. Dec. 258.

Missouri. — *Wasson v. English*, 13 Mo. 176.

New Jersey. — *Romaine v. Hendrickson*, 27 N. J. Eq. 162; *Den v. Hammel*, 18 N. J. L. 73.

New York. — *Woodruff v. Boyden*, (N. Y. Super. Ct. Spec. T.) 3 Abb. N. Cas. (N. Y.) 29.

Pennsylvania. — *Shuman's Appeal*, 27 Pa. St. 64; *Rosenberger's Appeal*, 26 Pa. St. 67; *Herr's Estate*, 1 Grant Cas. (Pa.) 272. See *Powers v. Black*, 159 Pa. St. 153.

South Carolina. — *Zimmerman v. Harmon*, 4 Rich. Eq. (S. Car.) 165.

Utah. — *Hamilton v. Dooley*, 15 Utah 280.

1. **Trustee Guilty of Fraud Forfeits All Rights.** — *Young v. Fox*, 37 Fed. Rep. 385.

2. **Trustee Reimbursed for Money Expended in Purchase** — *England.* — *Ex p. James*, 8 Ves. Jr. 337.

Canada. — *Re Follis*, 6 Ont. Pr. 160; *McDonnell v. Smyth*, 26 Nova Scotia 259.

Illinois. — *Connecticut Mut. L. Ins. Co. v. Stinson*, 62 Ill. App. 319.

Maine. — *Freeman v. Harwood*, 49 Me. 195.

Maryland. — *Smith v. Townshend*, 27 Md. 368, 92 Am. Dec. 637; *Dorsey v. Dorsey*, 3 Har. & J. (Md.) 410, 6 Am. Dec. 506; *Bell v. Webb*, 2 Gill (Md.) 163; *Spindler v. Atkinson*, 3 Md. 409, 56 Am. Dec. 755.

Missouri. — *Lass v. Sternberg*, 50 Mo. 124.

New Jersey. — *Carson v. Marshall*, 37 N. J. Eq. 213; *Mulford v. Minch*, 11 N. J. Eq. 16; *Culver v. Culver*, 11 N. J. Eq. 215.

New York. — *Woodruff v. Boyden*, (N. Y. Super. Ct. Spec. T.) 3 Abb. N. Cas. (N. Y.) 29; *Gilman v. Healey*, 49 Hun (N. Y.) 274; *Jahn v. Gleason*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 483.

Pennsylvania. — *Beeson v. Beeson*, 9 Pa. St. 270.

South Carolina. — *Mathews v. Dragaud*, 3 Desaus. (S. Car.) 25.

**Interest on Purchase Money.** — The trustee is

also entitled to interest upon money expended. *Carter v. Palmer*, 8 Cl. & F. 657.

3. **Reimbursed for Money Advanced.** — *In re Leslie*, 23 Ch. D. 552; *In re Pumfrey*, 22 Ch. D. 255; *Hughes-Hallett v. Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561; *In re Winchilsea*, 39 Ch. D. 168; *Re Exhall Coal Co.*, 35 Beav. 449; *Darke v. Williamson*, 25 Beav. 622; *Balsh v. Hyham*, 2 P. Wms. 453; *Case v. Kelly*, 133 U. S. 21; *Ellig v. Naglee*, 9 Cal. 683; *Stewart v. Fellows*, 128 Ill. 480; *Bradford v. Clayton*, (Ky. 1897) 39 S. W. Rep. 40; *McCall v. Burk*, 76 S. W. Rep. 177, 25 Ky. L. Rep. 643; *Winslow v. Young*, 94 Me. 145; *Pratt v. Thornton*, 28 Me. 355, 48 Am. Dec. 492; *Wilson v. Welles*, 79 Minn. 53; *Haydel v. Hurck*, 72 Mo. 253; *Olson v. Lamb*, 56 Neb. 104, 71 Am. St. Rep. 670; *Mathews v. Dragaud*, 3 Desaus. (S. Car.) 25; *Dickel v. Smith*, 42 W. Va. 126; *Fulmer v. Abbe*, 105 Wis. 235.

A trustee is to be reimbursed for money expended by him in obtaining the bid of the purchaser of the *cestui que trust's* land, although denied any right to profit thereby. *Bradford v. Clayton*, (Ky. 1897) 39 S. W. Rep. 40.

A Trustee Is Entitled to Interest upon his advances. *Dilworth v. Sinderling*, 1 Binn. (Pa.) 488, 2 Am. Dec. 469.

**Advance Made Ultra Vires.** — Where directors, in order to preserve a trust estate, borrowed money, although this was beyond the powers granted to them, they were held to be entitled to be reimbursed the actual money paid by them on the loan. *Ex p. Chippendale*, 4 De G. M. & G. 19.

**Where the Money Is Not Disbursed in Furtherance of the Trust** the trustee is not entitled to reimbursement. *In re Pumfrey*, 22 Ch. D. 255; *Raybold v. Raybold*, 20 Pa. St. 308.

**Mortgage of Trust Property to Secure Advances.** — Trustees, to secure advances made by them to the trust estate, may, with the consent of the beneficiaries, obtain a mortgage on the trust estate. *Greenstreet v. Paris Hydraulic Co.*, 21 Grant Ch. (U. C.) 229.

4. For cases, see *infra*, this section, *Lien for Reimbursement.*

5. **Trustee Reimbursed for Substantial Improvements** — *England.* — *Mill v. Hill*, 3 H. L. Cas. 828. See *Vyse v. Foster*, L. R. 8 Ch. 309.

Canada. — *Bevis v. Boulton*, 7 Grant Ch. (U. C.) 39.

United States. — *Balloch v. Hooper*, 146 U. S. 363; *Wormeley v. Wormeley*, 1 Brock. (U. S.) 330.

California. — *Woodward v. Wright*, 82 Cal. 202.

from,<sup>1</sup> he is entitled to be reimbursed from the trust estate.<sup>2</sup> But he is not entitled to be reimbursed where such improvements were adopted as a matter of taste or personal convenience,<sup>3</sup> or where he sought his own personal advantage,<sup>4</sup> or where the improvements were very costly or unnecessary,<sup>5</sup> or where they were clearly unauthorized by the trust instrument.<sup>6</sup>

(3) *Lien for Reimbursement.* — A trustee has an equitable lien upon the trust estate for reimbursement for these expenditures and advancements,<sup>7</sup> and

*Kentucky.* — *Bradford v. Clayton*, (Ky. 1897) 39 S. W. Rep. 40.

*Maryland.* — *Mason v. Martin*, 4 Md. 124; *Spindler v. Atkinson*, 3 Md. 409, 56 Am. Dec. 755; *Bell v. Webb*, 2 Gill (Md.) 163.

*Massachusetts.* — *Morse v. Hill*, 136 Mass. 60.

*New Jersey.* — *Wiley v. Morris*, 39 N. J. Eq. 97.

*New York.* — *Matter of Nesmith*, 140 N. Y. 609.

*Pennsylvania.* — *Harper's Appeal*, 64 Pa. St. 315; *Beeson v. Beeson*, 9 Pa. St. 279; *Dilworth v. Sinderling*, 1 Binn. (Pa.) 488, 2 Am. Dec. 469.

*South Carolina.* — *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214, 16 Am. Dec. 648.

And see generally the title **IMPROVEMENTS**, vol. 16, p. 62.

**What Are Necessary Improvements.** — Expenses incurred "in erecting a fence around the property, for constructing a windmill, in laying water pipes for carrying water to portions of the property, for digging a new well, and for the construction of a new bridge," says the *California* courts, are necessary expenses for which a trustee should be reimbursed. *Woodard v. Wright*, 82 Cal. 202.

**1. Removal of Incumbrances** — *United States.* — *Wormeley v. Wormeley*, 1 Brock. (U. S.) 330.

*Alabama.* — *Wiswall v. Stewart*, 32 Ala. 433, 70 Am. Dec. 549; *Crutchfield v. Haynes*, 14 Ala. 49.

*Illinois.* — *King v. Cushman*, 41 Ill. 31, 89 Am. Dec. 366; *Johnston v. Fletcher*, 32 Ill. App. 589; *Wagenseler v. Prettyman*, 7 Ill. App. 192.

*Indiana.* — *Adams v. La Rose*, 75 Ind. 471; *Taylor v. Calvert*, 138 Ind. 67.

*Maine.* — *Corey v. Greene*, 51 Me. 117; *Pratt v. Thornton*, 28 Me. 355, 48 Am. Dec. 492; *Gardiner Bank v. Wheaton*, 8 Me. 373.

*New York.* — *Jewett v. Miller*, 10 N. Y. 402; *Murray v. De Rottenham*, 6 Johns. Ch. (N. Y.) 52.

*South Carolina.* — *Mathews v. Dragaud*, 3 Desaus. (S. Car.) 25; *Freeman v. Tompkins*, 1 Strobh. Eq. (S. Car.) 53.

*Virginia.* — *Harrison v. Manson*, 95 Va. 593; *Raugh v. Walker*, 77 Va. 99; *Henderson v. Hunton*, 26 Gratt. (Va.) 926.

**2. The Knowledge, Consent, or Acquiescence of the Beneficiary** is not necessary to bind the estate for the trustee's disbursements. *Woodard v. Wright*, 82 Cal. 202; *Matter of Nesmith*, 140 N. Y. 609; *Dilworth v. Sinderling*, 1 Binn. (Pa.) 488, 2 Am. Dec. 469.

**3. Improvements Matter of Taste.** — *Mill v. Hill*, 3 H. L. Cas. 828.

**Money Expended in Unsuccessful Experiments.** — *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214, 16 Am. Dec. 648.

**4. Trustee Not Remunerated Where He Sought His Own Advantage.** — *In re Pumfrey*, 22 Ch. D. 255; *Pratt v. Thornton*, 28 Me. 355, 48 Am. Dec. 492; *Henderson v. Hunton*, 26 Gratt. (Va.) 926.

**5. Costly or Unnecessary Improvements.** — *Harper's Appeal*, 64 Pa. St. 315; *Dilworth v. Sinderling*, 1 Binn. (Pa.) 488, 2 Am. Dec. 469.

**A Trustee Cannot Improve His Cestui Que Trust Out of the Estate** nor can he ordinarily charge the corpus of the estate with improvement voluntarily and unnecessarily made by him. *Dickel v. Smith*, 42 W. Va. 126.

**6. Clearly Unauthorized by Trust Instrument** — *McKinley v. Irvine*, 13 Ala. 681; *Booth v. Bradford*, 114 Iowa 562.

**7. Trustee Has Equitable Lien for All Proper Expenses** — *England.* — *Jervis v. Wolferstan*, L. R. 18 Eq. 18, 43 L. J. Ch. 809; *In re Winchelsea*, 39 Ch. D. 168; *In re Leslie*, 23 Ch. D. 552; *In re Pumfrey*, 22 Ch. D. 255; *Darke v. Williamson*, 25 Beav. 622; *Russell v. Buchanan*, 4 Jur. 430.

*Canada.* — *Bevis v. Boutlin*, 7 Grant Ch. (U. C.) 39; *Life Assoc. of Scotland v. Walker*, 24 Grant Ch. (U. C.) 293; *Burn v. Gifford*, 8 Ont. Pr. 44. See *Brunet v. Brazier*, 7 Quebec Q. B. 166.

*United States.* — *Balloch v. Hooper*, 146 U. S. 363.

*Alabama.* — *Jones v. Dawson*, 19 Ala. 672; *Marks v. Sample*, 111 Ala. 637.

*California.* — *Woodard v. Wright*, 82 Cal. 202. See *Robles v. Clarke*, 25 Cal. 317.

*Georgia.* — *Poole v. Wilkinson*, 42 Ga. 539.

*Illinois.* — *Stewart v. Fellows*, 128 Ill. 480; *King v. Cushman*, 41 Ill. 31, 89 Am. Dec. 366; *Johnston v. Fletcher*, 32 Ill. App. 589; *O'Halloran v. Fitzgerald*, 71 Ill. 53.

*Indiana.* — *State v. Windle*, 156 Ind. 648; *Adams v. La Rose*, 75 Ind. 471.

*Iowa.* — *Smith v. Walker*, 49 Iowa 289.

*Kentucky.* — *Bradford v. Clayton*, (Ky. 1897) 39 S. W. Rep. 40.

*Maine.* — *Second Unitarian Soc. v. Woodbury*, 14 Me. 281.

*Maryland.* — *Callis v. Ridout*, 7 Gill & J. (Md.) 1; *Spindler v. Atkinson*, 3 Md. 409, 56 Am. Dec. 755.

*Massachusetts.* — *Thomas v. Goodwin*, 12 Mass. 140.

*Minnesota.* — *Truesdale v. Philadelphia Trust, etc., Co.*, 63 Minn. 49.

*Missouri.* — *Haydel v. Hurck*, 72 Mo. 253.

*Mississippi.* — *Fearn v. Mayers*, 53 Miss. 458;

*New Jersey.* — *Mulford v. Minch*, 11 N. J. Eq. 16.

*New York.* — *Henry v. Fowler*, 3 Daly (N. Y.) 199; *Matter of Nesmith*, 140 N. Y. 609; *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111; *Murray v. De Rottenham*, 6 Johns. Ch. (N. Y.) 52; *Randall v. Dusenbury*, 39 N. Y. Super. Ct. 174, affirmed in 63 N. Y. 645; *Jewett v.*

will not generally be compelled to part with the property until his claims are satisfied.<sup>1</sup> The lien of a trustee retains its full hold on all the trust property however reduced in amount,<sup>2</sup> but a trustee may not enforce his lien to the destruction of the trust estate, since his right to reimbursement is subject to his duty of preserving the estate.<sup>3</sup>

**Lien of Trustee Paramount.** — This lien of the trustee for reimbursement and indemnity is paramount to all other claims upon the trust estate except perhaps a *bona fide* purchaser without notice, and must be first satisfied upon a distribution of trust assets.<sup>4</sup>

Miller, 10 N. Y. 402; Van Epps v. Van Epps, 9 Paige (N. Y.) 237.

North Carolina. — Matthews v. McPherson, 65 N. Car. 189.

Ohio. — Mannix v. Purcell, 46 Ohio St. 102, 15 Am. St. Rep. 562.

Pennsylvania. — Harper's Appeal, 64 Pa. St. 315.

South Carolina. — Myers v. Myers, 2 McCord Eq. (S. Car.) 214, 16 Am. Dec. 648; Johnson v. Packer, 1 Nott & M. (S. Car.) 1.

Vermont. — Rensselaer, etc., R. Co. v. Miller, 47 Vt. 146.

Virginia. — Harrison v. Manson, 95 Va. 593; Henderson v. Hunton, 26 Gratt. (Va.) 926.

In Harrison v. Manson, 95 Va. 593, the court decreed that the trustee or one in his interest should retain the title to trust property until he, the trustee, was reimbursed for money advanced in payment of a claim against the estate.

**When Trustee Not Entitled to Lien** — Although a trustee may be entitled to be reimbursed where the advances made by him were not in furtherance of the trust, as where payments are made to the beneficiaries in excess of those directed by the trust instrument, yet he is entitled to no lien on the trust property therefor. Marks v. Semple, 111 Ala. 637.

**Lien of Trustee Not a Matter of Contract** — The equitable lien of a trustee, unlike the ordinary lien, which is usually a matter of agreement, arises independently of any contractual obligation entered into by the trustee to secure this right to himself. *Re Exhall Coal Co.*, 35 Beav. 449; Russel v. Buchanan, 4 Jur. 430; King v. Cushman, 41 Ill. 31, 89 Am. Dec. 366; Rensselaer, etc., R. Co. v. Miller, 47 Vt. 146; Hardoon v. Belilios, 83 L. T. N. S. 573.

On the subject of liens in general, their origin and enforcement, see the article LIENS, vol. 19, p. 3.

**A Purchaser with Notice of the Facts** is bound, on purchase of property upon which there is an equitable lien of a trustee, to satisfy that lien, although ignorant that the existence of such facts would give the trustee an equitable lien on the property. Bolton v. Curre, (1895) 1 Ch. 544.

**1. Trustee's Claims Must Be Satisfied Before He Parts with Property.** — *Re Exhall Coal Co.*, 35 Beav. 449; Life Assoc. of Scotland v. Walker, 24 Grant Ch. (U. C.) 293; Jones v. Dawson, 19 Ala. 672; Woodard v. Wright, 82 Cal. 202; Johnston v. Fletcher, 32 Ill. App. 589; Crawford v. Ginn, 35 Iowa 543; Second Unitarian Soc. v. Woodbury, 14 Me. 281; Corey v. Greene, 51 Me. 117; Lass v. Sternberg, 50 Mo. 124; Murray v. De Rottenham, 6 Johns. Ch. (N. Y.) 52; Johnson v. Packer, 1 Nott &

M. (S. Car.) 1; Rensselaer, etc., R. Co. v. Miller, 47 Vt. 146.

**In Distributing Trust Assets**, the trustee has a right to retain an amount reasonably sufficient to satisfy his claims incurred in the performance of trust duties. Russel v. Buchanan, 4 Jur. 430; Hawley v. Mancius, 7 Johns. Ch. (N. Y.) 174.

**Lien Does Not Affect Transfer of Property to a New Trustee.** — The lien of a trustee cannot interfere with the transfer of trust property to new trustees. Wilson v. Parker, 10 Jur. 979.

**Lien Enforced by Sale Without Beneficiaries' Consent.** — Where the enforcement of the lien is not incompatible with the performance by a trustee of his duties, as where trustees were empowered to invest the trust property at the request of the beneficiaries, and to resell the same, and to enable them to do so it was necessary for the trustee to advance money to the estate, the court held that the trustee might enforce his lien for reimbursement by a sale of the estate without the consent of the beneficiaries. *In re Pumfrey*, 22 Ch. D. 255. See also Murray v. Vanderbilt, 39 Barb. (N. Y.) 140.

**Lien Lost by Voluntarily Parting with Possession.** — Where a trustee voluntarily parts with the possession of trust property he loses the lien on the trust property as between himself and a purchaser. Johnson v. Packer, 1 Nott & M. (S. Car.) 1.

**2. Lien of Trustee Follows Trust Property.** — Life Assoc. of Scotland v. Walker, 24 Grant Ch. (U. C.) 293.

**Although the Trust May Have Been converted** into another species of property, the trustee's lien still retains its hold. *Re Exhall Coal Co.*, 35 Beav. 449. See Bolton v. Curre, (1895) 1 Ch. 544.

**A Residuary Legatee Must Refund** money delivered to him from the trust estate when the assets are not sufficient to satisfy the claims of the trustee. Jervis v. Wolferstan, L. R. 18 Eq. 18.

**3. Lien Not Enforced to the Destruction of Trust Estate.** — *In re Pumfrey*, 22 Ch. D. 255; Darke v. Williamson, 25 Beav. 622; Rensselaer, etc., R. Co. v. Miller, 47 Vt. 146.

**Upon the Termination of the Trust**, however, trustees may enforce their lien for reimbursement and indemnity, although the trust estate is swallowed up by these claims. Darke v. Williamson, 25 Beav. 622; Adams v. La Rose, 75 Ind. 471; Mathews v. Dragaud, 3 Desaus. (S. Car.) 25.

**4. Claim of Trustee Entitled to Priority of Satisfaction.** — Batten v. Dartmouth Harbor Com'rs, 45 Ch. D. 612, 59 L. J. Ch. 700; *Re Exhall Coal Co.*, 35 Beav. 449; Balloch v.



*d. RIGHT OF INDEMNITY.* — In *England*, a trustee who commits a breach of trust at the instance of the *cestui que trust*, or from which the *cestui que trust* has knowingly profited, is entitled to be indemnified for the liability incurred from the share of the beneficiary in the trust estate.<sup>1</sup> The trustee may also stipulate by contract to be indemnified, by the *cestui que trust*, against the consequences of a breach of trust,<sup>2</sup> to enforce which contract he has a lien on the trust estate,<sup>3</sup> paramount to the claims of general creditors.<sup>4</sup>

*e. RIGHT TO COMPENSATION* — (1) *General Principles* — (a) *In England.* — It is a fundamental principle of the English courts that trustees are not to be permitted to derive personal profit from the performance of the duties of the trust, and hence no compensation is allowed to them for personal services in the performance of their official duties though involving personal trouble and loss of time,<sup>5</sup> unless such compensation is provided for in the trust instrument,

Hooper, 146 U. S. 363; *King v. Cushman*, 41 Ill. 31, 89 Am. Dec. 366; *Spindler v. Atkinson*, 3 Md. 409, 56 Am. Dec. 755; *Iredell v. Langston*, 1 Dev. Eq. (16 N. Car.) 396; *Matthews v. McPherson*, 65 N. Car. 189; *Rensselaer, etc., R. Co. v. Miller*, 47 Vt. 146; *Henderson v. Hunton*, 26 Gratt. (Va.) 926. See *Robles v. Clarke*, 25 Cal. 317.

1. *Where Beneficiary Instigated Breach of Trust, or Profited Thereby, Trustee Indemnified.* — *In re Holt*, (1897) 2 Ch. 525, 66 L. J. Ch. 734; *Bolton v. Currie*, (1895) 1 Ch. 544; *In re Somerset*, (1894) 1 Ch. 231; *Sawyer v. Sawyer*, 28 Ch. D. 595; *Hallett v. Hallett*, 13 Ch. D. 232; *Butler v. Butler*, 7 Ch. D. 116; *Griffith v. Hughes*, (1892) 3 Ch. 105; *Head v. Gould*, (1898) 2 Ch. 250; *Williams v. Allen*, 32 Beav. 650; *M'Gachen v. Dew*, 15 Beav. 84; *Barratt v. Wyatt*, 30 Beav. 442; *Hood v. Clapham*, 19 Beav. 90; *Fuller v. Knight*, 6 Beav. 205; *Greenwood v. Wakeford*, 1 Beav. 576; *Booth v. Booth*, 1 Beav. 125; *Cocker v. Quayle*, 1 Russ. & M. 535; *Trafford v. Boehm*, 3 Atk. 444; *Phillipson v. Gatty*, 7 Hare 516; *Raby v. Ridehalgh*, 7 De G. M. & G. 104. See also *Meyer v. Montriou*, 9 Beav. 521; *Hughes-Hallett v. Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561.

*Cestui Que Trust's Assent Must Be Plain and Unqualified.* — *Phillipson v. Gatty*, 7 Hare 516. See *Sawyer v. Sawyer*, 28 Ch. D. 595; *In re Holt*, (1897) 2 Ch. 525.

*English Trustee Act.* — In *England* a trustee is reimbursed for the amount which he has been required to pay on account of a breach of trust, according to the provisions of the Trustee Act, 1893, § 45, which provides that "where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman, entitled for her separate use and restrained from anticipation, make such order as to the court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him." *In re Holt*, (1897) 2 Ch. 525. See *Bolton v. Currie*, (1895) 1 Ch. 544. 2. *Williams v. Lomas*, 16 Beav. 1. See also *Ghost v. Waller*, 9 Beav. 497; *Bartlett v. Hodgson*, 1 T. R. 42.

*Where there Is No Trust Estate from Which the Trustee Can Be Indemnified, he must rely upon the personal contract of the cestui que trust, involving the personal liability of the*

latter. *Hughes-Hallett v. Indian Mammoth Gold Mines Co.*, 22 Ch. D. 561.

*Indemnity Not an Absolute Protection.* — A trustee's right to indemnity, secured by contract, extends only to protecting him against liabilities to other parties incurred by the breach of trust, and does not embrace the loss by the trustee of a beneficial interest. *Evans v. Benyon*, 37 Ch. D. 329.

*No Indemnity Against Consequence of Duty.* — A trustee cannot demand indemnity before the performance of a duty expressly undertaken. *Kirby v. Mash*, 3 Y. & C. Exch. 295.

*Indemnity clause No Protection Against Wilful Default.* — *Drosier v. Brereton*, 15 Beav. 221.

*Nor Against Negligence.* — *Dix v. Burford*, 19 Beav. 409; *Brumridge v. Brumridge*, 27 Beav. 5; *Mucklow v. Fuller*, Jac. 198. See also *Fenwick v. Greenwell*, 10 Beav. 412. Trustees may, however, stipulate against negligence of co-trustees. *Wilkins v. Hogg*, 3 Giff. 116.

*Implied Contract of Indemnity.* — Where a trustee accepts a trust at the request of the *cestui que trust*, the latter is personally liable to indemnify the trustee for any loss occurring in the due execution of the trust. *Jervis v. Wolfertan*, L. R. 18 Eq. 18.

3. *Bolton v. Currie*, (1895) 1 Ch. 544.

A trustee of a fund in which there is a power of appointment after a life estate loses his lien on the fund after the execution by his debtor of the power, which vests the estate in another, even though the trustee claims under an express contract. *Morris v. Clarkson*, 1 Jac. & W. 107.

4. *Williams v. Allen*, 32 Beav. 650; *Fuller v. Knight*, 6 Beav. 205. See *Butler v. Butler*, 7 Ch. D. 116.

*Restraint on Anticipation Cannot Be Removed by a Trustee to satisfy his claim against the beneficiary.* *Bolton v. Currie*, (1895) 1 Ch. 544. See *Sheriff v. Butler*, 12 Jur. N. S. 329; *Cocker v. Quayle*, 1 Russ. & M. 535.

5. *In England Trustee Not Allowed Compensation* — *Matter of Ormsby*, 1 Ball & B. 189; *Brocksopp v. Barnes*, 5 Madd. 90; *Robinson v. Pett*, 3 P. Wms. 249; *Sykes v. Hastings*, 11 Ves. Jr. 363; *Barratt v. Hartley*, L. R. 2 Eq. 780; *Re Bignell*, (1892) 1 Ch. 59.

*Executors and Administrators* were regulated by the same rule. See the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1277.

*Reason for Rule.* — The reasons for the rule that a trustee, executor, or administrator shall have no allowance for his care and trouble are that,

or by special contract.<sup>1</sup> But as even in England the trustee is allowed indemnity for all necessary expenses, including losses and charges, the effect is much the same as if compensation was granted to him.<sup>2</sup>

(b) **In Canada and United States.** — **English Doctrine Generally Repudiated.** — Although formerly this doctrine was and at the present time is, in the absence of statutes, followed in some states,<sup>3</sup> yet now in America and Canada, generally, a trustee, in the absence of any agreement or stipulation therefor, is allowed compensation by the court where he has faithfully discharged his duties.<sup>4</sup> Some courts deny the trustee's right to commis-

if allowed, the estate might be so encumbered as to be of little value, and the great difficulty in adjusting the quantum of such allowance, since one man's time may be more valuable than that of another; and besides, the acceptance of a trust by a trustee is not compulsory, but optional. *Robinson v. Pett*, 3 P. Wms. 249.

**1. Special Provision May Provide for Compensation.** — *Douglass v. Archbutt*, 2 De G. & J. 148; *Nicholson v. Tutin*, 3 Jur. N. S. 235; *Bainbridge v. Blair*, 8 Beav. 588; *Barrett v. Hartley*, L. R. 2 Eq. 789; *Power v. Meagher*, 17 Can. Sup. Ct. 287; *Barney v. Saunders*, 16 How. (U. S.) 535; *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; *Manning v. Manning*, 1 Johns. Ch. (N. Y.) 527.

**2. Indemnity May Amount to Compensation.** — *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250.

In England, if a trustee desires extra or any compensation for his services when not stipulated for, where the performance of his duties as trustee would entail to him much labor and personal loss, and such duties are essential to the preservation of the trust estate, he should come into court and ask that he should be remunerated by the court for such services upon their performance, and the court under these circumstances will generally allow him commissions for his time and labor expended. *Brainbridge v. Blair*, 8 Beav. 588; *In re Freeman*, 37 Ch. D. 148; *Marshall v. Halloway*, 2 Swanst. 432.

**3. English Doctrine Followed.** — *Biscoe v. State*, 23 Ark. 592; *Kendall v. New England Carpet Co.*, 13 Conn. 383; *State v. Platt*, 4 Harr. (Del.) 154; *Egbert v. Brooks*, 3 Harr. (Del.) 110; *Warbass v. Armstrong*, 10 N. J. Eq. 263; *State Bank v. Marsh*, 1 N. J. Eq. 288; *Gilbert v. Sutliff*, 3 Ohio St. 129; *Charleston College v. Willingham*, 13 Rich. Eq. (S. Car.) 195.

In Illinois the English Rule Still Prevails. — *Leman v. Rothbarth*, 159 Ill. 270; *Buckingham v. Morrison*, 136 Ill. 437; *Cook v. Gilmore*, 133 Ill. 139; *Payson v. Ross*, 77 Ill. App. 635; *Hough v. Harvey*, 71 Ill. 72; *Heffron v. Gage*, 44 Ill. App. 147, affirmed in 149 Ill. 182; *Hugbins v. Rider*, 77 Ill. 360.

But Trustees under a Will, except in cases of trusts for charitable, religious, or educational purposes, are now by statute, Act Ill., June 17, 1891, allowed a reasonable compensation, although there is no stipulation therefor in the will. *Arnold v. Alden*, 173 Ill. 229.

In Nova Scotia and New Brunswick, as well as in England, until the passage of the Act of 51 Vict., c. 11, § 69, in 1888, when compensation was for the first time allowed trustees, they had been uniformly denied commissions for their

services. *Power v. Meagher*, 17 Can. Sup. Ct. 287, reversing *Power v. Meagher*, 21 Nova Scotia 184; *Re Wiggins*, 2 N. Bruns. Eq. 123.

**4. Trustee Generally Allowed a Fair Compensation for His Services** — *United States*. — *Barney v. Saunders*, 16 How. (U. S.) 541.

*Alabama*. — *Harris v. Martin*, 9 Ala. 895.

*Florida*. — *Muscogee Lumber Co. v. Hyer*, 18 Fla. 698, 43 Am. Rep. 332.

*Indiana*. — *Premier Steel Co. v. Yandes*, 139 Ind. 307.

*Kentucky*. — *Phillips v. Bustard*, 1 B. Mon. (Ky.) 348.

*Maryland*. — *Northern Cent. R. Co. v. Keighler*, 29 Md. 572; *Bentley v. Shreve*, 2 Md. Ch. 215; *Winder v. Diffendaffer*, 2 Bland. (Md.) 166.

*Massachusetts*. — *Longley v. Hall*, 11 Pick. (Mass.) 120.

*Minnesota*. — *Davis v. Swedish-American Nat. Bank*, 78 Minn. 408, 79 Am. St. Rep. 400.

*Mississippi*. — *Niolon v. McDonald*, 71 Miss. 337, 42 Am. St. Rep. 466.

*Missouri*. — *Maginn v. Green*, 67 Mo. App. 616.

*New Jersey*. — *Warbass v. Armstrong*, 10 N. J. Eq. 263.

*North Carolina*. — *Ingram v. Kirkpatrick*, 8 Ired. Eq. (43 N. Car.) 62; *Sherrill v. Shuford*, 6 Ired. Eq. (41 N. Car.) 228; *Boyd v. Hawkins*, 2 Dev. Eq. (17 N. Car.) 329.

*Pennsylvania*. — *Hanna v. Clark*, 204 Pa. St. 145; *In re Dorrance*, 186 Pa. St. 64; *Heckert's Appeal*, 24 Pa. St. 482.

*Vermont*. — *Hubbard v. Fisher*, 25 Vt. 539.

*Virginia*. — *Miller v. Beverley*, 4 Hen. & M. (Va.) 415; *Granberry v. Granberry*, 1 Wash. (Va.) 246, 1 Am. Dec. 455.

*Canada*. — *Bald v. Thompson*, 17 Grant Ch. (U. C.) 154. See also *In re Cobourg Town Trust*, 22 Grant Ch. (U. C.) 377; *In re Toronto Harbour Com'rs*, 28 Grant Ch. (U. C.) 195.

**Performance of Services Directed by Trust Instrument.** — *Marks v. Semple*, 111 Ala. 637; *Tracy v. Gravois R. Co.*, 13 Mo. App. 295, affirmed in 84 Mo. 210.

**Discharge of Duties Required by Nature of the Trust Estate.** — *Marks v. Semple*, 111 Ala. 637; *Gould v. Hays*, 25 Ala. 426; *Loud v. Winchester*, 64 Mich. 23; *Niolon v. McDonald*, 71 Miss. 337, 42 Am. St. Rep. 466; *Tracy v. Gravois R. Co.*, 13 Mo. App. 295, affirmed in 84 Mo. 210.

"A Trustee Can Never Demand to be paid out of the trust fund for mere accommodations or voluntary benefactions, however beneficial to the estate, or to the parties interested." *Tracy v. Gravois R. Co.*, 13 Mo. App. 295, affirmed in 84 Mo. 210.



sions upon principal received from investments made by him,<sup>1</sup> or his right to his commissions upon the disbursement of capital when it is reinvested.<sup>2</sup> In Canada, however, trustees are allowed commissions where capital is reinvested or where principal is received from trustees' investments.<sup>3</sup> In some of these jurisdictions the case of trustees has been held to be "within the equity" of statutes regulating the compensation of executors and other fiduciaries,<sup>4</sup> while in a number of states the matter is now regulated to a greater or less extent by direct statutes.<sup>5</sup>

**Compensation Provided by Trust Instruments or Contracts.**—Provision is frequently made for compensation to the trustee, either by the instrument creating the trust,<sup>6</sup> or by special contract on the part of the trustee.<sup>7</sup>

**1. Principal Received from Investments.**—*Clute v. Gould*, 28 Hun (N. Y.) 348; *Spencer v. Spencer*, 38 N. Y. App. Div. 403; *Matter of Kellogg*, 7 Paige (N. Y.) 265.

**2. Capital Reinvested—Commissions Denied.**—*Marks v. Semple*, 111 Ala. 637; *Beard v. Beard*, (Supm. Ct. Gen. T.) 22 N. Y. Supp. 1; *Matter of Hayden*, 54 Hun (N. Y.) 197; *Hemphill's Appeal*, 18 Pa. St. 303; *Pedrick's Estate*, 5 Phila. (Pa.) 478, 21 Leg. Int. (Pa.) 197.

Compensation is given to a trustee for the care and management of an estate and not for the simple act of receiving and paying out money. *Wagstaff v. Lowerre*, 23 Barb. (N. Y.) 209.

**3. Contrary Doctrine in Canada.**—*Re Wiggins*, 2 N. Bruns. Eq. 123; *In re Eaton*, 1 N. Bruns. Eq. Rep. 527; *Re Prittie*, 13 Ont. Pr. 19.

**4. Within Equity of Statutes Regulating Compensation of Other Fiduciaries—United States.**—*Prevost v. Gratz*, 3 Wash. (U. S.) 434.

*Florida.*—*Muscogee Lumber Co. v. Hyer*, 18 Fla. 698, 43 Am. Rep. 332.

*Kentucky.*—*Central Trust Co. v. Johnson*, (Ky. 1903) 74 S. W. Rep. 663.

*Maryland.*—*Bentley v. Shreve*, 2 Md. Ch. 215; *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250.

*New York.*—*Meacham v. Sternes*, 9 Paige (N. Y.) 398; *In re Schill*, 53 N. Y. 265; *Phoenix v. Livingston*, 101 N. Y. 451; *Disbrow v. Disbrow*, 46 N. Y. App. Div. 111, *affirmed* 167 N. Y. 606; *Matter of Johnson*, 170 N. Y. 139; *Matter of Hunt*, 41 Misc. (N. Y.) 72.

*North Carolina.*—*Boyd v. Hawkins*, 2 Dev. Eq. (17 N. Car.) 329.

*South Carolina.*—*Muckenfuss v. Heath*, 1 Hill Eq. (S. Car.) 182.

See *In re Tilsonburgh, etc.*, R. Co., 24 Ont. App. 378; *Deedes v. Graham*, 20 Grant Ch. (U. C.) 258.

**The Regulation of Trustees' Compensation by Statute Fixing** compensation of other fiduciaries is not a fixed rule. *Central Trust Co. v. Johnson*, (Ky. 1903) 74 S. W. Rep. 663.

**5. Compensation of Trustees Regulated by Statute.**—*Nicholls v. Hodges*, 1 Pet. (U. S.) 562; *Burney v. Spear*, 17 Ga. 223; *Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257; *Parker v. Hill*, (Mass. 1904) 69 N. E. Rep. 336; *McKnight v. Walsh*, 24 N. J. Eq. 498; *Warbass v. Armstrong*, 10 N. J. Eq. 263; *Cobb v. Fant*, 36 S. Car. 1; *Charleston College v. Willingham*, 13 Rich. Eq. (S. Car.) 195; *In re Tilsonburgh, etc.*, R. Co., 24 Ont. App. 378.

**The Ontario Statute of 1874** provides that trustees shall be entitled to such fair and rea-

sonable allowance for the care, pains, and trouble, and their time expended in and about the trust estate, as may be allowed by a court of chancery, or a judge or master thereof. *In re Cobourg Town Trust*, 22 Grant Ch. (U. C.) 377.

**Rights under Statute May Be Varied by Contract.**—*Charleston College v. Willingham*, 13 Rich. Eq. (S. Car.) 195. But the evidence of such contract must be clear and explicit. *Greer v. Greer*, 5 Redf. (N. Y.) 214.

**As to the Compensation of Trustees Appointed Prior to the Passage of Such a Statute**, see *Aydell v. Breeding*, 111 Ky. 847; *Arnold v. Alden*, 173 Ill. 229; *Savage v. Sherman*, 24 Hun (N. Y.) 307; *Naylor v. Gale*, 73 Hun (N. Y.) 53; *In re Cobourg Town Trust*, 22 Grant Ch. (U. C.) 377.

**A Voluntary Trustee in California**, who has become such through his own fault, is not entitled to compensation. Civ. Code Cal., § 2275. See also *Berghauer v. Blankenburg*, 86 Cal. 316; *Weygant v. Bartlett*, 102 Cal. 224.

**6. In re Fish**, (1893) 2 Ch. 415; *Clarkson v. Robinson*, (1900) 2 Ch. 722; *Meacham v. Sternes*, 9 Paige (N. Y.) 398; *Smith v. Washington City, etc.*, R. Co., 33 Gratt. (Va.) 617.

**Compensation Allowed.**—Where several trustees, who were fellow creditors, were appointed as a committee to act for all the creditors in securing the property of an absconding debtor, in order to do which they had to institute extradition proceedings in Canada, a letter by them to certain of their fellow creditors, in which they stated that they would act for their interest, as well as for the interest of the other creditors and themselves, was held not to import that they were to act without compensation. *Rowland v. Maddock*, 183 Mass. 360.

**7. Compensation of Trustees Frequently a Matter of Contract.**—*Jenkins v. Doolittle*, 69 Ill. 415; *Huggins v. Rider*, 77 Ill. 360; *M'Millen v. Scott*, 1 T. B. Mon. (Ky.) 150; *Widener v. Fay*, 51 Md. 273; *Matter of Young*, 15 N. Y. App. Div. 285, *affirmed* 160 N. Y. 705; *Greenfield's Estate*, 14 Pa. St. 489.

**Discretion of Court.**—By express agreement the matter of compensation is sometimes left to the discretion of the court. *Smith v. Washington City, etc.*, R. Co., 33 Gratt. (Va.) 617.

**Court Will Set Aside an Unfair Contract.**—*Greenfield's Estate*, 14 Pa. St. 489. But a high rate of commission does not necessarily render a contract void. *Donelson v. Posey*, 13 Ala. 752.

**An Implied Contract** to pay what a trustee's services are reasonably worth, although there is no express agreement for compensation, is



(c) **Court's Discretion as to Compensation.** — Where there is no express contract regulating the compensation of trustees<sup>1</sup> the power of the court to refuse or allow compensation to trustees,<sup>2</sup> or if commissions are granted, to grade the amount allowed according to their discretion or judgment as they may deem equitable in each particular case,<sup>3</sup> is in all cases absolute.<sup>4</sup>

**Effect of Statutory Regulations.** — Where there is a statute regulating the amount of compensation by which a limit is prescribed to commissions allowed trustees, this furnishes the proper standard for compensation, and the court will not generally exceed the limit,<sup>5</sup> although some courts hold that the compensation of trustees may be increased beyond the statutory limit where their duties are arduous and were performed by them with diligence.<sup>6</sup> In any case, however, where there is a statutory regulation of the trustee's compensation, the court may, according to its discretion, increase or decrease a trustee's compensation within the confines of the statutory limit, and the decision in such cases is as unrestricted and final as it would be were there no statutory provision.<sup>7</sup>

generally formed where a trustee, not otherwise interested in the trust, performs services at the instance of one interested in the distribution of trust funds. *Premier Steel Co. v. Yandes*, 139 Ind. 307; *Louisville, etc., R. Co. v. Hubbard*, 116 Ind. 195; *Wetmore v. Brown*, 37 Barb. (N. Y.) 133. See *Huggins v. Rider*, 77 Ill. 360.

**A Stipulation for Expenses Merely** excludes a claim for compensation, since *expressio unius est exclusio alterius*. *M'Millen v. Scott*, 1 T. B. Mon. (Ky.) 150.

**Effect of Attempt to Compromise.** — The trustee's right to full compensation is not affected by his agreeing to accept as compensation far less than was reasonable prior to a suit against him by the beneficiary, to settle up the estate. *Phillips v. Burton*, (Ky. 1899) 52 S. W. Rep. 1064.

**1. Express Contract Controls Compensation.** — *Biscoe v. State*, 23 Ark. 592; *Ross v. Conwell*, 7 Ind. App. 375; *Widener v. Fay*, 51 Md. 273; *Opplinger v. Sutton*, 50 Mo. App. 348; *Matter of Schell*, 53 N. Y. 263; *Greenfield's Estate*, 24 Pa. St. 232; *Heron v. Moffatt*, 7 Ont. Pr. 438.

**Even Where there Is a Contract** the court will deprive a trustee of compensation when he has been guilty of gross negligence. *Matter of Thompson*, 101 Cal. 349.

**Trustee's Discretion.** — Where the amount of a commission to be allowed a trustee for collecting the rents and profits of an estate is, by the terms of a will, vested in the discretion of his cotrustees, so long as the discretionary power of the trustees is exercised in good faith, a court will not interfere. *Hawley v. James*, 5 Paige (N. Y.) 484.

**2. Court May Refuse or Allow Commissions to Trustees.** — *Central Trust Co. v. Johnson*, (Ky. 1903) 74 S. W. Rep. 663; *Jenkins v. Whyte*, 62 Md. 427; *Northern Cent. R. Co. v. Keighler*, 29 Md. 572; *Henderson v. Sherman*, 47 Mich. 267; *Jacobus v. Munn*, 37 N. J. Eq. 48; *Pedrick's Estate*, 5 Phila. (Pa.) 478, 21 Leg. Int. (Pa.) 197.

**Substituted Trustees Have Been Held Entitled Only to the Compensation Allowed by General Usage** although a higher rate was by express agreement to be given to the original trustees. *Widener v. Fay*, 51 Md. 273.

**A Trustee Appointed by a Court to Sell Property**

acts in many respects like a sheriff, and the commissions allowed to such trustee are analogous to poundage fees allowed a sheriff. *Ridgely v. Gittings*, 2 Har. & G. (Md.) 58.

**3. Or Court May Grade the Amount Allowed.** — *Marks v. Semple*, 111 Ala. 637; *Offutt v. Divine*, (Ky. 1899) 53 S. W. Rep. 816; *Fleming v. Wilson*, 6 Bush (Ky.) 610; *Waring v. Darnall*, 10 Gill & J. (Md.) 126; *Blake v. Pegram*, 101 Mass. 592; *Hanna v. Clark*, 204 Pa. St. 145; *Ward v. Funsten*, 86 Va. 359; *McDonald v. Davidson*, 6 Ont. App. 320; *In re Eaton*, 1 N. Bruns. Eq. Rep. 527.

**4. Court's Power Unlimited** — *Alabama*. — *Ma-gee v. Cowperthwaite*, 10 Ala. 966.

*Iowa*. — *Booth v. Bradford*, 114 Iowa 562.

*Maryland*. — *Abbott v. Baltimore, etc., Steam Packet Co.*, 4 Md. Ch. 310; *Winder v. Diffenderffer*, 2 Bland (Md.) 166.

*Michigan*. — *Henderson v. Sherman*, 47 Mich. 267.

*New York*. — *Woodruff v. New York, etc., R. Co.*, 129 N. Y. 27.

*North Carolina*. — *Wiesel v. Cobb*, 118 N. Car. 11.

*Pennsylvania*. — *Kilgore's Appeal*, (Pa. 1887) 8 Atl. Rep. 441; *Hanna v. Clark*, 204 Pa. St. 145; *Ahl's Appeal*, 129 Pa. St. 26.

*Virginia*. — *Guggenheimer v. Rogers*, 95 Va. 711; *Whitehead v. Whitehead*, 85 Va. 870.

*Canada*. — *McDonald v. Davidson*, 6 Ont. App. 320; *Re Wiggins*, 2 N. Bruns. Eq. 123.

**5. A Statutory Limit Cannot Generally Be Exceeded.** — *Nicholls v. Hodges*, 1 Pet. (U. S.) 562; *Matter of Gloyd*, 93 Iowa 303; *Abbott v. Baltimore, etc., Steam Packet Co.*, 4 Md. Ch. 310; *Winder v. Diffenderffer*, 2 Bland (Md.) 166; *Davis v. Swedish-American Nat. Bank*, 78 Minn. 408, 79 Am. St. Rep. 400; *Dufford v. Smith*, 46 N. J. Eq. 216; *Lent v. Howard*, 89 N. Y. 169; *Woodruff v. New York, etc., R. Co.*, 129 N. Y. 27; *Matter of Gill*, (Surrogate Ct.) 21 Misc. (N. Y.) 281; *Morgan v. Hannas*, (Ct. App.) 13 Abb. Pr. N. S. (N. Y.) 361.

**6. Cases of Extraordinary Difficulty.** — *Matter of Gloyd*, 93 Iowa 303; *Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257; *Matter of Schell*, 53 N. Y. 263; *Matter of Gill*, (Surrogate Ct.) 21 Misc. (N. Y.) 281.

**7. Within the Statutory Limits Court's Discretion Unfettered.** — *Gibson's Case*, 1 Bland (Md.)

In Determining the Amount of Commissions or Compensation to be allowed, courts will take into consideration the zeal, fidelity, and skill with which the trustee has acted in his official capacity,<sup>1</sup> the difficulty, risk, and responsibility incurred, and the extent and amount of time and labor required of him.<sup>2</sup> The court will also consider the amount and character of the property in the trustee's charge;<sup>3</sup> the value of his services to the estate, taking account of his ability and reputation in the business world;<sup>4</sup> and finally the condition of the trust property, whether in a valuable condition or not, at the termination of the trustee's relation to it.<sup>5</sup> Generally each case is to be determined by its own particular circumstances.<sup>6</sup> But infallibility of judgment is not required of a

138, 17 Am. Dec. 257; *Davis v. Swedish-American Nat. Bank*, 78 Minn. 408, 79 Am. St. Rep. 400; *Stinson v. Stinson*, 8 Ont. Pr. 560.

But see *Cobb v. Fant*, 36 S. Car. 1, where the court held that in a case proper for commissions not forfeited by law the right of the trustee to statutory compensation was fixed.

**1. Court Will Take into Consideration the Capacity of the Trustee.**—*Kendall v. New England Carpet Co.*, 13 Conn. 383; *Premier Steel Co. v. Yandes*, 139 Ind. 307; *U. S. Bank v. Huth*, 4 B. Mon. (Ky.) 423; *Parker v. Hill*, (Mass. 1904) 69 N. E. Rep. 336; *Van Houten v. Van Houten*, 45 N. J. Eq. 796; *Wagstaff v. Lowerre*, 23 Barb. (N. Y.) 209; *Matter of Gill*, (Surrogate Ct.) 21 Misc. (N. Y.) 281; *Willet's Estate*, (Surrogate Ct.) 15 Civ. Pro. (N. Y.) 284, 290, 6 Dem. (N. Y.) 435; *Wistar's Appeal*, 125 Pa. St. 526, 11 Am. St. Rep. 917; *McElhenny's Appeal*, 46 Pa. St. 347.

**Trustees' Commissions Reduced for Lack of Business Capacity.**—As where a trustee managed an estate with integrity, to the best of his ability, but, owing to his lack of business qualifications the estate suffered loss, he was not disallowed commissions, but they were reduced. *Kilgore's Appeal*, (Pa. 1887) 8 Atl. Rep. 441.

**Demand of Exorbitant Commissions.**—A trustee who vexes heirs and delays distribution by preferring an exorbitant claim for commissions is not entitled to the same consideration as a trustee who makes only a reasonable charge for his services. *Carrier's Appeal*, 79 Pa. St. 230.

**2. Circumstances Considered in Awarding Compensation—England.**—*The Rendsberg*, 6 C. Rob. 142.

*Canada.*—*Re Prittie*, 13 Ont. Pr. 19; *Stinson v. Stinson*, 8 Ont. Pr. 560; *In re Cobourg Town Trust*, 22 Grant Ch. (U. C.) 377; *Re Wiggins*, 2 N. Bruns. Eq. 123; *McDonal v. Davidson*, 6 Ont. App. 320; *In re Tilsonburgh, etc.*, R. Co., 24 Ont. App. 378.

*Alabama.*—*Marks v. Semple*, 111 Ala. 637; *Gould v. Hays*, 25 Ala. 426; *Donelson v. Posey*, 13 Ala. 752.

*Kentucky.*—*Offutt v. Divine*, (Ky. 1899) 53 S. W. Rep. 816; *Ten Broeck v. Fidelity Trust, etc.*, Co., 88 Ky. 242; *Fleming v. Wilson*, 6 Bush (Ky.) 610; *Phillips v. Bustard*, 1 B. Mon. (Ky.) 348.

*Maryland.*—*Widener v. Fay*, 51 Md. 273; *Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257.

*Massachusetts.*—*Barrell v. Joy*, 16 Mass. 221. *New Jersey.*—*McKnight v. Walsh*, 24 N. J. Eq. 498.

*New York.*—*Matter of Gill*, (Surrogate Ct.) 21 Misc. (N. Y.) 281; *Lawrance v. Garner*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 534.

*North Carolina.*—*Lane v. Royster*, 118 N. Car. 159.

*Pennsylvania.*—*In re Dorrance*, 186 Pa. St. 64; *Dunlap's Appeal*, (Pa. 1888) 14 Atl. Rep. 262; *Vastine's Estate*, 190 Pa. St. 443; *Bosler's Estate*, 161 Pa. St. 457; *Biddle's Appeal*, 83 Pa. St. 340, 24 Am. Rep. 183; *McElhenny's Appeal*, 46 Pa. St. 347; *Heckert's Appeal*, 24 Pa. St. 482; *Matter of Harland*, 5 Rawle (Pa.) 323; *Crumph's Estate*, 2 Pa. Dist. 478.

*Virginia.*—*Miller v. Beverley*, 4 Hen. & M. (Va.) 415.

**The Giving of a Bond by a Trustee** is a matter for consideration in compensating him. *Dunlap's Appeal*, (Pa. 1888) 14 Atl. Rep. 262.

**Services Performed Before Appointment.**—A trustee is entitled to compensation for services performed by him for the benefit of the estate, before his appointment as trustee. *Perkins's Appeal*, 108 Pa. St. 314, 56 Am. Rep. 208.

**Money Which Never Passed through Trustee's Hands.**—Although the money passes into the beneficiaries' hands directly without the intervention of the trustee, the trustee is entitled to commissions thereon, where his exertions procured the fund. *Lanier v. Brunson*, 21 S. Car. 41.

**3. Character and Amount of Trust Property.**—*U. S. Bank v. Huth*, 4 B. Mon. (Ky.) 423; *Parker v. Hill*, (Mass. 1904) 69 N. E. Rep. 336; *Wagstaff v. Lowerre*, 23 Barb. (N. Y.) 209; *Matter of Gill*, (Surrogate Ct.) 21 Misc. (N. Y.) 281.

It has been said, however, that the value of the property is the true basis for commissions only when there are sales by a trustee; the true basis should be *pro rata* of the time and attention given, and not *pro rata* of the subject-matter. *The Rendsberg*, 6 C. Rob. 142.

**4. Trustee's Ability and Reputation in Business World.**—*The Rendsberg*, 6 C. Rob. 142; *Huggins v. Rider*, 77 Ill. 360; *Van Houten v. Van Houten*, 45 N. J. Eq. 796; *Matter of Gill*, (Surrogate Ct.) 21 Misc. (N. Y.) 281; *Kilgore's Appeal*, (Pa. 1887) 8 Atl. Rep. 441. See also *Parker v. Hill*, (Mass. 1904) 69 N. E. Rep. 336.

**5. Condition of Estate at Termination of Trust.**—*Central Trust Co. v. Johnson*, (Ky. 1903) 74 S. W. Rep. 663; *Kendall v. New England Carpet Co.*, 13 Conn. 383; *Van Houten v. Van Houten*, 45 N. J. Eq. 796; *Matter of Gill*, (Surrogate Ct.) 21 Misc. (N. Y.) 281; *Wistar's Appeal*, 125 Pa. St. 526, 11 Am. St. Rep. 917; *McElhenny's Appeal*, 46 Pa. St. 347; *Brolasky's Estate*, 4 Pa. Dist. 218.

**6. Court Will Take into Consideration All the Circumstances.**—Generally, in determining what is a reasonable and adequate compensation to a trustee for his services, since the dis-

trustee;<sup>1</sup> and, generally, where the estate has been preserved intact by the trustee, the court will view a trustee's misconduct, where there is not such fraud, wilful misconduct, or gross negligence as to shut the doors of equity against him, with a lenient eye.<sup>2</sup>

(2) *Waiver*. — A trustee may waive or release his claims to commissions,<sup>3</sup> and this waiver may appear from the terms of his acceptance of the trust, or it may appear from the conduct and dealings of the parties that no compensation was intended or expected.<sup>4</sup>

cretionary power of the court thereover is unlimited, the court will take into account all the circumstances of each particular case. *Central Trust Co. v. Johnson*, (Ky. 1903) 74 S. W. Rep. 663; *Parker v. Hill*, (Mass. 1904) 69 N. E. Rep. 336; *In re Tilsonburgh, etc.*, R. Co., 24 Ont. App. 378.

**1. Infallibility of Judgment Not Required.** — *Lyon v. Foscue*, 60 Ala. 468; *Griffin v. Pringle*, 56 Ala. 486; *Fahnestock's Appeal*, 104 Pa. St. 46; *Eyster's Appeal*, 16 Pa. St. 372; *Bechtel's Appeal*, 7 Pa. Super. Ct. 451.

**Error of Judgment.** — Where an estate was impaired in value owing to an error in judgment by a trustee in making a lease of trust property, he was allowed commissions. *Bechtel's Appeal*, 7 Pa. Super. Ct. 451.

**Improper Investments.** — When a trustee made improper investments but there was no loss sustained by the estate, he was allowed full commissions. *Makin's Estate*, 7 Pa. Dist. 126.

**Trust Estate Not Benefited.** — Where trustees converted land into stock, but both were equally valueless, they were allowed compensation for their trouble. *Re Prittie*, 13 Ont. Pr. 19.

**2. Trustee's Conduct Will Not Be Too Rigidly Scrutinized by Court.** — *Abbott v. Summers*, 116 Fed. Rep. 687; *Booth v. Bradford*, 114 Iowa 562; *Ward v. Shire*, (Ky. 1901) 65 S. W. Rep. 8; *Winder v. Diffenderffer*, 2 Bland (Md.) 166; *Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257; *Garesche v. Levering Invest. Co.*, 146 Mo. 436; *Jacobus v. Munn*, 37 N. J. Eq. 48; *Moore v. Zabriskie*, 18 N. J. Eq. 51; *Morgan v. Morgan*, 4 Dem. (N. Y.) 353; *Willett's Estate*, (Surrogate Ct.) 15 Civ. Pro. (N. Y.) 284, 290, 6 Dem. (N. Y.) 435; *Vastine's Estate*, 190 Pa. St. 443; *Patrick's Estate*, 162 Pa. St. 175; *Ahl's Appeal*, 129 Pa. St. 26; *Makin's Estate*, 7 Pa. Dist. 126; *Miller v. Beverley*, 4 Hen. & M. (Va.) 415.

**Even Where a Trustee Has Been Guilty of a Breach of Trust**, the court may allow him compensation for his services, so far as they have been advantageous to the beneficiary, although it withholds all compensation to him as trustee. *Jacobus v. Munn*, 37 N. J. Eq. 48; *Moore v. Zabriskie*, 18 N. J. Eq. 51.

**In Case of Constructive Fraud**, where there was no actual loss of the estate, the trustee was allowed full commissions. *Booth v. Bradford*, 114 Iowa 562.

**Where There Is No Actual Loss to the Estate.** — Trustees will be allowed commissions, although guilty of negligence, where misconduct has caused no loss to the estate. *Muckenfuss v. Heath*, 1 Hill Eq. (S. Car.) 182.

**Trivial Irregularities** which have done no harm are disregarded by the court. *Booth v. Bradford*, 114 Iowa 562.

**Commissions Reduced.** — *Whitehead v. Whitehead*, 85 Va. 870.

**Half Commissions Allowed.** — Where a trustee kept a correct and accurate account of his receipts and disbursements, but mingled the trust funds with his own, he was allowed half of the usual commission where he was charged with the principal expended and compound interest on the trust money diverted by him to his own use. *Diffenderffer v. Winder*, 3 Gill & J. (Md.) 311. *Appealed from Winder v. Diffenderffer*, 2 Bland (Md.) 166.

**3. Trustee May Waive His Right to Commissions.** — *Barry v. Barry*, 1 Md. Ch. 20; *Ridgely v. Gittings*, 2 Har. & G. (Md.) 58; *Hancox v. Meeker*, 95 N. Y. 528.

But this presumption may be overcome by circumstances. *Schwarz v. Wendell*, Walk. (Mich.) 267.

The language in a will or deed to deprive a trustee of his commissions should be plain and explicit. *Matter of Mason*, 98 N. Y. 527.

**Waiver Arises Easily in Family Matters.** — *Ten Broeck v. Fidelity Trust, etc., Co.*, 88 Ky. 242.

**Where a Trustee Makes a Final Settlement Without Asking for Allowance** he is presumed to have waived his right to commissions. *Phillips v. Burton*, (Ky. 1899) 52 S. W. Rep. 1065; *Wiener's Estate*, 4 Pa. Dist. 422.

A trustee was denied interest on his yearly commissions where he did not demand them until he asked leave of the court to resign. *Matter of Allen*, 29 Hun (N. Y.) 7.

**A Trustee Who Has Waived Commissions on His Former Settlements Is Not Estopped** thereby from claiming commissions on his subsequent reports and accounting. *Denmead v. Denmead*, 62 Md. 321.

**4. That Compensation Was Not Intended** may appear from the terms of the trust instrument. *Northern Cent. R. Co. v. Keighler*, 29 Md. 572. Or from the nature of the trust. *Arnold v. Alden*, 173 Ill. 229; *Reiff's Appeal*, 124 Pa. St. 145. Or from the conduct of the parties. *Marshalltown First Nat. Bank v. Owen*, 23 Iowa 185. Or from the situation of the trustee. *Nicholson v. Tutin*, 3 Jur. N. S. 235; *Premier Steel Co. v. Yandes*, 139 Ind. 307; *Matter of Mason*, 98 N. Y. 527; *Reiff's Appeal*, 124 Pa. St. 145.

If a trustee accepts a trust coupled with an interest which benefits him, without any stipulation for compensation, he is not entitled to compensation. *Premier Steel Co. v. Yandes*, 139 Ind. 307; *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 457.

Where, under a will, the trustee had a life estate vested in her as trustee with remainder over, she was held not entitled to commissions



(3) *Forfeiture.* — **Fraudulent Contract** on the part of a trustee has been held absolutely to bar his right to compensation.<sup>1</sup>

**Wilful and Intentional Misconduct Forfeits Commissions.** — Where a trustee has been guilty of wilful and intentional violation of his duties, though no actual fraud has been practiced, he will generally be held to have forfeited his right to commissions.<sup>2</sup> And where in addition to his misconduct loss is sustained by the trust estate by reason thereof, the rule denying him compensation for his services is almost universally adopted by the courts.<sup>3</sup>

for preserving the fund. *Reiff's Appeal*, 124 Pa. St. 145.

**In Charitable Trusts**, that the trustee is not to receive compensation for his services is generally implied. *Dilworth v. Sinderling*, 1 Binn. (Pa.) 488, 2 Am. Dec. 469.

**1. Fraudulent Conduct.** — *Booth v. Bradford*, 114 Iowa 562; *Davis v. Swedish American Nat. Bank*, 78 Minn. 408, 79 Am. St. Rep. 400; *Jacobus v. Munn*, 37 N. J. Eq. 48; *McCulloch v. Tompkins*, 62 N. J. Eq. 262; *Cook v. Lowry*, 95 N. Y. 103; *Fahnestock's Appeal*, 104 Pa. St. 46; *Bechtel's Appeal*, 7 Pa. Super. Ct. 451; *Makin's Estate*, 7 Pa. Dist. 126.

Where there is no evidence tending to impeach the good faith of a trustee in any transaction relating to the trust, the presumption is that he has fulfilled his duty. *Rathbun v. Colton*, 15 Pick. (Mass.) 471.

**The Following Are Instances of fraudulent conduct**, either actual or constructive, for which, irrespective of loss to the estate, the courts denied to trustees any commissions for their services:

*Where a Trustee Made Material Alterations in His Own Favor in the Trust Account.* *Elmer v. Loper*, 25 N. J. Eq. 475.

*Where a Trustee Appropriated Trust Money to His Own Use.* *Walker v. Walker*, 9 Wall. (U. S.) 743; *Matter of Lafferty*, 184 Pa. St. 502; *Daniel v. Fain*, 5 Lea (Tenn.) 258.

*Where a Trustee Claimed Trust Property as His Own.* *Moore v. Zabriskie*, 18 N. J. Eq. 51; *Stone v. Farnham*, 22 R. I. 227, denying the trust in his answer to the complaint of the *cestui que trust*; *Pollard v. Lathrop*, 12 Colo. 171, or repudiating the agreement under which the assignment was made to him for the benefit of creditors, *Ireland v. Potter*, (Supm. Ct. Spec. T.) 25 How. Pr. (N. Y.) 175, or did not keep an account of rents and profits during his trusteeship, *Royal v. Royal*, 30 Oregon 448, or his conduct involved the estate in expensive litigation and he neglected to pay the beneficiary any profits of the estate, *Hanna v. Clark*, 204 Pa. St. 145.

*Where a Trustee Rendered Services under a Deed of Trust Known to Him to Be Fraudulent* as to creditors, *French v. Commercial Nat. Bank*, 97 Ill. App. 533, affirmed 199 Ill. 213, or under a chattel deed of trust intended to operate as an assignment for the benefit of creditors which violated creditor's rights, and hence was fraudulent by the bankrupt law, *Abbott v. Summers*, 116 Fed. Rep. 687.

*Where a Trustee Made a Sale of the Trust Estate Which Amounted to Constructive Fraud.* *Flagg v. Mann*, 3 Sumn. (U. S.) 84.

**2. Wilful Misconduct** — *United States*. — *Flagg v. Mann*, 3 Sumn. (U. S.) 84; *Barney v. Saunders*, 16 How. (U. S.) 540.

*Maryland.* — *Diffenderffer v. Winder*, 3 Gill & J. (Md.) 311.

*Massachusetts.* — *Rowland v. Maddock*, 183 Mass. 360.

*Minnesota.* — *Davis v. Swedish-American Nat. Bank*, 78 Minn. 408, 79 Am. St. Rep. 400; *St. Paul Trust Co. v. Kittson*, 62 Minn. 408.

*Missouri.* — *Newton v. Rebenack*, 90 Mo. App. 650.

*New Jersey.* — *McCulloch v. Tompkins*, 62 N. J. Eq. 262; *Welsh v. Brown*, 50 N. J. Eq. 387; *Jacobus v. Munn*, 37 N. J. Eq. 48.

*Ohio.* — *Gilbert v. Sutliff*, 3 Ohio St. 129.

*Pennsylvania.* — *Hanna v. Clark*, 204 Pa. St. 145; *Fellows v. Loomis*, 204 Pa. St. 227; *Vastine's Estate*, 190 Pa. St. 443; *Hanbest's Estate*, 22 Pa. Super. Ct. 419; *Makin's Estate*, 7 Pa. Dist. 126; *Patrick's Estate*, 162 Pa. St. 175.

*South Carolina.* — *Muckenfuss v. Heath*, 1 Hill Eq. (S. Car.) 182.

In the following instances the trustee's conduct was held by the court to have deprived him of all commissions: Where a trustee ignored the direction of the trust deed and invested the trust money in real estate, instead of interest-bearing securities, *Newton v. Rebenack*, 90 Mo. App. 650. Where a trustee invested the trust funds in a firm of which he was a partner, *Sharpe's Estate*, 2 Phila. (Pa.) 280, 14 Leg. Int. (Pa.) 140. Where a trustee turned over all the assets of the trust estate to the life tenant, without regarding the rights of the remainderman, *Singleton v. Lowndes*, 9 S. Car. 465. Where an assignee for the benefit of creditors bought up the debts of the estate at a discount, and then claimed a credit for them in his account from the estate as paid in full, *Hermstead's Appeal*, 60 Pa. St. 423. Where a trustee refused to deliver trust property until a commission was allowed under an alleged agreement between the donor and himself, *Stearly's Appeal*, 38 Pa. St. 525. Where a testamentary trustee attempted to establish a legacy alleged to be granted to him by the testatrix, thereby injuring the claims of the beneficiaries by reduction of the amount of the trust fund, *Greenfield's Estate*, 24 Pa. St. 232. A trustee cannot convert trust property into more valuable securities, and while holding on to such property thus enhanced in value, claim commissions for his services. *Lane v. Royster*, 118 N. Car. 150.

**3. Where Trust Estate Has Suffered Loss.** — *Booth v. Bradford*, 114 Iowa 562; *Henderson v. Sherman*, 47 Mich. 267; *St. Paul Trust Co. v. Kittson*, 62 Minn. 408; *Maginn v. Green*, 67 Mo. App. 616; *Jacobus v. Munn*, 37 N. J. Eq. 48; *Cook v. Lowry*, 95 N. Y. 103; *Gilbert v. Sutliff*, 3 Ohio St. 129; *Royal v. Royal*, 30 Oregon 448; *Hart's Estate*, 203 Pa. St. 496;

**By Gross Negligence Commissions Forfeited.** — Where a trustee has been grossly negligent and careless in the discharge of his duties he will forfeit his commissions.<sup>1</sup>

(4) *When Trustee Entitled to Extra Compensation.* — A trustee is entitled to extra compensation for his services when extra services have been required of him,<sup>2</sup> although an arrangement providing for the payment of a certain sum of money had been expressly entered into by him.<sup>3</sup> To entitle a trustee to extra compensation the nature of the duties performed by him must not be those usually required and generally exercised by a trustee in the proper discharge of his offices;<sup>4</sup> they must be outside of the skill, labor, and time required by law of the trustee in the general management of an estate, to entitle him to the usual commissions.<sup>5</sup> The right to extra compensation,

Vastine's Estate, 190 Pa. St. 443; Muckenfuss v. Heath, 1 Hill Eq. (S. Car.) 182.

Where the damage resulting from a trustee's breach of trust is greater than the benefit derived from his services, a trustee is not entitled to compensation for his services. Probate Judge v. Jackson, 58 N. H. 458.

1. **Where Trustee Has Been Grossly Negligent.** — Matter of Thompson, 101 Cal. 349; Lehman v. Rotherbarth, 159 Ill. 270; Booth v. Bradford, 114 Iowa 562; Davis v. Swedish-American Nat. Bank, 78 Minn. 408, 79 Am. St. Rep. 400; St. Paul Trust Co. v. Kittson, 62 Minn. 408; McKnight v. Walsh, 24 N. J. Eq. 498; Cook v. Lowry, 95 N. Y. 103; Fahnestock's Appeal, 104 Pa. St. 46; Nagle's Estate, 12 Phila. (Pa.) 25, 34 Leg. Int. (Pa.) 264; Makin's Estate, 7 Pa. Dist. 126.

**Instances of Negligence for Which Trustees' Commissions Forfeited.** — Where a trustee's accounts are involved in obscurity he will be denied commissions. Blauvelt v. Ackerman, 23 N. J. Eq. 495, affirmed 25 N. J. Eq. 570. And see McDowell v. Caldwell, 2 McCord Eq. (S. Car.) 43, 16 Am. Dec. 635. Where a trustee failed to keep a correct account of the affairs of the trust estate by preserving necessary documents, whereby the estate was involved in expensive litigation, and the court was unable to arrive at the exact state of affairs, Welch v. Brown, 50 N. J. Eq. 387; Gilbert v. Sutliff, 3 Ohio St. 129. Where no account has been settled by trustee for thirty years, and then when compelled to do so by legal proceedings, an unfair exhibit was made, Holman's Appeal, 24 Pa. St. 174. Where there is no evidence of proper attention to the duty of the trust, Hart's Estate, 203 Pa. St. 496.

**Negligence in Attending to Investments.** — McKnight v. Walsh, 24 N. J. Eq. 498. Where several trustees left a fund uninvested during a long period in the hands of a cotrustee without any security, Warbass v. Armstrong, 10 N. J. Eq. 263. Where the trustee made irregular payments to the *cestui que trust* and kept no accounts, Dufford v. Smith, 46 N. J. Eq. 216. Trustees have been denied commissions on trust property collected by a cotrustee and misapplied by him, Matter of Lafferty, 184 Pa. St. 502.

2. **Extra Compensation for Extra Services.** — Grimal v. Cruse, 70 Ala. 534; Biscoe v. State, 23 Ark. 592; Doom v. Howard, (Ky. 1901) 64 S. W. Rep. 469; Turnbull v. Pomeroy, 140 Mass. 117; Parker v. Hill, (Mass. 1904) 69 N. E. Rep. 336; Mumford v. Murray, 6 Johns. Ch.

(N. Y.) 1; Lawrance v. Garner, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 534; Hemphill's Appeal, 18 Pa. St. 303; Duval's Appeal, 38 Pa. St. 112; Carrier's Appeal, 79 Pa. St. 230; Perkin's Appeal, 108 Pa. St. 314, 56 Am. Rep. 208; Dunlap's Appeal, (Pa. 1888) 14 Atl. Rep. 262; Miller v. Beverlylys, 4 Hen. & M. (Va.) 415; *In re Cursitor*, 9 Manitoba 433.

3. **Existence of Express Agreement.** — Grimbail v. Cruse, 70 Ala. 534; Biscoe v. State, 23 Ark. 592.

4. **Duties Outside Those Generally Required.** — Bainbridge v. Blair, 8 Beav. 588; The Rendsberg, 6 C. Rob. 142; *In re Tilsonburgh*, etc., R. Co., 24 Ont. App. 378; Grimbail v. Cruse, 70 Ala. 534; Matter of Gloyd, 93 Iowa 303; Moore v. White, 4 Har. & J. (Md.) 548; Lindsay v. Richardson, 98 Mich. 319; Brolasky's Estate, 4 Pa. Dist. 218; Perkins's Appeal, 108 Pa. St. 314, 56 Am. Rep. 208; Vastine's Estate, 190 Pa. St. 443.

**Keeping Correct Accounts and Making Proper Settlements** are within the scope of a trustee's ordinary duties. Grimbail v. Cruse, 70 Ala. 534.

**Preservation of the Trust Property** is one of the trustee's ordinary duties. Matter of Ormsby, 1 Ball & B. 189; Grimbail v. Cruse, 70 Ala. 534; Woodruff v. New York, etc., R. Co., 129 N. Y. 27; Perkins's Appeal, 108 Pa. St. 314, 56 Am. Rep. 208.

5. **Must Be Outside Skill, etc., Required by Law.** — Bainbridge v. Blair, 8 Beav. 588, 9 Jur. 765; Barrett v. Hartley, L. R. 2 Eq. 789; The Rendsberg, 6 C. Rob. 142; *In re Tilsonburgh*, etc., R. Co., 24 Ont. App. 378; Grimbail v. Cruse, 70 Ala. 534; Biscoe v. State, 23 Ark. 592; Matter of Gloyd, 93 Iowa 303; Doom v. Howard, (Ky. 1901) 64 S. W. Rep. 469; Lindsay v. Richardson, 98 Mich. 319; Moore v. Zabriskie, 18 N. J. Eq. 51; Woodruff v. New York, etc., R. Co., 129 N. Y. 27; Lawrance v. Garner, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 534; Hemphill's Appeal, 18 Pa. St. 303; Perkins's Appeal, 108 Pa. St. 314, 56 Am. Rep. 208; Brolasky's Estate, 4 Pa. Dist. 218; Sollee v. Craft, 9 Rich. Eq. (S. Car.) 474. See Hough v. Harvey, 71 Ill. 72.

**Death of Cotrustee Causing Extra Labor on the Part of the Survivor** warrants extra compensation. Lawrance v. Garner, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 534.

**Litigation Concerning the Title to Trust Property** causing extra labor to the trustee entitles him to extra compensation. Grimbail v. Cruse, 70 Ala. 534.



however, does not depend upon whether the trust estate is benefited.<sup>1</sup>

(5) *Fixing Amount of Compensation* — (a) *In General* — *No Fixed Rule of Compensation*. — Since in each case the difficulty experienced by trustees in administering an estate varies according to the nature of the individual trust,<sup>2</sup> and the amount of labor and care required of and bestowed by a trustee is necessarily different in each case,<sup>3</sup> there can be no fixed rule or method of compensation for a trustee.<sup>4</sup> Many cases, however, are so similar in their nature and requirements that they are conveniently and usually grouped by the courts into one class;<sup>5</sup> and substantially the same compensation will usually be awarded to those trustees whose duties naturally fall within that class.<sup>6</sup> Courts are not bound, however, to follow similar cases in the fixing of compensation, but may depart from them in their discretion.<sup>7</sup>

*Similar Duties*. — The duties of trustees involved in the sale of real estate,<sup>8</sup> or in the receipt and disbursement of funds received by them,<sup>9</sup> are generally regarded by the courts as so similar that the compensation for these services is usually regulated by a certain fixed percentage.<sup>10</sup> But if the trustee in a particular case can produce evidence that he has performed services beyond those usually performed, the court may depart from the fixed percentage rule.<sup>11</sup>

(b) *Of Several Trustees*. — Where there are joint trustees, or several are con-

1. *A Trustee Negotiating for a Sale Which Fell Through* was allowed extra compensation for expenses incurred and inconvenience he was put to. *Lowrie's Appeal*, 1 Grant Cas. (Pa.) 373.

2. *Compensation Varies According to Nature of Trust*. — *Abbott v. Baltimore, etc., Steam Packet Co.*, 4 Md. Ch. 310; *Parker v. Hill*, (Mass. 1904) 69 N. E. Rep. 336; *Wagstaff v. Lowerre*, 23 Barb. (N. Y.) 209; *Dunlap's Appeal*, (Pa. 1888) 14 Atl. Rep. 262; *Montgomery's Appeal*, 86 Pa. St. 230; *McElhenny's Appeal*, 46 Pa. St. 347; *Heckert's Appeal*, 24 Pa. St. 482.

3. *Compensation Varies According to Amount of Labor Bestowed*. — *Gould v. Hays*, 25 Ala. 426; *Parker v. Hill*, (Mass. 1894) 69 N. E. Rep. 336; *Wagstaff v. Lowerre*, 23 Barb. (N. Y.) 209; *In re Dorrance*, 186 Pa. St. 64; *Montgomery's Appeal*, 86 Pa. St. 230; *McElhenny's Appeal*, 46 Pa. St. 347; *Heckert's Appeal*, 24 Pa. St. 482.

4. *No Fixed Rule for Compensating Trustees* — *Alabama*. — *Gould v. Hays*, 25 Ala. 426; *Harris v. Martin*, 9 Ala. 805.

*Kentucky*. — *Offutt v. Divine*, (Ky. 1899) 53 S. W. Rep. 816; *Fleming v. Wilson*, 6 Bush (Ky.) 610; *Central Trust Co. v. Johnson*, (Ky. 1903) 74 S. W. Rep. 663.

*Maryland*. — *Abbott v. Baltimore, etc., Steam Packet Co.*, 4 Md. Ch. 310; *Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257.

*Massachusetts*. — *Parker v. Hill*, (Mass. 1904) 69 N. E. Rep. 336.

*New York*. — *Wagstaff v. Lowerre*, 23 Barb. (N. Y.) 209.

*Pennsylvania*. — *In re Slifer*, 4 Phila. (Pa.) 225, 17 Leg. Int. (Pa.) 164; *Dunlap's Appeal*, (Pa. 1888) 14 Atl. Rep. 262; *In re Dorrance*, 186 Pa. St. 64; *Bosler's Estate*, 161 Pa. St. 457; *Perkins's Appeal*, 108 Pa. St. 314, 56 Am. Rep. 208; *Montgomery's Appeal*, 86 Pa. St. 230; *Carrier's Appeal*, 79 Pa. St. 230; *Duval's Appeal*, 38 Pa. St. 112; *McElhenny's Appeal*, 46 Pa. St. 347; *Heckert's Appeal*, 24 Pa. St. 482; *Matter of Harland*, 5 Rawle (Pa.) 323.

*Canada*. — *Thompson v. Freeman*, 15 Grant Ch. (U. C.) 384.

5. *Similar Cases Frequently Grouped*. — *Magee v. Cowperthwaite*, 10 Ala. 966; *Parker v. Hill*, (Mass. 1904) 69 N. E. Rep. 336; *Matter of Meserole*, 36 Hun (N. Y.) 298; *Fisher v. Fisher*, 1 Bradf. (N. Y.) 335; *Dunlap's Appeal*, (Pa. 1888) 14 Atl. Rep. 262; *Vastine's Estate*, 190 Pa. St. 443; *Carrier's Appeal*, 79 Pa. St. 230; *Miller v. Beverley*, 4 Hen. & M. (Va.) 415.

6. *Same Compensation for Similar Duties*. — *Parker v. Hill*, (Mass. 1904) 69 N. E. Rep. 336; *Matter of Meserole*, 36 Hun (N. Y.) 298; *Hawley v. James*, 5 Paige (N. Y.) 317; *Fisher v. Fisher*, 1 Bradf. (N. Y.) 335; *Dunlap's Appeal*, (Pa. 1888) 14 Atl. Rep. 262; *Vastine's Estate*, 190 Pa. St. 443; *Carrier's Appeal*, 79 Pa. St. 230; *McElhenny's Appeal*, 46 Pa. St. 347; *Duval's Appeal*, 38 Pa. St. 112; *Miller v. Beverley*, 4 Hen. & M. (Va.) 415; *In re Cursor*, 9 Manitoba 433.

7. *Departure in Discretion of Court*. — *Offutt v. Divine*, (Ky. 1899) 53 S. W. Rep. 816; *Fleming v. Wilson*, 6 Bush (Ky.) 610; *Parker v. Hill*, (Mass. 1904) 69 N. E. Rep. 336; *Perkins's Appeal*, 108 Pa. St. 314, 56 Am. Rep. 208; *Carrier's Appeal*, 79 Pa. St. 230. See *Thouren's Estate*, 182 Pa. St. 126.

8. *Sale of Real Estate*. — *Hawley v. James*, 5 Paige (N. Y.) 317; *Dunlap's Appeal*, (Pa. 1888) 14 Atl. Rep. 262; *Carrier's Appeal*, 79 Pa. St. 230; *Duval's Appeal*, 38 Pa. St. 112; *Crump's Estate*, 2 Pa. Dist. 478.

9. *Receipts and Disbursements of Funds*. — *Woodruff v. Snedecor*, 68 Ala. 437; *Magee v. Cowperthwaite*, 10 Ala. 966; *Cobb v. Fant*, 36 S. Car. 1; *In re Cursor*, 9 Manitoba 433; *Hawley v. James*, 5 Paige (N. Y.) 317.

10. *Uniform Schedule of Compensation*. — *Woodruff v. Snedecor*, 68 Ala. 437; *Hawley v. James*, 5 Paige (N. Y.) 317; *Dunlap's Appeal*, (Pa. 1888) 14 Atl. Rep. 262; *Carrier's Appeal*, 79 Pa. St. 230; *Duval's Appeal*, 38 Pa. St. 112.

11. *Extra Exertions*. — *Dunlap's Appeal*, (Pa. 1888) 14 Atl. Rep. 262.



cerned in the administration of the same trust, commissions will be apportioned among them according to the actual value of the services of each.<sup>1</sup>

(6) *On What Fund Charged*—(a) *On Income*.—In the case of a continuous trust, one duty of which is to preserve the fund, as a source of periodic interest, dividends, rents, and the like, the authorities do not recognize a right in the trustee, except in extraordinary circumstances, or when the instrument by which the trust is created so indicates, to diminish the fund which is to create the income during the life of the trust. For services rendered by way of collecting and paying over the income the compensation is a fit charge upon the income and is properly deducted from it.<sup>2</sup> In fact, for a trustee under such circumstances to charge his commissions upon the corpus of the trust fund, thereby necessarily decreasing the fund, would be inconsistent with the chief cause of his appointment, the duty of preserving undiminished the trust capital.<sup>3</sup>

*Income Inadequate*.—But where the income from the trust estate is inadequate or insufficient to satisfy a trustee's claim for remuneration, the trust estate is liable therefor.<sup>4</sup>

(b) *On Principal*.—Commissions on the principal are granted for the labor, care, and responsibility which pertain to the conservation and general supervision of the trust estate.<sup>5</sup>

**1. Commissions Apportioned.**—*Dow v. Memphis, etc.*, R. Co., 32 Fed. Rep. 185; *Huggins v. Rider*, 77 Ill. 360; *Matter of Johnson*, 170 N. Y. 139; *Slosson v. Naylor*, 2 Dem. (N. Y.) 257; *Matter of Hunt*, (Surrogate Ct.) 41 Misc. (N. Y.) 72; *Matter of Hayden*, 54 Hun (N. Y.) 197; *Maury v. Chesapeake, etc.*, R. Co., 27 Gratt. (Va.) 698; *In re Williams*, 4 Ont. L. Rep. 501.

In *Willitt's Estate*, (Surrogate Ct.) 15 Civ. Proc. (N. Y.) 284, 290, 6 Dem. (N. Y.) 435, the court said: "The standard by which to measure the apportionment of commissions to cotrustees is not to be adjusted by a percentage upon the amount either or both received, but by the actual value of the services rendered by each to the trust."

**2. Commissions Charged on Income**—*Alabama*.—*Marks v. Semple*, 111 Ala. 637; *Lyon v. Foscue*, 60 Ala. 468.

*Georgia*.—*Burney v. Spear*, 17 Ga. 223.

*Iowa*.—*Matter of Gloyd*, 93 Iowa 303.

*Kentucky*.—*Whittingham v. Schoefeld*, (Ky. 1902) 68 S. W. Rep. 116; *Fleming v. Wilson*, 6 Bush (Ky.) 610; *Central Trust Co. v. Johnson*, (Ky. 1903) 74 S. W. Rep. 663.

*Maryland*.—*Hatton v. Weems*, 12 Gill & J. (Md.) 83; *Diffenderfer v. Winder*, 3 Gill & J. (Md.) 311; *Williams v. Mosher*, 6 Gill (Md.) 454; *Willson v. Tyson*, 61 Md. 575; *Abell v. Brady*, 79 Md. 94.

*Massachusetts*.—*Parker v. Ames*, 121 Mass. 220; *Dixon v. Homer*, 2 Met. (Mass.) 426; *Denny v. Allen*, 1 Pick. (Mass.) 147.

*New Hampshire*.—*Peirce v. Burroughs*, 58 N. H. 302.

*New Jersey*.—*Van Houten v. Van Houten*, 45 N. J. Eq. 796; *Dufford v. Smith*, 46 N. J. Eq. 216; *Brown v. Grandin*, (N. J. 1888) 13 Atl. Rep. 266.

*New York*.—*Matter of Selleck*, 111 N. Y. 284; *Matter of Mason*, 98 N. Y. 527; *Savage v. Sherman*, 87 N. Y. 283; *Whitson v. Whitson*, 53 N. Y. 479; *Naylor v. Gale*, 73 Hun (N. Y.) 53; *Matter of Meserole*, 36 Hun (N. Y.)

298; *Clute v. Gould*, 28 Hun (N. Y.) 348; *Matter of Haight*, 51 N. Y. App. Div. 310; *Matter of Gill*, (Surrogate Ct.) 21 Misc. (N. Y.) 281; *Foote v. Bruggerhof*, 66 Hun (N. Y.) 406; *Matter of Hayden*, 54 Hun (N. Y.) 197; *In re Thompson*, (Surrogate Ct.) 1 N. Y. Supp. 213.

*Pennsylvania*.—*Guarantee Trust, etc., Co.'s Appeal*, (Pa. 1887) 9 Atl. Rep. 66; *Vastine's Estate*, 190 Pa. St. 443; *Thouron's Estate*, 182 Pa. St. 126; *Bosler's Estate*, 161 Pa. St. 457; *Biddle's Appeal*, 83 Pa. St. 340; *McElhenny's Appeal*, 46 Pa. St. 347; *Spangler's Estate*, 21 Pa. St. 335; *Roberts's Estate*, 22 Pa. Co. Ct. 4; *Horwitz's Estate*, 7 Pa. Dist. 179.

*Tennessee*.—*Daniel v. Fain*, 5 Lea (Tenn.) 258.

*Canada*.—*In re Williams*, 4 Ont. L. Rep. 501; *In re Cobourg Town Trust*, 22 Grant Ch. (U. C.) 377; *Re Berkeley*, 8 Ont. Pr. 193; *Stinson v. Stinson*, 8 Ont. Pr. 560; *Re Wiggins*, 2 N. Bruns. Eq. 123.

**3. Reasons Why Commissions Are Not Charged on Corpus**.—See *Guarantee Trust, etc., Co.'s Appeal*, (Pa. 1887) 9 Atl. Rep. 66; *Bosler's Estate*, 161 Pa. St. 457.

**4. Principal Liable if Income Insufficient**.—*Burney v. Spear*, 17 Ga. 223; *Whittingham v. Schoefeld*, 68 S. W. Rep. 116, 23 Ky. L. Rep. 2444; *Lindsay v. Kirk*, 95 Md. 50; *Guarantee Trust, etc., Co.'s Appeal*, (Pa. 1887) 9 Atl. Rep. 66; *Biddle's Appeal*, 83 Pa. St. 340, 24 Am. Rep. 183.

**5. Liability of Principal for Commissions**—*Alabama*.—*Lyon v. Foscue*, 60 Ala. 468.

*Iowa*.—*Matter of Gloyd*, 93 Iowa 303.

*New York*.—*Matter of Mason*, 98 N. Y. 527; *Phoenix v. Livingston*, 101 N. Y. 451; *Wagstaff v. Lowerre*, 23 Barb. (N. Y.) 209; *Matter of Moffat*, (Surrogate Ct.) 24 Hun (N. Y.) 325; *In re Thompson*, (Surrogate Ct.) 1 N. Y. Supp. 213; *Matter of Gill*, (Surrogate Ct.) 21 Misc. (N. Y.) 281; *Matter of Marten*, (Surrogate Ct.) 16 Misc. (N. Y.) 245.

*Pennsylvania*.—*Lukens's Appeal*, 47 Pa. St. 356; *McCausland's Appeal*, 38 Pa. St. 466;

**As to Liability of Remainder.** — A trustee is not allowed, where there is a remainder after a life estate, to receive out of the corpus of the fund charges for his services which should have been deducted from the income, unless both estates are owned by the same parties.<sup>1</sup>

(7) *When Commissions Payable* — (a) **In General.** — Upon the assumption of the trust no commissions are allowed.<sup>2</sup> But a trustee is ordinarily entitled to a reasonable compensation for his services as they are rendered. He cannot be compelled to wait till the conclusion of the trust.<sup>3</sup> Where, however, the services rendered are a proper charge on the corpus of the trust estate, commissions are usually awarded at the expiration of the trust,<sup>4</sup> or when the particular trustee's relation to it ends.<sup>5</sup> In certain cases, however, the trustee may be allowed commissions on the principal before the termination of the trust estate.<sup>6</sup>

Guarantee Trust, etc., Co.'s Appeal, (Pa. 1887) 9 Atl. Rep. 66; Bosler's Estate, 161 Pa. St. 457.

Canada. — *Re Berkeley*, 8 Ont. Pr. 193; *In re Williams*, 4 Ont. L. Rep. 501.

**Payment of Taxes and Insurance**, although the actual funds to satisfy these claims are generally taken from the income of the trust estate, is a duty connected with the preservation of the trust estate. *Matter of Martens*, (Surrogate Ct.) 16 Misc. (N. Y.) 245; *Re Berkeley*, 8 Ont. Pr. 193.

**Receipt of Payments from Principal Invested** and reinvestment of such funds is generally considered a charge on the principal. *In re Williams*, 4 Ont. L. Rep. 501.

**1. Liability of Remainder.** — *Brown v. Grandin*, (N. J. 1888) 13 Atl. Rep. 266; *Offutt v. Divine*, (Ky. 1899) 53 S. W. Rep. 816; *Parker v. Ames*, 121 Mass. 220; *Denny v. Allen*, 1 Pick. (Mass.) 147; *Matter of Haight*, 51 N. Y. App. Div. 310; *Matter of Slocum*, 60 N. Y. App. Div. 438; *Matter of Bevier*, (Surrogate Ct.) 17 Misc. (N. Y.) 486; *Biddle's Appeal*, 83 Pa. St. 340, 24 Am. Rep. 183; *Daniel v. Fain*, 5 Lea (Tenn.) 258. See *Spencer v. Spencer*, 38 N. Y. App. Div. 463.

**2. Upon the Assumption** of the trust no commissions are allowed. *Dixon v. Homer*, 2 Met. (Mass.) 420. See *Matter of McAlpine*, 126 N. Y. 285; *Linsly v. Bogert*, 87 Hun (N. Y.) 137.

**3. Commissions Earned When Work Performed.** — *Dixon v. Homer*, 2 Met. (Mass.) 420; *Van Houten v. Van Houten*, 45 N. J. Eq. 796; *Matter of Selleck*, 111 N. Y. 284; *Naylor v. Gale*, 73 Hun (N. Y.) 53; *Meacham v. Sternes*, 0 Paige (N. Y.) 398; *Vastine's Estate*, 190 Pa. St. 443; *Spangler's Appeal*, 21 Pa. St. 335; *Roberts's Estate*, 22 Pa. Co. Ct. 4; *Pedrick's Estate*, 5 Phila. (Pa.) 478, 21 Leg. Int. (Pa.) 197; *Lanier v. Brunson*, 21 S. Car. 41; *In re Cobourg Town Trust*, 22 Grant Ch. (U. C.) 377.

**4. If Corpus Liable Commissions Deducted When Trust Expires** — *United States*. — *Barney v. Saunders*, 16 How. (U. S.) 535.

*Connecticut*. — *Clark v. Platt*, 30 Conn. 282. *Maryland*. — *Bentley v. Shreve*, 2 Md. Ch. 215.

*New York*. — *Matter of Mason*, 98 N. Y. 527; *Matter of Moffat*, 24 Hun (N. Y.) 325; *Matter of Kellogg*, 7 Paige (N. Y.) 265; *Smith v. Lansing*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 566; *McKee v. Weeden*, 1 N. Y. App. Div. 583; *Matter of Baker*, 35 Hun (N. Y.) 272.

*North Carolina*. — *Ingram v. Kirkpatrick*, 8 Ired. Eq. (43 N. Car.) 62.

*Pennsylvania*. — *Dunlap's Appeal*, (Pa. 1888) 14 Atl. Rep. 262; *Guarantee Trust, etc., Co.'s Appeal*, (Pa. 1887) 9 Atl. Rep. 66; *Thouron's Estate*, 182 Pa. St. 126; *Bosler's Estate*, 161 Pa. St. 457; *Luken's Appeal*, 47 Pa. St. 356; *Shunk's Appeal*, 2 Pa. St. 304.

Canada. — *In re Cursor*, 9 Manitoba 433.

**Principal and Income May Be Treated as One Fund upon Final Settlement** of a trustee's accounts. *Andrews v. Goodrich*, 3 Dem. (N. Y.) 245; *Slosson v. Naylor*, 2 Dem. (N. Y.) 257.

**5. Upon Severance of the Relation** the trustee may be entitled to commissions on the principal. *Central Trust Co. v. Johnson*, (Ky. 1903) 74 S. W. Rep. 663; *Bentley v. Shreve*, 2 Md. Ch. 215; *Matter of De Peyster*, 4 Sandf. Ch. (N. Y.) 511; *Matter of Gill*, (Surrogate Ct.) 21 Misc. (N. Y.) 281; *Thouron's Appeal*, 182 Pa. St. 126; *Bosler's Estate*, 161 Pa. St. 462; *Makin's Estate*, 7 Pa. Dist. 126; *Guggenheimer v. Rogers*, 95 Va. 711.

**But in New York** it is held that where a trustee resigns to suit his own private purpose or convenience, he is not entitled to commissions on the corpus of the trust fund. *Matter of Jones*, 4 Sandf. Ch. (N. Y.) 615; *Matter of Allen*, 29 Hun (N. Y.) 7; *Matter of Hayden*, 54 Hun (N. Y.) 197; *Beard v. Beard*, (Supm. Ct. Gen. T.) 22 N. Y. Supp. 1; *Matter of Gill*, (Surrogate Ct.) 21 Misc. (N. Y.) 281; *Matter of Baker*, 35 Hun (N. Y.) 272; *Matter of Bevier*, (Surrogate Ct.) 17 Misc. (N. Y.) 486.

**Removal for Failure to Furnish Proper Securities.**

— Where a trustee failed to furnish proper securities upon his bond, for which he was removed, he was not allowed commissions upon the principal. *Matter of Baker*, 35 Hun (N. Y.) 272.

**6. When Commissions on Principal Allowed Before Termination of Trust.** — *Clark v. Anderson*, 10 Bush (Ky.) 99; *Guarantee Trust, etc., Co.'s Appeal*, (Pa. 1887) 9 Atl. Rep. 66; *Thouron's Estate*, 182 Pa. St. 126; *Bosler's Estate*, 161 Pa. St. 457; *Makin's Estate*, 7 Pa. Dist. 126.

Where the administration of an estate extended over a number of years and the trustee doubled the capital of the trust fund by his extra exertions, he was allowed a compensation of seventy-five hundred dollars on an intermediate settlement of his accounts as trustee, which was taken from the corpus of the trust fund. *Thouron's Estate*, 182 Pa. St. 126; *Bosler's Estate*, 161 Pa. St. 457.

(b) **At Expiration of Trust.** — The commissions of a trustee will be satisfied before the funds are distributed to the beneficiary or to the creditors of the estate,<sup>1</sup> provided he has faithfully discharged his duties.<sup>2</sup>

**Basis of Estimating Commissions.** — Commissions upon the termination of the trustee's duties are generally regulated by a certain percentage upon the corpus or trust fund.<sup>3</sup> This rule, however, is not universal, and the court frequently allows commissions in the form of the payment of a gross sum,<sup>4</sup> and in fact this has been held to be preferable.<sup>5</sup>

**Commission on Receipts and Disbursements.** — Commissions on all moneys, whether principal or not, which come into his hands, whether such moneys are received by him by means of a sale of trust property or otherwise,<sup>6</sup> and upon all moneys that are distributed or disbursed by him,<sup>7</sup> are allowed at the time of the performance of these acts, without waiting for a final settlement of accounts, upon the principle that a trustee is entitled to his commissions when he performs his work.

(c) **Periodical Accountings.** — If accountings are required to be made before the court by a trustee at periodical intervals, a trustee should then deduct his commissions;<sup>8</sup> and in *New York* if he renders an account without deducting his commission therefor from the income, he is held to have waived his right

**Commissions Reduced in Amount.** — *Horwitz's Estate*, 7 Pa. Dist. 179.

Where commissions are charged on the principal before the expiration of the trust they are frequently reduced in amount. *In re Horwitz's Estate*, 7 Pa. Dist. 179.

1. **Commissions First Satisfied.** — *Dow v. Memphis, etc.*, R. Co., 32 Fed. Rep. 185; *Premier Steel Co. v. Yandes*, 139 Ind. 307; *Willson v. Tyson*, 61 Md. 575; *Marshall v. Goble*, 56 Neb. 274; *Shunk's Appeal*, 2 Pa. St. 304; *Guggenheimer v. Rogers*, 95 Va. 711; *Smith v. Washington City, etc.*, R. Co., 33 Gratt. (Va.) 617.

2. **Must Have Faithfully Discharged Duties.** — *Harper's Appeal*, 111 Pa. St. 243.

**A Trustee Must First Pay All That He Owes to the Beneficiary** before commissions are allowed him. *Winder v. Diffenderfer*, 2 Bland (Md.) 166.

**A Trustee Must First Restore Losses Incurred by Wrongful Investments** to the corpus of the estate before he receives his commissions. *Aydellott v. Breeding*, 111 Ky. 847.

**Prior Mortgages** are to be satisfied before a trustee is to be compensated for his services connected with duties pertaining exclusively to the satisfaction of a subsequent mortgage. *Smith v. Washington City, etc.*, R. Co., 33 Gratt. (Va.) 617.

3. **When Percentage Allowed** — *United States*. — *Barney v. Saunders*, 16 How. (U. S.) 535.

*Connecticut*. — *Clark v. Platt*, 30 Conn. 282.

*Iowa*. — *Matter of Gloyd*, 93 Iowa 303.

*Kentucky*. — *Central Trust Co. v. Johnson*, (Ky. 1903) 74 S. W. Rep. 663.

*Massachusetts*. — *Barrell v. Joy*, 16 Mass. 221.

*New Jersey*. — *Van Houten v. Van Houten*, 45 N. J. Eq. 796.

*New York*. — *Woodruff v. New York, etc.*, R. Co., 129 N. Y. 27; *Matter of Mason*, 98 N. Y. 527; *Wagstaff v. Lowerre*, 23 Barb. (N. Y.) 209; *Matter of Moffat*, 24 Hun (N. Y.) 325; *Matter of De Peyster*, 4 Sandf. Ch. (N. Y.) 511; *Foot v. Bruggerhof*, 66 Hun (N. Y.) 406.

*Pennsylvania*. — *Lukens's Appeal*, 47 Pa. St. 356.

*South Carolina*. — *Lanier v. Brunson*, 21 S. Car. 41.

*Virginia*. — *Whitehead v. Whitehead*, 85 Va. 870.

*Canada*. — *In re Cursitor*, 9 Manitoba 433.

4. **When Gross Sum Allowed.** — *Magee v. Cowperthwaite*, 10 Ala. 966; *Premier Steel Co. v. Yandes*, 139 Ind. 307; *Phillips v. Burton*, (Ky. 1899) 52 S. W. Rep. 1064; *Vastine's Estate*, 190 Pa. St. 445; *Bechtel's Appeal*, 7 Pa. Super. Ct. 451; *In re Williams*, 4 Ont. L. Rep. 501; *Re Prittie*, 13 Ont. Pr. 19; *Stinson v. Stinson*, 8 Ont. Pr. 560; *Re Wiggins*, 2 N. Bruns. Eq. 123; *Thompson v. Freeman*, 15 Grant Ch. (U. C.) 384; *The Rendsberg*, 6 C. Rob. 142.

**Evidence Necessary.** — For a trustee to receive compensation in the form of the payment of a gross sum, he must produce particular and explicit evidence of all acts connected with caring for and preserving the estate, in order to enable the court to arrive at a reasonable estimate of the value of his services. *Stinson v. Stinson*, 8 Ont. Pr. 560.

5. **Preferable Method.** — *Matter of Harland*, 5 Rawle (Pa.) 323; *Pedrick's Estate*, 5 Phila. (Pa.) 478, 21 Leg. Int. (Pa.) 197.

6. **Commissions upon Receipts.** — *Van Houten v. Van Houten*, 45 N. J. Eq. 796; *Brolasky's Estate*, 4 Pa. Dist. 218; *Vaccaro v. Cicalla*, 89 Tenn. 63; *Whitehead v. Whitehead*, 85 Va. 870; *In re Cursitor*, 9 Manitoba 433; *In re Van Wart*, 2 N. Bruns. Eq. 320.

7. **Commissions on Disbursements.** — *Clute v. Gould*, 28 Hun (N. Y.) 348; *Matter of Hayden*, 54 Hun (N. Y.) 197.

8. **Commissions Deducted When Periodical Accountings Made.** — *Matter of Selleck*, 111 N. Y. 284; *Matter of Mason*, 98 N. Y. 527; *Hancock v. Meeker*, 95 N. Y. 528; *Andrews v. Goodrich*, 3 Dem. (N. Y.) 245; *Naylor v. Gale*, 73 Hun (N. Y.) 53; *Matter of Meserole*, 36 Hun (N. Y.) 298. See *Hurlbut v. Durant*, 88 N. Y. 121.



to commissions.<sup>1</sup> But the infliction upon the trustee of such a severe penalty for an offense of this nature is not approved in most jurisdictions.<sup>2</sup>

**In Absence of Periodical Accountings.** — Where periodical accountings are not required, a trustee may wait until the termination of the trust and then receive his commissions;<sup>3</sup> or, as held by some courts, he may periodically deduct reasonable commissions from the income, and subsequently obtain the court's assent thereto in his final settlement of accounts.<sup>4</sup>

(8) *Right to Charge for Professional or Business Services* — **Rendered by Trustee.** — In the *English and Canadian* courts a trustee who renders professional or other services of a business character to the trust estate is not allowed commissions for his services, where he personally performs them, according to the rule that a trustee shall not profit from the estate;<sup>5</sup> and he is allowed only the actual costs out of pocket expended by him.<sup>6</sup> There is this exception, however, that where clear provision is made therefor by contract he is entitled to commissions.<sup>7</sup> In the *United States*, however, a trustee who personally renders services to the estate, whether in a professional or business capacity, is allowed a reasonable compensation for his services.<sup>8</sup>

**1. New York Doctrine.** — Matter of Haight, 51 N. Y. App. Div. 310; Spencer v. Spencer, 38 N. Y. App. Div. 403; Hancox v. Meeker, 95 N. Y. 528; Matter of Roberts, (Surrogate Ct.) 40 Misc. (N. Y.) 512; Matter of Harper, (Surrogate Ct.) 27 Misc. (N. Y.) 471. See in this connection Matter of Slocum, 60 N. Y. App. Div. 438.

**2. Contrary Doctrine.** — Phillips v. Burton, (Ky. 1899) 52 S. W. Rep. 1064; Fleming v. Wilson, 6 Bush (Ky.) 610; Lindsay v. Kirk, 95 Md. 50; Wister's Appeal, 86 Pa. St. 160; Biddle's Appeal, 83 Pa. St. 340, 24 Am. Rep. 183; Wiener's Estate, 4 Pa. Dist. 422; Lanier v. Brunson, 21 S. Car. 41; *In re Williams*, 4 Ont. L. Rep. 501.

**3. May Wait Till Termination of Trust.** — Diffenderfer v. Winder, 3 Gill & J. (Md.) 311; Matter of Allen, 29 Hun (N. Y.) 7; McElhenny's Appeal, 46 Pa. St. 347.

**4. Court's Consent Obtained to Reasonable Deductions.** — Barrell v. Joy, 16 Mass. 222; Matter of Hunt, (Surrogate Ct.) 41 Misc. (N. Y.) 72; Andrews v. Goodrich, 3 Dem. (N. Y.) 245; Heron v. Moffatt, 7 Ont. Pr. 438.

**5. Rule in England and Canada.** — *In re Barber*, 34 Ch. D. 77; *In re Pooley*, 40 Ch. D. 1, 58 L. J. Ch. 1; *In re Corsellis*, 34 Ch. D. 675; Clack v. Carlon, 30 L. J. Ch. 639, 7 Jur. N. S. 441; Lincoln v. Windsor, 9 Hare 158, 15 Jur. 765; Arnold v. Garner, 2 Phil. 231, 11 Jur. 339; Mathison v. Clarke, 3 Drew 3, 18 Jur. 1020; Moore v. Frowd, 3 Myl. & C. 45, 1 Jur. 653; New v. Jones, 1 Hall & T. 632, note, 1 Macn. & G. 668, note; Fraser v. Palmer, 4 Y. & C. Exch. 515; *Ex p. Wynch*, 5 De G. M. & G. 209; Broughton v. Broughton, 5 De G. M. & G. 160; Lyon v. Baker, 5 De G. & Sm. 622; Christophers v. White, 10 Beav. 523; Stanes v. Parker, 9 Beav. 385, 10 Jur. 603; Todd v. Wilson, 9 Beav. 486; Bainbridge v. Blair, 8 Beav. 588; *In re Sherwood*, 3 Beav. 338; Collins v. Carey, 2 Beav. 129; *In re Taylor*, 18 Jur. 666; Cradock v. Piper, 14 Jur. 97; Pince v. Beattie, 9 Jur. N. S. 1119; Pollard v. Doyle, 6 Jur. N. S. 1130; Meighen v. Buell, 24 Grant Ch. (U. C.) 503.

**6. Trustee Allowed Only Actual Costs Out of Pocket.** — *In re Pooley*, 40 Ch. D. 1; *In re Corsellis*, 34 Ch. D. 675; *In re Barber*, 34 Ch.

D. 77; Todd v. Wilson, 9 Beav. 486, 10 Jur. 626; Collins v. Carey, 2 Beav. 129; Cradock v. Piper, 14 Jur. 97; Pince v. Beattie, 9 Jur. N. S. 1119; Clack v. Carlon, 7 Jur. N. S. 441; Pollard v. Doyle, 6 Jur. N. S. 1139; Lincoln v. Windsor, 9 Hare 158; Christophers v. White, 10 Beav. 523; Fraser v. Palmer, 4 Y. & C. Exch. 515; *Ex p. Wynch*, 5 De G. M. & G. 209; Lyon v. Baker, 5 De G. & Sm. 622; Broughton v. Broughton, 5 De G. M. & G. 160; Meighen v. Buell, 24 Grant Ch. (U. C.) 503.

**Where, However, the Question Does Not Arise** between trustees and *cestuis que trustent*, but between a trustee and a third party, a trustee is allowed solicitor's or other professional fees. Pince v. Beattie, 9 Jur. N. S. 1119; Meighen v. Buell, 25 Grant Ch. (U. C.) 606; Colonial Trust Co. v. Cameron, 24 Grant Ch. (U. C.) 548. See Clute v. Gould, 28 Hun (N. Y.) 348.

If a trustee is made a defendant in a suit against him as trustee he is entitled to his full costs from the adverse party, and not those only which are paid out of pocket by him. York v. Brown, 1 Coll. Ch. Cas. 260; *In re Barber*, 34 Ch. D. 77; Lincoln v. Windsor, 9 Hare 158.

**Where the Services Rendered by Him Are Not** required in the discharge of a trust, a trustee is allowed to charge for his services. *In re Corsellis*, 34 Ch. D. 675; *In re Barber*, 34 Ch. D. 77.

A trustee who acts as a solicitor for his cotrustee may charge for his services. *In re Corsellis*, 34 Ch. D. 675; Cradock v. Piper, 14 Jur. 97.

**7. By Express Agreement Commissions Recoverable for Professional Services.** — Harbin v. Darby, 28 Beav. 325, 6 Jur. N. S. 906; Christophers v. White, 10 Beav. 523; *In re Sherwood*, 3 Beav. 338; Willis v. Kibble, 1 Beav. 559; *In re Barber*, 34 Ch. D. 77; *In re Chapple*, 27 Ch. D. 584; *In re Fish*, (1893) 2 Ch. 413; *In re Webb*, (1894) 1 Ch. 73, 63 L. J. Ch. 145; Douglas v. Archbut, 4 Jur. N. S. 315, 2 De G. & J. 148; Webb v. Shaftesbury, 7 Ves. Jr. 480.

**8. Rule in United States.** — Marks v. Semple, 111 Ala. 637; Harris v. Martin, 9 Ala. 805; Binsse v. Paige, 1 Abb. App. Dec. (N. Y.) 138; Hawley v. James, 5 Paige (N. Y.) 484; Smith v. Lansing, (Supm. Ct. Spec. T.) 24 Misc. (N.

**Rendered by Outsider.** — Both in the *United States* and *England* a trustee is entitled to an allowance for reasonable expenses incurred in obtaining the services of professional or business men, in administering the trust,<sup>1</sup> where such expenditures are necessary<sup>2</sup> and proper in the administration of the trust.<sup>3</sup>

**10. Duties of Trustees — a. IN GENERAL.** — The general duty of trustees is, to do whatever is necessary and proper to give effect to the purposes contemplated by the trust. The duties necessarily vary with the directions, limitations, and restrictions contained in the instrument declaring the trust which is intended to guide their action.<sup>4</sup>

**Good Faith.** — In dealing with the *cestui que trust* or in the management of the trust estate the trustee must show the utmost good faith.<sup>5</sup>

Y.) 566; *Woodruff v. New York, etc., R. Co.* (Buffalo Super. Ct. Spec. T.) 10 N. Y. Supp. 305; *Fisher v. Fisher*, 1 Bradf. (N. Y.) 335; *Perkin's Estate*, 108 Pa. St. 314, 56 Am. Rep. 208; *Lowrie's Appeal*, 1 Grant Cas. (Pa.) 373. See also *McGillis v. Hogan*, 85 Ill. App. 194, affirmed 190 Ill. 176.

**What Is Reasonable Compensation.** — The compensation allowed is generally regulated by the charges usually made by professional men for services of like character. *Harris v. Martin*, 9 Ala. 895; *Perkin's Estate*, 108 Pa. St. 314, 56 Am. Rep. 208; *Lowrie's Appeal*, 1 Grant Cas. (Pa.) 373. See *Babcock v. Hubbard*, 56 Conn. 289.

**1. Reasonable Allowance to Trustee When Outsider Employed — England.** — *In re Corse*, 34 Ch. Div. 675; *Stanes v. Parker*, 9 Beav. 385; *In re Taylor*, 18 Jur. 666; *Meighen v. Buell*, 25 Grant Ch. (U. C.) 604.

*United States.* — *Grimball v. Cruse*, 70 Ala. 534; *Aydelott v. Breeding*, 111 Ky. 847; *Bentley v. Shreve*, 2 Md. Ch. 215; *Turnbull v. Pomeroy*, 140 Mass. 117; *Woodruff v. New York, etc., R. Co.* (Buffalo Super. Ct. Spec. T.) 10 N. Y. Supp. 305; *Burney v. Atkinson*, (Tenn. Ch. 1899) 54 S. W. Rep. 998; *Vaccaro v. Cicalla*, 89 Tenn. 63.

**2. Expenditures Must Be Necessary.** — *Burr v. M'Ewen, Baldw.* (U. S.) 154; *Munden v. Bailey*, 70 Ala. 63; *Grimball v. Cruse*, 70 Ala. 534; *Smith v. Lansing*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 566; *Burney v. Atkinson*, (Tenn. Ch. 1899) 54 S. W. Rep. 998.

**Where the Trustee Consults His Own Interest** and disregards the interests of the estate in disbursements for professional services he alone will be liable for their payment, and he cannot charge the trust estate therefor when he renders them personally. *Patterson v. Donner*, 48 Cal. 369; *Aydelott v. Breeding*, 111 Ky. 847; *Olson v. Lamb*, 56 Neb. 104, 71 Am. St. Rep. 670; *Vaccaro v. Cicalla*, 89 Tenn. 63. See *Abbott v. Summers*, 116 Fed. Rep. 687; *Gray v. Robertson*, 174 Ill. 242.

**3. Expenditures Must Be Proper.** — *Burr v. M'Ewen, Baldw.* (U. S.) 154; *Grimball v. Cruse*, 70 Ala. 534; *Aydelott v. Breeding*, 111 Ky. 847; *Woodruff v. New York, etc., R. Co.* (Buffalo Super. Ct. Spec. T.) 10 N. Y. Supp. 305; *Burney v. Atkinson*, (Tenn. Ch. 1899) 54 S. W. Rep. 998; *Vaccaro v. Cicalla*, 89 Tenn. 63; *Cogbill v. Boyd*, 77 Va. 450.

**4. Duty in General.** — *Carter v. Rolland*, 11 Humph. (Tenn.) 333. And see the other cases specifically cited in the following notes.

**Where Duty Limited to Furnishing Money.** — Where, by their deed of trust, trustees were required, at a certain cost, to found and endow an institution under the direction of persons named in the deed, who were directed to acquire a site and to form a corporation to own, control, and manage the institution, it was held that the trustees had no other power or duty than to furnish the money up to the amount named, as directed by the deed, and to be applied for the purposes therein named. *Floyd v. Rankin*, 86 Cal. 159.

**Where Duty to Support Executed by Support in Trustee's Family.** — Where a testator directed his widow "to maintain, support, and educate" his granddaughter from the interest and income to be paid said widow, it was held that the granddaughter's support and education in the widow's family, of which she had hitherto been a member, was *prima facie* a performance of the trust, without payment of money to her or to any third person for her. *Conover v. Fisher*, (N. J. 1897) 36 Atl. Rep. 948.

**It Is a Trustee's Duty to Endeavor to Sustain a Decision** favorable to his *cestui que trust*. "Where the decision of the court below is against the rights of unknown parties whose contingent interests are represented by a trustee, it may not be the duty of such trustee to appeal from the decision in order to protect himself from future responsibility. But where the decision of the court below is in favor of the rights of such unknown parties, it is unquestionably the duty of the trustee to endeavor to sustain such decision in the appellate court." *Walworth, Chancellor*, in *Wood v. Burnham*, 6 Paige (N. Y.) 513.

**A Trustee Is Bound to Preserve Evidence of his acts.** *Aspland v. Watte*, 3 W. R. 526.

**5. Good Faith Required — England.** — *McDonnell v. White*, 11 H. L. Cas. 570.

*United States.* — *Savings, etc., Soc. v. Davidson*, (C. C. A.) 97 Fed. Rep. 696, affirming 80 Fed. Rep. 54.

*Georgia.* — *Maynard v. Cleveland*, 76 Ga. 52.

*Iowa.* — *Booth v. Bradford*, 114 Iowa 562.

*Kentucky.* — *White v. Prentiss*, 3 T. B. Mon. (Ky.) 449.

*Massachusetts.* — *Snailham v. Isherwood*, 151 Mass. 317. See also *First Nat. F. Ins. Co. v. Salisbury*, 130 Mass. 310.

*Missouri.* — *Chesley v. Chesley*, 49 Mo. 540; *Sherwood v. Saxton*, 63 Mo. 78.

*New York.* — *Rogers v. New York, etc., Land Co.*, 134 N. Y. 197; *Matter of Elting*, (Surrogate Ct.) 33 Misc. (N. Y.) 675.



**Disclosure of Facts.**—Trustees are under no obligation to give a testator's widow information as to her statutory rights so long as they remain passive, but when they approach her to extinguish these rights they owe her the same duty as a trustee owes in dealing with any *cestui que trust*; <sup>1</sup> nor is it their duty to children for whom money has been left in trust during their parent's lifetime, and then to them absolutely, to inform them, as they arrive at their majority, of their interest under the will, <sup>2</sup> nor to answer inquiries by an intending incumbrancer; <sup>3</sup> but the fullest disclosure of facts may be necessary, even though the relation of trustee and *cestui que trust* does not strictly exist between the parties. <sup>4</sup> The court will always save a trustee from harm while he is acting in good faith and without any selfish motive, <sup>5</sup> especially when he

*North Carolina.*—Whitford v. Foy, 65 N. Car. 265.

*Oklahoma.*—U. S. National Bank v. National Bank, 6 Okla. 182.

*South Dakota.*—Farmer's, etc., Bank v. Kimball Milling Co., 1 S. Dak. 388.

*Virginia.*—Davis v. Harman, 21 Gratt. (Va.) 194.

*Wisconsin.*—Ludington v. Patton, 111 Wis. 208.

See also *infra*, this section, *Liabilities of Trustees*. And see the titles FRAUD AND DECEIT, vol. 14, pp. 20, 69, 122, 194, etc.; ILLEGAL CONTRACTS, vol. 15, p. 945.

**In Dealing with Cestui Que Trust.**—A contract between a trustee and his *cestui que trust* will not be sustained where the trustee has taken advantage of information received in his capacity as trustee. Saunders v. Richard, 35 Fla. 28.

**What Good Faith May Include.**—Good faith in the management of a trust includes not only what is commonly understood by honesty and integrity, but care, diligence, and attention; and in matters of judgment and discretion that they should be carefully applied. Hester v. Hester, 1 Dev. Eq. (16 N. Car.) 332.

**In Paying Over Income.**—Where trustees were directed to pay over so much of the net income to testator's daughter as she "shall desire for her own use," it was held that the trustees must exercise good faith and reasonable care to see that the payments were for the daughter's own use. Greene v. Smith, 17 R. I. 28.

**Dry Trust.**—Where the whole duty of a trustee was to advance purchase money and take and hold the legal title for his sister until she paid him her share of the price, it was a dry trust, the trustee having no active duties to perform; there was no greater burden on him than in a dealing between strangers, and he did not require to show the fairness of a sale by her of her interest in the property to him. Inlow v. Christy, 187 Pa. St. 186.

**Where Trustees in a Railroad Mortgage were empowered, under certain circumstances, to declare all the bonds secured thereby to be past due, it was held that they were bound to exercise this power with the utmost good faith, and only when approved by their honest, disinterested judgment, as the best thing for the interest of the bondholders.** Bound v. South Carolina R. Co., 50 Fed. Rep. 853.

**Where the Beneficiary Is Also Acting in a Fiduciary Capacity,** the trustee is under more than usual obligations to act with honesty and fair-

ness, as any dealing with the beneficiary in the wrong of the latter's estate would affect both parties with an equitable responsibility. Heath v. Waters, 40 Mich. 457.

1. Ludington v. Patton, 111 Wis. 208.

2. Mulford v. Mulford, (N. J. 1902) 53 Atl. Rep. 79.

3. Low v. Bouverie, (1891) 3 Ch. 82.

4. Carpenter v. Danforth, (Supm. Ct. Spec. T.) 19 Abb. Pr. (N. Y.) 225, where the executor of one of two active trustees of a corporation was induced by the surviving trustee to sell to him his testator's stock at less than its value. And see the title FRAUD AND DECEIT, vol. 14, p. 69.

5. See *infra*, this section, *Liabilities of Trustees—A. In General*.

**When Trust Declared Void.**—The acts of trustees done in good faith will be upheld by the court after the trust is declared void. Hawley v. James, 16 Wend. (N. Y.) 61.

**Presumption of Good Faith.**—Where trustees had executed a satisfaction of a mortgage to them, it was held that, in the absence of evidence to the contrary, it was done in the proper discharge of their duties. Bendheim v. Morrow, 73 Hun (N. Y.) 90.

Where a trustee of land for the benefit of infants sold timber therefrom, the presumption will be that he applied the price to the extinguishment of a lien against the land itself, rather than to the extinguishment of other indebtedness due from him as trustee. Howard v. London Mfg. Co., 72 S. W. Rep. 771, 24 Ky. L. Rep. 1934.

**The Fact that the Trustee Is Attorney and Agent for the Cestui Que Trust** is not sufficient in itself to set aside or invalidate his acts. Before a court of equity will interfere to that extent, it must further appear that there was an abuse of the trust. Washburn v. Williams, 10 Colo. App. 153.

**Where a Widow Was Trustee under Her Husband's Will** and also beneficiary during her life or widowhood, the mere fact that she only returned, "for purposes of city taxation," certain real estate in the city where she resided, valued at \$4,500, when she owned other property worth \$4,500, was not sufficient to justify the apprehension that, if the fund were placed in her hands, the taxes on it would be left unpaid to the prejudice of the remaindermen, thereby causing waste, and hence such fact was not sufficient to deprive her of the custody of the fund. Carr v. Bredenberg, 50 S. Car. 471.

**Where a Trustee in a Deed under which he**



acts under the advice of counsel.<sup>1</sup>

**The Burden of Proving Good Faith** in transactions between the trustee and the *cestui que trust* is upon the former.<sup>2</sup>

**Care and Diligence.** — A trustee must exercise the same degree of care and diligence in the execution of the trust as a man of ordinary prudence would use in the management of his own affairs. More cannot be required of him.<sup>3</sup>

held land in security of a debt merely accepted from the grantor and debtor an absolute deed of the same land to the creditor for the amount of the debt, without having induced the debtor to grant it, and without the knowledge of the creditor, who, however, subsequently assented to the transaction, it was held to be no breach of trust, and the deed was not voidable by the grantor. *Matheney v. Sandford*, 26 W. Va. 386.

1. See the title **ADVICE OF COUNSEL**, vol. 1, p. 894, and *infra*, this section, *Liabilities of Trustees*, a. (1).

2. **Burden of Proving Good Faith.** — *Pairo v. Vickery*, 37 Md. 467; *Blain v. Terryberry*, 11 Grant Ch. (U. C.) 286. See also the title **FRAUD AND DECEIT**, vol. 14, p. 194. But the ordinary presumption of good faith (see same title, vol. 14, p. 190) controls, unless the trustee is dealing with his *cestui que trust*. See the last note but one, *supra*.

3. **Ordinary Care and Diligence Required** — *England.* — *In re Jackson*, 21 Ch. D. 786; *In re Speight*, 22 Ch. D. 727; *Ex p. Belchier*, Ambl. 219; *Massey v. Banner*, 1 Jac. & W. 241; *Hibbert v. Cooke*, 1 Sim. & St. 552; *In re Leslie*, 2 Ch. D. 185; *Ferraby v. Hobson*, 2 Phil. 255.

*United States.* — *Burr v. M'Ewen*, Baldw. (U. S.) 154; *Barney v. Saunders*, 16 How. (U. S.) 535.

*Alabama.* — *Harrison v. Mock*, 10 Ala. 185; *Foscue v. Lyon*, 55 Ala. 440.

*California.* — *Bermingham v. Wilcox*, 120 Cal. 467; *Ellig v. Naglee*, 9 Cal. 683.

*District of Columbia.* — *Johns v. Herbert*, 2 App. Cas. (D. C.) 485.

*Florida.* — *Saunders v. Richard*, 35 Fla. 28.

*Georgia.* — *King v. King*, 37 Ga. 205; *Campbell v. Miller*, 38 Ga. 304, 95 Am. Dec. 389; *Westbrook v. Davis*, 48 Ga. 471; *Miller v. Smythe*, 92 Ga. 154.

*Illinois.* — *Waterman v. Alden*, 144 Ill. 90; *Fergus v. Wilmarth*, 17 Ill. App. 98.

*Kentucky.* — *McRoberts v. Carneal*, (Ky. 1898) 44 S. W. Rep. 442.

*Maryland.* — *Waring v. Darnall*, 10 Gill & J. (Md.) 126; *Gould v. Chappell*, 42 Md. 466.

*Massachusetts.* — *Scott v. Ray*, 18 Pick. (Mass.) 360.

*Missouri.* — *Taylor v. Hite*, 61 Mo. 142.

*New Jersey.* — *Speakman v. Tatem*, 48 N. J. Eq. 136; *Danforth v. Moore*, 55 N. J. Eq. 127.

*New York.* — *Scott v. Depeyster*, 1 Edw. (N. Y.) 513; *Bogart v. Van Velsor*, 4 Edw. (N. Y.) 718; *Griffen v. Ford*, 1 Bosw. (N. Y.) 123; *Higgins v. Whitson*, 20 Barb. (N. Y.) 141; *Litchfield v. White*, 7 N. Y. 438, 57 Am. Dec. 534; *King v. Talbot*, 40 N. Y. 76; *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546; *Matter of Dean*, 86 N. Y. 399; *Matter of Cornell*, 110 N. Y. 351;

*Matter of Elting*, (Surrogate Ct.) 33 Misc. (N. Y.) 675; *Smith v. Keteltas*, 62 N. Y. App. Div. 174.

*North Carolina.* — *Whitford v. Foy*, 65 N. Car. 265.

*Ohio.* — *Gilbert v. Sutliff*, 3 Ohio St. 129.

*Pennsylvania.* — *Jones's Appeal*, 8 W. & S. (Pa.) 143, 42 Am. Dec. 282; *Landis v. Scott*, 32 Pa. St. 495; *Neff's Appeal*, 57 Pa. St. 91; *Fahnestock's Appeal*, 104 Pa. St. 46; *Fesmire's Estate*, 134 Pa. St. 67, 19 Am. St. Rep. 676.

*South Carolina.* — *McKnight v. McKnight*, 10 Rich. Eq. (S. Car.) 157.

*Texas.* — *Finlay v. Merriman*, 39 Tex. 56.

*Vermont.* — *Spaulding v. Wakefield*, 53 Vt. 660, 38 Am. Rep. 709; *McCloskey v. Gleason*, 56 Vt. 264.

*Virginia.* — *Davis v. Harman*, 21 Gratt. (Va.) 194; *Coghill v. Boyd*, 77 Va. 450. See also *Myers v. Zetelle*, 21 Gratt. (Va.) 733.

*Wisconsin.* — *Hutchinson v. Lord*, 1 Wis. 286.

See also *infra*, this section, *Liabilities of Trustees*; and see the title **INVESTMENTS**, vol. 17, p. 423. And as to degree and standards of diligence, see the title **BAILMENTS**, vol. 3, p. 742.

**The Degree of diligence** depends upon the nature of the subject-matter and the terms of the instrument. *Browne v. Lamb*, 111 N. Car. 16.

**A Voluntary or Self-appointed trustee** is also bound to the exercise of ordinary diligence. *Indiana, etc., R. Co. v. Swannell*, 54 Ill. App. 260; *Casey v. Casey*, 14 Ill. 112.

**Question for Jury.** — Whether ordinary diligence has been used by trustees is a question for the jury. *King v. King*, 37 Ga. 205.

**A Trustee Should Not Surrender Collateral or Other Securities** held by him, until the obligations to secure which they are given are discharged. *Fergus v. Wilmarth*, 17 Ill. App. 98, *affirmed* 117 Ill. 542; *Seehorn v. American Nat. Bank*, 148 Mo. 256.

**Application of Payments.** — Where a debtor pays money to a trustee to satisfy the trustee's claim, and the debtor also owes the trust estate, the money should be applied *pari passu* to both claims, since a trustee is bound to take as good care of the trust property as of his own. *Scott v. Ray*, 18 Pick. (Mass.) 360. See *Bryant v. Russell*, 23 Pick. (Mass.) 508.

**Where Trustees Purchased Unproductive Property** with the knowledge that productive property was needful to make a sufficient income, or made the purchase without ascertaining that material point, and paid for it one-third more than it was found to be worth, they were held entitled to credit only for the real value of the property purchased. *Larkin v. Armstrong*, 9 Grant Ch. (U. C.) 390.

**Must Be Present at Sale of Trust Property.** — *Brickenkamp v. Rees*, 69 Mo. 426.

**A Paid Trustee** is bound to use a greater degree of diligence than a gratuitous trustee.<sup>1</sup>

Where There Are Cotrustees, it appears they may apportion the duties without assuming liability beyond the individual receipts, where there is no apparent danger of the impairment of the estate, but where a trustee, by his own negligence, suffers his cotrustee to receive and waste the trust fund when reasonable care and diligence would have prevented it, he will be responsible for the loss.<sup>2</sup>

**6. TO EXECUTE THE TRUST.** — After trustees have accepted the trust they are bound to proceed and to carry out the purposes according to the terms of the instrument creating it,<sup>3</sup> or according to their agreement,<sup>4</sup> or the order of a court having jurisdiction,<sup>5</sup> and they may be compelled to execute it within a reasonable time.<sup>6</sup>

Where an Executor Becomes a Trustee under the terms of a will, he becomes bound to carry out the trust according to the terms of the will.<sup>7</sup> In such a case the executor's duties as trustee commence with the distribution of the trust property.<sup>8</sup>

**What Is or Is Not Sufficient Execution.** — Questions sometimes arise as to what is or is not sufficient execution of the trust, which must be decided according to the special facts of each case.<sup>9</sup>

**1. Paid Trustee Accountable for Greater Diligence than Gratuitous Trustee.** — *Clark v. Anderson*, 10 Bush (Ky.) 99; *Ex p. Cassel*, 3 Watts (Pa.) 443, where Gibson, C. J., distinguished the case of a paid trustee from that of a gratuitous trustee, liable under the old rule as to degrees of diligence for gross negligence only (2 Fonblanque's Eq. 178), and held a trustee receiving a stipulated reward to the same accountability as a bailee for hire. See the title BAILMENTS, vol. 3, p. 745 *et seq.*

**2. See *infra*, this section, *Liabilities of Trustees* — *For Acts of Cotrustees*.** And see *Hayes v. Pratt*, 147 U. S. 557, holding that where each of two trustees by agreement assumes the care and management of the property in his own state, the arrangement does not affect the duty of either or both of them, or of the court, to see that the trust is carried out according to the testator's intention.

**3. To Execute Trust.** — *Marsh v. Bennett*, 5 McLean (U. S.) 117; *Floyd v. Rankin*, 86 Cal. 159; *Haddock v. Perham*, 70 Ga. 572; *McCreary v. Gewinner*, 103 Ga. 528; *Switzer v. Skiles*, 8 Ill. 529, 44 Am. Dec. 723; *Campbell's Case*, 2 Bland (Md.) 209, 20 Am. Dec. 360; *Bacon's Estate*, 6 Phila. (Pa.) 335, 14 Leg. Int. (Pa.) 12; *Poindexter v. Gibson*, 1 Jones Eq. (54 N. Car.) 44.

**Neglect to Execute Trust Will Not Invalidate Deed of Trust.** — Where a trustee neglects to execute a trust, chancery may coerce the execution, but a court of law cannot treat the deed of trust as invalid in consequence of such neglect. *Cowling v. Douglass*, 4 Ala. 206.

**Must Comply with Terms of Trust.** — A direction to invest in a particular class of securities is mandatory so long as compliance with it is feasible; as to invest in first mortgage notes secured on real estate in a certain city. *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272. See also the title INVESTMENTS, vol. 17, p. 423.

Where the trustees were directed to pay from the income such sums as might be required for the education of the child or children of the

testator's daughter, it was held that they must make the payments direct, when necessary, and not to the testator's daughter. *Greene v. Smith*, 17 R. I. 28.

**4. According to Their Agreement.** — *Sledge v. Clopton*, 6 Ala. 589; *Hallinan v. Hearst*, 133 Cal. 645.

**5. According to Order of Court.** — *Thompson v. Newlin*, 6 Ired. Eq. (41 N. Car.) 380.

A trustee who was ordered by the court to purchase for his *cestui que trust* a tract of land from the *cestui's* husband was held to have obeyed the order by paying for it in a judgment against the husband purchased by the trustee. *Ex p. Epting*, 22 S. Car. 399.

**6. Within a Reasonable Time.** — *Clerks' Invest. Co. v. Sydnor*, 19 App. Cas. (D. C.) 97; *Thompson v. Newlin*, 6 Ired. Eq. (41 N. Car.) 380.

**7. Where Executor Becomes Trustee.** — *Tinnin v. Womack*, 1 Jones Eq. (54 N. Car.) 135. See also *supra*, this section, 2. *Appointment*.

**8. Commencement of His Duties.** — *Mastin v. Barnard*, 33 Ga. 520; *In re Higgins*, 15 Mont. 474.

**9. Sufficient Execution According to Terms of Trust.** — Where a trust estate originally consisted of lands and slaves, a provision for reinvestment of the proceeds "in property of the same kind" was complied with by a reinvestment in slaves alone. *Claiborne v. Holland*, 88 Va. 1046.

A subscription was raised to build a house o. public worship, and the fund committed to the management of certain trustees, to purchase ground and build a house to be used by the Methodist Episcopal Church half the Sundays in the month, and the other half by other denominations. The same trustees sold the house, after a title was acquired, to another denomination, and vested the fund in another house for the Methodist Episcopal Church exclusively. It was held that the trust was well performed. *Alexander v. Slavens*, 7 B. Mon. (Ky.) 351.

**By Payment of Life Tenant's Debts at Request of Remainderman.** — Where a trustee for a wife,

**A Trust Is Not Executed** so long as there remains something to be done by the trustees.<sup>1</sup>

**Trustee Must Continue to Execute Trust.** — Where trustees have entered upon the execution of the trust they cannot discharge themselves without the assent of the *cestui que trust*, or the direction of the court, or a special provision in the deed creating the trust, but must continue to execute the trust.<sup>2</sup>

whose husband had a life estate of the property, at the wife's request paid off the husband's debts to protect the property, that was held, on evidence of such payment, to entitle him to credit therefor. *Lowe v. Morris*, 13 Ga. 165.

Where a will provided that of the income of a trust fund a part was to be paid to a son, and the remainder to the son's wife for the use of herself and their children, on payment by the trustees of the amount due to the wife their responsibility ceased, and they are not chargeable with the duty of supervising her expenditure of the same. *Clark v. Clark*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 272.

Where a testator bequeathed a certain sum to his niece, to be held in trust by his executors, and the income or proceeds thereof without diminution of the principal to be paid to her during life, and at her decease the principal sum to be equally divided among her surviving children, and the executors, acting in good faith, set aside the sum specified to constitute a trust fund for this purpose, it was held that this was a good execution of the trust in this respect, and that if the fund so established became diminished in value, the deficiency could not be supplied out of the residue of the estate. *Hubbard v. Lloyd*, 6 Cush. (Mass.) 522, 53 Am. Dec. 55.

Where A, holding certain money and slaves in trust for his sister, appropriated the money and the proceeds of the sale of the slaves in purchasing, in good faith, land in Missouri, and removing his sister and her family to the place, and afterwards conveyed the estate to her and her children, in satisfaction of the trust, and it was occupied by and divided among them, it was held that the trust was thereby discharged. *Hickman v. Wood*, 30 Mo. 199.

A sale by the debtor, with the concurrence of the trust creditor, to another creditor not secured by the trust deed, for a consideration compounded of the balance remaining due upon the trust, other debts claimed by the trust creditor, and the debt due to the purchasing creditor, was held to be an execution of trust in *Tavener v. Robinson*, 2 Rob. (Va.) 280.

In *New York* a trust to receive rents and profits, and apply them to the payment of debts, may be satisfied by a sale of the premises for a term of years, taking the whole rent in advance and discharging the debts, and such a sale is not contrary to the statute. *Rogers v. Tilley*, 20 Barb. (N. Y.) 639.

Where a deed of trust to secure the payment of certain notes falling due at different dates expressly declared that the property was liable to be sold for the payment of the notes as they severally fell due, the note first falling due was entitled to a preference, which was available to an assignee, and payment to him of the

proceeds of the property was a sufficient execution of the trust. *M'Vay v. Bloodgood*, 9 Port. (Ala.) 547.

**Substantial Execution of Powers.** — The law requires no more than a substantial execution of the powers conferred on a trustee. *Orr v. Rode*, 101 Mo. 387.

**Insufficient Execution.** — Where a trust deed conveying lands and buildings to trustees provided that the property should be applied to the support of the preaching of Wesleyan doctrines, a conveyance by the trustees to a minister who had been ordained an Episcopalian was set aside as a breach of trust. *Combe v. Brazier*, 2 Desaus. (S. Car.) 431.

A power to a trustee to convey property by deed of gift or dispose of it by will is not executed by a conveyance by bill of sale. *Marshall v. Stephens*, 8 Humph. (Tenn.) 159, 47 Am. Dec. 601.

**Where Terms of Trust Illegal.** — Where many of the trusts of a will were illegal and none of them could be carried into effect in the manner contemplated by the testator, the court recommended that an amicable arrangement should be come to with the parties interested, which would receive the sanction of the court. *Wood v. Wood*, 5 Paige (N. Y.) 596, 28 Am. Dec. 451.

Where a trustee knows at the time of his acceptance of a trust that the deed creating it is fraudulent as to creditors, he assumes all the duties which attach to ordinary trustees, and cannot defeat the trust on the ground that it was fraudulent. *Henderson v. Segars*, 28 Ala. 352.

A trustee is not bound to pay the income to a beneficiary, as provided by the trust, pending a proceeding to set aside the trust deed for fraud on the part of the grantor. *Bissel v. Continental Trust Co.*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 724.

**1. Trust Not Executed While Something Remains to Be Done.** — *Harley v. Platts*, 6 Rich. L. (S. Car.) 310. See also *supra*, this title, III. 4.

So, where the trustees were directed to make a conveyance of the trust property to the *cestui que trust*, the trust remains executory so long as the absolute legal title is in the trustees. *Schley v. Lyon*, 6 Ga. 530. See also *Reeder v. Cartwright*, 2 Har. & M. (Md.) 469.

**Execution by Happening of Event.** — Where property is conveyed to trustees for a married woman for the sole purpose of protecting it from her husband, the purposes of the trust are fully executed on her death. *Liptrot v. Holmes*, 1 Ga. 381.

**2. Trustees Must Continue to Execute Trust.** — *Shepherd v. M'Evers*, 4 Johns. Ch. (N. Y.) 136, 8 Am. Dec. 561; *Cruger v. Halliday*, 11 Paige (N. Y.) 314; *Reed v. Allerton*, 3 Robt. (N. Y.) 567. See *supra*, this section. 4. and 6.

Where the trustee has no cause of resigna-



**Gratuitous Trustee.** — It has been held that where one undertakes to act as a trustee for a particular fund, without compensation, and with no agreement to act for any specified length of time, he is entitled to be discharged whenever the future execution of the trust becomes inconvenient to him.<sup>1</sup> But it has also been held that when a trust is undertaken without compensation and actually commenced, the trustee is bound to proceed and execute it with the same diligence and good faith as if he were to be paid for his services.<sup>2</sup>

**Trustee Cannot Change His Relation to Trust.** — Where the relation of trustee and *cestui que trust* is once established, the trustee cannot by his own voluntary act change his capacity into that of a mere debtor,<sup>3</sup> or by any subsequent dealing with the trust property alter his relation thereto.<sup>4</sup> He is bound not to do anything which will place him in a position inconsistent with the interests of the trust, or which may have a tendency to interfere with his duty in discharging it.<sup>5</sup>

**Trustee's Duties Not Affected by His Bankruptcy.** — His duties as trustee remain unaffected by his bankruptcy,<sup>6</sup> and he is not discharged from liability by a discharge in bankruptcy.<sup>7</sup>

**c. APPLICATION TO COURT FOR ADVICE.** — Trustees may apply to courts having jurisdiction for instruction, advice, aid, and direction as to their powers and duties, where they have reasonable doubt and uncertainty as to the true interpretation of the terms of the instrument under which they act,<sup>8</sup> dealing,

tion other than his wish to be relieved from his duties, the court will impose upon him the cost of appointment of his successor. *Matter of Jones*, 4 Sandf. Ch. (N. Y.) 615.

**1. Gratuitous Trustee Need Not Continue Execution.** — *Hallinan v. Hearst*, 133 Cal. 645; *Boyle v. Boyle*, 3 Allen (Mass.) 158.

**2. Contra.** — *Switzer v. Skiles*, 8 Ill. 529, 44 Am. Dec. 723.

**3. Cannot Change His Relation to Trust.** — *Marshall v. Marshall*, 11 Colo. App. 505.

**4. Harris v. Elliott**, 24 N. Y. App. Div. 133; *Cox v. Cox*, 95 Va. 173.

**5. Bellamy v. Sheriff**, 6 Fla. 62; *Saunders v. Richard*, 35 Fla. 28; *Dawes v. Boylston*, 9 Mass. 337, 6 Am. Dec. 72.

Where a trustee was a party to the trust deed, with full knowledge of its consideration, it having been executed upon his suggestion, solicitation, and request, and he having accepted the trust, acted under the deed, and taken possession of the property, the grantor raising no objection, he cannot for his own benefit surrender the trust deed and take a deed to the same property from the grantor, to the injury of his *cestui que trust*. *Saunders v. Richard*, 35 Fla. 28.

**6. Trustee's Duties Not Affected by His Bankruptcy.** — *Rankin v. Barcroft*, 114 Ill. 441.

**7. Pinkston v. Brewster**, 14 Ala. 315.

**8. May Apply to Court for Instruction, Advice, Aid, and Direction** — *England*. — *Talbot v. Radnor*, 3 Myl. & K. 252; *In re Smith*, (1896) 1 Ch. 171; *Merlin v. Blagrove*, 25 Beav. 130.

*Canada*. — *Foott v. Rice*, 4 Ont. 94.

*Alabama*. — *Trotter v. Blocker*, 6 Port. (Ala.) 269.

*California*. — *Staacke v. Bell*, 125 Cal. 315.

*Connecticut*. — *Union Trust Co. v. Stamford Trust Co.*, 72 Conn. 86; *Crosby v. Mason*, 32 Conn. 482.

*Illinois*. — *Waterman v. Alden*, 144 Ill. 90.

*Maryland*. — *Jones v. Stockett*, 2 Bland (Md.) 409; *Heald v. Heald*, 56 Md. 300.

*Massachusetts*. — *Drury v. Natick*, 10 Allen (Mass.) 169; *Dimmock v. Bixby*, 20 Pick. (Mass.) 368; *Treadwell v. Cordis*, 5 Gray (Mass.) 341; *Stevens v. Warren*, 101 Mass. 564; *Putnam v. Collamore*, 109 Mass. 509; *Hyde v. Wason*, 131 Mass. 450; *Welch v. Adams*, 152 Mass. 74.

*Missouri*. — *Hayden v. Marmaduke*, 19 Mo. 403; *Sampson v. Mitchell*, 125 Mo. 217; *Mersman v. Mersman*, 136 Mo. 256; *State v. Netherton*, 26 Mo. App. 414.

*New Hampshire*. — *Wheeler v. Perry*, 18 N. H. 307; *Goodhue v. Clark*, 37 N. H. 531; *Baptist Church's Petition*, 51 N. H. 424; *Greeley v. Nashua*, 62 N. H. 166.

*New Jersey*. — *Pennington v. Metropolitan Museum of Art*, (N. J. 1903) 55 Atl. Rep. 468; *Vanness v. Jacobus*, 17 N. J. Eq. 153; *Traphagen v. Levy*, 45 N. J. Eq. 448; *Griggs v. Veghte*, 47 N. J. Eq. 180.

*New York*. — *Riley's Estate*, (Surrogate Ct.) 4 Misc. (N. Y.) 338; *Bundy v. Bundy*, 38 N. Y. 410; *Coe v. Beckwith*, 31 Barb. (N. Y.) 339; *Slocum's Estate*, 1 Tuck. (N. Y.) 443; *Lorillard v. Coster*, 5 Paige (N. Y.) 172; *Hawley v. James*, 5 Paige (N. Y.) 318.

*Ohio*. — *Wiswell v. Cincinnati First Cong. Church*, 14 Ohio St. 31; *Rothgeb v. Mauck*, 35 Ohio St. 505.

*Rhode Island*. — *Greene v. Smith*, 17 R. I. 28.

*South Carolina*. — *Fraser v. Davie*, 11 S. Car. 56.

*Tennessee*. — *Read v. Citizens' St. R. Co.*, (Tenn. 1903) 75 S. W. Rep. 1056.

**Contra** — *Pennsylvania*. — The Pennsylvania courts have no such advisory jurisdiction. There must be a contest. *Morton's Estate*, 201 Pa. St. 269.

**As to Establishment of Trust.** — Where there is a dispute as to whether a trust deed has ever become operative, the trustee named in the deed may properly apply to a court of equity for instructions in regard to his duties as be-

it may be, with the disposition of the funds,<sup>1</sup> conflicting claims,<sup>2</sup> or the investment of funds and change of securities.<sup>3</sup> They may also find it necessary to seek instructions as to matters arising after the creation of the trust.<sup>4</sup>

**Trustee May Decline** to act without the court's protection, leaving the parties interested to bring their bill against them.<sup>5</sup> It has been said that a trustee may, in almost all cases, if he thinks proper, take upon himself the risk of properly executing the trust without assistance from any quarter.<sup>6</sup>

**Sometimes Duty of Trustees to Apply for Advice.** — But the condition of the trust estate and the existence of conflicting claims may make it not only the privilege but the duty of the trustees to obtain a construction of the deed, and advice as to their duties under it,<sup>7</sup> and it may be said generally that where a will is so ambiguously expressed that the trustee is unwilling to take the responsibility of acting under it, his proper course is to seek the instructions of the court.<sup>8</sup>

**Court Will Ratify a Power Which It Would Have Granted.** — Where a trustee has

tween the grantor in trust and his *cestui que* trust under the deed. *Fraser v. Davie*, 11 S. Car. 56.

**Construction of Will.** — The validity of a trust in the will for the accumulation of rents and profits, or income of the estate, will be passed upon by the court. *Lorillard v. Coster*, 5 Paige (N. Y.) 172; *Hawley v. James*, 5 Paige (N. Y.) 318.

1. **As to Disposition of Funds.** — *Talbot v. Radnor*, 3 Myl. & K. 252; *Waterman v. Alden*, 144 Ill. 90, to determine what belonged to principal and what to interest; *Hubbard v. Lloyd*, 6 Cush. (Mass.) 522, 53 Am. Dec. 55; *Hayden v. Marmaduke*, 19 Mo. 403; *Goodhue v. Clark*, 37 N. H. 531; *Rothgeb v. Mauck*, 35 Ohio St. 505; *Greene v. Smith*, 17 R. I. 28; *State v. Union Bank*, 9 Yerg. (Tenn.) 171.

2. **Conflicting Claims.** — *Grimball v. Cruse*, 70 Ala. 534; *Union Trust Co. v. Stamford Trust Co.*, 72 Conn. 86; *Stevens v. Warren*, 101 Mass. 564; *Putnam v. Collamore*, 109 Mass. 509; *Treadwell v. Cordis*, 5 Gray (Mass.) 341; *First Presb. Soc. v. First Presb. Soc.*, 25 Ohio St. 128; *Caperton v. Huddleston*, 7 Humph. (Tenn.) 452.

**Conflicting Claims Growing Out of Past Management.** — The principle on which protection of the court is afforded does not apply when the alleged conflicting claims grow out of the past management of the trust, and involve an inquiry into the validity of the management. *Sohier v. Burr*, 127 Mass. 221; *Cincinnati v. McMicken*, 3 Ohio Dec. 409, 6 Ohio Cir. Ct. 188.

3. *Heald v. Heald*, 56 Md. 300; *Wheeler v. Perry*, 18 N. H. 307; *Baptist Church's Petition*, 51 N. H. 424.

**Court May Also Settle Questions of Title.** — The questions involved may determine not only the trustee's duty but also the title of himself and others. *Traphagen v. Levy*, 45 N. J. Eq. 448; *Read v. Citizens' St. R. Co.*, (Tenn. 1903) 75 S. W. Rep. 1056.

4. **Matters Arising After Creation of Trust.** — As, for instance, a compromise, making it necessary to raise funds not provided for in the trust deed, or the refusal of a cotrustee to act. *Reynolds v. Brandon*, 3 Heisk. (Tenn.) 593.

Or the determination of the amount to be paid for the support of a beneficiary, where the will does not authorize the trustee or the bene-

ficiary to determine it. *Riley's Estate*, (Surrogate Ct.) 4 Misc. (N. Y.) 338; *Bundy v. Bundy*, 38 N. Y. 410. But contra, *Crawford v. Winston*, 34 N. Y. App. Div. 457.

**Extent of Court's Interference.** — The court will only define the trusts and will not order a sale of property, where no adverse right is asserted. *Wiswell v. Cincinnati First Cong. Church*, 14 Ohio St. 31.

**To Change the Scheme of a Trust.** — It will instruct the trustees to change the scheme of a trust so as to effectuate the testator's ultimate object, with regard to the balance of an estate, where that will not interfere with the testator's directions with regard to prior purposes. *Pennington v. Metropolitan Museum of Art*, (N. J. 1903) 55 Alt. Rep. 468. But it must be shown that it is impossible to carry out the scheme in terms of the deed. *Winthrop v. Atty.-Gen.*, 128 Mass. 258. See also *Johns v. Johns*, 172 Ill. 472.

5. **May Decline to Act and Leave Parties Interested to Apply.** — *Dimmock v. Bixby*, 20 Pick. (Mass.) 368; *Greeley v. Nashua*, 62 N. H. 166; *Mason v. Jones*, 2 Barb. (N. Y.) 229.

6. **Trustee May Take Risk of Executing Trust.** — *Jones v. Stockett*, 2 Bland (Md.) 425.

7. **Where Duty of Trustee to Apply to Court.** — *Dent v. Maddox*, 4 Md. 523; *Freeman v. Cook*, 6 Ired. Eq. (41 N. Car.) 373.

If part of the trust fund has been misapplied by a cotrustee and the other trustee has received security from the former in settlement of the loss, it is the duty of the latter to report such transaction to the court and procure its sanction in order to avoid personal responsibility for loss arising from such security. *Wayman v. Jones*, 4 Md. Ch. 500.

8. **Where, to Avoid Responsibility, Trustee Should Apply.** — *Lincoln v. Aldrich*, 141 Mass. 342; *Rogers v. Ross*, 4 Johns. Ch. (N. Y.) 608.

A trustee may act with the best intentions and, the utmost good faith, and whilst his not seeking the aid and instruction of the court may be no evidence to the contrary, yet if he wants to avoid responsibility for losses by reason of investments which may prove to be unprofitable or worthless, he should first obtain authority from the court having jurisdiction over him, unless his discretion and powers are undoubted. *Lowe v. Protestant Episcopal Church Convention*, 83 Md. 409.



exercised a power which, if previously applied for, would have been granted by the court, it will usually ratify the act as if it had been authorized.<sup>1</sup>

It Is Only Where There Is Some Reasonable Question or Doubt<sup>2</sup> as to their powers or duties,<sup>3</sup> or as to the rights of the parties beneficially interested,<sup>4</sup> that trustees are entitled to have the court's direction.

**Future Rights — Questions of Law — Discretionary Powers.** — Trustees are not entitled to ask the court for direction as to future rights, or questions depending upon future events,<sup>5</sup> even when it is certain that the event must occur,<sup>6</sup> or upon mere questions of law arising between them and third parties asserting rights independent of the trust instrument,<sup>7</sup> such as the construction of a tax act in

**1. Court Will Ratify a Power Which It Would Have Granted.** — *Brown v. Hazlehurst*, 54 Md. 26; *Abell v. Brown*, 55 Md. 217; *Hatton v. Weens*, 12 Gill & J. (Md.) 83; *Sharpe's Estate*, 2 Phila. (Pa.) 280, 14 Leg. Int. (Pa.) 140; *Williams v. Smith*, 10 R. I. 280. See also *supra*, this section, 8. *Powers of Trustees*.

Where necessary payments are made in good faith out of the trust fund for the use of the beneficiaries, the court will not refuse to allow trustees credit therefor if it be shown that the circumstances under which the payments were made were such that authority would have been granted by the court to a trustee upon application to make the disbursement. *Sharpe's Estate*, 2 Phila. (Pa.) 280, 14 Leg. Int. (Pa.) 140.

"We see no reason why a trustee making an advance out of his own moneys for the support of his infant *cestui que trust* should not be allowed the benefit of a charge for the same upon the trust estate in any case where it is clear that the court would have permitted the charge, if its sanction had been previously requested. In such a case the risk falls upon the trustee and not upon the *cestui que trust*, as it would if the trustee should assume to sell or mortgage the trust estate, which whether he could properly do without the previous sanction of the court, we need not decide. In this view of the law, the question for us to decide is whether the trustee has done at his own risk anything more than the court would have authorized him to do, if its instruction had been asked beforehand; and, taking the facts to be as stated by the trustee in the answer, we have no hesitation in deciding this question in his favor." *Williams v. Smith*, 10 R. I. 280.

**2. Only Where Some Reasonable Question or Doubt.** — *In re Foxwell*, 1 N. Bruns. Eq. Rep. 195; *Cole v. Glover*, 16 Grant Ch. (U. C.) 392; *McGill v. Courtice*, 17 Grant Ch. (U. C.) 271; *Northern Cent. R. Co. v. Keigler*, 29 Md. 572; *Vanness v. Jacobus*, 17 N. J. Eq. 153; *Crawford v. Winston*, 34 N. Y. App. Div. 457; *Holland Trust Co. v. Sutherland*, 177 N. Y. 327.

The court will not direct the administration of a trust where there is no difficulty or complication likely to arise in its execution, or any question of dispute as to the powers or duties of the trustee or the rights of the parties beneficially interested in the trust. *Northern Cent. R. Co. v. Keigler*, 29 Md. 572.

**Contra.** — In *Texas* it has been held that a trustee is entitled to the direction of the court even where the will is clear and unambiguous. *Vaccaro v. Cicalla*, 89 Tenn. 63.

**3. As to Powers and Duties.** — *Matter of*

*Brewer*, 43 Hun (N. Y.) 597, where the court refused to give instructions to a trustee who had discretionary power under a will to permit the *cestui que trust* to occupy a certain property, or receive its income.

Where a trustee's sole duty is embodied in the instrument, he cannot come into court and ask for instructions as to whether he shall or shall not perform that duty strictly as prescribed. *Crawford v. Winston*, 34 N. Y. App. Div. 457. See also *Wilbur v. Maxam*, 133 Mass. 541.

**4. As to Rights of Parties Beneficially Interested.** — *Heald v. Heald*, 56 Md. 300; *Woods v. Fuller*, 61 Md. 457; *Treadwell v. Salisbury Mfg. Co.*, 7 Gray (Mass.) 393, 66 Am. Dec. 490; *Quincy v. Atty.-Gen.*, 160 Mass. 431; *Farley v. Blood*, 30 N. H. 354.

**Where It Is Plain that a Dispute can be settled** only by litigation, it is not necessary for a trustee to ask the advice of the court before defending. *In re Williams*, 22 Ont. App. 196; and in such circumstances the court will not give him advice or instruction. *Clay v. Gurley*, 62 Ala. 14; *Bradford v. Forbes*, 9 Allen (Mass.) 365.

**5. Not Entitled to Direction as to Future Rights.** — *May v. May*, 167 U. S. 310; *Heald v. Heald*, 56 Md. 300; *Woods v. Fuller*, 61 Md. 457; *Devecmon v. Shaw*, 70 Md. 219; *Greeley v. Nashua*, 62 N. H. 166; *Griggs v. Veghte*, 47 N. J. Eq. 180; *O'Cain v. O'Cain*, 51 S. Car. 348. For instance, as to the disposition of a fund on an event which has not yet happened. *Bullard v. Chandler*, 149 Mass. 532; *White v. Massachusetts Inst. of Technology*, 171 Mass. 84; *Gafney v. Kenison*, 64 N. H. 354; *Tuttle v. Woolworth*, 62 N. J. Eq. 532. See also *Hano's Estate*, 22 Pa. Co. Ct. 561. Or as to the management of a trust fund before it is certain that any estate will remain after payment of the debts. *Proctor v. Heyer*, 122 Mass. 525. Or as to the distribution of the assets of the estate before these have been ascertained. *Muldoon v. Muldoon*, 133 Mass. 111.

**But Where Such Direction Given, Trustee Must Follow It.** — If trustees ask the advice of the court upon a future right, and the court gives it, the trustees, on a decision adverse to them being given, cannot be heard to insist that the decision was premature. *Devecmon v. Shaw*, 70 Md. 219.

**6. Bullard v. Atty.-Gen.**, 153 Mass. 249.

**7. Not Entitled to Advice on Questions with Third Parties.** — *Clay v. Gurley*, 62 Ala. 14; *Holland Trust Co. v. Sutherland*, 65 N. Y. App. Div. 256 (but see this case 177 N. Y. 327); *New York v. Fitch*, 9 N. Y. App. Div. 452.



its application to the trust fund,<sup>1</sup> and the court will not, as a rule, instruct a trustee where he is called by the nature of the trust<sup>2</sup> or by its express provisions<sup>3</sup> to exercise discretionary power. The court will not give an opinion upon disputed or unascertained facts.<sup>4</sup>

**A Nominal Trust** in a municipal corporation, where there is no trust instrument to be construed, and no *cestui que trust* to be considered, furnishes no ground for the court's advisory jurisdiction.<sup>5</sup>

**Trustee Must Be Impartial.** — A trustee's conduct in procuring the interpretation of a will by the court should be one of strict neutrality favoring none of the parties to the suit,<sup>6</sup> and to obtain an impartial direction it is his duty to give the court all the information in his power.<sup>7</sup>

**d. MANAGEMENT OF PROPERTY** — (1) *General Duties.* — In the management of trust property a trustee should generally assume charge of the trust estate,<sup>8</sup> and should preserve and protect the trust funds for the benefit of all interested in the distribution thereof.<sup>9</sup> A trustee, since he holds the legal

1. *Greene v. Mumford*, 4 R. I. 313.

2. **Or Where Trustee Required to Exercise Discretionary Power.** — *Proctor v. Heyer*, 122 Mass. 525; *Matter of Brewer*, 43 Hun (N. Y.) 597; *Holland Trust Co. v. Sutherland*, 177 N. Y. 327; *Tinnin v. Womack*, 1 Jones Eq. (54 N. Car.) 135; *Rutland Trust Co. v. Sheldon*, 59 Vt. 374. See also *New York v. Fitch*, 9 N. Y. App. Div. 452. See *supra*, this section, 8. *Powers of Trustees.*

3. *Richardson v. Hall*, 124 Mass. 228.

4. **Or upon Unascertained Facts.** — *Stultz v. Kiser*, 2 Ired. Eq. (37 N. Car.) 543.

5. **Or Where the Trust Is Nominal.** — *New York v. Fitch*, 9 N. Y. App. Div. 452.

6. **Trustee Must Be Impartial.** — *Grimball v. Cruse*, 70 Ala. 534; *Jones v. Stockett*, 2 Bland (Md.) 409.

7. **Must Give Court All Information.** — *Jones v. Stockett*, 2 Bland (Md.) 409.

**In England.** — Under 22 & 23 Vict., c. 35, § 30, enabling trustees to apply by petition to any judge of chancery for his opinion, advice, or direction respecting the management or administration of the trust property, or the assets of any testator or intestate, the court would not construe a doubtful instrument so as to determine the rights of parties, or settle questions as to capital of considerable amount, *In re Dennis*, 5 Jur. N. S. 1388; *Re Evans*, 30 Beav. 232; *Re Bunnett*, 10 Jur. N. S. 1098; *Re Hooper*, 29 Beav. 656; *In re Lorenz*, 7 Jur. N. S. 402; *In re Tyrrell*, 23 L. R. Ir. 263; or give advice on matters of detail which would require the sifting of evidence, *In re Barrington*, 6 Jur. N. S. 1073; or on other facts not yet ascertained, *In re Muggeridge*, 6 Jur. N. S. 192; *In re Mockett*, 6 Jur. N. S. 142; *In re Box*, 11 W. R. 945; or give the trustees powers unauthorized by the will, *In re Shaw*, L. R. 12 Eq. 124. It will only give advice as to the investment of funds, *In re French*, L. R. 15 Eq. 68; *In re Lorenz*, 7 Jur. N. S. 402; *In re Fanning*, 10 Jur. N. S. 307; *In re T—*, 15 Ch. D. 78; *In re Smith*, 26 L. T. N. S. 820; the application of income, *In re T—*, 15 Ch. D. 78; payment of costs by the life tenant, *In re De la Warr*, 16 Ch. D. 587; *In re Willan*, 45 L. T. N. S. 745; or other matters of minor importance arising in the administration and management of the property, *In re Markintosh*, 42 L. J. Ch. 208; *In re Tyrrell*, 23 L. R. Ir. 263.

The act was repealed by the Trustee Act of 1893.

8. **Trustee Should Take Charge of Estate.** — *Vose v. Internal Imp. Fund*, 2 Woods (U. S.) 647; *Speakman v. Tatem*, 48 N. J. Eq. 136; *Harbster's Estate*, 133 Pa. St. 351; *Colyar v. Wheeler*, (Tenn. 1903) 75 S. W. Rep. 1089.

**A Receiver Must Keep Control of Trust Funds** in his own hands. *White v. Baugh*, 3 Cl. & F. 44.

**Custody of Trust Deeds.** — A trustee is entitled to the custody of trust deeds. *Kerrison v. Dorrien*, 9 Bing. 76, 23 E. C. L. 269, 2 Moo. & S. 114.

But these are generally placed in the hands of a solicitor by the trustee. *Field v. Field*, (1894) 1 Ch. 425.

9. **Trustee Should Act for Interests of All** — *England.* — *Matthews v. Brise*, 6 Beav. 239; *Hutchinson v. Morritt*, 3 Y. & C. Exch. 547.

*Alabama.* — *Huckabee v. Billingsly*, 16 Ala. 414, 50 Am. Dec. 183; *Harrison v. Mock*, 10 Ala. 185; *Robinson v. Mauldin*, 11 Ala. 977; *Duncan v. Simmons*, 2 Stew. & P. (Ala.) 356.

*Georgia.* — *McCreary v. Gewinner*, 103 Ga. 537.

*Maryland.* — *Mitchell v. Colburn*, 61 Md. 244.

*Mississippi.* — *Dozier v. Freeman*, 47 Miss. 647; *Prewett v. Land*, 36 Miss. 495; *Sinking Fund Com'rs v. Walker*, 6 How. (Miss.) 143, 38 Am. Dec. 433.

*Missouri.* — *Baker v. Nall*, 59 Mo. 265.

*New Jersey.* — *Speakman v. Tatem*, 48 N. J. Eq. 136.

*New York.* — *Burr v. Bigler*, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 177.

*North Carolina.* — *Cheatham v. Rowland*, 92 N. Car. 340.

*Pennsylvania.* — *Mackey v. Coates*, 70 Pa. St. 350; *Stallman's Appeal*, 38 Pa. St. 200; *Greenfield's Estate*, 24 Pa. St. 232.

*Texas.* — *Alliance Milling Co. v. Eaton*, (Tex. Civ. App. 1896) 33 S. W. Rep. 591; *Parker v. Portis*, 14 Tex. 166.

**Duty to Prevent Waste.** — A trustee should protect the estate against waste whether by the beneficiary or by outsiders. *Woodman v. Good*, 6 W. & S. (Pa.) 169; *Whittingham v. Schofield*, (Ky. 1902) 67 S. W. Rep. 846; *First Nat. F. Ins. Co. v. Salisbury*, 130 Mass. 303; *Carter v. Rolland*, 11 Humph. (Tenn.) 333.

title to the trust property,<sup>1</sup> should bring all necessary actions where the title to the trust property is involved,<sup>2</sup> and since he has the right of possession to trust property, unless the right is especially denied by the instrument, should bring all suits necessary to recover possession.<sup>3</sup>

**Duties upon Sales.**—Where a sale of trust property is necessary, a trustee should use due diligence in procuring the best price possible, and in order to do so, the sale should be properly advertised by him.<sup>4</sup>

**Duty to Repair.**—Trustees should see that the trust property does not fall into decay for want of ordinary repair,<sup>5</sup> but a trustee ought not, on his own initiative, to expend trust money in repairs of a permanent and substantial character, as in rebuilding,<sup>6</sup> although, with the court's consent, expenditures of this sort may be made.<sup>7</sup> The expense of temporary or ordinary repairs should be borne by the income,<sup>8</sup> while the corpus of the estate should bear

**As Between Life Tenant and Remainderman.**—A trustee should not permit the life tenant to receive and waste the corpus of the estate. *Mitchell v. Colburn*, 61 Md. 244.

**Discretion Required.**—Although in an instrument creating a trust a direction to the trustee to receive and "pay" over rents and profits to certain persons is unqualified, the exercise of discretion is required, and a payment directly to a beneficiary whom he knows from mental or moral conditions to be incapable of using it beneficially to himself is a breach rather than a compliance with the terms of the trust. *Gott v. Cook*, 7 Paige (N. Y.) 538; *Mason v. Jones*, 2 Barb. (N. Y.) 229. See also *Leggett v. Perkins*, 2 N. Y. 310, quoted under *APPLY*, vol. 2, p. 472.

1. See *supra*, this title, V. 3.

2. **Trustee Should Protect the Title to Trust Property.**—*Goodtitle v. Jones*, 7 T. R. 43; *Judson v. Corcoran*, 17 How. (U. S.) 612; *Curtis v. Smith*, 6 Blatchf. (U. S.) 537; *Parsons v. Boyd*, 20 Ala. 112; *Colburn v. Broughton*, 9 Ala. 351; *Schley v. Lyon*, 6 Ga. 530; *Presley v. Stribling*, 24 Miss. 527; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Woodman v. Good*, 6 W. & S. (Pa.) 169; *Tutt v. Port Royal, etc.*, R. Co., 16 S. Car. 365.

3. **Trustee Should Sue for Possession in Proper Case.**—*Stackhouse v. Jersey*, 7 Jur. N. S. 359; *Haselinton v. Gill*, 3 T. R. 620 note; *McLeod v. Bernhold*, 32 Ark. 671; *McRaeny v. Johnson*, 2 Fla. 520; *Wynn v. Lee*, 5 Ga. 217; *Blake v. Irwin*, 3 Ga. 345; *Pace v. Pierce*, 49 Mo. 393; *Jones v. McNeil*, 1 Bailey L. (S. Car.) 235; *Poage v. Bell*, 8 Leigh (Va.) 604. See also *infra*, this section, *Liabilities of Trustees*.

The superiority of the trustee's claim over that of the beneficiary to retain possession and control of the trust property must obviously depend in most cases upon the terms of the trust instrument. *Williamson v. Wilkins*, 14 Ga. 416.

**Cestui Que Trust in Possession.**—The fact that the *cestui* retains or obtains possession does not affect trustees' rights against third parties. *Haselinton v. Gill*, 3 T. R. 620 note; *McLeod v. Bernhold*, 32 Ark. 671; *McRaeny v. Johnson*, 2 Fla. 520; *Wynn v. Lee*, 5 Ga. 217; *Reed v. Harris*, 7 Robt. (N. Y.) 151.

**Duration of Right.**—A trustee has the right of possession, even against his *cestui que trust*, until he has executed or surrendered the trust. *Guphill v. Isbell*, 1 Bailey L. (S. Car.) 230, 19 Am. Dec. 675.

4. **Advertising Sale.**—*White v. Prentiss*, 3 T. B. Mon. (Ky.) 449; *Gibson's Case*, 1 Bland (Md.) 138, 17 Am. Dec. 257; *Graham v. Yeomans*, 18 Grant Ch. (U. S.) 238.

A trustee should see that the trust title to be conveyed is valid. *Ennis v. Leach*, 1 Ired. Eq. (36 N. Car.) 416.

5. **Estate Must Be Kept in Ordinary Repair.**—*Conway v. Fenton*, 40 Ch. D. 512; *In re Hotchkys*, 32 Ch. D. 408; *In re Teissier*, (1893) 1 Ch. 153; *Bowes v. Strathmore*, 8 Jur. 92; *Parsons v. Winslow*, 16 Mass. 361; *Herbert v. Herbert*, (C. Pl.) 57 How. Pr. (N. Y.) 333; *Cheatham v. Rowland*, 92 N. Car. 340.

In the matter of repairs, the duties of trustees are closely connected with their powers. For a full collection of cases, see *supra*, this section, *Powers of Trustees*.

6. **Costly Improvements Forbidden.**—*Bridge v. Brown*, 2 Y. & C. Ch. 181; *Cooke v. Cholmondeley*, 4 Drew. 326, 4 Jur. N. S. 827; *In re Willis*, (1902) 1 Ch. 15; *In re Montagu*, (1897) 2 Ch. 8; *In re Jackson*, 21 Ch. D. 786; *Re De Tabley*, 75 L. T. N. S. 328; *Bleazard v. Whalley*, 18 Jur. 869; *Whittingham v. Schofield*, (Ky. 1902) 67 S. W. Rep. 846; *Herbert v. Herbert*, (C. Pl.) 57 How. Pr. (N. Y.) 333; *Cole's Estate*, 102 Wis. 1, 72 Am. St. Rep. 854.

**Expressly Provided for.**—Such improvements may be allowed by the trust instrument. *Bleazard v. Whalley*, 18 Jur. 869.

**Repairs Made at the Expense of Capital** are to that extent an investment of so much of the trust fund; and are therefore justifiable only when the realty upon which they are made is itself an investment, and a proper one, of that fund. *Veazie v. Forsaith*, 76 Me. 172.

7. *Frith v. Cameron*, L. R. 12 Eq. 169.

8. **Ordinary Repairs Payable from Income—England.**—*In re Fowler*, 16 Ch. D. 723; *Bowes v. Strathmore*, 8 Jur. 92; *In re Willis*, (1902) 1 Ch. 15; *Atty.-Gen. v. Geary*, 3 Meriv. 513.

*Kentucky.*—*Whittingham v. Schofield*, (Ky. 1902) 67 S. W. Rep. 846.

*Maine.*—*Veazie v. Forsaith*, 76 Me. 172.

*Massachusetts.*—*Little v. Little*, 161 Mass. 188; *New England Trust Co. v. Eaton*, 140 Mass. 532, 51 Am. Rep. 493; *Sohier v. Eldredge*, 103 Mass. 345; *Watts v. Howard*, 7 Met. (Mass.) 478; *Parsons v. Winslow*, 16 Mass. 361.

*Minnesota.*—*Smith v. Gibson*, 15 Minn. 80.

*New Jersey.*—*Matter of Heaton*, 21 N. J. Eq. 221.

the burden of the expense of reconstruction or of permanent repairs.<sup>1</sup>

**Duty to Insure.** — Although a trustee's duty to insure trust property is not imperative or absolute, yet a trustee ought to do so in a proper case.<sup>2</sup> Charges for insurance of property should be apportioned between the life tenant and the remainderman according to their respective interests.<sup>3</sup>

**Duty to Pay Taxes and Assessments.** — A trustee should pay all taxes legally and rightfully imposed upon the trust estate,<sup>4</sup> for defraying which he should resort to the income rather than the principal,<sup>5</sup> or the estate of the life tenant

*New York.* — *Herbert v. Herbert*, (C. Pl.) 57 How. Pr. (N. Y.) 333.

*North Carolina.* — *Cheatham v. Rowland*, 92 N. Car. 340.

*Rhode Island.* — *Greene v. Greene*, 19 R. I. 619.

It is difficult to make any legal distinction between ordinary and extraordinary repairs. If they are necessary in order to preserve the property and make it productive, they should be paid for from the income. *Guthrie v. Wheeler*, 51 Conn. 207.

**1. Permanent Repairs Charged on Principal.** — *Veazie v. Forsaith*, 76 Me. 172; *Hart v. Allen*, 166 Mass. 78; *Little v. Little*, 161 Mass. 188; *New England Trust Co. v. Eaton*, 140 Mass. 532, 54 Am. Rep. 493; *Sohier v. Eldredge*, 103 Mass. 345; *Brown v. Berry*, 71 N. H. 241; *Smith v. Keteltas*, 62 N. Y. App. Div. 174; *Matter of Deckelman*, 84 Hun (N. Y.) 476; *Stevens v. Melcher*, 80 Hun (N. Y.) 514; *Greene v. Greene*, 19 R. I. 619.

**The Expense of Putting a Dwelling House into Tenatable Repair** should be borne by the principal. *Parsons v. Winslow*, 16 Mass. 361; *Brown v. Berry*, 71 N. H. 241.

**Apportioned Between Capital and Income.** — When both life tenant and remainderman are equally benefited, the burden of expenses should be ratably adjusted. *Parsons v. Winslow*, 16 Mass. 361; *Sohier v. Eldredge*, 103 Mass. 345; *In re Hotchkys*, 32 Ch. D. 408.

**2. Duty to Insure Not Absolute.** — *England.* — *Bailey v. Gould*, 4 Y. & C. Exch. 221; *Craufurd v. Hunter*, 8 T. R. 13.

*United States.* — *Howard Ins. Co. v. Chase*, 5 Wall. (U. S.) 509; *Burr v. M'Ewen, Baldw.* (U. S.) 154. See *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25.

*Louisiana.* — *Page v. Western M. & F. Ins. Co.*, 19 La. 49.

*Massachusetts.* — *Lerow v. Wilmarth*, 9 Allen (Mass.) 382.

*New Hampshire.* — *Goodall v. New England Mut. F. Ins. Co.*, 25 N. H. 186.

*New Jersey.* — *Perrine v. Newell*, 49 N. J. Eq. 57.

*New York.* — *Disbrow v. Disbrow*, 167 N. Y. 606; *Garvey v. Owens*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 349.

*Vermont.* — *Swift v. Vermont Mut. F. Ins. Co.*, 18 Vt. 305.

**Care in Selecting Insurer.** — A trustee must exercise due care in the selection of good and solvent companies. *Gettins v. Scudder*, 71 Ill. 86.

**Trustee Has Insurable Interest.** — See the title FIRE INSURANCE, vol. 13, p. 177.

**3. Premiums for Insurance Should Be Apportioned.** — *Kearney v. Kearney*, 17 N. J. Eq. 59;

*Stevens v. Melcher*, 80 Hun (N. Y.) 514; *Matter of Housman*, 4 Dem. (N. Y.) 404.

**4. Duty to Pay Taxes.** — *United States.* — *Burr v. M'Ewen, Baldw.* (U. S.) 154.

*Arkansas.* — *Cagwin v. Buerkle*, 55 Ark. 5.

*California.* — *In re Hensing*, (Cal. 1892) 31 Pac. Rep. 578.

*Florida.* — *Merritt v. Jenkins*, 17 Fla. 593.

*Kentucky.* — *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 457.

*Michigan.* — *Detroit v. Lewis*, 109 Mich. 155.

*New Hampshire.* — *Smith v. New Hampshire Trust Co.*, 68 N. H. 424.

*New Jersey.* — *Trenton Trust, etc., Co. v. Donnelly*, (N. J. 1903) 55 Atl. Rep. 92; *Perrine v. Newell*, 49 N. J. Eq. 57.

*New York.* — *Matter of Olmstead*, 52 N. Y. App. Div. 515, affirmed 164 N. Y. 571; *Garvey v. Owens*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 349; *Jones v. Jones*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 844.

*North Carolina.* — *Browne v. Lamb*, 111 N. Car. 16.

*Oregon.* — *Royal v. Royal*, 30 Oregon 448.

See also *Thiebaud v. Tait*, 138 Ind. 238, and the title TAXATION, vol. 27, p. 748.

**Return of Inventory.** — Trustees should render to the assessors an inventory under oath. *Bell v. Sawyer*, 59 N. H. 393. See also the title TAXATION, vol. 27, p. 669.

**Sale of Trust Property — Payment Out of Purchase Money.** — Where trust property has been sold, accrued taxes which should have been paid before the sale ought not to be paid by the trustee out of the proceeds of the sale, but the purchaser takes the land subject to this incumbrance. *Scott v. Shy*, 53 Mo. 478; *Schmidt v. Smith*, 57 Mo. 135; *Tanner v. Taussig*, 11 Mo. App. 534; *State v. Stelbrink*, 58 Mo. App. 662.

**5. Income Liable for Taxes.** — *Georgia.* — *McCook v. Harp*, 81 Ga. 229.

*Massachusetts.* — *Plympton v. Boston Dispensary*, 106 Mass. 544; *Watts v. Howard*, 7 Met. (Mass.) 478; *Minot v. Amory*, 2 Cush. (Mass.) 377.

*Minnesota.* — *Smith v. Gibson*, 15 Minn. 89.

*New Jersey.* — *Trenton Trust, etc., Co. v. Donnelly*, (N. J. 1903) 55 Atl. Rep. 92; *Dufford v. Smith*, 46 N. J. Eq. 216; *Brown v. Grandin*, (N. J. 1888) 13 Atl. Rep. 266; *Combes v. Cadmus*, 36 N. J. Eq. 382; *Matter of Heaton*, 21 N. J. Eq. 221.

*New York.* — *Whitson v. Whitson*, 53 N. Y. 479; *Matter of Tracy*, 87 N. Y. App. Div. 215; *Smith v. Keteltas*, 62 N. Y. App. Div. 174; *Hepburn v. Hepburn*, 2 Bradf. (N. Y.) 74.

*Pennsylvania.* — *Howell's Estate*, 7 Pa. Dist. 677.

*Rhode Island.* — *Fitzgerald v. Rhode Island*



rather than to that of the remainderman.<sup>1</sup> Where assessments are levied for permanent improvements the charges therefor should generally be apportioned between income and principal.<sup>2</sup>

(2) *Treatment of Funds.* — A trustee should pay the ordinary and general expenses of the estate, which are incidental to the administration of the estate, such as interest upon incumbrances, and commissions, from the income of the trust estate;<sup>3</sup> and such charges should be borne by the life tenant rather than the remainderman.<sup>4</sup> The same rules apply, as we have seen, in the case of ordinary repairs and taxes.<sup>5</sup>

**Corpus Liable.** — Where, however, the expense is incurred by proceedings ascertaining the amount of and settling the estate, which generally precede

Hospital Trust Co., 24 R. I. 59; Bailey's Petition, 13 R. I. 543.

**Legacy and Succession Taxes** are chargeable on the income. *Sohier v. Eldridge*, 103 Mass. 345.

**Taxation of Annuity.** — See *Whitson v. Whitson*, 53 N. Y. 479, stated under the title ANNUITIES, vol. 2, p. 392.

**Corpus Liable for Accrued Taxes.** — When the property comes into the trustee's hands subject to charges for taxes already accrued, the *corpus* of the estate is liable therefor. *Trenton Trust, etc., Co. v. Donnelly*, (N. J. 1903) 55 Atl. Rep. 92; *Matter of Young*, (Surrogate Ct.) 17 Misc. (N. Y.) 680. See also *Stone v. Littlefield*, 151 Mass. 485.

**1. Life Tenant Liable for Taxes.** — *Holmes v. Taber*, 9 Allen (Mass.) 246; *Peirce v. Burroughs*, 58 N. H. 302; *Matter of Tuttle*, 49 N. J. Eq. 259; *Combes v. Cadmus*, 36 N. J. Eq. 382; *Holcombe v. Holcombe*, 27 N. J. Eq. 473, 29 N. J. Eq. 597; *Smith v. Keteltas*, 62 N. Y. App. Div. 174; *Matter of Martens*, (Surrogate Ct.) 16 Misc. (N. Y.) 245; *Matter of Deckelmann*, 84 Hun (N. Y.) 476; *Hepburn v. Hepburn*, 2 Bradf. (N. Y.) 74.

**2. Assessments Apportioned.** — *Thomas v. Evans*, 105 N. Y. 601; *Peck v. Sherwood*, 56 N. Y. 615; *Matter of Deckelmann*, 84 Hun (N. Y.) 476; *Matter of Young*, (Surrogate Ct.) 17 Misc. (N. Y.) 680.

Assessments for structures of permanent improvement chargeable to *corpus*. *Greene v. Greene*, 19 R. I. 619. See *Matter of Martens*, (Surrogate Ct.) 16 Misc. (N. Y.) 245.

**Assessment for Asphalt Pavements Chargeable to Income.** — Where the life tenant's interest is especially benefited by the expenditure, as where the assessment was for an asphalt pavement not especially durable, income of estate liable. *Wordin's Appeal*, 71 Conn. 531, 71 Am. St. Rep. 219.

**3. General Expenses Payable from Income** — *Connecticut.* — *Guthrie v. Wheeler*, 51 Conn. 207.

*Georgia.* — *Wylly v. Collins*, 9 Ga. 223.

*Maryland.* — *Lindsay v. Kirk*, 95 Md. 50; *Burroughs v. Bunnell*, 70 Md. 18.

*Massachusetts.* — *Parker v. Ames*, 121 Mass. 220; *Heard v. Eldredge*, 109 Mass. 258, 12 Am. Rep. 687; *Watts v. Howard*, 7 Met. (Mass.) 478.

*New York.* — *Hancox v. Meeker*, 95 N. Y. 528; *North American Coal Co. v. Dyett*, 7 Paige (N. Y.) 9, *affirmed* 20 Wend. (N. Y.) 570, 32 Am. Dec. 598; *Matter of Young*, (Sur-

rogate Ct.) 17 Misc. (N. Y.) 680; *Booth v. Ammerman*, 4 Bradf. (N. Y.) 129; *Hepburn v. Hepburn*, 2 Bradf. (N. Y.) 74; *Reynolds v. Reynolds*, 3 Dem. (N. Y.) 82; *Cammann v. Cammann*, 2 Dem. (N. Y.) 211.

*Pennsylvania.* — *Butterbaugh's Appeal*, 98 Pa. St. 351; *Spangler's Estate*, 21 Pa. St. 335; *Moore's Estate*, 9 Pa. Dist. 675.

*Rhode Island.* — *Rhode Island Hospital Trust Co. v. Waterman*, 23 R. I. 342; *Greene v. Greene*, 19 R. I. 619.

*Wisconsin.* — *Cole's Estate*, 102 Wis. 1, 72 Am. St. Rep. 854.

**To Hold Principal Liable for Expenses Authority Must Be Given by Instrument.** — Says the New York court: "To sustain a construction, whereby the capital might be more or less seriously impaired, by using it in the payment of taxes and of interest on the mortgage, and in maintaining the realty used by the beneficiary, we ought to find words of the most unmistakable import and pointing unequivocally in that direction." *Matter of Albertson*, 113 N. Y. 434.

**The Use of Plate Glass** in repairs is chargeable to income. *Hancox v. Meeker*, 95 N. Y. 528.

**Counsel Fees**, on appointment of trustee, payable out of income. *Parker v. Ames*, 121 Mass. 220.

**A Charge for Which the Income** is liable cannot generally be placed upon the principal sum except when the two funds are owned by the same parties. *Lindsay v. Kirk*, 95 Md. 50.

**Where the Expenditure Benefits Both** the life tenant and the remainderman there should be equitable apportionment. *Rhode Island Hospital Trust Co. v. Waterman*, 23 R. I. 342.

**Where Trustee's Delay** in making sale burdens income by payment of expenses, etc., but benefits the principal by increased price at sale, principal should account for expenses. *Moore's Estate*, 9 Pa. Dist. 675.

**The Costs** of a suit by which both estates are benefited should be apportioned ratably. *Parsons v. Winslow*, 16 Mass. 361.

For discussion of rules relating to costs, see TRUSTS AND TRUSTEES, 22 ENCYC. OF PL. AND PR., pp. 70, 108.

For cases holding income liable for payment of taxes, insurance, and repairs, see *supra*, this section, 10 d. (1) *General Duties*.

4. *Matter of Albertson*, 113 N. Y. 434; *Thomas v. Evans*, 105 N. Y. 601; *Matter of Deckelmann*, 84 Hun (N. Y.) 476; *Wilcox v. Quinby*, 73 Hun (N. Y.) 524.

5. See *supra*, this section, 10. d. (1).

the administration of the estate, the corpus is liable;<sup>1</sup> and where the principal is especially benefited or affected by the outlay, it should bear the expenses incurred.<sup>2</sup>

**Investments.** — The duties of a trustee involved in the investment of trust funds is discussed elsewhere.<sup>3</sup>

**Funds Kept Separate.** — A trustee should not mingle trust funds with his own,<sup>4</sup> and should keep separate all funds in his hands belonging to different beneficiaries.<sup>5</sup> He should preserve income and capital distinct and separate both in receipts and disbursements of trust moneys, when each fund goes to different beneficiaries.<sup>6</sup> Where the trust fund is changed or altered, income and

**1. Corpus Liable.** — *In re Bennett*, (1896) 1 Ch. 778; *Bartlett*, Petitioner, 163 Mass. 509; *Mandell v. Green*, 108 Mass. 283; *Bowditch v. Soltyk*, 99 Mass. 136; *Matter of Young*, (Surrogate Ct.) 17 Misc. (N. Y.) 680; *Reynolds v. Reynolds*, 3 Dem. (N. Y.) 82.

**For Preparing and Filing Trustee's Account** the corpus is liable. *Peterson's Estate*, 14 Phila. (Pa.) 268, 38 Leg. Int. (Pa.) 113.

**Legal Services Rendered to Accounting Trustee** are, in general, chargeable upon the corpus. *Donovan v. MacDowall*, 2 Dem. (N. Y.) 213.

**2. Principal Benefited by Outlay.** — *Donovan v. MacDowall*, 2 Dem. (N. Y.) 213; *Hart's Estate*, 203 Pa. St. 496; *Rhode Island Hospital Trust Co. v. Waterman*, 23 R. I. 342. See *Humber v. Hubble*, (Ky. 1899) 52 S. W. Rep. 926.

**Money Paid for the Services of a Broker** in making investments has been held to be chargeable against the principal. *Whittemore v. Beekman*, 2 Dem. (N. Y.) 275.

**The Costs of a Suit by Remainderman Against a Tenant for Life**, which was dismissed, were held to be payable out of the corpus. *Powys v. Blgrave*, 4 De G. M. & G. 448.

**General Criterion.** — It is the nature, object, and result, rather than the amount, of an expenditure, which usually determines whether it is chargeable to a life tenant or to the remainderman. However large, if properly and reasonably incident to the management of the estate in behalf of the party equitably entitled to the accruing income, and not resulting in a direct increase of the principal fund, nor in substitutions which vary the items of which that is composed, a trustee's charges and disbursements are, under ordinary circumstances, payable from its income, if that be sufficient for the purpose, unless it be otherwise provided by the terms of the trust. *Wordin's Appeal*, 71 Conn. 531, 71 Am. St. Rep. 219.

3. See the title **INVESTMENTS**, vol. 17, p. 423.

**Premiums for Investments.** — Whether premiums paid by a trustee for securities in which the trust funds are invested should be charged against income or corpus depends entirely upon the intent of the settlor to be gathered from the instrument creating the trust, and is not to be determined by any hard and fast rule. *Shaw v. Cordis*, 143 Mass. 443; *New York L. Ins. Co. v. Baker*, 165 N. Y. 484, *modifying* 38 N. Y. App. Div. 417; *Matter of Hoyt*, 160 N. Y. 607, *reversing* 27 N. Y. App. Div. 285; *McLouth v. Hunt*, 154 N. Y. 170, *affirming* 92 Hun (N. Y.) 607; *New York L. Ins., etc., Co. v. Kane*, 17 N. Y. App. Div. 542. See also the title **INVESTMENTS**, vol. 17, p. 458 *et seq.*

Such premiums have sometimes been held to

fall on income, which in the absence of unforeseen calamities should save the corpus harmless. *People v. Davenport*, 30 Hun (N. Y.) 177, *modified* 117 N. Y. 549; *Farwell v. Tweddle*, (Supm. Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 94. See also *New England Trust Co. v. Eaton*, 140 Mass. 532, 54 Am. Rep. 493.

Another view is that no part of the income should be taken to make good to the remainderman the premium paid for the investment, but these cases are decided upon facts involved. *Brown v. Gellatly*, L. R. 2 Ch. 751; *Hume v. Richardson*, 4 De G. F. & J. 29; *Hemenway v. Hemenway*, 134 Mass. 446; *Boyer's Estate*, 23 Pa. Co. Ct. 32; *Turness's Estate*, 12 Phila. (Pa.) 130, 35 Leg. Int. (Pa.) 275. See also *In re Thomas*, (1891) 3 Ch. 482.

**4. Trust Funds to Be Kept Distinct and Separate.** — *Chedworth v. Edwards*, 8 Ves. Jr. 46; *Corya v. Corya*, 119 Ind. 593; *Brackenridge v. Holland*, 2 Blackf. (Ind.) 377, 20 Am. Dec. 123; *Little v. Chadwick*, 151 Mass. 109; *Matter of Stafford*, 11 Barb. (N. Y.) 353; *Erie School Dist. v. Griffith*, 203 Pa. St. 123; *McAllister v. Com.*, 30 Pa. St. 537; *Mason v. Whitthorne*, 2 Coldw. (Tenn.) 242; *Moore v. Mitchell*, 2 Woods (U. S.) 483, *affirmed* 95 U. S. 587.

**Trustee Liable Regardless of Intention.** — *Cook v. Addison*, L. R. 7 Eq. 466.

**For Full Discussion of Trustee's Duties and liabilities** in connection with the commingling of trust funds with his own, see *infra*, this section, *Liabilities of Trustees*; and VII. 4. g. (2). And see the title **INVESTMENTS**, vol. 17, p. 468.

5. *McCullough v. McCullough*, 44 N. J. Eq. 313; *Salisbury v. Colt*, 27 N. J. Eq. 492; *Fowler v. Colt*, 25 N. J. Eq. 202; *Mumford v. Murray*, 6 Johns. Ch. (N. Y.) 1.

**6. Income and Principal Must Be Kept Separate.** *In re Crowther*, (1895) 2 Ch. 56, 64 L. J. Ch. 537; *Burt v. Gill*, 89 Md. 145; *Milligan v. Pleasants*, 74 Md. 8; *Pole v. Pietsch*, 61 Md. 570; *New England Trust Co. v. Eaton*, 140 Mass. 532, 54 Am. Rep. 493; *Mudge v. Parker*, 139 Mass. 153; *Prewett v. Land*, 36 Miss. 495; *Woodbridge v. Boeckes*, 59 N. Y. App. Div. 503; *U. S. Mortgage, etc., Co. v. Marquam*, 41 Oregon 391.

**Surplus Profits** on principal which had accumulated during the testator's lifetime, or prior to execution of the deed, should go to the corpus, although they may not be distributed until after the death of the grantor or testator. *Lang v. Lang*, 57 N. J. Eq. 325; *Smith's Estate*, 140 Pa. St. 344, 23 Am. St. Rep. 237; *Earp's Appeal*, 28 Pa. St. 368. See *Moss's Appeal*, 83 Pa. St. 264, 24 Am. Rep. 164.

**Profits Which Accrue After the Death of the**  
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principal should each retain their relative positions in the distribution of trust assets.<sup>1</sup> Where the estate has depreciated in value, income and principal should be proportionately reduced.<sup>2</sup> Generally a trustee should not retain income to meet contingent liabilities.<sup>3</sup>

**When Principal May Be Invaded.** — A trustee should not, in general, encroach upon the capital of a trust estate without the court's consent.<sup>4</sup> Where the income is insufficient for the expressed purpose of the trust,<sup>5</sup> and where the disbursement is clearly necessary to the carrying out of the trust or to the preservation of the estate, the court will generally permit a trustee to expend the principal.<sup>6</sup> Some courts hold that the trustee may make such necessary expenditures on his own initiative, and, if proper, it will be ratified by the court.<sup>7</sup>

testator, or the execution of the trust deed, should be distributed as income. *Wiltbank's Appeal*, 64 Pa. St. 256, 3 Am. Rep. 585.

**Dividends.** — As to whether stock or cash dividends should go to the tenant as income, or to the remainderman as principal, is discussed elsewhere. See the title *DIVIDENDS*, vol. 9, p. 710.

**1. Upon Change of Investment, Corpus and Income Kept Distinct.** — *Witter v. Witter*, 3 P. Wms. 100; *Heard v. Eldredge*, 109 Mass. 258, 12 Am. Rep. 687; *Leland v. Hayden*, 102 Mass. 542; *Doland v. Williams*, 101 Mass. 571; *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705; *Beeton v. Simpson*, 48 N. J. Eq. 17.

**Profits Derived from a Sale of Securities** forming part of the principal go to the corpus of the estate and not the income. *Matter of Lawrence*, 2 Connoly (N. Y.) 53.

**2. Apportionment of Loss Between Income and Principal.** — *Cox v. Cox*, L. R. 8 Eq. 343; *Veazie v. Forsaith*, 76 Me. 172; *Parsons v. Winslow*, 16 Mass. 361; *Trenton Trust, etc., Co. v. Donnelly*, (N. J. 1903) 55 Atl. Rep. 92; *Matter of Tuttle*, 49 N. J. Eq. 259; *Hagan v. Platt*, 48 N. J. Eq. 206; *Greene v. Greene*, 19 R. I. 619.

**Where Fund is Reduced by Life-tenant's Misconduct**, income and not corpus is liable for the loss. *Mandell v. Green*, 108 Mass. 277; *Covenentry v. Coventry*, 1 Keen 758.

**3. Accumulation of Income Not Required.** — *Willson v. Tyson*, 61 Md. 575; *Farwell v. Tweddle*, (Supm. Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 94; *Matter of Chesterman*, 75 N. Y. App. Div. 573; *Boyer's Estate*, 23 Pa. Co. Ct. 32.

A trustee should not accumulate income unless expressly authorized to do so in the instrument. *Burt v. Sill*, 89 Md. 145.

**Satisfaction of Annuities.** — Where there is a deficiency in the yearly income out of which an annuity is payable, to satisfy the annuity the arrearages may be paid from subsequently accruing income. *Rudolph's Appeal*, 10 Pa. St. 34.

**4. Trustee Should Not Invade Principal** — *England*. — *In re Willis*, (1902) 1 Ch. 15; *In re Montagu*, (1897) 2 Ch. 8, 66 L. J. Ch. 541; *Re De Tabley*, 75 L. T. N. S. 328; *Walker v. Wetherell*, 6 Ves. Jr. 473; *Turner v. Turner*, 4 Sim. 431. See also *Ex p. Garland*, 10 Ves. Jr. 110.

*Georgia*. — *Burney v. Spear*, 17 Ga. 223; *Cornwise v. Bourguim*, 2 Ga. Dec. (pt ii.) 15.

*Illinois*. — *Longwith v. Riggs*, 123 Ill. 258.

*Maryland*. — *Burt v. Gill*, 89 Md. 145; *Hatton v. Weems*, 12 Gill & J. (Md.) 83.

*New Hampshire*. — *Brown v. Berry*, 71 N. H. 241.

*New York*. — *Matter of Fero*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 85; *Deen v. Cozzens*, 7 Robt. (N. Y.) 178; *Matter of Reed*, 45 N. Y. App. Div. 196.

*North Carolina*. — *Donney v. Bullock*, 7 Ired. Eq. (42 N. Car.) 102.

*South Carolina*. — *Haigood v. Wells*, 1 Hill. Eq. (S. Car.) 59.

*Tennessee*. — *Carter v. Rolland*, 11 Humph. (Tenn.) 333; *Hester v. Wilkinson*, 6 Humph. (Tenn.) 215, 44 Am. Dec. 303.

*Virginia*. — *Green v. Wooldridge*, 89 Va. 632.

See *In re McMaster*, 2 Ont. L. Rep. 474. See also *infra*, this section, 8. *Powers of Trustees* — *Powers as to Maintenance of Beneficiary*.

**Where the Expenditure Is Authorized by the Instrument**, the trustee may use the trust fund. *Lombe v. Stoughton*, 17 Sim. 85; *Matter of Fero*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 85.

**Interests of Remaindermen Respected.** — As a general rule the interests of others as remaindermen should not be prejudiced by such outlays invading the corpus of the estate. *Ex p. Keble*, 11 Ves. Jr. 604; *Turner v. Turner*, 4 Sim. 431; *Newton v. Rebenack*, 90 Mo. App. 650; *Matter of Ryder*, 11 Page (N. Y.) 185, 42 Am. Dec. 109; *Matter of Davison*, 6 Paige (N. Y.) 136. See *Errat v. Barlow*, 14 Ves. Jr. 202.

**5. Income Insufficient.** — *Elder v. Elder*, 50 Me. 535; *Eggleston v. Merriam*, 86 Minn. 88; *Griffith's Estate*, 147 Pa. St. 274. See *Bridge v. Brown*, 2 Y. & C. Ch. 181.

**6. Court's Consent Necessary.** — *In re Jackson*, 21 Ch. D. 786; *Conway v. Fenton*, 40 Ch. D. 512, 59 L. T. N. S. 928; *Frith v. Cameron*, L. R. 12 Eq. 169; *In re Leslie*, 2 Ch. D. 185, 34 L. T. N. S. 239; *Burney v. Spear*, 17 Ga. 223; *Patterson v. Johnson*, 113 Ill. 559; *Hatton v. Weems*, 12 Gill & J. (Md.) 83; *Brown v. Berry*, 71 N. H. 241; *Matter of Herring*, 35 N. J. Eq. 359.

**7. Contrary Doctrine.** — *Smith v. Keteltas*, 62 N. Y. App. Div. 174; *Matter of Deckelmann*, 84 Hun (N. Y.) 476; *Matter of Potts*, 1 Ashm. (Pa.) 340; *Sedgwick v. Taylor*, 84 Va. 820; *Barton v. Bowen*, 27 Gratt. (Va.) 849.

"It may be true, that, under some circumstances, a trustee, although restricted to the expenditure of the profits, may be at liberty to anticipate by spending, under an emergency,



**11. Liabilities of Trustees**—*a. IN GENERAL*.—(1) *General Rule*.—The general doctrine being that trustees ought to conduct the business of the trust in the same manner as an ordinarily prudent man of business would conduct his own, they will not be chargeable with more than they have received nor held responsible for losses that may arise, when they have acted in good faith and with common skill, prudence, and diligence. But whenever trustees have been guilty either of actual misconduct in relation to the trust or of unreasonable negligence in the performance of their duties, they and their personal representatives become responsible to those for whom the trust property should be held, and are chargeable in equity with all damage caused to the estate by their breach of trust.<sup>1</sup> And it is immaterial that the trustees may

more than the profits of the current year; as if there be a dearth and a consequent failure of crops, or some extraordinary sickness, making it necessary to incur heavy medical bills; but, in such case, the existence of this emergency must be averred and proven and a full account rendered." *Downey v. Bullock*, 7 Ired. Eq. (42 N. Car.) 102.

**The Burden of Proof** is on the trustee to show that the encroachments on the capital were justifiable. *Green v. Wooldridge*, 89 Va. 632.

**1. General Rule as to Liability**—*England*.—*Charitable Corp. v. Sutton*, 2 Atk. 400; *Knight v. Plimouth*, 3 Atk. 480; *Bell v. Turner*, 2 Ch. D. 409, 45 L. J. Ch. 681; *In re Speight*, 22 Ch. D. 727; *Obee v. Bishop*, 1 De G. F. & J. 137, 6 Jur. N. S. 132; *Lander v. Weston*, 3 Drew. 389, 2 Jur. N. S. 58; *Jenkins v. Robertson*, 1 Eq. R. 123; *Brown v. Sewell*, 11 Hare 53, 17 Jur. 708; *Massey v. Banner*, 1 Jac. & W. 241; *Story v. Gape*, 2 Jur. N. S. 706; *Woodhouse v. Woodhouse*, 38 L. J. Ch. 481; *Stone v. Stone*, L. R. 5 Ch. 74, 39 L. J. Ch. 196; *Briggs v. Massey*, 51 L. J. Ch. 447; *Knatchbull v. Pearnhead*, 3 Myl. & C. 122, 1 Jur. 687; *Munch v. Cockerell*, 5 Myl. & C. 178; *Selby v. Bowie*, 2 New Reports 2, 9 Jur. N. S. 432; *Wilkinson v. Stafford*, 1 Ves. Jr. 41; *Caffrey v. Darby*, 6 Ves. Jr. 488; *Atty.-Gen. v. Higham*, 2 Y. & C. Ch. 634. See also *Fox v. Buckley*, 3 Ch. D. 508; *Davis v. Chambers*, 7 De G. M. & G. 386; *Penny v. Avison*, 3 Jur. N. S. 62; *Sleeman v. Wilson*, L. R. 13 Eq. 36; *Burgh v. Wentworth*, Cary 54.

*Canada*.—*Taylor v. Magrath*, 10 Ont. 669; *Stewart v. Snyder*, 27 Ont. App. 423; *Crowe v. Craig*, 29 Nova Scotia 394; *Vernon v. Seaman*, Russ. Eq. Dec. (Nova Scotia) 190. See also *Ford v. Chandler*, 8 Grant Ch. (U. C.) 85.

*United States*.—*Hazard v. Durant*, 19 Fed. Rep. 471.

*Alabama*.—*Hill v. Jones*, 65 Ala. 214.

*Georgia*.—*Dorsett v. Frith*, 25 Ga. 537; *Campbell v. Miller*, 38 Ga. 304, 95 Am. Dec. 389; *Pettyjohn v. Liebscher*, 92 Ga. 149.

*Illinois*.—*Waterman v. Alden*, 144 Ill. 90; *Van Buskirk v. Van Buskirk*, 148 Ill. 9.

*Kansas*.—*Morrow v. Saline County*, 21 Kan. 484.

*Kentucky*.—*Cromie v. Bull*, 81 Ky. 646.

*Maryland*.—*Diffenderfer v. Winder*, 3 Gill & J. (Md.) 311; *Chase v. Lockerman*, 11 Gill & J. (Md.) 185, 35 Am. Dec. 277; *Norris v. Lantz*, 18 Md. 260.

*Massachusetts*.—*Barrell v. Joy*, 16 Mass. 221; *Parsons v. Winslow*, 16 Mass. 361.

*Mississippi*.—*Coffin v. Bramliitt*, 42 Miss.

194, 97 Am. Dec. 449; *Barr v. Lewis*, 71 Miss. 727.

*Missouri*.—*State v. Meagher*, 44 Mo. 356, 100 Am. Dec. 208; *Fudge v. Durn*, 51 Mo. 264; *Sherwood v. Saxton*, 63 Mo. 78; *Harkness v. Scammon*, 48 Mo. App. 136.

*New Hampshire*.—*Kimball v. Reding*, 31 N. H. 352, 64 Am. Dec. 333.

*New Jersey*.—*Hamburgh Mfg. Co. v. Edsall*, 12 N. J. Eq. 392; *Childs v. Jones*, 41 N. J. Eq. 74; *Staats v. Bergen*, 30 N. J. L. 131.

*New York*.—*Litchfield v. White*, 7 N. Y. 438, 57 Am. Dec. 534, 3 Sandf. Ch. (N. Y.) 545; *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546; *McCabe v. Fowler*, 84 N. Y. 314; *Crabb v. Young*, 92 N. Y. 56; *Denton v. Sanford*, 103 N. Y. 607; *Purdy v. Lynch*, 145 N. Y. 462; *Gomez v. Gomez*, 33 N. Y. App. Div. 379; *Stuart v. Kissam*, 11 Barb. (N. Y.) 271; *Higgins v. Whitson*, 20 Barb. (N. Y.) 141; *Matter of Edwards*, 10 Daly (N. Y.) 68; *Pierson v. Thompson*, 1 Edw. (N. Y.) 212; *Scott v. Depeyster*, 1 Edw. (N. Y.) 513; *Brown v. Campbell*, Hopk. (N. Y.) 233; *James v. Cowing*, 17 Hun (N. Y.) 256; *Green v. Winter*, 1 Johns. Ch. (N. Y.) 27, 7 Am. Dec. 475; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513; *Thompson v. Brown*, 4 Johns. Ch. (N. Y.) 619; *Putnam v. Ritchie*, 6 Paige (N. Y.) 391.

*North Carolina*.—*Freeman v. Cook*, 6 Ired. Eq. (41 N. Car.) 373; *Whitford v. Foy*, 65 N. Car. 265; *Bason v. Harden*, 72 N. Car. 287.

*Pennsylvania*.—*Dilworth v. Sinderling*, 1 Binn. (Pa.) 488, 2 Am. Dec. 469; *Ex p. Casel*, 3 Watts (Pa.) 408; *Calhoun's Estate*, 6 Watts (Pa.) 185; *Neff's Appeal*, 57 Pa. St. 91; *Spering's Appeal*, 71 Pa. St. 11, 10 Am. Rep. 684; *Greenwood's Appeal*, 92 Pa. St. 181; *Fahnestock's Appeal*, 104 Pa. St. 46; *Fesmire's Estate*, 134 Pa. St. 67, 19 Am. St. Rep. 676; *Law's Estate*, 144 Pa. St. 499; *Old's Estate*, 176 Pa. St. 150; *Hart's Estate*, 203 Pa. St. 488; *Allen's Estate*, 9 Pa. Co. Ct. 329; *Gouldsey's Estate*, 10 Pa. Dist. 216.

*Rhode Island*.—*Hodges v. New England Screw Co.*, 1 R. I. 312, 53 Am. Dec. 624.

*Tennessee*.—*Bradshaw v. Cruise*, 4 Heisk. (Tenn.) 260; *State v. McAuley*, 4 Heisk. (Tenn.) 424; *Draper v. Joiner*, 9 Humph. (Tenn.) 612, 49 Am. Dec. 719; *Carter v. Roland*, 11 Humph. (Tenn.) 333.

*Texas*.—*Finlay v. Merriam*, 39 Tex. 56.

*Virginia*.—*Elliott v. Carter*, 9 Gratt. (Va.) 559; *Lovett v. Thomas*, 81 Va. 245; *Rush v. Steele*, 93 Va. 526.

have received no personal profit from the transactions which constitute such breach,<sup>1</sup> or that the trust may have been a voluntary one created by the trustees themselves.<sup>2</sup> If, in addition to having acted in good faith, trustees have sought the advice of counsel, they are so much the more protected from the consequences of their acts.<sup>3</sup>

In England and Canada, it is provided by statute that if, in any proceeding affecting trustees or trust property, it appears to the court that a trustee is or may be personally liable for a breach of trust, but has acted honestly and reasonably, and ought fairly to be excused for such breach, the court may relieve the trustee either wholly or partly from personal liability therefor.<sup>4</sup>

**Possible Profits.** — Within the general rule above stated, a trustee who has been guilty neither of wrongful nor of negligent conduct will not be held liable for rents, hires, proceeds, or other profits not actually received by him, on the theory that he might have received the same by pursuing a different course.<sup>5</sup>

*West Virginia.* — *Key v. Hughes*, 32 W. Va. 189; *Dickel v. Smith*, 42 W. Va. 126.

*Wisconsin.* — *Wilcox v. Bates*, 45 Wis. 138; *Williams v. Williams*, 55 Wis. 300, 42 Am. Rep. 708; *Hoile v. Bailey*, 58 Wis. 434.

**Distinction Between Liability of Ordinary Trustee and That of Towns and Cities.** — *Ayer v. Bangor*, 85 Me. 511.

**A Substituted Trustee** is liable to his *cestui que trust* and no one else. *Myler v. Fitzpatrick*, 6 Madd. 360.

**A Trustee Partially Accepting the Trust** is liable for the negligence of himself and of his co-trustee only as to the property embraced in his acceptance. *Malzy v. Edge*, 2 Jur. N. S. 80.

**The Submission to Arbitration** of a claim against the estate does not make a trustee personally liable for the award. *Davies v. Ridge*, 3 Esp. 101.

**Where the Trustee Has Unlimited Power** over the administration of the trust, nothing but fraud or gross negligence should hold him liable for losses. *Barrell v. Joy*, 16 Mass. 221.

**The Conduct of the Trustee Should Be Judged** in the light of the facts existing at the time he acted, not aided or enlightened by those which subsequently take place and by reason of which the loss has occurred. *Purdy v. Lynch*, 145 N. Y. 462.

**The Presumption Is Against** a trustee who destroys the written evidence of the trust. *Jones v. Knauss*, 31 N. J. Eq. 609, 32 N. J. Eq. 323.

**The Trustee of a Married Woman** is not personally liable for her debts when he has been guilty of no misconduct. *Woodson v. Perkins*, 5 Gratt. (Va.) 345.

**Feme Covert Trustee.** — Breaches of trust committed by a female trustee during coverture are chargeable to her husband. *Re Smith*, 48 L. J. Ch. 205; *Bahin v. Hughes*, 31 Ch. D. 390, 55 L. J. Ch. 472; *Phillips v. Richardson*, 4 J. J. Marsh. (Ky.) 212. See also *Palmer v. Wakefield*, 3 Beav. 227; *U. S. Trust Co. v. Sedgwick*, 97 U. S. 309.

**To Whom Trustee Liable.** — Where a majority of an association who have contributed towards a trust fund vote to turn over such fund to new trustees, the latter are not liable to those members of the association who take no part in the proceedings, but the former trustees are liable. *Abels v. McKeen*, 18 N. J. Eq. 462.

**Liability for Debts of Corporation.** — The statute exempting trustees of express trusts from lia-

bility for debts of a corporation in which they hold stock in their fiduciary capacity does not extend to one who subscribes for stock in his own name, but on the joint account of himself and another. *Stover v. Flack*, 30 N. Y. 64.

**When One Is Clothed with a Double Fiduciary Capacity**, if one trust is fully executed, and the amount of the trust fund authoritatively and definitely ascertained, the trustee may, by an unequivocal act, change his liability for the fund from one trust to the other, provided he has the trust money or property in hand, or if he then or afterwards segregates the amount from his general estate. *Lincoln Trust Co. v. Tracy*, 77 Mo. App. 96. See also *State v. Branch*, 126 Mo. 448, 134 Mo. 592, 56 Am. St. Rep. 533.

**Reimbursement of Trustee.** — Where a trustee is surcharged with the principal of a ground rent, the title of which is in the beneficiary, it is the duty of the court to order the reconveyance of such ground rent to the trustee. *Harris's Appeal*, 24 W. N. C. (Pa.) 370.

**1. Personal Profit Not Necessary.** — *Adair v. Shaw*, 1 Sch. & Lef. 272; *Taylor v. Benham*, 5 How. (U. S.) 233; *Blauvelt v. Ackerman*, 20 N. J. Eq. 141.

**2. Immaterial How Trust Created.** — *Drosier v. Brereton*, 15 Beav. 221; *Randolph v. East Birmingham Land Co.*, 104 Ala. 355, 53 Am. St. Rep. 64.

**3. Advice of Counsel.** — *Doyle v. Blake*, 2 Sch. & Lef. 243; *Vez v. Emery*, 5 Ves. Jr. 144; *Ellig v. Naglee*, 9 Cal. 683; *Perrine v. Vreeland*, 33 N. J. Eq. 102, *affirmed* 33 N. J. Eq. 596; *Miller v. Proctor*, 20 Ohio St. 442; *Neff's Appeal*, 57 Pa. St. 91. But compare *Freeman v. Cook*, 6 Ired. Eq. (41 N. Car.) 373. And see the title **ADVICE OF COUNSEL**, vol. 1, p. 907.

**4. England.** — *Judicial Trustees Act 1896* [59 & 60 Vict., cap. 35, § 3]; *Re Roberts*, 76 L. T. N. S. 479; *In re Stuart*, (1897) 2 Ch. 583, 66 L. J. Ch. 780; *In re Kay*, (1897) 2 Ch. 518, 66 L. J. Ch. 750; *In re De Clifford*, (1900) 2 Ch. 707, 83 L. T. N. S. 160; *Re Smith*, 71 L. J. Ch. 411, 86 L. T. N. S. 401.

*Canada.* — *Dover v. Denne*, 3 Ont. L. Rep. 664.

**5. Liability for Possible Profits.** — *Van Buskirk v. Van Buskirk*, 148 Ill. 9; *Hamburg Mfg. Co. v. Edsall*, 12 N. J. Eq. 302; *Perkins v. Brinkley*, 133 N. Car. 154; *Moore's Appeal*, 10 Pa. St. 435; *Greenwood's Appeal*, 92 Pa. St. 181;

But if property of the estate has been lost beyond recovery through the fault of the trustee, he will be decreed to account for all profits that might have been made therefrom.<sup>1</sup>

(2) *Naked Trustee*. — When the trustee has merely the legal title, and the beneficiary is entitled to the possession of the estate, the trustee is liable only for gross negligence,<sup>2</sup> and will not be compelled to make good losses occasioned by the delinquencies of the beneficiary.<sup>3</sup>

(3) *Constructive Trustee*. — One who assumes to act as trustee is subject to all the liabilities of a trustee,<sup>4</sup> as is also one who assists the trustee in committing a breach of trust.<sup>5</sup> Thus, where a trustee uses the trust funds in his own business, his partner, if he has notice of the trust, is equally liable as a constructive trustee;<sup>6</sup> and the same rule is applicable to a purchaser who buys from the trustee with knowledge of the fraudulent character of the sale.<sup>7</sup>

*Agents of Trustees*. — But strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, unless those agents receive some part of the trust property and act therewith in such manner as would render them personally liable if they were express trustees, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.<sup>8</sup>

(4) *Sanction or Acquiescence of Beneficiary*. — The court will not visit a trustee with the consequences of a breach of trust, committed with the sanc-

Thomson *v.* Peake, 38 S. Car. 440; Griffin *v.* Macaulay, 7 Gratt. (Va.) 476. See also Johnson *v.* Lewis, 2 Strobb. Eq. (S. Car.) 157. And see the title INVESTMENTS, vol. 17, p. 462.

**Where the Beneficiary Is Himself Not Free from Fault**, he is not in a position to claim the utmost that might have been made out of the estate. Miller *v.* Whittier, 36 Me. 577.

1. Freeman *v.* Cook, 6 Ired. Eq. (41 N. Car.) 373.

2. **Naked Trustee Liable Only for Gross Negligence**. — Carter *v.* Rolland, 11 Humph. (Tenn.) 333. See also Perkins *v.* Brinkley, 133 N. Car. 154.

3. **Losses Occasioned by Beneficiary**. — Mitchell *v.* Richey, 12 Grant Ch. (U. S.) 88, 11 Grant Ch. (U. C.) 511; Adams *v.* La Rose, 75 Ind. 471.

4. **Acting as Trustee**. — Pearce *v.* Pearce, 22 Beav. 248, 2 Jur. N. S. 843; Kirwan *v.* Daniel, 5 Hare 493, 16 L. J. Ch. 191, 11 Jur. 235; Rackham *v.* Siddall, 16 Sim. 297, 12 Jur. 640; McArthur *v.* Gordon, 126 N. Y. 597; Blewitt *v.* Olin, 14 Daly (N. Y.) 351. See also *In re* Barney, (1892) 2 Ch. 265, 61 L. J. Ch. 585.

**The Fund Intermeddled with must form part of the trust estate**. *In re* Mitchell, 74 Vt. 186.

5. **Assisting Trustee in Breach**. — Andrews *v.* Bousfield, 10 Beav. 511; Barnes *v.* Addv, L. R. 9 Ch. 244; Rolfe *v.* Gregory, 4 De G. J. & S. 576, 11 Jur. N. S. 98.

6. **Partner of Trustee**. — De Ribeyre *v.* Barclay, 23 Beav. 107, 26 L. J. Ch. 747; Eager *v.* Barnes, 31 Beav. 579; Coomer *v.* Bromley, 5 De G. & Sm. 532, 16 Jur. 609; Cleather *v.* Twisden, 28 Ch. D. 340, 54 L. J. Ch. 408; Trull *v.* Trull 13 Allen (Mass.) 407; Hollembaek *v.* More, 44 N. Y. Super. Ct. 107.

**One Member of a Firm cannot so act as to make himself a constructive trustee and render his partners liable**. Mara *v.* Browne, (1896) 1 Ch. 199, 65 L. J. Ch. 225. Compare Blyth *v.* Fladgate, (1891) 1 Ch. 337, 60 L. J. Ch. 66.

7. See *infra*, this title, VIII. *Rights and Liabilities of Purchasers*.

8. **Agent of Trustee — England**. — Sadler *v.* Lee, 6 Beav. 324, 7 Jur. 476; Atty.-Gen. *v.* Leicester, 7 Beav. 176; Robertson *v.* Armstrong, 28 Beav. 123; Hardy *v.* Caley, 33 Beav. 365; Brinsden *v.* Williams, (1894) 3 Ch. 185, 63 L. J. Ch. 713; Pannell *v.* Hurley, 2 Coll. Ch. Cas. 241; Bodenham *v.* Hoskyns, 2 De G. M. & G. 903, 16 Jur. 721; Pollard *v.* Downes, 1 Eq. Cas. Abr. 6, par. 4, 2 Ch. Cas. 121; Morgan *v.* Stephens, 3 Giff. 226, 7 Jur. N. S. 701; Archer *v.* Lavender, Ir. R. 9 Eq. 220; Clark *v.* Hoskins, 36 L. J. Ch. 689; Magnus *v.* Queensland Nat. Bank, 37 Ch. D. 466, 57 L. J. Ch. 413; *In re* Blundell, 40 Ch. D. 370, 57 L. J. Ch. 730; Gray *v.* Johnston, L. R. 3 H. L. 1; Barnes *v.* Addy, L. R. 9 Ch. 244; Lee *v.* Sankey, L. R. 15 Eq. 204; Rowland *v.* Witherden, 3 Macn. & G. 568, 21 L. J. Ch. 480; Keane *v.* Roberts, 4 Madd. 332; Myler *v.* Fitzpatrick, 6 Madd. 360; Williams *v.* Stevens, 4 Moo. P. C. C. N. S. 235, 12 Jur. N. S. 952; Wilson *v.* Moore, 1 Myl. & K. 127; Soar *v.* Ashwell, (1893) 2 Q. B. 390; Cowper *v.* Stoneham, 3 Reports 242; Macdonnell *v.* Harding, 7 Sim. 178, 4 L. J. Ch. 10. See also Fyler *v.* Fyler, 3 Beav. 550, 5 Jur. 187; Williams *v.* Williams, 17 Ch. D. 437; Pearson *v.* Scott, 9 Ch. D. 108; Dettmar *v.* Metropolitan, etc., Bank, 1 Hem. & M. 641.

*Canada*. — Secord *v.* Costello, 17 Grant Ch. (U. C.) 328.

**An Agent Is Not Liable** to the trustee when the latter's negligence permits a breach of trust by the agent's clerk. Whitmore *v.* Wilks, 3 C. & P. 364, 14 E. C. L. 349.

**A Renouncing Trustee** who becomes the agent of the other trustee is not liable to account as a trustee. Dove *v.* Everard, 1 Russ. & M. 231. But a trustee who does not disclaim and acts under a power of attorney from the other trustees is liable as trustee and not as agent. Montgomery *v.* Johnson, 11 Ir. Eq. 476.



tion or by the desire of the *cestui que trust*, or of one in which the latter acquiesces without original concurrence.<sup>1</sup> But the court must inquire into all the circumstances which induced acquiescence or concurrence,<sup>2</sup> and it must appear not only that all the beneficiaries joined in concurring or acquiescing,<sup>3</sup> but that they had full knowledge of all the facts and were apprised of their legal rights,<sup>4</sup> and were under no disability, such as may exist in case of married women, minors, and the like, to assert such rights.<sup>5</sup> A married woman, however, may acquiesce in a breach of trust when the trust property is held for her sole and separate use,<sup>6</sup> or when the trust instrument has conferred upon her power to release the trustee from the consequences of his acts.<sup>7</sup>

(5) *Measure of Liability*. — When the amount of the loss occasioned to the estate by the wrongful or negligent acts of the trustee is capable of being exactly ascertained, such amount is the measure of his personal liability.<sup>8</sup> But when the trustee has sold the trust property without authority or has converted the same to his own use, a difficulty arises as to the amount which he should be compelled to refund to the beneficiaries. In such cases, the true rule would seem to be that the trustee is liable to the extent of the actual value of the property at the time of the sale or conversion, with interest.<sup>9</sup> In the case of a wrongful sale, the actual value will be considered to be the amount of proceeds coming into the trustee's hands, in the absence of fraud

1. **Sanction or Acquiescence of Beneficiary** — England. — Griffiths *v.* Porter, 25 Beav. 236; Farrant *v.* Blanchford, 1 De G. J. & S. 107; Brice *v.* Stokes, 11 Ves. Jr. 325.

Arkansas. — Turman *v.* Forrester, 55 Ark. 336.

Maryland. — Hunt *v.* Gontrum, 80 Md. 64. Massachusetts. — Weston *v.* Jenkins, 128 Mass. 562; Pope *v.* Farnsworth, 146 Mass. 339.

New Jersey. — Dyer *v.* Riley, 51 N. J. Eq. 124.

New York. — Sherman *v.* Parish, 53 N. Y. 483; Butterfield *v.* Cowing, 112 N. Y. 486. See also Roosevelt *v.* Roosevelt, (N. Y. Super. Ct. Spec. T.) 6 Abb. N. Cas. (N. Y.) 447.

North Carolina. — Bason *v.* Harden, 72 N. Car. 287.

See *infra*, this section, 12. *Accounting*. And see also *infra*, this title, VII. *The Cestui Que Trust*.

**Loss Caused by Beneficiary** — A trustee is not liable for the penalty imposed for failing to pay a tax when due, when the delay was caused by the beneficiary. Disbrow *v.* Disbrow, 167 N. Y. 606, *affirming* 46 N. Y. App. Div. 111.

**A Trustee Is Not Exonerated** from liability because the beneficiary acted with the trustee's agent as the sole person accountable. Adams *v.* Clifton, 1 Russ. 297.

**Pursuing a Trust Fund** in the hands of a misconducting trustee cannot be construed as a waiver of claims for his deficiencies. Loud *v.* Winchester, 64 Mich. 23.

2. Walker *v.* Symonds, 3 Swanst. 64.

3. Henderson *v.* Sherman, 47 Mich. 267.

4. **Knowledge of Beneficiary**. — Munch *v.* Cockerell, 5 Myl. & C. 178; White *v.* Sherman, 168 Ill. 580, 61 Am. St. Rep. 132; Nichols, Appellant, 157 Mass. 20; Minneapolis Trust Co. *v.* Menage, 73 Minn. 441.

5. **Disability of Beneficiary**. — White *v.* Sherman, 168 Ill. 589, 61 Am. St. Rep. 132; Sherman *v.* Parish, 53 N. Y. 483.

6. Sherman *v.* Parish, 53 N. Y. 483.

7. Cooper's Estate, 11 Pa. Co. Ct. 617.

8. See *supra*, this subdivision, (1) *General Rule*.

9. **General Rule as to Measure of Liability**. — Pettyjohn *v.* Liebscher, 92 Ga. 149; Gibbs *v.* Meserve, 12 Ill. App. 613; Cushman *v.* Bonfield, 139 Ill. 219, *affirming* 36 Ill. App. 436; Smith *v.* Vertrees, 2 Bush (Ky.) 63; Ringgold *v.* Ringgold, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; Rogers *v.* Barnes, 169 Mass. 179; Darling *v.* Potts, 118 Mo. 506; Van Rensselaer *v.* Morris, 1 Paige (N. Y.) 13; Baker *v.* Disbrow, 3 Redf. (N. Y.) 348; Prondzinski *v.* Garbutt, 10 N. Dak. 300; Hart's Estate, 203 Pa. St. 488. Compare Irby *v.* Kitchell, 42 Ala. 438.

**The Market Value of Stock** at the time of the conversion thereof is the measure of the trustee's liability. Darling *v.* Potts, 118 Mo. 506.

**Admission of Value by Trustee**. — A trustee will be held liable for the conversion of stock in the amount stated by him to be its value in a declaration of trust given by him. McComb *v.* Frink, 149 U. S. 629, *affirming* 39 Fed. Rep. 292.

**Liability of Trustee When Life Tenant**. — The liability for a wrongful sale by a trustee who is a life tenant is the value of the property sold at the time of his death, excluding improvements made since the sale. Norman *v.* Cunningham, 5 Gratt. (Va.) 63.

**Liability for Sale of Portion Only**. — A trustee who wrongfully sells part of the trust property is liable for the value of such part only, unless the value of the whole has been thereby depreciated. Silliman *v.* Gano, 90 Tex. 637.

**A Trustee Who Releases a Recognizance** without consideration is liable for the penalty thereof. Jevon *v.* Bush, 1 Vern. 342.

**Hire for Slaves**. — A trustee is liable to pay only fair hire for slaves used by him instead of the profits accruing from their labor. Johnson *v.* Richey, 4 How. (Miss.) 233.

**Interest, Costs, and Expenses**. — As to the liability of a trustee for interest, costs, and expenses, see *infra*, this section, 12. *Accounting*.

or lax faith on his part in conducting the sale.<sup>1</sup> If the sale has been conducted fraudulently, the trustee is liable for the difference between the actual value and the price received.<sup>2</sup> When the trustee is unable to show the price realized by him, he is chargeable with the utmost value of the property,<sup>3</sup> and the same is true when the trustee has so mingled or confused the trust property that its actual value cannot be ascertained.<sup>4</sup> The trustee is liable for the whole value of property misappropriated by him, no matter who else may have participated in the profits from the transaction,<sup>5</sup> and though the *cestui que trust* may be able to recover a part of such property.<sup>6</sup>

(6) *Liability in Tort.* — A trustee is individually liable to third persons for the negligence of himself<sup>7</sup> or of his employees<sup>8</sup> in managing the trust property.

b. FOR MISTAKES. — If trustees act in good faith within the limits of their powers, using proper prudence and diligence, they will not be held responsible for mere mistakes or errors of judgment from which they have derived no benefit.<sup>9</sup> But they will not be permitted to shield themselves by pleading gross ignorance, when the mistake might have been avoided by the exercise of ordinary intelligence.<sup>10</sup>

c. FOR ACTUAL MISCONDUCT — (1) *Transcending Powers.* — Trustees are bound to observe the limits placed upon their powers, either by law or by the trust instrument, and if they transcend such powers and cause damage to the estate they will be held responsible therefor, although they may have acted in perfect good faith.<sup>11</sup>

1. *Value Determined by Proceeds.* — Greenwood's Appeal, 92 Pa. St. 181; Powers v. Black, 159 Pa. St. 153. See also Rochefoucauld v. Boustead, (1898) 1 Ch. 550, 67 L. J. Ch. 427.

Rule Applicable to Unmarketable Stock. — Loetscher v. Dillon, 119 Iowa 202.

In New Jersey the rule is that a trustee who sells contrary to the directions of the trust instrument will be held responsible for the highest value the property can be shown to have had. Melick v. Voorhees, 24 N. J. Eq. 305, affirmed 25 N. J. Eq. 523. See also Cooper v. Browning, 40 N. J. Eq. 335; Danforth v. Moore, 55 N. J. Eq. 127.

In Texas it has been held that where a trustee wrongfully sells land, the measure of damages is not the value of the land at the time of sale, but either the selling price with interest or the value at the time suit is instituted against the trustee. Mixon v. Miles, 92 Tex. 318. See also Loomis v. Satterthwaite, (Tex. Civ. App. 1894) 25 S. W. Rep. 68.

If the Trustee Receives More than the Actual Value, he must account for the whole. Parker v. Straat, 39 Mo. App. 616.

2. Cleghorn v. Love, 24 Ga. 590.

3. Morton's Estate, 7 Phila. (Pa.) 484.

4. When Actual Value Not Ascertainable. — Hardin v. Eames, 5 Ill. App. 153; Brackenridge v. Holland, 2 Blackf. (Ind.) 377, 20 Am. Dec. 123; Ringgold v. Ringgold, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250. And see Perrin v. Lepper, 72 Mich. 454, holding that a trustee who misappropriates the funds and conceals his transactions so that the profits cannot be estimated may be compelled to pay over the original fund with the largest profits that could be made thereon by sagacious business men.

5. Davis v. Hoffman, 167 Mo. 573.

6. Rogers v. Barnes, 169 Mass. 179.

7. O'Malley v. Gerth, 67 N. J. L. 610.

8. Sprague v. Smith, 29 Vt. 421, 70 Am. Dec. 424. See also Williams v. Taylor, 4

Port. (Ala.) 234. And see the title AGENCY, vol. 1, p. 930.

9. *Liability for Mistakes.* — Crookshanks v. Turner, 7 Bro. P. C. (Toml. ed.) 255; Matlocks v. Moulton, 84 Me. 545; Harkness v. Scammon, 48 Mo. App. 136; Matter of McIntyre, 24 N. Y. App. Div. 167; Pleasanton's Appeal, 99 Pa. St. 362. See also Litchfield v. White, 3 Sandf. (N. Y.) 545; Kimball v. Reding, 31 N. H. 352, 64 Am. Dec. 333; Miller v. Proctor, 20 Ohio St. 442.

Recording Deed in Wrong Office. — Hext v. Porcher, 1 Strobb. Eq. (S. Car.) 170.

Erroneous Construction of Trust Instrument. — Atty.-Gen. v. Exeter, 2 Russ. 45.

A Trustee Who Did Not Know of his right to real property and suffered an adverse title thereto to be acquired by lapse of time was held not liable. Youde v. Cloud, L. R. 18 Eq. 634, 44 L. J. Ch. 93.

Acting under Professional Advice. — See *supra*, this section, a. In General — (1) *General Rule.*

10. Hun v. Carey, 82 N. Y. 65, 37 Am. Rep. 546; Gilbert v. Sutliff, 3 Ohio St. 129. See also Bogart v. Van Velsor, 4 Edw. (N. Y.) 725.

11. *Liability for Transcending Powers.* — Wightwick v. Lord, 6 H. L. Cas. 217; Hogg v. Hoag, 107 Fed. Rep. 807; Green v. Putney, 1 Md. Ch. 262; Loud v. Winchester, 64 Mich. 23; Vernon v. Board of Police, 47 Miss. 181; Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546; Atkinson v. Beckett, 34 W. Va. 584. See also Atty.-Gen. v. Greenfield Library Assoc., 135 Mass. 563. And see the title INVESTMENTS, vol. 17, p. 462.

Wrongful Sale of Trust Property. — Cleghorn v. Love, 24 Ga. 590; Gibbs v. Meserve, 12 Ill. App. 613; Smith v. Vertrees, 2 Bush (Ky.) 63; Ringgold v. Ringgold, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; Melick v. Voorhees, 24 N. J. Eq. 305; Danforth v. Moore, 55 N. J. Eq. 127; James v. Cowing, 17 Hun (N. Y.) 256,

(2) *Fraud, Conversion, or Misappropriation*—**Fraud.**—A trustee who is guilty of any fraudulent conduct in dealing with the trust estate is personally liable for the resulting loss,<sup>1</sup> even though the trust instrument gives him full discretion and expressly releases him from liability for his acts.<sup>2</sup> Thus, the trustee must respond in damages for a fraudulent sale<sup>3</sup> of trust property, or for wilfully paying, in the purchase of property, more than the same is worth,<sup>4</sup> or for fraudulently purchasing, with trust moneys, property belonging to himself individually.<sup>5</sup>

**Conversion.**—If the trustee converts the trust funds to his own use, he is personally chargeable with the full value thereof.<sup>6</sup> Thus, he will be liable for taking title to trust property in his own name;<sup>7</sup> or for applying trust assets to the discharge of his individual responsibilities,<sup>8</sup> unless the trust is indebted to him;<sup>9</sup> or for wrongfully refusing to deliver property upon demand;<sup>10</sup> or for commingling the trust funds with his own property.<sup>11</sup>

82 N. Y. 449; *Silliman v. Gano*, 90 Tex. 637; *Loomis v. Satterthwaite*, (Tex. Civ. App. 1894) 25 S. W. Rep. 68; *Mixon v. Niles*, (Tex. Civ. App. 1898) 46 S. W. Rep. 105; *Norman v. Cunningham*, 5 Gratt. (Va.) 63.

**Wrongful Purchase with Trust Funds.**—*Shaw v. Devecmon*, 81 Md. 215; *Deegan v. Capner*, 44 N. J. Eq. 339; *Baker v. Disbrow*, 3 Redf. (N. Y.) 348.

**Abuse of Discretionary Powers.**—*Sherwood v. Saxton*, 63 Mo. 78; *Harkness v. Scammon*, 48 Mo. App. 136. And see *supra*, this section, 8. *Powers of Trustees*—*c. Control by Court of Powers of Trustees*.

**A Trustee Who Expend More than he is authorized to expend is liable unless the court subsequently ratifies his acts.** *Patterson's Appeal*, 104 Pa. St. 369.

**Compromising Claim Against Estate.**—A trustee is not liable for compromising a claim against the estate when it is probable that any man of good business judgment would have thought it safer so to do. *Loud v. Winchester*, 64 Mich. 23; *Gomez v. Gomez*, 33 N. Y. App. Div. 379. And see *supra*, this section, 8. *Powers of Trustees*.

**Action under Void Order of Court.**—Where a trustee undertakes to convey land under a void order of court, he should not be held personally liable for the value thereof in the absence of fraud on his part and if the land can be recovered. *Canfield v. Canfield*, (C. C. A.) 118 Fed. Rep. 1.

1. **Fraud.**—*White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132; *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546.

2. **A Trustee Giving an Opinion as an Attorney** is not chargeable on the ground of misconduct, misrepresentation, or fraud, when such opinion is misapplied without his knowledge. *Rogers v. Benson*, 5 Johns. Ch. (N. Y.) 431.

3. *Markle's Estate*, 182 Pa. St. 378.

3. **Fraudulent Sale.**—*Sadler v. Lee*, 6 Beav. 324, 7 Jur. 476; *Adams v. Lambard*, 80 Cal. 426; *Cleghorn v. Love*, 24 Ga. 590; *Smith v. Vertrees*, 2 Bush (Ky.) 63; *Cocke v. Minor*, 25 Gratt. (Va.) 246.

**Selling at a Loss** is not such a fraud or negligence as will render the trustee liable, if such a course seemed wise at the time. *Owen v. Campbell*, 100 Mich. 34.

4. *Larkin v. Armstrong*, 9 Grant Ch. (U. C.) 390.

5. **Purchase of Trustee's Own Property.**—*Nichols*, Appellant, 157 Mass. 20; *McKim v. Glover*, 167 Mass. 280.

6. **Conversion.**—*Cushman v. Bonfield*, 139 Ill. 219, affirming 36 Ill. App. 436; *Haxton v. McClaren*, 132 Ind. 235; *Loetscher v. Dillon*, 119 Iowa 202; *Chamberlain v. O'Brien*, 46 Minn. 80; *Staats v. Bergen*, 30 N. J. L. 131; *Prondzinski v. Garbutt*, 10 N. Dak. 300; *Hart's Estate*, 203 Pa. St. 488. See also *Crane's Estate*, 174 Pa. St. 613.

**Conversion of Discounted Note Not Due.**—*Brown v. Cowell*, 116 Mass. 461.

**The Personal Representative of a Trustee**, who converts the property in ignorance of its trust character, is not personally liable for loss. *Jernee v. Bentley*, 49 N. J. Eq. 584.

**A Beneficiary Appointed Sole Trustee** is individually liable to the estate for funds and property had and received to her own use. *Woodbridge v. Bockes*, 59 N. Y. App. Div. 503.

**It Is Not a Fraudulent Conversion** for one who has deposited money for another in his own name as trustee to change or withdraw the deposit, so long as the fund is preserved intact. *In re Walker*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 666, 63 Hun (N. Y.) 627.

7. **Taking Title Personally.**—*De Jarnette v. De Jarnette*, 41 Ala. 708; *Cunningham v. Schley*, 41 Ga. 426; *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132; *Gilbert v. Welsch*, 75 Ind. 557; *Morris v. Wallace*, 3 Pa. St. 319, 45 Am. Dec. 642; *Stanley's Appeal*, 8 Pa. St. 431, 49 Am. Dec. 530; *Sanders v. Forgasson*, 3 Baxt. (Tenn.) 249; *Draper v. Joiner*, 9 Humph. (Tenn.) 612, 49 Am. Dec. 719. See also the title *INVESTMENTS*, vol. 17, p. 456.

8. *Van Rensselaer v. Morris*, 1 Paige (N. Y.) 13.

**Renewing Lease for Personal Benefit.**—*Ex p. Phelps*, 9 Mod. 357.

9. *Jackson v. Updegraffe*, 1 Rob. (Va.) 111.

10. *Horry v. Glover*, 2 Hill Eq. (S. Car.) 515.

**A Trustee Is Not Guilty of Conversion** for refusing to relinquish the title to property not in his possession and which he has no present power to sell. *Huddleston v. Currin*, 4 Humph. (Tenn.) 237.

11. **Mingling Trust Funds.**—*Cowper v. Stoneham*, 3 Reports 242; *Moore v. Mitchell*, 2 Woods (U. S.) 483, affirmed 95 U. S. 587; *Royall v. McKenzie*, 25 Ala. 363; *De Jarnette*



**Misappropriation.** — Where a trustee misappropriates or disposes of property contrary to, or in a manner variant from, the terms of his trust, he will be required to make good the property thus lost to the estate, at its full value.<sup>1</sup> Within this rule, it is a breach of trust for the trustee to reconvey or deliver to the settlor any part of the trust funds,<sup>2</sup> even though he receive other property in return,<sup>3</sup> or to dispose of securities, by order of the settlor, otherwise than as first directed.<sup>4</sup> And the same principle obtains though the settlor be also a beneficiary.<sup>5</sup>

**d. FOR NEGLIGENCE** — (1) *Failure to Perform Duty.* — A trustee will be held equally liable for a failure to do that which he was in duty bound to do as for his acts of positive misconduct. For any neglect of duty, expressed or implied, he must respond in damages.<sup>6</sup> But a trustee is not responsible for the nonperformance of a trust of which he is ignorant,<sup>7</sup> nor will a deviation from the strict letter of the trust be considered a breach, when such deviation is necessary or beneficial to the *cestui que trust*.<sup>8</sup> As instances of losses for which a trustee will be held liable may be mentioned those arising from his failure to keep accounts,<sup>9</sup> failure to make repairs,<sup>10</sup> failure to record deeds or other securities,<sup>11</sup> failure to pay taxes,<sup>12</sup> and failure to obey an order of the

*v. De Jarnette*, 41 Ala. 708; *Gunter v. Janes*, 9 Cal. 643; *McCook v. Harp*, 81 Ga. 229; *Harrison v. Smith*, 83 Mo. 210, 53 Am. Rep. 571; *Hooley v. Gieve*, 9 Daly (N. Y.) 104; *Case v. Abeel*, 1 Paige (N. Y.) 393; *Kellett v. Rathbun*, 4 Paige (N. Y.) 102; *Saunders v. Gregory*, 3 Heisk. (Tenn.) 567; *Re Hodges*, 66 Vt. 70, 44 Am. St. Rep. 820. See also *Sparhawk v. Sparhawk*, 114 Mass. 356.

In *Wisconsin* it has been held that a mere attempt by the trustee to ignore the trust and deal with the property as his own is not such a fraud as will charge him beyond actual receipts. *Wilcox v. Bates*, 45 Wis. 138; *Hoile v. Bailey*, 58 Wis. 434.

**When a Trustee Mingles His Own Funds with Trust Funds**, in an indistinguishable mass, and takes therefrom a part for his own use, the part taken will be presumed to have been his own and not that which he held as trustee. *Standish v. Babcock*, 52 N. J. Eq. 628.

**1. Misappropriation of Funds.** — *State v. Hunter*, 73 Conn. 435; *Hardin v. Eames*, 5 Ill. App. 153; *Chamberlain v. O'Brien*, 46 Minn. 80; *Seehorn v. American Nat. Bank*, 148 Mo. 256; *Rothschild v. Frank*, 14 N. Y. App. Div. 399; *Moore v. Robertson*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 554. See also *Eric School Dist. v. Griffith*, 203 Pa. St. 123.

**A Trustee Is Liable to the Beneficiary's Surety** for a misapplication of funds. *Loughmiller v. Harris*, 2 Heisk. (Tenn.) 553.

**2. Reconveyance to Settlor.** — *Henderson v. Sherman*, 47 Mich. 267; *Eighmie v. Townsend*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 464, 60 Hun (N. Y.) 586; *National Bank v. Moore*, 21 Grant Ch. (U. C.) 269. See also *Richards v. Reeves*, (Ind. 1896) 45 N. E. Rep. 624.

**3. Jacques v. Fackney**, 64 Ill. 87.

**4. Wilkinson v. Stewart**, 30 Ill. 48.

**5. Henderson v. Sherman**, 47 Mich. 267.

**6. Neglect of Duty.** — *Carruthers v. Carruthers*, (1896) A. C. 659; *Hogg v. Hoag*, 107 Fed. Rep. 807; *Green v. Winter*, 1 Johns. Ch. (N. Y.) 26, 7 Am. Dec. 475; *Duffy v. Duncan*, 32 Barb. (N. Y.) 587; *James v. Cowing*, 17 Hun (N. Y.) 256; *Freeman v. Cook*, 6 Ired. Eq. (41 N. Car.) 373; *Bradshaw v. Cruise*, 4 Heisk. (Tenn.) 260; *Carter v. Rolland*, 11 Humph.

(Tenn.) 333. See also *Merrill v. Farmers' L. & T. Co.*, 24 Hun (N. Y.) 297.

**Indemnity Clause in Settlement.** — A trustee is liable for a positive breach of duty in spite of an indemnity clause in the settlement exonerating him from omission or neglect. *Rae v. Meek*, 14 App. Cas. 558.

**Failure to Comply with Foreign Statute.** — A trustee is not negligent in failing to guard against the provisions of a foreign statute of which he did not know the existence. *New Jersey Constr. Co. v. Farmers' L. & T. Co.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 672.

**Failure to Perform Agreement with Beneficiary.** — A trustee who agrees to purchase land for his beneficiary and to pay for the same with trust funds is liable for the loss occasioned by his failure to pay when payment is due. *Green v. Winter*, 1 Johns. Ch. (N. Y.) 26, 7 Am. Dec. 475.

**7. Youde v. Cloud**, L. R. 18 Eq. 634, 44 L. J. Ch. 93. See also *Pearce v. Pearce*, 22 Beav. 248, 2 Jur. N. S. 843.

**8. Harrison v. Randall**, 9 Hare 397, 16 Jur. 72.

**A Failure to Sue**, as directed in the trust instrument, will not render the trustee liable, where no loss has resulted therefrom. *Pattenden v. Hobson*, 17 Jur. 406.

**9. Failure to Keep Accounts.** — *Waterman v. Alden*, 144 Ill. 90; *Nagle's Estate*, 12 Phila. (Pa.) 25, 34 Leg. Int. (Pa.) 264. See also *Yoder's Appeal*, 45 Pa. St. 394; *Ward v. Shire*, (Ky. 1901) 65 S. W. Rep. 8. And see *infra*, this section, *Accounting*.

**10. Failure to Make Repairs.** — *Whittingham v. Schofield*, (Ky. 1902) 67 S. W. Rep. 846; *Keating v. Stevenson*, 21 N. Y. App. Div. 604; *Moniot v. Jackson*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 197; *Gillick v. Jackson*, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 627; *Ferrier v. Trépannier*, 24 Can. Sup. Ct. 86. See also *supra*, this section, 8. *Powers of Trustees*.

**11. Failure to Record Securities.** — *Hatch's Appeal*, (Pa. 1888) 12 Atl. Rep. 593; *Cooper v. Day*, 1 Rich. Eq. (S. Car.) 26; *Cogbill v. Boyd*, 77 Va. 450. Compare *Sleeman v. Wilson*, L. R. 13 Eq. 86.

**12. Failure to Pay Taxes.** — *Thiebaud v. Tait*,

court as to the payment of the beneficiary's debts.<sup>1</sup>

(2) *Intrusting Funds to Others* — (a) *In General*. — A trustee acting strictly within the line of his duty and exercising reasonable care and diligence will not be responsible for the insolvency or misconduct of those to whom, from necessity, he has intrusted the trust funds. But if the regular course of business in administering the trust does not require that the trustee part with the custody of the funds, or if any part of the trust property be put within the control of persons who ought not to be intrusted with it, and a loss be thereby eventually sustained, the trustee will be liable to make such loss good.<sup>2</sup> Thus, permitting the settlor to retain possession of or to collect trust funds is a breach of trust for which the trustee is personally liable.<sup>3</sup>

(b) *Bank Deposits*. — A trustee will not be held liable for the loss of trust funds deposited by him in a bank, provided such deposit was made in good faith, and ordinary prudence and diligence were exercised in the selection of a depository.<sup>4</sup> But the trustee must make good the loss if the deposit was not necessary,<sup>5</sup> or if the fund had been theretofore ordered to be paid into court<sup>6</sup> or to be invested,<sup>7</sup> or if the intrusting of the trust moneys to the bank partook of the nature of a loan rather than of a deposit.<sup>8</sup> And a trustee is not justified in leaving funds on deposit for an unreasonable length of time,<sup>9</sup> except with the consent or by the direction of the beneficiary.<sup>10</sup>

*Manner of Deposit*. — In order to escape liability, the trustee must make the deposit in the name of the trust estate, and not to his personal credit<sup>11</sup> or in

138 Ind. 238; *Jones v. Jones*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 844.

1. *Failure to Obey Order of Court*. — *Williams v. Thorn*, 81 N. Y. 381.

2. *Intrusting Funds to Others*. — *Clough v. Bond*, 3 Myl. & C. 496; *Langford v. Gascoyne*, 11 Ves. Jr. 333; *Forsyth v. Woods*, 11 Wall. (U. S.) 484; *Matter of Olmstead*, 52 N. Y. App. Div. 515, *affirmed* 164 N. Y. 571; *Beal v. Darden*, 4 Ired. Eq. (39 N. Car.) 76; *Freeman v. Cook*, 6 Ired. Eq. (41 N. Car.) 373; *Key v. Hughes*, 32 W. Va. 184. See also *Brown v. Clark*, 1 Jur. 838.

3. *Intrusting Funds to Settlor*. — *Harrison v. Mock*, 10 Ala. 185; *Speakman v. Tatem*, 48 N. J. Eq. 136.

4. *No Liability for Loss of Deposit* — *England*. — *Ex p. Belchier*, Amb. 218; *Knight v. Pli-mouth*, 3 Atk. 480; *Swinfen v. Swinfen*, 29 Beav. 211; *Johnson v. Newton*, 11 Hare 160; *Wilks v. Groom*, 3 Drew. 584, 2 Jur. N. S. 681; *France v. Woods*, Tamlyn 172; *Rowth v. Howell*, 3 Ves. Jr. 565; *Adams v. Claxton*, 6 Ves. Jr. 226; *Churchill v. Hobson*, 1 P. Wms. 241; *Jones v. Lewis*, 2 Ves. 240; *Clough v. Bond*, 3 Myl. & C. 490.

*United States*. — *Barney v. Saunders*, 16 How. (U. S.) 546.

*Indiana*. — *Norwood v. Harness*, 98 Ind. 134, 49 Am. Rep. 739; *State v. Greensdale*, 106 Ind. 364.

*Kentucky*. — See *Germania Safety Vault, etc., Co. v. Driskell*, (Ky. 1902) 66 S. W. Rep. 610.

*Maryland*. — See *O'Hara v. Shepherd*, 3 Md. Ch. 306.

*New York*. — *Cornwell v. Deck*, 8 Hun (N. Y.) 122.

*North Carolina*. — See *Collins v. Gooch*, 97 N. Car. 186.

*Pennsylvania*. — *Breneman v. Mylin*, 12 Pa. Co. Ct. 324; *Law's Estate*, 144 Pa. St. 499.

*South Carolina*. — *Crane v. Moses*, 13 S. Car. 561.

*Virginia*. — *Whitehead v. Whitehead*, 85 Va. 870.

*Trustee May Select Bank Where Settlor Did Business*. — *Dorchester v. Effingham*, Tamlyn 279; *Rowth v. Howell*, 3 Ves. Jr. 565; *Hanbest's Appeal*, 92 Pa. St. 482.

5. *When Deposit Not Necessary*. — *Macdonnell v. Harding*, 7 Sim. 178, 4 L. J. Ch. 10; *Darke v. Martyn*, 1 Beav. 525; *Moyle v. Moyle*, 2 Russ. & M. 710. See also *Matter of Knight*, (Supm. Ct. Spec. T.) 21 Abb. N. Cas. (N. Y.) 388.

6. *When Fund Ordered Paid into Court*. — *Wilkinson v. Bewick*, 4 Jur. N. S. 1010; *Lunham v. Blundell*, 4 Jur. N. S. 3.

7. *Matter of Knight*, (Supm. Ct. Spec. T.) 21 Abb. N. Cas. (N. Y.) 388, holding that, in such case, the trustee is liable in spite of a clause in the trust instrument exonerating him from liability for losses occasioned by the failure of banks.

8. *When Deposit Is in Nature of Loan*. — *Barney v. Saunders*, 16 How. (U. S.) 535; *Baskin v. Baskin*, 4 Lans. (N. Y.) 94; *Matter of Knight*, (Supm. Ct. Spec. T.) 21 Abb. N. Cas. (N. Y.) 388; *Baer's Appeal*, 127 Pa. St. 360; *Frankenfield's Appeal*, 11 W. N. C. (Pa.) 373. See also *Hunt, Appellant*, 141 Mass. 515; *Wilkinson v. Dodd*, 40 N. J. Eq. 123, *affirmed* 41 N. J. Eq. 566; *Evans's Estate*, 7 Pa. Super. Ct. 142. And see the title INVESTMENTS, vol. 17, p. 452.

*It Is Still a Deposit* though interest is paid and a notice of withdrawal is necessary. *Law's Estate*, 144 Pa. St. 499.

9. *Leaving Funds on Deposit for Unreasonable Time*. — *Horsely v. Chaloner*, 2 Ves. 84; *Moyle v. Moyle*, 2 Russ. & M. 710; *Barney v. Saunders*, 16 How. (U. S.) 535; *Wood v. Myrick*, 17 Minn. 408.

10. *Heckert's Appeal*, 69 Pa. St. 264. See also *Mills v. Swearingen*, 67 Tex. 269.

11. *Trustee Not to Deposit Funds in Own Name* — *England*. — *Wren v. Kirton*, 11 Ves. Jr. 377;

such a way as to part with the sole control thereof.<sup>1</sup> But though he does deposit in his own name, he will not be liable where the bank had knowledge of the character of the funds, and the loss is not due to the form in which the deposit was made.<sup>2</sup>

(3) *Payment to Persons Not Entitled.*—If the trustee pays over the trust funds to persons not entitled thereto, he must bear the loss,<sup>3</sup> though he acts under the best advice he can procure.<sup>4</sup> So, a trustee is liable if he pays one beneficiary in full and the estate thereafter depreciates;<sup>5</sup> or if he distributes the estate regardless of claims against, or assignments of, any part of the funds,<sup>6</sup> of which he has legal notice.<sup>7</sup> A trustee may, without liability, pay

*Masses v. Banner*, 1 Jac. & W. 241; *Matthews v. Brise*, 6 Beav. 239; *Robinson v. Ward*, 2 C. & P. 60, 12 E. C. L. 29; *Macdonnell v. Harding*, 7 Sim. 178; *Pennell v. Deffell*, 4 De G. M. & G. 372; *Fletcher v. Walker*, 3 Madd. 73.

*Alabama.*—See *Beasley v. Watson*, 41 Ala. 234.

*Georgia.*—See *Phillips v. Lamar*, 27 Ga. 228, 73 Am. Dec. 731.

*Illinois.*—*White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132.

*Indiana.*—*Gilbert v. Welsch*, 75 Ind. 561; *Fletcher v. Sharpe*, 108 Ind. 276; *Naltner v. Dolan*, 108 Ind. 500, 58 Am. Rep. 61; *Corya v. Corya*, 119 Ind. 593.

*Louisiana.*—See *Norris v. Hero*, 22 La. Ann. 605.

*Maryland.*—*Jenkins v. Walter*, 8 Gill & J. (Md.) 218, 29 Am. Dec. 539.

*Massachusetts.*—*School Dist. v. Greenfield First Nat. Bank*, 102 Mass. 174.

*Mississippi.*—*Coffin v. Bramlitt*, 42 Miss. 194, 97 Am. Dec. 449.

*Missouri.*—*Coleman v. Lipscomb*, 18 Mo. App. 444.

*New York.*—*Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520; *Matter of Stafford*, 11 Barb. (N. Y.) 353.

*Ohio.*—*Shaw v. Bauman*, 34 Ohio St. 32. See *Odd Fellows' Beneficial Assoc. v. Ferson*, 2 Ohio Cir. Dec. 48.

*Pennsylvania.*—*Com. v. McAlister*, 28 Pa. St. 486, 30 Pa. St. 536; *Law's Estate*, 144 Pa. St. 499.

*Tennessee.*—*Draper v. Joiner*, 9 Humph. (Tenn.) 612, 49 Am. Dec. 719. See also *Mason v. Whitthorne*, 2 Coldw. (Tenn.) 242.

*Virginia.*—See *Parsley v. Martin*, 77 Va. 376, 46 Am. Rep. 733.

*Wisconsin.*—*Williams v. Williams*, 55 Wis. 300, 42 Am. Rep. 708; *Booth v. Wilkinson*, 78 Wis. 652, 23 Am. St. Rep. 443.

**Rule Applies Though Trustee Has No Personal Deposit.**—*Summers v. Reynolds*, 95 N. Car. 404.

1. *Salway v. Salway*, 2 Russ. & M. 215.

2. **Where Bank Has Knowledge of Character of Funds.**—*Atterberry v. McDuffee*, 31 Mo. App. 603; *Parsley v. Martin*, 77 Va. 376, 46 Am. Rep. 733. See also *Jenkins v. Walter*, 8 Gill & J. (Md.) 218, 29 Am. Dec. 539; *School Dist. v. Greenfield First Nat. Bank*, 102 Mass. 174; *Coleman v. Lipscomb*, 18 Mo. App. 444.

**Deposit as Agent.**—That a trustee deposits money in bank to his credit as agent is not a conversion of the fund, even though the bank knew of the existence of the trust. *Mun-*

*nerlyn v. Augusta Sav. Bank*, 88 Ga. 333, 30 Am. St. Rep. 159.

3. **Payment to Persons Not Entitled.**—*Margetts v. Perks*, 34 L. J. Ch. 109; *Doyle v. Blake*, 2 Sch. & Lef. 243; *Garrigus v. Burnett*, 9 Ind. 528; *Sparrow's Succession*, 39 La. Ann. 696; *Owings v. Rhodes*, 65 Md. 408; *Dodd v. Winship*, 144 Mass. 461; *Thayer v. Swift, Harr. (Mich.)* 430; *Wasson v. Garrett*, 2 Baxt. (Tenn.) 477. See also *Crosby v. Church*, 3 Beav. 485, 5 Jur. 50; *Cothay v. Sydenham*, 2 Bro. C. C. 391; *Anson v. Potter*, 13 Ch. D. 141; *Hayes v. Oatley*, L. R. 14 Eq. 1, 41 L. J. Ch. 510; *Molyneux v. Fletcher*, (1898) 1 Q. B. 648, 67 L. J. Q. B. 392; *Kempland v. Humphries*, 2 Jones (Ir.) 726; *Mills v. Osborne*, 7 Sim. 30; *Averell v. Barber*, 24 N. Y. App. Div. 53.

**Where the Trustee Doubts the Identity of the cestui que trust**, without cause, and pays to others, he is liable. *Hutchins v. Hutchins*, 15 Jur. 869.

**A Trustee Who Relies upon a Forged Marriage Certificate** is liable for payment to the wrong person. *Eaves v. Hickson*, 30 Beav. 136, 7 Jur. N. S. 1297.

**Charging Against the Sum Due a Beneficiary** an amount owing by her guardians to the trustees in a different matter is not a proper payment for which the trustees will be given credit. *Hunting v. Safford*, 183 Mass. 157.

4. **Payment by Advice No Defense.**—*Boulton v. Beard*, 3 De G. M. & G. 608; *Doyle v. Blake*, 2 Sch. & Lef. 243; *Owings v. Rhodes*, 65 Md. 408.

5. **Payment Followed by Depreciation.**—*Tilsly v. Throckmorton*, 2 Ch. Cas. 132. Compare *Bryant v. Russell*, 23 Pick. (Mass.) 508.

6. **Payment Regardless of Claims or Charges.**—*Wright v. Chard*, 6 Jur. N. S. 476, 29 L. J. Ch. 415; *Hodgson v. Hodgson*, 2 Keen 704; *Carling Brewing, etc., Co. v. Black*, 6 Ont. 441.

7. **Notice of Claims Necessary.**—*Mutual L. Assur. Soc. v. Langley*, 32 Ch. D. 460; *Stephens v. Green*, (1895) 2 Ch. 148, 64 L. J. Ch. 546; *Seger v. Farmers' L. & T. Co.*, 176 N. Y. 589; *Allmand v. Russell*, 5 Ired. Eq. (40 N. Car.) 183. See also *In re Lewer*, 4 Ch. D. 101.

**Notice to One Trustee** is notice to all. *In re Wyatt*, (1892) 1 Ch. 188, 61 L. J. Ch. 178. See also *Ward v. Duncombe*, (1893) A. C. 369, 62 L. J. Ch. 881. And the title *NOTICE*, vol. 21, p. 587.

**New Trustees** are not liable for loss arising from their ignorance of charges where there was nothing in the trust documents delivered to them which would give them notice. *Hallows v. Lloyd*, 39 Ch. D. 686, 58 L. J. Ch. 105. And they are not bound to inquire of their



the fund to the executor<sup>1</sup> of the beneficiary, but not to the latter's father, when the father is a cotrustee.<sup>2</sup> He may also pay over moneys to a person appointed by the beneficiary to receive the same,<sup>3</sup> when the beneficiary is entitled thereto<sup>4</sup> and is the sole person interested therein,<sup>5</sup> and when the appointment is regular<sup>6</sup> and valid.<sup>7</sup> If the trustee relies upon false representations of the beneficiary and makes payment to him, he will be held liable.<sup>8</sup> And he must bear all losses due to his having erroneously construed the trust instrument and made payments in accordance with such construction.<sup>9</sup>

**Approval of Court.** — When the trustee has distributed the funds without objection by the beneficiaries, and the court has approved such distribution, the trustee cannot thereafter be held for any loss.<sup>10</sup> But a decree of the court as to the payment of funds, which is afterwards reversed,<sup>11</sup> or which is an absolute nullity,<sup>12</sup> will not save the trustee from liability.

(4) **Negligence in Getting in Trust Property.** — It is incumbent upon a trustee who accepts a trust to reduce the trust estate to his possession, and he will be held personally liable for a neglect of such duty.<sup>13</sup> But where the trustee is given a discretion as to whether the funds should be called in or not, he will not be chargeable if, in his discretion, he deems it inexpedient to call them in.<sup>14</sup>

**A New Trustee,** in receiving trust proceeds from his predecessor, will be liable for accepting improper securities<sup>15</sup> or for allowing illegal credits.<sup>16</sup> And he will be charged with liability for a part of the fund converted by the latter when he has neglected his duty to recover the property so converted.<sup>17</sup>

**Debts.** — If there are debts due the estate, the trustee is liable for a failure to adopt every means in his power to collect or secure the same.<sup>18</sup> He may not accept less than the full amount of the debt without a satisfactory explanation therefor.<sup>19</sup> He may take payment in money passing current at the

predecessors as to the existence of charges. *Phipps v. Lovegrove*, L. R. 16 Eq. 80, 42 L. J. Ch. 892.

1. *Waugh v. Wyche*, 2 Drew. 318, 23 L. J. Ch. 833.

2. *Lawrence v. Blake*, 8 Cl. & F. 504, 6 Jur. 427.

3. *Knoch v. Von Bernuth*, 145 N. Y. 643.

4. *Nevitt v. Woodburn*, 190 Ill. 283.

5. *Stambaugh's Estate*, 135 Pa. St. 585.

6. *Hopkins v. Myall*, 2 Russ. & M. 86.

7. *Harrison v. Randall*, 9 Hare 397, 16 Jur. 72.

8. **False Representations of Beneficiaries.** — *Sporle v. Barnaby*, 10 Jur. N. S. 1142. *Compare Overton v. Banister*, 3 Hare 503, 8 Jur. 906.

9. *Marks v. Semple*, 111 Ala. 637.

10. **Approval of Court.** — *Bowditch v. Ayrault*, 63 Hun (N. Y.) 23, 138 N. Y. 222. *Compare Lawrence v. Security Co.*, 56 Conn. 423.

**Beneficiaries Must Be Parties to the Proceeding.** — *Nevitt v. Woodburn*, 190 Ill. 283.

11. *Hay v. Bennett*, 153 Ill. 271.

12. *Burris v. Brooks*, 118 N. Car. 789.

13. **Failure to Reduce Estate to Possession.** — *M'Gachen v. Dew*, 15 Beav. 84; *Bacon v. Clark*, 3 Myl. & C. 294; *Lowry v. Fulton*, 9 Sim. 104, 7 L. J. Ch. 158; *Speakman v. Tatem*, 48 N. J. Eq. 136. See also *Howland v. McLaren*, 22 Grant Ch. (U. C.) 231; *Garesche v. Levering Invest. Co.*, 146 Mo. 436.

**Neglect to Enforce Covenant in Trust Instrument.** — *Fenwick v. Greenwell*, 10 Beav. 412, 11 Jur. 620; *Maitland v. Bateman*, 8 Jur. 926; *Kirby v. Mash*, 3 Y. & C. Exch. 295, 3 Jur. 221.

**Where Trust Property Is Seized in Another State** the trustee is not liable for failure to bring a suit for recovery in time to prevent the bar of the statute of limitations. *Hester v. Wilkinson*, 6 Humph. (Tenn.) 215, 44 Am. Dec. 303.

14. *Paddon v. Richardson*, 7 De G. M. & G. 563.

15. *Miles v. Hoffman*, 26 Hun (N. Y.) 594.

16. *Ashley v. Holman*, 44 S. Car. 145.

17. *Green v. Gaskill*, 175 Mass. 265.

**When the Former Trustee Is Insolvent,** the new trustee will not be liable for a failure to sue him for a loss to the estate. *Peake v. Jamison*, 82 Mo. 552.

**A New Trustee Is Not Liable** for loss upon securities taken by his predecessor, and upon which the latter negligently failed to realize. *Bentley v. Shreve*, 2 Md. Ch. 215.

18. **Neglect to Collect or Secure Debt.** — *Byrne v. Norcott*, 13 Beav. 336; *Grove v. Price*, 26 Beav. 103; *Clack v. Holland*, 19 Beav. 262; *Simes v. Eyre*, 6 Hare 137; *Ex p. Woodward*, 3 Mont. & A. 232, 1 Jur. 385; *Chisholm v. Barnard*, 10 Grant Ch. (U. C.) 479; *Royall v. McKenzie*, 25 Ala. 363; *Waterman v. Alden*, 144 Ill. 90; *Hunt v. Gontrum*, 80 Md. 64; *Lowry v. McGee*, 3 Head (Tenn.) 269. See also *Smith v. Mason*, 1 Ont. L. Rep. 594.

**Failure to Collect Rents.** — *Mansfield's Estate*, 19 Pa. Super. Ct. 26.

**Where a Note Is Barred** by the statute of limitations, the trustee is not liable for the loss if he was unable to get payment or renewal. *Zimmerman v. Fraley*, 70 Md. 561.

19. **Acceptance of Less than Face Value.** — *Wal-*

time in his locality without incurring liability for its subsequent depreciation,<sup>1</sup> but if he receives land in payment, and a loss ensues, he will be compelled to make it good.<sup>2</sup>

**Collections from Sales.** — A trustee will not be held responsible for his inability to realize upon sales made by him when the purchasers were at the time in good credit and apparently sound.<sup>3</sup> And he is not necessarily negligent in failing to require payment down of the purchase money.<sup>4</sup> But he will be held liable for neglecting to take proper steps to collect from the purchaser.<sup>5</sup>

*e. PARTICULAR LOSSES* — (1) *By Depreciation.* — A trustee is not liable for the depreciation of trust funds in his possession if he has been guilty of no bad faith or negligence in receiving or retaining the same.<sup>6</sup>

(2) *By Robbery.* — If a trustee is robbed of the trust funds, he will not be liable for the loss, provided he has kept the funds as he would keep his own.<sup>7</sup> But the proof of the robbery should be as clear as possible,<sup>8</sup> and it is generally held that, if the fact of the robbery be shown by proof *aliunde*, the amount taken may be shown by the trustee's own unsupported testimony.<sup>9</sup>

(3) *By Fire.* — A trustee claiming loss of trust funds by fire must show such fact with reasonable certainty.<sup>10</sup>

(4) *By Forgery.* — A trustee is not liable for a loss occasioned by the forgery of a third person, even though the latter was allowed access to securities belonging to the estate.<sup>11</sup>

*f. FOR ACTS OF COTRUSTEES* — (1) *General Rule.* — In the United States the general rule is that a trustee is responsible for the acts of a cotrustee only

*lis v. Thornton*, 2 Brock. (U. S.) 422; *Baldwin v. Thomas*, 15 Grant Ch. (U. C.) 119; *Calkins v. Bump*, 120 Mich. 335.

**1. Collections in Current Money.** — *Campbell v. Miller*, 38 Ga. 304, 95 Am. Dec. 389; *Dilworth v. Sinderling*, 1 Binn. (Pa.) 488, 2 Am. Dec. 469; *Bradshaw v. Cruise*, 4 Heisk. (Tenn.) 260; *State v. McAuley*, 4 Heisk. (Tenn.) 424.

**Collections in Confederate Currency.** — See *McBurney v. Carson*, 99 U. S. 567; *Mitchell v. Moore*, 95 U. S. 587, 2 Woods (U. S.) 483; *Blount v. Moore*, 54 Ala. 360; *Ferguson v. Lewery*, 54 Ala. 510, 25 Am. Rep. 718; *Foscue v. Lyon*, 55 Ala. 440; *Campbell v. Miller*, 38 Ga. 304, 95 Am. Dec. 389; *Brown v. Wright*, 39 Ga. 96; *Jepson v. Patrick*, 39 Ga. 569; *Westbrook v. Davis*, 48 Ga. 471; *Venable v. Cody*, 68 Ga. 171; *Purser v. Simpson*, 65 N. Car. 497; *Dockery v. French*, 73 N. Car. 420; *Sudderth v. McCombs*, 79 N. Car. 398; *Furr v. Brower*, 79 N. Car. 408; *Williams v. Williams*, 79 N. Car. 411; *Patton v. Farmer*, 87 N. Car. 337; *Mayer v. Mordecai*, 1 S. Car. 383, 7 Am. Rep. 26; *Fitzsimons v. Fitzsimons*, 1 S. Car. 400; *Sanders v. Rogers*, 1 S. Car. 452; *Crane v. Moses*, 12 S. Car. 561; *Knight v. Watts*, 26 W. Va. 175.

See also *infra*, this section, *Particular Losses* — (1) *By Depreciation.*

2. *Royall v. McKenzie*, 25 Ala. 363.

3. *Loud v. Winchester*, 64 Mich. 23. See also *Torrance v. Chapman*, 6 L. C. Jur. 32.

4. *Harkness v. Scammon*, 48 Mo. App. 136.

5. *Hurt v. Fisher*, 1 Har. & G. (Md.) 88; *Bentley v. Shreve*, 2 Md. Ch. 215.

**6. Loss by Depreciation.** — *Re Barker*, 77 L. T. N. S. 712; *Edinburgh L. Assur. Co. v. Allen*, 23 Grant Ch. (U. C.) 230; *Vernon v. Seaman*, Russ. Eq. Dec. (Nova Scotia) 190; *Snyder v. McComb*, 39 Fed. Rep. 292; *Babcock v. Hubbard*, 56 Conn. 284; *Johns v. Herbert*, 2 App.

*Cas. (D. C.)* 485; *Campbell v. Miller*, 38 Ga. 304, 95 Am. Dec. 389; *Nevitt v. Woodburn*, 190 Ill. 283; *Coffin v. Bramlitt*, 42 Miss. 194, 97 Am. Dec. 449; *Crabb v. Young*, 92 N. Y. 56; *Smith v. Smith*, 4 Johns. Ch. (N. Y.) 445; *Dilworth v. Sinderling*, 1 Binn. (Pa.) 488, 2 Am. Dec. 469; *Barnabas's Estate*, 182 Pa. St. 407; *Saunders v. Gregory*, 3 Heisk. (Tenn.) 567; *State v. McAuley*, 4 Heisk. (Tenn.) 424.

**Loss of Funds Levied upon under Execution.** — *Guhl v. Frank*, 22 Pa. Super. Ct. 531.

**Loss of Runaway Slave.** — *Chaplin v. Givens*, Rice Eq. (S. Car.) 132.

**A Provision in the Trust Instrument** that the trustee may manage the property without impeachment of waste does not allow him to waste the trust property, but merely allows him to act as a tenant who is not accountable for waste. *Vernon v. Seaman*, Russ. Eq. Dec. (Nova Scotia) 190.

And see the title **INVESTMENTS**, vol. 17, p. 464.

**7. Loss by Robbery.** — *Jones v. Lewis*, 2 Ves. 240; *Christy v. McBride*, 2 Ill. 75; *Stevens v. Gage*, 55 N. H. 175, 20 Am. Rep. 191; *Carpenter v. Carpenter*, 12 R. I. 544, 34 Am. Rep. 716.

8. *Foster v. Davis*, 46 Mo. 268.

**9. Proof of Robbery.** — *Furman v. Coe*, 1 Cai. Cas. (N. Y.) 96; *Morley v. Morley*, 2 Ch. Cas. 2; *Seawell v. Greenway*, 22 Tex. 691, 75 Am. Dec. 794. Compare *Fudge v. Durn*, 51 Mo. 264; *State v. Meagher*, 44 Mo. 356, 100 Am. Dec. 298.

**Personal Representatives of Trustee May Show Robbery.** — *Furman v. Coe*, 1 Cai. Cas. (N. Y.) 96.

**10. Loss by Fire.** — *Montgomery v. Coldwell*, 14 Lea (Tenn.) 29. See also *Lawson v. Crookshank*, 2 Ch. Chamb. (Ont.) 373.

**11. Loss by Forgery.** — *Pennsylvania L. Ins. Co. v. Franklin F. Ins. Co.*, 5 Pa. Dist. 323.

when the former has, by his voluntary co-operation or connivance, enabled the latter to commit a breach of trust, or, as a matter of course, when the trustees have expressly agreed to be bound for each other.<sup>1</sup>

In England the rule is somewhat more rigid. It is said that it is the duty of each trustee to protect the trust property from the acts of his colleagues, and if loss is occasioned through any neglect of this duty, the negligent trustee is personally liable therefor.<sup>2</sup>

The Distinction between the two rules seems to be merely the distinction between acts of commission and acts of omission; for in the United States mere passiveness on the part of a trustee, such as in not obstructing the collection of funds by his associate, or in not withdrawing from the latter's hands funds which have never been in the possession of the former, will create no liability;<sup>3</sup> while, under the English rule, mere negligence or want of attention to the duties of the trust will render a trustee liable for any loss occasioned by the acts of his cotrustee.<sup>4</sup> Within either rule, however, active participation or

**1. Rule in United States.** — Story Eq. Jur. § 1280.

*United States.* — Taylor v. Benham, 5 How. (U. S.) 233.

*Alabama.* — Williams v. Taylor, 4 Port. (Ala.) 234; Taylor v. Roberts, 3 Ala. 86; Hinson v. Williamson, 74 Ala. 195.

*California.* — Birmingham v. Wilcox, 120 Cal. 467.

*District of Columbia.* — Colburn v. Grant, 16 App. Cas. (D. C.) 113.

*Kentucky.* — Laurel County Ct. v. Laurel Seminary, 93 Ky. 379; Darnaby v. Watts, (Ky. 1893) 21 S. W. Rep. 333.

*Maryland.* — Latrobe v. Tiernan, 2 Md. Ch. 475; Glenn v. McKim, 3 Gill (Md.) 366.

*Massachusetts.* — Stowe v. Bowen, 99 Mass. 194.

*New Jersey.* — Laroe v. Douglass, 13 N. J. Eq. 308.

*New York.* — Ormiston v. Olcott, 84 N. Y. 339; Bruen v. Gillet, 115 N. Y. 10, 12 Am. St. Rep. 764; Banks v. Wilkes, 3 Sandf. Ch. (N. Y.) 99.

*North Carolina.* — Worth v. M'Aden, 1 Dev. & B. Eq. (21 N. Car.) 199.

*Ohio.* — State v. Guilford, 15 Ohio 593.

*Pennsylvania.* — Jones's Appeal, 8 W. & S. (Pa.) 143, 42 Am. Dec. 282; Stell's Appeal, 10 Pa. St. 149; Fesmire's Estate, 134 Pa. St. 67, 19 Am. St. Rep. 676; Hilles's Estate, 13 Phila. (Pa.) 402, 37 Leg. Int. (Pa.) 493; Wilson's Appeal, 115 Pa. St. 95; Bireley's Estate, 7 Pa. Dist. 395.

*Virginia.* — Boyd v. Boyd, 3 Gratt. (Va.) 114; Miller v. Beverley, 4 Hem. & M. (Va.) 415.

**Trustee Not Insurer of Trust Fund or Surety for Cotrustee.** — Fesmire's Estate, 134 Pa. St. 67, 19 Am. St. Rep. 676. Compare Laurel County Ct. v. Laurel Seminary, 93 Ky. 379.

**Cotrustees Not Debtor and Creditor.** — *Ex p.* Taylor, 18 Q. B. D. 295, 56 L. J. Q. B. 195.

**Indemnity Clause in Settlement** may relieve trustees from the acts of each other. Bartlett v. Hodgson, 1 T. R. 42.

**The Giving of a Joint Bond** is an agreement to be expressly liable each for the other. Pearson v. Darrington, 32 Ala. 227.

**The Accounting Together Jointly** to the court, or other like act of co-operation, is generally construed a holding themselves out as acting together and assuming a joint liability. Scruggs

v. Driver, 31 Ala. 287; Stewart v. Conner, 9 Ala. 803. Compare Matter of Lafferty, 184 Pa. St. 502.

**An Acknowledgment by One Trustee** of his joint liability with another for funds received by the latter must be in writing to be binding upon him. Bailey v. Mineral School Dist., 14 Mo. 498.

**Order of Liability.** — Where two trustees have been guilty of a breach of trust, the court may determine the order in which they shall stand answerable for the loss, by making one primarily liable and the other secondarily. McCartin v. Traphagen, 43 N. J. Eq. 323.

**A Trustee Cannot Complain** that the party injured by the misappropriation of funds by a cotrustee, and his investment thereof in real property, has not sought to enforce his lien against such property. Matter of Evans, 2 Ashm. (Pa.) 470.

**2. Rule in England.** — Hill on Trustees 309; Laroe v. Douglass, 13 N. J. Eq. 308.

In Ontario, a trustee is not liable for the acts of his cotrustee if the former has acted honestly and reasonably in discharging his duty to the trust estate. Dover v. Denne, 3 Ont. L. Rep. 664.

**Trustees Bound by Agreement Will Not Be Relieved by Court.** — Leigh v. Barry, 3 Atk. 583.

**Where the Court Orders** one trustee to distribute funds held by him, the other is not liable. *Ex p.* Dawson, 4 Deac. & C. 130, 2 Mont. & A. 94.

**Trustees Acting in Rotation** according to the terms of a will are not liable for the acts of each other. Atty.-Gen. v. Holland, 2 Y. & C. Exch. 683, 7 L. J. Exch. 51.

**A Cotrustee Is Bound by an Account** rendered in the joint names of both trustees, when he has so acted as to sanction and adopt the account as his own. Horton v. Brocklehurst, 29 Beav. 504.

**3. Mere Passiveness Creates No Liability.** — Bruen v. Gillet, 115 N. Y. 10, 12 Am. St. Rep. 764; Matter of Litzenberger, 85 Hun (N. Y.) 512; Worth v. M'Aden, 1 Dev. & B. Eq. (21 N. Car.) 199; State v. Guilford, 15 Ohio 593. See also Cocks v. Barlow, 5 Redf. (N. Y.) 406.

**4. Want of Attention Creates Liability.** — Wilkins v. Hogg, 3 Giff. 116, 31 L. J. Ch. 41, 8 Jur. N. S. 25; Charitable Corp. v. Sutton, 2 Atk. 400; Horton v. Brocklehurst, 29 Beav. 504; Harrington v. Harrington, 1 L. J. Ch. 41;



acquiescence in a breach of trust makes the trustees equally liable for the loss,<sup>1</sup> and acquiescence will be presumed when a trustee, who has knowledge that the trust fund is in course of abuse by his cotrustee, remains passive, and refuses to interfere.<sup>2</sup> Upon the same principle, the failure on the part of one trustee to see that a direction as to the management of the trust fund contained in the trust instrument is complied with, renders him personally liable for the misappropriation of such fund by his associate.<sup>3</sup>

**When a Trustee Is Ignorant** of the fact that his cotrustee has received funds belonging to the estate, he will not be chargeable with their loss.<sup>4</sup>

(2) *Joint Receipt of Funds.*—If cotrustees actually join in the receipt of trust funds,<sup>5</sup> or agree that one of their number shall receive the same,<sup>6</sup> they are mutually liable therefor. But, as trustees are generally required to join in receipts and discharges, and in conveyances or other dispositions of the trust property, the fact that they do so join is not conclusive evidence of their joint liability. Such joinder may be explained and each trustee will be held liable individually no further than assets have come into his hands,<sup>7</sup>

*Mendes v. Guedalla*, 8 Jur. N. S. 878, 31 L. J. Ch. 561; *City Bank v. Maulson*, 3 Ch. Chamb. (Ont.) 334. See also *Home v. Pringle*, 8 Cl. & F. 264; *In re Fryer*, 3 Kay & J. 317, 3 Jur. N. S. 485.

**Trustees Are Not Liable** for funds in the hands of one of their number when they could not have legally possessed themselves thereof. *Derbishire v. Home*, 3 De G. M. & G. 80.

**Two Debtors Appointed Trustees** of a fund to consist of their own debts, are each liable only for their own default. *Ex p. Woodward*, 3 Mont. & A. 232, 1 Jur. 385.

**1. Active Participation in Breach.**—*Ex p. Shakeshaft*, 3 Bro. C. C. 197; *Sandford v. Jodrell*, 2 Smale & G. 176; *Hinson v. Williamson*, 74 Ala. 195; *Taylor v. Roberts*, 3 Ala. 83; *Fell-rath v. Peoria German School Assoc.*, 66 Ill. App. 77; *Glenn v. McKim*, 3 Gill (Md.) 366; *Gilchrist v. Stevenson*, 9 Barb. (N. Y.) 9; *Hannahs v. Hammond*, (Supm. Ct. Spec. T.) 28 Abb. N. Cas. (N. Y.) 317; *Pim v. Downing*, 11 S. & R. (Pa.) 65; *Powers v. Black*, 159 Pa. St. 153. See *Hazard v. Durant*, 19 Fed. Rep. 471.

**2. Noninterference in Breach.**—*Boardman v. Mosman*, 1 Bro. C. C. 68; *Booth v. Booth*, 1 Beav. 125, 2 Jur. 938; *Ex p. Heaton*, Buck. 386; *Costello v. O'Rorke*, Ir. R. 3 Eq. 172; *Wilkins v. Hogg*, 3 Giff. 116, 31 L. J. Ch. 41, 8 Jur. N. S. 25; *City Bank v. Maulson*, 3 Ch. Chamb. (Ont.) 334; *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; *Glenn v. McKim*, 3 Gill (Md.) 366; *Crane v. Hearn*, 26 N. J. Eq. 378; *Smith v. Pettigrew*, 34 N. J. Eq. 216; *Crane v. Howell*, 35 N. J. Eq. 374; *Matter of Niles*, 113 N. Y. 547; *Meldon v. Devlin*, 31 N. Y. App. Div. 146, *affirmed* 167 N. Y. 573; *Weetjen v. Vibbard*, 5 Hun (N. Y.) 265; *Clark v. Clark*, 8 Paige (N. Y.) 153, 35 Am. Dec. 676; *McMurray v. Montgomery*, 2 Swan (Tenn.) 374.

**The Rule Is Applicable** even to a trustee who has been excluded from any participation in the management of the estate by his cotrustee and by the *cestui que trust*. *Matter of Westerfield*, 32 N. Y. App. Div. 324. See also *Matter of Westerfield*, 61 N. Y. App. Div. 617.

**A Trustee Having Knowledge** of any fact endangering the safety of the fund is bound to see to its security and communicate the fact to the court and to his cotrustee, and not take the management of it into his own hands. *Wayman v. Jones*, 4 Md. Ch. 500.

**Where Property Is Purchased by One Cotrustee** under a contract therefor entered into by him before he became trustee, the other cotrustee is liable for the amount of the purchase money where he fails to compel the payment thereof from his cotrustee. *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250.

**3. Failure to Carry Out Direction of Settlor.**—*Booth v. Booth*, 1 Beav. 125; *Bates v. Underhill*, 3 Redf. (N. Y.) 365; *Hille's Estate*, 13 Phila. (Pa.) 402, 37 Leg. Int. (Pa.) 493; *Dead-erick v. Cantrell*, 10 Yerg. (Tenn.) 263, 31 Am. Dec. 576; *Thomas v. Scruggs*, 10 Yerg. (Tenn.) 400. *Compare Dyer v. Riley*, 51 N. J. Eq. 124.

**Investment of Funds.**—As to the liability of one trustee for misconduct of his associate in the matter of the investment of trust funds, see the title *INVESTMENTS*, vol. 17, p. 472.

**4. Receipt of Funds Unknown to Trustee.**—*Barnard v. Bagshaw*, 3 De G. J. & S. 355, 9 Jur. N. S. 220; *Glenn v. McKim*, 3 Gill (Md.) 366; *Banks v. Wilkes*, 3 Sandf. Ch. (N. Y.) 99.

**5. Actual Joint Receipt of Funds.**—*Monell v. Monell*, 5 Johns. Ch. (N. Y.) 287, 9 Am. Dec. 298; *Hughlett v. Hughlett*, 5 Humph. (Tenn.) 453.

**Where Cotrustees Each Take a Moiety** of the trust funds into possession, they are mutually liable. *Lewis v. Nobbs*, 8 Ch. D. 591, 47 L. J. Ch. 662.

**Two Persons Who Are Not Originally Joint Trustees** become such by joining in one instrument disposing of the trust property for a bulk consideration and are jointly as well as severally liable for the entire proceeds. *Furman v. Rapelje*, 67 Ill. App. 31.

*6. Hughlett v. Hughlett*, 5 Humph. (Tenn.) 453.

**7. Trustee Liable Only for Amount Received.**—*England.*—*Brice v. Stokes*, 11 Ves. Jr. 319; *Chambers v. Minchin*, 7 Ves. Jr. 198; *Ex p. Bel-chier*, Ambli. 218; *Fellows v. Mitchell*, 1 P. Wms. 81, 2 Vern. 504; *In re Fryer*, 3 Jur. N. S. 485, 26 L. J. Ch. 398. See also *Spalding v. Shalmer*, 1 Vern. 303; *Scurfield v. Howes*, 3 Bro. C. C. 90.

*District of Columbia.*—*Colburn v. Grant*, 16 App. Cas. (D. C.) 113.

*Kentucky.*—*Gray v. Reamer*, 11 Bush (Ky.) 113; *Laurel County Ct. v. Laurel Seminary*, 93 Ky. 379.

*Maryland.*—*Latrobe v. Tiernan*, 2 Md. Ch. 475.

provided the transaction is a fair one and there is no breach of trust.<sup>1</sup>

(3) *Intrusting Funds to Cotrustee.* — Where several trustees intrust funds of the estate to one of their number, or permit the latter to obtain possession of such funds when they had it in their power to secure the same, they are equally liable for a misappropriation.<sup>2</sup> Thus, if trustees agree between themselves that each shall take and hold a part of the fund, each is liable for the defalcation of the other.<sup>3</sup> But where the circumstances are such that the care and management of the estate may be properly left to one trustee, who acts as factor for the others, the latter are answerable for the acts and defaults of the acting trustee, not as for a cotrustee,<sup>4</sup> but merely as for an agent.<sup>5</sup> According to one authority, while a trustee may escape personal liability for the acts of a cotrustee to whom he has committed the control of the estate, he cannot avoid responsibility for expenses which he might have avoided.<sup>6</sup>

*Loan to Cotrustee.* — Where one trustee consents to the loan of the trust funds to his cotrustee, upon insufficient security, he is liable for any resulting loss.<sup>7</sup> But failure to call in trust moneys authorized by the instrument to be loaned to one during the discretion of the other does not make the latter liable.<sup>8</sup>

*Massachusetts.* — *Stowe v. Bowen*, 99 Mass. 194. See *McKim v. Aulbach*, 130 Mass. 481, 39 Am. Rep. 470.

*New York.* — *Kip v. Deniston*, 4 Johns. (N. Y.) 23; *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283, 9 Am. Dec. 298. See *Spencer v. Spencer*, 11 Paige (N. Y.) 299.

*Pennsylvania.* — *Hall v. Boyd*, 6 Pa. St. 270; *Irwin's Appeal*, 35 Pa. St. 294; *Wilson's Appeal*, 115 Pa. St. 95; *Fesmire's Estate*, 134 Pa. St. 67, 19 Am. St. Rep. 676; *Jones's Appeal*, 8 W. & S. (Pa.) 147, 42 Am. Dec. 282.

*South Carolina.* — See *Johnson v. Johnson*, 2 Hill Eq. (S. Car.) 277, 29 Am. Dec. 72.

*Tennessee.* — *Deaderick v. Cantrell*, 10 Yerg. (Tenn.) 264, 31 Am. Dec. 576.

*Virginia.* — *Griffin v. Macaulay*, 7 Gratt. (Va.) 578.

1. *Wallis v. Thornton*, 2 Brock. (U. S.) 422.

2. *Intrusting Funds to Cotrustee* — *England.* — *Hewett v. Foster*, 6 Beav. 259, 7 Jur. 228; *Wiglesworth v. Wiglesworth*, 16 Beav. 269; *Trutch v. Lamprell*, 20 Beav. 116; *Thompson v. Finch*, 22 Beav. 316, 25 L. J. Ch. 681; *Griffiths v. Porter*, 25 Beav. 236; *Cowell v. Gatcombe*, 27 Beav. 568; *Ingle v. Partridge*, 32 Beav. 661; *Sadler v. Hobbs*, 2 Bro. C. C. 114; *Burrows v. Walls*, 5 De G. M. & G. 233, 3 Eq. Rep. 960; *Wilkins v. Hogg*, 3 Giff. 116, 31 L. J. Ch. 41, 8 Jur. N. S. 25; *Gill v. Atty.-Gen.*, *Hardres* 314; *Keble v. Thompson*, 3 Bro. C. C. 112; *Curtis v. Mason*, 12 L. J. Ch. 442; *In re Turner*, (1897) 1 Ch. 536, 66 L. J. Ch. 282; *Rodbard v. Cooke*, 36 L. T. N. S. 504; *Underwood v. Stevens*, 1 Meriv. 712; *Oliver v. Court*, 8 Price 127; *Adair v. Shaw*, 1 Sch. & Lef. 272; *Joy v. Campbell*, 1 Sch. & Lef. 341; *Hanbury v. Kirkland*, 3 Sim. 265; *Mariott v. Kinnersley*, Tamlyn 470; *Chambers v. Minchin*, 7 Ves. Jr. 186; *Brice v. Stokes*, 11 Ves. Jr. 319; *Shipbrook v. Hinchinbrook*, 16 Ves. Jr. 479; *Broadhurst v. Baluey*, 1 Y. & C. Ch. 17.

*Canada.* — *Crowe v. Craig*, 29 Nova Scotia 394.

*United States.* — *Colburn v. Grant*, 181 U. S. 606.

*Alabama.* — *Royall v. McKenzie*, 25 Ala. 363.

*California.* — *Fox v. Tay*, 80 Cal. 339.

*Maryland.* — *Glenn v. McKim*, 3 Gill (Md.) 366; *Maccubbin v. Cromwell*, 7 Gill & J. (Md.) 157; *Barroll v. Forman*, 88 Md. 188.

*New Jersey.* — *Laroe v. Douglass*, 13 N. J. Eq. 308; *Schenck v. Schenck*, 16 N. J. Eq. 174.

*New York.* — *Matter of Litzenger*, 85 Hun (N. Y.) 512; *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 287, 9 Am. Dec. 298; *Mumford v. Murray*, 6 Johns. Ch. (N. Y.) 1; *Bruen v. Gillet*, 115 N. Y. 10, 12 Am. St. Rep. 764.

*North Carolina.* — *Graham v. Davidson*, 2 Dev. & B. Eq. (22 N. Car.) 155.

*Ohio.* — *State v. Guilford*, 15 Ohio 593.

*Pennsylvania.* — *Fesmire's Estate*, 134 Pa. St. 67, 19 Am. St. Rep. 676; *Matter of Evans*, 2 Ashm. (Pa.) 470.

*Tennessee.* — *McMurray v. Montgomery*, 2 Swan (Tenn.) 374; *Deaderick v. Cantrell*, 10 Yerg. (Tenn.) 263, 31 Am. Dec. 576. See also *Hays v. Hays*, 3 Tenn. Ch. 88.

*Vermont.* — *Foote v. Emerson*, 10 Vt. 338, 33 Am. Dec. 205.

*Virginia.* — *Graham v. Austin*, 2 Gratt. (Va.) 274.

*Trustee Acting Merely by Request.* — *Mickleburgh v. Parker*, 17 Grant Ch. (U. C.) 503. *Compare* *Dover v. Denne*, 3 Ont. L. Rep. 664.

3. *Gill v. Atty.-Gen.*, *Hardres* 314; *Graham v. Austin*, 2 Gratt. (Va.) 273; *Birmingham v. Wilcox*, 120 Cal. 467.

*When the Trust Instrument Permits the division of the trust moneys between the trustees, each is liable for his share only.* *Birls v. Betty*, 6 Madd. 90.

4. *Purdy v. Lynch*, 145 N. Y. 462, reversing 72 Hun (N. Y.) 272; *Boyd v. Boyd*, 3 Gratt. (Va.) 109; *Crowe v. Craig*, 29 Nova Scotia 394.

*Collection of Securities Properly Left to One Trustee.* — *Cottam v. Eastern Counties R. Co.*, 1 Johns. & H. 243, 6 Jur. N. S. 1367; *Dyer v. Riley*, 51 N. J. Eq. 124; *Fesmire's Estate*, 134 Pa. St. 67, 19 Am. St. Rep. 676; *Hatch's Appeal*, (Pa. 1888) 12 Atl. Rep. 593.

*Keeping of Books Properly Left to One Trustee.* — *Matter of Cozzens*, 2 Connolly (N. Y.) 622.

5. *Home v. Pringle*, 8 Cl. & F. 264; *City Bank v. Maulson*, 3 Ch. Chamb. (Ont.) 335.

6. *Emlen's Estate*, 8 Pa. Co. Ct. 508.

7. *Keble v. Thompson*, 3 Bro. C. C. 112; *Matter of Cozzens*, 2 Connolly (N. Y.) 622; *Matter of Rutherford*, 5 Dem. (N. Y.) 499.

8. *Paddon v. Richardson*, 1 Jur. N. S. 1192.

**Sale to Cotrustee.** — Trustees are jointly liable for the sale of property to one of their number.<sup>1</sup>

(4) *Renouncing, Retiring, and Surviving Trustees.* — A **Renouncing Trustee** is not responsible for a breach by the other trustees where it does not appear that the former ever had any part of the trust fund in his hands.<sup>2</sup>

A **Retiring Trustee** is liable for a breach of trust participated in by him before his retirement though he may have been discharged from liability by his cotrustees.<sup>3</sup> He is not liable for a breach committed by his successors, unless such breach was contemplated by him at the time of retiring,<sup>4</sup> or unless he failed to secure the appointment of a new trustee as provided by the trust instrument.<sup>5</sup>

A **Surviving Trustee** must respond for the whole amount of the trust fund, in the absence of proof that the same did not come into his hands upon the death of his cotrustee.<sup>6</sup>

(5) *Contribution Between Cotrustees.* — When cotrustees are jointly and severally liable for a breach of trust, a right of contribution exists between them,<sup>7</sup> unless such breach of trust is in the nature of a tort.<sup>8</sup> This right is maintainable only in a suit brought for that purpose, and cannot be enforced in an action instituted against them jointly to recover damages for the breach.<sup>9</sup> The liability to contribute survives against the estate of a deceased cotrustee,<sup>10</sup> and, it seems, is not released by a discharge in bankruptcy.<sup>11</sup>

If **One of the Trustees Is Also a Cestui Que Trust** he cannot call upon his cotrustees to contribute, upon the principle that a *cestui que trust* who concurs or acquiesces in a breach of trust cannot obtain any relief against his trustee.<sup>12</sup> And this principle applies though the person filling both characters does not become a *cestui que trust* until after the breach has been committed.<sup>13</sup> In such case, however, the *cestui que trust* will be compelled to indemnify the other trustee to the extent of the former's whole beneficial interest.<sup>14</sup>

**g. FOR ACTS OF AGENTS — In General.** — The rule is that when a trustee acts by other hands, either from necessity or conformably to the common usage of mankind, he is not to be made answerable for losses, provided he has exercised due care and discretion in selecting the agent and has maintained a vigilant superintendence over the latter's dealings after his appointment.<sup>15</sup>

1. Ringgold v. Ringgold, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250.

2. Clagett v. Hall, 9 Gill & J. (Md.) 80. Compare Doyle v. Blake, 2 Sch. & Lef. 229.

3. Smith v. Patrick, 84 L. T. N. S. 740.

4. Head v. Gould, (1898) 2 Ch. 250, 67 L. J. Ch. 480, 78 L. T. N. S. 739. See also Harrison v. Randall, 9 Hare 397, 16 Jur. 72; Webster v. Le Hunt, 8 Jur. N. S. 345.

**Trustee Not Liable for Debt Contracted After Retirement.** — Noyes v. Turnbull, 54 Hun (N. Y.) 26, affirmed 130 N. Y. 639.

5. Wilkinson v. Parry, 4 Russ. 272; Pearce v. Pearce, 22 Beav. 248.

6. Davis v. Kerr, 3 N. Y. App. Div. 322.

7. **Right of Contribution.** — Pom. Eq. Jur., § 1081; Baynard v. Woolley, 20 Beav. 583; Priestman v. Tindall, 24 Beav. 244; Fletcher v. Green, 33 Beav. 513; Bahin v. Hughes, 31 Ch. D. 390; Wilson v. Goodman, 4 Hare 54; Robinson v. Harkin, (1896) 2 Ch. 415, 65 L. J. Ch. 773; *In re Turner*, (1897) 1 Ch. 536, 66 L. J. Ch. 282; Lingard v. Bromley, 1 Ves. & B. 114, 12 Rev. Rep. 195; Birmingham v. Wilcox, 120 Cal. 467; Hannahs v. Hammond, (Supm. Ct. Spec. T.) 28 Abb. N. Cas. (N. Y.) 317; Sherman v. Parish, 53 N. Y. 489. See also Lincoln v. Wright, 4 Beav. 427; *Ex p. Shakeshaft*, 3 Bro. C. C. 198; Head v. Gould,

(1898) 2 Ch. 250, 78 L. T. N. S. 739; Gray v. Addison, 2 Jur. N. S. 662; Norton v. Steinkopf, Kay 45, 23 L. J. Ch. 35; Butler v. Butler, 7 Ch. D. 116, 47 L. J. Ch. 77; Blyth v. Fladgate, (1891) 1 Ch. 337, 60 L. J. Ch. 66. And see the title CONTRIBUTION AND EXONERATION, vol. 7, p. 325.

8. **No Contribution as to Tort.** — Perry on Trusts, § 876; Lingard v. Bromley, 1 Ves. & B. 114, 12 Rev. Rep. 195. See also Cunningham v. Pell, 5 Paige (N. Y.) 607.

9. **Separate Suit Necessary.** — Fletcher v. Green, 33 Beav. 513; Birmingham v. Wilcox, 120 Cal. 467. See also McClain v. Babbitt, 62 N. J. Eq. 753.

10. Ramskill v. Edwards, 31 Ch. D. 100, 55 L. J. Ch. 81.

11. Ramskill v. Edwards, 31 Ch. D. 100, 55 L. J. Ch. 81.

12. Chillingworth v. Chambers, (1896) 1 Ch. 685, 65 L. J. Ch. 343.

13. Chillingworth v. Chambers, (1896) 1 Ch. 685, 65 L. J. Ch. 343.

14. Chillingworth v. Chambers, (1896) 1 Ch. 685, 65 L. J. Ch. 343.

15. **Trustee Not Answerable for Loss by Agent.** — *Ex p. Belcher*, Ambl. 218; *In re Speight*, 22 Ch. D. 727; *In re Weall*, 42 Ch. D. 674, 58 L. J. Ch. 713; Jobson v. Palmer, (1893) 1 Ch.



This rule is applicable to the employment of auctioneers,<sup>1</sup> attorneys or solicitors,<sup>2</sup> brokers,<sup>3</sup> bankers,<sup>4</sup> etc. But a trustee cannot delegate the personal duties of his trust without remaining personally liable for a breach thereof;<sup>5</sup> nor can he escape liability for unduly allowing trust funds to remain in the possession and control of his agents,<sup>6</sup> unless the possession by the agent has been negligently permitted by the *cestui que trust*.<sup>7</sup>

*h.* FOR CONTRACTS RELATING TO ESTATE. — As a general rule, it is well settled that a trustee having no power to bind the trust estate will be held personally bound by the contracts he makes as trustee, for the obvious reason that the person contracted with would otherwise be without remedy. The mere use of the name of trustee or any other name of office or employment will not discharge the trustee. In order to protect himself from individual liability, he must expressly stipulate that he is not to be personally responsible.<sup>8</sup> If, as the result of such a stipulation, the other party has no remedy, he has

71, 62 L. J. Ch. 180; *Bostock v. Floyer*, L. R. 1 Eq. 26; *City Bank v. Maulson*, 3 Ch. Chamb. (Ont.) 334; *Anderson v. Roberts*, 147 Mo. 486; *Law's Estate*, 144 Pa. St. 499; *Carpenter v. Carpenter*, 12 R. I. 544, 34 Am. Rep. 716; *McCloskey v. Gleason*, 56 Vt. 264. See also *Matter of Litchfield*, 1 Atk. 87; *Turner v. Corney*, 5 Beav. 515; *Griffiths v. Porter*, 25 Beav. 236; *Hale's Estate*, 9 Pa. Dist. 389.

**Trustee May Appoint Agent Employed by Settlor.** — *Beck's Estate*, 12 Phila. (Pa.) 74; 35 Leg. Int. (Pa.) 153.

**Agent Not to Be Employed Out of Ordinary Scope of Business.** — *Fry v. Tapson*, 28 Ch. D. 268, 54 L. J. Ch. 224.

**The Burden of Proof** that the loss of funds in the hands of an agent is due to the negligence of the trustees is on those making the claim. *In re Brier*, 26 Ch. D. 238.

**1. Auctioneer.** — *Edmonds v. Peake*, 7 Beav. 239.

**2. Attorneys or Solicitors.** — *In re De Clifford*, (1900) 2 Ch. 707, 83 L. T. N. S. 160; *In re Weall*, 42 Ch. D. 674, 58 L. J. Ch. 713; *Jobson v. Palmer*, (1893) 1 Ch. 71, 62 L. J. Ch. 180; *Re Smith*, 71 L. J. Ch. 411, 86 L. T. N. S. 401. *Compare* *Hopgood v. Parkin*, L. R. 11 Eq. 74; *Bostock v. Floyer*, 35 Beav. 603, L. R. 1 Eq. 26; *Sutton v. Wilders*, L. R. 12 Eq. 373; *Ghost v. Waller*, 9 Beav. 497; *Waugh v. Wyche*, 2 Drew. 318, 23 L. J. Ch. 833; *Hall v. Franck*, 11 Beav. 519.

**3. Broker.** — *Ex p. Belchier*, Amb. 218; *Speight v. Gaunt*, 9 App. Cas. 1, 53 L. J. Ch. 419; *Bullock v. Bullock*, 56 L. J. Ch. 221; *Law's Estate*, 144 Pa. St. 499.

**4. Banker.** — See *supra*, this subsection, *For Negligence — Bank Deposits*.

**5. Liability upon Delegation of Trust.** — *Hardwick v. Mynd*, 1 Anstr. 109; *Cowper v. Stoneham*, 3 Reports 242; *Merrill v. Farmers' L. & T. Co.*, 24 Hun (N. Y.) 297. See also *Minneapolis Trust Co. v. Menage*, 73 Minn. 441; *Sharp v. Goodwin*, 51 Cal. 219.

**6. Liability for Funds Allowed to Remain in Hands of Agent.** — *Matthews v. Brise*, 6 Beav. 239; *Challen v. Shippam*, 4 Hare 555; *Wood v. Weightman*, L. R. 13 Eq. 434; *In re Dewar*, 54 L. J. Ch. 830; *Rowland v. Witherden*, 3 Macn. & G. 568, 21 L. J. Ch. 480; *Macdonnell v. Harding*, 7 Sim. 178, 4 L. J. Ch. 10; *Gilroy v. Stephens*, 51 L. J. Ch. 834; *Bacon v. Clark*, 3 Myl. & C. 294; *Adams v. Clifton*, 1

Russ. 297; *Barr v. Lewis*, 71 Miss. 727. See also *Stewart v. Snyder*, 27 Ont. App. 423.

**Rule Applies in Spite of Immunity Clause in Settlement.** — *Wyman v. Paterson*, (1900) A. C. 271, 82 L. T. N. S. 473.

**7. Horn v. Coleman**, 2 Jur. N. S. 1127, 26 L. J. Ch. 213.

**8. Personal Liability for Contracts — England.** — *Eaton v. Bell*, 5 B. & Ald. 34, 7 E. C. L. 13. *Canada.* — *In re Mason*, 21 Grant Ch. (U. C.) 629.

*United States.* — *Thayer v. Wendell*, 1 Gall. (U. S.) 37; *Duvall v. Craig*, 2 Wheat. (U. S.) 45; *Taylor v. Davis*, 110 U. S. 330.

*Alabama.* — *Jones v. Dawson*, 19 Ala. 672; *Sanford v. Howard*, 29 Ala. 684, 68 Am. Dec. 101; *Wade v. Pope*, 44 Ala. 690; *Eufaula Nat. Bank v. Manassas*, 124 Ala. 379. See also *Peters v. Heydenfeldt*, 3 Ala. 205; *Simms v. Norris*, 5 Ala. 42; *Johnson v. Gaines*, 8 Ala. 791.

*Connecticut.* — See *Coe v. Talcott*, 5 Day (Conn.) 92.

*Georgia.* — *Vason v. Beall*, 58 Ga. 500. See *Aven v. Beckom*, 11 Ga. 1.

*Illinois.* — *McGillis v. Hogan*, 190 Ill. 176, affirming 85 Ill. App. 194; *Johnson v. Leman*, 131 Ill. 609, 19 Am. St. Rep. 63; *Dinsmoor v. Bressler*, 56 Ill. App. 207.

*Iowa.* — *Bloom v. Wolfe*, 50 Iowa 286; *Stevenson v. Polk*, 71 Iowa 278.

*Kentucky.* — *Findley v. Wilson*, 3 Litt. (Ky.) 390, 14 Am. Dec. 72; *Nicholas v. Jones*, 3 A. K. Marsh. (Ky.) 385. See *Manifee v. Morrison*, 1 Dana (Ky.) 208.

*Maryland.* — *Glenn v. Allison*, 58 Md. 527. See also *Ricketts v. Montgomery*, 15 Md. 46.

*Massachusetts.* — *Everett v. Drew*, 129 Mass. 150; *Mason v. Pomeroy*, 151 Mass. 164; *Hussey v. Arnold*, (Mass. 1904) 70 N. E. Rep. 87. See also *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83.

*Michigan.* — *Packard v. Kingman*, 109 Mich. 497.

*Minnesota.* — *Truesdale v. Philadelphia Trust, etc., Co.*, 63 Minn. 49.

*Mississippi.* — *Woods v. Ridley*, 27 Miss. 119; *Short v. Porter*, 44 Miss. 533; *Clopton v. Gholson*, 53 Miss. 466; *Norton v. Phelps*, 54 Miss. 467.

*Missouri.* — *Hackman v. Maguire*, 20 Mo. App. 286; *Koken Iron Works v. Kinealy*, 86 Mo. App. 199.

no one to blame but himself, in accepting a contract of such character.<sup>1</sup> But in one line of decisions it has been held that a trustee may not only stipulate against his own liability, but may expressly bind the trust estate. If he has no funds in his possession and an expenditure is necessary for the protection, reparation, or safety of the trust estate, and he is not willing to make himself personally liable, he may transfer to any other person the lien upon the estate which he would acquire by advancing the money to make the expenditure.<sup>2</sup>

**Reimbursement.**—When the trustee has been held personally liable at law upon an obligation, the consideration of which has accrued to the trust estate, he may look to the trust funds in his hands for reimbursement.<sup>3</sup>

**12. Accounting**—*a.* **LIABILITY TO ACCOUNT**—(1) *Jurisdiction of Equity.*—A court of equity has inherent jurisdiction to call for an accounting in case of the need of a discovery, or of the complicated character of the accounts, or the existence of a fiduciary or trust relation. The aid of the court is seldom invoked in the first two of these cases, but it has often been extended to compel a trustee to account to his *cestui que trust*.<sup>4</sup>

*New York.*—Blewitt v. Olin, 14 Daly (N. Y.) 351; Fowler v. Mutual L. Ins. Co., 28 Hun (N. Y.) 195; U. S. Trust Co. v. Stanton, 139 N. Y. 531. See Crate v. Benzinger, 13 N. Y. App. Div. 617.

*North Carolina.*—Godley v. Taylor, 3 Dev. L. (14 N. Car.) 178; Mitchell v. Whitlock, 121 N. Car. 166. See Cheatham v. Rowland, 92 N. Car. 340; Little v. Bennett, 5 Jones Eq. (58 N. Car.) 156.

*Ohio.*—Day v. Brown, 2 Ohio 345.

*Pennsylvania.*—Fehlinger v. Wood, 134 Pa. St. 517; Dougherty's Appeal, (Pa. 1887) 9 Atl. Rep. 46. See Woddrop v. Weed, 154 Pa. St. 307, 35 Am. St. Rep. 832.

*Rhode Island.*—Roger Williams Nat. Bank v. Groton Mfg. Co., 16 R. I. 504.

*South Carolina.*—Neal v. Bleckley, 51 S. Car. 506. See also De Treville v. Ellis, Bailey Eq. (S. Car.) 35, 21 Am. Dec. 518.

*Tennessee.*—Kain v. Humes, 5 Sneed (Tenn.) 610.

*Texas.*—Connally v. Lyons, 82 Tex. 664, 27 Am. St. Rep. 935.

*Vermont.*—McIntyre v. Williamson, 72 Vt. 183, 82 Am. St. Rep. 929.

*Virginia.*—See Poindexter v. Burwell, 82 Va. 507; Heth v. Richmond, etc., R. Co., 4 Gratt. (Va.) 482, 50 Am. Dec. 88.

**Rule Applicable to Negotiable Paper.**—Patapsco Guano Co. v. Morrison, 2 Woods (U. S.) 395; Conner v. Clark, 12 Cal. 168, 73 Am. Dec. 529; Beatty v. Clark, 20 Cal. 11; Packard v. Kingman, 109 Mich. 497; Peterson v. Homan, 44 Minn. 166, 20 Am. St. Rep. 564; Stitzer v. Whittaker, (Neb. 1902) 91 N. W. Rep. 713; Hills v. Bannister, 8 Cow. (N. Y.) 31; Storrs v. Flint, 46 N. Y. Super. Ct. 498. See also Forster v. Fuller, 6 Mass. 58, 4 Am. Dec. 87; Wood v. Waterville, 5 Mass. 299, 4 Am. Dec. 61.

**Contra.**—In Printup v. Trammel, 25 Ga. 240, it was held the trustee was not personally liable upon notes given by him "as trustee" for property sold to the *cestui que trust*, the payee having knowledge that they were dealing on the credit of the trust estate. See also Frost v. Schackelford, 57 Ga. 260; Clark v. Flannery, 96 Ga. 782.

**Rule Applies Where Contract Made by Trustee's**

**Agent.**—Blewitt v. Olin, 14 Daly (N. Y.) 351.

**Liability for Title to Property Sold at Public Sale.**—Worthy v. Johnson, 8 Ga. 236, 52 Am. Dec. 399.

**A Succeeding Trustee** is not liable upon contracts entered into by his predecessor. U. S. Trust Co. v. Stanton, 139 N. Y. 531.

**A Provision in the Trust Deed** that the trustees shall be free from personal liability does not affect their liability upon contracts. American Min., etc., Co. v. Converse, 175 Mass. 449.

**Where the Trustee Gives a Purchase-money Mortgage**, he is personally liable for any deficiency arising upon a foreclosure thereof. Hannah v. Carnahan, 65 Mich. 601.

**Trustees of a Religious Corporation** are not personally liable upon a mortgage executed by them individually for the benefit of the corporation. Beatty v. Gregory, 24 Ont. App. 325.

1. Thayer v. Wendell, 1 Gall. (U. S.) 37; Glenn v. Allison, 58 Md. 529.

2. **Power to Bind Estate by Express Stipulation.**—Noyes v. Blakeman, 6 N. Y. 567; Stanton v. King, 8 Hun (N. Y.) 4; New v. Nicoll, 73 N. Y. 127, 29 Am. Rep. 111; Mander v. Low, (Supm. Ct. Spec. T.) 12 Misc. (N. Y.) 316; Randall v. Dusenbury, 39 N. Y. Super. Ct. 174, affirmed 63 N. Y. 645. See also Johnson v. Leman, 30 Ill. App. 370; Geissler v. Werner, 3 Dem. (N. Y.) 200.

**In Georgia** it is declared by statute that trustees are not authorized to create any lien upon the trust estate. Taylor v. Clark, 56 Ga. 309.

3. **Reimbursement from Trust Estate.**—Taylor v. Davis, 110 U. S. 330; Jones v. Dawson, 19 Ala. 672; Sanford v. Howard, 29 Ala. 684, 68 Am. Dec. 101; Poole v. Wilkinson, 42 Ga. 539; Woods v. Ridley, 27 Miss. 119; Short v. Porter, 44 Miss. 533; Neal v. Bleckley, 51 S. Car. 506; McIntyre v. Williamson, 72 Vt. 183, 82 Am. St. Rep. 929. See also *supra*, this section, *Rights of Trustee*.

4. **Jurisdiction of Equity.**—See generally the title ACCOUNTS AND ACCOUNTING, ENCYC. OF PL. AND PR., vol. 1, p. 93; and see, as to the jurisdiction to call on a trustee to account, the title TRUSTS AND TRUSTEES, ENCYC. OF PL. AND PR., vol. 22, p. 90.

But there must be a fiduciary<sup>1</sup> or contractual relation. In the absence of a contractual relation, or an express trust, the fiduciary relation must be founded on tort, and in order to establish the right to an accounting the tort must be clearly proved.<sup>2</sup> If, however, there be a contractual relation, the right to an accounting does not rest on tort.<sup>3</sup> It is not necessary that it should appear that on the accounting something will be found due to the beneficiary, for the right to an accounting results from the fact that a fiduciary relation exists, and that the beneficiary does not know what has been done with the trust fund;<sup>4</sup> but if it clearly appears that nothing will be gained by an accounting, as where the trustee has advanced more than the estate is worth, no accounting will be ordered.<sup>5</sup>

(2) *Duty of Trustee to Account* — (a) *In General*. — It is well settled that it is the duty of every trustee, appointed under an express trust, or holding property as a constructive trustee, to keep fair, accurate, and full accounts of his dealings with the trust estate, to have such accounts always ready for inspection, and to render them promptly upon reasonable notice, at the request of the *cestuis que trustent*.<sup>6</sup> If the interests of the beneficiaries are separate, separate accounts should be kept;<sup>7</sup> but the trustee may be called upon to

**No Adequate Remedy at Law.** — Where the trustee mingles the trust funds with his own, a resort to equity is necessary in order to have an accounting. *Taft v. Stow*, 174 Mass. 171.

**1. Must Be Fiduciary Relation.** — *Moxon v. Bright*, L. R. 4 Ch. 292; *Marvin v. Brooks*, 94 N. Y. 71.

**2. When Tort Must be Proved.** — *Woodbridge v. Saratoga Springs First Nat. Bank*, 45 N. Y. App. Div. 166, *affirmed* 166 N. Y. 238.

**3. When Accounting Does Not Rest on Tort.** — *Green v. Brooks*, 81 Cal. 328.

**4. Not Necessary to Show Balance Due.** — *Green v. Brooks*, 81 Cal. 328; *Frethey v. Durant*, 24 N. Y. App. Div. 58.

**5. Useless Accounting Not Ordered.** — *Liddell v. Deacon*, 20 Grant Ch. (U. C.) 70.

**6. Duty to Account** — *England*. — *Springett v. Dashwood*, 2 Giff. 521; *Pearse v. Green*, 1 Jac. & W. 135; *Eglin v. Sanderson*, 8 Jur. N. S. 329; *Freeman v. Fairlie*, 3 Meriv. 29.

*Canada*. — *Sanford v. Porter*, 16 Ont. App. 565; *Randall v. Burrowes*, 11 Grant Ch. (U. C.) 364.

*Colorado*. — *Hottel v. Mason*, 16 Colo. 43.

*District of Columbia*. — *Richardson v. Van Auken*, 5 App. Cas. (D. C.) 209.

*Georgia*. — *Poullain v. Poullain*, 76 Ga. 420; *Dill v. McGehee*, 34 Ga. 438.

*Illinois*. — *Lehman v. Rothbarth*, 150 Ill. 270; *Dole v. Olmstead*, 36 Ill. 150, 85 Am. Dec. 397; *Nevitt v. Woodburn*, 190 Ill. 283; *Weaver v. Fisher*, 110 Ill. 146.

*Kentucky*. — *Ward v. Shire*, (Ky. 1901) 65 S. W. Rep. 8.

*Maine*. — *Miller v. Whittier*, 36 Me. 577.

*Maryland*. — *Hatton v. Weems*, 12 Gill & J. (Md.) 108.

*Massachusetts*. — *Rowland v. Maddock*, 183 Mass. 360.

*Michigan*. — *Perrin v. Lepper*, 72 Mich. 454; *Wooden v. Kerr*, 91 Mich. 188.

*New Jersey*. — *Elmer v. Loper*, 25 N. J. Eq. 475.

*New York*. — *Hancock v. Wall*, 28 Hun (N. Y.) 214.

*Ohio*. — *Chapman v. Loveland*, 11 Ohio St. 214.

*Pennsylvania*. — *Hermstead's Appeal*, 60 Pa. St. 423; *Landis v. Scott*, 32 Pa. St. 495.

*Tennessee*. — *Montgomery v. Coldwell*, 14 Lea (Tenn.) 29.

*Wisconsin*. — *Geisse v. Beall*, 3 Wis. 367.

And see the cases cited in the following notes.

**As to Who Is Entitled to Call for an Accounting** see the title TRUSTS AND TRUSTEES, vol. 22, p. 95, ENCYC. OF PL. AND PR.

**A Trustee** submitting his readiness to account should file with his answer a statement of his account. *Booth v. Sineath*, 2 Strobl. L. (S. Car.) 31.

**A Statute** authorizing suit on a trustee's bond for neglect of duty does not confine the beneficiaries to a suit on the bond, but they are entitled to an accounting in equity. *Laurel County Ct. v. Laurel Seminary*, 93 Ky. 379.

**Right of Trustee to an Account.** — Under the *New York Act of 1895*, amending 2 Rev. Stat., p. 94, the trustees of a trust under a will may, from time to time, render their accounts, and have them settled in court without being cited by the surrogate. *Glover v. Holley*, 2 Bradf. (N. Y.) 291.

**Liability of Trustee's Agent to Account.** — If a trustee employs an agent, so long as the latter acts merely as agent he cannot be compelled to account. *Atty.-Gen. v. Chesterfield*, 18 Beav. 596; *Myler v. Fitzpatrick*, 6 Madd. 360; *Dove v. Everard*, 1 Russ. & M. 231; *Maw v. Pearson*, 28 Beav. 196; *Archer v. Lavender, Jr.* R. 9 Eq. 220; *Barnes v. Addy*, L. R. 9 Ch. 244. See also *Marshall v. Sladden*, 7 Hare 428. But if he obtains possession of the trust funds and does not act in strict conformity with his duty as agent, he becomes a constructive trustee, and must account to the *cestuis que trustent*. See *supra*, this section, *Liabilities of Trustees*.

**Accounting Condition Precedent to Discharge.** — Under Code Civ. Pro. N. Y., § 2814, a surrogate should not discharge a trustee until he has accounted for the entire trust estate and has paid it over. *Matter of Olmstead*, 24 N. Y. App. Div. 190.

**7. Separate Accounts of Separate Interests.** — *Dennis v. Dennis*, 15 Md. 73.



account to various beneficiaries in one action, though their interests are distinct.<sup>1</sup>

**Right to an Accounting Not an Absolute One.** — The right to an accounting is not an absolute right, but should be accorded on principles of equity alone, and if the circumstances render an accounting improper, none will be ordered.<sup>2</sup>

(b) **Particular Instances.** — A trustee who has acted under a trust cannot set up as a bar to the accounting the invalidity of the trust,<sup>3</sup> or of his appointment,<sup>4</sup> nor the fact that he has assumed the duties of trustee without authority,<sup>5</sup> nor that the beneficiaries are not the rightful owners, when he has acquired possession of the trust fund through them.<sup>6</sup> He is not relieved from an accounting by reason of his having already accounted as executor;<sup>7</sup> nor may the executor of a deceased trustee excuse himself from accounting by showing that a cotrustee of his testator is still alive.<sup>8</sup> It is no excuse for failure to render an account that the trustee has discretionary powers,<sup>9</sup> and a decree of the court ordering the trustee to pay the income of a fund to a beneficiary and on the latter's death to distribute it does not relieve him from accounting as to the manner in which he has paid over the income.<sup>10</sup> Where a trustee is removed and another appointed under a power in a trust deed, this does not of itself discharge the first trustee from liability to account.<sup>11</sup> It is no objection to a bill for accounting that the beneficiaries have not tendered to the trustee the amount advanced by him in securing title

**1. Accounting to Several Cestuis in One Action.** — *Norris v. Hassler*, 22 Fed. Rep. 401.

**2. Accounting Not an Absolute Right.** — *Nail v. Punter*, 5 Sim. 555; *Woodbridge v. Bockes*, 170 N. Y. 596.

In *England*, under Order LV., n. 10, the court may refuse to order an accounting where justice can be done the parties without such a decree. *Campbell v. Gillespie*, 81 L. T. N. S. 514, 48 W. R. 151, holding that where the trustee has kept full accounts, which have been submitted to the *cestuis que trustent* from time to time, and no objection raised to them, and the trustee then destroys his account books, in good faith, he will not be made to submit a new account.

**No Liability to Account.** — Where property is given to a parent, or to one standing in *loco parentis*, with direction to educate and maintain children, upon the fulfilment of the trust no account can be demanded. *Hadow v. Hadow*, 9 Sim. 438; *Leach v. Leach*, 13 Sim. 304; *Hora v. Hora*, 33 Beav. 88; *Macknet v. Macknet*, 27 N. J. Eq. 594. See also *Jodrell v. Jodrell*, 14 Beav. 397.

Where, by the terms of a will, the trustee is not to account until the beneficiary reaches the age of twenty-three, no accounting can be demanded before that time, unless the trustee be insolvent. *Tilly v. Simpson*, *Moseley* 244.

A surety of a deceased trustee, having possession of the assets of the estate, is under no duty to account to the administrator of said trustee, in order that the administrator may establish a claim for commissions due to his intestate; there is no privity between surety and administrator, and the latter should file the accounts of his intestate, obtaining the necessary books, etc., from the surety. *Scott's Estate*, 202 Pa. St. 389.

**3. Invalidity of Trust** — *Hazard v. Dillon*, 34 Fed. Rep. 485; *Saunders v. Richard*, 35 Fla. 28; *Duncan v. Bryan*, 11 Ga. 63; *Jones v. Butler*, 30 Barb. (N. Y.) 641.

**4. Invalidity of Appointment.** — *McDowell v. Brantley*, 80 Ala. 173.

**5. Assumption of Duties Without Authority.** — *Werborn v. Austin*, 77 Ala. 381.

**6. Disputing Right of Beneficiaries Who Put Him in Office.** — *Walton v. Stewart*, 129 N. Y. 667.

**Liability to Third Party No Excuse.** — It having been shown that the trustee has received the profits of certain patents belonging to the trust estate, he cannot excuse himself from accounting therefor by proof that he is trustee for a third party, to whom he has turned over such profits. *Averell v. Barber*, 24 N. Y. App. Div. 53.

**7. Previous Accounting as Executor.** — *Merritt v. Merritt*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 230; *Creamer v. Holbrook*, 99 Ala. 52. See also *Wooden v. Kerr*, 91 Mich. 188.

**8. Executor of Deceased Trustee Must Account.** — *Shoch's Estate*, 15 Phila. (Pa.) 519, 30 Leg. Int. (Pa.) 90.

**Accounting by Personal Representative of Trustee.** — It is the proper practice, upon the death of one of a number of trustees, who, with the consent and approval of his cotrustees, has had sole charge and management of the estate, receiving and disbursing its moneys, making its investments, etc., that his account of the management of the estate to the date of his death should be prepared and filed by his executor or administrator, since the latter represents the deceased trustee and receives from his dead hand the moneys and other assets of the estate he had in custody during his life, as well as his individual estate, which, perhaps, may be called upon to supply any deficit in the trust estate. *Emlen's Estate*, 8 Pa. Co. Ct. 508.

**9. Trustee with Discretionary Powers.** — *Libbett v. Maulsby*, 71 N. Car. 345.

**10. Decree of Court.** — *Re Hodges*, 63 Vt. 661.

**11. Appointment of New Trustee.** — *Clarke v. Deveau*, 1 S. Car. 172.

to the trust property, where he has made no such demand, and where he has enough funds in hand to reimburse himself.<sup>1</sup> Lapse of time is not of itself a bar to an accounting.<sup>2</sup> The trustee cannot refuse to render an account merely because such account is very simple.<sup>3</sup> A previous collusive accounting is not a defense to a subsequent accounting.<sup>4</sup>

(c) **Duty to Furnish Copies.** — Although it is the duty of the trustee to have his accounts always ready, to afford all reasonable facilities for inspection and examination, and to give full information whenever required, as a general rule he is not obliged to prepare copies of his accounts for the beneficiaries.<sup>5</sup> It has been held that the trustee does not discharge his duty to account by an offer to permit the *cestui que trust* or his attorney or accountant to examine the books,<sup>6</sup> but there seems to be no authority distinctly laying down the rule that the rendering of an account means the preparation of a copy and its delivery to the *cestui que trust*.<sup>7</sup>

(d) **Penalty for Neglect to Account.** — If a trustee fails to account, his commission<sup>8</sup> and expenses<sup>9</sup> may be refused him, and such neglect may be ground for charging him interest.<sup>10</sup> Failure to account is usually a breach of a trustee's bond.<sup>11</sup>

(e) **Statutory Duty to Account.** — The duty to render accounts annually, or by order of court, is very generally imposed on trustees by statute.<sup>12</sup>

**b. CHARGES** — (1) *In General.* — A trustee must account for all he has received,<sup>13</sup> and the difference between this and the amount of his proper dis-

1. **Tender of Amount of Advances.** — *Christy v. Christy*, 162 Pa. St. 485; *Christy v. Caristy*, 176 Pa. St. 421.

**Retention of Check by Cestui.** — Where the trustee sends a check to one of the *cestui que trust* as final payment, the *cestui* does not lose his right to an accounting by returning the check without cashing it. *Rowland v. Maddock*, 183 Mass. 360.

2. **Lapse of Time.** — *Atty.-Gen. v. Gibbs*, 1 De G. & Sm. 156; *Nobles v. Hogg*, 36 S. Car. 322.

In *Atty.-Gen. v. Gibbs*, 1 De G. & Sm. 156, it was held that though a trustee for a public charity is not called on for twenty years by the body to whom he is accountable, yet it is his duty to tender his accounts to such body without requisition. And in *Nobles v. Hogg*, 36 S. Car. 322, it was said that lapse of time was an additional reason for furnishing an account.

3. **Account Very Simple.** — *Talbot v. Marshfield*, L. R. 3 Ch. 622.

4. **Previous Collusive Accounting No Bar.** — *Kerr v. Blodgett*, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 137.

5. **No Duty to Furnish Copies.** — *Sandford v. Porter*, 16 Ont. App. 565. See also *Randall v. Burrowes*, 11 Grant Ch. (U. C.) 364.

6. **Offer to Allow Examination Not Enough.** — *Kemp v. Burn*, 4 Giff. 348.

7. **Rendering Account Does Not Mean Furnishing Copies.** — *Sandford v. Porter*, 16 Ont. App. 565. And see also *Ottley v. Gilby*, 8 Beav. 602; *Smith v. Roe*, 11 Grant Ch. (U. C.) 311.

8. See *supra*, this section, *Rights of Trustees* — *Right to Compensation*.

9. **Loss of Expenses.** — *Gilbert v. Sutliff*, 3 Ohio St. 129.

10. **Neglect of Duty to Account Ground for Charging Interest.** — *Pearse v. Green*, 1 Jac. & W. 135; *Perrin v. Lepper*, 72 Mich. 454.

11. **Failure to Account Breach of Bond.** — *Prindle v. Holcomb*, 45 Conn. 111.

12. **Statutory Duty to Account.** — See the codes and statutes in the various states.

A trustee substituted by the court in place of the trustee originally appointed, the latter having surrendered his trust in pursuance of the Act of 1796, is within the Act of 1824, requiring trustees appointed by the court to return annual accounts of the estates in their possession. *Ex p. Mayrant*, Rich. Eq. Cas. (S. Car.) 1.

Under N. Y. Code Civ. Pro., § 2605, the surrogate has power to require a removed trustee to render an account, even though his letters testamentary have not been expressly revoked, for the order of removal is in effect a revocation of the letters. *Matter of Storm*, 84 N. Y. App. Div. 552.

13. **Duty to Account for All He Receives** — *England*. — *Wainford v. Heyl*, L. R. 20 Eq. 321, 44 L. J. Ch. 567; *Pearse v. Green*, 1 Jac. & W. 135; *Cramer v. Bird*, L. R. 6 Eq. 143.

*United States*. — *Chandler v. Pomeroy*, 87 Fed. Rep. 262; *Missouri Broom Mfg. Co. v. Guymon*, (C. C. A.) 115 Fed. Rep. 112.

*California*. — *Wooster v. Nevills*, 73 Cal. 58; *Green v. Brooks*, 81 Cal. 328.

*Florida*. — *Fuller v. Fuller*, 23 Fla. 236.

*Georgia*. — *Napier v. Napier*, 6 Ga. 404.

*Illinois*. — *Lehman v. Rothbarth*, 159 Ill. 270; *Van Buskirk v. Van Buskirk*, 148 Ill. 9.

*Maryland*. — *Mackubin v. Brown*, 1 Bland (Md.) 410.

*New Jersey*. — *Pence v. Force*, 46 N. J. Eq. 348.

*New York*. — *Campbell v. Johnston*, 1 Sandf. Ch. (N. Y.) 148; *New York L. Ins., etc., Co. v. Cuthbert*, 31 N. Y. App. Div. 191; *Smith v. Keteltas*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 111.

*North Carolina*. — *Weisel v. Cobb*, 114 N. Car. 22.

*Pennsylvania*. — *Ex p. Cassel*, 3 Watts (Pa.) 408; *Dickey's Appeal*, 73 Pa. St. 218; *Boyer's Appeal*, 125 Pa. St. 164; *Powers v. Black*, 159

bursements is the sum with which he will be charged,<sup>1</sup> that is, for which he is personally responsible. While this rule is a strict one, it goes without saying that a trustee cannot be held responsible for more than he has received,<sup>2</sup> and it must appear that he has actually received the amount with which he is sought to be charged.<sup>3</sup> But, on the other hand, the beneficiary may show that the trustee has received more than he has accounted for.<sup>4</sup> If a trustee receives bonds or notes, he will be charged with their value, unless he can satisfactorily show that the proceeds thereof have not come to his hands;<sup>5</sup> so a trustee appointed to sell real estate who reports a sale to the court will be presumed, after the lapse of ten years, to have received the purchase money and will be held responsible whether he has received it or not.<sup>6</sup> The satisfaction of a mortgage of record is *prima facie*, if not absolute, proof of the receipt of the amount of the mortgage.<sup>7</sup> Though the rule is, as stated above, that in order to charge a trustee with a particular sum it must be shown that he has received such sum, yet if it appears that the trustee has received some sum from the sale or rent of property, it is his duty to show what he has actually received, and in the absence of such proof on his part he will be charged with the highest value which can be put upon the property according to the evidence.<sup>8</sup>

**Liability for More than Amount Received.** — The question as to the liability of the trustee to account for more than he has actually received depends upon considerations not belonging to the subject of accounting and will be found elsewhere.<sup>9</sup>

**Relief Limited to Scope of Trust.** — The right of the *cestui que trust* to an accounting extends only as far as the limits of the trust, and an accounting may be had only of matters within the trust. Thus, in a suit to enforce a trust in land, the accounting should be limited to matters relating to the land, and a general accounting is improper.<sup>10</sup> So the trustee is not liable to account for money belonging to the beneficiary, but not connected with the trust in which

Pa. St. 153; Ahl's Appeal, 25 W. N. C. (Pa.) 113, 129 Pa. St. 26; Greenwood's Appeal, 92 Pa. St. 181.

*South Carolina.* — Terry v. Hopkins, 1 Hill Eq. (S. Car.) 1; McFall v. McFall, 35 S. Car. 559; Clarke v. Deveaux, 1 S. Car. 172.

*Tennessee.* — Gray v. Ward, (Tenn. Ch. 1898) 52 S. W. Rep. 1028; Loveman v. Taylor, 85 Tenn. 1.

*Wisconsin.* — Ludington v. Patton, 111 Wis. 208; Hoile v. Bailey, 58 Wis. 434; Wilcox v. Bates, 45 Wis. 138.

**Trustee Must Account for Actual Amount Received.** — Where a constructive trust in goods sold is established, and pending the suit the trustee is allowed to sell and hold the proceeds, the trustee must account for the price received, although this is more than he has paid for them. Missouri Broom Mfg. Co. v. Guymon, (C. C. A.) 115 Fed. Rep. 112.

**1. Amount with Which Chargeable.** — Chapman v. Loveland, 11 Ohio St. 214.

**2. Liable Only for What Received.** — Goodwin v. Fox, 129 U. S. 601; Tucker v. Cocke, 32 Miss. 184; Beale v. Kline, 183 Pa. St. 149; Fitzgerald v. Rhode Island Hospital Trust Co., 24 R. I. 59; Tindal v. Neal, 59 S. Car. 4; Loveman v. Taylor, 85 Tenn. 1. See also Thomson v. Peake, 38 S. Car. 440; Ramsay v. Judah, 2 L. C. Jur. 251. But see as to the liability of a cotrustee for money not received by him, *supra*, this section, *Liabilities of Trustees — For Acts of Cotrustees*.

**Payment under Decree of Court.** — Where a trustee is ordered by the court to distribute certain funds not yet received by him, he is not liable to any one claiming under the order of distribution when he has been unable to collect said funds. Norris v. Lantz, 18 Md. 260.

**Liability Limited to Amount Received up to Filing of Bill for Accounting.** — Butler v. Austin, 64 Cal. 3.

**3. Receipt Must Be Shown.** — Crampton v. Seymour, 67 Vt. 393.

**Burden of Proof.** — Where a beneficiary seeks to charge an account, the burden of proof is on him, in accordance with the fundamental principle that he who affirms must sustain. Welsh v. Brown, 50 N. J. Eq. 387.

**4. Receipt of Greater Amount May Be Proved.** — Crampton v. Seymour, 67 Vt. 393.

**5. Presumption of Receipt of Money Due Estate.** — Mackubin v. Brown, 1 Bland (Md.) 410.

**6. Receipt of Purchase Money.** — Maddox v. Dent, 4 Md. Ch. 543.

**7. Receipt of Amount of Mortgage.** — Biss's Estate, 4 Pa. Dist. 251.

**8. Trustee Must Show What He Has Received.** — Blauvelt v. Ackerman, 23 N. J. Eq. 495; Morton's Estate, 7 Phila. (Pa.) 484; Stromafi v. Rottenbury, 4 Desaus. (S. Car.) 268.

**9. Liability for More than Amount Received.** — See *supra*, this section, *Liabilities of Trustees*.

**10. Accounting Limited by Trust.** — Royal v. Royal, 30 Oregon 448.



the accounting is asked,<sup>1</sup> nor is he liable, as trustee, for money loaned him by the *cestui que trust*.<sup>2</sup>

(2) *Interest* — (a) *When Chargeable* — *aa. GENERAL PRINCIPLES.* — While it may be stated as a broad general rule that trustees are liable for interest upon the receipts of the trust fund, in the absence of circumstances justifying their retaining them in possession,<sup>3</sup> yet no fixed rule can be laid down which will govern all the cases, and each case must necessarily depend upon its own facts and circumstances.<sup>4</sup> The principle upon which they are usually held liable for interest is that they have received interest, and have used the money themselves, or that they have been negligent, either in not paying it over or in not investing it so as to render it productive.<sup>5</sup> The trustee is not liable until the funds are in his possession and under his control,<sup>6</sup> and may be excused from

1. *Money Unconnected with Trust.* — Matter of Keteltas, 1 Connoly (N. Y.) 468.

*Money Received by Trustee as Officer of Corporation.* — In an action by beneficiaries against their trustee, the latter cannot be compelled to account for moneys unlawfully received while president of a corporation in which the trust estate owns the control of the stock. The corporation alone could demand such accounting, and the interest of the plaintiffs as shareholders is too remote to entitle them to an accounting in an action prosecuted only in their own right. *Elias v. Schwyer*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 707.

2. *Money Loaned by Cestui.* — *Fuller v. Abbe*, 105 Wis. 235.

But when a trustee seeks to convert the trust funds or a portion thereof, in his hands, into an ordinary debt, or a loan from his *cestui que trust* to himself, he must do so by clear and satisfactory evidence. The presumptions are all against him, and the law looks with jealousy upon such transactions. It exacts the highest good faith on the part of the trustee, and the burden is upon him of showing it. The parties are not dealing at arms' length, nor upon equal terms. *Stewart's Estate*, 140 Pa. St. 124; *Kittel's Estate*, 156 Pa. St. 445.

*Death of the Trustee* does not have the effect of changing the trustee into a debtor. *Marshall v. Marshall*, 11 Colo. App. 505.

3. *Liable for Interest.* — *Woodhead v. Marriott*, Coop. Pr. Cas. 62; *Earle v. Burland*, 6 Ont. L. Rep. 327; *McComb v. Frink*, 149 U. S. 629, affirming *Snyder v. McComb*, 39 Fed. Rep. 292; *Booth v. Bradford*, 114 Iowa 562; *Offutt v. Divine*, (Ky. 1890) 53 S. W. Rep. 816; *Blauvelt v. Ackerman*, 23 N. J. Eq. 495; *McCausland's Appeal*, 38 Pa. St. 466; *Mundy v. Vawter*, 3 Gratt. (Va.) 518.

"A trustee is liable to pay interest for trust money in his hands, in all cases, unless he can show that it was necessarily kept in hand for the purposes of the trust." *Miller v. Beverley*, 4 Hen. & M. (Va.) 415.

4. *Depends upon Circumstances.* — *Gott v. State*, 44 Md. 319; *Bobb v. Bobb*, 89 Mo. 411; *Kane v. Kane*, 146 Mo. 605; *Cook v. Lowry*, 95 N. Y. 103. See also *Voorhees v. Stoothoff*, 11 N. J. L. 145.

"As a general rule, in the absence of anything to the contrary, the question of requiring a trustee to pay interest on the trust funds is one which must depend upon the facts and circumstances in each particular case; and, where good conscience requires that the trustee

be charged with interest, the payment thereof ought to be exacted." *Per Jordan, J.*, in *Stanley v. Pence*, 160 Ind. 636.

*Books Not Sold.* — Where there is no evidence showing a sale of books by the trustee, the time of sale, and the amount realized, it is not error to refuse to charge him interest in his final account on the value of the books from the time they came into his hands. *Boyer's Appeal*, 125 Pa. St. 164.

*Support of Beneficiary by Trustee.* — A daughter of weak mind, who was incapable of managing her business affairs, assigned to her mother a five-thousand-dollar life-insurance policy, the proceeds of which were to be used for the daughter's benefit. For twenty-seven years the daughter was supported by the mother, during which time no accounts were given or demanded. Upon the death of the trustee, it was held that she was not liable for interest on the proceeds of the policy during the time of such support, but only after the trustee's death was her estate liable for interest. *Harker's Estate*, 167 Pa. St. 197.

*Negligence of Beneficiary.* — Where no interest was made by the trustee, and for twenty years the beneficiary left the trustee without any knowledge of his residence, and without any instructions what to do with the income of the trust fund, such neglect on the part of the beneficiary relieved the trustee of liability to account for interest. *Cassels v. Vernon*, 5 Mason (U. S.) 332.

5. *Principles Governing Liability.* — *Miller v. Billingsley*, 49 Ind. 489; *Doom v. Howard*, (Ky. 1901) 64 S. W. Rep. 469; *Calkins v. Bump*, 120 Mich. 335; *Minuse v. Cox*, 5 Johns. (N. Y.) 441, 9 Am. Dec. 313; *McNair v. Ragland*, 1 Dev. Eq. (16 N. Car.) 520; *Martin v. Martin*, (Oregon 1903) 72 Pac. Rep. 639. See also *Sammes v. Rickman*, 2 Ves. Jr. 36.

*Not Liable When Payments Made as Fast as Collected.* — *Doom v. Howard*, (Ky. 1901) 64 S. W. Rep. 469.

*Prosperous Management of Trust — Technical Breach.* — Where the trustee has managed the estate prudently and it has prospered in his hands, although he is guilty of technical breach of trust in depositing the funds to his credit, no wrong being intended, and no loss resulting, and no reasonable delay being made in making investments, no interest will be charged. *Vaccaro v. Cicalla*, 89 Tenn. 63.

6. *Funds in Possession.* — *Lowrie's Appeal*, 1 Grant Cas. (Pa.) 373.

*Erroneous Charge.* — A trustee erroneously

such liability by agreement,<sup>1</sup> but having once accepted the trust his liability continues until he is relieved, although he tenders his resignation and refuses to perform the duties of the trust.<sup>2</sup>

*bb. FAILURE TO COLLECT FUND.* — It is the duty of the trustee to be diligent in collecting debts due the trust estate, and the interest on investments, and where he fails to make proper efforts to do so, he is liable for interest on the sums which should have been collected by him.<sup>3</sup>

*cc. MINGLING TRUST FUNDS WITH INDIVIDUAL FUNDS.* — If a trustee commingles the funds of the trust estate with his own private funds, and does not keep the accounts separate, he is liable for interest on the trust fund, upon the theory of compensation to the *cestui que trust*, because the presumption is that it was used for his own profit;<sup>4</sup> and the rule is not affected by the readiness of the trustee to pay at all times.<sup>5</sup>

*dd. USE OF FUNDS BY TRUSTEE.* — It is universally held that a trustee, employing the trust funds in his own business or for his own benefit, is liable for interest thereon, upon the principle that he shall derive no gain, benefit, or advantage from the trust fund, and whatever profit may be made therewith properly belongs to the trust estate.<sup>6</sup> Where he thus uses the fund no demand on

charged himself with the whole amount of a sale of land, without considering that one-third of it was to remain a charge thereon for the benefit of the widow. He was held entitled to have deducted the one-third and the interest thereon. *Yoder's Appeal*, 45 Pa. St. 394.

**1. Not Liable for Interest if No Commissions Are Charged.** — *Barclay v. Cooper*, 42 N. J. Eq. 516.

**2. Liability Continues until Relieved of Trust.** — *Tucker v. Grundy*, 83 Ky. 540.

**3. Failure to Collect.** — *Simes v. Eyre*, 6 Hare 137; *Kennedy v. Winn*, 80 Ala. 165; *Hamilton v. Reese*, 18 Ga. 8; *Weisel v. Cobb*, 118 N. Car. 11; *Old's Estate*, 8 Lanc. L. Rev. 329; *Wolgamuth's Estate*, 16 Lanc. L. Rev. 229; *Lowry v. McGee*, 3 Head (Tenn.) 269.

**Collection of Good Accounts Delayed from Six to Eighteen Months.** — *Weisel v. Cobb*, 118 N. Car. 11.

**Debtor and Trustee Living on Same Side of Belligerent Line — Liable for Failure to Collect Interest.** — *Coltrane v. Worrell*, 30 Gratt. (Va.) 434.

**Interest on Mortgage — Payment of Board of Children.** — A mother held a mortgage on a farm, it being tacitly understood that the interest should pay for the board of her children, who spent their summers there. After her death, her husband was made trustee with an annual allowance of ten thousand dollars for the support of the children, who continued to spend their summers on the farm. The trustee was held not liable for failing to collect the interest on the mortgage. *Dow v. Dow*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 222.

**4. Funds Mingled.** — *Moons v. De Bernaldes*, 1 Russ. 301; *Cook v. Addison*, L. R. 7 Eq. 466; *Wightman v. Helliwell*, 13 Grant Ch. (U. C.) 330; *Bemmerly v. Woodward*, 124 Cal. 568; *Asay v. Allen*, 124 Ill. 391; *St. Paul Trust Co. v. Strong*, 85 Minn. 1; *Knowlton v. Bradley*, 17 N. H. 458, 43 Am. Dec. 609; *Duffy v. Duncan*, 35 N. Y. 187; *Matter of Reed*, 45 N. Y. App. Div. 196; *Wistar's Appeal*, 54 Pa. St. 60; *Re Hodges*, 66 Vt. 70, 44 Am. St. Rep. 820. See *infra*, this subsection, *Use of Funds by Trustee*.

In *Rapalje v. Hall*, 1 Sandf. Ch. (N. Y.) 339, it was said: "The authorities do not establish that a trustee is to pay interest solely for the reason that he deposits trust moneys indiscriminately with his own; \* \* \* there must be superadded a breach of trust; a neglect or refusal to invest the fund at the time or in the mode which the trust instrument or the law itself has pointed out. In the case where the trustee has made use of the funds, but no breach of trust is shown, he may be charged with interest, if it be proved that he has made interest."

**Deposit with Interest-bearing Account.** — *Hess's Estate*, 68 Pa. St. 454.

**Depreciated Currency — Separate Account.** — *Saunders v. Gregory*, 3 Heisk. (Tenn.) 567.

**5. Readiness to Pay.** — *Kerr v. Laird*, 27 Miss. 544.

**6. Use of Funds by Trustee — England.** — *Mousley v. Carr*, 4 Beav. 49; *Knott v. Cottee*, 16 Beav. 77; *Treves v. Townshend*, 1 Bro. C. C. 384; *Westover v. Chapman*, 1 Coll. Ch. Cas. 177; *Forbes v. Ross*, 2 Cox Ch. 113; *Townend v. Townend*, 1 Giff. 201; *Penny v. Avison*, 3 Jur. N. S. 627; *Berwick v. Murray*, 3 Jur. N. S. 847; *Heathcote v. Hulme*, 1 Jac. & W. 122; *Burdick v. Garrick*, L. R. 5 Ch. 233; *Imperial Mercantile Credit Assoc. v. Coleman*, L. R. 6 H. L. 189, 42 L. J. Ch. 644; *Walker v. Woodward*, 1 Russ. 107; *Atty.-Gen. v. Solly*, 2 Sim. 518.

*Canada.* — *Wiard v. Gable*, 8 Grant Ch. (U. C.) 458.

*Arkansas.* — *Humphreys v. Butler*, 51 Ark. 351.

*California.* — *Matter of Thompson*, 101 Cal. 349; *Faulkner v. Hendy*, 103 Cal. 15; *In re Hensing*, (Cal. 1892) 31 Pac. Rep. 578.

*Connecticut.* — *Clement v. Brainard*, 46 Conn. 174; *State v. Howarth*, 48 Conn. 207.

*Illinois.* — *Ogden v. Larrabee*, 57 Ill. 389; *Lehmann v. Rothbarth*, 111 Ill. 185; *Lehman v. Rothbarth*, 159 Ill. 270.

*Indiana.* — *Stanley v. Pence*, 160 Ind. 636.

*Kentucky.* — *Clark v. Anderson*, 10 Bush (Ky.) 99; *Montjoy v. Lashbrook*, 2 B. Mon. (Ky.) 261; *Clemens v. Caldwell*, 7 B. Mon. 171; *Page v. Holman*, 82 Ky. 573.

him is necessary in order for him to be liable for interest.<sup>1</sup>

**Option of Cestui Que Trust to Take Profits or Interest.** — Where the use of the trust fund by the trustee in trade or speculation for his own private benefit has resulted in profits which can be determined, the *cestui que trust* has the option to hold him liable for the profits so made, or interest on the fund used,<sup>2</sup> but he must elect to take the profits for the whole period the fund was so employed, or interest thereon for the whole period. He will not be allowed

*Maryland.* — *Diffenderffer v. Winder*, 3 Gill & J. (Md.) 311; *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; *Gott v. State*, 44 Md. 319; *Dorsey v. Banks*, 70 Md. 508.

*Massachusetts.* — *McKim v. Hibbard*, 142 Mass. 422.

*Michigan.* — *Perrin v. Lepper*, 72 Mich. 454.

*Mississippi.* — *Kerr v. Laird*, 27 Miss. 544.

*Missouri.* — *Bobb v. Bobb*, 89 Mo. 411; *Kane v. Kane*, 146 Mo. 605.

*New Hampshire.* — *First Cong. Soc. v. Pelham*, 58 N. H. 566.

*New Jersey.* — *Voorhees v. Stoothoff*, 11 N. J. L. 145; *Lathrop v. Smalley*, 23 N. J. Eq. 192; *McKnight v. Walsh*, 24 N. J. Eq. 498, affirming 23 N. J. Eq. 136.

*New York.* — *Morgan v. Morgan*, 3 Dem. (N. Y.) 612; *Brown v. Rickets*, 4 Johns. Ch. (N. Y.) 303, 8 Am. Dec. 567; *Mumford v. Murray*, 6 Johns. Ch. (N. Y.) 1; *Reynolds v. Sisson*, 78 Hun (N. Y.) 595; *Cook v. Lowry*, 95 N. Y. 103, affirming 29 Hun (N. Y.) 20.

*Pennsylvania.* — *Sharpe's Estate*, 2 Phila. (Pa.) 280, 14 Leg. Int. (Pa.) 140; *Breneman v. Frank*, 28 Pa. St. 475; *Griffith's Estate*, 147 Pa. St. 274; *Moore v. Moore*, 165 Pa. St. 464; *Erie School Dist. v. Griffith*, 203 Pa. St. 123.

*Rhode Island.* — *Hazard v. Durant*, 14 R. I. 25.

*South Carolina.* — *Earley v. Law*, 42 S. Car. 330.

*Vermont.* — *Williams v. Haskins*, 66 Vt. 378. In *Voorhees v. Stoothoff*, 11 N. J. L. 145, the rule was said to be a "fundamental principle, dictated no less by morality and practical honesty than by the law."

**Breach of Trust.** — In *Rapalje v. Hall*, 1 Sandf. Ch. (N. Y.) 399, it was said that the authorities did not establish the rule that a trustee should pay interest solely for the reason that he used the funds in his own business, but that there must be superadded a breach of trust. See also *Price v. Holman*, 135 N. Y. 124.

**Use Presumed.** — Where a trustee retained moneys, and did not show that he had deposited them for safe keeping or kept them in his hands unemployed, he was held properly charged with interest upon the assumption that he had appropriated them to his own use. *Beaton v. Boomer*, 2 Ch. Chamb. (Ont.) 89.

**Treasurer of Company — No Dividends Declared.** — When the trustee is treasurer of a company and uses the money, the fact that no dividends were declared will not release him from liability for interest. *Kerr v. Laird*, 27 Miss. 544.

**Death of Trustee — Liability of Estate.** — In *Bemmerly v. Woodward*, 124 Cal. 568, where a trustee had misused the funds, which came into his personal representative's hands unmarked as trust funds, it was held that although the trustee was liable for compound interest up to the time of his death, his personal represent-

ative was under no obligation to invest, and the estate was not liable for interest, but only for the fund and interest up to the trustee's death. But see *Perrin v. Lepper*, 72 Mich. 454.

**Effect of Uncertain Contract — Stipulation Broken.** — Liability of the trustee to pay interest on funds invested for private use will not be excused by agreement with the *cestui que trust*, releasing him from such payments, if the evidence is conflicting as to the contract, and a stipulation in the alleged contract was broken. *Dorsey v. Banks*, 70 Md. 508.

**Unintentional Use of Part — Knowledge by Beneficiary — Interest on Whole Not Allowed.** — A trust estate consisted of an interest in a business, and the trustee, who was a member of the firm, deposited the income of the trust with the firm account, with no intention of using it for his private purposes. Upon finding that at times such fund had been used for private transactions, he charged himself with interest in the overcharges. The contention of the beneficiary, who knew of the mode of business, that interest should be charged on the whole amount, was not sustained. *Matter of Nesmith*, 140 N. Y. 609, affirming 71 Hun (N. Y.) 139.

**Trust Fund Charged with Interest.** — Where a trustee, by using trust funds, makes the trust account in debit at the bankers, for which it has to pay interest, he is liable to make good such interest. *Campbell v. Gillespie*, 81 L. T. N. S. 514, 48 W. R. 151.

**1. No Demand Necessary.** — *Kerr v. Laird*, 27 Miss. 544.

**2. Option of Trustee — England.** — *Jones v. Foxall*, 15 Beav. 388; *Townend v. Townend*, 1 Giff. 201; *Vyse v. Foster*, L. R. 8 Ch. 309; *In re Davis*, (1902) 2 Ch. 314; *Ex p. Watson*, 2 Ves. & B. 414; *Docker v. Somes*, 2 Myl. & K. 655; *Hankey v. Garret*, 1 Ves. Jr. 236. See also *Robinson v. Robinson*, 1 De G. M. & G. 247.

*Maryland.* — *Winder v. Diffenderffer*, 2 Bland (Md.) 166.

*New Jersey.* — *McKnight v. Walsh*, 23 N. J. Eq. 136, affirmed 24 N. J. Eq. 498.

*New York.* — *Morgan v. Morgan*, 4 Dem. (N. Y.) 353.

*Pennsylvania.* — *Robinett's Appeal*, 36 Pa. St. 174; *Norris's Appeal*, 71 Pa. St. 106.

**Misrepresentation by Trustee that Fund Was Invested in Stock.** — *Bate v. Scales*, 12 Ves. Jr. 402.

**Labor of Trustee — Share of Profits.** — "The use of trust funds will not always justify a claim for a proportionate share of profits, where the profits arise not only from the use of the money, but from the labor and attention bestowed by the party upon the business. The *cestui que trust* cannot, in such a case, claim as a right an equal participation of the profits."



to take profits for a part of the time, and interest for the remainder.<sup>1</sup>

*ee. IMPROPER INVESTMENTS.* — In the absence of specific directions as to investment of the fund, the trustee should select such securities as are recognized by the courts as proper, and a prudent man would choose in investing his own funds; and where the instrument creating the trust gives express directions as to what investments shall be made, the trustee must obey the directions. For a breach of duty in either case he is liable to the beneficiary for interest.<sup>2</sup> If the directions are indefinite he should ask the advice of the court, or invest at his own risk.<sup>3</sup>

*Option of Cestui Que Trust.* — Where the trustee invests in a different manner from the directions in the trust, the *cestui que trust* may make him account either for the profits or for interest on the fund.<sup>4</sup>

*ff. FUNDS UNEMPLOYED* — (aa) *Pending Proceedings.* — The retention of a trust fund by the trustee, without putting it to his own use, until the court determines to whom it should be paid does not make him liable for interest.<sup>5</sup> So, when the distribution of the fund is delayed by exceptions to the account no interest is charged pending the exceptions.<sup>6</sup> Nor is it charged on amounts received by him after the filing of a complaint against him for an accounting,<sup>7</sup> and after payment of the fund into court.<sup>8</sup>

(bb) *To Meet Contingencies.* — A trustee may retain in his hands unemployed a reasonable sum, not disproportionate to the current expenses of the trust, for the payment of contingent expenses, without becoming liable to account for interest thereon, if it is not employed for his own private purposes.<sup>9</sup> And if he is under obligation to pay on demand, which is liable to be made at any

Sharpe's Estate, 2 Phila. (Pa.) 280, 14 Leg. Int. (Pa.) 140.

1. **Must Elect for Whole Period.** — *Heathcote v. Hulme*, 1 Jac. & W. 122.

2. **Improper Investments** — *England.* — *Hooker v. Pratts*, 1 Jur. 473; *In re Barclay*, (1899) 1 Ch. 674; *Robinson v. Robinson*, 1 De G. M. & G. 247; *Atty.-Gen. v. Alford*, 4 De G. M. & G. 843; *Munch v. Cockerell*, 5 Myl. & C. 179.

*Canada.* — *Paterson v. Lailey*, 18 Grant Ch. (U. C.) 13.

*Illinois.* — *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132.

*New Jersey.* — *Williams v. Williams*, 35 N. J. Eq. 100.

*New York.* — *Morgan v. Morgan*, 4 Dem. (N. Y.) 353; *Matter of Reed*, 45 N. Y. App. Div. 196.

*Virginia.* — *Cogbill v. Boyd*, 79 Va. 1.

*Wisconsin.* — *Andrew v. Schmitt*, 64 Wis. 664.

**Not Authorized to Invest.** — *Lee v. Lee*, 2 Vern. 548.

**Investment in Mortgage.** — *Fletcher v. Green*, 33 Beav. 246.

**Deposit in Savings Bank — Personal Security.** — *Spratt v. Wilson*, 19 Ont. 28.

**Directions to Invest in Public or Government Stocks or Funds, or on Real Estate Security — Investment in Foreign Stocks and Bonds, and Exchange Bills.** — *Knott v. Cottee*, 16 Beav. 77.

**Purchase of House in Violation of Trust — Rents Less than Legal Interest.** — In violation of the terms of a trust to keep money invested and to pay the beneficiary the interest, the trustee purchased a house and accounted for the rents, which amounted to less than legal interest. He was held liable for the difference. *Williams v. Williams*, 35 N. J. Eq. 100.

**Inadequate Security at Ten per Cent. Repudiated by Beneficiary and Condemned by Court.** — In *Cogbill v. Boyd*, 79 Va. 1, the investments of the trustee, which were upon inadequate security, were at ten per cent. The *cestui que trust* repudiated them, and they were condemned by the court, as injudicious and improper, not being such as a prudent man would have made of his own funds. The trustee was held liable for interest at six per cent., the legal rate.

3. *Ihmsen's Appeal*, 43 Pa. St. 431, where the trustee was directed to invest in "some good, secure, and profitable stocks or other securities," and it was held that he must comply with the directions or ask advice of court, or he would be liable for interest.

4. **Option of Cestui Que Trust.** — *Pocock v. Reddington*, 5 Ves. Jr. 799. See the title INVESTMENTS, vol. 17, pp. 472, 475.

5. **Conflicting Claims.** — *January v. Poyntz*, 2 B. Mon. (Ky.) 404; *Calkins v. Bump*, 120 Mich. 335. See *Knapp v. Marshall*, 56 Ill. 362.

6. **Pending Exceptions.** — *Yoder's Appeal*, 45 Pa. St. 394.

**Exceptions by Accountant.** — "In many cases it would be improper to charge the accountant with interest during the pendency of exceptions to his account. If they are filed by himself and are groundless, it is usual and proper to charge interest." *Yoder's Appeal*, 45 Pa. St. 394.

7. **Funds Received After Complaint.** — *Butler v. Austin*, 64 Cal. 3.

8. **Payment into Court.** — *Cloud's Estate*, 4 Leg. Gaz. (Pa.) 369.

9. **Current Expenses.** — *St. Paul Trust Co. v. Strong*, 85 Minn. 1; *Knowlton v. Bradley*, 17 N. H. 458, 43 Am. Dec. 609; *Luken's Appeal*, 47 Pa. St. 356; *Griffith's Estate*, 147 Pa. St. 274; *Fulton v. Davidson*, 3 Heisk. (Tenn.) 614.

time, he is not chargeable with interest.<sup>1</sup>

(cc) *Failure to Distribute or Disburse.* — If a trustee retains funds for an unreasonable length of time after it becomes his duty to distribute them to the beneficiaries, or to disburse them in payment of debts, he is properly chargeable with interest thereon.<sup>2</sup> He is also liable when he makes payment to one not entitled to the fund,<sup>3</sup> and for the retention of commissions forfeited by his conduct,<sup>4</sup> or which are not due.<sup>5</sup> But he is not liable where he is to hold for another's use unless he fails to pay on demand,<sup>6</sup> nor after he makes proper tender of the fund.<sup>7</sup>

(dd) *Failure to Invest or Keep Invested.* — So, also, when it is the duty of the trustee to make the fund productive, if he fails to invest, or to keep investments already made, he is properly chargeable with interest.<sup>8</sup> But if the

**1. Payment on Demand.** — *Wilcox v. Quarry*, 73 Hun (N. Y.) 524.

**2. Failure to Disburse** — *England.* — *Trimleston v. Hamill*, 1 Ball. & B. 377; *Parrot v. Treby*, Prec. Ch. 254; *Pearse v. Green*, 1 Jac. & W. 135; *Penny v. Avison*, 3 Jur. N. S. 62. See *Tew v. Winterton*, 1 Ves. Jr. 451.

*Canada.* — *Small v. Eccles*, 12 Grant Ch. (U. C.) 37.

*Alabama.* — *Royall v. McKenzie*, 25 Ala. 363. *Illinois.* — *Jenkins v. Doolittle*, 69 Ill. 415; *Bingham v. Spruill*, 97 Ill. App. 374.

*Indiana.* — *Miller v. Billingsly*, 41 Ind. 489.

*Maryland.* — *Glenn v. Cockey*, 16 Md. 446; *Bentley v. Shreve*, 2 Md. Ch. 215.

*Massachusetts.* — *Rowland v. Maddock*, 183 Mass. 360.

*Michigan.* — *Perrin v. Lepper*, 72 Mich. 454.

*New Jersey.* — *Dufford v. Smith*, 46 N. J. Eq. 216.

*Pennsylvania.* — *Stearley's Appeal*, 38 Pa. St. 525; *Matter of Merrick*, 1 Ashm. (Pa.) 305.

*Virginia.* — *Lomax v. Pendleton*, 3 Call (Va.) 538.

**Payment Directed by Court.** — *Sammes v. Rickman*, 3 Ves. Jr. 36; *Lyons v. Chamberlin*, 25 Hun (N. Y.) 49, affirmed 89 N. Y. 578.

**Deposit in Bank of Which Trustee a Member.** — *Weisel v. Cobb*, 118 N. Car. 11.

**Retention of Funds Fifteen Years.** — *Comgess v. State*, 10 Gill & J. (Md.) 175.

**Payment to Wrong Person — Mistake of Law.** — Where the trustee, by mistake of law, pays the wrong person, and is compelled to pay again to the proper person, the court will not impose interest. *Calkins v. Bump*, 120 Mich. 335.

**Wrongful Demand for Whole Fund.** — The trustee of a voluntary trust "for the benefit of himself (trustor) and wife to be used as they might need it," after the death of the trustor paid a portion of it to the widow, who had no separate means of support. The intestate's administrator demanded the whole fund of the trustee, which was refused. It was held that the trustee was not liable for interest thereafter as he was not in fault in not complying with the demand for the whole fund. *Williams v. Haskins*, 66 Vt. 378.

**Joint Liability of Cotrustees.** — If a trustee fails to apply the proceeds of the trust fund to the payment of an outstanding indebtedness, with the knowledge of the cotrustee, who does not have the proceeds so applied, they are jointly chargeable for the interest on the debt. *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250.

**Failure to Pay Preferred Creditor.** — The proceeds of an assignment for the benefit of creditors were turned over to a trustee to be paid to a preferred creditor. The surety for this debt notified the trustee not to pay, and he did not do so. The debtor had given his note to the surety, and the assignee of the note filed a bill to compel payment to him. The holder of the debt filed a cross-bill, and after several years was given the money. The trustee was held liable for interest from the filing of the cross-bill, not having paid the money into court. *Knapp v. Marshall*, 56 Ill. 362.

**3. Erroneous Payment.** — *English v. Willats*, 1 L. J. Ch. 84; *McClain v. Babbitt*, 62 N. J. Eq. 753.

**4. Commissions Forfeited.** — *McKnight v. Walsh*, 24 N. J. Eq. 498, affirming 23 N. J. Eq. 136.

**5. Commissions Not Due.** — *Bosler's Estate*, 161 Pa. St. 457.

But when a trustee who has no legal right to commissions until they are allowed by decree deducts his commissions, which he had earned, in good faith, prior to that time, without any damage to the estate, he will not be liable for interest thereon. *Beard v. Beard*, 140 N. Y. 260, reversing (Supm. Ct. Gen. T.) 22 N. Y. Supp. 1.

**6. Failure to Pay on Demand.** — *Knight v. Reese*, 2 Dall. (Pa.) 182; *Barrett's Estate*, 1 Leg. Gaz. (Pa.) 99.

**7. Tender of Fund.** — *McBride v. McIntyre*, 100 Mich. 302; *Erie School Dist. v. Griffith*, 203 Pa. St. 123.

**8. Failure to Invest or Keep Invested** — *England.* — *Jones v. Foxall*, 15 Beav. 388; *Knott v. Cottee*, 16 Beav. 77; *In re Emmet*, 17 Ch. D. 142; *Atty.-Gen. v. Alford*, 4 De G. M. & G. 843; *Amiss v. Hall*, 3 Jur. N. S. 584; *Berwick v. Murray*, 3 Jur. N. S. 847.

*Canada.* — *Wiard v. Gable*, 8 Grant Ch. (U. C.) 458.

*United States.* — *Nicholson v. McGuire*, 4 Cranch (C. C.) 194; *Barney v. Saunders*, 16 How. (U. S.) 535; *Canfield v. Canfield*, (C. C. A.) 118 Fed. Rep. 1.

*Illinois.* — *Mathewson v. Davis*, 191 Ill. 391. *Kentucky.* — *Jennings v. Davis*, 5 Dana (Ky.) 127; *Offutt v. Divine*, (Ky. 1899) 53 S. W. Rep. 816.

*Maryland.* — *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; *Winder v. Diffenderfer*, 2 Bland (Md.) 166; *Smith v. Darby*, 39 Md. 268.

*Michigan.* — *Perrin v. Lepper*, 72 Mich. 454.

fund is not for investment, but for preservation or distribution, he is not accountable for interest, where he makes no profit by using the fund, and properly distributes it.<sup>1</sup> He is not liable for interest where he has been enjoined from receiving the funds,<sup>2</sup> nor where the amounts received are so small as not to be readily invested,<sup>3</sup> unless there be specific directions to invest.<sup>4</sup>

(b) **Rate of Interest — Generally.** — The rate of interest to be charged a trustee depends upon the circumstances of each case, the court proceeding upon the theory of compensating the *cestui que trust* and depriving the trustee of the advantages he has wrongfully obtained,<sup>5</sup> but where the trustee has been diligent and prudent in making investments, he is chargeable only for the interest actually received.<sup>6</sup> And the beneficiary may be estopped from claiming a higher rate of interest than was received by agreeing to an investment at a lower rate.<sup>7</sup> If the account extends over a number of years, during which time the legal rate is charged, the rate charged should conform to the

*New Jersey.* — McKnight v. Walsh, 24 N. J. Eq. 498, affirming 23 N. J. Eq. 136.

*New York.* — Mabie v. Bailey, 95 N. Y. 206.

*Pennsylvania.* — Stearley's Appeal, 38 Pa. Ct. 525; Griffith's Estate, 147 Pa. St. 274.

See the title INVESTMENTS, vol. 17, p. 462.

**In California by Civil Code, §§ 2261, 2262.** — Elizalde v. Elizalde, 137 Cal. 634.

**In Missouri interest is charged when the trustee has failed to make it only where the terms of the trust have required him to do so.** Kane v. Kane, 146 Mo. 605.

**No Notice of Payment of Investment.** — Trust funds were invested in the Pennsylvania State Loan of 1867, and the interest bonds, which were deposited in bank, were paid by the cashier. The state exercised the option to pay during the periods when interest was due, and no notice was received by the cashier or the trustee until after the next period for payment of interest. The trustee was not made to account for interest during the interval. Witmer's Appeal, 87 Pa. St. 120.

**Failure to Invest — Liability to Remaindermen.** — The trustees were directed to convert the trust property, which consisted of things capable of personal enjoyment, into money and invest, paying the income to the life tenant, and preserving the *corpus* for the remaindermen. The trustees failed to convert the property, and the life tenant acquiesced therein. From the death of the life tenant the trustees were chargeable with interest. Mackenzie v. Taylor, 7 Beav. 467.

**1. Fund Not for Investment.** — Mathewson v. Davis, 191 Ill. 391; Knight v. Reese, 2 Dall. (Pa.) 182; Hess's Estate, 68 Pa. St. 454; Williams v. Haskins, 66 Vt. 378.

**Deposit in Bank of Which Trustee a Member.** — The fact that a trustee, who is under no obligation to invest, but to distribute, deposits in a bank of which he is member will not make him liable for interest. Hess's Estate, 68 Pa. St. 454.

**By Section 2250 of the Civil Code of California** the personal representative of a deceased trustee is under no obligation to invest the funds. Elizalde v. Elizalde, 137 Cal. 634.

**2. Receipt of Funds Enjoined.** — Clagett v. Hall, 9 Gill & J. (Md.) 80.

**3. Small Amounts.** — Knowlton v. Bradley, 17 N. H. 458, 43 Am. Dec. 609; Griffith's Estate, 147 Pa. St. 274.

**4. Direction to Invest.** — McCauseland's Appeal, 38 Pa. St. 466.

**5. Rate of Interest — Generally.** — Inglis v. Beaty, 2 Ont. App. 453; Burdick v. Garrick, L. R. 5 Ch. 233; Hamilton v. Reese, 18 Ga. 8; Perrin v. Lepper, 72 Mich. 454; Bobb v. Bobb, 89 Mo. 411; Kane v. Kane, 146 Mo. 605; Morgan v. Morgan, 3 Dem. (N. Y.) 612.

"When laches may be attributed, or wrongful and excessive claims are made upon the trustee by the *cestui que trust*, they become mitigating circumstances, and should be taken into account." Perrin v. Lepper, 72 Mich. 454.

**Canadian Investments Prior to Repeal of Usury Laws.** — Where investments were made by trustees at six per cent. before the abolition of the usury laws, and were not called in for several years thereafter, they were not held liable for a higher rate, where it did not appear that they were aware of an opportunity to invest at higher rates. Cameron v. Bethune, 15 Grant Ch. (U. C.) 486.

Similarly, trustees were held not called upon, at the risk of getting fresh investments, to call in the moneys from good security, and reinvest the same at the rates it could have been loaned at after the abolition of the usury laws. Smith v. Roe, 11 Grant Ch. (U. C.) 311.

**6. Prudent Investments.** — *In re Emmet*, 17 Ch. D. 142; Phillips v. Burton, (Ky. 1899) 52 S. W. Rep. 1064; Voorhees v. Stoothoff, 11 N. J. L. 145; Wilcox v. Quinby, 73 Hun (N. Y.) 524.

**Deposit in Savings Bank of Good Repute.** — *In re Hensing*, (Cal. 1892) 31 Pac. Rep. 578.

**Highest Rate with View to Security.** — A trustee who invests a small trust fund with his own at four and one-half per cent., which was the highest rate that could be safely gotten, will not be held liable for a higher rate. Graver's Appeal, 50 Pa. St. 189.

**7. Agreement of Beneficiary as to Rate.** — Gregg v. Gabbert, 62 Ark. 602.

**Lapse of Long Period During Which Settlements and Payments Made at Five Per Cent.** — Hertzler's Estate, 192 Pa. St. 548.

**Rate After Demand.** — Under a contract by which the trustee agrees to pay interest at the rate of one and one-half per cent. per month on moneys therein specified, after demand, if no demand is found it is error to compute interest at that rate. Butler v. Austin, 64 Cal. 3.



fluctuations.<sup>1</sup> Where the trustee fails to observe the directions of the trust instrument to invest in government bonds or in a safe manner with real estate security, he is liable for the rate of interest he might have obtained on the real estate security.<sup>2</sup> In *England*, in ordinary cases, when there has been a mere neglect to invest, or where there has been no want of faith in making investments or improper use of the funds, the rate prescribed against the trustee is four per centum;<sup>3</sup> but where there has been an improper use of the funds, or other direct breach of trust, the courts usually hold him liable at five per centum.<sup>4</sup> In a recent case, however, where the trustee violated a direction for an accumulation, the rate was changed from four to three per centum.<sup>5</sup> In *Canada* separate rates of interest are not applied, and the trustee is liable at the legal rate, which was six per centum prior to the relaxation of the usury laws.<sup>6</sup> In the *United States*, when a trustee becomes liable to account for interest upon the trust fund, the rate of interest applied is the legal rate in the particular jurisdiction.<sup>7</sup>

**1. Fluctuation in Rate.**—*Gilmore v. Tuttle*, 34 N. J. Eq. 45.

**2. Failure to Follow Direction of Trust.**—*Andrew v. Schmitt*, 64 Wis. 664.

See the title *INVESTMENTS*, vol. 17, p. 463.

**3. England — Four Per Cent.**—*Jones v. Foxall*, 15 Beav. 388; *Knott v. Cottee*, 16 Beav. 77; *Baynard v. Woolley*, 20 Beav. 583; *Fletcher v. Green*, 33 Beav. 426; *Berwick v. Murray*, 3 Jur. N. S. 847; *Penny v. Avison*, 3 Jur. N. S. 62; *Hooker v. Platt*, 1 Jur. 473; *Amiss v. Hall*, 3 Jur. N. S. 584; *Imperial Mercantile Credit Assoc. v. Coleman*, L. R. 6 H. L. 189, 42 L. J. Ch. 644; *In re Emmet*, 17 Ch. D. 142; *Atty-Gen. v. Alford*, 4 De G. M. & G. 843; *Hicks v. Hicks*, 3 Atk. 274; *Simes v. Eyre*, 6 Hare 137; *In re Hilliard*, 1 Ves. Jr. 89. See also *Weightman v. Helliwell*, 13 Grant Ch. (U. C.) 330.

**Special Case Necessary for Higher Rate — Noninsertion of Item.**—A special case must be made for a higher rate of interest than four per cent. The mere noninsertion of an item in an account does not make such case. *Woodhead v. Marriott*, Coop. Pr. Cas. 62.

**4. Five Per Cent.**—*Munch v. Cockerell*, 5 Myl. & Cr. 179; *Cook v. Addison*, L. R. 7 Eq. 466; *Burdick v. Garrick*, L. R. 5 Ch. 233; *Vyse v. Foster*, L. R. 8 Ch. 309; *In re Davis*, (1902) 2 Ch. 314; *Mousley v. Carr*, 4 Beav. 49; *Pocock v. Reddington*, 5 Ves. Jr. 799; *Bate v. Scales*, 12 Ves. Jr. 402; *Jones v. Foxall*, 15 Beav. 388; *Knott v. Cottee*, 16 Beav. 77; *Penny v. Avison*, 3 Jur. N. S. 62; *Berwick v. Murray*, 3 Jur. N. S. 847; *Forbes v. Ross*, 2 Cox Ch. 113; *Heathcote v. Hulme*, 1 Jac. & W. 122; *Treves v. Townshend*, 1 Bro. C. C. 384; *Townend v. Townend*, 1 Giff. 201; *Westover v. Chapman*, 1 Coll. Ch. Cas. 177; *Devaynes v. Noble*, 1 Meriv. 580; *Walker v. Woodward*, 1 Russ. 107; *Atty-Gen. v. Solly*, 2 Sim. 518; *English v. Willats*, 1 L. J. Ch. 84. See *Robinson v. Robinson*, 1 De G. M. & G. 247; *Wightman v. Helliwell*, 13 Grant Ch. (U. C.) 330.

"The question of interest clearly depends upon the amount the trustee may be fairly presumed to have made by improper use. If he has applied it to his own use, he ought not to be heard to say that he has made less than five per cent., but to go further and charge him with more you must make out a case." Sir

G. M. Gifford in *Burdick v. Garrick*, L. R. 5 Ch. 233.

**Cases When More than Usual Rate of Four Per Cent. Charged.**—There are three cases in which the court charges trustees with more than the usual rate of four per cent. on balances due. First, when he ought to have received more, as by calling in an investment bearing that rate; second, when he actually receives more; and, third, when he is presumed to have received a higher rate, as when he uses the fund in trade. *Penny v. Avison*, 3 Jur. N. S. 62.

**Highest Rate.**—In *Wightman v. Helliwell*, 13 Grant Ch. (U. C.) 330, decided in 1867, it was said that five per cent. was the highest rate of interest ever imposed on trustees in England until recent years.

**Doubtful Will — Ignorance of Trustee.**—But where the trustee did not know that certain funds were trust funds which should be invested, because of a doubtful will not construed, and used the money in his own business, he was only held liable for four per cent. interest. *Mousley v. Carr*, 4 Beav. 49.

**5. Rate Changed to Three Per Cent.**—*In re Barclay*, (1899) 1 Ch. 674.

**6. Canada.**—*Wiard v. Gable*, 8 Grant Ch. (U. C.) 458; *Small v. Eccles*, 12 Grant Ch. (U. C.) 37; *Beaton v. Boomer*, 2 Ch. Chamb. (Ont.) 89.

**Funds Placed in Savings Bank at Less than Six Per Cent. — Liable for Difference.**—*Spratt v. Wilson*, 19 Ont. 28.

**Prior to the Relaxation of the Usury Laws** by 22 Vict., c. 85, a trustee authorized to invest in mortgages or government securities invested in good faith in stock of the Upper Canada Bank, which proved worthless. He was held liable at six per cent. although eight per cent. might have been obtained on mortgage. *Pater-son v. Lailey*, 18 Grant Ch. (U. C.) 13.

**7. United States.**—*Canfield v. Canfield*, (C. C. A.) 118 Fed. Rep. 1.

*California.*—*In re Hensing*, (Cal. 1892) 31 Pac. Rep. 578.

*Connecticut.*—*State v. Howarth*, 48 Conn. 207.

*Illinois.*—*White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132.

*Indiana.*—*Stanley v. Pence*, 160 Ind. 636.

(c) **Computation of Interest** — *aa. PERIOD OF COMPUTATION.* — The time allowed a trustee in which he may hold funds exempt from interest varies with the circumstances of each case, the courts prescribing such periods as they deem reasonable for the collection, investment, or disbursement of the fund. The periods when allowed vary from one month to two years.<sup>1</sup> But there are cases in which the trustee is allowed no time during which the funds are exempt from interest, as where he uses it in his own business,<sup>2</sup> withdraws it from an investment,<sup>3</sup> or fraudulently sells trust property and makes no accounting.<sup>4</sup> In case of failure to pay an outstanding indebtedness, or to make proper efforts to collect a debt, interest is chargeable from time payment should have been made,<sup>5</sup> or collection was authorized,<sup>6</sup> and where the fund for payment of debts is in excess of the amount of debts, the balance bears interest from the payment of all the debts.<sup>7</sup> The trustee is liable for interest from the time the beneficiary is entitled to receive the fund,<sup>8</sup> but in case of mismanagement interest should not be charged against him "as long as he may remain trustee."<sup>9</sup>

*bb. AMOUNT ON WHICH COMPUTATION MADE.* — As a general rule where a trustee's account extends over a period of time, and involves receipts and disbursements, his accounts are stated so as to show annual balances, which bear interest from the end of the year.<sup>10</sup> But it is not incorrect to charge interest

*Kentucky.* — *Montjoy v. Lashbrook*, 2 B. Mon. (Ky.) 261; *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171.

*Missouri.* — *Bobb v. Bobb*, 89 Mo. 411.

*New York.* — *Brown v. Rickets*, 4 Johns. Ch. (N. Y.) 303, 8 Am. Dec. 567; *Morgan v. Morgan*, 3 Dem. (N. Y.) 612; *Reynolds v. Sisson*, 78 Hun (N. Y.) 595; *Cook v. Lowry*, 95 N. Y. 103, affirming 29 Hun (N. Y.) 20.

*Pennsylvania.* — *Sharpe's Estate*, 2 Phil. (Pa.) 280, 14 Leg. Int. (Pa.) 140; *Bishop's Estate*, 1 Lanc. L. Rev. 115.

*Vermont.* — *Re Hodges*, 66 Vt. 70, 44 Am. St. Rep. 820.

*Virginia.* — *Cogbill v. Boyd*, 79 Va. 1.

**Legal Rate Applied, Although Higher Rate Might Have Been Obtained.** — *Montjoy v. Lashbrook*, 2 B. Mon. (Ky.) 261. See the titles **INTEREST**, vol. 16, p. 984; **INVESTMENTS**, vol. 17, p. 472. See also *infra*, this subsection, **Computation of Interest**.

**1. Period of Computation.** — *St. Paul Trust Co. v. Strong*, 85 Minn. 1; *Witmer's Appeal*, 87 Pa. St. 120; *Griffith's Estate*, 147 Pa. St. 274; *Pettus v. Sutton*, 10 Rich. Eq. (S. Car.) 356.

**One Month.** — *Barney v. Saunders*, 16 How. (U. S.) 535.

**Three Months.** — *Luken's Appeal*, 47 Pa. St. 356.

**Six Months.** — *Clark v. Anderson*, 10 Bush (Ky.) 99; *Matter of Merrick*, 1 Ashm. (Pa.) 305.

But where the trustees manifest no disposition to invest or reinvest the trust funds or receipts, the usual rest of six months without interest will not be allowed. *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250.

**Twelve Months After Acceptance of Trust.** — *Royall v. McKenzie*, 25 Ala. 363; *Weisel v. Cobb*, 118 N. Car. 11.

**Annual Balances — Expiration of Year from Accrual.** — *Dennis v. Dennis*, 15 Mo. 73.

**Two Years from Commencement of Trust.** — *Bentley v. Shreve*, 2 Md. Ch. 215.

**Usual Period for Investments.** — Where money was received in February, and April 1 was the usual time for making investments, interest was charged after that time. *Witmer's Appeal*, 87 Pa. St. 120.

**First of January Following Receipt.** — In *Livingston v. Wells*, 8 S. Car. 347, it was said that as a general rule interest on funds received by a trustee was computed from the first of January next following their receipt.

**2. Use of Fund by Trustee.** — *Stanley v. Pence*, 160 Ind. 636; *McKim v. Hibbard*, 142 Mass. 422; *Miller v. Beverley*, 4 Hen. & M. (Va.) 415. See *Sollee v. Croft*, 7 Rich. Eq. (S. Car.) 34; *Matter of Reed*, 45 N. Y. App. Div. 196.

**Funds Mingled — Use Presumed.** — *St. Paul Trust Co. v. Strong*, 85 Minn. 1.

**Date of Receipt Unknown — Liable from Date of Investment.** — *Humphreys v. Butler*, 51 Ark. 351.

**3. Withdrawal from Investment.** — *Mabie v. Bailey*, 95 N. Y. 206.

**4. Fraudulent Sale — No Accounting.** — *Adams v. Lambard*, 80 Cal. 426. See *Sollee v. Croft*, 7 Rich. Eq. (S. Car.) 34.

**5. Failure to Pay Debt.** — *Jenkins v. Doolittle*, 69 Ill. 415.

**6. Failure to Collect Debt.** — *Lowry v. McGee*, 3 Head (Tenn.) 269.

**7. Fund for Payment of Debts in Excess of Debts.** — *Napier v. Napier*, 13 Ga. 243.

**8. Beneficiary Entitled to Fund.** — *Rowland v. Maddock*, 183 Mass. 360; *Judd v. Dike*, 30 Minn. 380. See *Knapp v. Marshall*, 56 Ill. 362.

**Liable to Remainderman from Death of Life Tenant.** — *Simes v. Eyre*, 6 Hare 137; *Hawkins v. Gardiner*, 2 Smale & G. 441; *McCook v. Harp*, 81 Ga. 229; *Howard v. Quattlebaum*, 46 S. Car. 95.

**9. Matter of Thompson**, 101 Cal. 349, where it was said that it was presumed the trustee would faithfully discharge the trust in the future.

**10. Annual Balances.** — *Atty.-Gen. v. Solly*, 2 Sim. 518; *Dennis v. Dennis*, 15 Md. 73;

on each amount received from date of receipt if interest is allowed similarly on each disbursement.<sup>1</sup> The account against a trustee for balance due should include interest up to date of the report, and the decree should allow interest on the balance from that date until paid,<sup>2</sup> but if at the time of accounting interest on investments is not due, he should not be charged with interest thereon up to that time.<sup>3</sup>

*cc. SIMPLE INTEREST.* — If the default of the trustee is mere neglect to invest, disburse, or distribute, or to collect amounts due the fund, without any fraud or flagrant violation of duty, as by dealing improperly with the fund, only simple interest will be charged against him.<sup>4</sup> And simple interest only is charged a trustee from the rendering of a decree against him in an accounting.<sup>5</sup>

*dd. COMPOUND INTEREST.* — But where the trustee is guilty of a gross breach of trust, such as mingling trust funds with private funds, making unauthorized and improper investments, or using the funds in his own private business, with no account of the profits, the courts impose compound interest upon him.<sup>6</sup>

*Lathrop v. Smalley*, 23 N. J. Eq. 192; *Gilmore v. Tuttle*, 34 N. J. Eq. 45; *Cook v. Lowry*, 95 N. Y. 103; *Erie School Dist. v. Griffith*, 203 Pa. St. 123. See *Parrot v. Treby*, Prec. Ch. 254.

**Interest Not Charged on Advances — Charge for Services.** — But where the trustees charged no interest for advances, and if they had charged for services the balance would have been in their favor at the date of account, they are not liable for interest on the balance. *Burr v. M'Ewen*, Baldw. (U. S.) 154.

**1. Interest from Date of Receipt and Disbursement.** — *Darling v. Potts*, 118 Mo. 506; *Jones v. McKean*, 27 Can. Sup. Ct. 249. See *Garvey v. Owens*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 349.

In *Jones v. McKean*, 27 Can. Sup. Ct. 249, it was held no error to allow interest upon receipts and disbursements from their date, and to charge the trustee with interest on the balance obtained by deducting the disbursements and interest from the receipts and interest.

**2. Statement of Account.** — *Merritt v. Jenkins*, 17 Fla. 593.

**3. Interest on Investment Not Due.** — *Wilcox v. Quinby*, 73 Hun (N. Y.) 524.

**4. Simple Interest.** — *Barney v. Saunders*, 16 How. (U. S.) 535; *Adams v. Lombard*, 80 Cal. 426; *Hamilton v. Reese*, 18 Ga. 8; *Offutt v. Divine*, (Ky. 1899) 53 S. W. Rep. 816; *Dennis v. Dennis*, 15 Md. 73; *Glenn v. Cockey*, 16 Md. 446; *Smith v. Darby*, 39 Md. 268; *St. Paul Trust Co. v. Strong*, 85 Minn. 1; *Livingston v. Wells*, 8 S. Car. 347. See *McKnight v. Walsh*, 24 N. J. Eq. 498, *affirming* 23 N. J. Eq. 136.

Where the facts do not indicate any realization of profits on the assets, or the withdrawal of funds from legitimate channels of accumulation, nor raise any presumption that the assets would have been increased in any way if the line of duty had been more strictly followed, the trustee is not liable for compound interest. *Ames v. Scudder*, 11 Mo. App. 168, *affirmed* in 83 Mo. 189.

**Retention of Assets Purchased by Settlor — No Misconduct of Trustee.** — On an accounting by a trustee it was objected because he had held assets which were not as valuable as supposed. The assets had been purchased and held by the settlor, and no misconduct of the trustee was shown. He was held liable for simple interest

only. *Jones v. Jones*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 844.

**Retention of Funds After Title to Land Perfected.** — And where a trustee had some color for his demand that title to certain land be perfected before he would purchase, and held the funds until after title was made good by limitations, he was only charged with simple interest from the time title was perfected. *Mathewson v. Davis*, 191 Ill. 391.

**5. Decree in Accounting.** — *Matter of Lawrence*, 2 Connolly (N. Y.) 53.

**Compound Interest Allowed When Judgment Set Aside.** — *Faulkner v. Hendy*, 103 Cal. 15.

**6. Compound Interest — England.** — *Jones v. Foxall*, 15 Beav. 388; *Knott v. Cottee*, 16 Beav. 77; *Walker v. Woodward*, 1 Russ. 107; *Townend v. Townend*, 1 Giff. 201; *In re Barclay*, (1899) 1 Ch. 674; *In re Emmet*, 17 Ch. D. 142. **Canada.** — *Wiard v. Gable*, 8 Grant Ch. (U. C.) 458; *Small v. Eccles*, 12 Grant Ch. (U. C.) 37; *Wightman v. Helliwell*, 13 Grant Ch. (U. C.) 330.

**California.** — *Adams v. Lambard*, 80 Cal. 426; *Matter of Thompson*, 101 Cal. 349; *Bemmerly v. Woodward*, 124 Cal. 568.

**Connecticut.** — *Clement v. Brainard*, 46 Conn. 174; *Stake v. Howarth*, 48 Conn. 207.

**Georgia.** — *Hamilton v. Reese*, 18 Ga. 8.

**Illinois.** — *Ogden v. Larrabee*, 57 Ill. 389; *Hughes v. People*, 111 Ill. 457; *Asay v. Allen*, 124 Ill. 391; *Lehman v. Rothbarth*, 159 Ill. 270; *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132; *Mathewson v. Davis*, 191 Ill. 391.

**Kentucky.** — *Clark v. Anderson*, 10 Bush (Ky.) 99; *Montjoy v. Lashbrook*, 2 B. Mon. (Ky.) 261; *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171; *Page v. Holman*, 82 Ky. 573.

**Maryland.** — *Winder v. Diffenderffer*, 2 Bland (Md.) 166; *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250; *Diffenderffer v. Winder*, 3 Gill & J. (Md.) 311.

**Michigan.** — *Heath v. Waters*, 40 Mich. 457; *Perrin v. Lepper*, 72 Mich. 454.

**Missouri.** — *Bobbs v. Bobbs*, 89 Mo. 411; *Kane v. Kane*, 146 Mo. 605.

**New Jersey.** — *McKnight v. Walsh*, 24 N. J. Eq. 498, *affirming* 23 N. J. Eq. 136.

**New York.** — *Cook v. Lowry*, 95 N. Y. 103, *affirming* 29 Hun (N. Y.) 20; *Matter of Reed*, 45 N. Y. App. Div. 196; *Reynolds v. Sisson*, 78 Hun (N. Y.) 595.



**Rests.** — The periods for compounding interest vary and depend upon the circumstances of each case,<sup>1</sup> but the general rule is to make the computation with annual rests.<sup>2</sup> There are cases, however, in which the rests are made semi-annually,<sup>3</sup> and also biennially.<sup>4</sup>

**c. CREDITS** — (1) *Disbursements and Allowances* — (a) **General Rule.** — It may be stated as a general rule that a trustee will be allowed in his accounts for all disbursements which, by the terms of the trust instrument or by necessary implication, he is compelled or empowered to make.<sup>5</sup> A consideration of all the items which will be allowed would be but the statement of self-evident corollaries to propositions elsewhere laid down as to the powers and duties of trustees;<sup>6</sup> accordingly there will be found here only such rules as are of general application.

(b) **Expenses of Administration** — *aa. IN GENERAL.* — Whenever necessary expenses are incurred in the administration of the trust, the trustee is entitled, without

*Vermont.* — *Re Hodges*, 66 Vt. 70, 44 Am. St. Rep. 820.

See *Livingston v. Wells*, 8 S. Car. 347.

**"On the Subject of Compounding Interest on Trustees,** there is, and indeed could not well be, any uniform rule which could justly apply to all cases. When a trust to invest has been grossly and wilfully neglected; when the funds have been used by the trustees in their own business, or profits made of which they give no account, interest is compounded as a punishment, or as a measure of damage for undisclosed profits and in place of them." *Grier, J., in Barney v. Saunders*, 16 How. (U. S.) 535.

Thus, in *Hazard v. Durant*, 14 R. I. 25, where the trustee used the funds, it appearing that he had not profited thereby but had lost them, the court only charged simple interest.

And where the trustees used the trust fund with the intention of applying the profits to the trust estate, compound interest was not allowed against them. *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250.

**Use Prior to Deposit in Bank — Liable to That Time.** — *In re Hensing*, (Cal. 1892) 31 Pac. Rep. 578.

**Right Not Affected by Judgment Subsequently Set Aside.** — *Foulkner v. Hendy*, 103 Cal. 15.

**Actual or Presumed Gain.** — Compound interest is not charged as a punishment to the trustee for using the beneficiary's money, but on the principle that he has made it, or is presumed to have done so. *Burdick v. Garrick*, L. R. 5 Ch. 233. See also *Ringgold v. Ringgold*, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250.

So, where the trust funds were mingled by the trustee with private funds and earned eleven per cent., there being also gross negligence in the management of the estate, it was held no error to charge him with ten per cent. interest, compounded annually, upon the theory of compensation. *Matter of Thompson*, 101 Cal. 349.

**Failure to Pay Interest to the Beneficiary During Time of War** does not make the trustee liable for interest on interest. *Coltrane v. Worrell*, 30 Gratt. (Va.) 434.

**Imposition on Future Transactions Errorneous.** — Although compound interest may be allowed up to the settlement of the trustee's accounts, compounded annually, when he uses the funds for private use, it is error to allow it "so long

as he shall remain in office" as trustee. *Matter of Thompson*, 101 Cal. 349.

**1. Depends on Circumstances.** — *Mathewson v. Davis*, 191 Ill. 391; *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171; *Perrin v. Lepper*, 72 Mich. 454.

**"There are Some Inconsistencies in the Decisions** of the American courts as to what interest must be paid by trustees, and they cannot be harmonized. As a rule, however, these courts have repudiated the plan of charging and compounding interest from annual rests, as unjust, save under exceptional circumstances." *Per Collins, J., in St. Paul Trust Co. v. Strong*, 85 Minn. 1.

**Rests Discarded in Pennsylvania** — In *Graver's Appeal*, 50 Pa. St. 189, it was said that rests were entirely discarded in Pennsylvania.

**2. Annual Rests — England.** — *Knott v. Cottee*, 16 Beav. 77; *Townend v. Townend*, 1 Giff. 201; *Walker v. Woodward*, 1 Russ. 107; *Jones v. Foxall*, 15 Beav. 388.

*Canada.* — *Small v. Eccles*, 12 Grant Ch. (U. C.) 37.

*California.* — *Matter of Thompson*, 101 Cal. 349.

*Connecticut.* — *State v. Howarth*, 48 Conn. 207.

*Illinois.* — *Asay v. Allen*, 124 Ill. 391; *Ogden v. Larrabee*, 57 Ill. 389; *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132.

*Kentucky.* — *Page v. Holman*, 82 Ky. 573; *Montjoy v. Lashbrook*, 2 B. Mon. (Ky.) 261; *Clemens v. Caldwell*, 7 B. Mon. (Ky.) 171.

*Missouri.* — *Bobb v. Bobb*, 89 Mo. 411.

*New Jersey.* — *McKnight v. Walsh*, 24 N. J. Eq. 498, affirming 23 N. J. Eq. 136.

*New York.* — *Cook v. Lowry*, 95 N. Y. 103; *Reynolds v. Sisson*, 78 Hun (N. Y.) 595; *Matter of Reed*, 45 N. Y. App. Div. 196.

*Vermont.* — *Re Hodges*, 66 Vt. 70, 44 Am. St. Rep. 820.

**3. Semi-annual Rests.** — *Barney v. Saunders*, 16 How. (U. S.) 535; *In re Hensing*, (Cal. 1892) 31 Pac. Rep. 578; *Perrin v. Lepper*, 72 Mich. 454.

**4. Biennial Rests.** — *Page v. Holman*, 82 Ky. 573; *Clark v. Anderson*, 10 Bush (Ky.) 99.

5. See the cases cited *infra*.

**As to the Charging of Disbursements to Capital or to Income,** see *supra*, this section, *Duties of Trustees — Management of Property*.

6. See *supra*, this section, *Powers of Trustees; Duties of Trustees*.

any express provision to that effect, to make the payments required to meet these necessary expenses out of the funds in his hands belonging to the trust.<sup>1</sup> But no credit will be allowed if the expenses are not necessary,<sup>2</sup> or if the trustee is guilty of misconduct,<sup>3</sup> or if the act causing the outlay is not authorized by the trust instrument, even though it be induced by the solicitation of the *cestuis que trustent*.<sup>4</sup> But it is not an objection to the allowance of valid disbursements that the trustee made them without the consent of his cotrustees.<sup>5</sup>

*bb. EMPLOYMENT OF AGENTS.* — So far as the trustee has power to employ agents to aid him in the execution of the trust, so far may he pay them and credit himself for such payment.<sup>6</sup>

*cc. EXPENSES OF LITIGATION.* — It is the duty of a trustee to assert and protect, diligently and faithfully, the interests of the beneficiaries, and if in fulfilling that duty he becomes involved in necessary litigation, he will be allowed in his accounts a reasonable amount expended for legal advice,<sup>7</sup> counsel fees,<sup>8</sup>

**1. Allowance of Necessary Expenses.** — *Atty.-Gen. v. Norwich*, 2 Myl. & C. 407, *affirming* 1 Jur. 398. And see the cases cited *infra*.

**Court Will Work Substantial Justice.** — Where on a reference to a master the trustee was allowed nothing for his expenses, but was allowed a larger commission than was proper, and it appeared that this sum was equal to what he really was entitled to from both commissions and reimbursement of expenses, the report was not disturbed. *Clark v. Hoyt*, 8 Ired. Eq. (36 N. Car.) 222.

**Expenditures Limited by Court.** — Where by decree of court the trustee is to account, and is to be allowed for money expended up to the amount received by him, he cannot credit himself with money expended above the amount received, although such expenditures were for legitimate objects and for the benefit of the trust. *Braun v. Aumond*, 19 Grant Ch. (U. C.) 172.

**Construction of Will.** — Where trustees were directed by will to set apart and invest a fund to pay debts, legacies, funeral expenses, expenses for proving the will, and "the execution of the trusts hereof," it was held that this latter phrase was limited to those expenses properly payable by the executor, and that the cost of executing the trusts of the various estates and interests should be borne by these various estates in proportion to their interest and not by the particular fund set aside. *Brougham v. Poulett*, 19 Beav. 119.

**2. Unnecessary Expenses Not Allowed.** — *Tracy v. Gravois R. Co.*, 13 Mo. App. 295, *affirmed* 84 Mo. 210.

**3. No Allowance to Trustee Guilty of Misconduct.** — *Hanna v. Clark*, 204 Pa. St. 145.

**4. Unauthorized Act Solicited by Cestui.** — *Leedham v. Chawner*, 4 Kay & J. 458.

**5. Consent of Cotrustee Not Essential.** — *Milner v. Beverley*, 4 Hen. & M. (Va.) 415.

**6. Power to Employ Agents.** — See *supra*, this section, *Powers of Trustees*.

**Expense of Agents Employed Must Be Reasonable.** — *In re Weall*, 42 Ch. D. 674.

**Salary of Agents in Discretion of Trustee.** — A testator devised lands in trust to found a grammar school and directed that the trustees should manage it and should appoint teachers and pay them certain salaries. The school having been established, the trustees, owing to

the increase in the income from the real estate, increased the salaries of the teachers. It was held that the trustees were entitled to be credited with this increase in salary. *Atty.-Gen. v. Christ Church*, 2 Russ. 321.

**7. Legal Advice.** — *Stephens v. Newborough*, 11 Beav. 403; *Fearn v. Young*, 10 Ves. Jr. 184; *Poole v. Pass*, 1 Beav. 600; *Hayes v. Hayes*, 29 Grant Ch. (U. C.) 90; *Jones v. Stockett*, 2 Bland (Md.) 409; *Vaccaro v. Cicalla*, 89 Tenn. 63; *Cochran v. Richmond*, etc., R. Co., 91 Va. 339.

In *Fearn v. Young*, 10 Ves. Jr. 184, Lord Eldon said: "Where the trustee in the fair execution of his trust has expended money by reasonably and properly taking opinions and procuring directions that are necessary to the due execution of his trust, he is entitled not only to his costs, but also to his charges and expenses under the head of just allowances."

**8. Counsel Fees — United States.** — *Dow v. Memphis*, etc., R. Co., 23 Blatchf. (U. S.) 84; *Western Union Tel. Co. v. Boston Safe-Deposit, etc., Co.*, 104 Fed. Rep. 580.

*Alabama.* — *Marks v. Semple*, 111 Ala. 637.  
*Illinois.* — *Nevitt v. Woodburn*, 190 Ill. 283.

*Kentucky.* — *Clark v. Anderson*, 13 Bush (Ky.) 111; *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 457.

*Maryland.* — *Bentley v. Shreve*, 2 Md. Ch. 215. See also *Mahoney v. Mackubin*, 54 Md. 268.

*Missouri.* — *Beck v. Kinealy*, 89 Mo. App. 418.

*New Jersey.* — *Perrine v. Newell*, 49 N. J. Eq. 57.

*New York.* — *Noyes v. Blakeman*, 6 N. Y. 567; *Geissler v. Werner*, 3 Dem. (N. Y.) 200.

*Ohio.* — *Ingham v. Lindemann*, 37 Ohio St. 218; *Chapman v. Loveland*, 11 Ohio St. 214.

*Rhode Island.* — *Williams v. Smith*, 10 R. I. 280.

*Vermont.* — *Towle v. Mack*, 2 Vt. 19.

*Canada.* — *Sandford v. Porter*, 16 Ont. App. 565.

**As to What Is Reasonable Fee.** — See *Dow v. Memphis*, etc., R. Co., 23 Blatchf. (U. S.) 84; *Bosler's Estate*, 161 Pa. St. 457.

**As to Right of Trustee, Who Is Also Attorney, to Charge for His Own Services,** see *supra*, this section, *Rights of Trustee*.

and other expenses.<sup>1</sup> So, where by the terms of the trust instrument he is entitled to an allowance for costs and expenses, such allowance will embrace, even without express provision, the expense of employing an attorney, when this is reasonably necessary.<sup>2</sup>

**Expenses Must Be Necessary and Proper.** — In all cases, however, the expenses must be reasonable and proper, and are subject to the regulation of the court,<sup>3</sup> and no allowance at all will be made if it appear that there was no necessity for employing counsel,<sup>4</sup> or that no defense should have been made.<sup>5</sup>

**What Is Necessary and Proper Litigation.** — Any litigation for the benefit of the trust estate, such as foreclosing a mortgage held by the estate,<sup>6</sup> or bringing suit to recover damages for land taken by a railroad,<sup>7</sup> is necessary and proper. The trustee is entitled to an allowance for defending an action against the estate even though the cause of action is his alleged misconduct,<sup>8</sup> or though he, at the time of the suit, claimed the trust estate as his own,<sup>9</sup> for it is the benefit to the estate which entitles him to reimbursement.<sup>10</sup> If attacked personally by the beneficiaries it is his duty to defend himself, and so he will be allowed his expenses where he successfully defends a suit brought to remove him from office,<sup>11</sup> or to surcharge his accounts,<sup>12</sup> or to set aside a sale made by him,<sup>13</sup> or where he and the beneficiary are equally at fault.<sup>14</sup> Where the validity of his appointment is attacked he may defend the suit, and will be allowed his expenses even though he is unsuccessful, for such a defense is for the benefit of the estate. But if he appeals such a case, his successor having been appointed, this is not in the interest of the estate, and he will not be allowed his expenses of the appeal.<sup>15</sup> Remaindermen under a trust are not to be

**1. Expenses of Litigation.** — *In re Holden*, 20 Q. B. D. 43; *Edinburgh L. Assur. Co. v. Allen*, 23 Grant Ch. (U. C.) 230; *Nevitt v. Woodburn*, 190 Ill. 283; *Loud v. Winchester*, 64 Mich. 23; *Rahway Sav. Inst. v. Drake*, 25 N. J. Eq. 220; *Matter of Olmstead*, 52 N. Y. App. Div. 515, *affirmed* in 164 N. Y. 571; *Towle v. Mack*, 2 Vt. 19; *Fuller v. Abbe*, 105 Wis. 235.

**Case Where Trustee Liable.** — Where a trustee brings an action for the benefit of the estate and judgment is given for the defendant, and costs are given the defendant, it seems that the trustee may charge these costs against the estate, but if he pays out all the trust fund, knowing of this judgment for costs, he is liable for the costs personally. *Butler v. Boston, etc., R. Co.*, 24 Hun (N. Y.) 99.

**As to the Liability of the Trustee for Costs,** and the allowance of costs to him when the trust estate is in court, see *ENCYC. OF PL. AND PR.*, vol. 22, p. 207.

**No Costs Unless Given.** — A trustee cannot retain out of the estate the costs of an action in which the court refused to make any order whatsoever as to the costs, as this is in effect refusing to give him any costs. *In re Hodgkinson*, (1895) 2 Ch. 190.

**As to the Costs of Accounting,** see *ENCYC. OF PL. AND PR.*, vol. 22, p. 108.

**2. Counsel Fees Within Terms of Trust Deed.** — *Green v. Putney*, 1 Md. Ch. 262; *Brady v. Dilley*, 27 Md. 570.

**3. Amount Must Be Reasonable.** — *Johnson v. Telford*, 3 Russ. 477; *Ingham v. Lindemann*, 37 Ohio St. 218.

**4. No Necessity for Employment.** — *Holcombe v. Holcombe*, 13 N. J. Eq. 415; *Vaccaro v. Cicalla*, 89 Tenn. 63.

**5. No Necessity for Defending Suit.** — *In re Beddoe*, (1893) 1 Ch. 547.

**6. Foreclosing Mortgage.** — *Nevitt v. Woodburn*, 190 Ill. 283; *Matter of Olmstead*, 52 N. Y. App. Div. 515, *affirmed* 164 N. Y. 571.

**7. Suit to Recover Damages for Land Taken.** — *Fuller v. Abbe*, 105 Wis. 235, in which case the trustee of land repudiated the trust and conveyed the land for her own benefit, and the beneficiary brought an action compelling the trustee to account for the proceeds so received. A portion of the proceeds resulted from money received by the trustee in certain condemnation proceedings caused by taking a part of the land for railroad purposes, and the trustee was credited with all disbursements made in these condemnation proceedings, the reason being that the beneficiary had had the benefit of the proceeds, and therefore should bear his share of the disbursements.

**8. Defending Suit Caused by Own Misconduct.** — *Walters v. Woodbridge*, 7 Ch. D. 504.

**9. Claiming Estate as His Own.** — *Williams v. Gibbs*, 20 How. (U. S.) 535.

**10. Benefit to Estate.** — *Walters v. Woodbridge*, 7 Ch. D. 504; *Fuller v. Abbe*, 105 Wis. 235.

**11. Defending Action for Removal.** — *Brunet v. Brunet*, 17 Quebec Super. Ct. 490; *Morris's Estate*, 20 W. N. C. (Pa.) 30.

**12. Surcharging Accounts.** — *Clark v. Anderson*, 13 Bush (Ky.) 111; *Thome v. Allen*, (Ky.) 1902) 70 S. W. Rep. 410; *Lycan v. Miller*, 56 Mo. App. 79; *Biddle's Appeal*, 83 Pa. St. 340, 24 Am. Rep. 183.

**13. Action to Set Aside Sale.** — *Andrews's Estate*, 6 Pa. Dist. 434.

**14. Trustee and Cestui Both at Fault.** — *Woodruff v. Snedecor*, 68 Ala. 437.

**15. Attack on Validity of Appointment.** — *Sherman v. Leman*, 137 Ill. 94.



charged with counsel fees paid the trustee in disputing their rights and advancing the interest of the trustees.<sup>1</sup> If a trustee for no good reason resigns from the trust he must pay his own counsel fees.<sup>2</sup> If the trust estate is small and the litigation uses up the corpus, the trustee will not be allowed his expenses unless there was not only probable cause, but also an extraordinary necessity, for bringing the suit.<sup>3</sup>

*dd. REPAIRS AND IMPROVEMENTS.* — The trustee will be allowed for expenditures for repairs and improvements to the exact extent to which he has power to make such repairs or improvements.<sup>4</sup>

*ee. TAXES AND INSURANCE.* — So, too, he will be allowed for money paid out for taxes and insurance premiums, since it is his duty to make these outlays.<sup>5</sup> And he will be allowed for the payment of penalties for delay in paying taxes, when such delay is caused by the beneficiary;<sup>6</sup> and for insurance premiums, even though the property is over-insured, if the creator of the trust had kept it insured to that amount.<sup>7</sup>

*ff. OTHER EXPENSES.* — For all other proper expenditures incurred in the due administration of the trust, the trustee will be given credit. Thus, he will be allowed for traveling expenses, if these are necessary and proper,<sup>8</sup> but not if they are caused by his wilful misconduct.<sup>9</sup> So also he will be allowed for the expense of making a sale authorized by the trust deed;<sup>10</sup> but where a trustee of property to secure a debt sells the property at the request of the creditor, and the debt is promptly paid, he will not be reimbursed for his unnecessary outlay;<sup>11</sup> nor may a trustee allow land to be sold for taxes and then charge the estate with the costs occasioned by such sale.<sup>12</sup> Where the trustee of a mine expends money in trying to recover a lost vein, or in other ways, he will be allowed for these expenditures, if made in good faith.<sup>13</sup>

(c) **Advances** — *aa. IN CREATION OF TRUST.* — Where the trustee advances money toward securing the property which is to constitute the trust estate, he may credit himself with the amount so advanced.<sup>14</sup>

1. **Disputing Rights of Remaindermen.** — Holman's Appeal, 24 Pa. St. 174.

2. **Resigning Trust.** — Matter of Abbott, (Surrogate Ct.) 39 Misc. (N. Y.) 760. And see *supra*, this section, *Resignation*.

3. **Using up Corpus.** — Ashley v. Holman, 44 S. Car. 145.

4. **Repairs and Improvements.** — See *supra*, this section, *Powers of Trustees*.

5. **Taxes and Insurance.** — See *supra*, this section, *Duties of Trustees*.

**Taxes Not Allowed.** — Where a trustee borrows the trust fund, by consent of the beneficiary, at a rate of interest lower than could be obtained elsewhere, it is in the discretion of the court to disallow him taxes paid by him on such funds, since he is already reimbursed by profits made by using the fund. Gregg v. Gabbert, 62 Ark. 602.

6. **Penalty for Delayed Taxes.** — Disbrow v. Disbrow, 46 N. Y. App. Div. 111, affirmed 167 N. Y. 606.

7. **Over-Insurance.** — Disbrow v. Disbrow, 46 N. Y. App. Div. 111, affirmed 167 N. Y. 606.

8. **Traveling Expenses.** — Hayes v. Hayes, 29 Grant Ch. (U. C.) 90; Floyd v. Davis, 98 Cal. 591.

9. **Traveling Expenses Caused by Misconduct of Trustee.** — Berryhill's Appeal, 35 Pa. St. 245.

10. **Expenses of Sale.** — Nolon v. McDonald, 71 Miss. 337, 42 Am. St. Rep. 466, in which case Cooper, J., said: "Since by the terms of the deed he was authorized to so advertise,

clearly he was entitled to be repaid for this outlay."

11. **No Allowance for Unnecessary Sale.** — Wetmore v. Brown, 37 Barb. (N. Y.) 133.

**Expenses Borne by Particular Fund.** — Under a direction by will to accumulate and lay out a certain sum of money in the purchase of land to be settled to uses thereby declared, the costs of the investment are to be paid out of the particular sum directed to be invested. Gwyther v. Allen, 1 Hare 505.

12. **Sale Caused by Act of Trustee.** — Godwin v. Whitehead, 95 Ala. 409.

13. **Money Expended in Working a Mine.** — Gisborn v. Charter Oak L. Ins. Co., 142 U. S. 326; Gallagher v. Yosemite Min., etc., Co., 10 Utah 189.

**Payment of Expenses Not under Trust.** — Where it was the duty of the trustee, on the death of the life tenant, to pay the fund to his widow and children, and the trustee on the death of the life tenant paid his funeral expenses, etc., acting as agent for the widow and children, he was allowed therefor, though this was not an act under the trust. Casey v. Lockwood, 24 R. I. 72. See also Young v. Young, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 381.

14. **Advances Made by Trustee to Secure Title to Property.** — Jackson v. Hyde, 91 Cal. 463; Wagenseller v. Prettyman, 7 Ill. App. 192; Wilson v. Welles, 79 Minn. 53; Altimus v. Elliott, 2 Pa. St. 62; Jenckes v. Cook, 9 R. I. 520. See also Smith v. Miller, 98 Va. 535;

*bb. IN PERFORMANCE OF TRUST — (aa) In General.* — If the trustee, in good faith, advances money for the benefit of the estate or the furtherance of the object of the trust, he is entitled to reimbursement;<sup>1</sup> but the advances must be within the scope of his authority,<sup>2</sup> and he is not allowed for mere speculative investments made on his own account.<sup>3</sup> He is allowed only for the actual amount expended, and if he buys property at a discount or pays debts of the estate at less than their face value, he cannot be credited with the face value thereof.<sup>4</sup>

*(bb) Paying Debts and Discharging Incumbrances.* — It is, of course, the duty of the trustee to pay all proper claims and debts against the estate, and he will be allowed for money advanced in settling such indebtedness,<sup>5</sup> even though the debt is not reduced to judgment until after the execution of the trust.<sup>6</sup> But a trustee will not be allowed for settling a claim which cannot be enforced against the estate.<sup>7</sup>

**Liens and Incumbrances.** — The trustee is also entitled to credit for paying off liens<sup>8</sup> and discharging incumbrances, such as mortgages, provided this be done in good faith and for the benefit of the estate.<sup>9</sup> Even though a direction in a will, providing for paying off mortgages, is void, still payments actually made in good faith should be allowed.<sup>10</sup> So the representatives of a deceased trustee will be allowed for money expended in discharging a mortgage, though they do not know he was a trustee, and suppose they are making the payment

*Smith v. Townshend*, 27 Md. 368, 92 Am. Dec. 637.

**As to Manner in Which Trustee Should Repay Himself His Advances**, see *Taylor v. Magrath*, 10 Ont. 669; *Elmer v. Loper*, 25 N. J. Eq. 475.

**Trustee Cannot Receive More than His Advance.** — Where a trustee is to sell certain land, pay himself a debt owed him by the creator of the trust, and then pay the balance to the creator, he cannot, having sold the land for paper currency, which is legal tender, charge the creator with the difference in value between this and gold or silver, which was the only legal tender when the debt was contracted. *Urann v. Coates*, 117 Mass. 41.

**1. Reimbursement.** — See *supra*, this section, *Rights or Trustees*.

**2. Advances Within Authority of Trustee.** — *Perrine v. Newell*, 49 N. J. Eq. 57.

**3. Investments of Trustee.** — *Royal v. Royal*, 30 Oregon 448. See the title INVESTMENTS, vol. 17, p. 723.

**4. Allowance of Actual Amount Advanced** — *Hanna v. Spotts*, 5 B. Mon. (Ky.) 362, 43 Am. Dec. 132; *Ireland v. Potter*, (Supm. Ct. Spec. T.) 25 How. Pr. (N. Y.) 175; *Fellows v. Loomis*, 204 Pa. St. 225.

**5. Paying Debts and Claims.** — *Marks v. Semple*, 111 Ala. 637; *Price v. Boyce*, 10 Ind. App. 145; *Loud v. Winchester*, 64 Mich. 23; *Williams v. Haskins*, 66 Vt. 378. See also *Smith v. Miller*, 98 Va. 535.

**Beneficiary Released from Liability.** — Where the trustee has honestly and fairly expended money by which the beneficiary is discharged from being liable for money borrowed by the trustee for the benefit of the beneficiary, the trustee should be repaid. *Balsh v. Hyham*, 2 P. Wms. 453.

**6. Debt Reduced to Judgment After Execution of Trust.** — *Marks v. Semple*, 111 Ala. 637.

**7. No Allowance for Claim Not Enforceable.** — *Marks v. Semple*, 111 Ala. 637. But see *For-*

*shaw v. Higginson*, 8 De G. M. & G. 827, 3 Jur. N. S. 476.

**Payment of Excessive Interest.** — A trustee of property to secure debts will be credited with the amount of interest necessary to renew a note given by the grantor, even though such rate is above the legal rate, if it appear that these payments were sanctioned by the grantor and by the court. *Stacy v. Rose*, (Tenn. Ch. 1900) 58 S. W. Rep. 1087.

**8. Paying Off Lien.** — *Browning v. Kelly*, 124 Ala. 645; *Harrison v. Mock*, 16 Ala. 616; *Freeman v. Tompkins*, 1 Strobb. Eq. (S. Car.) 53.

**Paying Supposed Lien.** — Where a trustee is about to sell part of the real estate, and the purchaser raises the objection that there is a legacy charged on the real estate, and this objection is reasonably well founded, and the trustee, acting on the advice of counsel, honestly believes it to be so, he is entitled to be credited in his accounts with money expended in removing this charge in order that he may satisfy the purchaser, even though the objection may not, as a matter of fact, have been valid. *Forshaw v. Higginson*, 8 De G. M. & G. 827, 3 Jur. N. S. 476.

**Buying in Outstanding Title.** — *King v. Cushman*, 41 Ill. 31, 89 Am. Dec. 366; *Cushman v. Bonfield*, 139 Ill. 219. See also *Chaffin v. Hull*, 49 Fed. Rep. 524, *affirmed* (C. C. A.) 54 Fed. Rep. 437.

**Money Expended in Buying, at Foreclosure Sale, land mortgaged to secure notes given the estate, is allowed on an accounting.** *Nevitt v. Woodburn*, 190 Ill. 283.

**9. Discharging Mortgage.** — *Fischbeck v. Gross*, 112 Ill. 208; *Pratt v. Thornton*, 28 Me. 355, 48 Am. Dec. 492; *Hafner v. Hafner*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 65; *Garvey v. New York L. Ins., etc., Co.*, 4 Silv. Sup. (N. Y.) 348.

**10. Payments Made in Good Faith.** — *Hafner v. Hafner*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 65.

for the benefit of his estate.<sup>1</sup> But a trustee cannot buy in executions against the trust estate and then avail himself of them to sell the trust property.<sup>2</sup>

(cc) *Maintenance of Beneficiaries.* — For all payments made to the *cestuis que trustent*, in accordance with the terms of the trust instrument, the trustee will be allowed;<sup>3</sup> but where the advance is not made on the security of the trust fund, no credit will be given,<sup>4</sup> nor can the trustee set off, against his indebtedness to the trust, an independent debt due him individually from the beneficiary.<sup>5</sup> But a reasonable construction is given to the trust instrument;<sup>6</sup> thus, a trustee of land held in trust for his father during his life should be allowed for his board and lodging during that time;<sup>7</sup> and a direction to board and educate minor children authorizes disbursements for their clothing.<sup>8</sup> Where the trustee, induced by the fraudulent representations of the infant beneficiary, pays to him part of the trust estate to which he is entitled upon coming of age, he should be credited with this sum as against the infant, when the latter actually attains his majority.<sup>9</sup>

(d) *Payments under Order of Court.* — If the trustee be ordered by the court to disburse any sum, he will, as a matter of course, be allowed for this sum in his accounts.<sup>10</sup> The allowance of costs out of the estate comes under this head, but is fully treated elsewhere.<sup>11</sup>

(e) *Interest on Advances* — *aa.* WHEN ALLOWED. — If the trust instrument directs that the trustee shall be allowed interest on advances, this direction will be carried out, unless the trustee is in fault.<sup>12</sup> In the absence of any provision in the trust instrument, the allowance of interest is in the discretion of the court,<sup>13</sup> but it is generally allowed,<sup>14</sup> unless the intention of the creator of the

1. *Payment by Representative of Trustee.* — *Garvey v. New York L. Ins., etc., Co.*, 4 Silv. Sup. (N. Y.) 348.

2. *Wrongful Purchase of Execution.* — *Harrison v. Mock*, 16 Ala. 616.

3. *Advances to Cestuis.* — *Bethea v. McColl*, 5 Ala. 308; *Brinkerhoff v. Banta*, 26 N. J. Eq. 157; *Pence v. Force*, 46 N. J. Eq. 348; *Royal v. Royal*, 30 Oregon 448; *Taylor's Appeal*, (Pa. 1887) 11 Atl. Rep. 307; *Williams v. Haskins*, 66 Vt. 378; *Cogbill v. Boyd*, 77 Va. 450; *Hayes v. Hayes*, 29 Grant Ch. (U. C.) 90.

*Payment Must be for the Benefit of the Cestui Que Trust.* — *Hunting v. Safford*, 183 Mass. 157.

As to the Power of Trustees to Make Disbursements, Not Within Terms of Trust, for Maintenance of Beneficiaries, see *supra*, this section, *Powers of Trustees*.

4. *Advance Not Made on Security of Fund.* — *Grove v. Price*, 26 Beav. 103.

As to Liability of Trustee for Unauthorized Advances, see *supra*, this section, *Liabilities of Trustees*.

5. *Set-off of Individual Credit.* — *Knowles v. Goodrich*, 60 Ill. App. 506. See also *In re Jones*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 127, 2 N. Y. Supp. 844.

But if the Beneficiary Assents, he may do so. *Owens v. Barroll*, 88 Md. 204.

6. *Construction of Will.* — A testator devised his real estate to trustees in trust to pay an annuity to his daughter, and also bequeathed to them his personal property, and directed them to pay all his debts, and when this was done to increase the annuity. Upon his death it was found that his personal property was much larger than anticipated, and was sufficient to pay all debts and incumbrances. Some of it, however, being invested very profitably, the trustees thought it best not to pay off all the in-

cumbrances at once, but increased the annuity. It was held that they were right in this, and that the increased payment should be allowed in their accounts. *Astley v. Essex*, L. R. 6 Ch. 898.

7. *Allowance for Board of Cestui.* — *Leeper v. Taylor*, 111 Mo. 312.

8. *Board and Education Include Clothing.* — *Hardy v. Park*, 28 Ga. 369.

9. *Payment Induced by Fraud of Beneficiary.* — *Cory v. Gertken*, 2 Madd. 40; *Overton v. Banister*, 3 Hare 503; *Parker v. Hayes*, 39 N. J. Eq. 469. See also *Wright v. Snowe*, 2 De G. & Sm. 321.

10. *Payment under Order of Court.* — *Morison v. Morison*, 7 De G. M. & G. 214, 1 Jur. N. S. 1100; *Weed's Estate*, 163 Pa. St. 595. See also *Clark v. Anderson*, 10 Bush (Ky.) 99.

11. *Allowance of Costs.* — See ENCYC. OF PL. AND PR., vol. 22, p. 207.

12. *Direction in Trust Instrument.* — *Booth v. Bradford*, 114 Iowa 562.

13. *Discretion of Court.* — *Turner v. Turner*, 44 Ark. 25.

14. *Interest Generally Allowed.* — See *Browning v. Kelly*, 124 Ala. 645; *McCall v. Burk*, (Ky. 1903) 76 S. W. Rep. 177; *Perrine v. Newell*, 49 N. J. Eq. 57; *Gilmore v. Tuttle*, 34 N. J. Eq. 45; *Dilworth v. Sinderling*, 1 Binn. (Pa.) 488, 2 Am. Dec. 469. And see cases cited *infra*, this section, *Rate and Computation of Interest*. See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1267.

*The Contrary* has been held in *Pennsylvania*. *King's Estate*, 147 Pa. St. 410, holding that interest will not be allowed on advances, unless such payments are expressly authorized by the will, the ground of the decision being that interest is damages for the unjust detention of money.



trust seems to be otherwise.<sup>1</sup> No interest will be allowed if the trustee has funds in hand when the advances are made.<sup>2</sup>

*bb. RATE AND COMPUTATION OF INTEREST.* — The rate of interest to be allowed a trustee for advances is generally confined to the ordinary legal and reasonable rate.<sup>3</sup> It has been held that, since the trustee is under no obligation to advance the money, he should be allowed only simple interest,<sup>4</sup> but the better view is that if the trustee advancing money for the benefit of the estate is obliged to pay compound interest to secure this money, he should be credited with compound interest, in order to be made whole.<sup>5</sup>

(f) **Proof of Disbursements** — *aa. IN GENERAL* — Since a trustee is chargeable with all he has received, in order to be given credit on his accounts he must show, by affirmative proof, what he has expended, and he must sustain the burden of proving that his disbursements are proper.<sup>6</sup> A trustee is bound to keep clear and accurate accounts, and whatever doubts and obscurities appear will be construed strictly against him.<sup>7</sup> But if the beneficiaries rely on charges exhibited by the account they will thereby be forced to admit the credits therein, unless disproved.<sup>8</sup>

*bb. HOW MADE.* — The trustee's statements as to matters of discharge are not conclusive,<sup>9</sup> and his own receipt is no higher evidence than his oral statement,<sup>10</sup> and, as a general rule, disbursements should be proved by the production of vouchers or other evidences of payment,<sup>11</sup> but such expenses as court costs,

In an Accounting between the plaintiff and defendant as to the money advanced by the former to the latter, the defendant cannot object to being charged with interest on the sums advanced when he is credited with interest at the same rate on all sums paid out by him on the property bought and for its preservation. *Darling v. Potts*, 118 Mo. 506; *Garvey v. Owens*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 349.

For the Converse of This, see *Doom v. Howard*, (Ky. 1901) 64 S. W. Rep. 469.

1. **Intention of Creator.** — *Adams v. Lambard*, 80 Cal. 426.

2. **No Interest if Funds in Hand.** — *Cook v. Lowry*, 95 N. Y. 103; *King v. Talbot*, 40 N. Y. 76.

3. **Only Legal Rate Allowed.** — *Finch v. Pescott*, L. R. 17 Eq. 554, 30 L. T. N. S. 156; *Urann v. Coates*, 117 Mass. 41; *Fisk v. Brunette*, 30 Wis. 102.

4. **Only Simple Interest.** — *Evertson v. Tappen*, 5 Johns. Ch. (N. Y.) 497; *Carpenter's Appeal*, 2 Grant Cas. (Pa.) 381.

5. **Compound Interest Allowed.** — *Barrell v. Joy*, 16 Mass. 221; *Jenckes v. Cook*, 10 R. I. 215.

6. **Burden of Proof.** — *Matter of Thompson*, 101 Cal. 349; *Clapp v. Emery*, 98 Ill. 523; *Ward v. Shire*, (Ky. 1901) 65 S. W. Rep. 8; *McCulloch v. Tompkins*, 62 N. J. Eq. 262; *Welsh v. Brown*, 50 N. J. Eq. 387; *Gilbert v. Sutliff*, 3 Ohio St. 129; *Mintz v. Brock*, 193 Pa. St. 294. See also *Nobles v. Hogg*, 36 S. Car. 322.

**Presumption of Payment.** — It has been held that there is a presumption of payment wherever moneys have been collected which it would be a fraud not to pay over. *Matter of Davis*, 43 N. Y. App. Div. 331, citing *Beattie v. Beattie*, 83 Hun (N. Y.) 295.

7. **Obscurities Construed Against Trustees.** — *Hottel v. Mason*, 16 Colo. 43; *Ward v. Shire*, (Ky. 1901) 65 S. W. Rep. 8; *Miller v. Whit-tier*, 36 Me. 577; *Dennis v. Dennis*, 15 Md. 73; *Blauvelt v. Ackerman*, 23 N. J. Eq. 495,

*affirmed* 25 N. J. Eq. 570; *Dufford v. Smith*, 46 N. J. Eq. 216; *In re Gaston*, 35 N. J. Eq. 60; *Veghte v. Steele*, 35 N. J. Eq. 348; *White v. Rankin*, 18 N. Y. App. Div. 293, *affirmed* 162 N. Y. 622; *Bockius's Estate*, 10 Pa. Co. Ct. 183.

8. **Cestuis Relying on Charges in Account Admit Credits Therein.** — *Dennis v. Dennis*, 15 Md. 73.

9. **Trustee's Statements Not Conclusive.** — *Baker v. Williamson*, 4 Pa. St. 456.

10. **Trustee's Receipt No Higher Evidence.** — *White v. Rankin*, 18 N. Y. App. Div. 293, *affirmed* 162 N. Y. 622.

11. **Payment Should Be Proved by Vouchers.** — *Poullain v. Poullain*, 76 Ga. 420; *Dennis v. Dennis*, 15 Md. 73; *Disbrow v. Disbrow*, 46 N. Y. App. Div. 111, *affirmed* 167 N. Y. 606; *Bockius's Estate*, 10 Pa. Co. Ct. 183.

In *Dennis v. Dennis*, 15 Md. 73, *Eccleston, J.*, said: "If an account, so irregularly kept, and subject to so many objections as we have stated in regard to the one before us, although professing to be in the handwriting of the trustee, who died between one and two years prior to the institution of the suit, should be admitted as *prima facie* correct, and as casting the *onus* on the *cestui que trusts* of impeaching it, by showing its errors, it would be establishing a precedent which would afford trustees the opportunity, either by design or by great negligence, of subjecting *cestui que trusts* to great injustice, leaving them but little opportunity of correcting errors in the account. How would the present plaintiffs be able, with any degree of tolerable success, to investigate and ascertain whether those numerous charges, which do not indicate to whom paid, are or are not correct? How, by means of the account, can they ever accurately adjust the blended charges or the blended credits? It is rarely, if ever, the case that a trustee cannot procure and preserve vouchers. He may also apply to a court of equity, in case of minors,

by the record of the court in which the suit was brought.<sup>1</sup> Lapse of time, however, will excuse a trustee from so great particularity, if the time be long enough.<sup>2</sup> What is sufficient time is doubtful, but it seems that it must be at least twenty years.<sup>3</sup> Where all the disbursements have been with the consent and advice of the beneficiaries, formal vouchers will not be required,<sup>4</sup> and if no better evidence can be secured it seems that a trustee may prove his expenditures by his own oath,<sup>5</sup> or the court may, in the absence of an account, make the best deduction it can from the evidence.<sup>6</sup>

(2) *Settlement and Release*—(a) **Validity**—*aa. IN GENERAL.*—A trustee may be relieved from his liability to account or may be credited on his accounting, by setting up a release from his *cestui que trust*, obtained in good faith and on a fair settlement.<sup>7</sup> But such release must be from the *cestui que trust* or his

with whom he cannot account, and there administer his trust."

**Acquiescence in Accounts by Beneficiary.**—The ordinary rule as to the effect of the acquiescence of the debtor in an account rendered does not apply to the case of a trustee's account taken from his private books, since the beneficiary has neither opportunity nor right to examine the source from which it is taken. *Ahl's Appeal*, 129 Pa. St. 26.

**Receipts**, signed by the *cestui que trust*, are *prima facie* evidence of disbursements, but are not conclusive upon him, and he may set up mistake or fraud. *Welsh v. Brown*, 50 N. J. Eq. 387. And see generally *infra*, this section, *Settlement and Release*.

**Settlement with Cestui as Proof.**—Although an alleged settlement may possibly be appealed to, in exoneration of vouching the items of an old and long-standing account, it ought not to avail against such an exposition of the accounts themselves as will enable the representative of the *cestui que trust* to examine and search for errors and defects. *Rieben v. Hicks*, 4 Bradf. (N. Y.) 136. See also *Clarke v. Ormonde*, *Jac. 120*.

After accounts between trustee and *cestui que trust* have been examined by the parties to a bill filed for that object by the trustee, and a release executed, where there is no proof of concealment, upon a bill filed to impeach such release, after a lapse of ten years from its execution, the trustee will not be required to produce actual proof or detailed information of what the records and accounts displayed. *Forbes v. Forbes*, 5 Gill (Md.) 29.

**Maintenance of Infants by One of Two Trustees.**—A and B were trustees of a will and guardians of two infants. The infants were maintained by B, who was allowed by A to receive the income. It was held that A was not discharged by mere proof of payment to B, but that if it was shown that B had properly maintained the infants, a reasonable sum would be allowed A in his accounting, without need of his proving each item of expenditure. *In re Evans*, 26 Ch. D. 58.

**New York Code Civil Procedure, § 2729, subd. 2**, providing that an executor may be allowed any item the payment of which he satisfactorily proves by any competent evidence other than his own oath or that of his wife, is applicable to trustees, and payments may be proved without vouchers, by any satisfactory evidence. *Matter of Davis*, 43 N. Y. App. Div. 331.

**Proof by Drafts Indorsed by Trustee.**—It is proper to admit in evidence certain drafts signed and indorsed by the trustees, and indorsed by neighbors of the beneficiary, with whom the trustees had no business relations, but which drafts are otherwise unconnected with the beneficiary, provided that such evidence is offered in connection with other evidence showing their method of making payments and their general method of dealing with the beneficiary. *Matter of Davis*, 43 N. Y. App. Div. 331.

**Must Be Some Proof of Expenditures.**—A trustee can claim no credit for expenditures for legal services, where no bill for such services has been rendered, and there is no evidence of what services were rendered, and no vouchers for the payments. *Matter of Quinn*, (Surrogate Ct.) 16 Misc. (N. Y.) 651.

**1. Court Costs.**—*Gates v. Hunter*, 13 Mo. 511.

**2. Lapse of Time.**—*Allender v. Trinity Church*, 3 Gill (Md.) 166.

**3. Twenty Years' Time.**—See *Dennis v. Dennis*, 15 Md. 73.

**4. Vouchers Not Required.**—*Groom v. Thompson*, (Ky. 1891) 16 S. W. Rep. 369.

**5. Proof by Oath of Trustee.**—*Miller v. Beverley*, 4 Hen. & M. (Va.) 415. But see the codes and statutes in the various states, *e. g.*, N. Y. Code Civ. Proc., § 2729, subd. 2.

**6. Estimate Deduced by Court from Evidence.**—*Clapp v. Emery*, 98 Ill. 523.

**7. Release Obtained in Good Faith—England.**—*Aveline v. Melhuish*, 10 Jur. N. S. 788.

*Illinois.*—*Moss v. Moss*, 95 Ill. 449; *Scanlan v. Scanlan*, 134 Ill. 630.

*Kentucky.*—*Bradford v. Clayton*, (Ky. 1897) 39 S. W. Rep. 40.

*Maryland.*—*Forbes v. Forbes*, 5 Gill (Md.) 29.

*Massachusetts.*—*Pope v. Farnsworth*, 146 Mass. 339.

*Nebraska.*—*Streitz v. Hartman*, 35 Neb. 406.

*New York.*—*Cocks v. Barlow*, 5 Redf. (N. Y.) 406; *Scudder v. Burrows*, (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 605; *Woodbridge v. Boakes*, 170 N. Y. 596, *affirming* 59 N. Y. App. Div. 503.

*Pennsylvania.*—*Shartel's Appeal*, 64 Pa. St. 25.

*South Carolina.*—*Britton v. Lewis*, 8 Rich. Eq. (S. Car.) 271; *Anderson v. Simms*, 29 S. Car. 247, 13 Am. St. Rep. 711.

duly authorized agent;<sup>1</sup> thus, a release from the administrator *c. t. a.* of the creator of the trust is of no effect,<sup>2</sup> nor may the trustee rely on a release obtained from an agent of the beneficiary, when he knows such agent had no authority to make such release.<sup>3</sup> A release by the life tenant cannot discharge the trustee from liability to the remainderman.<sup>4</sup>

*bb. WHO MAY RELEASE.* — The *cestui que trust*, at the time of executing the release, must be *sui juris*. Thus, a release by an infant is void, except as to the payments actually made to him.<sup>5</sup> Although a *feme covert*, at common law, cannot contract, yet a release by her is *prima facie* correct.<sup>6</sup>

*cc. GOOD FAITH AND FAIR DEALING.* — The duty of a trustee to exercise the utmost good faith in all dealings with his *cestui que trust*<sup>7</sup> extends also to obtaining a release, and if there be any fraud the release is void.<sup>8</sup> It is his duty to put his *cestui que trust* in possession of a full and true statement of the affairs of the trust. *Uberrima fides* is the requirement in such transactions, and if any material fact be concealed the release will be of no effect.<sup>9</sup> The court is especially jealous of the rights of a *cestui que trust* who has executed a release soon after attaining his majority, and in such a case the transactions will be narrowly scrutinized.<sup>10</sup> But if the *cestui que trust* is of full age, *sui juris*, and capable of understanding his rights, with full opportunity of ascertaining them, under no disability, advised as to all the circumstances surrounding the matter, or in a situation, by reasonable and proper diligence, to be thus advised, he must abide the result, and equity will not give relief.<sup>11</sup>

**Advice of Counsel.** — The fact that the *cestui que trust* has employed counsel is usually a ground for upholding the release, if counsel is put in possession of all the facts,<sup>12</sup> but if the trustee conceals material facts from counsel, the

*Tennessee.* — *Smith v. Thomas*, 4 Heisk. (Tenn.) 116.

See also *Hope v. Beard*, 10 Grant Ch. (U. C.) 212.

A release, like any other contract, must have a consideration. *Clarke v. Deveaux*, 1 S. Car. 172.

**1. Agent of Beneficiary.** — *Britton v. Lewis*, 8 Rich. Eq. (S. Car.) 271.

**2. Release by Administrator c. t. a. of Creator.** — *Wooden v. Kerr*, 91 Mich. 188.

**3. Agent Not Authorized.** — *Fast v. McPherson*, 98 Ill. 496.

**4. Release by Life Tenant No Bar to Remainderman.** — *Henderson v. Segars*, 28 Ala. 352; *Diehl v. Cotts*, 48 W. Va. 255.

**5. Release by Infant Void.** — *Overton v. Banister*, 3 Hare 503; *Parker v. Hayes*, 39 N. J. Eq. 469. See also *Wright v. Snowe*, 2 De G. & Sm. 321.

**6. Release by Feme Covert Prima Facie Correct.** — *Smith v. Thomas*, 4 Heisk. (Tenn.) 116.

A *feme covert* usually cannot concur in a breach of trust, but where she can appoint a sum on her death to her husband, a release by her to a trustee for paying such sum to her husband will estop her from surcharging his accounts for that amount. *Cooper's Estate*, 11 Pa. Co. Ct. 617.

**7. Duty of Good Faith.** — See *supra*, this section, *Duties of Trustees* — *a. In General*, and *Rights of Trustees* — *a. Right to Profit from Office*.

**8. Release Obtained by Fraud.** — *Jones v. Lloyd*, 117 Ill. 597; *Berryhill's Appeal*, 35 Pa. St. 245.

**9. Release No Bar if Fact Concealed** — *England.* — *Farrant v. Blanchford*, 1 De G. J. &

S. 119; *Wedderburn v. Wedderburn*, 2 Keen 722; *Lloyd v. Attwood*, 3 De G. & J. 614; *Munch v. Cockerell*, 5 Myl. & C. 179; *Hore v. Becher*, 12 Sim. 465.

*Iowa.* — *Pearson v. Taylor*, 37 Iowa 331; *Barton v. Fuson*, 81 Iowa 575; *Booth v. Bradford*, 114 Iowa 562.

*Mississippi.* — *Field v. Middlesex Banking Co.*, 77 Miss. 180.

*New Jersey.* — *Parker v. Hayes*, 39 N. J. Eq. 469; *Danforth v. Moore*, 55 N. J. Eq. 127.

*New York.* — *Smith v. Howlett*, 29 N. Y. App. Div. 182.

*Pennsylvania.* — *Diller v. Brubaker*, 52 Pa. St. 408, 91 Am. Dec. 177.

*South Carolina.* — *Waldrop v. Leaman*, 30 S. Car. 428.

*Texas.* — *Alexander v. Solomon*, (Tex. 1891) 15 S. W. Rep. 906.

*Vermont.* — *Re Hodges*, 63 Vt. 661.

*Wisconsin.* — *Ludington v. Patton*, 111 Wis. 208.

Mere proof that the *cestui que trust* was of sound mind and understood the nature and effect of the contract, is not enough. *Re Hodges*, 63 Vt. 661.

**10. Cestui Que Trust Just of Age.** — *Forbes v. Forbes*, 5 Gill (Md.) 29; *Parker v. Bloxam*, 20 Beav. 295; *Malone v. Kelley*, 54 Ala. 532; *Field v. Middlesex Banking Co.*, 77 Miss. 180.

**11. If Cestui Well Informed and Sui Juris.** — *Murrel v. Murrel*, 2 Strobb. Eq. (S. Car.) 148, 49 Am. Dec. 664; *Waldrop v. Leaman*, 30 S. Car. 428.

**12. Advice of Counsel.** — *Stanes v. Parker*, 9 Beav. 385; *Malone v. Kelley*, 54 Ala. 532; *Colton v. Stanford*, 82 Cal. 351, 16 Am. St. Rep. 137; *Forbes v. Forbes*, 5 Gill (Md.) 29.



release is invalid.<sup>1</sup> So, of course, if counsel representing the *cestui que trust* be not in fact employed by him, it is the same as if he did not act.<sup>2</sup>

*dd.* BURDEN OF PROOF. — The rule is generally laid down that the burden of proof is on the trustee to prove the validity of the release,<sup>3</sup> but it seems that a release executed by a person *sui juris* is *prima facie* correct, and casts on the person impeaching it the burden of going forward with evidence, subject always in the last analysis to the rule of law that the trustee must satisfy the court of the fairness of the transaction.<sup>4</sup>

Where There Is No Fiduciary Relation, the amount of evidence necessary to sustain a release impeached for fraud is less than in the case of a trust,<sup>5</sup> and it has been held that when the liability of the trustee to the *cestui que trust* arises from contract and not from tort, so great proof of good faith is not required.<sup>6</sup>

*cc.* LACHES AND LAPSE OF TIME. — As a general rule a release acquiesced in by the beneficiaries for a number of years will not be set aside on the ground of fraud,<sup>7</sup> but a *cestui que trust* is not barred by laches where he delays six years from the execution of the release, but only discovers the fraud just before bringing suit.<sup>8</sup>

(b) Operation and Effect. — A release discharges the trustee only up to the time it is executed, and anything that comes to his hands after that time must be accounted for.<sup>9</sup> The operation of the release is confined to the liability to which it refers,<sup>10</sup> and a release to an executor as executor does not discharge him as trustee, if the duties are separate and distinct.<sup>11</sup>

*d.* CAPITAL AND INCOME. — In the management and care of the trust estate the trustee is held to a strict accountability for expenditures from the capital and income. His powers and duties with respect to the application of each portion of the fund for this purpose, and his resulting liability for failing to apply the proper part of the fund in particular instances, have been treated elsewhere in this title.<sup>12</sup>

13. Administration of Trust by Court — *a.* EXECUTION BY COURT. — A Court of Equity Has Inherent Power<sup>13</sup> to take upon itself, through its officers or agents, the execution of the powers and duties of a trust, upon the failure<sup>14</sup>

1. Counsel Ignorant of Material Fact. — Waldrop v. Leaman, 30 S. Car. 428.

2. Counsel Not Employed by Cestui. — Lloyd v. Attwood, 3 De G. & J. 614.

3. Burden of Proof. — Farrant v. Blanchford, 1 De G. J. & S. 119; Schoch's Appeal, 33 Pa. St. 351; Stewart's Estate, 140 Pa. St. 124. And see generally the cases cited *supra*, this subdivision, *cc.* Good Faith and Fair Dealing.

4. Burden of Going Forward with Evidence. — Keaton v. McGwier, 24 Ga. 217; Crocker v. Pierce, 61 Me. 58. See also Welsh v. Brown, 50 N. J. Eq. 387.

5. No Fiduciary Relation. — Smith v. Ogilvie, 127 N. Y. 143. See also Keaton v. McGwier, 24 Ga. 217.

6. Liability Arising from Contract. — Dalrymple v. Craig, 149 Mo. 345.

7. Acquiescence in Release. — Clute v. Fraiser, 58 Iowa 268; Bradford v. Clayton, (Ky. 1897) 39 S. W. Rep. 40. And see *infra*, this title, IX. Limitation and Laches.

8. Excusable Delay. — Jones v. Lloyd, 117 Ill. 597.

9. Release Discharges Only Up to Time of Release. — *In re* Taggard, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 629, *affirmed* 138 N. Y. 610. See also Diehl v. Cotts, 48 W. Va. 255.

10. Operation Confined to Liability Mentioned. —

Burt v. Gill, 89 Md. 145, holding that where a release purports to cover all income, but refers to "said income" as that appearing in the auditor's accounts, it should be held to apply only to such income as is awarded by the auditor's account, and not to that which was retained by the trustee.

11. Release to Trustee as Executor. — Hanson v. Worthington, 12 Md. 418; Dority v. Dority, 40 N. Y. App. Div. 236; *In re* Taggard, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 629, *affirmed* 138 N. Y. 610.

12. See *supra*, this section, 8. Powers of Trustees — *g.* Powers as to Maintenance of Beneficiary; 10. Duties of Trustees — *d.* Management of Property.

As to Rights of Life Tenant and Remainderman in Dividends, see the title DIVIDENDS, vol. 9, p. 710.

13. Inherent Power of Court. — Rogers v. Rogers, 111 N. Y. 228; Greenland v. Waddell, 116 N. Y. 242, 15 Am. St. Rep. 400; Kirk v. Kirk, 137 N. Y. 510. See also the title TRUSTS AND TRUSTEES, 22 ENCYC. OF PL. AND PR., p. 113.

14. Failure of Trustee to Act. — Prendergast v. Prendergast, 14 Jur. 989; Grievson v. Kirsopp, 2 Keen 653; Colton v. Colton, 127 U. S. 300; Ewing v. Walker, 60 Ark. 503; Nicoll v. Miller, 37 Ill. 387; Babbitt v. Babbitt, 26 N. J.

or refusal to act <sup>1</sup> of the duly appointed trustee, or upon his death, <sup>2</sup> or removal from the state <sup>3</sup> before the termination of the trust, or when he becomes incapable of fulfilling it, <sup>4</sup> or is guilty of such negligence in <sup>5</sup> performing his duties as to endanger the safety of the trust fund.

In New York It Is Provided by Statute that upon the death of the surviving trustee of an express trust, the trust, if then unexecuted, shall vest in the Supreme Court, and shall be executed by some person appointed for that purpose under the direction of the court. <sup>6</sup> And the court cannot divest itself of the trusteeship by appointing a new trustee. <sup>7</sup>

**Exercise of Discretionary Powers.** — When the court is called upon to execute the trust, it will not generally attempt to exercise discretionary powers conferred upon the trustee. <sup>8</sup> But it may, in a proper case, order a reference to determine what course of action will be beneficial to all parties interested. <sup>9</sup>

**b. PAYMENT INTO COURT.** — Upon a proper showing, such as that the trust fund is in danger of being wasted, or is being improperly dealt with by the trustees, or is about to be removed from the court's jurisdiction, the court will deprive the trustees of the custody and control of the fund, and require the same to be paid into court. <sup>10</sup> And whenever the trust fund is in litigation, and it appears from the trustee's admission or otherwise that he has in his possession moneys belonging to the estate, such moneys may be ordered paid into court without further proof. <sup>11</sup>

Eq. 44; *Hawley v. James*, 5 Paige (N. Y.) 318.

**1. Refusal of Trustee to Act.** — *Mortimer v. Watts*, 14 Beav. 616; *Izod v. Izod*, 32 Beav. 242; *Prendergast v. Prendergast*, 14 Jur. 989; *Gower v. Mainwaring*, 2 Ves. 87; *Colton v. Colton*, 127 U. S. 300; *Ewing v. Walker*, 60 Ark. 503; *McCosker v. Brady*, 1 Barb. Ch. (N. Y.) 329; *King v. Donnelly*, 5 Paige (N. Y.) 46; *Johnson v. Roland*, 2 Baxt. (Tenn.) 203; *Saunders v. Harris*, 1 Head (Tenn.) 185; *Faulkner v. Davis*, 18 Gratt. (Va.) 651, 98 Am. Dec. 698. See also *Benett v. Wyndham*, 4 De G. F. & J. 259; *Schultz v. Blackford*, 9 Lea (Tenn.) 431.

**2. Death of Trustee.** — *Batesville Institute v. Kauffman*, 18 Wall. (U. S.) 151; *H. B. Claflin Co. v. Middlesex Banking Co.*, 113 Fed. Rep. 958; *Waring v. Waring*, 10 B. Mon. (Ky.) 331; *Faulkner v. Davis*, 18 Gratt. (Va.) 651, 98 Am. Dec. 698.

**3. Removal of Trustee from State.** — *Cullum v. Branch Bank*, 23 Ala. 797.

**4. Trustee Incapable.** — *Colton v. Colton*, 127 U. S. 300; *Jones v. McPhillips*, 77 Ala. 314; *Suarez v. Pumpelly*, 2 Sandf. Ch. (N. Y.) 336.

**Intemperance of Trustee.** — *Payne v. Morris*, (Va. 1888) 5 S. E. Rep. 568.

**Insolvency of Trustee.** — *Cohn v. Ward*, 32 W. Va. 34.

**Removal of Trustee Unnecessary.** — In *Franklin v. Franklin*, 2 Swan (Tenn.) 521, it was held that where a trustee was incapable of performing the duties of his trust the court could, without removing him, appoint suitable persons to perform the active duties of trustee, leaving the legal title still in the original trustee.

**5. Trustee Negligent.** — *Jones v. McPhillips*, 77 Ala. 314; *Jones v. Dougherty*, 10 Ga. 287; *Knight v. Knight*, 75 Ga. 386; *Burroughs v. Gaither*, 66 Md. 171; *Mower v. Hanford*, 6 Minn. 535; *Tappan v. Ricamio*, 16 N. J. Eq. 80.

**6. New York Statute.** — *Mulry v. Mulry*, 89 Hun (N. Y.) 531; *Rogers v. Rogers*, 111 N. Y. 228; *Douglas v. Cruger*, 80 N. Y. 15; *Elsworth*

*v. Hinton*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 573; *Jewett v. Schmidt*, 83 N. Y. App. Div. 276; *Wetmore v. Wetmore*, 44 N. Y. App. Div. 52; *Robinson v. Schmitt*, 17 N. Y. App. Div. 628; *Graham v. De Witt*, 3 Bradf. (N. Y.) 186.

**Statute Not Applicable to Trusts of Personality.** — In *Bucklin v. Bucklin*, 1 Abb. App. Dec. (N. Y.) 242, it was held that a trust of personality was not within the purview of the statute (1 R. S. 730, § 68), providing that a trust should vest in the court of chancery upon the death of the trustee.

**7. Willey v. Robinson**, 85 Hun (N. Y.) 362; See also *supra*, this section, 2. *Appointment.*

**8. Exercise of Discretionary Powers.** — *Re Hall*, 14 Beav. 115, 15 Jur. 940; *Prendergast v. Prendergast*, 14 Jur. 989; *Matter of Coe*, 4 Kay. & J. 199. But compare *Meddis v. Bull*, (Ky. 1892) 18 S. W. Rep. 6, holding that where a trustee resigns without having executed a personal power of sale conferred upon him, the chancellor may exercise such power in enforcing the trust. And see *supra*, this section, 8. *Powers of Trustees* — *e. Control by Court of Powers of Trustees.*

**Where Discretion Is Given as to the Apportionment of the Trust Funds**, the court will divide them equally. *Izod v. Izod*, 32 Beav. 242; *Tomlin v. Hatfield*, 12 Sim. 167; *Grieverson v. Kirsopp*, 2 Keen 653.

**Where Discretion Was Given as to the Amount of Income to be paid annually**, not exceeding a certain limit, the court decreed payment of the full amount. *Young v. Young*, 1 Jur. 840.

**9. Reference to Master.** — *Dale v. Hamilton*, 2 Phil. 266; *Gower v. Mainwaring*, 2 Ves. 87.

**10. Trust Fund in Danger Ordered into Court.** — *Clagett v. Hall*, 9 Gill & J. (Md.) 81; *Ehlen v. Ehlen*, 63 Md. 267; *Tappan v. Ricamio*, 16 N. J. Eq. 80; *Carr v. Bredenbergh*, 50 S. Car. 471. See also *Stileman v. Campbell*, 13 Grant Ch. (U. C.) 454. And see the title TRUSTS AND TRUSTEES, 22 ENCYC. OF PL. AND PR. 113.

**11. Trust Fund in Litigation Ordered into Court.** — *Hosac v. Rogers*, 6 Paige (N. Y.) 415;

In England It Is Provided by Statute that trustees, or a majority of them, having in their hands or under their control money or securities belonging to any trust, may pay the same into court to be dealt with according to the orders of said court. If the majority of trustees desire to pay into court, and the concurrence of the minority cannot be obtained, the court has power to order the payment.<sup>1</sup> But, independently of the statute, the court has power to order the payment of trust funds into court.<sup>2</sup>

c. PROPERTY IN FOREIGN JURISDICTION. — The decree of a court of equity acts primarily and properly *in personam*, and only collaterally, at the most, *in rem*; consequently, in cases of trust, whenever jurisdiction over the parties has been acquired, full relief will be administered without regard to the nature or situation of the property involved, although lands in another state may be affected by the decree.<sup>3</sup>

**VII. THE CESTUI QUE TRUST — 1. Definition.** — The phrase *cestui que trust*, or, as it is sometimes written, *cestuy que trust* (literally "he in trust for whom"), denotes the person in trust for whom or for whose benefit another is seized or possessed of real or personal estate. In other words, the *cestui que trust* is the real, substantial, and beneficial owner of an estate which is held in trust, as distinguished from the trustee in whom the mere legal title is vested.<sup>4</sup> This phrase has been criticised as awkward and not in harmony with the English idiom,<sup>5</sup> but it has nevertheless remained in use and is probably as convenient and expressive as any substitute that has been suggested.

**2. Who May Be Cestui Que Trust — a. IN GENERAL.** — The general rule is that any person may be a *cestui que trust*, if he have a capacity to take property; and there is no distinction in this respect between legal estates and trust estates, because equity subjects trusts to the same construction that the courts

Clarkson v. De Peyster, Hopk. (N. Y.) 274; Blanton v. Heckscher, 101 Va. 42; Grinnan v. Long, 22 W. Va. 693. See also Williams v. Conroy, 52 Cal. 414. And see the title FUNDS AND DEPOSITS IN COURT, 9 ENCYC. OF PL. AND PR., p. 738, *et seq.*

**1. English Statute.** — Trustee Act, 1893, § 42.

**Voluntary Payment into Court.** — Hockey v. Western, (1898) 1 Ch. 350, 67 L. J. Ch. 166; See also *In re Buckley*, 17 Beav. 110; Barker v. Peile, 2 Drew. & Sm. 340; Hankey v. Morley, 4 Jur. N. S. 234; Abraham v. Holderness, 6 Jur. 290; Cox v. Cox, 1 Kay. & J. 251; Matter of Wright, 3 Kay. & J. 419; Matter of Williams, 4 Kay. & J. 87; Croyden's Trust, 14 Jur. 54, 19 L. J. Ch. 172; *Re Metcalfe*, 10 Jur. N. S. 287, 33 L. J. Ch. 308; *In re Sutton*, 2 Ch. D. 175, 48 L. J. Ch. 350; *In re Parry*, 6 Hare 306; *Mountain v. Young*, 18 Jur. 769; *Re United Kingdom L. Ins. Co.*, 11 Jur. N. S. 424, 6 New Reports 59.

**Canada.** — See *Re Bajus*, 24 Ont. 397.

**2. London Syndicate v. Lord**, 8 Ch. D. 84; *Hollis v. Burton*, (1892) 3 Ch. 226. And see the title FUNDS AND DEPOSITS IN COURT, 9 ENCYC. OF PL. AND PR. 738 *et seq.*

**3. Jurisdiction Over Foreign Property.** — *Ewing v. Orr Ewing*, 9 App. Cas. 34; *Massie v. Watts*, 6 Cranch (U. S.) 148; *Briggs v. French*, 1 Sumn. (U. S.) 504; *Smith v. Davis*, 90 Cal. 25, 25 Am. St. Rep. 92; *Johnson v. Gibson*, 116 Ill. 294; *Campbell's Case*, 2 Bland (Md.) 209, 20 Am. Dec. 360; *Mitchell v. Bunch*, 2 Paige (N. Y.) 606, 22 Am. Dec. 660; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *U. S. v. Maxwell Land Grant Co.*, 5 N. Mex. 297; *Pickett v. Ferguson*, 86 Tenn. 650; *Davis v.*

*Morris*, 76 Va. 21; *Wimer v. Wimer*, 82 Va. 901, 3 Am. St. Rep. 126. See also the titles PRIVATE INTERNATIONAL LAW, vol. 22, p. 1377; SPECIFIC PERFORMANCE, vol. 26, p. 133, and the title TRUSTS AND TRUSTEES, 22 ENCYC. OF PL. AND PR. 20

In *Lindley v. O'Reilly*, 50 N. J. L. 636, 7 Am. St. Rep. 802, the court said: "Ever since *Penn v. Baltimore*, 1 Ves. 444, it has been established law that in cases of contract, trust, or fraud, the equity courts of one state or county having jurisdiction of the parties are competent to entertain a suit for specific performance, or to establish a trust, or for a conveyance, although the contract, trust, or fraudulent title pertains to lands in another state or country. The principle upon which this jurisdiction rests is that chancery, acting *in personam* and not *in rem*, holds the conscience of the parties bound without regard to the *situs* of the property. \* \* \* The decree in a suit of this aspect imposes a mere personal obligation, enforceable by injunction, attachment, or like process against the person, and cannot operate *ex proprio vigore* upon lands in another jurisdiction to create, transfer, or vest a title."

**4. Cestui Que Trust Defined.** — *Burrill Law Dict., Cestui Que Trust*.

**5. Criticism of Terminology.** — Mr. Justice Story says: "The phrase *cestui que trust* is a barbarous Norman law-French phrase; and is so ungainly and ill-adapted to the English idiom that it is surprising that the good sense of the English legal profession has not long since banished it and substituted some phrase in the English idiom furnishing an analogous meaning." Story's Eq. Jur., § 320, note 3.



of law do legal estates.<sup>1</sup> In some jurisdictions, however, this rule is modified by statutes forbidding the creation of trusts, except for the benefit of minors, persons *non compos mentis*, and such persons as, on account of mental weakness, or intemperate, wasteful, or profligate habits, are unfit to be put in the management and right of property.<sup>2</sup> Under such a statute it has been held that a trust could not be created for the benefit of any male person who is *sui juris*, for the purpose of protecting the property from his creditors;<sup>3</sup> and it is also said that since the passage of the Woman's Enabling Act a trust cannot be created in favor of a woman by reason of her sex alone, because, whether she be *feme sole* or *feme covert*, she is capable in law of taking the absolute fee free from the debts and control of her husband.<sup>4</sup>

**Persons Not in Existence.** — It is not necessary that the *cestui que trust* should be in existence at the time of the creation of the trust estate. It is sufficient if a person answering the description in the deed or other instrument creating the trust afterwards comes into existence.<sup>5</sup>

**Cestui Que Trust Must Be Ascertained.** — The *cestui que trust* must be a definitely ascertained person or class of persons, else the trust will fail for indefiniteness.<sup>6</sup> It is not necessary that the instrument creating the trust should, in all cases, name the *cestui que trust*, but the person intended to be benefited may be identified by other evidence. The identification in such cases must, however, be by clear and satisfactory evidence.<sup>7</sup>

**b. STATE AND UNITED STATES.** — If there is no statute forbidding it, a state may be a *cestui que trust*,<sup>8</sup> and the same is true as to the United States.<sup>9</sup>

**c. CORPORATIONS.** — Since any person may be a *cestui que trust* who has capacity to take the legal title to property, it is clear that a corporation may be the *cestui que trust* of personal property the same as an individual. On the same principle, a corporation may be the *cestui que trust* of real estate if it could take the legal title thereto;<sup>10</sup> but in case of a statutory prohibition against the acquisition of real estate by corporations, such statute is not to be evaded by a conveyance to trustees for the benefit of a corporation.<sup>11</sup>

**1. Capacity to Take Property.** — *Trotter v. Blocker*, 6 Port. (Ala.) 269.

**2. Statutory Provisions as to Cestuis Que Trustent.** — See, for instance, Ga. Code, § 3149. See also *Nashville First Nat. Bank v. Nashville Trust Co.*, (Tenn. Ch. 1901) 62 S. W. Rep. 392. Compare the statutes of the other states.

**3. Male Persons Who Are Sui Juris.** — *Gray v. Obeare*, 54 Ga. 231; *Sargent v. Burdett*, 96 Ga. 111; *Lester v. Stephens*, 113 Ga. 495.

**4. Trusts in Favor of Women.** — *Sargent v. Burdett*, 96 Ga. 111. And see *infra*, this section, *Married Women*.

**5. Persons Not in Existence.** — *Salem Capital Flour Mills Co. v. Stayton Water-Ditch, etc., Co.*, 33 Fed. Rep. 146; *Hale v. Hale*, 146 Ill. 227; *Ashhurst v. Given*, 5 W. & S. (Pa.) 323.

**6. Cestui Que Trust Must Be Ascertained.** — *District of Columbia v. Washington Market Co.*, 3 MacArthur (D. C.) 559; *Chili First Presb. Soc. v. Bowen*, 21 Hun (N. Y.) 389. See also *infra*, this section, *Unincorporated Societies*, and the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 893.

Thus, a trust specified in a deed to two persons named, in trust for a designated unincorporated association, "and for the use and benefit of the several members thereof, according to their respective interests," without stating who such members were, was held void because it was too uncertain as to the bene-

ficiaries. *German Land Assoc. v. Scholler*, 10 Minn. 331.

**Children of Future Marriage.** — In *May v. May*, 7 Fla. 207, 68 Am. Dec. 431, a father created a trust in favor of his daughter for life, and in case she should marry then for the joint use of herself and husband and the survivor of them, and on the death of the survivor for the use of the children of the said marriage. The daughter married twice and had children by both marriages, and it was held that all such children took share and share alike.

**7. Cestui Que Trust Need Not Be Named in Instrument.** — *Ashhurst v. Given*, 5 W. & S. (Pa.) 328; *Raphael v. McFarlane*, 18 Can. Sup. Ct. 183.

**Proof of Beneficial Interest.** — *Sowles v. Witters*, 35 Fed. Rep. 463, holding the evidence insufficient to establish a beneficial interest in the claimant; *Guion v. Williams*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 786, affirmed 125 N. Y. 768, holding the evidence sufficient to establish a trust for the plaintiff.

**8. State May Be Cestui Que Trust.** — *Lamar v. Simpson*, 1 Rich. Eq. (S. Car.) 71, 42 Am. Dec. 345.

**9. United States May Be Cestui Que Trust.** — *Neilson v. Lagow*, 12 How. (U. S.) 107.

**10. Corporations as Cestuis Que Trustent of Real Property.** — *Coleman v. San Rafael Turnpike Road Co.*, 49 Cal. 518.

**11.** *Levin on Trusts* 44.

*d.* UNINCORPORATED SOCIETIES. — An unincorporated society or voluntary association having no legal existence cannot take property in an organization, but the title of all is vested in the members thereof.<sup>1</sup> Neither can such an association be a *cestui que trust* in its associated name.<sup>2</sup> Such societies or associations may, however, acquire property by having the title thereto vested in the trustees for the use and benefit of the members composing the particular association.<sup>3</sup>

Charitable and Religious Societies are not within the rule governing unincorporated societies generally, but they may take property directly in their associate names, or they may take the legal title in the name of the trustees.<sup>4</sup>

*e.* MARRIED WOMEN. — Trusts for the benefit of married women were the usual and well-recognized mode of enabling them to enjoy their property free from the control of their husbands, before the enactment of the Married Woman's Property Act.<sup>5</sup> By the enactment of these laws, the necessity of such arrangements has been obviated in theory, because all the property of a married woman continues to be her own and under her exclusive control as much as if she were unmarried; but the fact remains that a married woman is subject to be unduly influenced by her husband, so that it would seem that trusts may still be created for the benefit of married women or women in contemplation of marriage, in the absence of legislation forbidding such trusts.<sup>6</sup>

*f.* ALIENS — (1) *Rule as to Real Estate* — (a) *At Common Law*. — At common law an alien may, by act *inter partes*, take title to real estate, and may hold such title as against all persons except the sovereign.<sup>7</sup> Therefore, an alien may be a *cestui que trust* of real estate, subject only to the right of the sovereign, in an appropriate proceeding, to claim the beneficial interest in the trust property.<sup>8</sup> But it has been held that a resulting trust will not arise in favor of an alien, because equity will never raise a resulting trust in fraud of the rights of the state or of the laws of the land.<sup>9</sup>

1. See the title SOCIETIES, CLUBS, AND UNINCORPORATED ASSOCIATIONS, vol. 25, p. 1132.

2. *Unincorporated Association Cannot Be Cestui Que Trust in Its Associate Name*. — German Land Assoc. v. Scholler, 10 Minn. 331.

3. *Salem Capital Flour Mills Co. v. Stayton Water-Ditch, etc., Co.*, 33 Fed. Rep. 146; *Austin v. Shaw*, 10 Allen (Mass.) 552; *Second Cong. Soc. v. Waring*, 24 Pick. (Mass.) 304; *Miller v. Rosenberger*, 144 Mo. 292; *Swedish Evangelical Lutheran Church v. Shivers*, 16 N. J. Eq. 453; *King v. Townshend*, 141 N. Y. 358; *Sangston v. Gordon*, 22 Gratt. (Va.) 755.

4. *Charitable and Religious Societies*. — See the titles CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 918 *et seq.*; RELIGIOUS SOCIETIES, vol. 24, p. 360 *et seq.* See also the following cases: *Iowa City First Constitutional Presb. Church v. Congregational Soc.*, 23 Iowa 567; *Second Cong. Soc. v. Waring*, 24 Pick. (Mass.) 304; *Towar v. Hale*, 46 Barb. (N. Y.) 361.

5. *For a Full Treatment* of the matter referred to in the text, see the titles MARRIAGE SETTLEMENTS, vol. 19, p. 1224; SEPARATE PROPERTY OF MARRIED WOMEN, vol. 25, p. 331.

In *Pennsylvania* a trust cannot be created for the benefit of an unmarried woman unless she is in immediate contemplation of marriage. *Potts's Appeal*, 30 Pa. St. 168; *Dubs v. Dubs*, 31 Pa. St. 149; *McBride v. Smyth*, 54 Pa. St. 250; *Snyder's Appeal*, 92 Pa. St. 504; *Cridland's Estate*, 7 Phila. (Pa.) 58; *Pickering v. Coates*, 10 Phila. (Pa.) 65, 30 Leg. Int. (Pa.) 225; *Matter of Stirling*, 11 Phila. (Pa.) 150, 33 Leg. Int. (Pa.) 374.

6. *Under the Georgia Statute* a married woman cannot be a *cestui que trust* by reason alone of the fact of her coverture. See *supra*, this section, *Who May Be Cestui Que Trust — In General*.

7. See the title ALIENS, vol. 2, p. 70 *et seq.*

8. *Right of Alien to Be Cestui Que Trust of Land — England*. — *Atty.-Gen. v. Sands*, *Hardres* 495; *Atty.-Gen. v. Duplessis*, *Parker* 144; *Rex v. Holland*, *Style* 21; *Burney v. Macdonald*, 15 Sim. 6; *Burgess v. Wheate*, 1 Eden. 188. See *Rittson v. Stordy*, 3 Smale & G. 230.

*United States*. — *Craig v. Leslie*, 3 Wheat. (U. S.) 563; *Taylor v. Benham*, 5 How. (U. S.) 270.

*New York*. — *Meakings v. Cromwell*, 5 N. Y. 136; *Anstice v. Brown*, 6 Paige (N. Y.) 448.

*South Carolina*. — *McCaw v. Galbraith*, 7 Rich. L. (S. Car.) 74.

*Virginia*. — *Com. v. Martin*, 5 Munf. (Va.) 117.

The court of equity in case of a trust of land for an alien follows the law in relation to escheats of legal estates purchased by aliens; and as the law does not, in cases of escheat, give the commonwealth the profits received by the alien, before office found, so neither will equity, in case of the trust estate, give the commonwealth the profits thereof accrued before decree. *Hubbard v. Goodwin*, 3 Leigh (Va.) 492.

9. *Resulting Trusts*. — *Philips v. Crammond*, 2 Wash. (U. S.) 441; *Leggett v. Dubois*, 3 Paige (N. Y.) 114. See also *Hubbard v. Goodwin*, 3 Leigh (Va.) 492.

**Trust to Sell Land and Hold Proceeds for Alien.** — Where land is devised or conveyed to trustees to sell and hold the proceeds for the benefit of an alien there is an equitable conversion of the land into personalty as of the time of the testator's death and the interest of the alien *cestui que trust* is indefeasible,<sup>1</sup> as in other cases of trust in personal property.<sup>2</sup>

**Bequest of Income of Real Estate in Trust.** — So, too, it has been held that an alien may be *cestui que trust* of the income of real estate under a bequest of such income to the testator's executor to pay the expenses of the estate and to pay over the residue of the income to such alien. The principle here involved is that the income goes to the beneficiary not as real estate, nor even as an incident of real estate, but as personal property, the title, both legal and equitable, being in the trustee, and the *cestui que trust* having the simple right to enforce performance of the trust in equity.<sup>3</sup>

(b) **By Statute.** — The common-law rule forbidding aliens to hold real estate has been very generally abrogated or modified by statute,<sup>4</sup> and in the jurisdiction where such changes have been effected, an alien may be a *cestui que trust* of real estate as well as of personal property.<sup>5</sup>

**Even an Alien Enemy** may be made a *cestui que trust*, though he may not enforce the trust until the termination of the war.<sup>6</sup>

(2) **Rule as to Personal Property.** — It has always been the rule that an alien may take and hold personal property.<sup>7</sup>

**3. Knowledge of or Acceptance by Cestui Que Trust** — *a.* **IN GENERAL.** — It is a matter of plain reason, as well as a technical rule of law, that no person can be made the donee of property against his will, and, therefore, in order to complete a transfer of title, whether by deed or conveyance, gift, legacy, or devise, there must be an acceptance of the deed, etc.,<sup>8</sup> and the rule is the same where the transfer is made to a trustee for the person intended to be benefited as well as in the case of the transfer of the legal title to him.<sup>9</sup>

**Infants.** — Where a trust is created in favor of an infant no formal acceptance by him is required, but the law will accept it for him if it is beneficial to him,

1. **Trust in Proceeds of Land.** — Du Hourmelin v. Sheldon, 1 Beav. 79, affirmed 4 Myl. & C. 525, 4 Jur. 116; Fletcher v. Ashburner, 1 Bro. C. C. 497; Craig v. Leslie, 3 Wheat. (U. S.) 563; Meakings v. Cromwell, 5 N. Y. 136.

As to the doctrine of equitable conversion generally, see the title CONVERSION AND RECONVERSION, vol. 7, p. 463.

**Effect of Right of Election.** — It has been argued that the right of legatees of the proceeds of land devised to be sold operates as a conveyance to them and an equitable title to real estate, which, if they are aliens, they are incapable of holding, and that in consequence of this the state will take the trust. The court held to the contrary, however, and applied the doctrine stated in the text. Com. v. Martin, 5 Munf. (Va.) 122.

**Where Land Is Taken in Payment of a Debt Due to an Alien,** and is conveyed to a trustee on a valid trust to sell and convert it into personal estate, without any unreasonable delay for the benefit of the *cestui que trust*, a court of equity on the principles of equitable conversion will consider the land as personal estate belonging to the alien, and transmissible to his personal representatives as such; and if necessary will compel the trustee, who holds the legal estate, to sell the land and convert it into money. Anstice v. Brown, 6 Paige (N. Y.) 448.

2 See *infra*, this subdivision of this section, (2) **Rule as to Personal Property.**

3. Marx v. McGlynn, 88 N. Y. 358.

4. See the title ALIENS, vol. 2, p. 76 *et seq.*

5. **Aliens as Cestuis Que Trusteys by Statute.** — Crutcher v. Hord, 4 Bush (Ky.) 360; Roach v. Hudson, 8 Bush (Ky.) 410.

6. **Alien Enemies.** — Buford v. Speed, 11 Bush (Ky.) 338.

7. Craig v. Leslie, 3 Wheat. (U. S.) 563; Hamersley v. Lambert, 2 Johns. Ch. (N. Y.) 508. See also the cases cited *supra*, this division of this section, (1) **Rule as to Real Estate** — (a) **At Common Law**, paragraph **Trust to Sell Land and Hold Proceeds for Alien.**

8. See the titles DEEDS, vol. 9, p. 161; GIFTS, vol. 14, p. 1027; LEGACIES AND DEVISES, vol. 18, p. 743.

9. **Necessity of Acceptance by Cestui Que Trust** — Commercial Nat. Bank v. Kirkwood, 172 Ill. 563, reversing 68 Ill. App. 116; Kendrick v. Ray, 173 Mass. 305; Breedlove v. Stump, 3 Yerg. (Tenn.) 257.

The rights of a person are not affected by the fact that he was named as *cestui que trust* where he never accepted the provisions of the trial deed. Lytle v. Pope, 11 B. Mon. (Ky.) 297.

**Partial Acceptance.** — A *cestui que trust* must accept the entire trust or renounce it entirely. He cannot accept it so far as it is beneficial and renounce it so far as it may be onerous on him. Judice v. Provost, 18 La. Ann. 601; Swanson v. Tarkington, 7 Heisk. (Tenn.) 612; Williams v. Gideon, 7 Heisk. (Tenn.) 617.



even though he was ignorant of the gift.<sup>1</sup>

**Knowledge of Cestui Que Trust.** — It is not essential that the *cestui que trust* should have known of the trust at the time of its creation. He may assent to and accept the benefits of it as soon as he ascertains its existence.<sup>2</sup>

**b. WHAT CONSTITUTES ACCEPTANCE OR REFUSAL.** — Any act or conduct in general which evinces an acquiescence on the part of a *cestui que trust* in the provision made for his benefit will constitute an acceptance of the trust. Thus, the institution of suit by the beneficiary to enforce the provision made for him is a sufficient acceptance of the trust.<sup>3</sup> To constitute a refusal of the benefit of a trust, however, there must be a clear, unequivocal, and decisive act of the *cestui que trust*, evincing a determination not to have the benefit designed for him.<sup>4</sup>

**c. PRESUMPTION AS TO ACCEPTANCE.** — There is a general presumption in all cases that a person will accept that which is beneficial to himself,<sup>5</sup> and accordingly a *cestui que trust* is presumed to accept the trust in his favor until the contrary appears.<sup>6</sup> This presumption, however, is founded on the benefit conferred on the *cestui que trust*, and it ceases when onerous conditions are imposed as the price of the benefit.<sup>7</sup>

**4. Rights of Cestui Que Trust** — **a. IN GENERAL.** — The *cestui que trust*, as the term implies,<sup>8</sup> is the beneficial owner of the estate, and therefor he is entitled to receive the profits, and he is also entitled to the possession of the estate, if he is the only person interested, and the trustee is not required, in the performance of the duties imposed on him, to retain the possession.<sup>9</sup> In

**1. Acceptance by Infant Not Necessary.** — *Minor v. Rogers*, 40 Conn. 512, 16 Am. Rep. 69; *Kerrigan v. Rautigan*, 43 Conn. 17; *Guard v. Bradley*, 7 Ind. 600; *Nolte v. Libbert*, 34 Ind. 163; *Pruitt v. Pruitt*, 91 Ind. 595; *Copeland v. Summers*, 138 Ind. 219; *Williams v. Walton*, 8 Yerg. (Tenn.) 387, 29 Am. Dec. 122; *Raphael v. McFarlane*, 18 Can. Sup. Ct. 183.

**2. Knowledge of Cestui Que Trust.** — *Marquette v. Wilkinson*, 119 Mich. 414; *Taylor v. Watkins*, (Miss. 1893) 13 So. Rep. 811; *Pleasants v. Glasscock, Smed. & M. Ch.* (Miss.) 17; *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Rogers Locomotive, etc., Works v. Kelly*, 88 N. Y. 234; *Norton v. Mallory*, 1 Hun (N. Y.) 499; *Moses v. Murgatroyd*, 1 Johns. Ch. (N. Y.) 119; *Shepherd v. McEvers*, 4 Johns. Ch. (N. Y.) 136; *Berly v. Taylor*, 5 Hill (N. Y.) 577; *Moloney v. Tilton*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 682; *Babcock Printing Press Mfg. Co. v. Ranous*, 31 N. Y. App. Div. 629, affirmed 164 N. Y. 440; *Breedlove v. Stump*, 3 Yerg. (Tenn.) 257; *Cochran v. Paris*, 11 Gratt. (Va.) 348.

**Money Deposited in Trust.** — A familiar instance of the application of this rule is afforded by the deposit of money in trust for a person named. The money so deposited becomes, at the death of the depositor, the property of the person named as beneficiary. *Minor v. Rogers*, 40 Conn. 512, 16 Am. Rep. 69; *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Young v. Young*, 80 N. Y. 422, 36 Am. Rep. 634; *Boone v. Citizens Sav. Bank*, 84 N. Y. 86, 33 Am. Rep. 498; *Mabie v. Bailey*, 95 N. Y. 206; *Macy v. Williams*, 125 N. Y. 767; *In re Walker*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 666, 63 Hun (N. Y.) 627.

**Acceptance by One of Several Beneficiaries.** — Where a trust is accepted by one of several

beneficiaries, the trust is valid as to that one, though it may not have been accepted by or known to the others. *Willis v. Thompson*, 85 Tex. 301.

**3. Acceptance of Trust.** — *Copeland v. Summers*, 138 Ind. 219.

**4. Refusal of Trust.** — *Beall v. Lowndes*, 4 S. Car. 258; *Breedlove v. Stump*, 3 Yerg. (Tenn.) 257.

As to the facts showing a refusal, see *White v. White*, 107 Ala. 417.

**As to Revoking Refusal**, see *Gwynn v. Gwynn*, 11 App. Cas. (D. C.) 564.

**5. Presumption as to Acceptance of Benefits.** — See the title PRESUMPTIONS, vol. 22, p. 1280.

**6. Acceptance of Trusts Presumed.** — *Brooks v. Marbury*, 11 Wheat. (U. S.) 78; *Wiswall v. Ross*, 4 Port. (Ala.) 321; *Guard v. Bradley*, 7 Ind. 600; *Emporia First Nat. Bank v. Ride-nour*, 46 Kan. 718, 26 Am. St. Rep. 167; *Scott v. Harbeck*, 49 Hun (N. Y.) 292; *Cloud v. Calhoun*, 10 Rich. Eq. (S. Car.) 358; *Field v. Arrowsmith*, 3 Humph. (Tenn.) 442, 39 Am. Dec. 185; *Saunders v. Harris*, 1 Head (Tenn.) 185; *Furman v. Fisher*, 4 Coldw. (Tenn.) 626, 94 Am. Dec. 210. See also the titles ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, p. 63; CHATTEL MORTGAGES, vol. 5, p. 970.

**7. Effect of Onerous Conditions.** — *Kemp v. Porter*, 7 Ala. 138; *Elmes v. Sutherland*, 7 Ala. 262.

**8.** See *supra*, this section, 1. *Definition*.

**9. Rights of Cestui Que Trust in General.** — *Perin v. McMicken*, 15 La. Ann. 158.

As to the right to the possession of the estate, see also *infra*, this division of this section, *Right to Possession of Property*.

**As to What Constitutes Income** as distinguished from principal, see *INCOME*, vol. 16, p. 147. See also the following cases: *Gibbons v. Mahon*, 136 U. S. 549, affirming 4 Mackey

case there are several *cestuis que trustent*, each is, of course, entitled to the full extent of the interest given him; and therefore, if a *cestui que trust* improves the trust property, he may be allowed compensation therefor.<sup>1</sup> And where an undivided interest in land is held in trust, improvements on the land made by the owner of the other undivided interest, who also holds the legal title to the whole, will not lessen the proportional interest of the *cestui que trust*. Such improvements follow the land and belong to the owner.<sup>2</sup>

**Right to Purchase Remainder.** — Where a life estate is given in trust with remainder over absolutely, the *cestui que trust* of the life estate may purchase the remainder like any other person. There is nothing in the relation to preclude such a purchase.<sup>3</sup>

**Rights Specially Conferred by Trust Instrument.** — In addition to the inherent right of beneficial enjoyment, the instrument creating the trust sometimes confers rights and powers on the *cestui que trust* which he would not otherwise possess. Thus, he may be authorized, if the trustee named in the trust deed fails or refuses to act, to appoint another trustee in his stead.<sup>4</sup> So, too, power may be conferred on the *cestui que trust* to revoke the uses appointed on the creation of the trust and to appoint new uses in place thereof.<sup>5</sup>

**Conflict of Laws.** — The rights of a *cestui que trust* are governed by the laws of the state in which the trust was created and not by the law of the forum.<sup>6</sup>

**b. RIGHTS INTER SE.** — The general rules as to the rights of joint owners of property *inter se*<sup>7</sup> are ordinarily applicable to joint *cestuis que trustent*; and accordingly, if one advances money in order to protect the trust estate, he is entitled to contribution from the others in proportion to their interests, or to be reimbursed from the trust funds.<sup>8</sup>

**Dealings for Individual Benefit.** — Generally speaking, a *cestui que trust* is not permitted, by his dealings with or in respect to the trust estate, to obtain any individual benefit to the exclusion of his associates in interest.<sup>9</sup> On the same principle, if one *cestui que trust* has converted to his own use a part of the trust estate, the amount thereof may be retained from his share of the income for the reimbursement of the others.<sup>10</sup> And if he induces his associates to

(D. C.) 130; *Hook v. Dyer*, 47 Mo. 214; *Lang v. Lang*, 57 N. J. Eq. 325; *In re Vine St. Cong. Church*, 9 Ohio Dec. 253, 6 Ohio N. P. 223; *Greene v. Smith*, 17 R. I. 28.

**Quantity of Interest.** — A device of the probate court distributing property of a testator to "trustees for N." is not an adjudication that N. is the sole beneficiary, where the distribution is in trover made under the will, which gave N. a life estate only. *Leake v. Watson*, 58 Conn. 332, 18 Am. St. Rep. 270.

**1. Compensation for Improvements.** — *Dorance's Estate*, 9 Kulp (Pa.) 151.

**2. Blum v. Rogers**, 71 Tex. 668.

**3. Purchase of Remainder.** *Albany Exch. Sav. Bank v. Brass*, 59 N. Y. App. Div. 370, affirmed 171 N. Y. 693.

**4. Power to Appoint Trustee.** — *Foster v. Goree*, 4 Ala. 440, holding that the power was not exhausted by one appointment, but that successive appointments might be made. See also *supra*, this title, *The Trustee — Appointment*.

**5. Appointment of New Uses.** — *Asay v. Hoover*, 5 Pa. St. 21, 45 Am. Dec. 713; *Coryell v. Duntun*, 7 Pa. St. 530, 49 Am. Dec. 489. And see generally the title **POWERS**, vol. 22, p. 1088.

**Power of Revocation Does Not Exist Unless Specially Given.** — *Aubuchon v. Bender*, 44 Mo. 560.

**6. Conflict of Laws.** — *Paterson First Nat. Bank v. National Broadway Bank*, 156 N. Y. 459.

**7.** See the title **JOINT TENANTS AND TENANTS IN COMMON**, vol. 17, p. 668 *et seq.*

**8. Contribution Between Cestuis Que Trustent.** — *Frierson v. Branch*, 30 Ark. 453; *Rogers v. Vaughan*, 31 Ark. 62; *Dunham v. W. Steele Packing, etc., Co.*, 100 Mich. 75. See also the title **CONTRIBUTION AND EXONERATION**, vol. 7, p. 353 *et seq.*

**Taxes Paid by a Cestui Que Trust** are a lien on the land and may be paid out of the trust fund. *Gary v. May*, 16 Ohio 66.

**In Case of a Devastavit** anything that the vigilance of one of two *cestuis que trustent* has rescued from the wreck must inure to the benefit of both. *Duplaine's Estate*, 6 Pa. Dist. 164, 19 Pa. Co. Ct. 344, affirmed 185 Pa. St. 332, 64 Am. St. Rep. 651.

**9. Dealings for Individual Benefit in General.** — *Duplaine's Estate*, 19 Pa. Co. Ct. 344, 6 Pa. Dist. 164, affirmed 185 Pa. St. 332, 64 Am. St. Rep. 651.

Where the beneficiaries are equal in priority neither can obtain priority over the other by attachment. *Babcock Printing Press Mfg. Co. v. Ranous*, 31 N. Y. App. Div. 629, affirmed 164 N. Y. 440.

**10. Conversion by Cestui Que Trust.** — *Crocker v. Dillon*, 133 Mass. 91.

sell their interests to him, when he has a secret agreement with a third person for a resale at a higher price, he will be required to account for the profits so made.<sup>1</sup>

**Purchase at Tax Sale.** — So, too, one of several *cestuis que trustent* is not permitted to defeat the rights and interests of the others by purchasing the trust property at a tax sale or by acquiring an outstanding tax title.<sup>2</sup>

**Apportionment of Losses.** — Where a trust fund is held for the benefit of one person for life, remainder to another, and a part of the fund is lost by reason of the insufficiency of an investment, the loss will be apportioned between the life tenant and the remainderman.<sup>3</sup>

**Severance of Trusts.** — Where a fund is held in trust for several persons jointly, they may have a severance of the trusts, if it is practicable and conducive to economy in administering the estate.<sup>4</sup>

**c. DEALINGS WITH TRUSTEE.** — The rights of the *cestui que trust* in respect to dealings with the trustee are correlative to the duties of the trustee, and have been fully considered in another connection.<sup>5</sup>

**d. RIGHT TO POSSESSION OF PROPERTY — In General.** — Since the *cestui que trust* is the beneficial owner of the trust property, he is generally entitled to the possession thereof for the purpose of the enjoyment of his beneficial ownership, unless the duties imposed on the trustee require him to retain the possession, or there is otherwise manifested in the trust instrument an intent that the *cestui que trust* should not have the possession.<sup>6</sup>

**Real Estate.** — Thus, the general rule is that when real estate is conveyed or devised to a trustee to pay the rents and profits to the *cestui que trust*, the *cestui que trust* is entitled to the possession,<sup>7</sup> even though there are charges on the property.<sup>8</sup>

**Personal Property.** — Where the trust property consists of chattels which are capable of identification, the *cestui que trust* may be allowed to have pos-

A beneficiary who induces or profits by a breach resulting in a diminution of the estate should be made to contribute out of his or her interest in the estate to make good the principal in favor of other beneficiaries. *Newton v. Rebenack*, 90 Mo. App. 650.

**1. Dealing with Property for Individual Profit.** — *Newell v. Cochran*, 41 Minn. 374.

**2. Purchase of Tax Title.** — *Friskern v. Branch*, 30 Ark. 453.

**3. Apportionment of Losses.** — *Turner v. Newport*, 2 Phil. 17; *Cox v. Cox*, L. R. 8 Eq. 343; *In re Tinkler*, L. R. 20 Eq. 456; *Moore v. Johnson*, 52 L. T. N. S. 510, 54 L. J. Ch. 432; *In re Plumb*, 27 Ont. 601; *Hagan v. Platt*, 48 N. J. Eq. 206; *Matter of Tuttle*, 49 N. J. Eq. 259.

**4. Severance of Trusts.** — *Palmer v. Dunham*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 262. In this case the trustees named in the will died, and the court, at the request of the beneficiaries, appointed separate trustees for the several beneficiaries and set apart the respective shares of the fund.

**5. See supra**, this title, *The Trustee*.

**6. Right to Possession in General.** — *Cook v. Kennerly*, 12 Ala. 42; *Perin v. McMicken*, 15 La. Ann. 154.

**Trustee Required by His Duties to Retain Possession.** — *Wickham v. Berry*, 55 Pa. St. 70. See also *Hallinan v. Hearst*, 133 Cal. 645; *Seamans v. Gibbs*, 132 Mass. 239.

**Discretion of Trustee to Let Cestui Que Trust into Possession** — *Cox v. Williams*, 5 Jones Eq. (58 N. Car.) 150.

**Adverse Possession.** — The possession of the *cestui que trust* is not adverse to the trustee where the trust arises out of an agreement of the parties. *Taylor v. Dawson*, 3 Jones Eq. (56 N. Car.) 86; *Taylor v. Gooch*, 4 Jones L. (49 N. Car.) 436.

**7. Right to Possession of Real Estate — England.** — *Tidd v. Lister*, 5 Madd. 429; *Denton v. Denton*, 7 Beav. 388; *Pugh v. Vaughan*, 12 Beav. 517; *Younghusband v. Gisborne*, 1 Coll. Ch. Cas. 400; *Baylies v. Baylies*, 1 Coll. Ch. Cas. 537.

**Canada.** — *McDougall v. Bell*, 10 Grant Ch. (U. C.) 283; *Whiteside v. Miller*, 14 Grant Ch. (U. C.) 393.

**Iowa.** — *Stewart v. Chadwick*, 8 Iowa 463.

**Kentucky.** — *Young v. Miles*, 10 B. Mon. (Ky.) 287.

**Pennsylvania.** — *Caldwell v. Lowden*, 3 Brews. (Pa.) 63.

But the court will not give possession to the *cestui que trust* when it sees that doing so would do violence to the intention. *Whiteside v. Miller*, 14 Grant Ch. (U. C.) 393.

**Possession with Consent of Trustee.** — A *cestui que trust* who is in possession with the consent or acquiescence of the trustee is a mere tenant at will of the trustee. *Melling v. Leak*, 16 C. B. 652, 81 E. C. L. 652.

**8. Real Estate Subject to Charges.** — *Whiteside v. Miller*, 14 Grant Ch. (U. C.) 393, holding that in such case the court, as a condition to giving possession, will impose proper terms to secure the charges.



session;<sup>1</sup> but in the case of other species of personalty which may be dissipated, such as money, stocks, and bonds, the *cestui que trust* is entitled only to the income or profits and not to the possession.<sup>2</sup>

**Executed Trusts.** — If the trust is executed, that is, if the trustee is charged with no duty except to hold the legal title, the possession will follow the use, and the *cestui que trust* will be allowed to have the possession of the property, on giving security to have it forthcoming at the termination of his estate.<sup>3</sup>

**c. ALIENATING OR ENCUMBERING PROPERTY.** — The right of the *cestui que trust* to deal with his equitable interest and alienate or encumber it at his will is generally recognized<sup>4</sup> where such interest is a vested one,<sup>5</sup> unless the terms of the instrument creating the trust expressly or impliedly restrict or abrogate entirely this right,<sup>6</sup> or there are statutes which do so.<sup>7</sup>

**The Cestui's Equitable Interest May Be Mortgaged,**<sup>8</sup> unless the terms of the deed of trust, either expressly or impliedly, provide otherwise.<sup>9</sup>

**The Cestui's Equitable Interest May Be Assigned,**<sup>10</sup> even though it may be defeated by a contingency. But in such a case the assignee takes subject to the contingency.<sup>11</sup>

**Alienating Income by Anticipation.** — Where property is left in trust to pay over the income from the property to the *cestui* at stated times the *cestui* may alienate the income before it becomes due,<sup>12</sup> in the absence of statutes to the

**1. Right to Possession of Personal Property.** — Cook v. Kennerly, 12 Ala. 42; Mountjoy v. Lashbrook, 8 Dana (Ky.) 33.

**2. Possession of Money, Stocks, Etc.** — Mountjoy v. Lashbrook, 8 Dana (Ky.) 33; Young v. Miles, 10 B. Mon. (Ky.) 287.

**Power of Disposal Given to Cestui Que Trust.** — A power given to the *cestui que trust* to dispose of the trust fund by will, or by deed to take effect at his death, does not entitle him to the possession of the fund. Barkley v. Dosser, 15 Lea (Tenn.) 529.

**3. Executed Trusts.** — Bowman v. Long, 26 Ga. 142; Walker v. Watson, 32 Ga. 264.

**A Trustee Charged with No Duties** is merely trustee of the legal title, and ejectment will lie against him at the suit of the *cestui que trust* at any time without any specific act of misfeasance on his part. Caldwell v. Lowden, 3 Brews. (Pa.) 63.

**4. Right of Cestui to Alienate or Encumber.** — Honnett v. Williams, 66 Ark. 148; Palmer v. Stevens, 15 Gray (Mass.) 343; Young v. Snow, 167 Mass. 287; Dibrell v. Carlisle, 51 Miss. 785; Cheyney v. Geary, 194 Pa. St. 427; Henson v. Wright, 88 Tenn. 501; Crosby v. Cotton, 5 Tex. Civ. App. 583; Barnes v. Dow, 59 Vt. 530.

**5. Equitable Interest Must Be Vested One.** — Crosby v. Cotton, 5 Tex. Civ. App. 583. And see Whipple v. Fairchild, 139 Mass. 262.

**6. For a Consideration of Restraints on the Right of Alienation by the *cestui que trust*,** see the titles RESTRAINTS ON ALIENATION, vol. 24, p. 863; SPENDTHRIFTS AND SPENDTHRIFT TRUSTS, vol. 26, p. 37.

**Consent of Trustee.** — The trust deed may provide that the right of the *cestui que trust* to alienate his interest shall be subject to the consent of the trustee. Colyar v. Wheeler, (Tenn. 1903) 75 S. W. Rep. 1089.

**7. Statutes Relating to Restraints on Alienation exist in many states.** See the title SPENDTHRIFTS AND SPENDTHRIFT TRUSTS, vol. 26,

p. 37.

In New York the statutes are directed against both voluntary and involuntary alienations. Cochran v. Schell, 140 N. Y. 516; Paterson First Nat. Bank v. National Broadway Bank, 156 N. Y. 459, 1 Rev. St. N. Y., p. 730, § 63; Craver v. Jermain, (Supm. Ct. Tr. T.) 17 Misc. (N. Y.) 244; McDougall v. Dixon, 19 N. Y. App. Div. 420; Bull v. Odell, 19 N. Y. App. Div. 605; Hooker v. Hooker, 41 N. Y. App. Div. 235; Colvin v. Martin, 68 N. Y. App. Div. 633; Raymond v. Harris, 34 N. Y. App. Div. 546.

But in Illinois only involuntary alienations are restrained. Binns v. La Forge, 191 Ill. 598.

In Michigan statutes vest the whole estate, both legal and equitable, in the trustee, and therefore the *cestui* possesses no power, and has no right, to charge the trust property with anything. Weaver v. Van Aikin, 71 Mich. 69.

**8. Cestui's Interest May Be Mortgaged.** — Honnett v. Williams, 66 Ark. 148; Tift v. Mayo, 61 Ga. 246; Dibrell v. Carlisle, 51 Miss. 785; Wood v. Kice, 103 Mo. 329; McNair v. Craig, 36 S. Car. 100.

**Where Rents and Profits of Land** are to go to the *cestui* for life he may mortgage his interest. Perrine v. Newell, 49 N. J. Eq. 57.

**9. Terms May Provide Otherwise.** — Tift v. Mayo, 61 Ga. 246; Dibrell v. Carlisle, 51 Miss. 785.

**A Cestui Entitled to Life Support** in trust estate was held not entitled to mortgage his interest, on the ground that the terms under which the trust estate was held impliedly showed that he was to have nothing that he could dispose of. Barnes v. Dow, 59 Vt. 530.

**10. Interest Assignable.** — Palmer v. Stevens, 15 Gray (Mass.) 343; Young v. Snow, 167 Mass. 287; Dibrell v. Carlisle, 51 Miss. 785.

**11. Equitable Interest Subject to Contingency Assignable.** — Whipple v. Fairchild, 139 Mass. 262.

**12. Alienating Income by Anticipation.** — Mar-

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contrary, or an intention shown by the creator of the trust that this should not be done.<sup>1</sup>

*f. INSPECTING DOCUMENTS AND PAPERS.* — The *cestui que trust* has the right as a general rule to an inspection of all books, papers, deeds, contracts, and the like which bear upon the administration of the trust property, and are relevant to it; and their production can be compelled from the trustee,<sup>2</sup> or from any other person in whose hands they are.<sup>3</sup>

*Cases Submitted for Opinion of Counsel.* — Where the relation of trustee and *cestui que trust* is established<sup>4</sup> the *cestui* is entitled to an inspection of all cases submitted by the trustee to counsel for his opinion and the opinions received, provided such opinions were obtained for the guidance of the trustee in the administration of his trust and not for the purpose of his own defense in any litigation against himself.<sup>5</sup>

*Account Books.* — In a proceeding for an accounting the *cestui que trust* is entitled to an inspection of all books containing accounts of the trust property, whether such books contain the trust accounts exclusively,<sup>6</sup> or whether they also contain other accounts, as, for example, trustee's private accounts,<sup>7</sup> or accounts of a partnership in which he is a partner.<sup>8</sup> There is this exception, however, that a *cestui que trust* is not entitled to examine books kept by one not a party to the cause who is employed by the trustee to manage the trust estate, where such books contain not only the trust accounts but also accounts relating to the estates of other persons.<sup>9</sup>

*g. FOLLOWING TRUST PROPERTY* — (1) *When Right to Retake Exists* — (a) *Rule Stated.* — The *cestui que trust* of property held by a trustee may follow and retake it from the possession of such trustee, or others in privity with him, and not a *bona fide* purchaser for value and without notice, whether such property remains in the original form or in some other substituted form, so long as it can be ascertained to be the same property, or the product or proceeds thereof.<sup>10</sup>

*tin v. Davis*, 82 Ind. 38; *Caldwell v. Boyd*, 109 Ind. 447; *McCrea v. Yule*, 68 N. J. L. 465.

In *Martin v. Davis*, 82 Ind. 38, the court says: "We need not decide in this case whether the owner of personal property, in a testamentary disposition thereof, may or may not give in trust its income, free from the debts of the beneficiary, or restrain him from the alienation thereof. This will gave the beneficiary an unrestricted interest in the income of the fund during his life, which, where there is no statutory prohibition, as in this case, he may alienate as a whole or in part."

1. See the title SPENDTHRIFTS AND SPENDTHRIFT TRUSTS, vol. 26, p. 37.

2. *Entitled to All Books, etc., from Trustee.* — *Bugden v. Tylee*, 21 Beav. 545.

3. *In an Accounting Against a Third Person* holding trust property with notice of the fact that it is trust property, the *cestui que trust* may compel him to produce any deed or contract relating to the trust property. *Smith v. Barnes*, L. R. 1 Eq. 65.

4. *Relation of Cestui and Trustee Must Be Established.* — *Wynne v. Humberston*, 27 Beav. 421.

5. *Cases Submitted and Opinions.* — *Brown v. Oakshott*, 12 Beav. 252; *Devaynes v. Robinson*, 20 Beav. 42; *Wynne v. Humberston*, 27 Beav. 421.

6. *Books Containing Trust Accounts Exclusively.* — *Turner v. Corney*, 5 Beav. 515.

7. *Trustee's Private Accounts.* — *Freeman v.*

*Fairlie*, 3 Meriv. 43; *Airey v. Hall*, 12 Jur. 1043.

8. *Partnership Accounts.* — *Freeman v. Fairlie*, 3 Meriv. 43.

9. *Books Kept by Agent or Manager.* — *Airey v. Hall*, 12 Jur. 1043.

10. *Rule Stated.* — *Fire, etc., Com'rs v. Wilkinson*, 119 Mich. 655.

The rule is sometimes stated as follows: "As between *cestui que trust* and trustee, and all parties claiming under the trustee otherwise than by purchase for a valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or altered state, continues to be subject to or affected by the trust." *Pennell v. Deffell*, 4 De G. M. & G. 387; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.*, 104 U. S. 54; *Central City First Nat. Bank v. Hummel*, 14 Colo. 259, 20 Am. St. Rep. 257; *Mercantile Trust, etc., Co. v. Weld*, 85 Md. 685; *Cavin v. Gleason*, 105 N. Y. 256; *Matter of Hicks*, 170 N. Y. 108.

In *Slater v. Oriental Mills*, 18 R. I. 352, the court said: "The rule is clear that one has an equitable right to follow and reclaim his property, which has been wrongfully appropriated by another, so long as he can find the property, or its substantial equivalent if its form has been changed, upon the ground that such property, in whatever form, is impressed with a trust in favor of the owner."

**Theory of Right.** — The right to follow trust property into a new form has its basis in the right of property, and the court proceeds on the principle that the

**Similar Statement of Rule** — *England.* — *Balgney v. Hamilton*, cited in *Lane v. Dighton*, Ambl. 414; *Ryall v. Ryall*, 1 Atk. 59, cited in *Lane v. Dighton*, Ambl. 413; *Lane v. Dighton*, Ambl. 409; *Buckeridge v. Glasse, Cr. & Ph.* 126; *Sheridan v. Joyce*, 1 J. & L. T. 401; *Greatley v. Noble*, 3 Madd. 79; *Taylor v. Plumer*, 3 M. & S. 562; *Pennell v. Deffell*, 4 De G. M. & G. 372; *Chedworth v. Edwards*, 8 Ves. Jr. 46; *Lench v. Lench*, 10 Ves. Jr. 519; *Murray v. Pinkett*, 12 Cl. & F. 784; *In re Hallett*, 13 Ch. D. 753; *Trench v. Harrison*, 17 Sim. 111; *Harford v. Lloyd*, 20 Beav. 310.

*United States.* — *Bank of Commerce v. Russell*, 2 Dill. (U. S.) 215; *Oliver v. Piatt*, 3 How. (U. S.) 333; *Yerger v. Jones*, 16 How. (U. S.) 36; *Veil v. Mitchell*, 4 Wash. (U. S.) 105; *May v. Le Claire*, 11 Wall. (U. S.) 217; *Duncan v. Jaudon*, 15 Wall. (U. S.) 165; *Cook v. Tullis*, 18 Wall. (U. S.) 341; *Bayne v. U. S.*, 93 U. S. 642; *U. S. v. State Bank*, 96 U. S. 30; *Litchfield v. Ballou*, 114 U. S. 190; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.*, 104 U. S. 54; *U. S. v. Myers*, 2 Brock. (U. S.) 516, 27 Fed. Cas. No. 15,844; *South Park Com'rs v. Kerr*, 13 Fed. Rep. 502; *Dow v. Berry*, 18 Fed. Rep. 121; *Frelinghuysen v. Nugent*, 36 Fed. Rep. 239; *Commercial Nat. Bank v. Armstrong*, 39 Fed. Rep. 684; *McClellan v. Pyeatt*, (C. C. A.) 66 Fed. Rep. 843; *Metropolitan Nat. Bank v. Campbell Commission Co.*, 77 Fed. Rep. 705.

*Alabama.* — *Eldridge v. Turner*, 11 Ala. 1049; *Pharis v. Leachman*, 20 Ala. 663; *Culver v. Guyer*, 129 Ala. 602; *Goldsmith v. Stetson*, 30 Ala. 164; *Jones v. Shaddock*, 41 Ala. 262; *Lehman v. Lewis*, 62 Ala. 129; *Parker v. Jones*, 67 Ala. 234.

*Arkansas.* — *Wheat v. Moss*, 16 Ark. 255; *Hill v. Coolidge*, 32 Ark. 626; *Dyer v. Jacoway*, 42 Ark. 186.

*California.* — *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141; *Carey v. Brown*, 62 Cal. 373; *Roach v. Caraffa*, 85 Cal. 436; *Byrne v. Byrne*, 113 Cal. 294; *Byrne v. McGrath*, 130 Cal. 316, 80 Am. St. Rep. 127; *Citizens' Bank v. Rucker*, 138 Cal. 606.

*Colorado.* — *Holden v. Piper*, 5 Colo. App. 71; *Marshall v. Marshall*, 11 Colo. App. 505; *Central City First Nat. Bank v. Hummel*, 14 Colo. 259, 20 Am. St. Rep. 257; *McClure v. La Plata County*, 19 Colo. 122; *Hopkins v. Burr*, 24 Colo. 502, 65 Am. St. Rep. 238; *Meldrum v. Henderson*, 7 Colo. App. 256.

*Connecticut.* — *Leake v. Watson*, 58 Conn. 332, 18 Am. St. Rep. 270.

*Delaware.* — *Barwick v. White*, 2 Del. Ch. 284.

*District of Columbia.* — *Brainard v. Buck*, 16 App. Cas. (D. C.) 595.

*Florida.* — *Gale v. Harby*, 20 Fla. 171.

*Georgia.* — *Martin v. Greer*, Ga. Dec. (pt. i.) 109; *Hargroves v. Batty*, 19 Ga. 130; *Spicer v. Spicer*, 21 Ga. 200; *Bazemore v. Davis*, 55 Ga. 504; *Planters' Bank v. Prater*, 64 Ga. 609; *Lewis v. Equitable Mortg. Co.*, 94 Ga. 572.

*Idaho.* — *Pocatello First Nat. Bank v. Bunting*, 7 Idaho 27.

*Illinois.* — *Gilman v. Hamilton*, 16 Ill. 225; *Elgin Lumber Co. v. Langman*, 23 Ill. App. 250; *Rusk v. Newell*, 25 Ill. 226; *School Trustees v. Kirwin*, 25 Ill. 73; *Richelieu Hotel Co. v. Miller*, 50 Ill. App. 390; *Henry County v. Winnebago Swamp Drainage Co.*, 52 Ill. 454; *Flint v. Lewis*, 61 Ill. 299; *Seiter v. Mowe*, 81 Ill. App. 346; *Atty.-Gen. v. Illinois Agricultural College*, 85 Ill. 516; *Reid v. Sheffy*, 99 Ill. App. 189; *Lang v. Metzger*, 101 Ill. App. 380; *Breit v. Yeaton*, 101 Ill. 242.

*Indiana.* — *Alexander v. Spaulding*, 160 Ind. 176; *Bundy v. Monticello*, 84 Ind. 119; *McComas v. Long*, 85 Ind. 549.

*Iowa.* — *McCrory v. Foster*, 1 Iowa 271; *Mac Gregor v. Mac Gregor*, 9 Iowa 65.

*Kansas.* — *Gray v. Ulrich*, 8 Kan. 112.

*Kentucky.* — *Williams v. McClanahan*, 3 Met. (Ky.) 420; *Allen v. Russell*, 78 Ky. 112; *Stephens v. Stephens*, 89 Ky. 185.

*Louisiana.* — *Beatty v. McCleod*, 1 La. Ann. 76.

*Maine.* — *Bugbee v. Sargent*, 23 Me. 269; *Thompson v. White*, 45 Me. 445; *McLarren v. Brewer*, 51 Me. 402; *Goodell v. Buck*, 67 Me. 514; *Portland, etc., Steamboat Co. v. Locke*, 73 Me. 370; *Cobb v. Knight*, 74 Me. 253; *Fowler v. True*, 76 Me. 43; *Cushman v. Goodwin*, 95 Me. 353.

*Maryland.* — *Duckett v. National Bank*, 88 Md. 8; *Englar v. Offutt*, 70 Md. 78, 14 Am. St. Rep. 332.

*Massachusetts.* — *Le Breton v. Peirce*, 2 Allen (Mass.) 8; *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; *Mason v. Waite*, 17 Mass. 560; *Rice v. Lane*, 166 Mass. 233.

*Michigan.* — *Neely v. Rood*, 54 Mich. 134, 52 Am. Rep. 802; *Pierce v. Holzer*, 65 Mich. 263; *Marquette v. Wilkinson*, 119 Mich. 413; *Richardson v. Richardson*, 83 Mich. 653; *Fire, etc., Com'rs v. Wilkinson*, 119 Mich. 655.

*Minnesota.* — *St. Paul Third Nat. Bank v. Stillwater Gas Co.*, 36 Minn. 75; *Hale v. Dresen*, 73 Minn. 277; *Towhy Mercantile Co. v. Melbye*, 83 Minn. 304.

*Mississippi.* — *McLeod v. Jackson First Nat. Bank*, 42 Miss. 99; *Wood v. Stafford*, 50 Miss. 370; *Eustice v. Holmes*, 52 Miss. 305; *Morrison v. Kinstra*, 55 Miss. 71; *Shields v. Thomas*, 71 Miss. 260, 42 Am. St. Rep. 458.

*Missouri.* — *St. Louis Union Soc. v. Mitchell*, 26 Mo. App. 206; *Evangelical Synod of North America v. Schoeneich*, 143 Mo. 652; *Davis v. Mugan*, 56 Mo. App. 311; *Mills v. Post*, 76 Mo. 426; *Rieper v. Rieper*, 79 Mo. 352; *Pearson v. Haydel*, 90 Mo. App. 262; *Phillips v. Overfield*, 100 Mo. 466; *Johnston v. Johnston*, 173 Mo. 91, 96 Am. St. Rep. 486.

*Nebraska.* — *Cogswell v. Griffith*, 23 Neb. 334; *State v. Bank of Commerce*, 54 Neb. 725, 61 Neb. 181.

*Nevada.* — *Stonecifer v. Yellow Jacket Silver Min. Co.*, 3 Nev. 38.

*New Jersey.* — *Culver v. Pierson*, (N. J. 1888) 15 Atl. Rep. 269; *Reeves v. Evans*, (N. J. 1896) 34 Atl. Rep. 477; *Ellicott v. Kuhl*, 60 N. J. Eq. 333.



title has not been affected by the change.<sup>1</sup>

**By Whom Change in Form Made.** — It is immaterial on the question of the *cestui's* right to follow trust property into the hands of a third person though it is found there in an altered form, whether the alteration is made by the trustee and the altered form is transferred to the third person, or whether the original trust property passes into the hands of the third person and is there altered.<sup>2</sup>

**Substituted Form More Valuable.** — The fact that the substituted form in the hands of the trustee is more valuable than the original trust property does not affect the *cestui's* right to take it in place of the trust property. He is not restricted to a mere equitable lien on the substituted property, as the trustee is not entitled to make any profit for himself out of the trust property.<sup>3</sup>

**(b) Nature of Substituted Property.** — It is ordinarily immaterial on the question of the *cestui's* right to retake, what the nature of the property is which has been substituted for the trust property. It may be land,<sup>4</sup>

*New York.* — *Moses v. Murgatroyd*, 1 Johns. Ch. (N. Y.) 119; *Bailey v. Inglee*, 2 Paige (N. Y.) 278; *Cobb v. Dows*, 10 N. Y. 341; *Gray v. Tompkins County*, 26 Hun (N. Y.) 265; *Roosevelt v. Land, etc., Imp. Co.*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 595; *English v. McIntyre*, 29 N. Y. App. Div. 439; *Ferris v. Van Vechten*, 73 N. Y. 125; *Dows v. Kidder*, 84 N. Y. 131; *Dodge v. Stevens*, 94 N. Y. 209; *People v. City Bank*, 96 N. Y. 32; *Baker v. New York Nat. Exch. Bank*, 100 N. Y. 31, 53 Am. Rep. 150; *Holmes v. Gilman*, 138 N. Y. 376, 34 Am. St. Rep. 463; *Matter of Hicks*, 170 N. Y. 195; *Warren-Scharf Asphalt Paving Co. v. Dunn*, 8 N. Y. App. Div. 209; *Matter of Holmes*, 37 N. Y. App. Div. 15; *Welch v. Polley*, 86 N. Y. App. Div. 260.

*North Carolina.* — *Cheshire v. Cheshire*, 2 Ired. Eq. (37 N. Car.) 569; *Freeman v. Cook*, 6 Ired. Eq. (41 N. Car.) 379; *Whitley v. Foy*, 6 Jones Eq. (59 N. Car.) 34, 78 Am. Dec. 236; *Bennett v. Merritt*, 6 Jones Eq. (59 N. Car.) 263; *Hunter v. Yarborough*, 92 N. Car. 68; *Barnard v. Hawks*, 111 N. Car. 333; *Vaughan v. Jeffreys*, 119 N. Car. 135.

*North Dakota.* — *Seybold v. Grand Forks Nat. Bank*, 5 N. Dak. 460; *Northern Dakota Elevator Co. v. Clark*, 3 N. Dak. 26.

*Oregon.* — *Ferchen v. Arndt*, 26 Oregon 121, 46 Am. St. Rep. 603; *Dunham v. Siglin*, 39 Oregon 291.

*Pennsylvania.* — *Lodge v. Chalfante*, 1 Chest. Co. Rep. (Pa.) 133; *Pierce v. M'Keehan*, 3 W. & S. (Pa.) 280; *Jamison's Estate*, 3 Pa. Dist. 217; *Hopkins's Appeal*, (Pa. 1887) 9 Atl. Rep. 867; *Farrell's Estate*, 17 Pa. Super. Ct. 240; *Thompson's Appeal*, 22 Pa. St. 17; *Norris's Appeal*, 71 Pa. St. 106; *McLaughlin v. Fulton*, 104 Pa. St. 161.

*Rhode Island.* — *Slater v. Oriental Mills*, 18 R. I. 352.

*South Carolina.* — *Garrett v. Garrett*, 1 Strobb. Eq. (S. Car.) 96; *Brazel v. Fair*, 26 S. Car. 370; *McNeil v. Morrow*, Rich. Eq. Cas. (S. Car.) 172; *Bomar v. Mullins*, 4 Rich. Eq. (S. Car.) 80.

*South Dakota.* — *Farmers, etc., Bank v. Kimball Milling Co.*, 1 S. Dak. 388, 36 Am. St. Rep. 739.

*Tennessee.* — *Wasson v. Garrett*, 2 Baxt. (Tenn.) 477; *Treadwell v. McKeon*, 7 Baxt. (Tenn.) 445; *Howthorne v. Brown*, 3 Sneed (Tenn.) 462; *Turner v. Petigrew*, 6

*Humph. (Tenn.)* 438; *Moffitt v. McDonald*, 11 *Humph. (Tenn.)* 457; *Kaphan v. Toney*, (Tenn. Ch. 1899) 58 S. W. Rep. 909.

*Texas.* — *Kennedy v. Baker*, 59 Tex. 150; *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85.

*Vermont.* — *Jackson v. Walton*, 28 Vt. 43; *Mitchell v. Blanchard*, 72 Vt. 85.

*Virginia.* — *Overseers of Poor v. State Bank*, 2 Gratt. (Va.) 544, 44 Am. Dec. 399; *Barksdale v. Finney*, 14 Gratt. (Va.) 338.

*West Virginia.* — *Vance v. Kirk*, 29 W. Va. 344.

*Wisconsin.* — *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237; *Burnham v. Barth*, 89 Wis. 362; *Gianella v. Momsen*, 90 Wis. 476.

1. **Theory of Right.** — *Holmes v. Gilman*, 138 N. Y. 376, 34 Am. St. Rep. 463.

2. **Alteration May Take Place in Hands of Third Person.** — *Scheerer v. Agee*, 106 Ala. 139; *National Express Co. v. Hough*, 3 Ohio Dec. 169.

3. **Substituted Form More Valuable.** — *Wilkinson v. Wilkinson*, 1 Head (Tenn.) 305.

4. **Trust Money Invested in Lands — England.** — *Lane v. Dighton*, Ambl. 413; *Ryall v. Ryall*, 1 Atk. 59; *Lench v. Lench*, 10 Ves. Jr. 517.

*Arkansas.* — *Shelton v. Lewis*, 27 Ark. 190.

*California.* — *Ponce v. McElvy*, 47 Cal. 154.

*Delaware.* — *Roberts v. Broom*, 1 Harr. (Del.)

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*Indiana.* — *Pugh v. Pugh*, 9 Ind. 132.

*Kentucky.* — *Brothers v. Porter*, 6 B. Mon. (Ky.) 106.

*Maine.* — *Cobb v. Knight*, 74 Me. 253.

*Maryland.* — *Suter v. Ives*, 47 Md. 520.

*Missouri.* — *Huetteman v. Viesselmann*, 48 Mo. App. 582; *Farrell v. Farrell*, 91 Mo. App. 665.

*New Jersey.* — *Horner v. Clements*, (N. J. 1887) 11 Atl. Rep. 465; *Arnold v. Robins*, 40 N. J. Eq. 723; *Laws v. Williams*, 56 N. J. Eq. 553.

*North Carolina.* — *Younce v. McBride*, 68 N. Car. 532.

*Pennsylvania.* — *Potter v. Hoppin*, 32 Leg. Int. (Pa.) 66.

*South Carolina.* — *Covar v. Cantelou*, 25 S. Car. 35.

*Tennessee.* — *Wilkinson v. Wilkinson*, 1 Head (Tenn.) 305.

*Texas.* — *Kahle v. Stone*, 95 Tex. 106.

*Virginia.* — *Warwick v. Warwick*, 31 Gratt. (Va.) 70.

securities,<sup>1</sup> or money.<sup>2</sup>

**Trust Property Consisting of Personalty Which Has Been Annexed to the Freehold cannot, however, be followed.**<sup>3</sup>

(c) **Into Whose Hands Followed.** — Trust property or its substitute may be followed and retaken when in the hands of the trustee,<sup>4</sup> or his judgment creditors,<sup>5</sup> agent,<sup>6</sup> personal representatives,<sup>7</sup> assignee for general creditors,<sup>8</sup> or a receiver.<sup>9</sup>

*West Virginia.* — *Webb v. Bailey*, 41 W. Va. 463; *Crumrine v. Crumrine*, 50 W. Va. 226, 88 Am. St. Rep. 859.

**Land Substituted for Goods.** — *Renfrow v. Pearce*, 68 Ill. 125.

**1. Trust Securities Exchanged for Other Securities.** — *Woodrum v. Washington Nat. Bank*, 60 Kan. 44.

**Other Stock Exchanged for Stock Held in Trust.** — *Barnard v. Hawks*, 111 N. Car. 333.

**Trust Funds Invested in Bank Stock.** — *Smith v. Combs*, 49 N. J. Eq. 420.

**Trust Funds Invested in Railroad Stock.** — *Western Div. of Western North Carolina R. Co. v. Drew*, 3 Woods (U. S.) 691, 29 Fed. Cas. No. 17,434.

**Bonds Substituted for Other Bonds Held in Trust** — **Bonds Substituted for Land Held in Trust.** — *Scheerer v. Agee*, 106 Ala. 139.

**2. Money Received from Sale of Land Held in Trust.** — *Simons v. Bedell*, 122 Cal. 341, 68 Am. St. Rep. 35; *Peabody v. Tarbell*, 2 Cush. (Mass.) 226; *McArthur v. Robinson*, 104 Mich. 540; *Hammond v. Pennock*, 61 N. Y. 145; *Miller v. Pearce*, 6 W. & S. (Pa.) 97; *Martin's Estate*, 11 Pa. Co. Ct. 245; *Hubbard v. Burrell*, 41 Wis. 365.

**Other Money Substituted for Trust Money.** — *People v. City Bank*, 96 N. Y. 32; *Baker v. New York Nat. Exch. Bank*, 100 N. Y. 31, 53 Am. Rep. 150; *Houghton v. Davenport*, 74 Me. 590; *Butler v. Hicks*, 11 Smed. & M. (Miss.) 78.

**Money Received from Note Held in Trust.** — *Eldridge v. Turner*, 11 Ala. 1049; *Martin v. Branch Bank*, 31 Ala. 115.

**Chattels Held in Trust Converted into Money.** — *Hunter v. Yarborough*, 92 N. Car. 68.

**3. Personal Property Held in Trust and Annexed to Freehold.** — *Jackson v. Walton*, 28 Vt. 43.

**4. Following Substituted Property into Hands of Trustee** — *England.* — *Waite v. Whorwood*, 2 Atk. 159; *Mant v. Leith*, 15 Beav. 524; *Harford v. Lloyd*, 20 Beav. 310; *Francis v. Francis*, 5 De G. M. & G. 108; *Pinkett v. Wright*, 2 Hare 120; *Matter of Bankrupt Law Consolidation Act*, 2 Kay & J. 560; *Lench v. Lench*, 10 Ves. Jr. 511; *Ward v. Ward*, 2 Smale & G. 125; *Mathias v. Mathias*, 3 Smale & G. 552; *Murray v. Pinkett*, 12 Cl. & F. 764; *Frith v. Cartland*, 2 Hem. & M. 417; *Buckeridge v. Glaspe, Cr. & Ph.* 126, 10 L. J. Ch. 134; *Lamb v. Orton*, 2 New Reports 435; *Ex p. Barber*, 28 W. R. 522, 42 L. T. N. S. 411; *Perry v. Phelps*, 17 Ves. Jr. 173; *Blake v. Blake*, 7 Bro. P. C. (Toml. ed.) 241; *Thornton v. Stokill*, 1 Jur. N. S. 751; *Patten v. Boyd*, 60 L. T. N. S. 583; *Carson v. Sloane*, 13 L. R. Ir. 139.

*United States.* — *Spokane v. Spokane First Nat. Bank*, (C. C. A.) 68 Fed. Rep. 982; *In re Swift*, 108 Fed. Rep. 212.

*Alabama.* — *Goldsmith v. Stetson*, 30 Ala. 164.

*Georgia.* — *Fears v. Lynch*, 28 Ga. 249; *Martin v. Greer*, Ga. Dec. (pt. i.) 109.

*Illinois.* — *Richelieu Hotel Co. v. Miller*, 50 Ill. App. 390.

*Iowa.* — *Mac Gregor v. Mac Gregor*, 9 Iowa 65.

*Michigan.* — *Collar v. Collar*, 86 Mich. 507.

*Mississippi.* — *Butler v. Hicks*, 11 Smed. & M. (Miss.) 78.

*Missouri.* — *Davis v. Mugan*, 56 Mo. App. 311; *Bircher v. Walther*, 163 Mo. 461.

*New Jersey.* — *Bohle v. Hasselbroch*, 64 N. J. Eq. 334.

*New York.* — *Cavin v. Gleason*, 105 N. Y. 262.

*North Carolina.* — *Cheshire v. Cheshire*, 2 Ired. Eq. (37 N. Car.) 569.

*Tennessee.* — *Treadwell v. McKeon*, 7 Baxt. (Tenn.) 201; *Miller v. Birdsong*, 7 Baxt. (Tenn.) 534; *Moffitt v. McDonald*, 11 Humph. (Tenn.) 457.

*Texas.* — *Rose v. Taylor*, 17 Tex. Civ. App. 535.

**5. Judgment Creditors.** — *Flanders v. Thompson*, 3 Woods (U. S.) 9, 9 Fed. Cas. No. 4,853; *Gray v. Perry*, 51 Ga. 180; *Shryock v. Waggoner*, 28 Pa. St. 430.

**6. Agent.** — *Bennett v. Merritt*, 6 Jones Eq. (59 N. Car.) 263; *Overseers of Poor v. State Bank*, 2 Gratt. (Va.) 544, 44 Am. Dec. 399.

**7. Personal Representatives.** — *Elizalde v. Elizalde*, 137 Cal. 634; *Barwick v. White*, 2 Del. Ch. 284; *Goodell v. Buck*, 67 Me. 514; *Cushman v. Goodwin*, 95 Me. 353; *Mills v. Post*, 7 Mo. App. 519; *Moses v. Murgatroyd*, 1 Johns. Ch. (N. Y.) 119; *Matter of Greene*, 2 Connolly (N. Y.) 166; *Matter of Steinway*, (Surrogate Ct.) 37 Misc. (N. Y.) 704; *Pennsylvania Co. v. Claghorn*, 21 Pa. Co. Ct. 7; *Overseers of Poor v. State Bank*, 2 Gratt. (Va.) 544, 44 Am. Dec. 399.

**8. Assignee for General Creditors.** — *Meldrum v. Henderson*, 7 Colo. App. 256; *Independent Dist. v. King*, 80 Iowa 497; *Bradley v. Chesebrough*, 111 Iowa 126; *Roosevelt v. Land*, etc., Imp. Co. (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 595; *American Sugar Refining Co. v. Fancher*, 145 N. Y. 552; *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 60 Am. St. Rep. 854; *Overseers of Poor v. State Bank*, 2 Gratt. (Va.) 544, 44 Am. Dec. 399; *Burnham v. Barth*, 89 Wis. 362.

**9. Receiver.** — *New York Security, etc., Co. v. Equitable Mortg. Co.*, 65 Fed. Rep. 12; *Metropolitan Nat. Bank v. Campbell Commission Co.*, 77 Fed. Rep. 705; *Union Nat. Bank v. Goetz*, 138 Ill. 127, 32 Am. St. Rep. 119; *Carley v. Graves*, 85 Mich. 483, 24 Am. St. Rep. 99; *Liebmann v. Liebmann Bros. Co.*, 84

**Third Person with Notice.** — It may also be reclaimed when in the hands of a third person with notice of the trust,<sup>1</sup> though he be a purchaser for a valuable

Hun (N. Y.) 361; *Atkinson v. Rochester Printing Co.*, 114 N. Y. 175; *Muhlenberg v. Northwest L. & T. Co.*, 26 Oregon 132; *Burnham v. Barth*, 89 Wis. 362; *Henika v. Heine-mann*, 90 Wis. 478.

**1. Third Person Taking Notice of Trust** — *England*. — *Adair v. Shaw*, 1 Sch. & Lef. 262; *Mansell v. Mansell*, 2 P. Wms. 681; *Boursot v. Savage*, L. R. 2 Eq. 134; *Bridgman v. Gill*, 24 Beav. 302; *Baillie v. McKewan*, 35 Beav. 177; *Foxton v. Manchester*, etc., *Banking Co.*, 44 L. T. N. S. 406; *Saunders v. Dehew*, 2 Vern. 271; *Thompson v. Simpson*, 2 Dr. & War. 459; *Rook v. Staples*, Cary 76; *Gorges v. Pye*, 7 Bro. P. C. (Toml. ed.) 221, Prec. Ch. 308, 1 P. Wms. 128; *Whitecomb v. Jacob*, 1 Salk. 160; *Langton v. Astrey*, 2 Ch. R. 30; *Pye v. George*, 2 Salk. 680; *Willoughby v. Willoughby*, Ambler 284.

*United States*. — *Mechanics Bank v. Seton*, 1 Pet. (U. S.) 299; *Wormley v. Wormley*, 8 Wheat. (U. S.) 421; *Hallett v. Collins*, 10 How. (U. S.) 174; *Calais Steamboat Co. v. Scudder*, 2 Black (U. S.) 372; *Cowell v. Colorado Springs Co.*, 100 U. S. 55; *In re Jordan*, 2 Fed. Rep. 319; *Pennington v. Smith*, 69 Fed. Rep. 188; *Jonathan Mills Mfg. Co. v. Whitehurst*, (C. C. A.) 72 Fed. Rep. 496; *Flanders v. Thompson*, 3 Woods (U. S.) 9, 9 Fed. Cas. No. 4,853; *Jaudon v. National City Bank*, 8 Blatchf. (U. S.) 430, 13 Fed. Cas. No. 7,230; *U. S. v. Polhamus*, 13 Blatchf. (U. S.) 200, 27 Fed. Cas. No. 16,062; *In re Tesson*, 9 Nat. Bankr. Reg. 378, 23 Fed. Cas. No. 13,844.

*Alabama*. — *Swoope v. Trotter*, 4 Fort. (Ala.) 27; *Conner v. Tuck*, 11 Ala. 794; *Jones v. Shaddock*, 41 Ala. 262; *Parker v. Jones*, 67 Ala. 234; *Whaley v. Whaley*, 71 Ala. 159; *McCall v. Rogers*, 77 Ala. 349; *Standifer v. Swann*, 78 Ala. 88; *Ware v. Swann*, 79 Ala. 330; *Bates v. Kelly*, 80 Ala. 142; *Randolph v. East Birmingham Land Co.*, 104 Ala. 355, 53 Am. St. Rep. 64.

*Arkansas*. — *Pindall v. Trevor*, 30 Ark. 249; *Gaines v. Saunders*, 50 Ark. 322.

*California*. — *Connolly v. Peck*, 6 Cal. 348; *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141; *Pell v. McElroy*, 36 Cal. 268; *Hassey v. Wilke*, 55 Cal. 525; *Cavagnaro v. Don*, 63 Cal. 227; *Eversdon v. Mayhew*, 65 Cal. 163; *Watson v. Suto*, 86 Cal. 500; *Warnock v. Harlow*, 96 Cal. 298, 31 Am. St. Rep. 209; *Marshall v. Farmers' Bank*, 115 Cal. 330.

*Colorado*. — *Wells v. Francis*, 7 Colo. 396. *District of Columbia*. — *Beckett v. Tyler*, 3 MacArthur (D. C.) 319.

*Florida*. — *Carpenter v. McBride*, 3 Fla. 292, 52 Am. Dec. 379; *Gale v. Harby*, 20 Fla. 171.

*Georgia*. — *Bazemore v. Davis*, 55 Ga. 504; *Kent v. Plumb*, 57 Ga. 207; *Planters' Bank v. Prater*, 64 Ga. 609; *Willis v. Foster*, 65 Ga. 82; *Cox v. Barber*, 68 Ga. 836; *Williams v. Swift*, 79 Ga. 708; *Lathrop v. White*, 81 Ga. 29; *Sharpton v. Johnson*, 86 Ga. 443.

*Illinois*. — *Webster v. French*, 11 Ill. 254; *Morrison v. Kelly*, 22 Ill. 610, 74 Am. Dec. 169; *Rusk v. Newell*, 25 Ill. 226; *School Trustees v. Kirwin*, 25 Ill. 73; *O'Neal v. Boone*,

82 Ill. 589; *McVey v. McQuality*, 97 Ill. 93; *Union Mut. L. Ins. Co. v. Spaid*, 99 Ill. 249; *Chicago Fifth Nat. Bank v. Hyde Park*, 101 Ill. 595, 40 Am. Rep. 218; *Harris v. McIntyre*, 118 Ill. 275; *Hazeltine v. Fournery*, 120 Ill. 493; *Dean v. Long*, 122 Ill. 447; *Webber v. Clark*, 136 Ill. 256; *Hagan v. Varney*, 147 Ill. 281.

*Indiana*. — *Talbott v. Barber*, 11 Ind. App. 1, 54 Am. St. Rep. 491; *Austin v. Willson*, 21 Ind. 252; *Brannon v. May*, 42 Ind. 92; *Shuey v. Latta*, 90 Ind. 136; *Orb v. Coapstick*, 136 Ind. 313.

*Iowa*. — *Stewart v. Chadwick*, 8 Iowa 463; *Ryan v. Doyle*, 31 Iowa 53; *Zuver v. Lyons*, 40 Iowa 510; *Sleeper v. Iselin*, 62 Iowa 583; *Bunton v. King*, 80 Iowa 506; *Bowman v. Anderson*, 82 Iowa 210, 31 Am. St. Rep. 473.

*Kansas*. — *Gray v. Ulrich*, 8 Kan. 112; *Beaubien v. Hindman*, 38 Kan. 471; *Martin v. Fix*, 44 Kan. 540.

*Kentucky*. — *Tobin v. Helm*, 4 J. J. Marsh. (Ky.) 288; *M'Nitt v. Logan*, Litt. Sel. Cas. (Ky.) 60.

*Louisiana*. — *Stetson v. Gurney*, 17 La. 163.

*Maine*. — *Cobb v. Knight*, 74 Me. 253; *Bradley v. Merrill*, 88 Me. 319.

*Maryland*. — *Hagthorpe v. Hook*, 1 Gill & J. (Md.) 270; *Rogers v. Scarff*, 3 Gill (Md.) 127; *Swift v. Williams*, 68 Md. 236; *Hoffman v. Gosnell*, 75 Md. 577.

*Massachusetts*. — *Trull v. Trull*, 13 Allen. (Mass.) 407; *Bancroft v. Consen*, 13 Allen (Mass.) 50; *Sturtevant v. Jaques*, 14 Allen (Mass.) 523; *Mason v. Waite*, 17 Mass. 560; *Shaw v. Spencer*, 100 Mass. 389; *Chace v. Chapin*, 130 Mass. 128; *Smith v. Burgess*, 133 Mass. 511; *Loring v. Brodie*, 134 Mass. 453.

*Michigan*. — *Austin v. Dean*, 40 Mich. 386; *Storrs v. Wallace*, 61 Mich. 437; *Ripley v. Seligman*, 88 Mich. 177; *McArthur v. Robinson*, 104 Mich. 540.

*Minnesota*. — *Martin v. Baldwin*, 30 Minn. 537; *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56, 40 Am. St. Rep. 299.

*Mississippi*. — *Joor v. Williams*, 38 Miss. 546; *Wood v. Stafford*, 50 Miss. 370; *Isom v. Jackson First Nat. Bank*, 52 Miss. 902; *Billingsley v. Pollock*, 69 Miss. 759, 30 Am. St. Rep. 585; *Newman v. Tillman*, 71 Miss. 29.

*Missouri*. — *Paul v. Fulton*, 25 Mo. 156; *Coffee v. Crouch*, 28 Mo. 106; *Smith v. Walser*, 49 Mo. 250; *Barr v. Cubbage*, 52 Mo. 404; *Turner v. Hoyle*, 95 Mo. 337; *Darling v. Potts*, 118 Mo. 506.

*Nebraska*. — *Jones v. Johnson Harvester Co.*, 8 Neb. 446; *Conlee v. McDowell*, 15 Neb. 184.

*New Hampshire*. — *Ferrin v. Errol*, 59 N. H. 234; *Scoby v. Blanchard*, 3 N. H. 170; *Pritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431; *Page v. Page*, 8 N. H. 187; *Lyford v. Thurston*, 16 N. H. 399; *Hill v. McIntire*, 39 N. H. 410, 75 Am. Dec. 229.

*New Jersey*. — *Wilson v. Ely*, 6 N. J. Eq. 181; *Newark Aqueduct Co. v. Joralemon*, 7 N. J. Eq. 304; *Dey v. Dey*, 26 N. J. Eq. 182; *Prall v. Tilt*, 28 N. J. Eq. 479; *Gaston v. American Exch. Nat. Bank*, 29 N. J. Eq. 98.



consideration.<sup>1</sup>

**Third Person Without Notice.** — And it may be reclaimed from a third person taking without notice of the trust when he takes without value;<sup>2</sup> but not when he takes with value.<sup>3</sup>

*New York.* — *Pendleton v. Fay*, 2 Paige (N. Y.) 202; *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566; *Shepherd v. M'Evors*, 4 Johns. Ch. (N. Y.) 136; *Gilchrist v. Stevenson*, 9 Barb. (N. Y.) 9; *Swan v. Produce Bank*, 24 Hun (N. Y.) 277; *White v. Price*, 39 Hun (N. Y.) 394; *Anderson v. Blood*, 86 Hun (N. Y.) 244; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271, 59 Am. Dec. 478; *Holden v. New York, etc., Bank*, 72 N. Y. 286; *Wetmore v. Porter*, 92 N. Y. 76; *Zimmerman v. Kinkle*, 108 N. Y. 282; *Murphy v. Whitney*, 140 N. Y. 541.

*North Carolina.* — *Pearson v. Daniel*, 2 Dev. & B. Eq. (22 N. Car.) 360; *Freeman v. Perry*, 2 Dev. Eq. (17 N. Car.) 243; *Bailey v. Wilson*, 1 Dev. & B. Eq. (21 N. Car.) 182; *Bunting v. Ricks*, 2 Dev. & B. Eq. (22 N. Car.) 130, 32 Am. Dec. 699; *Powell v. Jones*, 1 Ired. Eq. (36 N. Car.) 337; *Wilson v. Doster*, 7 Ired. Eq. (42 N. Car.) 231; *Ward v. Brandt*, Phil. Eq. (62 N. Car.) 71; *Johnson v. Prairie*, 91 N. Car. 159; *Dancy v. Duncan*, 96 N. Car. 111; *Ross v. Hendrix*, 110 N. Car. 403; *Commercial, etc., Nat. Bank v. Davis*, 115 N. Car. 226.

*Ohio.* — *Hunt v. Freeman*, 1 Ohio 490; *Stoddard v. Smith*, 11 Ohio St. 581; *Strong v. Strauss*, 40 Ohio St. 87; *Johnson v. Johnson*, 51 Ohio St. 446.

*Oregon.* — *Petrain v. Kiernan*, 23 Oregon 455.

*Pennsylvania.* — *Kaiser's Estate*, 2 Lanc. L. Rev. 362; *Walsh v. Stille*, 2 Chest. Co. Rep. (Pa.) 427; *Yocom v. Morris*, 3 Phila. (Pa.) 414, 16 Leg. Int. (Pa.) 173; *Barrett v. Bamber*, 9 Phila. (Pa.) 202, 31 Leg. Int. (Pa.) 164, 81 Pa. St. 247; *Scott v. Gallagher*, 14 S. & R. (Pa.) 333, 16 Am. Dec. 508; *Thompson's Appeal*, 22 Pa. St. 17; *Wilson v. McCullough*, 23 Pa. St. 440, 62 Am. Dec. 347; *Church v. Church*, 25 Pa. St. 278; *Eshleman v. Lewis*, 49 Pa. St. 410; *Hall v. Vanness*, 49 Pa. St. 457; *Coble v. Nonemaker*, 78 Pa. St. 501; *Blood v. Ludlow Carbon Black Co.*, 150 Pa. St. 1; *Young v. Weed*, 154 Pa. St. 316, 35 Am. St. Rep. 839.

*South Carolina.* — *Simons v. Bank*, 5 Rich. Eq. (S. Car.) 270; *Black v. Childs*, 14 S. Car. 312; *Minton v. Pickens*, 24 S. Car. 592; *Rabb v. Flenniken*, 29 S. Car. 278; *Mordecai v. Seignious*, 53 S. Car. 95; *Ellis v. Young*, 31 S. Car. 322; *Sullivan v. Latimer*, 35 S. Car. 422.

*Tennessee.* — *Pinson v. Ivey*, 1 Yerg. (Tenn.) 296; *Parker v. Gilliam*, 10 Yerg. (Tenn.) 394; *Lincoln v. Purcell*, 2 Head (Tenn.) 143, 73 Am. Dec. 196; *Treadwell v. McKeon*, 7 Baxt. (Tenn.) 445; *Breedlove v. Stump*, 3 Yerg. (Tenn.) 257; *Boyce v. Stanton*, 15 Lea (Tenn.) 346.

*Texas.* — *Halley v. Fontaine*, (Tex. Civ. App. 1895) 33 S. W. Rep. 260; *Kennedy v. Baker*, 59 Tex. 151; *Montgomery v. Noyes*, 73 Tex. 203.

*Vermont.* — *Towle v. Mack*, 2 Vt. 19.

*Virginia.* — *Edmunds v. Venable*, 1 Patt. &

H. (Va.) 121; *Jackson v. Updegraffe*, 1 Rob. (Va.) 114; *Rankin v. Bradford*, 1 Leigh (Va.) 163; *Mundy v. Vawter*, 3 Gratt. (Va.) 518; *Heth v. Richmond, etc., R. Co.*, 4 Gratt. (Va.) 482, 50 Am. Dec. 88; *Graff v. Castleman*, 5 Rand. (Va.) 195, 16 Am. Dec. 741; *Morgan v. Fisher*, 82 Va. 417.

*West Virginia.* — *Cain v. Cox*, 23 W. Va. 594.

**1. Third Person Taking for Value and with Notice** — *California.* — *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141; *Gilbert v. Sleeper*, 71 Cal. 293.

*Florida.* — *Gale v. Harby*, 20 Fla. 171.

*Illinois.* — *Nevitt v. Woodburn*, 82 Ill. App. 649.

*Kentucky.* — *Allen v. Russell*, 78 Ky. 105; *Curd v. Field*, 103 Ky. 293.

*Mississippi.* — *Isom v. Jackson First Nat. Bank*, 52 Miss. 902.

*North Carolina.* — *Lockhart v. Philips*, 1 Ired. Eq. (36 N. Car.) 342.

*Tennessee.* — *Treadwell v. McKeon*, 7 Baxt. (Tenn.) 201.

*Texas.* — *Silliman v. Gano*, 90 Tex. 637.

*Vermont.* — *Blaisdell v. Stevens*, 16 Vt. 179.

*Virginia.* — *Morgan v. Fisher*, 82 Va. 417.

*Wyoming.* — *State v. Foster*, 5 Wyo. 199, 63 Am. St. Rep. 47.

**2. Third Person Taking Without Notice and Without Value.** — *Burgess v. Wheate*, 1 Eden 219; *Spurgeon v. Collier*, 1 Eden 55; *Sounders v. Dehew*, 2 Vern. 271; *Langton v. Astrey*, 2 Ch. R. 30; *Boursot v. Savage*, L. R. 2 Eq. 134; *Pennington v. Smith*, 69 Fed. Rep. 188; *Graves v. Pinchback*, 47 Ark. 470; *Gilbert v. Sleeper*, 71 Cal. 293; *Otis v. Otis*, 167 Mass. 245; *Coffee v. Crouch*, 28 Mo. 106; *Darling v. Potts*, 118 Mo. 506; *Tradesman's Bank v. Merritt*, 1 Paige (N. Y.) 302; *Uzzle v. Wood*, 1 Jones Eq. (54 N. Car.) 226; *Coble v. Nonemaker*, 78 Pa. St. 501; *Sadler's Appeal*, 87 Pa. St. 154.

**3. Bona Fide Purchaser for a Valuable Consideration and Without Notice** — *England.* — *Mansell v. Mansell*, 2 P. Wms. 681; *Thorndike v. Hunt*, 3 De G. & J. 563; *Whale v. Booth*, 4 T. R. 625 note.

*United States.* — *Daggs v. Ewell*, 3 Woods (U. S.) 344, 6 Fed. Cas. No. 3,537; *Miller v. Merine*, 43 Fed. Rep. 261; *Oliver v. Piatt*, 3 How. (U. S.) 333.

*Alabama.* — *Durr v. Wilson*, 116 Ala. 125; *Waring v. Lewis*, 53 Ala. 630.

*Arkansas.* — *Sorrells v. Sorrells*, 4 Ark. 296.

*California.* — *Griffin v. Blanchard*, 17 Cal. 70; *Ricks v. Reed*, 9 Cal. 551; *Adams v. Lambard*, 80 Cal. 426; *Warnock v. Harlow*, 96 Cal. 298, 31 Am. St. Rep. 209.

*Colorado.* — *Learned v. Tritch*, 6 Colo. 432.

*Florida.* — *Gale v. Harby*, 20 Fla. 171; *Foster v. Ambler*, 24 Fla. 519; *Saunders v. Richard*, 35 Fla. 28.

*Georgia.* — *Fahn v. Bleckley*, 55 Ga. 81; *McNamara v. McNamara*, 62 Ga. 200; *McCaskill v. Lathrop*, 63 Ga. 96; *Iverson v. Saulsbury*,

The Question Who Is a Bona Fide Purchaser for Value and Without Notice is considered elsewhere.<sup>1</sup>

(d) Election to Take Trust Property or Its Substitute. — If the trustee wrongfully substitutes other property for the trust property, the *cestui que trust* may elect to take the substituted property or to follow the trust property into the hands of any one not a *bona fide* purchaser for value and without notice;<sup>2</sup>

65 Ga. 724; *Hathorn v. Maynard*, 65 Ga. 168; *Morgan v. Johnson*, 87 Ga. 383; *Lewis v. Equitable Mortg. Co.*, 94 Ga. 572.

*Illinois*. — *Prevo v. Walters*, 5 Ill. 35; *Moore v. Hunter*, 6 Ill. 317; *Farrar v. Payne*, 73 Ill. 82; *Pratt v. Stone*, 80 Ill. 440; *Hemstreet v. Burdick*, 90 Ill. 444.

*Indiana*. — *Beckett v. Bledsoe*, 4 Ind. 256; *Hampson v. Fall*, 64 Ind. 382; *Paulus v. Latta*, 93 Ind. 34.

*Iowa*. — *Rowan v. Lamb*, 4 Greene (Iowa) 468; *Emonds v. Termehr*, 60 Iowa 92; *Richardson v. Haney*, 76 Iowa 101; *Smith v. Crawford County State Bank*, 99 Iowa 282.

*Louisiana*. — *Desha v. Jones*, 6 La. Ann. 743. *Maine*. — *Carter v. Manufacturers' Nat. Bank*, 71 Me. 448, 36 Am. Rep. 338; *Bromley v. Gardner*, 79 Me. 246.

*Maryland*. — *Hoffman Steam Coal Co. v. Cumberland Coal, etc., Co.*, 16 Md. 456, 77 Am. Dec. 311.

*Minnesota*. — *Burgess v. Bragaw*, 49 Minn. 462.

*Mississippi*. — *Shirley v. Shattuck*, 28 Miss. 13; *Wyse v. Dandridge*, 35 Miss. 672, 72 Am. Dec. 149; *Isom v. Jackson First Nat. Bank*, 52 Miss. 902; *Sanders v. Sorrell*, 65 Miss. 288; *Atkinson v. Greaves*, 70 Miss. 42; *Clark v. Rainey*, 72 Miss. 151.

*Missouri*. — *Paul v. Fulton*, 25 Mo. 156. *Nebraska*. — *Streitz v. Hartman*, 26 Neb. 33. *New Jersey*. — *Booraem v. Wells*, 19 N. J. Eq. 87; *Bohle v. Hasselbroch*, 64 N. J. Eq. 334.

*New York*. — *Galatian v. Erwin*, *Hopk.* (N. Y.) 48; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150; *Averell v. Barber*, 53 Hun (N. Y.) 636, 6 N. Y. Supp. 255; *Doremus v. Doremus*, 66 Hun (N. Y.) 111; *Hollembaek v. More*, 44 N. Y. Super. Ct. 107; *Crocker v. Crocker*, 31 N. Y. 507, 88 Am. Dec. 291; *Stephens v. Board of Education*, 79 N. Y. 183, 35 Am. Rep. 511; *Holmes v. Gilman*, 138 N. Y. 376, 34 Am. St. Rep. 463.

*North Carolina*. — *Christmas v. Mitchell*, 3 Ired. Eq. (38 N. Car.) 535.

*Ohio*. — *Bayles v. Crossman*, 5 Ohio Dec. (Reprint) 354, 5 Am. L. Rec. 13.

*Pennsylvania*. — *Bracken v. Miller*, 4 W. & S. (Pa.) 102; *Smith v. Painter*, 5 S. & R. (Pa.) 223, 9 Am. Dec. 344; *Thompson's Appeal*, 22 Pa. St. 17; *Pennsylvania L. Ins. Co. v. Austin*, 42 Pa. St. 257; *Sadler's Appeal*, 87 Pa. St. 154; *Allen v. Laird*, 101 Pa. St. 65; *Socher's Appeal*, 104 Pa. St. 609; *Young v. Weed*, 154 Pa. St. 316, 35 Am. St. Rep. 839; *Thomson v. Gilliland, Add.* (Pa.) 296; *Lee v. Tiernan, Add.* (Pa.) 348.

*South Carolina*. — *Henderson v. Dodd*, *Bailey Eq.* (S. Car.) 138; *Wamburzee v. Kennedy*, 4 Desaus. (S. Car.) 474; *Hudnal v. Wilder*, 4 McCord L. (S. Car.) 294, 17 Am. Dec. 744; *Ex p. Williams*, 18 S. Car. 299; *Bailey v. Colton*, 25 S. Car. 436.

*Tennessee*. — *Bass v. Wheelless*, 2 Tenn. Ch.

531; *Stewart v. Greenfield*, 16 Lea (Tenn.) 13. *Texas*. — *Ranney v. Hogan*, 1 Tex. Unrep. Cas. 253; *Copelin v. Shuler*, (Tex. 1887) 6 S. W. Rep. 668; *Mayfield v. Cotton*, 37 Tex. 229.

*Vermont*. — *Waterman v. Cochran*, 12 Vt. 699; *Pownal v. Myers*, 16 Vt. 408; *Veile v. Blodgett*, 49 Vt. 270.

*Virginia*. — *Chancellor v. Ashby*, 2 Patt. & H. (Va.) 26; *Love v. Braxton*, 5 Call (Va.) 537; *Claiborne v. Holland*, 88 Va. 1046.

*West Virginia*. — *Cain v. Cox*, 23 W. Va. 594.

And see *supra*, this subdivision, *Rule Stated*.

**Consideration Inadequate.** — If the third person takes trust property without notice and for an inadequate consideration he has at any rate no pretension to retain more than is necessary for his own indemnity. *Hanly v. Sprague*, 20 Me. 431.

**Appropriation of Trust Property by Creditor.** — A creditor who receives trust property from the trustee as a depository, and who appropriates it by his sole act to a debt owed him by the trustee, cannot hold property as against the *cestui que trust* though he took without notice that it was trust property. *Chapoton v. Detroit*, 38 Mich. 636.

**Purchasers from Bona Fide Purchaser for Value and Without Notice** are, however, protected though they have notice that the trust property in their hands is trust property.

**Purchasers from Bona Fide Purchasers.** — *Bracken v. Miller*, 4 W. & S. (Pa.) 102; *Brodie v. Skelton*, 11 Ark. 120; *Booth's Appeal*, 35 Conn. 165; *Lathrop v. White*, 81 Ga. 29; *St. Joseph Mfg. Co. v. Daggett*, 84 Ill. 556; *Rooker v. Rooker*, 75 Ind. 571; *Church v. Church*, 25 Pa. St. 278; *Church v. Ruland*, 64 Pa. St. 432; *Gunn v. Blair*, 9 Wis. 352.

1. **Who Is a Bona Fide Purchaser.** — See *infra*, this title, *Rights and Liabilities of Third Parties*. And see generally the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 472.

2. **Election — England.** — *Taylor v. Plumer*, 3 M. & S. 562; *Lewis v. Madocks*, 8 Ves. Jr. 150, 17 Ves. Jr. 48; *Trench v. Harrison*, 17 Sim. 111; *Thornton v. Stokill*, 1 Jur. N. S. 751.

*United States*. — *Oliver v. Piatt*, 3 How. (U. S.) 333; *Wheeler v. Billings*, (C. C. A.) 72 Fed. Rep. 301.

*Alabama*. — *Malone v. Kelley*, 54 Ala. 532; *Powell v. Powell*, 80 Ala. 11.

*Georgia*. — *Martin v. Greer*, Ga. Dec. (pt. i.) 109; *Gray v. Perry*, 51 Ga. 180; *Bonner v. Holland*, 68 Ga. 718.

*Maine*. — *Libby v. Frost*, 98 Me. 291.

*New York*. — *Murray v. Lylburn*, 2 Johns. Ch. (N. Y.) 441.

*North Carolina*. — *Cheshire v. Cheshire*, 2 Ired. Eq. (37 N. Car.) 569.

*Pennsylvania*. — *Bonsall's Case*, 1 Rawle

but he cannot do both.<sup>1</sup>

(2) *When Right to Lien Exists* — (a) *Trust Property Mingled with Other Property of Same Kind* — *aa. IN GENERAL.* — Formerly the equitable right of a *cestui que trust* to follow trust property ceased when it became confused with other property of the same kind so as not to be distinguishable, as where the subject of the trust was money, or had been converted into money and then mixed and confounded in a general mass of money of the same description so as to be no longer distinguishable.<sup>2</sup> Finally, however, it has been held as the better doctrine, that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the *cestui* a priority of right over the other creditors of the trustees.<sup>3</sup>

*Substitute for Trust Property Mingled.* — It makes no difference whether it is the trust property itself that is mingled with other property of the same kind or whether it is the substitute for the trust property that is so mingled.<sup>4</sup>

*bb. IN BANK DEPOSIT.* — The rule with regard to the mingling of trust money with the trustee's own money in a general mass is usually applied where such

(Pa.) 274; *Kaufman v. Crawford*, 9 W. & S. (Pa.) 134, 42 Am. Dec. 323; *Norris's Appeal*, 71 Pa. St. 106.

*South Carolina.* — *Sollee v. Croft*, 7 Rich. Eq. (S. Car.) 34; *Brazel v. Fair*, 26 S. Car. 370.

*Vermont.* — *Blaisdell v. Stevens*, 16 Vt. 179.

*Virginia.* — *Barksdale v. Finney*, 14 Gratt. (Va.) 338.

**1. Cannot Take Both Trust Property and Substitute.** — Where a negro of a *cestui que trust* was sold, and with the proceeds of the sale land was purchased, the title of which passed to the *cestui que trust*, it was held that the *cestui que trust* could not reclaim the land and recover back the negro. *Fears v. Lynch*, 28 Ga. 249.

**2. Former Rule Stated** — *England.* — *Whitecomb v. Jacob*, 1 Salk. 160; *Miller v. Race*, 1 Burr. 457; *Ex p. Mordaunt*, 3 Deac. & C. 351; *Taylor v. Plumer*, 3 M. & S. 562; *In re West of England, etc., Bank*, 11 Ch. D. 772.

*United States.* — *Bank of Commerce v. Russell*, 2 Dill. (U. S.) 215; *Trecothick v. Austin*, 4 Mason (U. S.) 29; *Illinois Trust, etc., Bank v. Buffalo First Nat. Bank*, 15 Fed. Rep. 858; *Frelinghuysen v. Nugent*, 36 Fed. Rep. 239; *In re Janeway*, 4 Nat. Bankr. Reg. 100; *In re Coan, etc., Carriage Mfg. Co.*, 12 Nat. Bankr. Reg. 203.

*Michigan.* — *Fire, etc., Com'rs v. Wilkinson*, 119 Mich. 655.

*Minnesota.* — *Bishop v. Mahoney*, 70 Minn. 238.

*Mississippi.* — *Billingsley v. Pollock*, 69 Miss. 759, 30 Am. St. Rep. 585; *Shields v. Thomas*, 71 Miss. 260, 42 Am. St. Rep. 458.

*Missouri.* — *Pearson v. Haydel*, 90 Mo. App. 259.

*New York.* — *Hart v. Bulkley*, 2 Edw. (N. Y.) 70; *Kip v. State Bank*, 10 Johns. (N. Y.) 63.

*North Carolina.* — *Commercial, etc., Nat. Bank v. Davis*, 115 N. Car. 226.

*Wisconsin.* — *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237.

**3. Present Doctrine Stated** — *England.* — *Frith v. Cartland*, 2 Hem. & M. 417; *Pennell v. Deffell*, 4 De G. M. & G. 372; *In re Hallett*, 13 Ch. D. 708.

*United States.* — *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.*, 104 U. S. 54; *U. S. v. Waterborough*, 2 Ware (U. S.) 158, 28 Fed. Cas. No. 16,648.

*California.* — *Byrne v. McGrath*, 130 Cal. 316, 80 Am. St. Rep. 127; *Elizalde v. Elizalde*, 137 Cal. 634.

*Colorado.* — *Banks v. Rice*, 8 Colo. App. 217.

*Georgia.* — *Alspaugh v. Adams*, 80 Ga. 345.

*Illinois.* — *School Trustees v. Kirwin*, 25 Ill. 73; *Moninger v. Security Title, etc., Co.*, 90 Ill. App. 246; *Halle v. National Park Bank*, 140 Ill. 413; *Hauk v. Van Ingen*, 196 Ill. 20.

*Indiana.* — *McComas v. Long*, 85 Ind. 549.

*Kentucky.* — *Bright v. King*, (Ky. 1898) 45 S. W. Rep. 508.

*Maryland.* — *Englar v. Offutt*, 70 Md. 78, 14 Am. St. Rep. 332.

*Massachusetts.* — *Taft v. Stow*, 174 Mass. 171.

*Michigan.* — *Peters v. Union Trust Co.*, 131 Mich. 322.

*Mississippi.* — *Morrison v. Kinstra*, 55 Miss. 71; *Shields v. Thomas*, 71 Miss. 260, 42 Am. St. Rep. 458.

*Missouri.* — *Tiernan v. Security Bldg., etc., Assoc. No. 2*, 152 Mo. 135; *Mayer v. Citizens Bank*, 86 Mo. App. 422; *Harrison v. Smith*, 83 Mo. 210.

*Nebraska.* — *Lincoln v. Morrison*, 64 Neb. 822.

*New York.* — *Disbrow v. Mills*, 2 Hun (N. Y.) 132, affirmed 62 N. Y. 604; *Graham v. Van Duzer*, 2 Redf. (N. Y.) 322; *Moore v. Robertson*, (Supm. Ct. Spec. T.) 25 Abb. N. Cas. (N. Y.) 173; *Ferris v. Van Vechten*, 73 N. Y. 113; *Cavin v. Gleason*, 105 N. Y. 262; *Blair v. Hill*, 165 N. Y. 672; *Matter of Holmes*, 37 N. Y. App. Div. 15.

*Ohio.* — *Lotze v. Hoerner*, 11 Ohio Dec. (Reprint) 131, 25 Cinc. L. Bul. 31.

*Oregon.* — *Ferchen v. Arndt*, 26 Oregon 121, 46 Am. St. Rep. 603; *Muhlenberg v. Northwest L. & T. Co.*, 26 Oregon 132.

*Pennsylvania.* — *Farmers', etc., Nat. Bank v. King*, 57 Pa. St. 202, 98 Am. Dec. 215.

**4. Substitute for Trust Property Mingled.** — Personal property sold by trustee and proceeds mingled with his own funds. *Halle v. National Park Bank*, 140 Ill. 413.



mass is a bank deposit standing in the name of the trustee as an individual,<sup>1</sup> the cases going so far as to hold that money drawn out of the deposit from time to time will be presumed to have been his own and not the money held by him in trust.<sup>2</sup> Some of these cases expressly hold, however, that the *cestui que trust* is never entitled to a greater charge on the deposit than the minimum amount remaining there at any time after the trust money has been mixed in the common mass. This is on the ground that the minimum amount at any given time may be less than the amount of trust money originally deposited, in which case it is clear that the trustee must have drawn on the trust money also.<sup>3</sup>

**As Between Different Cestuis Having Moneys in One Deposit.** — Where a trustee holding money of different *cestuis que trustent* deposits all in one bank deposit, each *cestui* may follow his own money into the deposit. But as to money drawn out by the trustee from time to time it will be presumed that trust money first deposited was first drawn out.<sup>4</sup>

(b) **Trust Property Entering with Trustee's Own into Specific Property.** — Where the trustee converts trust property along with his own into other property which can be identified, the *cestui que trust* has a lien on such for the amount of trust property therein.<sup>5</sup> And it has been held that the *cestui que trust* has not

**1. Mingled Funds in Bank Deposit — England.** — *In re Hallett*, 13 Ch. D. 696; *Pennell v. Deffell*, 4 De G. M. & G. 372; *M'Mahon v. Fetherstonhaugh*, (1895) 1 Ir. Eq. 83.

**United States.** — *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.*, 104 U. S. 54; *Mercantile Trust Co. v. St. Louis, etc., R. Co.*, 99 Fed. Rep. 485.

**Iowa.** — *Matter of Maxwell*, 83 Iowa 590.

**Kentucky.** — *Beaven v. Citizens Nat. Bank*, (Ky. 1897) 43 S. W. Rep. 242.

**Maine.** — *Cushman v. Goodwin*, 95 Me. 358. But see *Portland, etc., Steamboat Co. v. Locke*, 73 Me. 370.

**Maryland.** — *Drovers', etc., Nat. Bank v. Roller*, 85 Md. 495, 60 Am. St. Rep. 344.

**Michigan.** — *Neely v. Rood*, 54 Mich. 134, 52 Am. Rep. 802.

**New Jersey.** — *Ellicott v. Kuhl*, 60 N. J. Eq. 333; *Hunt v. Smith*, 58 N. J. Eq. 25.

**New York.** — *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Importers, etc., Nat. Bank v. Peters*, 123 N. Y. 272; *Matter of Greene*, 2 Connolly (N. Y.) 166; *Matter of Holmes*, 37 N. Y. App. Div. 18; *Cole v. Cole*, 54 N. Y. App. Div. 37; *Cohnfeld v. Tanenbaum*, 58 N. Y. App. Div. 312, 32 Misc. (N. Y.) 563; *United Nat. Bank v. Weatherby*, 70 N. Y. App. Div. 279; *Lafort v. Carpenter*, 91 Hun (N. Y.) 76.

**Oregon.** — *Shute v. Hinman*, 34 Oregon 578.

**Pennsylvania.** — *Farmers', etc., Nat. Bank v. King*, 57 Pa. St. 202, 98 Am. Dec. 215.

**South Carolina.** — *Wulbern v. Timmons*, 55 S. C. 456.

**Wisconsin.** — *Burnham v. Barth*, 89 Wis. 368.

In *Cushman v. Goodwin*, 95 Me. 354, the court said: "The mere act by a trustee of mingling trust money with his own by depositing the different moneys in a bank in his individual name, with nothing done by the banker to distinguish the trust money from the individual money, does not necessarily prevent an identification of the trust fund. Equity will undertake to disentangle the accounts, and

give to the *cestui que trust* the portion that belongs to him."

**2. Rule as to Money Drawn Out.** — *Pinkett v. Wright*, 2 Hare 120; *Murray v. Pinkett*, 12 Cl. & F. 764; *In re Hallett*, 13 Ch. D. 696, *distinguishing Clayton's Case*, 1 Meriv. 572; *State v. Bank of Commerce*, 61 Neb. 181; *Lincoln v. Morrison*, 64 Neb. 822; *Heidelberg v. National Park Bank*, 87 Hun (N. Y.) 117.

In *Ellicott v. Kuhl*, 60 N. J. Eq. 333, the court said: "When moneys of a trust fund are traced to the bank account of a trustee and there are moneys remaining in the account to satisfy the whole or part of the fund, the *cestui que trust*, or person whose fiduciary agent has placed the moneys in such an account, may follow and take those moneys, because the presumption is that the moneys previously drawn from the account were rightfully drawn, and were chargeable first upon the private deposits with which the trust funds had been mingled. Thus considered, the whole or part of the trust fund has been traced to the account and found there, and the *cestui que trust* may assert his right to it."

**3. Charge No Greater than Minimum Amount on Deposit.** — *Frith v. Cartland*, 2 Hem. & M. 417; *Mercantile Trust Co. v. St. Louis, etc., R. Co.*, 99 Fed. Rep. 485; *Blair v. Hill*, 165 N. Y. 672; *Cole v. Cole*, 54 N. Y. App. Div. 37. And see *Beatty v. McCleod*, 11 La. Ann. 76; *Mills v. Post*, 76 Mo. 426; *Matter of Youngs*, 5 Dem. (N. Y.) 141.

**4. As Between Different Cestuis.** — *In re Hallett*, 13 Ch. D. 696; *In re Stenning*, (1895) 2 Ch. 433; *Matter of Holmes*, 37 N. Y. App. Div. 15; *United Nat. Bank v. Weatherby*, 70 N. Y. App. Div. 279.

**5. Land Held in Trust and Land Held in Trustee's Own Right Exchanged** for other land. *Kaplan v. Toney*, (Tenn. Ch. 1899) 58 S. W. Rep. 909.

**Mingled Moneys of Trustee and Cestui Que Trust** used in purchase of real estate. *Bohle v. Haselbroch*, 64 N. J. Eq. 334; *Aiken v. Taylor*, (Tenn. Ch. 1900) 62 S. W. Rep. 200.

only a claim by way of a lien on the substituted property, but also a claim by way of equitable ownership of an aliquot part of such property.<sup>1</sup>

**Profits Derived from Substituted Property** which contains the trustee's own property also will be apportioned between the *cestui* and the trustee.<sup>2</sup>

(c) **Trust Property Entering into Trustee's General Estate.** — Where trust property has become so mixed up with the trustee's individual estate that it is impossible to trace and identify it as entering into some specific property or mass, and the trustee becomes bankrupt, there has been considerable discussion as to whether the *cestui que trust* ought to have a lien on the general estate of the trustee or whether he ought to be considered a general creditor merely and on a footing with the other creditors.

**Earlier Doctrine.** — A few authorities have held that a lien exists under such circumstances on the ground that the general estate is benefited, even though it is shown that the trust property went to pay the trustee's individual debts.<sup>3</sup>

**Earlier Doctrine Criticised.** — The doctrine of these authorities has been much criticised, however, on the ground that it cannot be said that trust property entering into the general estate of the trustee necessarily benefits it, since such property may have been squandered, lost, or destroyed.<sup>4</sup> And there has even been a refusal to assume a benefit from the fact that the trustee's debts were paid out of the trust property.<sup>5</sup>

**Doctrine Overturned.** — The effect of this kind of criticism has been to overturn in the states once holding it the doctrine as stated above.<sup>6</sup>

**Purchase of Consols Partly with Trust Money and Partly with Trustee's Own Money.** — *Robertson v. Morrice*, 9 Jur. 122.

**Mingled Funds Loaned and Single Mortgage Taken.** — *Alspaugh v. Adams*, 80 Ga. 345.

**Trust Money Fund into Improvements on Church Property.** — *Miller v. Elder*, 3 Ohio Cir. Dec. 681, 7 Ohio Cir. Ct. 97.

**1. Equitable Ownership of Aliquot Part.** — In *In re Mulligan*, 116 Fed. Rep. 715, the court said: "Where the trust fund has been mingled with funds which belong to the trustee, and the mingled mass has been converted into property which exists in specie, the *cestui* has a claim upon this property by way of lien for the replacement of the trust fund advanced for the purchase, or by way of equitable ownership of an aliquot part of the property, either or both."

**2. Profits.** — *Lincoln v. Morrison*, 64 Neb. 822.

**3. Earlier Doctrine.** — *Davenport Plow Co. v. Lamp*, 80 Iowa 722, 20 Am. St. Rep. 442; *Independent Dist. v. King*, 80 Iowa 497; *Peak v. Ellicott*, 30 Kan. 156, 46 Am. Rep. 90; *Hazeltine v. McAfee*, 5 Kan. App. 119; *Myers v. Board of Education*, 51 Kan. 87, 37 Am. St. Rep. 263; *Hubbard v. Alamo Irrigating, etc., Co.*, 53 Kan. 637; *Carley v. Graves*, 85 Mich. 487, 24 Am. St. Rep. 99; *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287; *Francis v. Evans*, 69 Wis. 115; *Bowers v. Evans*, 71 Wis. 133. And see *Hooley v. Gieve*, (C. Pl. Spec. T.) 9 Abb. N. Cas. (N. Y.) 8.

**Ground of Doctrine.** — In *Shields v. Thomas*, 71 Miss. 267, 42 Am. St. Rep. 458, the court, referring to the doctrine stated in the text, said: "It seems to be held, though in some of the cases not very clearly, that there is a sort of equitable charge upon the whole estate of a person who has converted or wasted trust funds. This doctrine apparently rests upon a presumption entertained by the courts which announced it, that the general estate would have been less than it was but for the use of the trust fund,

and that an indirect and consequential melioration of the general estate subjects it to an equitable charge as though the trust fund was actually confused in but a part of it."

**4. Squandered, Lost, or Destroyed.** — *Pearson v. Haydel*, 90 Mo. App. 262; *Slater v. Oriental Mills*, 18 R. I. 355.

**5. Payment of Debts.** — *Travellers Ins. Co. v. Caldwell*, 59 Kan. 156; *Kansas State Bank v. First State Bank*, 62 Kan. 788; *St. Paul v. Seymour*, 71 Minn. 303; *Cavin v. Gleason*, 105 N. Y. 256; *Ferchen v. Arndt*, 26 Oregon 121, 46 Am. St. Rep. 603; *Slater v. Oriental Mills*, 18 R. I. 355; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 243.

In *Spokane County v. Spokane First Nat. Bank*, (C. C. A.) 68 Fed. Rep. 979, the court said: "We are unable to assent to the proposition that, because a trust fund has been used by the insolvent in the course of his business, the general creditors of the estate are by that amount benefited, and that therefore equitable consideration requires that the owner of the trust fund be paid out of the estate, to their postponement or exclusion. If the trust fund has been dissipated in the transaction of the business before insolvency, it will be impossible to demonstrate that the estate has been thereby increased, or better prepared to meet the demands of the creditors; and, even if it is proved that the trust fund has been but recently disbursed, and has been used to pay debts that otherwise would be claims against the estate, there would be manifest inequity in requiring that the money so paid out should be refunded out of the assets, for in so doing the general creditors, whose demands remain unpaid, are in effect contributing to the payment of the creditors whose demands have been extinguished by the trust funds."

**6. Doctrine Overturned.** — *Bradley v. Chesebrough*, 111 Iowa 126; *Travelers Ins. Co. v. Caldwell*, 59 Kan. 156; *Kansas State Bank v.*

**Present Doctrine.** — The present doctrine as laid down by the authorities is that a trust creditor, or in other words a *cestui que trust*, is not entitled to a preference over general creditors of the bankrupt trustee merely on the ground of the nature of his claim, that is, that he is a trust creditor as distinguished from a general creditor,<sup>1</sup> but that he must go further and at least show that the trust property has not been dissipated but has gone into the general estate, where it still remains in some form, causing an increase in the assets.<sup>2</sup> Some of the authorities expressly hold that the *cestui* may stop here.<sup>3</sup> But a few

First State Bank, 62 Kan. 788; Cavin v. Gleason, 105 N. Y. 256; Nonotuck Silk Co. v. Flanders, 87 Wis. 237, *overruling* McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287; Francis v. Evans, 69 Wis. 115; Bowers v. Evans, 71 Wis. 133.

1. **No Preference from Nature of Claim.** — Cavin v. Gleason, 105 N. Y. 262. And see *In re Mulligan*, 116 Fed. Rep. 715; Bradley v. Chesebrough, 111 Iowa 126; Lincoln v. Morrison, 64 Neb. 822; Todd v. Meding, 56 N. J. Eq. 83.

2. **Must at Least Show Increased Assets in Consequence** — *United States*. — Bank of Commerce v. Russell, 2 Dill. (U. S.) 217; Philadelphia Nat. Bank v. Dowd, 38 Fed. Rep. 172; Commercial Nat. Bank v. Armstrong, 39 Fed. Rep. 684; Multnomah County v. Oregon Nat. Bank, 61 Fed. Rep. 912; Massey v. Fisher, 62 Fed. Rep. 958; Spokane County v. Spokane First Nat. Bank, (C. C. A.) 68 Fed. Rep. 979; Metropolitan Nat. Bank v. Campbell Commission Co., 77 Fed. Rep. 705; *In re Marsh*, 116 Fed. Rep. 396; *In re Mulligan*, 116 Fed. Rep. 715.

*Alabama*. — Ellison v. Moses, 95 Ala. 221.

*California*. — Byrne v. Byrne, 113 Cal. 294; Byrne v. McGrath, 130 Cal. 316, 80 Am. St. Rep. 127.

*Kansas*. — Travellers Ins. Co. v. Caldwell, 59 Kan. 156; Kansas State Bank v. First State Bank, 62 Kan. 794.

*Kentucky*. — Bright v. King, (Ky. 1898) 45 S. W. Rep. 508.

*Minnesota*. — St. Paul v. Seymour, 71 Minn. 303; Twohy Mercantile Co. v. Melbye, 78 Minn. 357.

*Mississippi*. — Shields v. Thomas, 71 Miss. 260, 42 Am. St. Rep. 458.

*New Jersey*. — Collins v. Steuart, 58 N. J. Eq. 392; Ellicot v. Kuhl, 60 N. J. Eq. 333, *explaining* Smith v. Combs, 49 N. J. Eq. 420.

*North Dakota*. — Northern Dakota Elevator Co. v. Clark, 3 N. Dak. 26.

*Oregon*. — Ferchen v. Arndt, 26 Oregon 121, 46 Am. St. Rep. 603.

*Pennsylvania*. — Cunningham's Estate, (Pa. 1853) 2 Am. L. Reg. (N. S.) 120; Thompson's Appeal, 22 Pa. St. 16; Jefferis's Appeal, 33 Pa. St. 39; Abbott v. Reeves, 49 Pa. St. 494, 88 Am. Dec. 510; Wylie's Appeal, 92 Pa. St. 196; Peoples' Bank's Appeal, 93 Pa. St. 107, 39 Am. Rep. 728; Williams's Appeal, 101 Pa. St. 474; Seguin's Appeal, 103 Pa. St. 139; Hopkins's Appeal, (Pa. 1887) 9 Atl. Rep. 867.

*Tennessee*. — Arbuckle v. Kirkpatrick, 98 Tenn. 221, 60 Am. St. Rep. 854.

*Wisconsin*. — Nonotuck Silk Co. v. Flanders, 87 Wis. 237; Burnham v. Barth, 89 Wis. 362; Gianella v. Momsen, 90 Wis. 476; Henika v. Heinemann, 90 Wis. 478.

*Wyoming*. — State v. Foster, 5 Wyo. 199, 63 Am. St. Rep. 47.

*Canada*. — Culhane v. Stuart, 6 Ont. 97.

But see District Tp. v. Farmers' Bank, 88 Iowa 194.

**Trust Money Paid Out in Ordinary Course of Business.** — Where trust funds are mingled with individual funds of the trustee and paid out in the usual course of his business, the *cestui* is a general creditor only. Byrne v. Byrne, 113 Cal. 294; Pearson v. Haydel, 90 Mo. App. 253.

3. *Colorado*. — McClure v. La Plata County, 19 Colo. 122; Hopkins v. Burr, 24 Colo. 502, 65 Am. St. Rep. 238.

*Iowa*. — In Bradley v. Chesebrough, 111 Iowa 126, the court said: "That plaintiff was a trust creditor does not of itself entitle him to preference over general creditors. To obtain that right he must show by presumption of law or otherwise that his fund has been preserved in the hands of the assignee, as an increase of the assets of the estate, from which it may be taken without impairment of the rights of general creditors."

*Missouri*. — In Pearson v. Haydel, 90 Mo. App. 264, the court, referring to a rule laid down in Bircher v. St. Louis Sheet Metal Ornament Co., 77 Mo. App. 509, deduced from the Missouri cases, said: "The rule thus enunciated requires the trust fund or its proceeds to be still mixed with the mass of the insolvent's estate in the hands of his assignee, trustee, or other representative, in order for a preferential lien to be declared, and holds that the fact that it was at one time wrongfully mingled with it is insufficient to authorize a preference. Whether this view, which was also taken in Paul v. Draper, 158 Mo. 197, 81 Am. St. Rep. 296, is strictly consistent with all that was said in some of the other cases need not be discussed. It is the law as declared in the latest decisions of our Supreme Court, and must control the determination of the present controversy." And see Hockensmith v. Hockensmith, 57 Mo. App. 374; Leonard v. Latimer, 67 Mo. App. 138; Deming Co. v. Webb, 76 Mo. App. 329.

*Nebraska*. — Capital Nat. Bank v. Coldwater Nat. Bank, 40 Neb. 786, 59 Am. St. Rep. 572; State v. Midland State Bank, 52 Neb. 1, 66 Am. St. Rep. 484; Lincoln v. Morrison, 64 Neb. 822, *following* Morrison v. Lincoln Sav. Bank, 57 Neb. 225; State v. Bank of Commerce, 54 Neb. 725, and *overruling* State v. State Bank, 42 Neb. 896.

*New York*. — In Cavin v. Gleason, 105 N. Y. 256, the court said: "It may be sufficient to entitle a party to equitable preference in the distribution of a fund in insolvency that it



of them use language which seems to indicate that unless the *cestui* can trace the trust property into specific property his claim against the general estate is no better than that of any other creditor.<sup>1</sup>

**Trustee a Bank.** — Where the trustee is a bank and mingles trust funds with its general banking fund, some authorities apply the rule which exists where the trustee is a bank depositor and mingles with his deposit trust funds.<sup>2</sup> They allow the *cestui que trust* a lien on the general banking fund, assuming that what is used from time to time is not the trust property,<sup>3</sup> unless the general banking fund at any time since the mingling becomes less than the trust funds mingled, in which case a lien exists only for the amount of the banking fund at that time.<sup>4</sup>

**Rule Generally Applied.** — The rule generally applied, however, does not differ from that which is applied where the trustee is not a bank. There is no assumption that the general banking fund contains the trust fund and that what is used from time to time is not trust property, but the *cestui que trust* must at least show that the trust funds are really there in some form causing an increase in the assets.<sup>5</sup>

appears that the fund or property of the insolvent remaining for distribution includes the proceeds of the trust estate, although it may be impossible to point out the precise thing in which the trust fund has been invested, or the precise time when the conversion took place."

**Rhode Island.** — In *Slater v. Oriental Mills*, 18 R. I. 353, the court said: "Of the cases cited by the complainants only four go to the extent of holding that a *cestui que trust* is entitled to a lien for reimbursement on the general estate of the trustee where the trust fund does not, in some form, so appear. These are *Davenport Plow Co. v. Lamp*, 80 Iowa 722, 20 Am. St. Rep. 442; *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287; *Francis v. Evans*, 69 Wis. 115; *Bowers v. Evans*, 71 Wis. 133. In the first of these cases the court lost sight of the distinction, which we desire to make clear, between funds remaining in the estate, which go to swell the assets, and funds which, having been dissipated or used in the payment of debts, do not remain in the estate, and so do not swell the estate. Upon the former fact, as we have stated above, we concede the right to relief."

**1. Traced into Specific Property.** — *Fire, etc., Com'rs v. Wilkinson*, 119 Mich. 670. And see *Ellicott v. Kuhl*, 60 N. J. Eq. 333.

**Massachusetts Rule.** — In *Little v. Chadwick*, 151 Mass. 109, the court laid down the following rule: "Where trust property becomes so mixed up with the trustee's individual estate that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust property; but when, as a matter of fact, it cannot be traced, the equitable right of the *cestui que trust* to follow it fails. Under such circumstances, if the trustee has become bankrupt, the court cannot say that the trust property is to be found somewhere in the general estate of the trustee that still remains; he may have lost it with property of his own; and in such case the *cestui que trust* can only come in and share with the general creditors."

**2. Apply Rule Concerning Bank Deposits.** — See *In re Mulligan*, 116 Fed. Rep. 715.

This rule is stated *supra*, this subsection, *In Bank Deposit*.

**3. Cestui Has Lien on General Fund.** — *Massey v. Fisher*, 62 Fed. Rep. 958; *Merchants' Nat. Bank v. School Dist. No. 8*, (C. C. A.) 94 Fed. Rep. 705; *Woodhouse v. Crandall*, 197 Ill. 104; *Wallace v. Stone*, 107 Mich. 190; *Fire, etc., Com'rs v. Wilkinson*, 119 Mich. 655; *Fogg v. Friar's Point Bank*, 80 Miss. 750; *State v. Foster*, 5 Wyo. 199, 63 Am. St. Rep. 47. And see *In re Mulligan*, 116 Fed. Rep. 718.

**4. Lien on Minimum Amount.** — *Continental Nat. Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85.

And see *In re Mulligan*, 116 Fed. Rep. 718, where the court said: "If since that date the cash assets have at any time fallen below the amount of the trust deposit, it has been held that the trust fund has been finally dissipated to that extent."

**5. Trust Funds Must Be Actually Contained in General Fund** — *United States*. — *Illinois Trust, etc., Bank v. Buffalo First Nat. Bank*, 15 Fed. Rep. 858; *Philadelphia Nat. Bank v. Dowd*, 38 Fed. Rep. 172; *Multnomah County v. Oregon Nat. Bank*, 61 Fed. Rep. 912, *disapproving* *San Diego County v. California Nat. Bank*, 52 Fed. Rep. 59.

*Alabama*. — *St. Louis Brewing Assoc. v. Austin*, 100 Ala. 315.

*Illinois*. — *School Trustees v. Kirwin*, 25 Ill. 73.

*Kansas*. — *Kansas State Bank v. First State Bank*, 62 Kan. 788.

*Michigan*. — *Sunderlin v. Mecosta County Sav. Bank*, 116 Mich. 281.

*Mississippi*. — *Shields v. Thomas*, 71 Miss. 260, 42 Am. St. Rep. 458.

*Nebraska*. — *Lincoln v. Morrison*, 64 Neb. 822.

*New York*. — *Warren-Scharf Asphalt Paving Co. v. Dunn*, 8 N. Y. App. Div. 209; *Wiggins v. Stevens*, 33 N. Y. App. Div. 83.

*Pennsylvania*. — *Lebanon Trust, etc., Bank's Estate*, 166 Pa. St. 622; *Solicitors L. & T. Co.'s Estate*, 3 Pa. Super. Ct. 244.

*Wisconsin*. — *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, *overruling* *McLeod v. Evans*, 66 Wis. 401, 57 Am. Rep. 287.

And see *Mills v. Swearingen*, 67 Tex. 269; *Holden v. Piper*, 5 Colo. App. 71.

**Trust Funds Used in Business.** — In *Kansas*

(3) *Burden of Proof.* — The burden of proof is on the *cestui que trust* whose trust property has been misappropriated by the trustee to trace and identify such property either in its original or in its new form.<sup>1</sup> There is this qualification, however, that when trust property is traced into a new form of property in the hands of the trustee it will be presumed that it entered exclusively into the new form, and if, as a matter of fact, property belonging to the trustee is also represented there, the burden of proof is on the trustee to show what proportion his own property bears to the whole property, and what he cannot distinguish will be considered trust property.<sup>2</sup>

5. *Remedies of Cestui Que Trust* — *a. JURISDICTION OF COURTS.* — A consideration of the proper courts in which to enforce proceedings by or against *cestuis que trustent* will be found elsewhere.<sup>3</sup>

*b. DIFFERENT REMEDIES CONSIDERED* — (1) *Enforcing Personal Liability Against Trustee* — (a) *In General.* — The *cestui que trust* may hold the trustee personally liable for trust property misappropriated, where such property cannot be followed in its original or substituted form either because its identity has been lost<sup>4</sup> or because it has passed into the hands of a *bona fide* purchaser for value and without notice,<sup>5</sup> or even where it can be followed, provided the *cestui* elects to charge the trustee personally rather than rely on the property itself.<sup>6</sup> But if he so elects he is deprived thereafter of following

the court holds that the *cestui* must show that the banking fund has been benefited. But it also holds that such fund is shown to have been benefited when the trust funds have been used in the general banking business but not to pay debts. *Kansas State Bank v. First State Bank*, 62 Kan. 794.

1. *Burden of Proof on Cestui.* — *Frelinghuysen v. Nugent*, 36 Fed. Rep. 237; *In re Mulligan*, 116 Fed. Rep. 715; *In re Marsh*, 116 Fed. Rep. 396; *Roberts v. Broom*, 1 Harr. (Del.) 57; *Goodell v. Buck*, 67 Me. 514; *Fire, etc., Com'rs v. Wilkinson*, 119 Mich. 670; *Lincoln v. Morrison*, 64 Neb. 822; *Muhlenberg v. Northwest L. & T. Co.*, 26 Oregon 132; *Burnham v. Barth*, 89 Wis. 362.

*Cestui Held to Strict Proof.* — *Roberts v. Broom*, 1 Harr. (Del.) 57; *Suter v. Ives*, 47 Md. 520; *Ferris v. Van Vechten*, 73 N. Y. 113.

2. *Presumption that Substituted Property Contains Trust Property Exclusively.* — *Harris v. Truman*, 9 Q. B. D. 268; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.*, 104 U. S. 54; *Halle v. National Park Bank*, 140 Ill. 413; *Bohle v. Hasselbroch*, 64 N. J. Eq. 334; *Culhane v. Stuart*, 6 Ont. 97; *Samson v. Rouse*, 72 Vt. 422; *Frith v. Cartland*, 2 Hem. & M. 417.

*In Shute v. Hinman*, 34 Oregon 578, the court said: "If a trustee mingles with his own money the funds of his *cestui que trust* the whole will be regarded as belonging to the latter, except so far as the trustee may be able to distinguish his own."

3. *Jurisdiction of Courts.* — See *infra*, this title, *Jurisdiction of Courts*. See also generally the title TRUSTS AND TRUSTEES, 22 ENCYC. OF PL. AND PR. I.

4. *Identity Lost.* — *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141; *Rickets v. Montgomery*, 15 Md. 46; *Calhoun v. Burnett*, 40 Miss. 599; *Freeman v. Cook*, 6 Ired. Eq. (41 N. Car.) 379; *Norman v. Cunningham*, 5 Gratt. (Va.) 72.

5. *In Hands of Bona Fide Purchaser.* — *Adams*

*v. Lambard*, 80 Cal. 426; *Bradley v. Luce*, 99 Ill. 235; *Freeman v. Cook*, 6 Ired. Eq. (41 N. Car.) 379; *Boothe v. Fiest*, 80 Tex. 141; *Norman v. Cunningham*, 5 Gratt. (Va.) 72.

6. *May Elect to Hold Trustee Personally Liable* — *United States*. — *Oliver v. Piatt*, 3 How. (U. S.) 333.

*Alabama.* — *Julian v. Reynolds*, 8 Ala. 680.

*Arkansas.* — *Shelton v. Lewis*, 27 Ark. 190.

*California.* — *Gunter v. Janes*, 9 Cal. 643; *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141.

*Georgia.* — *Roberts v. Mansfield*, 38 Ga. 452.

*Illinois.* — *Breit v. Yeaton*, 101 Ill. 242.

*Indiana.* — *Naltner v. Dolan*, 108 Ind. 500, 58 Am. Rep. 61; *Haxton v. McClaren*, 132 Ind. 243.

*Iowa.* — *Mac Gregor v. Mac Gregor*, 9 Iowa 65; *Robinson v. Robinson*, 22 Iowa 427.

*Maryland.* — *Armitage v. Snowden*, 41 Md. 119.

*Massachusetts.* — *Peabody v. Tarbell*, 2 Cush. (Mass.) 226.

*Michigan.* — *Matthews v. Forslund*, 112 Mich. 591.

*Mississippi.* — *McLeod v. Jackson First Nat. Bank*, 42 Miss. 99; *Isom v. Jackson First Nat. Bank*, 52 Miss. 902.

*Missouri.* — *Wilson v. Drumrite*, 24 Mo. 304; *Barr v. Cubbage*, 52 Mo. 404; *Parker v. Straat*, 39 Mo. App. 616.

*New Jersey.* — *Bohle v. Hasselbroch*, 64 N. J. Eq. 334.

*New York.* — *Matter of Stafford*, 11 Barb. (N. Y.) 353; *Doud v. Holmes*, 63 N. Y. 635.

*North Carolina.* — *Younce v. McBride*, 68 N. Car. 532.

*Tennessee.* — *Treadwell v. McKeon*, 7 Baxt. (Tenn.) 201.

*Texas.* — *Silliman v. Gano*, 90 Tex. 637.

*Vermont.* — *Blaisdell v. Stevens*, 16 Vt. 179.

*Virginia.* — *Barksdale v. Finney*, 14 Gratt. (Va.) 338; *Brown v. Lambert*, 33 Gratt. (Va.) 256.

*Wisconsin.* — *Barker v. Barker*, 14 Wis. 131.

the trust property.<sup>1</sup>

(b) **Damages — Value of Property Misappropriated.** — The *cestui que trust* may recover the actual value of the trust property misappropriated<sup>2</sup> at the time of the misappropriation;<sup>3</sup> or the utmost value even, where there is no possible means by which the actual value can be ascertained.<sup>4</sup>

**Rents and Profits.** — He may also recover the amount of the rents and profits which would or might have been made from the property misappropriated.<sup>5</sup>

**Purchase of Other Property.** — The trustee may even be decreed to purchase other property of equal value with the trust property misappropriated, for the benefit of the *cestui que trust*.<sup>6</sup>

(2) **Enforcing Terms of Trust.** — Where the trustee refuses or neglects to carry out the terms of the trust the *cestui que trust* may proceed in the proper court to compel their fulfilment.<sup>7</sup>

As to the Proper Court in which to proceed there is full discussion elsewhere.<sup>8</sup>

(3) **Compelling an Accounting — By Trustee.** — One of the duties of a trustee to his *cestui que trust* is to afford him all reasonable and proper information in reference to the matter of the trust when called upon,<sup>9</sup> and the *cestui que trust* has a right to go into equity and compel an accounting when the trustee neglects<sup>10</sup> or refuses to perform this duty,<sup>11</sup> or does it in an imperfect manner.<sup>12</sup>

**By Third Person Holding Trust Property.** — The *cestui que trust* can compel an accounting not only from the trustee but from any person holding the trust property with notice of the trust.<sup>13</sup>

**Third Parties Cannot for Their Own Protection** require the *cestui* to follow the trust property rather than hold the trustee personally liable. *Barr v. Cabbage*, 52 Mo. 404.

**May Sue on Bond for Breach of Trust.** — *Armitage v. Snowden*, 41 Md. 119.

**1. Election Binding on Cestui.** — *Fears v. Lynch*, 28 Ga. 249; *Stoller v. Coates*, 88 Mo. 514; *Carter v. Gibson*, 61 Neb. 207; *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 10 Am. St. Rep. 479; *Barker v. Barker*, 14 Wis. 131. But see *Vance v. Kirk*, 29 W. Va. 344.

**2. Value of Property Misappropriated Recovered.** — *Ricketts v. Montgomery*, 15 Md. 46; *Freeman v. Cook*, 6 Ired. Eq. (41 N. Car.) 379.

**3. Value at Time of Misappropriation.** — *Flagg v. Mann*, 3 Sumn. (U. S.) 84; *Bradley v. Luce*, 99 Ill. 235; *Long v. Fox*, 100 Ill. 43; *Calhoun v. Burnett*, 40 Miss. 604; *Norman v. Cunningham*, 5 Gratt. (Va.) 72.

**4. Utmost Value.** — *Ricketts v. Montgomery*, 15 Md. 46.

**5. Rents and Profits.** — *Freeman v. Cook*, 6 Ired. Eq. (41 N. Car.) 379.

**6. Purchase of Other Property.** — *Oliver v. Piatt*, 3 How. (U. S.) 333; *Norman v. Cunningham*, 5 Gratt. (Va.) 72.

**7. Enforcing Terms of Trust — Alabama.** — *Duncan v. Simmons*, 2 Stew. & P. (Ala.) 356; *Robinson v. Mauldin*, 11 Ala. 977; *Bishop v. Bishop*, 13 Ala. 475.

*California.* — *Robles v. Clarke*, 25 Cal. 317.

*Delaware.* — *Collins v. Serverson*, 2 Del. Ch. 324.

*Georgia.* — *Brown v. Sockwell*, 26 Ga. 380.

*Illinois.* — *Cooper v. McClun*, 16 Ill. 435; *Maher v. Aldrich*, 205 Ill. 242; *Ackley v. Croucher*, 203 Ill. 530.

*Iowa.* — *Crawford v. Ginn*, 35 Iowa 543.

*Kentucky.* — *Berry v. Norris*, 1 Duv. (Ky.) 302.

*Massachusetts.* — *Tibballs v. Bidwell*, 1 Gray (Mass.) 399.

*Minnesota.* — *Ewing v. Clark*, 65 Minn. 71.

*Missouri.* — *Rector v. Hutchison*, 7 Mo. 522.

*Nebraska.* — *Goble v. Swobe*, 64 Neb. 838.

*New Jersey.* — *Wilson v. Ely*, 6 N. J. Eq. 181; *McCulloch v. Tomkins*, 62 N. J. Eq. 262.

*New York.* — *Griffen v. Ford*, 1 Bosw. (N. Y.) 123; *Depau v. Moses*, 3 Johns. Ch. (N. Y.) 349; *Mason v. Rice*, 85 N. Y. App. Div. 315; *Matter of Sill*, (Surrogate Ct.) 41 Misc. (N. Y.) 270.

*North Carolina.* — *McLean v. Nelson*, 1 Jones L. (46 N. Car.) 396; *Dameron v. Gold*, 2 Dev. Eq. (17 N. Car.) 17; *Link v. Link*, 90 N. Car. 235.

*Texas.* — *Dial v. Dial*, 21 Tex. 529.

*Virginia.* — *Emory, etc., College v. Shoemaker College*, 92 Va. 320.

See also the title TRUSTS AND TRUSTEES, 22 ENCYC. OF PL. AND PR. 1.

**8. Proper Court.** — See the title TRUSTS AND TRUSTEES, 22 ENCYC. OF PL. AND PR. 1.

**9. Duty of Trustees to Inform Cestui of State of Trust.** — *Hardwicke v. Vernon*, 14 Ves. Jr. 510; *Pearse v. Green, Jac. & W.* 140; *Ottley v. Gilby*, 8 Beav. 602; *Springett v. Dashwood*, 2 Giff. 521; *Kemp v. Burn*, 4 Giff. 348; *Cooper v. Weston*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 601.

It is the duty of trustees to afford to their *cestui que trust* accurate information of the disposition of the trust fund. *Walker v. Symonds*, 3 Swanst. 58.

**10. Neglect to Account.** — *Springett v. Dashwood*, 2 Giff. 521; *White v. Lincoln*, 8 Ves. Jr. 363.

**11. Refusal to Account.** — *Kemp v. Burn*, 4 Giff. 348; *Maverick Cong. Soc. v. Lovejoy*, 6 Allen (Mass.) 183.

**12. Imperfect Accounts.** — *Blauvelt v. Ackerman*, 23 N. J. Eq. 495.

**13. Accounting by Third Person Holding Trust Property.** — *Smith v. Barnes*, L. R. 1 Eq. 65.



A Consideration of What the Trustee Must Account For will be found elsewhere.<sup>1</sup>

(4) *Appointment of Receiver*. — The remedy the *cestui* has to go into a court of equity and secure a receivership for the trust property is treated elsewhere in this work.<sup>2</sup>

(5) *Removal of Trustee*. — The *cestui que trust* may under some circumstances proceed in equity for the removal of the trustee and for the substitution of another in his place. This remedy of the *cestui* against his trustee is considered elsewhere in this article in connection with the general treatment of the subject of the removal of trustees.<sup>3</sup>

(6) *Injunction*. — An injunction will lie by the *cestui que trust* to restrain the trustee from committing a threatened act detrimental to the trust estate<sup>4</sup> although the act threatened is not in its consequences irremediable.<sup>5</sup>

**Illustrations.** — A trustee has been restrained from selling trust property,<sup>6</sup> as where he was insolvent,<sup>7</sup> or was proceeding without giving notice of the sale to the *cestui que trust*,<sup>8</sup> or had inserted a depreciatory condition of sale,<sup>9</sup> or the title to the trust property was in dispute;<sup>10</sup> but he has not been restrained where the grounds for the bill were that the sale was advertised to take place at a time of great depression,<sup>11</sup> or where a court of concurrent jurisdiction had

1. See *supra*, this title, *The Trustee — Accounting*. And see, on the subject of the proper practice where an accounting is sought, the title TRUSTS AND TRUSTEES, 22 ENCYC. OF PL. AND PR. I.

2. *Receivership of Trust Property*. — See the title RECEIVERS, vol. 23, p. 1011.

3. See *supra*, this title, *The Trustee — Removal*.

4. *Injunction Will Lie — England*. — *Balls v. Strutt*, 1 Hare 146; *Ludlow v. Greenhouse*, 1 Bligh N. S. 57; *In re Chertsey Market*, 6 Price 279; *Atty.-Gen. v. Foundling Hospital*, 2 Ves. Jr. 42; *Anonymous*, 6 Madd. 10; *Webb v. Shaftesbury*, 7 Ves. Jr. 487; *Reeve v. Parkins*, 2 J. & La T. 390; *Milligan v. Mitchell*, 1 Myl. & K. 446; *Atty.-Gen. v. Liverpool*, 1 Myl. & C. 210; *Vann v. Barnett*, 2 Bro. C. C. 157; *Pechel v. Fowler*, 2 Anstr. 549; *Scott v. Becher*, 4 Price 346; *Jenkins v. Jones*, 2 Giff. 99; *Mansfield v. Shaw*, 3 Madd. 100; *Taylor v. Allen*, 2 Atk. 213; *Gladdon v. Stoneman*, 1 Madd. 141, note; *Howard v. Papera*, 1 Madd. 143; *Hathornthwaite v. Russel*, 2 Atk. 126, Barn. Ch. 334; *Everett v. Prythergch*, 12 Sim. 365.

*United States*. — *Dodge v. Woolsey*, 18 How. (U. S.) 331.

*Delaware*. — *Davis v. Browne*, 2 Del. Ch. 188.

*Georgia*. — *McCreary v. Gewinner*, 103 Ga. 528.

*New Hampshire*. — *Gale v. Sulloway*, 62 N. H. 57.

*New York*. — *Blake v. Buffalo Creek R. Co.*, 56 N. Y. 485.

*North Carolina*. — *Irwin v. Harris*, 6 Ired. Eq. (41 N. Car.) 215.

*West Virginia*. — *Forsyth v. Wheeling*, 19 W. Va. 318.

5. *Though Act Not Irremediable*. — *Atty.-Gen. v. Liverpool*, 1 Myl. & C. 174; *Downey v. Dennis*, 14 Ont. 219.

6. *Sale of Trust Property Restrained*. — *Sanders v. Christie*, 1 Grant Ch. (U. C.) 137; *Casady v. Bosler*, 11 Iowa 242; *Richards v. Richards*, 9 Gray (Mass.) 313; *Goncelier v. Foret*, 4 Minn. 13; *Davis v. Mugan*, 56 Mo. App. 311; *Mc-*

*Neely v. Steele*, Busb. Eq. (45 N. Car.) 240; *Raleigh v. Fitzpatrick*, 43 N. J. Eq. 501; *Depau v. Moses*, 3 Johns. Ch. (N. Y.) 349; *Watson v. Fletcher*, 7 Gratt. (Va.) 1; *Brockenbrough v. Spindle*, 17 Gratt. (Va.) 21.

*Imprudent and Improper Sale of Trust Property Prevented by injunction*. — *Downey v. Dennis*, 14 Ont. 219.

7. *Insolvency of the Trustee* may be a good ground for restraining him from selling trust property. *Mansfield v. Shaw*, 3 Madd. 100; *Scott v. Becher*, 4 Price 346; *Taylor v. Allen*, 2 Atk. 213.

But in *Illinois* the court refused to restrain the sale of trust property by an insolvent trustee where the *cestui* failed to show that the trustee became insolvent after he was appointed or that there was danger that he would misapply the moneys arising from the sale. *Tooke v. Newman*, 75 Ill. 215.

8. *Failure to Give Notice to Cestui*. — A trustee under power of sale in a mortgage deed may be restrained from selling the mortgaged premises where he has not apprised either the mortgagor or the mortgagee who are the *cestui que trust* — of his intention to proceed to a sale. *Anonymous*, 6 Madd. 11.

9. *Depreciatory Condition of Sale*. — A trustee will be restrained from selling trust property where a breach of the trust has been committed by inserting a condition calculated to depreciate the property at the auction without any reasonable ground for so doing. *Dance v. Goldingham*, L. R. 8 Ch. 902.

10. *Title in Dispute* — Where title to trust property is in dispute the trustee will be restrained from selling it, as it is probable that the full value cannot be obtained. *Lane v. Tidball*, Gilmer (Va.) 130; *Faulkner v. Davis*, 18 Gratt. (Va.) 651, 08 Am. Dec. 698.

11. *Sale at Time of Great Depression*. — But in *Caperton v. Landcraft*, 3 W. Va. 540, a bill seeking to restrain a trustee from selling trust property on the ground that the sale was advertised at a time when in consequence of the general prevalent depression and extreme scarcity of money, and the season of the year, and the

confirmed similar sales of other trust property although there was an appeal pending from such decision.<sup>1</sup> He has also been restrained from removing trust property beyond the jurisdiction of the court,<sup>2</sup> from prosecuting an action at law,<sup>3</sup> or from intermeddling with the trust property after his authority had lawfully ceased.<sup>4</sup>

*c. LOSS OF REMEDIES* — (1) *Laches*. — The doctrine of laches as affecting any of the *cestui's* remedies is treated elsewhere.<sup>5</sup>

(2) *Estoppel and Waiver*. — Acts done by the trustee in violation of the terms of the trust are not void, but are only voidable at the election of the *cestui que trust*,<sup>6</sup> and the latter may by estoppel and waiver lose his right to any remedy in consequence of such acts; as where he authorizes or concurs in the doing of the acts,<sup>7</sup> or acquiesces in them,<sup>8</sup>

inclemency of the weather at the time of the proposed sale, such a sale must result in great pecuniary loss and sacrifice, was dismissed.

1. *Similar Sales Confirmed*. — *Withers v. Denmead*, 22 Md. 135.

2. *Removing Trust Property Beyond the Jurisdiction of the Court*. — *Symons v. Reid*, 5 Jones Eq. (58 N. Car.) 327.

3. *Prosecuting Action at Law*. — The case of a trustee attempting to pervert his trust, or employ it to the prejudice of his *cestui que trust*, by a proceeding at law in which the *cestui que trust* would be barred of an adequate protection, is particularly appropriate for the interference of equity to restrain the proceeding by injunction. *St. Luke's Hospital v. Barclay*, 3 Blatchf. (U. S.) 259.

*Action of Ejectment Restrained*. — *Brown v. Combs*, 29 N. J. L. 36.

4. *Intermeddling with Trust Property After Authority Has Ceased*. — *Maverick Cong. Soc. v. Lovejoy*, 6 Allen (Mass.) 183.

5. *Laches*. — See *infra*, this title, *Limitations and Laches*.

6. *Unauthorized Acts Voidable Only*. — *Phillips v. Sanger Lumber Co.*, 130 Cal. 431.

7. *Authorization or Concurrence* — *England*. — *Whicote v. Lawrence*, 3 Ves. Jr. 740; *White v. White*, 5 Ves. Jr. 554; *Lister v. Lister*, 6 Ves. Jr. 631; *Ex p. James*, 8 Ves. Jr. 351; *Brice v. Stokes*, 11 Ves. Jr. 319; *Parkes v. White*, 11 Ves. Jr. 226; *Langford v. Gascoyne*, 11 Ves. Jr. 336; *Walker v. Symonds*, 3 Swanst. 1; *Ryder v. Bickerton*, 3 Swanst. 80 note; *Cresswell v. Dewell*, 4 Giff. 460; *Booth v. Booth*, 1 Beav. 125; *Fyler v. Fyler*, 3 Beav. 550; *Baker v. Read*, 18 Beav. 398; *Griffiths v. Porter*, 25 Beav. 236; *Nail v. Punter*, 5 Sim. 555; *Fellows v. Mitchell*, 1 P. Wms. 81; *Thayer v. Gould*, 1 Atk. 615; *Smith v. French*, 2 Atk. 243; *Jones v. Higgins*, L. R. 2 Eq. 538; *Webb v. Rorke*, 2 Sch. & Lef. 661; *Anonymous*, 2 Russ. 350; *In re Chertsey Market*, 6 Price 280; *Oliver v. Court*, 8 Price 167; *Roche v. O'Brien*, 1 Ball & B. 354; *Bateman v. Davis*, 3 Madd. 98; *Byrchall v. Bradford*, 6 Madd. 235; *Underwood v. Stevens*, 1 Meriv. 717; *Life Assoc. v. Siddal*, 3 De G. F. & J. 74; *Phillipson v. Gatty*, 7 Hare 516.

*Canada*. — *Eastern Trust Co. v. Forrest*, 30 Nova Scotia 173.

*Alabama*. — *Crutchfield v. Haynes*, 14 Ala. 49; *Colbert v. Daniel*, 32 Ala. 322.

*Georgia*. — *Fears v. Lynch*, 28 Ga. 249; *Dykes v. McVay*, 67 Ga. 502.

*Illinois*. — *Ferguson v. Tallmadge*, 20 Ill. 581; *Martin v. Clark*, 116 Ill. 654; *Hull v. Glover*, 126 Ill. 122.

*Indiana*. — *Huff v. Earl*, 3 Ind. 306; *Rice v. Cleghorn*, 21 Ind. 80.

*Iowa*. — *Buell v. Buckingham*, 16 Iowa 284, 85 Am. Dec. 516.

*Maryland*. — *Mason v. Martin*, 4 Md. 124; *Ricketts v. Montgomery*, 15 Md. 46; *Ehlen v. Baltimore*, 76 Md. 576.

*Massachusetts*. — *Pope v. Farnsworth*, 146 Mass. 339; *Preble v. Greenleaf*, 180 Mass. 79.

*Mississippi*. — *Jones v. Smith*, 33 Miss. 215.

*Missouri*. — *Newton v. Rebenack*, 90 Mo. App. 650.

*New Hampshire*. — *Page v. Page*, 8 N. H. 187; *Dudley v. Eastman*, 70 N. H. 418.

*New Jersey*. — *Vreeland v. Van Horn*, 17 N. J. Eq. 137.

*New York*. — *Schenck v. Ellingwood*, 3 Edw. (N. Y.) 175; *Clark v. Law*, (C. Pl. Spec. T.) 22 How. Pr. (N. Y.) 426; *Johnson v. Bennett*, 39 Barb. (N. Y.) 237; *Boerum v. Schenck*, 41 N. Y. 182; *Sherman v. Parish*, 53 N. Y. 483; *Butterfield v. Cowing*, 112 N. Y. 486; *Matter of Niles*, 113 N. Y. 547; *Matter of Hall*, 164 N. Y. 196; *Storrs v. Flint*, 46 N. Y. Super. Ct. 498; *In re Washbon*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 672; *Woodbridge v. Bockes*, 59 N. Y. App. Div. 503, *affirming* 170 N. Y. 596.

*North Carolina*. — *Villines v. Norfleet*, 2 Dev. Eq. (17 N. Car.) 167; *West v. Sloan*, 3 Jones Eq. (56 N. Car.) 102; *Pitt v. Petway*, 12 Ired. L. (34 N. Car.) 69; *Spencer v. Hawkins*, 4 Ired. Eq. (39 N. Car.) 288.

*Pennsylvania*. — *Magraw v. Pennock*, 2 Grant Cas. (Pa.) 89; *Clermontel's Estate*, 12 Phila. (Pa.) 139, 35 Leg. Int. (Pa.) 306; *Ervin's Estate*, 21 Pa. Co. Ct. 281.

*South Carolina*. — *Waring v. Purcell*, 1 Hill Eq. (S. Car.) 202; *McNish v. Pope*, 8 Rich. Eq. (S. Car.) 112; *Jones v. Hudson*, 23 S. Car. 494.

*Tennessee*. — *Springs v. Cooper*, (Tenn. Ch. 1898) 51 S. W. Rep. 997; *Brown v. Brown*, 107 Tenn. 349.

*Virginia*. — *Sedgwick v. Taylor*, 84 Va. 820; *Smith v. Miller*, 98 Va. 535.

8. *Acquiescence*. — *Harden v. Parsons*, 1 Eden 145; *Western Div. of Western North Carolina R. Co. v. Drew*, 3 Woods (U. S.) 691; *Hume v. Beale*, 17 Wall. (U. S.) 336; *Ames Iron Works v. West*, 24 Fed. Rep. 313; *Follansbe v. Kilbreth*, 17 Ill. 522, 65 Am. Dec. 691; *Miles v. Wheeler*, 43 Ill. 123; *Mitchell v. Berry*, 1 Met.

or ratifies them<sup>1</sup> after they are done.<sup>2</sup> But in order for his conduct to affect his right to relief he must labor under no legal incapacity;<sup>3</sup> and what he does must be voluntary and without pressure,<sup>4</sup> with full knowledge of all the facts and circumstances,<sup>5</sup> and clear and unequivocal.<sup>6</sup>

**Illustration.** — The concurrence or acquiescence sufficient to estop the *cestui que trust* from any relief for a breach of the trust may consist in consenting to<sup>7</sup> or accepting the proceeds of an unauthorized sale of the trust property,<sup>8</sup> standing by while the purchaser makes valuable improvements on it,<sup>9</sup> suggesting, consenting to, or acquiescing in an improper investment which proves disastrous to the trust estate,<sup>10</sup> or agreeing to a delay in investing trust

(Ky.) 602; *Pope v. Farnsworth*, 146 Mass. 339; *Davis v. Bowmar*, 55 Miss. 671; *Atty.-Gen. v. Dublin*, 38 N. H. 459; *Vreeland v. Van Horn*, 17 N. J. Eq. 137; *Villines v. Norfleet*, 2 Dev. Eq. (17 N. Car.) 167; *Butterfield v. Cowing*, 112 N. Y. 486; *Williams v. First Presb. Soc.*, 1 Ohio St. 478.

**1. Ratification.** — *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467.

**2.** In *Butterfield v. Cowing*, 112 N. Y. 486, the court said: "It is quite clear that no *cestui que trust* can allege that to be a breach of trust which has been done under his own sanction, whether by previous consent or subsequent ratification. The general rule is that either concurrence in the act or acquiescence without original concurrence will release the trustee."

**3. There Must Exist No Legal Incapacity.** — *Luers v. Brunjes*, 5 Redf. (N. Y.) 32; *Clark v. Law*, (C. Pl. Spec. T.) 22 How. Pr. (N. Y.) 426; *Cumberland Coal, etc., Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Boerum v. Schenck*, 41 N. Y. 182.

**A Married Woman Has Capacity** to consent to a breach of a trust affecting property settled to her separate use. *Crosby v. Church*, 3 Beav. 485; *Hanchett v. Briscoe*, 22 Beav. 496. And see the title SEPARATE PROPERTY OF MARRIED WOMEN, vol. 25, p. 436.

In *Sherman v. Parish*, 53 N. Y. 483, the court said: "It is stated generally in the text-books that acquiescence by the *cestui que trust* in a breach of trust by the trustee will bar a recovery therefor. This generality is stated to be so limited, as that the *cestui que trust* must be *sui juris* and capable of acting for themselves; so that married women, minors, and others thus under disability cannot be bound by alleged acquiescence, or even by urgent requests. This, again, is qualified to the extent that a married woman may acquiesce in an unauthorized investment of trust property given to her sole and separate use, in such manner as to bar her, after complaint of the investment as improper, so as to affect her trustee personally."

**4. Voluntary.** — *Bateman v. Davis*, 3 Madd. 98; *Boerum v. Schenck*, 41 N. Y. 182; *Wetmore v. Stromeyer*, 38 N. Y. App. Div. 627.

**5. Knowledge of Facts** — *England*. — *Buckridge v. Glasse*, Cr. & Ph. 135; *Mellish's Estate*, 1 Pars. Eq. Cas. (Pa.) 486; *Life Assoc. v. Siddal*, 3 De G. F. & J. 73; *Ryder v. Bickerton*, 3 Swanst. 80, note; *Cope v. Clark*, 18 W. R. 270; *Thompson v. Finch*, 22 Beav. 325.

*Canada*. — *Inglis v. Beaty*, 2 Ont. App. 453. *United States*. — *Prevost v. Gratz*, 6 Wheat. (U. S.) 487.

*Illinois*. — *Gilman, etc., R. Co. v. Kelly*, 77 Ill. 426; *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, affirming 62 Ill. App. 271.

*Minnesota*. — *St. Paul Trust Co. v. Strong*, 85 Minn. 1.

*Missouri*. — *Newton v. Rebenack*, 90 Mo. App. 650.

*New York*. — *Luers v. Brunjes*, 5 Redf. (N. Y.) 32; *Wetmore v. Stromeyer*, 38 N. Y. App. Div. 627; *Smith v. Howlett*, 29 N. Y. App. Div. 182; *Matter of Reed*, 45 N. Y. App. Div. 196.

*North Carolina*. — *West v. Sloan*, 3 Jones Eq. (56 N. Car.) 102.

*Pennsylvania*. — *Beeson v. Beeson*, 9 Pa. St. 300.

*Vermont*. — *Re Hodges*, 63 Vt. 661.

**Knowledge of Legal and Equitable Rights.** — The *cestui's* act must be done with a knowledge of his legal and equitable rights. *Mulford v. Minch*, 11 N. J. Eq. 16, 64 Am. Dec. 472. And see *Luers v. Brunjes*, 5 Redf. (N. Y.) 32.

In *Walker v. Symonds*, 3 Swanst. 1, the court said: "The court must inquire into the circumstances which induced concurrence or acquiescence, recollecting in the conduct of that inquiry how important it is on the one hand to secure the property of the *cestui que trust*, and on the other not to deter men from undertaking trusts from the performance of which they seldom obtain either satisfaction or gratitude."

**6. Clear and Unequivocal.** — *Boerum v. Schenck*, 41 N. Y. 190. In this case it was held that the acceptance of proceeds of an unauthorized sale of trust property with a reservation of the right to contest its validity did not act as an estoppel.

**7. Consenting to Unauthorized Sale.** — *Dykes v. McVay*, 67 Ga. 502.

**8. Acceptance of Proceeds of Unauthorized Sale.** — *Marx v. Clisby*, 130 Ala. 502; *Boerum v. Schenck*, 41 N. Y. 182; *Johnson v. Bennett*, 39 Barb. (N. Y.) 237. And see *Stump v. Gaby*, 2 De G. M. & G. 623; *Bensusan v. Nehemias*, 15 Jur. 503, 20 L. J. Ch. 536; *Phillips v. Sanger Lumber Co.*, 130 Cal. 431; *Rosenberger's Appeal*, 26 Pa. St. 67.

**9. Standing by While Valuable Improvements Made.** — *Iverson v. Saulsbury*, 65 Ga. 724; *Mulford v. Minch*, 11 N. J. Eq. 16, 64 Am. Dec. 472.

**10. Improper Investment.** — *White v. Sherman*, 168 Ill. 589, 61 Am. St. Rep. 132, affirming 62 Ill. App. 271; *Phillips v. Burton*, (Ky. 1899) 52 S. W. Rep. 1064; *Matter of Hall*, 164 N. Y. 196; *Clermontel's Estate*, 12 Phila. (Pa.) 139, 35 Leg. Int. (Pa.) 306.

In the Case of Separate Investments, some of



money in stocks advancing in the meantime.<sup>1</sup>

**A Remainderman** cannot acquiesce in the acts of the trustee until his interest falls into possession.<sup>2</sup>

**Concurrence by One of Several Cestuis.** — Where a loss occurs to a trust estate by reason of an illegal act of the trustee and there are several *cestuis que trustent* one only of whom concurs or acquiesces in the illegal act, the share of that one will be applied to make good the loss suffered by the other *cestuis*.<sup>3</sup>

**VIII. RIGHTS AND LIABILITIES OF PURCHASERS — 1. Duty to See Purchase Money Applied** — *a.* **WHEN TRUST IS DEFINITE** — (1) *In General.* — While at law the title of trust property is regarded as in the trustee, who can therefore convey it, equity looks on the beneficiary as the real owner. Out of this difference in point of view there have arisen certain rules as to when it is the duty of a purchaser of trust property to see to the application of the purchase money. The doctrine is applied in general only in cases where there is either such definiteness in the object of the trust as makes the imposition of that obligation reasonable or such fraud or unfair dealing as makes it just.

(2) *Trust to Pay Specified Debts.* — Thus, where the trust directs that property shall be sold for the payment of debts particularly specified, the purchaser must see to the application by the trustee, and for his own protection should demand a receipt from the *cestui que trust*.<sup>4</sup>

(3) *Specified Legacies and Annuities.* — The same rule applies to a trust for the payment of specified legacies and annuities.<sup>5</sup>

(4) *Doctrine Criticised.* — The doctrine as applied to cases other than those of fraud has never been popular in the United States, and has been severely criticised in England as productive of more inconvenience than real good and as carried further than sound equitable principles would warrant.<sup>6</sup>

which have resulted in profits and some in losses, the *cestui que trust* may ratify such investments as have been profitable and at the same time reject the unprofitable ones. *King v. Talbot*, 40 N. Y. 76. See also *Robinson v. Robinson*, 11 Beav. 371; *Oliver v. Piatt*, 3 How. (U. S.) 333; *Norris's Appeal*, 71 Pa. St. 106.

But this rule was held not to apply where the trustee, in speculating with the trust funds, deposited the trust securities with a broker on a margin, and some of the broker's transactions were profitable. In such case there was no setting apart of a particular portion of the trust fund and using it to make a particular investment. *English v. McIntyre*, 29 N. Y. App. Div. 439.

**1. Investing Trust Money in Stocks.** — *Byrchall v. Bradford*, 6 Madd. 13.

**2. Acquiescence by Remainderman.** — *Penn v. Fogler*, 182 Ill. 76, reversing 77 Ill. App. 365.

**3. Concurrence or Acquiescence of One of Several Cestuis.** — *Ehlen v. Baltimore*, 76 Md. 576.

**4. Trust to Pay Specified Debts** — *England.* — *Elliott v. Merryman*, 1 Hare & W. Lead. Cas. 45; *Dunch v. Kent*, 1 Vern. 261; *Abbot v. Gibbs*, 1 Eq. Cas. Abr. 358, par. 2; *Smith v. Guyon*, 1 Bro. C. C. 186; *Lloyd v. Baldwin*, 1 Ves. 173; *Jthell v. Beane*, 1 Ves. 215; *Culpepper v. Austin*, 2 Ch. Cas. 223; *Cotterel v. Hampson*, 2 Vern. 5; *Currer v. Walkley*, 2 Dick. 649; *Binks v. Rokeby*, 2 Madd. 238; *Doran v. Wiltshire*, 3 Swanst. 701; *Rogers v. Skillicorne*, Ambl. 189; *Storry v. Walsh*, 18 Beav. 559.

*United States.* — *Gardner v. Gardner*, 3 Mason (U. S.) 178.

*Kentucky.* — *Curd v. Field*, 103 Ky. 293.

*Maryland.* — *Duffy v. Calvert*, 6 Gill (Md.) 487.

*New Jersey.* — *St. Mary's Church v. Stockton*, 8 N. J. Eq. 520.

**5. Specific Legacies and Annuities.** — *Horn v. Horn*, 2 Sim. & St. 448; *Johnson v. Kennett*, 3 Myl. & K. 630; *Dickenson v. Dickenson*, 3 Bro. C. C. 19; *Amherst College v. Smith*, 134 Mass. 543; *Clyde v. Simpson*, 4 Ohio St. 445; *Downman v. Rust*, 6 Rand. (Va.) 587.

Where the trust property descends, on the death of the trustee, to his heirs at law, some of whom are minors and legally incompetent to discharge its functions, a purchaser bound to see to the application of the purchase money may apply to a court of chancery, making all persons in interest parties, and ask that the court appoint some one to receive and apply the purchase money. *Duffy v. Calvert*, 6 Gill (Md.) 487.

Likewise a purchaser who subsequently discovers his vendor's misapplication of the trust fund, may apply for the appointment of a receiver to look after the rents or to apply the purchase money. *Shelton v. Laird*, 68 Miss. 175.

**6. Doctrine Criticised.** — *Co. Litt. 290b.*, *Butler's note* (1); *Balfour v. Welland*, 16 Ves. Jr. 155 (Lord Eldon). See also *Rutledge v. Smith*, *Busb. Eq.* (45 N. Car.) 283; *Lining v. Peyton*, 2 Desaus. (S. Car.) 375; *Seaverns v. Presbyterian Hospital*, 173 Ill. 424, 64 Am. St. Rep. 125.

Even before the rule was abolished by statute it was common to nullify it by inserting in wills and deeds a clause to the effect that the receipt of the trustees should be a complete discharge. 2 *Co. Litt. 290b.*, note (1), § xiv.

(5) *Statutory Regulations.* — In some jurisdictions the common law rule as to seeing to the application of the purchase money has been abolished by statute. These statutes follow the English act which provides in effect that the *bona fide* payment to and the receipt of any person to whom any purchase or mortgage money is payable on any express or implied trust shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof unless the contrary shall be expressly declared by the instrument creating the trust or security.<sup>1</sup>

**The Rule Re-enacted.** — In a few jurisdictions the common law rule has been re-enacted by statute.<sup>2</sup>

*b. NOTICE, FRAUD, AND COLLUSION* — (1) *Fraud by Trustee.* — Where a trustee wrongfully sells, pledges, or assigns trust property or uses the proceeds for a purpose not authorized by the trust, a purchaser chargeable with notice of the trust and of the proposed breach is bound to see to the application of the purchase money; in other words, he is regarded by a court of equity as himself a trustee and affected with all the equities that existed in favor of the *cestui que trust* prior to the transfer.<sup>3</sup>

**1. Statutory Regulations** — *England.* — 7 & 8 Vict., c. 76, § 10; 8 & 9 Vict., c. 106, § 1; 22 & 23 Vict., c. 35, § 23; 23 & 24 Vict., c. 14, §§ 12 and 29; 2 Sugden on Vendors (14th ed.), p. 355.

*Canada.* — *Place v. Spawn*, 7 Grant Ch. (U. C.) 406.

*Kentucky.* — Ky. Stat., § 4846; *Magowan v. McCormick*, (Ky. 1889) 10 S. W. Rep. 632; *Johnson v. Dumeyer*, (Ky. 1902) 66 S. W. Rep. 1025; *Miller v. Stagner*, (Ky. 1903) 76 S. W. Rep. 160; *Robinson v. Pence*, (Ky. 1903) 76 S. W. Rep. 368; *Curd v. Field*, 103 Ky. 293.

*Missouri.* — *Orr v. Rode*, 101 Mo. 387.

*New York.* — 1 Rev. Stat. 730, § 66. See also *Waterman v. Webster*, 108 N. Y. 157. But see *Champlin v. Haight*, 10 Paige (N. Y.) 275, 7 Hill (N. Y.) 245.

**2. The Rule Re-enacted.** — *Whittle v. Vanderbilt*, Min., etc., Co., 83 Fed. Rep. 48; *Warnock v. Harlow*, 96 Cal. 298, 31 Am. St. Rep. 209; *Anderson v. Foster*, 112 Ga. 270.

**3. Fraud by Trustee** — *England.* — *Adair v. Shaw*, 1 Sch. & Lef. 262; *Watkins v. Check*, 2 Sim. & St. 199; *Eland v. Eland*, 4 Myl. & C. 427. See also *Rogers v. Skillicorne*, Amb. 189; *Atty.-Gen. v. Leicester*, 7 Beav. 176.

*Canada.* — *Blackburn v. Gummerson*, 8 Grant Ch. (U. C.) 331.

*United States.* — *Hoxie v. Carr*, 1 Sumn. (U. S.) 193; *Mechanics Bank v. Seton*, 1 Pet. (U. S.) 299; *Piatt v. Oliver*, 3 McLean (U. S.) 27; *Wormley v. Wormley*, 8 Wheat. (U. S.) 422; *Potter v. Gardner*, 12 Wheat. (U. S.) 499; *Smith v. Ayer*, 101 U. S. 320; *Second Unitarian Soc. v. Grant*, 55 Fed. Rep. 22.

*Alabama.* — *Jones v. Shaddock*, 41 Ala. 263; *Meyer v. Mitchell*, 75 Ala. 475; *Bates v. Kelly*, 80 Ala. 142; *Goetter v. Norman*, 107 Ala. 586; *Clemmons v. Cox*, 114 Ala. 355; *Randolph v. East Birmingham Land Co.*, 104 Ala. 355, 53 Am. St. Rep. 64; *Stickney v. Adler*, 91 Ala. 198.

*Arkansas.* — *Pindall v. Trevor*, 30 Ark. 249; *Grider v. Driver*, 46 Ark. 109; *Atkinson v. Ward*, 47 Ark. 533.

*California.* — *Price v. Reeves*, 38 Cal. 457; *Sharp v. Goodwin*, 51 Cal. 219; *Cavagnaro v. Don*, 63 Cal. 227.

*Connecticut.* — *Beecher v. Buckingham*, 18 Conn. 110, 44 Am. Dec. 580; *Leake v. Watson*, 58 Conn. 332, 18 Am. St. Rep. 270.

*Illinois.* — *Reece v. Allen*, 10 Ill. 236, 48 Am. Dec. 336; *Fast v. McPherson*, 98 Ill. 496; *Union Mut. L. Ins. Co. v. Spaid*, 99 Ill. 249; *Phillips v. South Park Com'rs*, 119 Ill. 626; *Union Mut. L. Ins. Co. v. Slee*, 123 Ill. 57; *Cushman v. Bonfield*, 139 Ill. 219; *Indiana*, etc., R. Co. v. *Swannell*, 157 Ill. 616.

*Indiana.* — *Nugent v. Laduke*, 87 Ind. 482; *Hanna v. McLaughlin*, 158 Ind. 292.

*Iowa.* — *Stewart v. Chadwick*, 8 Iowa 463; *Ryan v. Doyle*, 31 Iowa 53; *Zuver v. Lyons*, 40 Iowa 510; *Davenport Plow Co. v. Lamp*, 80 Iowa 722, 20 Am. St. Rep. 442; *Bunton v. King*, 80 Iowa 506.

*Kansas.* — *Reeves v. Pierce*, 64 Kan. 502.

*Kentucky.* — *Tobin v. Helm*, 4 J. J. Marsh. (Ky.) 288; *Columbia Finance, etc., Co. v. First Nat. Bank*, 76 S. W. Rep. 156, 25 Ky. L. Rep. 561; *Darnaby v. Watts*, (Ky. 1894) 28 S. W. Rep. 338.

*Maryland.* — *Hagthorp v. Hook*, 1 Gill & J. (Md.) 270; *Seldner v. McCreery*, 75 Md. 287; *Barroll v. Forman*, 88 Md. 188.

*Massachusetts.* — *Dyer v. Clark*, 5 Met. (Mass.) 580; *Loring v. Brodie*, 134 Mass. 453; *Blake v. Traders' Nat. Bank*, 145 Mass. 13; *Fisher v. Brown*, 104 Mass. 259, 6 Am. Rep. 235.

*Mississippi.* — *Vernon v. Board of Police*, 47 Miss. 181; *Eustice v. Holmes*, 52 Miss. 305.

*Missouri.* — *Smith v. Walser*, 49 Mo. 250; *Turner v. Hoyle*, 95 Mo. 337.

*Nebraska.* — *McWaid v. Blair State Bank*, 58 Neb. 618.

*New Jersey.* — *Wilson v. Ely*, 6 N. J. Eq. 181; *Nicholls v. Peak*, 12 N. J. Eq. 69; *Dey v. Dey*, 26 N. J. Eq. 182; *Foster v. Dey*, 27 N. J. Eq. 600; *Ross v. Fitzgerald*, 32 N. J. Eq. 838; *Jeffray v. Towar*, 63 N. J. Eq. 530.

*New York.* — *Pendleton v. Fay*, 2 Paige (N. Y.) 202; *Champlin v. Haight*, 10 Paige (N. Y.) 274; *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566; *Sheperd v. M'Ever*, 4 Johns. Ch. (N. Y.) 136, 8 Am. Dec. 561; *Smith v. Bowen*, 35 N. Y. 83; *Moloney v. Tilton*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 682; *Reynolds v.*

(2) *Fraud by Executor or Administrator.* — The general rule is that a purchaser in good faith from an executor or administrator is not bound to see to the application of the purchase money, though the executor or administrator was acting in bad faith and with the intention of misapplying the proceeds when he made the sale; but the purchaser will be held liable if he had notice of the fraudulent intent of the executor or administrator and participated therein.<sup>1</sup>

*Ætna L. Ins. Co.*, 28 N. Y. App. Div. 591; *English v. McIntyre*, 29 N. Y. App. Div. 439; *Fritz v. City Trust Co.*, 72 N. Y. App. Div. 532; *Le Baron v. Long Island Bank*, (Supm. Ct. Spec. T.) 53 How. Pr. (N. Y.) 286; *Robinson v. Adams*, 81 N. Y. App. Div. 20; *Wetmore v. Porter*, 92 N. Y. 76; *Zimmerman v. Kinkle*, 108 N. Y. 282. See also *James v. Cowing*, 17 Hun (N. Y.) 256.

*North Carolina.* — *Wilson v. Doster*, 7 Ired. Eq. (42 N. Car.) 231; *Tankard v. Tankard*, 84 N. Car. 286.

*Ohio.* — *Clyde v. Simpson*, 4 Ohio St. 445.

*Pennsylvania.* — *Garrard v. Pittsburgh, etc.*, R. Co., 29 Pa. St. 154; *Coble v. Nonemaker*, 78 Pa. St. 501.

*Rhode Island.* — *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510.

*South Carolina.* — *Fry v. Fry*, 6 Rich. Eq. (S. Car.) 129; *Salinas v. Pearsall*, 24 S. Car. 179; *Bomar v. Gist*, 25 S. Car. 340; *Sullivan v. Latimer*, 35 S. Car. 422.

*South Dakota.* — *Luscombe v. Grigsby*, 11 S. Dak. 408.

*Tennessee.* — *Pinson v. Ivey*, 1 Yerg. (Tenn.) 296; *Cardwell v. Cheatham*, 2 Head (Tenn.) 14; *North Carolina University v. Cambreling*, 6 Yerg. (Tenn.) 79; *Hadley v. Kendrick*, 10 Lea (Tenn.) 525; *Covington v. Anderson*, 16 Lea (Tenn.) 310; *Baxter v. Knoxville First Nat. Bank*, 85 Tenn. 33; *Harris v. Smith*, 98 Tenn. 286.

*Texas.* — *Everett v. Texas Mexican R. Co.*, 67 Tex. 430; *Golson v. Fielder*, 2 Tex. Civ. App. 400.

*Utah.* — *Haslam v. Haslam*, 19 Utah 1; *Schenck v. Wicks*, 23 Utah 576.

*Virginia.* — *Dodson v. Simpson*, 2 Rand. (Va.) 294; *Heth v. Richmond, etc.*, R. Co., 4 Gratt. (Va.) 482, 50 Am. Dec. 88; *Graff v. Castleman*, 5 Rand. (Va.) 195, 16 Am. Dec. 741; *Taylor v. King*, 6 Munf. (Va.) 358, 8 Am. Dec. 746; *Barksdale v. Finney*, 14 Gratt. (Va.) 338.

*West Virginia.* — *Cain v. Cox*, 23 W. Va. 594; *Skaggs v. Mann*, 46 W. Va. 209.

*Wisconsin.* — *Hill v. True*, 104 Wis. 294.

For additional cases in point see those cited *infra*, this section, (5) *What Constitutes Notice*.

Where a trust already exists the purchaser with notice is affected thereby, although his assumption thereof is by parol agreement. *Scrivner v. Dietz*, 84 Cal. 297.

The consent and ratification of the trustee cannot avail to discharge the party misappropriating trust money from liability to the *cestui que trust*. If he ratifies with a full knowledge of the facts such ratification renders him liable with the party misapplying the fund. *Bigham v. Coleman*, 71 Ga. 176; *Anderson v. Foster*, 112 Ga. 270.

Where one trustee permits his cotrustee to retain possession of a note payable to the two, the maker of the note may, at maturity, pay the amount due to the trustee in possession and is not responsible for his misappropriation of the proceeds. *Barroll v. Forman*, 88 Md. 188; *Van Horne's Petition*, 18 R. I. 389.

1. See the title EXECUTORS AND ADMINISTRATORS, vol. 11, pp. 1031, 1056.

See also the following cases:

*England.* — *Burting v. Stonard*, 2 P. Wms. 150; *Crane v. Drake*, 2 Vern. 616; *Watkins v. Check*, 2 Sim. & St. 199; *Bodenham v. Hoskyns*, 2 De G. M. & G. 903; *Andrew v. Wrigley*, 4 Bro. C. C. 136; *Colyer v. Finch*, 5 H. L. Cas. 905; *Hill v. Simpson*, 7 Ves. Jr. 152; *Corser v. Cartwright*, L. R. 7 H. L. 731; *Collinson v. Lister*, 7 De G. M. & G. 634; *Nugent v. Gifford*, 1 Atk. 463; *Taner v. Ivie*, 2 Ves. 466; *Mead v. Orrery*, 3 Atk. 240; *Keane v. Roberts*, 4 Madd. 357; *Whale v. Booth*, 4 T. R. 625 note (at law); *Savage v. Humble*, 1 Bro. P. C. 71; *M'Leod v. Drummond*, 17 Ves. Jr. 154.

*United States.* — *Duncan v. Jaudon*, 15 Wall. (U. S.) 176; *Smith v. Ayer*, 101 U. S. 320.

*Alabama.* — *Williamson v. Branch Bank*, 7 Ala. 906, 42 Am. Dec. 617; *Hutchinson v. Owen*, 59 Ala. 326.

*Connecticut.* — *Goodwin v. American Nat. Bank*, 48 Conn. 550.

*Illinois.* — *Whitman v. Fisher*, 74 Ill. 147.

*Indiana.* — *Thomasson v. Brown*, 43 Ind. 203; *Fleece v. Jones*, 71 Ind. 340; *Krutz v. Stewart*, 76 Ind. 9; *Rogers v. Zook*, 86 Ind. 237.

*Iowa.* — *Marshall County v. Hanna*, 57 Iowa 372.

*Kentucky.* — *Darnaby v. Watts*, (Ky. 1894) 28 S. W. Rep. 338.

*Maryland.* — *Williamson v. Morton*, 2 Md. Ch. 101; *Miller v. Williamson*, 5 Md. 219; *Marbury v. Ehlen*, 72 Md. 206, 20 Am. St. Rep. 467.

*Massachusetts.* — *Trull v. Trull*, 13 Allen (Mass.) 407; *Hutchins v. State Bank*, 12 Met. (Mass.) 421.

*Mississippi.* — *Prosser v. Leatherman*, 4 How. (Miss.) 240, 34 Am. Dec. 121; *Scott v. Searles*, 7 Smed. & M. (Miss.) 498, 45 Am. Dec. 317; *Eustice v. Holmes*, 52 Miss. 303; *Woodbridge v. Campbell*, 61 Miss. 634.

*New York.* — *Pendleton v. Fay*, 2 Paige (N. Y.) 202; *Colt v. Lasnier*, 9 Cow. (N. Y.) 342; *Sacia v. Berthoud*, 17 Barb. (N. Y.) 15; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441.

*North Carolina.* — *Exum v. Bowden*, 4 Ired. Eq. (39 N. Car.) 281; *Bradshaw v. Simpson*, 6 Ired. Eq. (41 N. Car.) 243; *Tyrrell v. Morris*, 1 Dev. & B. Eq. (21 N. Car.) 559; *Wilson v. Doster*, 7 Ired. Eq. (42 N. Car.) 231.

*Pennsylvania.* — *Petrie v. Clark*, 11 S. & R.



(3) *Fraud by Guardian.* — The same general rule applies to sales by guardians.<sup>1</sup> But it has been pointed out that since infants usually come to their property as the surplus of settled estates and are not so likely to be in arrear to the guardian, the necessity of a sale by a guardian is less obviously necessary than of a sale by an executor.<sup>2</sup>

(4) *Active Fraud Unnecessary.* — Some of the earlier cases held that in order to hold the purchaser liable for the fraud of the trustee, there must have been evidence of active fraud and collusion between the two.<sup>3</sup> In the later cases, however, it is recognized as sufficient if a purchaser knows that the fiduciary intends to misapply the trust funds.<sup>4</sup>

(5) *What Constitutes Notice.* — One who buys property from a trustee may or may not know that it belongs to an estate or is otherwise affected with a trust. In the latter case, where the circumstances are such as to put a prudent man on inquiry as to the character of the property conveyed a court of equity regards such circumstances as constituting constructive notice and imputes to the purchaser a knowledge of all facts that such inquiry would have revealed.<sup>5</sup>

**Duty to Ascertain Powers of Trustee.** — And where he knows or is chargeable with knowledge of the nature of the estate, it is his duty to go further and ascertain the nature and extent of the trustee's power in order that he may know whether or not he is violating his trust and misapplying the property in any

(Pa.) 377, 14 Am. Dec. 636; *Garrard v. Pittsburgh, etc., R. Co.*, 29 Pa. St. 154; *Pittsburgh, etc., R. Co. v. Barker*, 29 Pa. St. 160; *Blood v. Ludlow Carbon Black Co.*, 150 Pa. St. 1.

*Rhode Island.* — *Tillinghast v. Champlin*, 4 R. I. 213, 67 Am. Dec. 510.

*Virginia.* — *Graff v. Castleman*, 5 Rand. (Va.) 195, 16 Am. Dec. 741; *Pinckard v. Woods*, 8 Gratt. (Va.) 140; *Fisher v. Bassett*, 9 Leigh (Va.) 119, 33 Am. Dec. 227; *Cocke v. Minor*, 25 Gratt. (Va.) 246; *Jones v. Clark*, 25 Gratt. (Va.) 642; *Tosh v. Robertson*, 27 Gratt. (Va.) 270; *Patteson v. Bondurant*, 30 Gratt. (Va.) 94; *Brockenbrough v. Turner*, 78 Va. 438; *Knight v. Yarborough*, 4 Rand. (Va.) 566.

*West Virginia.* — *John v. Barnes*, 21 W. Va. 498.

A distinction has been made that where money is advanced at the time of a sale by the executor the purchaser need not see to the application of the money, although it be proved that the executor intended to misapply it and did afterwards misapply it; but if the advance be made to pay a previous debt, this circumstance creates a suspicion of fraud which puts the purchaser upon his guard. *M'Leod v. Drummond*, 14 Ves. Jr. 353, 17 Ves. Jr. 152.

1. See the title **GUARDIAN AND WARD**, vol. 15, p. 64. See also the following cases: *Grimsley v. Grimsley*, 79 Ga. 397; *Atkinson v. Atkinson*, 8 Allen (Mass.) 15; *Price v. Estill*, 87 Mo. 378; *Cohnfield v. Tanenbaum*, 176 N. Y. 126; *Strong v. Strauss*, 40 Ohio St. 87; *Asberry v. Asberry*, 33 Gratt. (Va.) 463.

2. *Exum v. Bowden*, 4 Ired. Eq. (39 N. Car.) 281, *Ruffin*, C. J.

3. **Active Fraud Not Essential.** — *Nugent v. Gifford*, 2 Ves. 269, note; *Taner v. Ivie*, 2 Ves. 466; *Mead v. Orrery*, 3 Atk. 235; *Whale v. Booth*, 4 T. R. 625, note; *Gray v. Armistead*, 6 Ired. Eq. (41 N. Car.) 74.

4. See especially *Bonney v. Ridgard*, 1 Cox Ch. 145; *Wilson v. Moore*, 1 Myl. & K. 337;

*Scott v. Tyler*, 2 Dick. 712; *Keane v. Roberts*, 4 Madd. 332; *Hill v. Simpson*, 7 Ves. Jr. 154; *M'Leod v. Drummond*, 17 Ves. Jr. 152; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441; *Graff v. Castleman*, 5 Rand. (Va.) 195, 16 Am. Dec. 741; *Pinckard v. Woods*, 8 Gratt. (Va.) 140; *Fisher v. Bassett*, 9 Leigh (Va.) 119, 33 Am. Dec. 227; *Jones v. Clark*, 25 Gratt. (Va.) 663; *Cocke v. Minor*, 25 Gratt. (Va.) 246; *Brockenbrough v. Turner*, 78 Va. 438.

5. **What Constitutes Notice** — *Florida.* — *Foster v. Ambler*, 24 Fla. 519.

*Illinois.* — *School Trustees v. Kirwin*, 25 Ill. 62; *Indiana, etc., R. Co. v. Swannell*, 157 Ill. 516.

*Iowa.* — *Bishop v. Knowles*, 53 Iowa 268.

*Maryland.* — *Swift v. Williams*, 68 Md. 236.

*Nebraska.* — *Stark v. Olsen*, 44 Neb. 646.

*New Jersey.* — *African M. E. Church v. Conover*, 27 N. J. Eq. 157; *Jeffrey v. Towar*, 63 N. J. Eq. 530; *Condit v. Bigalow*, 64 N. J. Eq. 504.

*New York.* — *Colt v. Lasnier*, 9 Cow. (N. Y.) 342; *Sacia v. Berthoud*, 17 Barb. (N. Y.) 15; *Brumfield v. Boutall*, 24 Hun (N. Y.) 451; *Pendleton v. Fay*, 2 Paige (N. Y.) 205; *Rogers v. Squires*, 98 N. Y. 49; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441; *Noyes v. Turnbull*, 54 Hun (N. Y.) 26; *Moloney v. Tilton*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 682.

*North Carolina.* — *Tankard v. Tankard*, 84 N. Car. 286.

*Pennsylvania.* — *Scott v. Gallagher*, 14 S. & R. (Pa.) 333, 16 Am. Dec. 508; *Trefts v. King*, 18 Pa. St. 157; *Rider v. Maul*, 70 Pa. St. 15; *Fellows v. Loomis*, 170 Pa. St. 415; *Walsh v. Stille*, 2 Pars. Eq. Cas. (Pa.) 17.

*Canada.* — *Clark v. Kendall*, 4 British Columbia 503; *Aluir v. Carter*, 16 Can. Sup. Ct. 478; *Cumming v. Landed Banking, etc., Co.*, 22 Can. Sup. Ct. 246.

way.<sup>1</sup> Further, the duty to make inquiry cannot be excused on the assumption that the trustee, of whom alone inquiry could be made, would not tell the truth.<sup>2</sup>

**Trust Apparent on Face of Instrument.** — The circumstances sufficient to affect a purchaser with constructive notice are scarcely susceptible of classification, since each case is recognized as determined by its own facts. It is, however, generally admitted that where the instrument of transfer or a paper which constitutes evidence of property, such as a check, note, or stock certificate, indicates on its face that the property transferred is held in trust, a purchaser or pledgee takes with notice of the trust.<sup>3</sup>

**Use of Word "Trustee."** — Ordinarily the words "trustee" or "in trust" or "guardian," contained in a deed, mortgage, assignment, or indorsement, are deemed sufficient to put a transferee on inquiry.<sup>4</sup> It has, however, been held that such words alone are not sufficient to give notice that a breach of trust is about to be committed, and that it is necessary for the purchaser to inquire whether the circumstances of the case constitute reasonable ground to conclude that a fraud is contemplated.<sup>5</sup>

**1. Duty to Ascertain Powers of Trustee** — *Arkansas*. — Owen v. Reed, 27 Ark. 122.

*Connecticut*. — Leake v. Watson, 58 Conn. 332, 18 Am. St. Rep. 270.

*Georgia*. — Bazemore v. Davis, 55 Ga. 504.

*Illinois*. — Swift v. Castle, 23 Ill. 132; Chicago Fifth Nat. Bank v. Hyde Park, 101 Ill. 595, 40 Am. Rep. 218.

*Iowa*. — Zion Church v. Parker, 114 Iowa 1.

*Maryland*. — Marbury v. Ehlen, 72 Md. 206, 20 Am. St. Rep. 467.

*Massachusetts*. — Shaw v. Spencer, 100 Mass. 382, 1 Am. Rep. 115.

*Nebraska*. — Stark v. Olsen, 44 Neb. 646.

*New York*. — Pendleton v. Fay, 2 Paige (N. Y.) 205; Cohnfeld v. Tanenbaum, 176 N. Y. 126; Suarez v. De Montigny, 1 N. Y. App. Div. 494.

*Ohio*. — Price v. M. E. Church, 4 Ohio 540.

*Pennsylvania*. — McMurtie v. Pennsylvania L. Ins. Co., 9 Phila. (Pa.) 529, 29 Leg. Int. (Pa.) 108.

An intending purchaser of real estate from a trustee who is acting by a real estate agent is bound to inquire as well into the powers and duties of the trustee as into the authority of the agent. Jones v. Holladay, 2 App. Cas. (D. C.) 279.

**2.** Jones v. Williams, 24 Beav. 62; Geysers-Marion Gold-Min. Co. v. Stark, (C. C. A.) 106 Fed. Rep. 558; Jeffray v. Towar, 63 N. J. Eq. 542.

**3. Trust Apparent on Face of Instrument** — *Alabama*. — Shorter v. Frazer, 64 Ala. 74.

*Iowa*. — Bishop v. Knowles, 53 Iowa 268.

*Massachusetts*. — Hayward v. Cain, 110 Mass. 273; Loring v. Salisbury Mills, 125 Mass. 138; Loring v. Brodie, 134 Mass. 453.

*Mississippi*. — Wooldridge v. Campbell, 61 Miss. 634.

*Missouri*. — Reid v. Mullins, 43 Mo. 306.

*New Jersey*. — Nicholls v. Peak, 12 N. J. Eq. 69; Condit v. Bigalow, 64 N. J. Eq. 504.

*New York*. — Ward v. Smith, 3 Sandf. Ch. (N. Y.) 592; Noyes v. Turnbull, 54 Hun (N. Y.) 26.

*Ohio*. — Strong v. Strauss, 40 Ohio 87.

*Pennsylvania*. — Clemens v. Heckscher, 185 Pa. St. 476.

*South Carolina*. — Webb v. Graniteville Mfg. Co., 11 S. Car. 396, 32 Am. Rep. 479.

*Tennessee*. — Covington v. Anderson, 16 Lea (Tenn.) 310.

*Canada*. — Sweeny v. Montreal Bank, 12 Can. Sup. Ct. 661; Cumming v. Landed Banking, etc., Co., 22 Can. Sup. Ct. 246.

**4. Use of the Word "Trustee"** — *England*. — Boursot v. Savage, L. R. 2 Eq. 134; Jones v. Smith, 1 Hare 43.

*Canada*. — Raphael v. McFarlane, 18 Can. Sup. Ct. 183; Foot v. McGeorge, 12 Ont. App. 351; Muir v. Carter, 16 Can. Sup. Ct. 473; Birkbeck Loan Co. v. Johnston, 3 Ont. L. Rep. 497; Fitch v. Currie, 19 Nova Scotia 522, 8 Can. L. T. 59; Duggan v. London, etc., Loan, etc., Co., 20 Can. Sup. Ct. 481; Cumming v. Landed Banking, etc., Co., 22 Can. Sup. Ct. 246.

*United States*. — Pennington v. Smith, (C. C. A.) 78 Fed. Rep. 399; Geysers-Marion Gold-Min. Co. v. Stark, (C. C. A.) 106 Fed. Rep. 558.

*District of Columbia*. — Jackson v. Davis, MacArthur & M. (D. C.) 334.

*Illinois*. — Philips v. South Park Com'rs, 119 Ill. 626.

*Massachusetts*. — Bancroft v. Consen, 13 Allen (Mass.) 50; Sturtevant v. Jaques, 14 Allen (Mass.) 523; Shaw v. Spencer, 100 Mass. 382, 1 Am. Rep. 115; Smith v. Burgess, 133 Mass. 511.

*New Jersey*. — Jeffray v. Towar, 63 N. J. Eq. 530.

*New York*. — Swan v. Produce Bank, 24 Hun (N. Y.) 277; Suarez v. De Montigny, (Supm. Ct. Spec. T.) 12 Misc. (N. Y.) 259; Kirsch v. Tozier, 143 N. Y. 395, 42 Am. St. Rep. 729; Cohnfeld v. Tanenbaum, 176 N. Y. 126.

*Pennsylvania*. — McMurtie v. Pennsylvania L. Ins. Co., 9 Phila. (Pa.) 529, 29 Leg. Int. (Pa.) 108.

*Tennessee*. — Covington v. Anderson, 16 Lea (Tenn.) 310.

For other cases in which the circumstances fell short of notice, see Tenn v. Porter, 61 Ark. 329; Goodwin v. American Nat. Bank, 48 Conn. 550; Harris v. Smith, 08 Tenn. 286; Claiborne v. Holland, 88 Va. 1046.

**5.** London, etc., Loan, etc., Co. v. Duggan,

**Knowledge of Agent.** — The knowledge of the agent of the vendee of trust property that the conveyance is in contravention of the trust is imputable to the vendee.<sup>1</sup>

**2. No Duty to See Purchase Money Applied** — *a.* **WHEN TRUST IS INDEFINITE** — (1) *In General.* — Where the trust is indefinite and unlimited in nature or impossible of present execution, the *bona fide* purchaser is not bound to see to the application of the purchase money. There are several well-recognized classes of such indefinite trusts.

(2) *Trust to Pay Debts Generally.* — Thus, where land is directed to be sold to pay debts, or is merely charged with the payment of debts, generally and not specifically, the purchaser is not bound to see the debts paid, and this although he may know that there are debts.<sup>2</sup> Where there is a general charge of debts the fact that in addition a particular debt is mentioned does not vary the rule.<sup>3</sup> Likewise, where land is sold to raise a deficiency left after the sale of the personal estate, the purchaser is not bound to inquire whether such sale is necessary.<sup>4</sup>

(3) *Trust to Pay Debts and Legacies or Annuities.* — The general rule just announced applies also to cases where the trust is to pay debts in general and also to pay legacies or annuities. To hold the purchaser liable to see the latter paid would in fact involve him in the account of the debts which must first be paid.<sup>5</sup> However, no duty to see the legacies paid arises even after

(1893) A. C. 506; *Sweeney v. Buchanan*, 5 Montreal Leg. N. 66; *Grafflin v. Robb*, 84 Md. 451; *Ashton v. Atlantic Bank*, 3 Allen (Mass.) 217.

A purchaser is chargeable with facts shown by the record of the suit for a sale, but not with notice of matters *aliunde*. *Wooldrige v. Campbell*, 61 Miss. 634.

Nor is a remote purchaser chargeable with notice of irregularity in the sale or false recitals in a deed as to compliance with formalities of sale. *Wilson v. South Park Com'rs*, 70 Ill. 46; *Gunnell v. Cockerill*, 79 Ill. 79.

Where the only trust of which there is notice or as to which there is anything to put the purchaser upon inquiry is definite and complete on its face and has been extinguished, the trustee may sell a good title to the trust estate. *Batt v. Mallon*, 151 Mass. 45, *following Sturtevant v. Jaques*, 14 Allen (Mass.) 523.

**1. Knowledge of Agent.** — *Chapman v. Hughes*, 134 Cal. 641; *Indiana, etc., R. Co. v. Swannell*, 157 Ill. 616; *Tobin v. Helm*, 4 J. J. Marsh. (Ky.) 288.

**2. Trusts to Pay Debts Generally** — *England.* — *Walker v. Smalwood*, Ambl. 676; *Smith v. Guyon*, 1 Bro. C. C. 186; *Shaw v. Borrer*, 1 Keen 559; *Hardwick v. Mynd*, 1 Anstr. 109; *Elliot v. Merryman*, 1 Hare & W. Lead. Cas. 45; *Williamson v. Curtis*, 3 Bro. C. C. 96; *Barker v. Devonshire*, 3 Meriv. 310; *Cadbury v. Duval*, 10 Pa. St. 265; *Balfour v. Welland*, 16 Ves. Jr. 151; *Dowling v. Hudson*, 17 Beav. 248. See also *Braybroke v. Inskip*, 8 Ves. Jr. 417.

*United States.* — *Gardner v. Gardner*, 3 Mason (U. S.) 178; *Potter v. Gardner*, 12 Wheat. (U. S.) 498.

*Illinois.* — *Cherry v. Greene*, 115 Ill. 591.

*Kentucky.* — *Grotenkemper v. Bryson*, 79 Ky. 353.

*Massachusetts.* — *Goodrich v. Proctor*, 1 Gray (Mass.) 567.

*New Jersey.* — *Dewey v. Ruggles*, 25 N. J. Eq. 35; *Conover v. Stothoff*, 38 N. J. Eq. 55.

*Ohio.* — *Stall v. Cincinnati*, 16 Ohio St. 169. *Pennsylvania.* — *Dalzell v. Crawford*, 1 Pars. Eq. Cas. (Pa.) 57.

*Tennessee.* — *Williams v. Otey*, 8 Humph. (Tenn.) 568, 47 Am. Dec. 632.

*Virginia.* — *Garnett v. Macon*, 6 Call (Va.) 308.

It has, however, been held that while a general charge of debts does not make a purchaser before the suit liable to see to the application of the money, yet after a suit commenced he is bound to do so. *Walker v. Smalwood*, Ambl. 676.

In *In re Tanqueray-Williamme*, 20 Ch. D. 465, it was held that where an executor in whom the legal estate is vested sells real estate charged with debts, the purchaser is not bound to inquire whether debts remain unpaid unless twenty years have elapsed from the testator's decease.

**3.** *Robinson v. Lowater*, 17 Beav. 592.

**4.** *Spalding v. Shalmer*, 1 Vern. 301.

Where a retiring partner assigns the partnership stock to his copartner, who covenants to pay the debts, the executors of the retiring partner are not entitled to sell the property in the possession of a purchaser with notice of the deed and apply the proceeds in payment of the debts of the partnership. The case is like one of an express trust to sell the property and apply the proceeds to pay debts. *In re Langmead*, 20 Beav. 20.

Of course there is no liability on a purchaser when the sale is made at the request of the *cestui que trust*. *Page v. Page*, 8 N. H. 187.

**5. Trust to Pay Debts and Legacies or Annuities** — *England.* — *Rogers v. Skillicorne*, Ambl. 188; *Walker v. Flamstead*, 2 Ken. K. B. (pt. ii.) 57; *Page v. Adam*, 4 Beav. 269; *Jenkins v. Hiles*, 6 Ves. Jr. 654, note; *Dowling v. Hudson*, 17 Beav. 248; *Storry v. Walsh*, 18 Beav. 559; *Jebb v. Abbott*, Coke Litt. 290b, § xiv, *Butler's note*; *Benyon v. Gollins*, Coke Litt. 290b, § xiv, *Butler's note*.



the debts are paid, for the rule is applied to the state of things existing at the death of the testator and is unaffected by subsequent events.<sup>1</sup> And it has been held by eminent authority that no distinction exists between cases where debts exist at the death of the testator and cases where debts arise subsequently.<sup>2</sup>

(4) *Trust Involving Time and Discretion.* — The same inability on the part of the purchaser to see the purchase money applied exonerates him from that duty in cases where the trustee is invested with discretion as to the necessity of a sale, or as to the time of making it, or as to the disposition of the proceeds, or where an interval of time must elapse between the sale and the application;<sup>3</sup> as where the beneficiary is then unborn or a minor,<sup>4</sup> or where the trustee is empowered to reinvest the proceeds.<sup>5</sup>

b. PURCHASER FROM TRUSTEE AUTHORIZED TO SELL. — It is a general rule that a purchaser in good faith from a trustee authorized to sell acquires a good title and is not bound to see to the application of the purchase money, nor liable for its misappropriation where there is nothing on the face of the deed or in the circumstances of the case apprising the purchaser of an attempted or intended violation of the trust.<sup>6</sup>

*Kentucky.* — *Sims v. Lively*, 14 B. Mon. (Ky.) 348.

*Massachusetts.* — *Andrews v. Sparhawk*, 13 Pick. (Mass.) 393.

*Pennsylvania.* — *Cadbury v. Duval*, 10 Pa. St. 265; *Grant v. Hook*, 13 S. & R. (Pa.) 259.

1. *Johnson v. Kennett*, 3 Myl. & K. 624; *Eland v. Eland*, 4 Myl. & C. 420.

2. *Stroughill v. Anstey*, 1 De G. M. & G. 635, in which Lord Lyndhurst criticised *Forbes v. Peacock*, 11 Sim. 152; *Page v. Adam*, 4 Beav. 269, in which the distinction noted was seemingly approved.

3. *Trust Involving Time and Discretion* — *England.* — *Balfour v. Welland*, 16 Ves. Jr. 151; *Sabin v. Heape*, 27 Beav. 553.

*United States.* — *Wormley v. Wormley*, 8 Wheat. (U. S.) 422.

*Georgia.* — *Bond v. Zeigler*, 1 Ga. 342, 44 Am. Dec. 656; *Colesbury v. Dart*, 61 Ga. 620; *Guill v. Northern*, 67 Ga. 345.

*Illinois.* — *Franklin Sav. Bank v. Taylor*, 131 Ill. 376; *Seaverns v. Presbyterian Hospital*, 173 Ill. 414, 64 Am. St. Rep. 125.

*Kentucky.* — *Sims v. Lively*, 14 B. Mon. (Ky.) 348.

*Massachusetts.* — *Norman v. Towne*, 130 Mass. 52.

*New Jersey.* — *Nicholls v. Peak*, 12 N. J. Eq. 69.

*North Carolina.* — *Hauser v. Shore*, 5 Ired. Eq. (40 N. Car.) 357.

*Ohio.* — *Coonrod v. Coonrod*, 6 Ohio 114.

*Pennsylvania.* — *Dalzell v. Crawford*, 1 Pars. Eq. Cas. (Pa.) 37.

*South Carolina.* — *Price v. Krasnoff*, 60 S. Car. 172.

*Texas.* — *Rogers v. Jones*, 13 Tex. Civ. App. 453.

*Virginia.* — *Steele v. Levisay*, 11 Gratt. (Va.) 454; *Davis v. Christian*, 15 Gratt. (Va.) 11; *Hughes v. Tabb*, 78 Va. 313.

4. *Beneficiaries Infants at Time of Sale.* — *Sowarsby v. Lacy*, 4 Madd. 142; *Lavender v. Stanton*, 6 Madd. 46; *Woodwine v. Woodrum*, 19 W. Va. 67. See also *Breedon v. Breedon*, 1 Russ & M. 413.

5. *Trust to Reinvest* — *England.* — *Doran v.*

*Wiltshire*, 3 Swanst. 699; *Locke v. Lomas*, 5 De G. & Sm. 326; *Wood v. Harman*, 5 Madd. 368. But see *Cox v. Cox*, 1 Kay & J. 251.

*Maryland.* — *Van Bokkelen v. Tinges*, 58 Md. 53; *Keister v. Scott*, 61 Md. 507.

*Missouri.* — *Mason v. Bank of Commerce*, 16 Mo. App. 275; *Turner v. Hoyle*, 95 Mo. 337.

*New York.* — *Spencer v. Weber*, 26 N. Y. App. Div. 285; *Dyett v. Central Trust Co.*, 140 N. Y. 54.

*South Carolina.* — *Lining v. Peyton*, 2 Desaus. (S. Car.) 375; *Pyron v. Redheimer*, *Spears Eq. (S. Car.)* 134; *Webb v. Chisolm*, 24 S. Car. 487.

*Virginia.* — *Redford v. Clarke*, 100 Va. 115.

6. *Purchaser from Trustee Authorized to Sell* — *Alabama.* — *Elliott v. Branch Bank*, 20 Ala. 345; *Dawson v. Ramser*, 58 Ala. 573.

*Arkansas.* — *Jacks v. State*, 44 Ark. 61.

*California.* — *Thompson v. McKay*, 41 Cal. 221.

*Connecticut.* — *Goodwin v. American Nat. Bank*, 48 Conn. 550.

*Georgia.* — *White v. Cook*, 73 Ga. 164.

*Illinois.* — *Reece v. Allen*, 10 Ill. 236, 48 Am. Dec. 336.

*Iowa.* — *Pike v. Baldwin*, 68 Iowa 263; *Waterman v. Baldwin*, 68 Iowa 255.

*Maryland.* — *Barroll v. Forman*, 88 Md. 188.

*Massachusetts.* — *Ashton v. Atlantic Bank*, 3 Allen (Mass.) 217.

*Missouri.* — *Mason v. Bank of Commerce*, 16 Mo. App. 275; *Gardner v. Armstrong*, 31 Mo. 535.

*Nebraska.* — *Streitz v. Hartman*, 26 Neb. 33.

*New Jersey.* — *Wagner v. Blanchet*, 27 N. J. Eq. 356.

*New York.* — *Dyett v. Central Trust Co.*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 19.

*North Carolina.* — *Hunt v. State Bank*, 2 Dev. Eq. (17 N. Car.) 60. But see *Rutledge v. Smith*, *Busb. Eq. (45 N. Car.)* 283.

*Pennsylvania.* — *Pennsylvania L. Ins. Co. v. Austin*, 42 Pa. St. 257.

*Rhode Island.* — *National Bank of Commerce v. Smith*, 17 R. I. 260.

*South Carolina.* — *Pyron v. Redheimer*, *Spears Eq. (S. Car.)* 134; *Mayer v. Mordecai*,

*c.* PURCHASER UNDER DECREE OF COURT. — A purchaser under a decree of the court is not bound to see to the application of the purchase money and is not affected by any misapplication which may be made of it.<sup>1</sup>

*d.* PURCHASER FOR VALUE WITHOUT NOTICE. — It is a general rule that a purchaser for value without notice of existing equities takes the property discharged of all equitable claims. The subject is fully discussed in a separate title of this work.<sup>2</sup>

**3. Return of Purchase Money and Pay for Improvements.** — An innocent purchaser of trust property, if subsequently ejected, is entitled to have the purchase money returned,<sup>3</sup> and also to be paid for improvements made by him.<sup>4</sup> A purchaser chargeable with active fraud cannot claim for improvements unless the owner claims rent, in which case the one claim may be set off or against the other.<sup>5</sup>

1 S. Car. 383, 7 Am. Rep. 26; *Lining v. Peyton*, 2 Saus. (S. Car.) 375; *Laurens v. Lucas*, 6 Rich. Eq. (S. Car.) 217; *Spencer v. Godfrey*, Bailey Eq. (S. Car.) 468.

*Tennessee.* — *Cardwell v. Cheatham*, 2 Head (Tenn.) 14.

*Texas.* — *Whately v. Oglesby*, (Tex. Civ. App. 1898) 44 S. W. Rep. 44.

And purchasers with notice from those who purchased *bona fide* without notice will be protected. *Dyett v. Central Trust Co.*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 19, 140 N. Y. 54.

In *Tapley v. Tapley*, 115 Ga. 109, it was held that while a purchaser would be liable for aiding the trustee to misappropriate the proceeds of a sale, his title would not be affected by such misappropriation unless it were the result of collusion between the two prior to the sale. See further the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 472.

**1. Purchaser under Decree of Court.** — *Lloyd v. Baldwin*, 1 Ves. 173; *Todd v. Studholme*, 3 Kay & J. 324; *Curtis v. Price*, 12 Ves. Jr. 105; *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236; *Wood v. Augustine*, 61 Mo. 46; *Wilson v. Davidson*, 2 Rob. (Va.) 385. See also *Jacks v. State*, 44 Ark. 61. But see *Williamson v. Branch Bank*, 7 Ala. 906, 42 Am. Dec. 617.

If the court is wholly without jurisdiction to decree the sale of trust property the purchaser may successfully depend upon that want of jurisdiction to avoid the sale, because the decree would in such case be an absolute nullity. *Ball v. Safe Deposit, etc., Co.*, 92 Md. 503.

A deed of trust authorizing the trustee, or in case of his death or absence a sheriff of the county, to sell the trust property vests no right, title, or interest in the sheriff, and a sale by him with a deed conveying all his right, title, and interest conveys nothing to the purchaser. *Miller v. Evans*, 35 Mo. 45.

**2. Purchaser for Value Without Notice.** — The subject of notice as it affects a purchaser of real property is fully discussed in the title PURCHASERS FOR VALUE AND WITHOUT NOTICE, vol. 23, p. 472. In addition to the cases there cited see the following:

*United States.* — *Carpenter v. Robinson*, *Holmes (U. S.)* 67; *Whittle v. Vanderbilt Min., etc., Co.*, 83 Fed. Rep. 48; *Smith v. American Nat. Bank*, (C. C. A.) 89 Fed. Rep. 832; *Holly v. Domestic, etc., Missionary Soc.*, (C. C. A.) 92 Fed. Rep. 745.

*Arkansas.* — *Sorrells v. Sorrells*, 4 Ark. 297.  
*California.* — *Carey v. Brown*, 62 Cal. 373; *Warnock v. Harlow*, 96 Cal. 298, 31 Am. St. Rep. 209.

*Florida.* — *Foster v. Ambler*, 24 Fla. 519; *Saunders v. Richard*, 35 Fla. 28.

*Iowa.* — *Emonds v. Termehr*, 60 Iowa 92; *Dillon v. Farley*, 114 Iowa 629.

*Kansas.* — *Borland v. Clark*, 26 Kan. 349.

*Kentucky.* — *Bailey v. Dyer*, 65 S. W. Rep. 595, 23 Ky. L. Rep. 1585.

*Maine.* — *Bromley v. Hardner*, 79 Me. 246.

*Maryland.* — *Latrobe v. Tiernan*, 2 Md. Ch. 474.

*Missouri.* — *Coffee v. Crouch*, 28 Mo. 106.

*Nebraska.* — *Streitz v. Hartman*, 26 Neb. 33.

*New Jersey.* — *Moore v. Kraemer*, 50 N. J. Eq. 776.

*New York.* — *Willet v. Stringer*, (N. Y. Super. Ct. Spec. T.) 17 Abb. Pr. (N. Y.) 152; *Roosevelt v. Land Imp. Co.*, 3 N. Y. App. Div. 563; *Riley v. Cummings*, 37 N. Y. App. Div. 512.

*South Carolina.* — *Ex p. Williams*, 18 S. Car. 299; *Bailey v. Colton*, 25 S. Car. 436; *Price v. Krasnoff*, 60 S. Car. 172.

*Texas.* — *Everett v. Texas Mexican R. Co.*, 67 Tex. 430; *Magnolia Park Co. v. Tinsley*, 96 Tex. 364.

*Utah.* — *Bacon v. Park*, 19 Utah 246.

*Wisconsin.* — *Rogers v. Rogers*, 53 Wis. 36, 40 Am. Rep. 756.

**3. Return of Purchase Money and Pay for Improvements.** — *Kirkwood v. Kidwell*, 72 Ill. App. 492.

**4.** *Iverson v. Saulsbury*, 65 Ga. 724; *Rines v. Bachelder*, 62 Me. 95. And see generally the title IMPROVEMENTS, vol. 16, p. 62.

**5.** *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585; *Tosh v. Robertson*, 27 Gratt. (Va.) 270; *Thompson v. Thompson*, 16 Wis. 91; *Hawley v. Tesch*, 88 Wis. 213.

The owner seeking to set aside a fraudulent sale need not tender to the purchaser a return of the purchase money. *Littell v. Grady*, 38 Ark. 584.

**Takes Subject to Incumbrances.** — The purchaser of property at trustee's sale takes it subject to incumbrances, and is not entitled to any abatement in the price by reason of such incumbrances. *Pickett v. Merchants' Bank*, 32 Ark. 348. See also *Condict v. Flower*, 106 Ill. 106.

**IX. LIMITATIONS AND LACHES — 1. In General.** — The general principles of laches and of statutes of limitation as applied to equitable actions generally, and to implied trusts specifically, have been set forth fully in other titles of this work.<sup>1</sup> All that is necessary here is to state the rules as to the applicability of these general principles to express trusts.

**2. Express Trusts Not Within the Statutes.** — The statutes of limitation do not bar an action by the *cestui que trust* against the trustee of an express trust. The reason assigned for the rule is that as between these two, the possession of the trustee is deemed to be the possession of the beneficiary.<sup>2</sup> But it is not all express trusts that are withdrawn from the operation of the statutes, and in rendering the rule more exact courts have generally adopted the test and the language of Chancellor Kent in what may be called the leading American case, viz.: "The trusts intended by the courts of equity, not to be reached or affected by the statute of limitations, are those technical

**1. Limitations and Laches.** — See the titles IMPLIED TRUSTS, vol. 15, p. 1205; LACHES, vol. 18, p. 95; LIMITATION OF ACTIONS, vol. 19, pp. 136, 154. As to adverse possession by trustee, see the title ADVERSE POSSESSION, vol. 1, p. 812.

In addition to the cases cited in the title IMPLIED TRUSTS, § vii., see the following cases decided since that section was written:

*United States.* — *Whitney v. Fox*, 166 U. S. 637.

*Alabama.* — *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81.

*Arkansas.* — *Grayson v. Bowlin*, 70 Ark. 145.

*California.* — *Barker v. Hurley*, 132 Cal. 21.

*Illinois.* — *Mayfield v. Forsyth*, 164 Ill. 32; *Renson v. Dempster*, 183 Ill. 297.

*Kansas.* — *Hackett v. Pratt*, 5 Kan. App. 586.

*Kentucky.* — *Stubbins v. Briggs*, 68 S. W. Rep. 392, 24 Ky. L. Rep. 230.

*Mississippi.* — *Cox v. Menzing*, (Miss. 1901) 30 So. Rep. 41.

*Missouri.* — *Joyce v. Growney*, 154 Mo. 253. *New York.* — *Lammer v. Stoddard*, 103 N. Y. 672.

*Ohio.* — *Ward v. Ward*, 12 Ohio Cir. Dec.

59. *Pennsylvania.* — *Braun v. First German Evangelical Lutheran Church*, 198 Pa. St. 152. *Tennessee.* — *Lucas v. Malone*, 106 Tenn. 380.

*Utah.* — *Scott v. Crouch*, 24 Utah 377.

*Virginia.* — *Redford v. Clarke*, 100 Va. 115,

4 Va. Sup. Ct. 36.

*West Virginia.* — *Woods v. Stevenson*, 43 W. Va. 149.

**2. Express Trusts Not Within the Statutes — England.** — *Wassell v. Leggett*, (1896) 1 Ch. 554; *Wedderburn v. Wedderburn*, 2 Keen 749; *Ormond v. Hutchinson*, 13 Ves. Jr. 49; *Brittlebank v. Goodwin*, L. R. 5 Eq. 545; *Young v. Waterpark*, 13 Sim. 199; *In re Cross*, 20 Ch. D. 109. See also *Thomson v. Eastwood*, 2 App. Cas. 215.

*Canada.* — *Houghton v. Bell*, 23 Can. Sup. Ct. 498; *Building, etc., Assoc. v. Poaps*, 27 Ont. 470; *Mack v. Mack*, 23 Can. Sup. Ct. 146.

*United States.* — *Seymour v. Freer*, 8 Wall. (U. S.) 218; *Lewis v. Hawkins*, 23 Wall. (U. S.) 126.

*Alabama.* — *Hastie v. Aiken*, 67 Ala. 316; *McCarthy v. McCarthy*, 74 Ala. 546; *Whetstone*

*v. Whetstone*, 75 Ala. 501; *Kennedy v. Winn*, 80 Ala. 165.

*Arkansas.* — *Brinkley v. Willis*, 22 Ark. 1.

*California.* — *Matter of Beisel*, 110 Cal. 276;

*White v. Costigan*, 138 Cal. 564.

*Colorado.* — *Farris v. Wirt*, 16 Colo. App. 1.

*Delaware.* — *Cartmell v. Perkins*, 2 Del. Ch. 102.

*Georgia.* — *McDonald v. Sims*, 3 Ga. 383; *Keaton v. Greenwood*, 8 Ga. 97; *Simms v. Smith*, 11 Ga. 200; *Oliver v. Hammond*, 85 Ga.

331.

*Illinois.* — *Russell v. Peyton*, 4 Ill. App. 473;

*Albretch v. Wolf*, 58 Ill. 190; *Walden v. Karr*,

88 Ill. 49; *Chicago, etc., R. Co. v. Hay*, 119

Ill. 493; *Reynolds v. Sumner*, 126 Ill. 58, 9

Am. St. Rep. 523.

*Indiana.* — *Thomas v. Merry*, 113 Ind. 83;

*Jones v. Henderson*, 149 Ind. 458.

*Kansas.* — *Reihl v. Likowski*, 33 Kan. 515.

*Kentucky.* — *Overstreet v. Bate*, 1 J. J. Marsh.

(Ky.) 370; *Moore v. Shepherd*, 2 Duv. (Ky.)

125; *Bohannon v. Sthreshley*, 2 B. Mon. (Ky.)

438; *Caldwell v. Hampton*, (Ky. 1899) 53 S. W.

Rep. 14.

*Maine.* — *Haskell v. Hervey*, 74 Me. 192.

*Maryland.* — *Fishwick v. Sewell*, 4 Har. & J.

(Md.) 393.

*Mississippi.* — *Payne v. Bullard*, 23 Miss. 88,

55 Am. Dec. 74; *Gay v. Edwards*, 30 Miss.

218.

*Missouri.* — *Condit v. Maxwell*, 142 Mo.

266.

*New Hampshire.* — *Bow v. Jewell*, 18 N. H.

340, 45 Am. Dec. 371.

*New Jersey.* — *Cook v. Williams*, 2 N. J. Eq.

209; *Wilson v. Ely*, 6 N. J. Eq. 181; *Dyer v.*

*Waters*, 46 N. J. Eq. 484; *Gutch v. Fosdick*, 48

N. J. Eq. 353; *Carter v. Uhlein*, (N. J. 1897)

36 Atl. Rep. 956.

*New York.* — *Decouche v. Savetier*, 3 Johns.

Ch. (N. Y.) 190, 8 Am. Dec. 478; *Coster v.*

*Murray*, 5 Johns. Ch. (N. Y.) 522; *Price v.*

*Mulford*, 36 Hun (N. Y.) 249; *Burt v. Myers*,

37 Hun (N. Y.) 281; *Merritt v. Merritt*, 161

N. Y. 634; *Matter of Lyth*, (Surrogate Ct.) 32

Misc. (N. Y.) 611.

*North Carolina.* — *Jones v. Person*, 2 Hawks

(9 N. Car.) 269; *Blount v. Robeson*, 3 Jones

Eq. (56 N. Car.) 73; *McMillan v. Baker*, 85 N.

Car. 291; *Owens v. Williams*, 130 N. Car. 165.

See also *Thompson v. Blair*, 3 Murph. (7 N.

Car.) 583.



and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of this court." <sup>1</sup>

**3. Statute Applies After Trust Terminates.** — But when the trust relation is terminated in any way, as by the open repudiation and disavowal of the trustee, or by some default on his part, or by vesting of the legal title in the *cestui*, or in some other way, and such termination is known to the beneficiary, then, and not till then, the possession of the trustee becomes adverse and the statute begins to run in his favor. <sup>2</sup>

*Ohio.* — *Williams v. Van Tuyl*, 2 Ohio St. 336.

*Pennsylvania.* — *Johnston v. Humphreys*, 14 S. & R. (Pa.) 395.

*South Carolina.* — *Howard v. Aiken*, 3 McCord L. (S. Car.) 467.

*Tennessee.* — *Pinson v. Ivey*, 1 Yerg. (Tenn.) 296; *Armstrong v. Campbell*, 3 Yerg. (Tenn.) 201, 24 Am. Dec. 556; *Lafferty v. Turley*, 3 Sneed (Tenn.) 170; *Porter v. Porter*, 3 Humph. (Tenn.) 586; *Colson v. Blanton*, 3 Hayw. (Tenn.) 158; *King v. Travis*, 4 Hayw. (Tenn.) 283.

*Texas.* — *Tinnen v. Mebane*, 10 Tex. 248, 60 Am. Dec. 205; *Fisk v. Wilson*, 15 Tex. 430; *Goode v. Lowery*, 70 Tex. 150.

*Vermont.* — *Evarts v. Nason*, 11 Vt. 122; *Kimball v. Ives*, 17 Vt. 430.

*Virginia.* — *Redwood v. Riddick*, 4 Munf. (Va.) 222; *Stewart v. Conrad*, 100 Va. 128, 4 Va. Sup. Ct. 49.

*Wisconsin.* — *Bostwick v. Dickson*, 65 Wis. 593.

**1. Continuing Trusts Not Cognizable at Law.** — *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 111, 11 Am. Dec. 417. See also the following cases:

*United States.* — *Miles v. Vivian*, (C. C. A.) 70 Fed. Rep. 852.

*Arkansas.* — *Harris v. King*, 16 Ark. 124; *Lawson v. Badgett*, 20 Ark. 195.

*Florida.* — *Carter v. Bennett*, 6 Fla. 244; *Anderson v. Northrop*, 30 Fla. 612.

*Georgia.* — *Thomas v. Brinsfield*, 7 Ga. 158.

*Indiana.* — *Smith v. Calloway*, 7 Blackf. (Ind.) 86.

*Kansas.* — *Harris v. Calvert*, 2 Kan. App. 749.

*Kentucky.* — *Talbott v. Todd*, 5 Dana (Ky.) 199; *Robinson v. Elam*, 90 Ky. 302.

*Maryland.* — *Young v. Mackall*, 3 Md. Ch. 398.

*New Jersey.* — *Conover v. Conover*, 1 N. J. Eq. 403; *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685, 23 Am. Dec. 748; *Cook v. Williams*, 2 N. J. Eq. 209; *Stark v. Hunton*, 3 N. J. Eq. 311; *Dean v. Dean*, 9 N. J. Eq. 429.

*New York.* — *Paff v. Kinney*, 1 Bradf. (N. Y.) 5.

*Ohio.* — *Irwin v. Lloyd*, 11 Ohio Cir. Dec. 212, 20 Ohio Cir. Ct. 339.

*Pennsylvania.* — *Finney v. Cochran*, 1 W. & S. (Pa.) 118, 37 Am. Dec. 450; *Lyon v. Marclay*, 1 Watts (Pa.) 271; *McCandless's Estate*, 61 Pa. St. 9.

*Tennessee.* — *Cocke v. McGinnis*, Mart. & Y. (Tenn.) 361, 17 Am. Dec. 809; *Pinkerton v. Walker*, 3 Hayw. (Tenn.) 221.

*Utah.* — *Felkner v. Dooly*, (Utah 1904) 75 Pac. Rep. 854.

*Wisconsin.* — *Merton v. O'Brien*, 117 Wis. 437; *Buttles v. De Baun*, 116 Wis. 323; *Boyd v. Mutual F. Assoc.*, 116 Wis. 177, 96 Am. St. Rep. 948.

**2. Statute Runs After Trust Terminates** — *United States.* — *Baker v. Whiting*, 3 Sumn. (U. S.) 475; *Oliver v. Piatt*, 3 How. (U. S.) 333; *Prevost v. Gratz*, 6 Wheat. (U. S.) 481; *Seymour v. Freer*, 8 Wall. (U. S.) 202; *Clarke v. Boorman*, 18 Wall. (U. S.) 493; *Boone v. Chiles*, 10 Pet. (U. S.) 177; *Bacon v. Rives*, 106 U. S. 99; *Philippi v. Philippe*, 115 U. S. 151; *Speidel v. Henrici*, 120 U. S. 377; *Snyder v. McComb*, 39 Fed. Rep. 292; *Swift v. Smith*, (C. C. A.) 79 Fed. Rep. 709.

*Alabama.* — *Bryan v. Weems*, 29 Ala. 423, 65 Am. Dec. 407; *Nettles v. Nettles*, 67 Ala. 599; *Kennedy v. Winn*, 80 Ala. 165.

*California.* — *Janes v. Throckmorton*, 57 Cal. 368.

*Georgia.* — *Keaton v. Greenwood*, 8 Ga. 97; *Wellborn v. Rogers*, 24 Ga. 558; *Pace v. Payne*, 73 Ga. 670; *McCallam v. Carswell*, 75 Ga. 25; *Teasley v. Bradley*, 110 Ga. 502, 78 Am. St. Rep. 113.

*Illinois.* — *Russell v. Peyton*, 4 Ill. App. 473.

*Iowa.* — *Newis v. Topfer*, (Iowa 1903) 96 N. W. Rep. 905.

*Kentucky.* — *Wickliffe v. Lexington*, 11 B. Mon. (Ky.) 161; *Manion v. Titsworth*, 18 B. Mon. (Ky.) 583; *McRoberts v. Carneal*, (Ky. 1898) 44 S. W. Rep. 442.

*Maryland.* — *White v. White*, 1 Md. Ch. 53.

*Massachusetts.* — *Merriam v. Hassam*, 14 Allen (Mass.) 522, 92 Am. Dec. 795.

*Minnesota.* — *Lamberson v. Youmans*, 84 Minn. 109.

*Mississippi.* — *Murdock v. Hughes*, 7 Smed. & M. (Miss.) 219.

*Missouri.* — *Goodwin v. Goodwin*, 69 Mo. 617; *Newton v. Rebenack*, 90 Mo. App. 650.

*New Hampshire.* — *Crowley v. Crowley*, (N. H. 1903) 56 Atl. Rep. 190.

*New Jersey.* — *Dean v. Dean*, 9 N. J. Eq. 425; *Condit v. Bigalow*, 64 N. J. Eq. 504.

*New York.* — *Matter of McCormick*, (Surrogate Ct.) 27 Misc. (N. Y.) 416.

*North Carolina.* — *McMillan v. Baker*, 85 N. Car. 201; *State University v. State Nat. Bank*, 96 N. Car. 280.

*Ohio.* — *Williams v. Cincinnati First Presb. Soc.*, 1 Ohio St. 478.

*Pennsylvania.* — *Johnston v. Humphreys*, 14 S. & R. (Pa.) 394.

*South Carolina.* — *Long v. Cason*, 4 Rich. Eq. (S. Car.) 60; *Roberts v. Lesly*, 8 Rich. Eq. (S. Car.) 35; *Sullivan v. Latimer*, 35 S. Car. 422.

*Tennessee.* — *Porter v. Greer*, 1 Coldw. (Tenn.) 564; *Smith v. Thompson*, 2 Swan (Tenn.) 386; *Yarbrough v. Newell*, 10 Yerg.

**Termination of Trust Presumed.** — It has, moreover, been held in some cases that after a great lapse of time the trust will be presumed to be extinguished and a plea of the statute or of laches will be admissible.<sup>1</sup>

**4. As Between Trust Estate and Strangers.** — As between the trust estate and strangers statutes of limitation apply as in other cases.<sup>2</sup>

**5. Statutory Regulations.** — Under the *English* practice prior to 1888 trustees who had committed breaches of trust were not permitted to plead the statute of limitations. Hence, in that year, the Trustee Act was passed by Parliament extending to such trustees the benefit of a six-year limitation.<sup>3</sup>

**6. Laches.** — Notwithstanding the general rule that statutes of limitation do not apply to express trusts, courts of equity have uniformly refused to grant a *cestui que trust* relief where, with full knowledge of his rights, he has slept on them for a period which the courts deem unreasonable, and where the circumstances or the nature of the trust render its execution difficult or inequitable. Long acquiescence is deemed equivalent to affirmation.<sup>4</sup> In such cases the courts apply the well-recognized principles of laches and nothing in the nature of the trust calls for a restatement or modification of those principles. For a full discussion and an exhaustive collection of cases the reader is referred to another title of this work.<sup>5</sup>

(Tenn.) 376; *Smart v. Waterhouse*, 10 Yerg. (Tenn.) 94; *Fennell v. Loague*, 107 Tenn. 239.

*Texas.* — *Tinnen v. Mebane*, 10 Tex. 248, 60 Am. Dec. 205; *Turner v. Smith*, 11 Tex. 620; *Moore v. Waco Bldg. Assoc.*, 19 Tex. Civ. App. 75.

*Canada.* — *Tiffany v. Thompson*, 9 Grant Ch. (U. C.) 244.

**1. Termination of Trust Presumed.** — *Prevost v. Gratz*, 6 Wheat. (U. S.) 481; *Rhodes v. Turner*, 21 Ala. 210; *Blackwell v. Blackwell*, 33 Ala. 57, 70 Am. Dec. 556; *Worley v. High*, 40 Ala. 171; *Ragland v. Morton*, 41 Ala. 344, 91 Am. Dec. 516; *Harrison v. Heflin*, 54 Ala. 552; *Greenlees v. Greenlees*, 62 Ala. 330; *McCarthy v. McCarthy*, 74 Ala. 546; *Jackson v. Moore*, 13 Johns. (N. Y.) 513, 7 Am. Dec. 398; *Nobles v. Hogg*, 36 S. Car. 322; *Miller v. Cramer*, 48 S. Car. 285.

**2. As Between Trust Estate and Strangers.** — The rule has been stated and the cases collected in the title LIMITATION OF ACTIONS, vol. 19, at pp. 186, 187. See the following additional cases:

*United States.* — *Meeks v. Vassault*, 3 Sawy. (U. S.) 206; *Meeks v. Olpherts*, 100 U. S. 564.

*Alabama.* — *Bryan v. Weems*, 29 Ala. 423, 65 Am. Dec. 407.

*California.* — *McLeran v. Benton*, 73 Cal. 329, 2 Am. St. Rep. 814.

*Tennessee.* — *Wooldridge v. Planter's Bank*, 1 Sneed (Tenn.) 297; *Ferguson v. Kennedy*, Peck (Tenn.) 323, 14 Am. Dec. 761; *Williams v. Otey*, 8 Humph. (Tenn.) 563, 47 Am. Dec. 632; *Goss v. Singleton*, 2 Head (Tenn.) 67; *Parker v. Hall*, 2 Head (Tenn.) 641; *Belote v. White*, 2 Head (Tenn.) 703.

*Utah.* — *Jenkins v. Jensen*, 24 Utah 126, 91 Am. St. Rep. 783.

See also the title ADVERSE POSSESSION, vol. 1, p. 814.

**3. Statutory Regulations.** — English statute, 51 & 52 Vict., c. 59, § 8; 59 & 60 Vict., c. 35, § 3.

The Canadian acts to the same effect are Rev. Stat. of Ontario (1897), c. 129, § 32; Nova Scotia, 52 Vict., c. 18, § 173; Ontario

Stat., 62 Vict., c. 15, § 1; New Brunswick Stat., 61 Vict., c. 26.

The statute has been construed and applied in many cases, see especially *Bulli Coal Min. Co. v. Osborne*, (1899) A. C. 363; *Thorne v. Heard*, (1895) A. C. 504; *In re Cornish*, (1896) 1 Q. B. 99; *In re Timmis*, (1902) 1 Ch. 176; *In re Somerset*, (1894) 1 Ch. 231; *In re Lands Allotment Co.*, (1894) 1 Ch. 616; *Mara v. Browne*, (1895) 2 Ch. 95; *How v. Winterton*, (1896) 2 Ch. 632; *In re Swain*, (1891) 3 Ch. 233; *In re Bowden*, 45 Ch. Div. 444.

For construction and applications of the Canadian acts, see *Garden v. Perry*, 6 Ont. L. Rep. 269; *Re Crowther*, 10 Ont. 159; *Clarke v. Macdonell*, 20 Ont. 564; *Stewart v. Snyder*, 30 Ont. 110; *Re McLatchie*, 30 Ont. 179; *Clark v. Bellamy*, 30 Ont. 532, 27 Ont. App. 435.

**4. Laches** — *England.* — *Thomson v. Eastwood*, 2 App. Cas. 215; *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1279; *Atty.-Gen. v. Exeter, Jac.* 449; *Bright v. Legerton*, 2 De G. F. & J. 606; *Re Taylor*, 81 L. T. N. S. 812.

*United States.* — *Hume v. Beale*, 17 Wall. (U. S.) 336; *Hammond v. Hopkins*, 143 U. S. 224; *Norton v. Kellogg*, 41 Fed. Rep. 452.

*California.* — *Coyle v. Lamb*, 123 Cal. 264.

*Delaware.* — *Van Dyke v. Johns*, 1 Del. Ch. 93, 12 Am. Dec. 76; *Perkins v. Cartmell*, 4 Har. (Del.) 270, 42 Am. Dec. 753.

*Illinois.* — *Boyd v. Boyd*, 163 Ill. 611.

*Kentucky.* — *Helm v. Rogers*, 81 Ky. 569; *McRoberts v. Carneal*, (Ky. 1898) 44 S. W. Rep. 442.

*Maryland.* — *Perrin v. Keithley*, 9 Gill (Md.) 412; *Preston v. Horwitz*, 85 Md. 164.

*Missouri.* — *Taylor v. Blair*, 14 Mo. 437.

*Pennsylvania.* — *Franklin's Estate*, 9 Pa. Co. Ct. 484; *Halsey v. Tate*, 52 Pa. St. 311; *In re Engel*, 180 Pa. St. 215.

*South Carolina.* — *Person v. Fort*, 64 S. Car. 502.

*Texas.* — *Connolly v. Hammond*, 51 Tex. 635.

**5. Laches as Applied to Express Trusts.** — See the title LACHES, vol. 18, p. 95.

**TRUTH.** — See note 1.

**TRY.** — See note 2.

**TUBE.** — See note 3.

**TUGS.** — See the title TOWAGE, TUGS, AND TOWS, *ante*, p. 260.

**TUITION.** — See note 4.

**TUMBLE.** — See note 5.

**TUMULT.** — See note 6.

**TUMULTUOUS.** (See also the titles AFFRAY, vol. 1, p. 915; BREACH OF THE PEACE, vol. 4, p. 902; RIOT, vol. 24, p. 971.) — The word "tumultuous" is defined as "conducted with disorder; noisy, confused, boisterous, disorderly; as, a tumultuous assembly or meeting."<sup>7</sup>

**TUNGSTEN ORE.** — See note 8.

**TURBARY.** (See also COMMON, vol. 6, p. 232; MOSSES, vol. 20, p. 1075; and see the title PROFIT À PRENDRE, vol. 23, p. 186.) — A right to dig turf in another's land.<sup>9</sup>

**TURN.** — See note 10.

**TURNOUT.** (See also the title LATERAL OR BRANCH RAILROADS, vol. 18, p. 560.) — A turnout is defined as a short sidetrack on a railroad, which may be occupied by one train while another is passing on the main track.<sup>11</sup>

1. **Truth.** — In *Wachstetter v. State*, 99 Ind. 297, it was said: "According to the best lexicographers of our language, at least in this country, the words *truth*, 'veracity,' and 'honesty' are almost synonyms each of the other, very nearly the same definitions being given to each of such words."

**Truth and Fact Distinguished.** — See *FACT*, vol. 12, p. 612.

2. **Try.** — A declaration charged that the defendant accused the plaintiff of having tried to steal, etc. It was held that this was equivalent to having charged him with an attempt to commit a larceny. The court said that the word *try* in this connection was synonymous with the word "attempt." *Berdeaux v. Davis*, 58 Ala. 611.

3. *Sterling Co. v. Pierpoint Boiler Co.*, 72 Fed. Rep. 788.

4. **Tuition.** — In *State v. Regents*, 54 Wis. 159, it was held that the word *tuition*, as used in a statute exempting residents of the state from the payment of "fees for *tuition*" in the university, meant that no student should be required to pay anything for instruction or teaching in the university; but did not include the incidental expenses for heating, lighting public halls, etc.

In *Cook County v. Chicago Industrial School*, 125 Ill. 549, it was said: "Nearly all the money claimed to be due is for *tuition*, care, and maintenance. The work of *tuition* was all performed by these institutions, as will be seen hereafter. The meaning of the word *tuition*, as here used, is 'instruction' or 'the act or business of teaching the various branches of learning.'" See also *Lady Teynham v. Lenard*, 2 Bro. P. C. 539.

5. **Tumble Rock.** — See *McCurdy v. Alpha Cold*, etc., Min. Co., 3 Nev. 32.

6. That the word *tumult* is substantially the same as "brawl," see *BRAWLS*, vol. 4, p. 880.

7. **Tumultuous.** — *Madisonville v. Bishop*, (Ky. 1902) 67 S. W. Rep. 269 quoting *Webst. Dict.* See also *Jolly v. Hawesville*, 89 Ky. 280.

In an indictment under a statute providing for the punishment of one who breaks the public peace "by *tumultuous* and offensive carriage," the first count charged *tumultuous* but not "offensive" carriage. The court animadverted upon the count, and distinguished *tumultuous* from "offensive," thus: "A man's carriage might, conceivably, be *tumultuous*, as in the noisy expression of joy over some great national good or achievement, and yet be the opposite of 'offensive,' and tend to spread rejoicing and good will rather than to disturb or break the public peace, in the true sense of that term." *State v. Archibald*, 59 Vt. 552.

8. **Tungsten Ore.** — *Hempstead v. U. S.*, 115 Fed. Rep. 256.

9. **Turbary.** — *Tirringham's Case*, 4 Coke 36b; *O'Hare v. Fahy*, 10 Ir. C. L. 318; *Ely v. Warren*, 2 Atk. 189.

Right of *turbary* does not allow the turf to be dug for sale. *Valentine v. Penny*, Noy 145; *Hayward v. Cannington*, Sid. 354. Nor does it give the right to take green grass for making grass plots, etc. *Wilson v. Willes*, 7 East 121.

10. **Regular Turn.** — In *Hudson v. Clementson*, 18 C. B. 213, 86 E. C. L. 213, the defendants chartered a ship from Sunderland to Carthage, engaging that she should "with all possible dispatch load in the south dock, in the customary manner, from the agents of the said merchants, a full and complete cargo of coke, to be loaded in regular *turn*." In an action for not loading the ship "in regular *turn*," pursuant to the charter-party, it was held that evidence was not admissible to show that, according to the custom of the port of Sunderland, under such a contract the shipowner was bound to wait his *turn* according to a list kept by a coke manufacturer not named in the contract, but mentioned at the time the contract was entered into, provided reasonable dispatch was used."

11. **Turnout.** — *Philadelphia v. River Front R. Co.*, 133 Pa. St. 139, quoting *Webst. Dict.* See also *Carson v. Central R. Co.*, 35 Cal. 325,



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